ORAL ARGUMENT SCHEDULED FOR DECEMBER 13, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 05-5160

EMILY's LIST

Plaintiffs-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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October 12, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMILY's LIST,	)	
	)	
Plaintiff-Appellant,	)	No. 05-5160
	)	
v.	)	**CERTIFICATE OF COUNSEL**
	)	**(Cir. R. 28(a)(1))**
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant-Appellee.	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("the Commission") hereby submits its Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici. The plaintiff below was EMILY's List, and it is the appellant in this Court. The Commission is the defendant below and is the appellee in this Court. Amici curiae in the district court and in this Court are: John McCain, Russell Feingold, Christopher Shays, Martin Meehan, Democracy 21, The Campaign Legal Center, and the Center for Responsive Politics. There have been no intervenors in the district court or in this Court.

(B) Rulings Under Review. EMILY's List appeals the February 25, 2005, decision of the United States District Court for the District of Columbia (Kollar-Kotelly, J.) denying its application for a preliminary injunction. The district court's opinion is reported as EMILY's List v. FEC, 362 F.Supp.2d 43 (D.D.C. 2005).

(C) Related Cases. This case has not previously been before this Court or any court other than the district court below. The Commission knows of no "related cases" as that term is defined in D.C. Cir. R. 28(a)(1)(C).

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GLOSSARY

AO	=	Advisory Opinion
APA	=	Administrative Procedure Act
BCRA	=	Bipartisan Campaign Reform Act of 2002
CFTC	=	Commodity Futures Trading Commission
CIA	=	Central Intelligence Agency
EPA	=	Environmental Protection Agency
FCC	=	Federal Communications Commission
FEC	=	Federal Election Commission
FECA	=	Federal Election Campaign Act of 1971
FERC	=	Federal Energy Regulatory Commission
FTC	=	Federal Trade Commission
NPRM	=	Notice of Proposed Rulemaking
NRC	=	Nuclear Regulatory Commission
NRDC	=	Natural Resources Defense Council
RNC	=	Republican National Committee
SSF	=	Separate Segregated Fund

Oral Argument Scheduled For December 13, 2005

No. 05-5160

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMILY's LIST,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

COUNTERSTATEMENT OF JURISDICTION

EMILY's List alleged jurisdiction under 28 U.S.C. 1292(a)(1) and 1331 over its claims that three regulations promulgated by the Federal Election Commission ("the Commission" or "FEC") are facially invalid. The Commission contests the Court's jurisdiction. See infra pp. 14-19.

COUNTERSTATEMENT OF ISSUES PRESENTED

Whether the district court abused its discretion in denying a preliminary injunction to prevent enforcement of three regulations implementing the contribution limits in the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), 2 U.S.C. 431-55, as they apply to political committees.

STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions are set out in the appellant's addendum.

COUNTERSTATEMENT OF THE CASE

EMILY's List appeals the February 25, 2005, order denying its application for a preliminary injunction in this facial challenge to three regulations. EMILY's List v. FEC, 362 F.Supp.2d 43 (D.D.C. 2005) (JA 25-49).[1] Two of these regulations simplify and clarify how federal political committees may "allocate" nonfederal funds to help finance administrative expenses, voter drives, and certain public communications that influence both federal and nonfederal elections. See 11 C.F.R. 106.6(c), 106.6(f). A third rule clarifies when funds obtained through solicitations by those committees constitute "contributions" under the Act. See 11 C.F.R. 100.57.

COUNTERSTATEMENT OF THE FACTS

I. BACKGROUND

A. THE PARTIES

The FEC is the independent agency of the United States government with exclusive jurisdiction to administer, interpret and civilly enforce the Act. See generally 2 U.S.C. 437c(b)(1), 437d(a) and 437g. The Commission is empowered to "formulate policy with respect to" the Act, 2 U.S.C. 437c(b)(1), and to promulgate "such rules … as are necessary to carry out the provisions" of the Act. 2 U.S.C. 437d(a)(8). See also 438(a)(8), (d).

[1] "JA __" references are to the Joint Appendix filed with appellant's brief.

EMILY's List has been registered with the Commission for more than 20 years as a multicandidate nonconnected political committee.[2] See 2 U.S.C. 433(a). It has separate bank accounts to fund its federal ("hard money") and nonfederal ("soft money") activities, pursuant to 11 C.F.R. 102.5(a). The federal account can only accept contributions that comply with the Act's source and amount restrictions, i.e., contributions up to $5,000 per year from individuals or other political committees, but no contributions from corporations, labor unions, or foreign nationals. See 2 U.S.C. 441a(a), 441b, 441e. EMILY's List may use its federal account in connection with federal elections. EMILY's List's nonfederal account can accept contributions that do not comply with the Act's source and amount restrictions, but it can use those funds only in connection with nonfederal elections.

EMILY's List is one of the wealthiest federal political committees, having raised more than $25 million in hard money alone during the 2003-04 election cycle. See JA 175. "EMILY's List is the biggest PAC, which means we have the most hard money, so it's not an issue of not having it," according to its president, Ellen Malcolm. Liz Sidoti, "Bush, Kerry to Pull Ads on Friday," Associated Press Newswires, June 7, 2004, at 1, available at LEXIS, News Library, Wire Service File.

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[2] A "political committee" is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year…." 2 U.S.C. 431(4)(A). A "nonconnected committee" is a political committee that is not a party committee, an authorized committee of a candidate, or a separate segregated fund ("SSF") established by a corporation or labor organization. 11 C.F.R. 106.6(a). A "multicandidate committee" is a political committee that has been registered at least 6 months, has more than 50 contributors, and has made contributions to at least 5 candidates for federal office. 2 U.S.C. 441a(a)(4).

B. STATUTORY AND REGULATORY BACKGROUND

1. Regulation of Allocation of Expenses by Nonconnected Political Committees Prior to BCRA

Since 1977, the Commission has required political committees to allocate between separate federal and nonfederal accounts administrative expenses and the costs of certain activities (such as voter registration) that affect both federal and nonfederal elections. See 11 C.F.R. 106.1 (1977); FEC Advisory Opinion ("AO") 1978-10. Between 1990 and 2004, 11 C.F.R. 106.6(c) permitted nonconnected committees to allocate administrative expenses and the costs of generic voter drives under the "funds expended method." 11 C.F.R. 106.6(c) (2000). These costs were allocated based on a ratio of "federal expenditures" to "total federal and non-federal disbursements" made by the committee during the two-year election cycle. Id. Committees were required to estimate and report this ratio to the Commission at the beginning of each election cycle and then report revised ratios during the election cycle to reflect actual disbursements. Id.; 11 C.F.R. 104.10(b) (2000).

Over the past ten years, EMILY's List has never reported a final allocation ratio reflecting less than 50% in direct federal candidate support. See JA 176-79 (final H1 Forms from 1997-2004). Its final allocation ratio for the 1995-96 election cycle was 70% federal and 30% nonfederal (JA 181).

2. Bipartisan Campaign Reform Act

In March 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), to amend FECA. BCRA eliminated allocation for national party committees and substituted a different allocation regime for other political party committees, although it explicitly left determination of the method of allocation to the Commission. 2 U.S.C. 441i(b)(2)(A). These amendments did not directly address allocation

by nonconnected political committees under 11 C.F.R. 106.6; they were found constitutional in McConnell v. FEC, 540 U.S. 93, 133-189 (2003).

3. Rulemaking

On March 11, 2004, the Commission published a detailed notice of proposed rulemaking ("NPRM") and, following a four-week comment period, held hearings on April 14 and 15, 2004. 69 Fed. Reg. 11,736-60 (JA 75-100).

a. Proposed Changes to 11 C.F.R. 106.6: Allocation

The Commission sought comment on a number of possible changes to the allocation rules for nonconnected committees. In particular, the Commission sought comment on the elimination of allocation to nonfederal accounts of any administrative expenses or generic voter drives (JA 93):

> Given McConnell's criticism of the Commission's prior allocation rules for political parties, is it appropriate for the regulations to allow political committees to have non-Federal accounts and to allocate their disbursements between their Federal and non-Federal accounts? If an organization's major purpose is to influence Federal elections, should the organization be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements?

The NPRM proposed imposing a minimum federal percentage on the funds-expended method in 11 C.F.R. 106.6(c); sought comment on several possible examples of a minimum percentage, ranging from 15% to 50%; and explicitly asked whether the Commission "[s]hould … adopt a fixed minimum Federal percentage?" JA 94. The NPRM also sought public comment on proposals to change the allocation methods for certain voter drive activity and public communications that specifically mention federal candidates (JA 93).

b. Proposed 11 C.F.R. 100.57: Solicitations

The Commission sought public comment on a proposed new regulation that any funds received in response to particular types of solicitations are "for the purpose of influencing any election for Federal office" and, therefore, "contributions" under FECA (JA 83). The NPRM included proposed regulatory text stating that any funds provided in response to a solicitation that contained "express advocacy" for or against a clearly identified federal candidate are contributions (JA 97). The Commission also sought comment regarding other possible standards for solicitations (JA 83):

> Should the new rule use a standard other than express advocacy, such as a solicitation that promotes, supports, attacks, or opposes a Federal candidate, or indicates that funds received in response thereto will be used to promote, support, attack, or oppose a clearly identified Federal candidate?

c. Public Comment and Hearings

Some commenters supported eliminating allocation in favor of requiring 100% federal funds for all expenditures under 11 C.F.R. 106.6, and some suggested abandoning the funds expended method and substituting a simpler system.[3] Others supported specific percentages to be used as a federal minimum for administrative expenses,[4] or simply urged the Commission to require a "significant minimum hard money share."[5] There was also testimony at the hearing

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[3] See Comments of Public Citizen, at 12-13 (April 5, 2004) (Exh. 12); Comments of Republican National Committee, at 7-8 (April 5, 2004) (Exh. 14). All citations to "Exh." herein refer to the FEC's Exhibits in Support of its Opposition to Plaintiff's Application for a Preliminary Injunction filed in the district court on January 24, 2005. The rulemaking comments and hearing transcripts are also available on the Commission's Web site at http://www.fec.gov/law/law_rulemakings.shtml#political_committee_status.

