UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE COMMISSION'S ALLOCATION AND SOLICITATION REGULATIONS ARE CONSTITUTIONAL AND CONSISTENT WITH THE FECA 2

A. Regulation 11 C.F.R. 106.6(f) Establishes Permissible Allocation Rules for Candidate-Specific Communications by Political Committees Like EMILY's List 9

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

C. Regulation 11 C.F.R. 100.57 Establishes Permissible Rules for Solicitation of Contributions by Political Committees Like EMILY's List 14

III. THE COMMISSION'S RULEMAKING SATISFIED APA NOTICE REQUIREMENTS 16

IV. EMILY'S LIST HAS FAILED TO MEET ITS EVIDENTIARY BURDEN AT SUMMARY JUDGMENT 18

V. EMILY'S LIST HAS FAILED TO JUSTIFY THE REMEDY IT SEEKS 20

VI. CONCLUSION 21

I. INTRODUCTION

In its opposition to the Federal Election Commission's ("Commission" or "FEC") motion for summary judgment, EMILY's List still fails to address the reasoning of this Court's preliminary injunction ruling as to the merits of this case, and it provides no reason for the Court to reach a different conclusion here. Plaintiff does not dispute that the Commission has the authority, in regulating contributions and expenditures made "for the purpose of influencing" federal elections, to promulgate rules that govern the financing of federal political committees' activities that may simultaneously affect both federal and state elections. Instead, plaintiff effectively objects to the Commission's policy choices, a challenge that must fail under the highly deferential standard of review. EMILY's List essentially argues that the Commission cannot regulate activity influencing federal elections if that activity also influences nonfederal elections, a position that proves too much because it would also invalidate the prior allocation scheme that plaintiff concedes is permissible. Although EMILY's List may be "independent" in the sense of not being controlled by a particular political party or candidate, it is nevertheless, like all political committees, subject to numerous restrictions under the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. 431-55. The Supreme Court has upheld restrictions on contributions to such multicandidate political committees, in part because such limits help prevent circumvention of the Act's individual and aggregate contribution limits. The regulations at issue here modestly revise and reasonably implement some of the Act's provisions that govern the activities of political committees like EMILY's List.

In particular, the challenged regulations simplify the allocation system applicable to EMILY's List and clarify when funds received in response to solicitations are considered

contributions. These regulations do not prevent any political committee from engaging in any political speech, as this Court noted in denying plaintiff a preliminary injunction. See EMILY's List v. FEC, 362 F.Supp.2d 43, 58 (D.D.C. 2005). At most, the rules may require plaintiff to choose between adjusting the wording of some of its communications and using a greater percentage of federal funds to finance them, options the Supreme Court specifically found acceptable in rejecting a constitutional challenge to comparable statutory restrictions in McConnell v. FEC, 540 U.S. 93, 206 (2003).

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

Plaintiff's lawsuit is a challenge to the Commission's policy decisions to simplify its allocation regulations and clarify when solicitations lead to "contributions" under the FECA. Because plaintiff's case rests on little more than an argument that the Commission should have chosen different allocation percentages or left the prior system unchanged, plaintiff has failed to show that the Commission's interpretation of the Act is impermissible under the highly deferential standards applicable to judicial review under Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842 (1984). See Rhinelander Paper Co. v. FERC, 405 F.3d 1, 6 (D.C. Cir. 2005); FEC's Summary Judgment Memorandum ("FEC Mem.") at 14-16. EMILY's List does not really question the applicability of this deferential standard of review, but only vaguely asserts that such deference "only extends so far." EMILY's List's Reply Memorandum and Memorandum in Opposition to Defendant's Motion for Summary Judgment ("Pl. Br.") at 20. Plaintiff also does not dispute that the Commission has the authority to regulate the financing of "mixed" activities that will influence both federal and nonfederal elections. Nor does plaintiff question the Commission's authority to require that the financing of mixed activities be allocated, in order to ensure that activities influencing federal elections be paid for with federal

funds. Indeed, the whole point of plaintiff's lawsuit appears to be to resurrect the Commission's prior rules governing allocation and solicitations, to which plaintiff does not object.[1] However, as this Court observed, plaintiff has "not demonstrated any right, statutory or otherwise, to the former system of allocation rules." EMILY's List, 362 F.Supp.2d at 55.