[4] See Comments of Democracy 21, Campaign Legal Center, Center for Responsive Politics, at 17-19 (April 5, 2004) (Exh. 15).

[5] See Comments of Senators McCain and Feingold, Representatives Shays and Meehan, at 3 (April 9, 2004) (Exh. 10).

regarding the complexities of the current allocation system and the proposal to move to a flat minimum federal percentage.[6]

Although the Commission received comments from numerous groups and individuals during the rulemaking, EMILY's List did not submit any comments.[7]

4. The Final Rules

The Final Rules and accompanying Explanation and Justification were published in the Federal Register on November 23, 2004, with an effective date of January 1, 2005. 69 Fed. Reg. 68,056-68 (JA 161-73).

a. Allocation: 50% Minimum for Administrative and Other Expenses

The final rules changed the allocation scheme in 11 C.F.R. 106.6 for nonconnected committees. JA 164-68. The Commission explained that the comments and the history of public filings regarding allocation by committees led it to conclude that a revised allocation method would enhance compliance with FECA by making the system easier for committees to understand and follow, and for the Commission to administer (JA 165). New 11 C.F.R. 106.6(c) replaced the funds-expended method with a flat 50% federal funds minimum for administrative

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[6] See Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 14, 2004, at 160 (testimony of Craig Holman) (stating the current allocation ratio was "a mess" and suggesting "it would certainly be a healthier improvement to at least come out with some sort of fixed percentage") (Exh. 8). See also Comments of Media Fund, at 20 (April 5, 2004) (Exh. 16).

[7] EMILY's List filed no comments before the April 9, 2004 deadline for rulemaking comments. On August 17, 2004, it submitted a letter (JA 159-60) asking the Commission to publish new proposed rules and accept additional comments. During the rulemaking, the Commission had indicated that it would not consider late-filed comments, see Notice available at http://www.fec.gov/press/press2004/20040407advisory.html (Exh. 5), but an agency is not required to consider untimely comments even if "it has indicated that it would take them into consideration." Reytblatt v. NRC, 105 F.3d 715, 723 (D.C. Cir. 1997).

expenses, generic voter drives, and public communications that refer to a political party without referring to clearly identified candidates (JA 167). Administrative expenses include rent, utilities, office supplies, and salaries not attributable to a clearly identified candidate. 11 C.F.R. 106.6(b)(1)(i). "Generic voter drives" include voter identification, voter registration, and get-out-the-vote drives that urge the public to support candidates of a particular political party, without mentioning a specific candidate. 11 C.F.R. 106.6(b)(1)(iii).

b. Allocation: Public Communications and Voter Drives

New section 11 C.F.R. 106.6(f) governs certain public communications and voter drives (JA 168). Those that refer to one or more clearly identified federal candidate, but to no nonfederal candidates, must be financed with 100% federal funds, regardless of whether political parties are also mentioned. Id.; 11 C.F.R. 106.6(f)(1). Conversely, public communications and voter drives that refer to a political party and only nonfederal candidates may be financed with 100% nonfederal funds. JA 168; 11 C.F.R. 106.6(f)(2). Those that refer to both federal and nonfederal candidates are subject to a time/space allocation between federal and nonfederal accounts, regardless of whether they also mention political parties. 11 C.F.R. 106.6(f)(3).

c. Solicitations

New section 11 C.F.R. 100.57 governs when funds received in response to certain solicitations must be treated as "contributions" under FECA (JA 161). If the solicitation "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate," then all money given in response is a "contribution" under FECA (JA 171). The rule seeks to capture solicitations that "plainly seek funds 'for the purpose of influencing Federal elections'" (JA 162).

The Commission provided examples and explained that the standard in 11 C.F.R. 100.57 was drawn from FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995) (JA 162). If a solicitation meets the standard in 100.57(a), but also refers to at least one clearly identified nonfederal candidate, then only 50% of the money received from the solicitation must be treated as contributions under FECA. 11 C.F.R. 100.57(b)(2) (JA 163). If a solicitation refers to nonfederal candidates and does not indicate that any funds received will be used to support or oppose the election of a clearly identified federal candidate, then 11 C.F.R. 100.57(a) does not apply and none of the funds received are federal contributions under that provision.

II. PROCEEDINGS IN THE DISTRICT COURT

EMILY's List filed suit against the Commission on January 12, 2005. The complaint challenged new regulations 11 C.F.R. 100.57, 106.6(c) and 106.6(f), alleging that each exceeded the Commission's authority, was arbitrary and capricious, was promulgated without adequate notice under the Administrative Procedure Act ("APA"), 5 U.S.C. 706(2), and violated the First Amendment. Complaint ¶¶ 46-79 (JA 16-22).

On February 25, the district court denied EMILY's List's motion for a preliminary injunction, concluding that "all four of the considerations relevant to the Court's determination … weigh in favor of denial of Plaintiff's request." JA 37. The court found that plaintiff had not shown a substantial likelihood of success on any of its claims and that it had made a "weak showing on the irreparable harm prong" of the preliminary injunction test (JA 48). The court also found that the harm to the parties and public interest factors "weigh heavily against the issuance of an injunction." JA 48-49.[8]

[8] EMILY's List asserts (Br. 2, 25) that the district court "did not consider" its claim that the regulations were arbitrary and capricious, but the court clearly did so (JA 37) — noting

On April 21, 2005, almost two months later, EMILY's List filed a timely appeal from the denial of a preliminary injunction. Meanwhile, on July 18, EMILY's List and the Commission completed briefing their cross motions for summary judgment, which are now pending before the district court.

SUMMARY OF ARGUMENT

EMILY's List cannot show that it is entitled to the extraordinary relief of a preliminary injunction to halt enforcement of three regulations promulgated by the Federal Election Commission. EMILY's List failed to present to the district court any evidence of harm and relied instead upon unsupported factual assertions and hypothetical examples. It thus failed to establish irreparable harm to itself and standing under Article III.

The district court did not abuse its discretion in finding that EMILY's List is unlikely to succeed on the merits. The regulations govern certain "mixed" activity that influences both federal and nonfederal elections, and they implement the FECA's contribution limits as applied to political committees, whose major purpose is the election of candidates. The provisions at issue do not limit how much money EMILY's List can spend on campaign activities, but only help to prevent soft money contributions from influencing federal elections.

Regulation 11 C.F.R. 106.6(c) sets a minimum 50% level of federal funds that federal political committees must use to finance administrative expenses and generic voter drives. The rule simplifies and clarifies the Commission's previous regulation and reasonably reflects the fact that generic activities like "get out the vote" drives influence both federal and nonfederal elections. The regulation is consistent with the Act's treatment of other political committees, and

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the claim "that the regulations themselves are arbitrary and capricious" — and then rejected it (JA 42-45).

it does not offend the First Amendment. It does not impose any spending limits or require EMILY's List to change how it has been funding such activity. Like other provisions that prevent circumvention of the Act's contribution limits, it is not subject to strict scrutiny. EMILY's List does not attempt to make the required showing that this regulation (or the other two) would so reduce its fundraising ability that it would no longer be able to make its message heard.

Regulation 11 C.F.R. 106.6(f) is a reasonable "candidate-driven" allocation rule that allows expenses for certain voter drives and public communications to be allocated based upon their references to federal or nonfederal candidates. It is consistent with the Act's treatment of similar activities by political party committees and other entities, and, like section 106.6(c), prevents circumvention of the Act's contribution limits. Appellant's hypothetical examples of applications of this regulation that are allegedly beyond the Commission's statutory authority or unconstitutional are insufficient to support a facial challenge.

Regulation 11 C.F.R. 100.57 specifies that when a political committee receives money in response to a solicitation that indicates that the funds received will be used to support or oppose the election of a clearly identified federal candidate, those funds are "contributions" under the Act. This regulation is consistent with the Act's definition of "contribution" and Supreme Court precedent interpreting that term. The regulation leaves multiple options for political committees to control whether their fundraising solicitations will seek federal or nonfederal donations, and it imposes no significant burden on EMILY's List.

EMILY's List is unlikely to succeed on its claim that the Commission's rulemaking notice was inadequate. The NPRM included both the terms and substance of the rules ultimately adopted, and the subjects and issues involved. Although EMILY's List chose not to submit

comments, the notice was more than adequate to inform appellant that the Commission was considering regulations like those ultimately adopted, as evidenced by the wide range of comments from other organizations and individuals.

The district court did not abuse its discretion when it found that a preliminary injunction would harm the Commission and the public. A preliminary injunction would change the status quo, impair the Commission's ability to implement the Act, and deprive the regulated community of the clear guidance it needs, thereby creating the potential for regulatory chaos.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A PRELIMINARY INJUNCTION

I. STANDARD OF REVIEW AND MOVANT'S BURDEN FOR A PRELIMINARY INJUNCTION

In denying a preliminary injunction the district court balanced four factors: (1) Whether the movant had shown that it is substantially likely to succeed on the merits; (2) whether the movant had shown that it would suffer irreparable injury if the injunction were not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the requested injunction is in the public interest (JA 35-37). See also, e.g., CityFed Financial Corp. v. Office of Thrift Supervision, 58 F.3d 738, 746 (D.C. Cir. 1995). This Court reviews the district court's weighing of these factors for abuse of discretion. See, e.g., Al-Fayed v. CIA, 254 F.3d 300, 303-04 (D.C. Cir. 2001) (citing Serono Labs., Inc. v. Shalala, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998)).

The Court reviews the district court's legal conclusions de novo, see, e.g., CityFed, 58 F.3d at 746, but "[t]here is no de novo appellate review of factfindings." United States v. Microsoft Corp., 253 F.3d 34, 117 (D.C. Cir. 2001). An appellate court will not set aside the

district court's "[f]indings of fact, whether based on oral or documentary evidence, … unless [they are] clearly erroneous." Fed. R. Civ. P. 52(a). "It does not matter whether a finding of fact is based on documentary evidence or inferences from other facts; in either event, an appellate court must respect a trial court's finding of fact unless it concludes that the finding is clearly erroneous." Bailey v. Federal National Mortgage Ass'n, 209 F.3d 740, 743 (D.C. Cir. 2000). This standard applies, for example, to the fact-dependent irreparable injury inquiry. See, e.g., Faulkner v. Jones, 10 F.3d 226, 233 (4th Cir. 1993); Plains Cotton Cooperative Ass'n of Lubbock, Texas v. Goodpasture Computer Service, Inc., 807 F.2d 1256, 1261 (5th Cir. 1987).

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in original). "The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." University of Texas v. Camenisch, 451 U.S. 390, 395 (1981). Accord Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 844 (D.C. Cir. 1977). EMILY's List seeks to alter the current status quo while its request for permanent relief is pending before the district court.

The preliminary injunction "factors interrelate on a sliding scale and must be balanced against each other." Davenport v. International Bhd. of Teamsters, 166 F.3d 356, 361 (D.C. Cir. 1999). Since EMILY's List has not made any serious attempt to demonstrate any factor other than its likelihood of success (see infra pp. 19-44), its burden on that factor is extraordinarily

heavy. See Holiday Tours, 559 F.2d at 843 ("The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors").[9]

II. EMILY'S LIST'S COMPLETE FAILURE TO PROVIDE EVIDENCE OF HARM IS FATAL TO ITS REQUEST FOR A PRELIMINARY INJUNCTION AND ITS ABILITY TO DEMONSTRATE STANDING

"[T]he basis of injunctive relief in the federal courts has always been irreparable harm," Sampson v. Murray, 415 U.S. 61, 88 (1974) (citation omitted). As the district court noted (JA 36; citation omitted), "if the movant makes no showing of irreparable injury, 'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." EMILY's List's failure to submit any affidavits or documentary evidence with its application for a preliminary injunction is, therefore, fatal to its claim of irreparable injury because "[b]are allegations of what is likely to occur are of no value since the court must decide whether the harm will in fact occur." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original).

EMILY's List claims (Br. 8) that the new regulations impose "severe limitations" on its political speech, but this conclusory assertion is unsupported in law or fact. As explained infra pp.28-30, the regulations do not prevent EMILY's List from spending whatever money it can legally raise, and EMILY's List offered no evidence about its alleged injury when it requested a

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[9] The Court should deny appellant's request (Br. 34) for a final judgment on the merits. "'[I]t is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits.'" Natural Resources Defense Council v. Pena, 147 F.3d 1012, 1023 (D.C. Cir. 1998) (quoting University of Texas v. Camenisch, 451 U.S. at 395). See also, e.g., National Wildlife Fed'n v. Burford, 835 F.2d 305, 319 (D.C. Cir. 1987) (Court "ordinarily do[es] not consider the merits of the case further than necessary to determine whether that discretion [in granting or denying a motion for preliminary injunction] was abused."). A merits judgment is clearly unwarranted here because the parties completed briefing their motions for summary judgment in July and the district court may issue its ruling imminently. The district court may conclude that factual issues remain and thus summary judgment is inappropriate now or, finding that the preconditions for summary judgment have been satisfied, it may soon make a final determination on the merits.

preliminary injunction. Instead, it has relied (Br. 4, 8-10, 14, 20, 23, 33) upon a slew of unsupported factual assertions, including statements about the intentions and activities of America Coming Together and other third parties; conclusory allegations of EMILY's List's supposed "critical shortage of funds"; descriptions of purely hypothetical communications; and unsubstantiated suggestions that EMILY's List now devotes "a majority" of its time and effort to nonfederal elections.[10] Moreover, appellant's failure to cite anything in the administrative record to show that the kinds of hypothetical examples it now imagines were presented to the Commission indicates that these arguments were not preserved for judicial review, and should not even be considered by this Court. See National Wildlife Fed'n v. EPA, 286 F.3d 554, 562 (D.C. Cir. 2002) ("[I]ssues 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).[11]

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[10] The omission from appellant's brief of "appropriate references to the record" for its factual assertions violates Fed R. App. P. 28(a)(7). See also Fed. R. App. P. 28(a)(9) (argument "must contain … citations to the authorities and parts of the record on which the appellant relies").

[11] On appeal, EMILY's List relies upon (Br. 9, 14, 17) the declaration of Britt Cocanour (JA 50-53), which was submitted to the district court with plaintiff's reply brief in support of its motion for summary judgment on June 27, 2005 — two months after it filed this appeal from the denial of a preliminary injunction. JA 4 #17; JA 5 #26. This vague and speculative declaration fails to demonstrate irreparable harm, but in any event, it came far too late to serve as the required evidence at the preliminary injunction stage. See LCvR 65.1(c) (D.D.C.). It is not part of the record on appeal from the preliminary injunction order and was included in the joint appendix over the Commission's objection. Moreover, the declaration's absence cannot be attributed to an error or accident in compiling the record, and EMILY's List did not even seek permission to supplement the record. See Fed. R. App. P. 10(e). The Court should therefore disregard Cocanour's declaration on this appeal. See, e.g., Meriwether v. Caraustar Packaging Co., 326 F.3d 990, 994 (8th Cir. 2003) (denying motion to supplement record "because such evidence was not before the district court at the time of its summary judgment ruling"); Inland Bulk Transfer Co. v. Cummins Engine Co., 332 F.3d 1007, 1012 (6th Cir. 2003); FTC v. Affordable Media, LLC, 179 F.3d 1228, 1231 n.1 (9th Cir. 1999) (striking declarations executed months after district court issued preliminary injunction).

The district court correctly found that EMILY's List had "failed to make the requisite showing of imminent, irreparable injury" (JA 46). EMILY's List had devoted only one page of its brief to "this central question," id.; however, even First Amendment claimants must do more than "merely allege" violations of their rights. Id. (quoting Wagner v. Taylor, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987) (emphasis in original)). The district court based its holding on three main findings. First, it found that EMILY's List had failed to show that the new 50% federal funds minimum in 11 C.F.R. 106.6(c) would require it to change its current practice (JA 47). Second, the court concluded that "the new rules do not in fact prevent [EMILY's List] from engaging in whatever political speech it seeks to undertake." Id. Finally, the district court found that, even if EMILY's List ultimately prevailed on the merits of its suit, any harm it had suffered would not be irreparable because it could seek a "retroactive adjustment of its expenditure ratios" (JA 47-48).

As the district court noted, the requirement in 11 C.F.R. 106.6(c) that committees allocate at least 50% of administrative and generic voter drive expenses to the federal account does not even require EMILY'S List to alter its pre-existing practices, since it has been using that same allocation formula for years. See supra p. 4; Second City Music, Inc. v. City of Chicago, 333 F.3d 846, 849 (7th Cir. 2003) (there is "no strong justification for immediate relief to this plaintiff, for … [plaintiff] does not contend that it has altered … its own mix of inventory") (emphasis in original).

As explained infra pp. 27-30, none of the challenged regulations restricts appellant's speech, and, as the district court recognized (JA 47-48), what is really at stake for EMILY'S List while the merits of this case are pending is the amount of federal money it will use to finance certain activities and whether it may have to raise funds from more contributors. See Buckley v.

Valeo, 424 U.S. 1, 21-22 (1976). It is well settled, however, that "[r]ecoverable monetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant's business." Wisconsin Gas, 758 F.2d at 674. EMILY's List, one of the nation's most successful fundraising committees, has not alleged that its existence is threatened. Instead, its arguments amount to nothing more than a conclusory prediction that it will not be able to raise as much in federal funds as it would like in the coming election cycle. See, e.g., EMILY's List Br. 12 (EMILY's List "must curtail its activities to the level permitted by the limited amount of federal funds available"), 13 (raising federal funds is "more difficult" than raising nonfederal funds).[12] Even if EMILY'S List were not one of the wealthiest committees in hard money, such speculation would not satisfy its burden of proving irreparable harm.