The Commission showed (Mem. 16-34) that the regulations at issue are consistent with the Constitution and the Act. Plaintiff does not dispute that the purpose of all of the regulations at issue in this case is to implement the Act's contribution restrictions, as this Court recognized in denying a preliminary injunction. EMILY's List, 362 F.Supp.2d at 57. Nor does plaintiff dispute that the Supreme Court has repeatedly upheld those statutory contribution restrictions, and measures to foreclose circumvention of them, on the grounds that they serve the important governmental interests in preventing corruption and the appearance of corruption. See Buckley v. Valeo, 424 U.S. 1, 26-28, 46-47 (1976); McConnell, 540 U.S. at 143-45; FEC v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 456 (2001) ("all Members of the Court agree that circumvention is a valid theory of corruption"); FEC Mem. 17-19. Indeed, nearly a quarter century ago, the Supreme Court upheld the contribution limits applicable to multicandidate political committees like EMILY's List, explaining that those limits were intended in part to prevent circumvention of the aggregate and individual candidate contribution limits upheld in Buckley. California Medical Ass'n v. FEC, 453 U.S. 182, 197-98 (1981).

The Court's ruling in California Medical, which plaintiff entirely ignores, plainly forecloses plaintiff's suggestions (Br. 8-11) that "independent groups" are somehow immune to

[1] See, e.g., Pl. Br. at 8 (claiming disruption caused by vacating regulations at issue would be minimal because of prior "set of functioning regulations"); Plaintiff's Opening Memorandum ("Pl. Opening Br.") at 5-6 (describing prior allocation system that resulted in "payment of generic expenses" in accord with "the share of that organization's goal devoted to federal elections").

corruption concerns, or that the potential of such groups to serve as circumvention vehicles is a mere "speculative possibility." Plaintiff's arguments prove too much because, if accepted, they would effectively bar the application of the prior allocation system and even the Act itself to such political committees. Yet the Supreme Court has never suggested that there is any barrier to the regulation of allocation or solicitation by federal political committees, including "independent" committees. Nonconnected committees like EMILY's List are subject to the Act's restrictions, even though they are not political parties, because their major purpose is the nomination or election of candidates, and they often have close relations with candidates, political parties, and office holders.[2] Indeed, the Supreme Court has stressed that because the term "political committee" need include only committees whose "major purpose" is the "nomination or election of a candidate," the expenditures of such a committee "are, by definition, campaign related." McConnell, 540 U.S. at 170 n.64 (quoting Buckley, 424 U.S. at 79). Thus, it is well-established that regulation of the finances of such committees serves important anti-corruption interests.

As the Commission explained (Mem. 21-22), the Supreme Court has recognized that Congress may constitutionally regulate different types of political entities in different ways, see McConnell, 540 U.S. at 158, but that clearly does not mean that an entity can immunize its federal election activity from regulation by also engaging in some nonfederal activity. On the contrary, McConnell upheld the Bipartisan Campaign Reform Act's ("BCRA's") elimination of national parties' solicitation and receipt of nonfederal funds despite the parties' recognized role

[2] In fact, the Declaration of Britt Cocanour (Cocanour Aff."), which EMILY's List supplies with its reply brief in a belated effort to establish standing, appears to belie plaintiff's own repeated claims (Br. 1, 8-10) that it operates "independently" of federal candidates. See, e.g., ¶¶ 2, 3 (EMILY's List "recruits qualified candidates," "help[s] them build and run effective campaign organizations," "trains them to be effective fundraisers and communicators," and "works with them throughout the campaign").

in nonfederal elections, and it also upheld BCRA's new allocation system for state and local parties, despite their even more obvious role in nonfederal elections. See 540 U.S. at 142-62. Nor must entities be as directly associated with federal candidates as political parties are to present corruption concerns. In California Medical, the Court upheld the contribution restrictions on independent multicandidate committees like EMILY's List because they furthered "the governmental interest in preventing the actual or apparent corruption of the political process" by preventing circumvention of the limits upheld in Buckley. See California Medical, 453 U.S. at 197-98. More recently, in McConnell, the Court upheld the electioneering communications restrictions of 2 U.S.C. 434(f)(3)(A) as to corporations and unions that do not have the major purpose of influencing federal elections, even though the electioneering communication restrictions are expenditure limits that are subject to strict scrutiny. See 540 U.S. at 203-09.

Since it has long been established that political committees like EMILY's List are properly subject to the Act's contribution limits because of the potential for corruption stemming from circumvention, plaintiff's continued insistence (Br. 1-2, 8-10) 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 plaintiff can imagine — is absurd.[3] Similarly, plaintiff claims (Br. 10-11) that Buckley's observation that the overall effect of the Act's contribution limits is merely to require political committees to raise

[3] "[A] regulation is reasonably related to the purpose of the legislation to which it relates if the regulation serves to prevent circumvention of the statute and is not inconsistent with the statutory provisions." Carpenter v. Secretary of Veteran Affairs, 343 F.3d 1347, 1352 (Fed. Cir. 2003). "Moreover, it is unnecessary for an agency to prove that circumvention has occurred in the past in order to sustain an anti-circumvention regulation as reasonable; a regulation can be justified by a reasonable expectation that it will prevent circumvention of statutory policy in the future." Id. at 1353.

funds from a greater number of sources (424 U.S. at 21-22) is irrelevant here because there is assertedly no "link" to the prevention of corruption. But that link was made by Congress and the Supreme Court decades ago, see California Medical, 453 U.S. at 197-98, and there is no basis for requiring the Commission to re-establish it for each regulatory change. As this Court noted in quoting that same language from Buckley, the regulations at issue do not prevent plaintiff 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." EMILY's List, 362 F.Supp.2d at 58. Indeed, the proper test in assessing the effect 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.'" McConnell, 540 U.S. at 173 (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 397 (2000)). Plaintiff's assertions to the effect that the new rules "impede the ability of EMILY's List to raise and spend money" (Cocanour Aff. ¶ 24) do not even attempt to meet that standard.

The regulations at issue in this case were promulgated to clarify the extent to which certain activities of political committees would be considered to be "for the purpose of influencing" a federal election under the Act. 2 U.S.C. 431(8), (9). Plaintiff agrees (Br. 11) that this is the relevant statutory standard, but asserts (Br. 2, 11-14) that the Commission has claimed the right to require political committees to finance "all" of their activities with federal funds. The Commission has done no such thing. Despite the straw man plaintiff creates, this case is actually about mixed activities, that is, those intended to influence both federal and nonfederal elections. As the Commission explained (Br. 16), McConnell made clear that a "literal reading of FECA's definition of 'contribution' would have required such activities to be funded with hard money." 540 U.S. at 123. Plaintiff's strategy (see, e.g., Br. 11) boils down to re-labeling this mixed activity as "state and local election activity," and then expressing outrage that the

Commission would suggest it could require that such activity be financed entirely with federal funds. As the Commission has explained (Mem. 16), however, the fact that a given activity may influence nonfederal elections does not mean that it does not also affect federal elections. See McConnell, 540 U.S. at 166. A pre-election television ad urging viewers to "vote Democratic," for example, would obviously affect both federal and nonfederal races on the ballot.

Plaintiff argues (Br. 12) that McConnell "did not enforce" this "literal reading" of the Act against state parties, but that was because Congress had changed the statute. In BCRA, Congress mandated a specific allocation system for state parties, and the Court upheld it. For independent political committees like EMILY's List, Congress left undisturbed the regulatory structure that has been in place for over 30 years, a structure that allows — but does not require — the Commission to permit allocation. In this regard, plaintiff continues to distort the meaning of Common Cause v. FEC, 692 F. Supp. 1391 (D.D.C. 1987), arguing (Br. 13) that the case does not support regulating all activities of political committees that are "active principally in state and local elections." But once again, that is not what the regulations at issue here do. As we have explained (Mem. 21-22, 25-27, 30-32), those regulations clarify the extent to which mixed activities of organizations that are political committees must be financed with federal funds. Just as plaintiff cannot transform mixed activity into purely nonfederal activity merely by labeling it as such, it cannot transform federal political committees into entities "active principally" in nonfederal elections merely through assertion. Indeed, as the Commission showed (Mem. 2-3, 29), EMILY's List itself has not reported an allocation ratio for administrative expenses and generic voter drives of less than 50% federal funds over the last decade, using the "funds

expended" method that should have reflected (as plaintiff itself notes) "the share of that organization's goal devoted to federal elections." Pl. Opening Br. at 6.[4]