> [T]he mere fact that [a soft money restriction] may reduce the relative amount of money available … to fund federal election activities is largely inconsequential. The question is not whether [the provision] reduces the amount of funds available over previous election cycles, but whether it is "so radical in effect as to … drive the sound of [the recipient's] voice below the level of notice."

McConnell, 540 U.S. at 173 (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 397 (2000); fourth alteration in McConnell). Cf. Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 391 (1990) (when statute "merely decreases the amount of money appellant has to spend on its religious activities, any such burden is not constitutionally significant").

EMILY's List argues that a retroactive adjustment cannot restore the political speech in

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[12] EMILY's List also claims (Br. 14) that in the current election cycle it plans to engage in more nonfederal activity than "ever before," and that such activity will become "the lion's share" of its total activities. For these assertions, EMILY's List relies solely on the declaration that it submitted with its summary judgment reply brief — long after the decision on appeal here. See, e.g., JA 51 (EMILY's List "expects" to "train significantly more" nonfederal candidates in the 2006 election cycle). Even if reliance on that declaration were proper (see supra p. 15 n.11), its vague and conclusory assertions do not show that appellant's harm is certain, imminent, great and irreparable, as is required.

which it will ostensibly be prevented from engaging. See Br. 12, 13-14. But this case is nothing like the case on which it relies, Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality). In Elrod the Supreme Court found that government employees had already been "threatened with discharge or had agreed to provide support for the Democratic Party in order to avoid discharge," and it was "clear therefore that First Amendment interests were either threatened or in fact being impaired at the time relief was sought." Id. at 373. EMILY'S List has not been punished for its political views, and it remains free to finance its political speech with all the hard money it can convince its supporters to contribute, supplemented by an allocable portion of nonfederal funds. Elrod did not eliminate the burden on a plaintiff who invokes the First Amendment to demonstrate that its interests are actually threatened or in fact being substantially impaired. See National Treasury Employees Union v. United States, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991); Wagner, 836 F.2d at 576-77 n.76; Christian Knights of the Ku Klux Klan Invisible Empire v. District of Columbia, 919 F.2d 148, 149-50 (D.C. Cir. 1990) (Elrod applies only to cases in which "First Amendment rights were totally denied by the disputed Government action").

Finally, because EMILY's List did not provide admissible evidence of its alleged harm, it also failed to establish the elements of standing. "The requirement that jurisdiction be established as a threshold matter … is 'inflexible and without exception.'" Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998) (citation omitted). To establish standing, EMILY's List bears the burden of demonstrating (1) a "concrete and particularized," "actual or imminent" injury that is (2) fairly traceable to the challenged regulations and (3) is likely to be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); McConnell, 540 U.S. at 225. "'Mere allegations will not support standing at the preliminary injunction stage.'" Doe v. Rumsfeld, 297 F.Supp.2d 119, 130 (D.D.C. 2003).

(citation omitted). The showing required to support standing for a preliminary injunction is normally no less than that required at summary judgment. See National Wildlife Fed'n v. Burford, 878 F.2d 422, 432 (D.C. Cir. 1989), rev'd on other grounds sub nom. Lujan v. National Wildlife Fed'n, 497 U.S. 871 (1990); Doe v. Rumsfeld, 297 F.Supp.2d at 130. At summary judgment, standing must be proved with admissible evidence. Democratic Senatorial Campaign Comm. v. FEC, 139 F.3d 951, 952 (D.C. Cir. 1998) ("[T]here is very little evidence regarding the three standing requirements … [y]et evidence there must be").

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT EMILY'S LIST FAILED TO ESTABLISH ITS LIKELIHOOD OF SUCCESS ON THE MERITS

A court may set aside a regulation under the APA only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This standard is "highly deferential" and "presumes the validity of agency action." Cellco Partnership v. FCC, 357 F.3d 88, 93 (D.C. Cir. 2004). Thus, "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." San Luis Obispo Mothers For Peace v. NRC, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc). Under this standard, "[a] court cannot substitute its judgment for that of an agency … and must affirm if a rational basis for the agency's decision exists." Appeal of Bolden, 848 F.2d 201, 205 (D.C. Cir. 1988). See also Sierra Club v. EPA, 353 F.3d 976, 978 (D.C. Cir. 2004). On a facial challenge, where the regulation has not "yet been applied in a particular instance" so there is "no record … concerning the [agency's] interpretation of the regulation or the history of its enforcement," the challenger "'must establish that no set of circumstances exists under which the [regulation] would be valid.'" Reno v. Flores, 507 U.S. 292, 300-301 (1993) (citation omitted). Accord, Building &

Constr. Trades Dep't, AFL-CIO v. Allbaugh, 295 F.3d 28, 33 (D.C. Cir. 2002), cert. denied, 537 U.S. 1171 (2003).

The Commission's construction of its own governing statute is entitled to substantial deference under Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842 (1984). "[U]nder Chevron, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." FEC v. National Rifle Ass'n, 254 F.3d 173, 187 (D.C. Cir. 2001) (quoting Serono Labs, 158 F.3d at 1321). The Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981). Accord, United States v. Kanchanalak, 192 F.3d 1037, 1049 (D.C. Cir. 1999).

A. THE ALLOCATION AND SOLICITATION REGULATIONS REASONABLY APPLY THE ACT'S CONTRIBUTION LIMITS TO POLITICAL COMMITTEES

This lawsuit challenges the Commission's policy decisions to simplify its allocation regulations and clarify when solicitations lead to "contributions" under the FECA. Because appellant relies on little more than an argument that the Commission should have chosen different allocation percentages or left the prior system unchanged, EMILY's List cannot show that the Commission's interpretation of the Act is impermissible under Chevron's highly deferential standard, 467 U.S. at 842.

As discussed in detail below, the context of this case is critical. First, the purpose of the regulations at issue here is to implement the Act's contribution restrictions, not to limit spending. The Supreme Court has repeatedly upheld the Act's contribution restrictions, and measures to foreclose circumvention of them, because 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 v. Beaumont, 539 U.S. 146, 160 (2003); California Med. Ass'n v. FEC, 453 U.S. 182, 197-98 (1981) (upholding contribution limits applied to independent political committees). Contrary to appellant's suggestions (Br. 15-18), it is well settled that contribution limits like those at issue here are subject to a "less rigorous standard of review" than the strict scrutiny applied to expenditure limits, McConnell, 540 U.S. at 137.

Second, the allocation regulations that EMILY's List challenges apply to "mixed" activities that influence both federal and nonfederal elections. A pre-election television ad urging viewers to "vote Democratic," for example, would obviously affect both federal and nonfederal races on the ballot. EMILY's List does not question the Commission's authority to require that such "mixed" activities that influence both federal and nonfederal elections be financed in part with federal dollars. Indeed, the aim of this lawsuit appears to be to resurrect the Commission's prior rules governing allocation of such spending, to which EMILY's List does not object.[13] As the district court found, however, EMILY's List has "not demonstrated any right, statutory or otherwise, to the former system of allocation rules" (JA 42).

Third, the regulations at issue apply only to political committees, whose major purpose is the nomination or election of candidates. As the Supreme Court reiterated in McConnell, it has been established for decades that,

> because the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate[,]" … a political committee's expenditures "are, by definition, campaign related."

[13] See, e.g., EMILY's List Br. 8-9 (lamenting loss of the "sensible flexibility of the previous set of allocation regulations").

McConnell, 540 U.S. at 170 n.64 (quoting Buckley, 424 U.S. at 79). The law thus presumes that expenditures by federal political committees like EMILY's List are for the purpose of influencing elections. Indeed, such organizations often have close relations with candidates, parties, and office holders.[14]

B. 11 C.F.R. 106.6(c) Is A Permissible Allocation Formula For Certain Federal And Nonfederal Shared Expenses

Revised paragraph 11 C.F.R. 106.6(c) governs, inter alia, the allocation of federal and nonfederal funds to finance nonconnected committees' administrative expenses and "generic voter drives." These disbursements benefit both federal and nonfederal candidates, and thus influence both federal and nonfederal elections. "Common sense dictates … that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office." McConnell, 540 U.S. at 167 (citation omitted). The revised regulation applies a minimum federal funds rate of 50% to these dual-purpose disbursements. This flat rate replaces the complex "funds expended" method of calculating a ratio for use of federal and nonfederal funds (JA 161).

The regulation is consistent with the Act. The FECA does not say anything about the allocation of expenditures by nonconnected political committees, much less mandate a particular framework. Congress addressed the allocation of "hard" and "soft" money for "mixed purpose" activities that influence federal elections for the first time in BCRA, but only by creating a limited allocation regime applicable to state and local party committees. See 2 U.S.C. 441i(b)(2)(A) ("Levin Amendment"). Significantly, BCRA expressly "gives the FEC

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[14] For example, EMILY's List asserts (Br. 2) that its purposes include "recruit[ing] and fund[ing] viable women candidates" and "help[ing] them build and run effective campaign organizations."

responsibility for setting the allocation ratio" under that regime. McConnell, 540 U.S. at 163 n.58. BCRA does not address allocation by nonconnected committees, and neither the Act nor its legislative history indicates that Congress intended to restrict the Commission's discretion to determine how such committees should allocate their mixed expenditures.

As the district court noted (JA 43), the Supreme Court concluded that, prior to enactment of BCRA, "concerning the treatment of contributions intended [to be spent on activities] to influence both federal and state elections," a "literal reading of FECA's definition of 'contribution' would have required such activities to be funded with hard money." McConnell, 540 U.S. at 123 (emphasis added). The Court thus made clear that the statutory language does not require the Commission to permit any allocation to a soft money account for mixed spending that influences both federal and state elections. After all, just because a contribution or expenditure has an influence on state elections does not negate that it may simultaneously affect federal elections. See id. at 166. Thus, the use of any allocation formula by a nonconnected committee for expenses that may influence both federal and nonfederal elections is a permissive administrative construction, not a statutory entitlement.[15]

More generally, an entity cannot immunize its federal election activity from regulation simply by also engaging in some nonfederal activity. On the contrary, McConnell upheld

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[15] EMILY's List wrongly suggests (Br. 24) that the district court "based" one of its holdings solely on Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987), and it distorts the meaning of that decision. Common Cause actually held that, although the Act authorizes the Commission to permit allocation of mixed expenditures, the Commission could just as well "conclude that no method of allocation will effectuate the Congressional goal that all monies spent" on certain activities "be 'hard money' under the FECA." 692 F. Supp. at 1395-96 (emphasis in original). Appellant's apparent suggestion (Br. 24-25) that Common Cause was merely describing the possible administrative impracticality of rules for mixed-activity allocation — rather than the Commission's regulatory discretion to end such allocation entirely if it proved to be impractical — is contrary to the plain language of the decision. See 692 F. Supp. at 1396.

BCRA's prohibition of national parties' solicitation, receipt, or expenditure of nonfederal funds despite the parties' recognized role in nonfederal elections, and it also upheld BCRA's more restrictive allocation system for state and local parties, despite their even more obvious role in nonfederal elections. See 540 U.S. at 142-62.

As the Commission explained (JA 164), it changed the allocation regime to "establish a simpler bright-line rule …. The previous rules were a source of confusion for some … nonconnected committees and resulted in time-consuming reporting." The Commission had "discovered that very few committees chose to allocate their administrative and generic voter drive expenses under former section 106.6(c)." JA 167.[16] Moreover, "[a]necdotal evidence suggested that many committees, including those that allocated, were confused as to how the funds expended ratio should be calculated and adjusted throughout the two-year election cycle," and "audit experience ha[d] also shown that some committees were not properly allocating under the complicated funds expended method." Id. By changing the allocation method, the Commission sought "to enhance compliance with the FECA, to simplify the allocation system, and to make it easier for … nonconnected committees to comprehend and for the Commission to administer" the requirements. JA 165. It is well settled that simplifying regulation to promote ease of compliance and enforcement is a valid rulemaking objective. See Allied Local and Regional Mfrs. Caucus v. EPA, 215 F.3d 61, 78 (D.C. Cir. 2000) ("The agency's consideration of ... 'regulatory efficiency,' seems nothing more than regulatory common sense ... "); Clinton

[16] "[F]ewer than 2% of all registered nonparty political committees … allocate[ed] administrative and generic voter drive expenses under former section 106.6(c)…. Any SSF or nonconnected committee that was not allocating under section 106.6 was presumably already using 100% Federal funds for these expenses, except where those expenses were paid by other entities in accordance with the Act and Commission regulations, such as an SFF's connected organization paying its administrative expenses." JA 167.

Memorial Hospital v. Shalala, 10 F.3d 854, 860 (D.C. Cir. 1993) ("the Secretary certainly is allowed to take administrative convenience into account").

The 50% minimum for activities that cannot be divided with scientific precision into exclusively federal and nonfederal components fairly reflects the dual nature of the disbursements. As the Commission noted, many of those few committees that have used the funds expended method "already use 50% or more as their Federal allocation ratio." JA 171. EMILY's List itself has consistently allocated its costs on this same 50% basis (JA 176-79). The prevalence of a 50% or higher ratio reflects the fact that, even though federal elections occur biennially, many political committees begin preparing for them during the preceding "off" year. Indeed, the appellant's name makes that very point; "EMILY" is an acronym for "Early Money Is Like Yeast" (JA 184). In off-year 2001, for example, EMILY's List raised more than $8,500,000 in "hard money" contributions from individuals, and its "federal receipts" totaled more than $9 million (JA 196-99). These circumstances are more than sufficient to establish that the Commission's choice of a 50% "line of demarcation is … within a zone of reasonableness, as distinct from the question of whether the line drawn by the Commission is precisely right." ExxonMobil Gas Mktg. Co. v. FERC, 297 F.3d 1071, 1084 (D.C. Cir. 2002) (internal quotation marks and citations omitted). See also Worldcom, Inc. v. FCC, 238 F.3d 449, 461 (D.C. Cir. 2001).

Relying on speculation, without record support, EMILY's List argues (Br. 26-27) that the 50% federal funds minimum rule is arbitrary and capricious because "[s]ome large committees may only dabble in nonfederal activity [while] others, such as EMILY's List, have a much higher level of nonfederal activity." This argument also ignores the important fact that the regulation applies only to federal political committees, whose major purpose is to influence

elections, see supra pp. 20-22, and that the kinds of activity governed by this regulation, by their very nature, affect both federal and nonfederal elections. As the Commission explained (JA 167):

> These committees have registered as Federal political committees with the FEC; consistent with that status, political committees should not be permitted to pay for administrative expenses, generic voter drives and public communications that refer to a political party with a greater amount of non-Federal funds than Federal funds.

Even regarding its own activity, EMILY's List provides no evidence but only asserts in its brief (at 23) that it "devote[s] a majority of [its] time and effort to nonfederal elections…."; its prior disclosure reports to the Commission, however, indicate otherwise. See supra p. 4; JA 177-81.

Contrary to appellant's accusation (Br. 26) that the Commission acted arbitrarily, the Commission (JA 165) "carefully consider[ed] the[] public comments and examin[ed] information regarding how the allocation system under former 11 CFR 106.6 ha[d] worked." The Commission summarized (JA 166-67) the comments it received on allocation; they included a range of views supporting either a 100% level or other percentages. See Comments of Public Citizen, at 12-13 (April 5, 2004) (supporting 100% federal funds) (Exh. 12); Comments of Democracy 21, Campaign Legal Center, Center for Responsive Politics, at 17-19 (April 5, 2004) (supporting 50% federal funds minimum, with exception for committees only active in two or three states) (Exh. 15); Comments of Senators McCain and Feingold, Representatives Shays and Meehan, at 3 (April 9, 2004) (supporting significant federal funds minimum) (Exh. 10).[17]

[17] EMILY's List also argues (Br. 27) that the Commission's review of public disclosure reports in this context was improper. This argument is fully addressed infra pp. 43-44.

In any event, 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, 765 (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, 238 F.3d at 461-462. EMILY's List has presented no basis for denying the Commission deference and substituting a different line for the one drawn by the Commission.[18]

The Commission's revision of 11 C.F.R. 106.6(c) is analogous to (though more lenient than) Congress's decision in BCRA to impose a flat 100% federal funds requirement for the wages and salaries of state and local party committee employees who dedicate most of their compensated time to nonfederal electoral activities, if they spend at least 25% of their time on federal activities. See 2 U.S.C. 431(20)(A)(iv). Expressly deferring to Congress's judgment, the Supreme Court upheld the 25% provision as a "'prophylactic rule'" that prevents circumvention of other provisions. McConnell, 540 U.S. at 170-71 (citation omitted).

EMILY's List also claims (Br. 16-17) that the 50% minimum federal allocation violates the First Amendment, but that argument is meritless. EMILY's List has offered absolutely no evidence to controvert the Commission's conclusion (JA 168) that the flat rate would result at

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[18] Appellant's claim (Br. 26) that the 50% minimum is "arbitrary and capricious" also reflects a basic misunderstanding of the Commission's broad regulatory discretion in creating rules to implement the Act's contribution restrictions. Such a rule is not required to be the result of what EMILY's List terms (Br. 26) a "formal study." It reflects common sense in light of the Commission's experience in regulating federal political committees. See General Instrument Corporation v. FCC, 213 F.3d 724, 735 (D.C. Cir. 2000) ("the Commission's concern ... appears well-grounded in common sense"); Allied Local, 215 F.3d at 78.

most in "only a minimal increase in Federal funds expended" even by those few committees — if there are any — that correctly used the funds expended method and consistently came up with a federal funds allocation ratio less than 50%.

The allocation regulations do not impose any ceiling on a committee's administrative and generic voter drive expenditures, but simply implement the Act's contribution restrictions. As the Supreme Court has recognized, the "overall effect of the Act's contribution ceilings is merely to require … political committees to raise funds from a greater number of persons." Buckley, 424 U.S. at 21-22. Thus, the district court found, relying on Buckley, that the regulations at issue here do not prevent EMILY's List from "engaging in whatever political speech it seeks to undertake," but mean only that it "may be required to raise money from a greater number of donors" (JA 47). Indeed, the test for the constitutionality of such a contribution limit is whether it is "so radical in effect as to … drive the sound of [the recipient's] voice below the level of notice." Shrink Missouri, 528 U.S. at 397).[19]

Contrary to appellant's suggestion (Br. 15) that the "narrow tailoring" or "exacting scrutiny" test applies here, even contribution restrictions that involve a "significant interference" with associational rights need only be "closely drawn to match a sufficiently important interest." McConnell, 540 U.S. at 136 (internal quotation marks and citations omitted). As the Supreme

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[19] Appellant's insistence (Br. 15-17) that the Commission provide an extensive, McConnell-style record of potential corruption as to each adjustment of the allocation and solicitation rules — indeed, as to each hypothetical application that EMILY's List can imagine — is absurd. "[I]t 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." Carpenter v. Secretary of Veteran Affairs, 343 F.3d 1347, 1353 (Fed. Cir. 2003). The Commission has wrestled with allocation issues for almost 30 years; the rulemaking at issue here is but the latest installment. See, e.g., McConnell, 540 U.S. at 123 n.7.

Court explained in rejecting the argument that strict scrutiny must be applied to the soft money restrictions in BCRA:

> [F]or purposes of determining the level of scrutiny, it is irrelevant that Congress chose in [BCRA] § 323 to regulate contributions on the demand rather than the supply side…. The relevant inquiry is whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.

McConnell, 540 U.S. at 138-39 (citation omitted). The same is true in this case because the allocation regulations merely limit the use of nonfederal contributions for certain expenditures, without placing any limit on the expenditures themselves. As the district court explained (JA 44-45; citation omitted),

> it is apparent that the FEC promulgated these rules in an effort to close an oft-exploited loophole in federal election law. Under the reasoning of both Common Cause and the Supreme Court's decision in McConnell, it is clear to the Court that the FEC is empowered under FECA to modify allocation rules to ensure that unregulated monies are not used to improperly influence federal elections. Indeed, the Court finds persuasive Defendant's argument that the FEC's "entire allocation system implements the contribution restrictions that have been held to serve an anti-corruption purpose."

EMILY's List has not suggested that the allocation regulations it challenges would lower its voice below the level of notice. Instead, EMILY's List suggests (Br. 15-17) that the activities of nonconnected political committees do not raise concerns of corruption and specifically argues (Br. 11) that it has "never been the subject of any suggestion that it is the avenue for corrupt politics." But neither had the committee in California Med. Ass'n, a decision that EMILY's List ignores. That decision upheld the restrictions on contributions to independent multicandidate committees; it stresses that those limits serve "the governmental interest in preventing the actual or apparent corruption of the political process" because contributors seeking to evade FECA's limits on contribution to candidates might otherwise channel funds through multicandidate

committees for that purpose. Id., 453 U.S. at 197-98. Acceptance of appellant's idiosyncratic argument would effectively bar the Act's application to any committee whose conduct had not already been shown to be questionable.

C. 11 C.F.R. 106.6(f) Uses Permissible Criteria to Define Which Candidate-Specific Communications Are Subject to Allocation Rules

In its new 11 C.F.R. 106.6(f), the Commission promulgated clear, bright-line rules for candidate-specific communications to "enhance compliance with the FECA, 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." JA 165. Specifically, the new regulation establishes

> candidate-driven allocation rules for voter drives and public communications that refer to clearly identified Federal or non-Federal candidates regardless of whether the voter drive or public communication refers to a political party. When the voter drive or public communication refers to clearly identified Federal candidates, but no clearly identified non-Federal candidates, the costs must be paid for with 100% Federal funds. Similarly, when the voter drive or public communication refers to clearly identified non-Federal candidates, but no clearly identified Federal candidates, the costs may be paid 100% from a non-Federal account. Any voter drives or public communications that refer to both clearly identified Federal and non-Federal candidates are subject to the time/space method of allocation under 11 C.F.R. 106.1.

JA 164. "The Commission believes that these final rules best resolve the problems with the former allocation scheme revealed through reviewing past FEC reports and the issues raised by the commenters on the NPRM." JA 168.

Like 11 C.F.R. 106.6(c), see supra pp. 22-30, section 106.6(f) applies only to federal political committees, whose major purpose is the nomination or election of candidates. It was thus well within the Commission's discretion to conclude that when a political committee's voter drives and public communications refer to clearly identified federal candidates, they should be

financed with federal funds — or, if they also refer to nonfederal candidates, with a proportionate allocation between federal and nonfederal funds, according to the pre-existing time/space method of 11 C.F.R. 106.1.

New 11 C.F.R. 106.6(f) is a reasonable implementation of the Act's contribution limits, which regulate different kinds of political entities differently to account for their basic nature and potential for abuse — limits that the Supreme Court has repeatedly upheld. See McConnell, 540 U.S. at 158. Specifically, section 106.6(f)'s regulation of nonconnected committees is consistent with, but less restrictive than, the Act's regulation of other entities. For example, Congress provided in BCRA that national party committees could no longer solicit, receive, or spend any nonfederal funds, and the Supreme Court upheld those new restrictions despite the acknowledged role national party committees regularly play in nonfederal elections. McConnell, 540 U.S. at 142-61. BCRA also established a new allocation system for state and local party committees, which have a vital interest in nonfederal elections. As the Supreme Court noted in upholding those new restrictions, BCRA "prevents donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'" McConnell, 540 U.S. at 161-62. Two of the four statutory categories of "Federal election activity" encompass the same kind of voter drive activity included in 11 C.F.R. 106.6(f): voter registration, 2 U.S.C. 431(20)(A)(i), and get-out-the-vote and generic campaign activity in connection with a federal election, 2 U.S.C. 431(20)(A)(ii). These provisions regulate the financing of such activities by state and local parties without regard to whether they involve any references to federal candidates. "A campaign need not mention federal candidates to have a direct effect on voting for such a candidate …. [G]eneric campaign activity has a direct effect on federal elections." McConnell, 540 U.S. at 168 (citations and internal quotation marks omitted).

Because federal political committees such as EMILY's List — like political parties — have as their major purpose the nomination or election of candidates, their generic activity can also be presumed to affect federal elections. See id. at 170 n.64 (discussing Buckley's presumption about spending by political committees in the context of political parties).

EMILY's List complains (Br. 9, 16, 20-22) that 11 C.F.R. 106.6(f) requires allocation of certain expenditures that "refer to" a clearly identified federal candidate, and poses several hypothetical examples (Br. 9, 20-21) designed to show that some applications of the regulation might exceed the Commission's statutory authority or violate the First Amendment.[20] But it fails to provide a single real-world example, or evidence of any specific communication that it actually plans to make, that would be adversely affected by the regulation. Rather, appellant's arguments are like those rejected by the Supreme Court regarding BCRA's regulation of electioneering communications. Indeed, as EMILY's List concedes (Br. 21), Congress employed just such a "refer to" standard in its definition of "electioneering communications." 2 U.S.C. 434(f)(3)(A). Congress clearly believed that such a standard was appropriate for the regulation of independent groups generally, even those whose major purpose is not to influence the election of candidates.[21] In any event, McConnell makes clear that in the future, EMILY's

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[20] Like its First Amendment attack on section 106.6(c), appellant's challenge to section 106.6(f) does not attempt to explain how this regulation's implementation of the Act's contribution limits could possibly lower EMILY's List's voice to unnoticeable levels. See supra pp. 27-29.

[21] EMILY's List includes (Br. 22) a quotation from the recent decision in Shays v. FEC, 414 F.3d 76, 99 (D.C. Cir. 2005), stating that electoral intent is not always "evident" merely because of a reference to a candidate. But the quoted passage was part of the Court's discussion of the content standards used to help define when communications coordinated with parties and candidates should be considered contributions, and as such it related to any entity engaged in such conduct, not just political committees. Indeed, in Shays the Court was actually concerned with whether such communications were election-related at all, not whether a political

List can adjust the wording of its communications, or simply separate its federal and nonfederal communications, to avoid the alleged problems it hypothesizes. See 540 U.S. at 206. The regulation is thus a reasonable implementation of Act's contribution limits that imposes only a marginal burden on speech.

In particular, EMILY's List points repeatedly (Br. 9, 16) to hypothetical public communications that refer to a federal candidate in a different jurisdiction or are made well in advance of any election in which that candidate is on the ballot.

> Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act…. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power.

United States v. Harriss, 347 U.S. 612, 626 (1954) (footnote omitted). See also Florida League of Prof'l Lobbyists v. Meggs, 87 F.3d 457, 461 (11th Cir. 1996) ("As for the League's hypothesized, fact-specific worst case scenarios, we also decline to accept the facial challenge based on these perceived problems."). Thus, even if there may be an unusual communication to which the regulation could not be lawfully applied, such an occurrence is not sufficient to invalidate the regulation on its face, and appellant's claims before the district court involved only a facial challenge. See McConnell, 540 U.S. at 157 n.52.

Moreover, in the unlikely event that a committee would try to influence a nonfederal election by identifying an out-of-state federal candidate but no nonfederal candidate, it is not evident that such a communication could not also affect an in-state federal election. Such a communication — like a generic party building advertisement — may well suggest that its audience support a party's full slate of candidates (federal and state) on the basis of their alliance

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committee's spending — which is presumed to be campaign-related — would influence state versus federal elections.

with a prominent out-of-state candidate's policies, or the out-of-state candidate's support for the in-state candidates. (EMILY's List also complains that communications are covered without regard to time, but of course there is a time element inherent in the term "candidate," defined in 2 U.S.C. 431(2)).

Appellant's other hypothetical examples fare no better. The example (Br. 20-21) involving the reference to an incumbent president's policies could easily be reworded to refer to "the Administration's policies" rather than using the name of the incumbent running for re-election, if the writer wanted to avoid using hard money. The hypothetical example (Br. 9, 20) involving the use of the popular name of federal legislation (e.g., "McCain-Feingold") to support the election of state candidates could easily be re-worded to avoid identifying a federal candidate. The examples (Br. 9, 20) involving advertisements that support a political party generally but refer to no candidates must be financed with at least 50% federal funds regardless of when they are run because undifferentiated support of a political party denotes support of all of its candidates, federal and nonfederal. Moreover, the same communication, if reworded to include the name of a clearly identified state candidate, could be financed entirely with nonfederal dollars in accordance with the regulation's "candidate-driven" approach. 69 Fed. Reg. 68,059 (JA 164). EMILY's List can thus easily abide by this reasonable regulation and control which donations may be used for its voter drives and public communications.

D. 11 C.F.R. 100.57 Is A Permissible Interpretation Of Which Donations To A Political Committee Are "Contributions"

11 C.F.R. 100.57 specifies when funds received in response to a solicitation will be considered "contributions" under the Act, a subject that is plainly within the Commission's statutory authority and broad discretion. See 2 U.S.C. 431(8) (defining "contribution" as "any

gift, … money or anything of value made … for the purpose of influencing any election for Federal office"). The regulation covers only 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 such a solicitation refers to no nonfederal candidates, the funds collected are federal funds. If it also refers to a nonfederal candidate, then at least 50% of the total funds collected are federal funds. 11 C.F.R. 100.57(b)(2). The new provision is narrowly focused on solicitations that not only "refer to" a clearly identified federal candidate, but also indicate that funds received will be used to support or oppose the election of that candidate.

The Supreme Court has always construed the statutory term "contribution" broadly, to include money "earmarked for political purposes" by the donor and money spent by the donor "in cooperation with" a candidate or campaign committee. Buckley, 424 U.S. at 78. It also includes money given to a multicandidate political committee like EMILY'S List, even if the gift is designated solely for expenses other than support of federal candidates. California Med. Ass'n, 453 U.S. at 199 n.19 ("contributions for administrative support clearly fall within the sorts of donations limited by § 441a(a)(1)(C)") (plurality); id. at 203 (Blackmun, J., concurring). The purpose of 11 C.F.R. 100.57 is to apply the broad statutory definition of "contribution" in a way that ensures that money given to a political committee in response to an appeal to help influence federal elections is subject to the statutory contribution limits. See 69 Fed. Reg. 68,056 (JA 161).

The standard in 11 C.F.R. 100.57 was drawn in large part from the Second Circuit's opinion in FEC v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995). That court held that donations made in response to a solicitation were "contributions" because the text of the mailings

"le[ft] no doubt that the funds contributed would be used to advocate President Reagan's defeat at the polls, not simply to criticize his policies during the election year." Id. at 295.

The Commission's explanation of the final rule describes its operation and provides examples to guide committees in complying with the rule (JA 162). The Commission carefully crafted the rule so as to "leave[] the group issuing the communication with complete control over whether its communications will trigger new section 100.57." Id. The Commission stressed that this regulation is based only on the language of the solicitation itself — the Commission will not use any other statements or solicitations by the organization, the timing or targeting of the solicitation, or any other external information to evaluate the solicitation. Id. If a group wants to be sure donations received in response to a solicitation are not treated as federal contributions, it can simply omit all statements indicating that the funds received will be used to influence federal elections. Thus, appellant's claims (Br. 7, 22-23) that the regulation forces it to "refuse" funds given for nonfederal purposes ring hollow.

EMILY's List repeatedly argues (Br. 7, 9, 17-18, 22-23) that 11 C.F.R. 100.57 is beyond the Commission's authority and unconstitutional because it would override express statements in solicitations that a lower percentage of funds received would be used to support federal candidates. However, EMILY's List identifies no language in the statute inconsistent with this regulation, and appellant's unsupported example is, like the others discussed above, inconsequential and insufficient to support a facial challenge. See supra pp. 32-34. EMILY's List does claim (Br. 17-18), relying on the declaration it submitted months after the denial of a preliminary injunction, that it wishes to use such solicitations in the future. But the vague,

self-serving assertions in this belated declaration are insufficient to show that 11 C.F.R. 100.57 would impose any significant burden.[22]

Indeed, 11 C.F.R. 100.57 leaves countless options for sophisticated political committees like EMILY's List to raise nonfederal funds — flexibility that the Supreme Court has found significant in reviewing comparable restrictions. See McConnell, 540 U.S. at 206. Under section 100.57, if EMILY's List wants any of the funds raised in response to a given solicitation to be nonfederal funds, it need only avoid stating that the money collected will be used to support or oppose the election of a clearly identified federal candidate (for 100% nonfederal proceeds), or include an indication that some of the funds raised will be used to support or oppose identified federal and nonfederal candidates (for 50% federal proceeds). As EMILY's List concedes (Br. 18), a committee might also simply use separate communications to raise funds in connection with federal and nonfederal elections. See RNC 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 it 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 candidacies, it is clearly reasonable to treat the proceeds as federal funds.

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[22] Of course, since EMILY's List did not participate in the rulemaking, it failed to suggest to the Commission that express statements in solicitations about allocation percentages should be given controlling weight. See Clinton Memorial Hospital, 10 F.3d at 859 ("[N]o one proposed … the use of other criteria…. The absence of any alternative proposals colors our assessment of the Secretary's explanation.").

E. EMILY'S LIST IS UNLIKELY TO SUCCEED ON ITS CLAIM THAT IT RECEIVED INADEQUATE NOTICE OF THE COMMISSION'S RULEMAKING

On March 11, 2004, the Commission published an NPRM that EMILY's List itself describes (Br. 5) as a "wide-ranging proposal of new regulations" that addressed a variety of topics. EMILY's List acknowledges (Br. 28) that the NPRM "contained both a comprehensive explanation of the subjects and issues involved, and specific details regarding the terms and substance of the proposed rules."

The APA provides two independent ways to comply with its notice requirements: "[t]he notice shall include ... either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. 553(b)(3) (emphasis added). See also First American Discount Corp. v. CFTC, 222 F.3d 1008, 1014 (D.C. Cir. 2000); Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 950-951 (D.C. Cir. 2004); United States Telecom Ass'n v. FCC, 400 F.3d 29, 40 n.21 (D.C. Cir. 2005). The Commission addressed both prongs of the APA's disjunctive notice requirement.

"[N]otice requirements do not require that the final rule be an exact replication of the proposed rule." Ass'n of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1058 (D.C. Cir. 2000). If every change required an additional notice and comment period, "[a]gencies would either refuse to make changes in response to comments or be forced into perpetual cycles of new notice and comments periods." Id. Therefore, "[a] final rule will be deemed to be the logical outgrowth of a proposed rule if 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.'" Id. (citation omitted). This requirement is satisfied if the notice is

"sufficient to apprise the public, at a minimum, that the issue … was on the table." Career College Ass'n v. Riley, 74 F.3d 1265, 1276 (D.C. Cir. 1996).[23]

EMILY's List had the same opportunity to comment on each of the new rules as the many organizations that actually did provide comments — and expressed a broad range of opinion. See, e.g., Comments of America Coming Together, dated April 5, 2004 (Exh. 13), at 36 (characterizing as "extreme" the proposal for political committees to "pay for all of its disbursements out of Federal funds"); Comments of Public Citizen, dated April 5, 2004 (Exh. 12), at 12 ("it would be entirely appropriate to go still further and end the allocation ratio altogether"). "The fact that others in [plaintiff's] shoes ... did comment on [and propose regulatory alternatives] suggests that they, at least, regarded it as a logical outgrowth." First American Discount Corp., 222 F.3d at 1015. See also Edison Electrical Inst. v. EPA, 2 F.3d 438, 450 (D.C. Cir. 1993) (comments "are at least probative evidence that the notice given was adequate").

1. The Commission Provided Ample Notice of Revisions to Its Allocation Regulation, 11 C.F.R. 106.6

a. The 50% Federal Funds Minimum Allocation Requirement Was Adequately Noticed

The Commission's NPRM broadly sought comment on changes to its allocation regulations. It asked, "what, if any, changes are advisable" (JA 94), and specifically provided notice that it was considering setting a federal funds floor at 50% for administrative expenses and voter drive activities. For one option, the Commission asked, "Should the Commission adopt a fixed minimum Federal percentage?" Id. One proposal suggested a two-tier system

[23] EMILY's List complains (Br. 10, 28) that this rulemaking was dominated by proposed rules not at issue here and that the less controversial allocation rules were overshadowed. However, the relevant question is only whether the NPRM provided adequate notice with respect to the provisions at issue here; the APA does not require that notice of one proposed regulation receive more or less prominence than others.

where committees' federal minimum percentage would depend upon the number of states in which the committee operated (perhaps 25% for fewer than 10 states, but 50% for more than 10 states). Thus, as the district court correctly concluded, the 50% federal funds minimum was specifically raised as a possibility (JA 40). Since EMILY's List itself operates in more than 10 states, it was plainly on notice that it could be subject to the 50% federal funds minimum.

By specifically asking, "what should the minimum Federal percentages be?" (JA 94), the Commission plainly put "on the table" the issue of where to set a minimum federal percentage. Career College Ass'n, 74 F.3d at 1276. As the district court correctly concluded, "[i]n light of the language included in the NPRM, it is simply implausible that EMILY's List was not on notice that a fixed 50 percent federal funds minimum requirement might be incorporated into the final rules." JA 40 (footnote omitted).

b. The Allocation Requirements for Communications that Refer to Federal Candidates and Political Parties Were Adequately Noticed

The Commission provided notice that it was considering allocation requirements for communications that refer to federal candidates only or to both federal candidates and political parties (JA 93-95). The Commission proposed allocating the costs of public communications that promote or oppose a political party under the same method as administrative expenses in 11 C.F.R. 106.6(c). Id. The Commission sought comment on a proposal to create a new section, 11 C.F.R. 106.6(f), requiring allocation of public communications that promote, support, attack, or oppose, or expressly advocate a clearly identified federal candidate and a political party (JA 95). The final rule adopted a somewhat more stringent approach, but nonetheless one easily within the range of noticed possibilities and thus "on the table" for revision. Career College Ass'n, 74 F.3d at 1276.

EMILY's List claims (Br. 29) that the Commission's NPRM gave no notice of the "refer to" standard and was locked into the "promote, support, attack, or oppose" standard. However, it is well established that the final rule permissibly may differ from versions that were presented to the public in the notice of proposed rulemaking. Health Ins. Ass'n v. Shalala, 23 F.3d 412, 421 (D.C. Cir. 1994)). For example, in Northeast Maryland Waste Disposal Auth., 358 F.3d at 951-52, EPA issued an NPRM that set up different requirements for refractory and nonrefractory waste combustion operations. Even though the final rule abandoned this distinction, the Court explained that EPA had "effectively served notice that … the distinction might not survive" by "invit[ing] comments on both the pros and cons of that distinction." Id. at 952. See also Ass'n of Battery Recyclers, 208 F.3d at 1059; Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1300 (D.C. Cir. 2000) ("any reasonable party should have understood that EPA might reach the opposite conclusion").

In this case, the NPRM plainly put EMILY's List on notice that the Commission was considering a regulation that would turn on the reference to a federal candidate in the communication. The nature of the reference that would trigger the regulation was clearly an issue the Commission indicated it was considering, and though "promote, support, attack, or oppose" and "expressly advocate" were set out as possible answers, the NPRM did not suggest that no other formulations would be considered. The specific "refer to" standard in the final rule still requires an explicit mention of an identified federal candidate and was a logical outgrowth of the original proposal, well within the "subjects and issues" identified in the NPRM.

2. The Commission Provided Ample Notice of Its Solicitation Regulation, 11 C.F.R. 100.57

The Commission sought comment on a rule that any funds received in response to particular solicitations are "for the purpose of influencing any election for Federal office" and

therefore "contributions" under FECA (JA 83). The NPRM included a proposed text for the solicitation regulation as well as possible permutations on that text. Although the proposed text included an "express advocacy" standard, the Commission also explicitly sought public comment regarding other possible standards. As the district court found, "the NPRM specifically asked whether 'the new rule [should] use a standard other than express advocacy, such as [a] solicitation that ... indicates that funds received in response thereto will be used to promote, support, attack, or oppose a clearly identified Federal candidate.'" JA 41-42 (quoting 69 Fed. Reg. 11,743) (emphases supplied by Court). Thus, since "[t]he NPRM included the specific language ultimately adopted," id., it is indisputable that the Commission provided adequate notice of the new rule under the "terms or substance" option within 5 U.S.C. 553(b)(3).

Despite this explicit notice, EMILY's List argues (Br. 32) that the rule's treatment of contributions in response to solicitations as either 50% or 100% federal contributions "severely constrain[s] EMILY's List's ability to fundraise for nonfederal political purposes." However, this complaint addresses the alleged effect of the regulation and not the adequacy of notice under the "terms or substance" prong of 5 U.S.C. 553(b)(3). Appellant concedes (Br. 32) that the NPRM "did ask whether another standard [other than express advocacy] should be used instead."[24]

The Commission also satisfied the second option under section 553(b)(3) by providing notice of the "subjects and issues." The notice identified the fundamental issue that it was

[24] EMILY's List claims (Br. 32) that there was no notice that the "express intent" of a solicitation would be ignored, but that is clearly wrong. Nothing in the NPRM suggested that such "express intent" was on the table as a relevant factor, and we are not aware of any evidence in the rulemaking — and EMILY's List has pointed to none — of real solicitations that specify, for example, that a fixed percentage of the donations received will be allocated exclusively for nonfederal elections. The rulemaking's complete silence on this hypothetical possibility thus put EMILY's List on notice that such "express intent" was not presented as the touchstone for deciding whether donations are contributions. See also supra pp. 15, 37 n.22.

addressing: whether a "standard other than express advocacy, such as a solicitation that promotes, attacks, or opposes a Federal candidate" should be used in the solicitation rule. "That the Proposed Rule described [one alternative] approvingly does not undermine the notice to interested parties that the rule was subject to modification, particularly in light of adverse comments," Career College Ass'n, 74 F.3d at 1276.

3. The Commission Can Rely Upon Data in Publicly Available Disclosure Reports

In the final rules the Commission noted that it had "examin[ed] public disclosure reports filed by [separate segregated funds] and nonconnected committees" and that its conclusions were based in part on this review (JA 167). EMILY's List argues (Br. 31-32) that the Commission improperly failed to provide notice of this intention. These disclosure reports, however, are publicly available on the Commission's Web site and in its public records office. See http://www.fec.gov/disclosure.shtml. EMILY's List states (Br. 31-32) that disclosure reports are only available in "unorganized form" and that "the disclosure reports of allocating committees are not able to be separated out from the reports of all other political committees." EMILY's List is flatly mistaken in this regard. The Commission's Web site posts both disclosure reports and data summary files. The data summary files can easily be sorted and analyzed. For example, the 2001-2002 PAC Summary shows the 188 committees that allocate. See FEC, PAC Financial Summaries, available at http://www.fec.gov/finance/disclosure/ftpsum.shtml. The cases EMILY's List relies upon (Br. 31) regarding inadequate notice of studies all involved results of formal studies conducted by experts using data not available to the public.

In any event, "[a]gencies may develop additional information in response to public comments and rely on that information without starting anew 'unless prejudice is shown.'" Personal Watercraft Industry Ass'n v. Department of Commerce, 48 F.3d 540, 544 (D.C. Cir.

1995) (citation omitted). "The party objecting has the burden of 'indicat[ing] with "reasonable specificity" what portions of the documents it objects to and how it might have responded if given the opportunity.'" Id. (citations omitted); see also West Virginia v. EPA, 362 F.3d 861, 869 (D.C. Cir. 2004). EMILY'S List has not even tried to specify anything it would have said about these publicly available documents that could have affected the outcome of the rule.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT A PRELIMINARY INJUNCTION WOULD CAUSE THE COMMISSION AND THE PUBLIC SUBSTANTIAL HARM

Even a temporary injunction against the challenged regulations would change the status quo and potentially encourage the use of soft money to influence federal elections. It would thereby harm the public interest in preserving the integrity of the federal election process by undermining the Act's contribution limitations and prohibitions. A preliminary injunction would also harm the Commission by preventing it from implementing fully its understanding of Congress's decision, embodied in the Act, to prevent the use of soft money to influence federal elections.

A preliminary injunction would also create confusion and uncertainty in the regulated community. The regulations at issue here apply to all nonconnected political committees. Appellant's argument (Br. 33) about the relatively small number of committees that availed themselves of former 11 C.F.R. 106.6(c) only addresses a portion of the overall harm that would be caused to the system by the injunction EMILY's List sought. As the district court explained (JA 48-49; citations omitted), if the rules were enjoined, the "public would find these portions of campaign finance law suddenly unregulated…. Enjoining the new rules would not even automatically reinstate the arguably flawed former regime preferred by [EMILY's List]."

Moreover, much of appellant's argument about the challenged regulations concerns the alleged procedural defects in their promulgation, i.e., allegedly inadequate notice. Even if the Court were to find that the appellant is likely to prevail on that ground, such a finding would not justify a preliminary injunction against the substantive operation of the rules. The "disruptive consequences of an interim change" would be severe indeed, and because the Commission could cure any notice defects on remand "it is not unlikely the [Commission] will be able to justify a future decision to retain the [r]ule[s]." Louisiana Federal Land Bank v. Farm Credit Admin., 336 F.3d 1075, 1085 (D.C. Cir. 2003).

Finally, the harm to the Commission is evident. No one disputes that the Commission has the statutory duty to enforce the Act. A preliminary injunction would preclude the Commission from performing its duty, causing it a substantial injury.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

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October 12, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMILY's LIST,	)	
	)	
	)	
Plaintiff-Appellant,	)	No. 05-5160
	)	
v.	)	**CERTIFICATE OF COMPLIANCE**
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant-Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH Fed.R.App.P. 32(a)(7)

As required by Fed.R.App.P. 32(a)(7)(C)(i), I hereby certify that the foregoing brief complies with the length requirements of Fed.R.App.P. 32(a)(7)(B). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 13,983 words.

I further certify that the foregoing brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5)(A), as modified by D.C. Cir. R.32(a)(1), and the type style requirements of Fed.R.App.P. 32(a)(6). The brief has been prepared in a proportionately space typeface using Microsoft Word 2000 in Times New Roman font size 12.

/s/

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October 12, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMILY's LIST,	)	
	)	
	)	
Plaintiff-Appellant,	)	No. 05-5160
	)	
v.	)	**CERTIFICATE OF SERVICE**
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant-Appellee.	)	

CE CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2005, I caused to be served by hand two copies of the foregoing Brief for the Federal Election Commission, upon the following counsel:

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October 12, 2005