The Commission has shown (Mem. 20-34) that the regulations at issue are carefully drawn to reach contributions and expenditures made for the purpose of influencing federal elections without burdening purely nonfederal activity. In asking the Court to set aside these regulations, plaintiff has relied on several worst-case hypothetical scenarios, the lack of evidence for which it now tries to defend (Br. 17) on the grounds that it is limited to the record in the rulemaking, and (presumably) that there is no evidence of such activities in that record. Of course, as the Commission has shown (Mem. 2-3, 6-10), plaintiff had every opportunity to participate in the rulemaking and supply such evidence, but it chose not to do so. Indeed, plaintiff's inability to find any presentation of these arguments in the administrative record 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) ("It is well established that issues not raised in comments before the agency are waived…. [T]here is a near absolute bar against raising new issues — factual or legal — on appeal in the administrative context.") (citations omitted). Plaintiff also suggests (Br. 18) that the

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[4] EMILY's List continues to suggest that Congress would disapprove of the regulations at issue even though no one in Congress sought to reject them when the regulations were submitted for Congressional review under 5 U.S.C. 801(a)(1). It asserts (Br. 13) that Common Cause does not mean that the FEC can regulate the "activities of independent committees" even though Congress has "pointedly chosen to leave [them] untouched." See Pl. Br. at 10 (Congress in BCRA "pointedly chose to leave [] alone" such committees administrative expenses and voter drive activities). Plaintiff offers no reason to consider Congress's complete silence on the issue as "pointed," not even legislative history suggesting that a provision was being left unchanged because of approval of existing regulations. See Castro v. Chicago Housing Authority, 360 F.3d 721, 728-9 (7th Cir. 2004) ("[A]ll we can deem from Congressional silence on the issue is just that — that Congress was silent on the issue"). In any event, plaintiff has already conceded that BCRA's silence about allocation by nonconnected committees does not prevent the Commission from adjusting these regulations. See FEC Mem. 22 n.19.

Commission has questioned the use of hypothetical examples generally, but in fact we have argued (Mem. 32-33) only that in the absence of evidence, the kind of remote scenarios plaintiff has supplied would be insufficient to support a facial challenge to agency rules, even if they had been presented to the agency in the rulemaking.[5]

Finally, as the Commission has previously explained (Mem. 23-24), McConnell itself addressed the potential compliance burden of objective, bright-line prophylactic rules. Noting that BCRA's electioneering communications definition (which, like 11 C.F.R. 101.6(f), employs a "reference" standard) might well reach some "genuine issue ads," the Court nonetheless upheld the restrictions against a facial challenge, in part because regulated entities could in the future avoid the restrictions "by simply avoiding any specific reference to federal candidates, or … paying for the ad from a segregated fund," i.e., with federal dollars. 540 U.S. at 206. Although EMILY's List did not even try to respond to this, the same principle is fully applicable here.

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

The Commission showed (Mem. 20-25) that 11 C.F.R. 106.6(f) established new, bright-line rules for the financing of candidate-specific public communications and voter drives by

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[5] Plaintiff's attempts to distinguish the cases on which the Commission relies are unsuccessful. Plaintiff's suggestion that Florida League of Prof'l Lobbyists, Inc. v. Meggs, 87 F.3d 457, 461 (11th Cir. 1996), is inapposite because it concerned a First Amendment challenge is especially ill-conceived, given that plaintiff relies on hypothetical examples to support its First Amendment challenge in its own brief. See Pl. Br. 9-10. The cases upon which EMILY's List relies (Br. 18) are suits by former employees seeking benefits under the Family and Medical Leave Act in which the courts used quite plausible hypothetical scenarios in their Chevron analyses of the Department of Labor regulations. See Harbert v. Healthcare Services Group, Inc., 391 F.3d 1140, 1149-54 (10th Cir. 2004), petition for cert. filed, 73 U.S.L.W. 3720 (May 27, 2005) (No. 04-1647); Bellum v. PCE Constructors, Inc., 407 F.3d 734, 738-40 (5th Cir. 2005). They are a far cry from plaintiff's efforts in this facial challenge to invent the most unlikely scenarios that the Commission's regulations could reach in order to defeat the regulations as a whole. See also infra pp. 10-11, 14-15.

federal political committees in order to enhance compliance with the Act's contribution limits. In sum, communications referring solely to federal candidates must be financed solely with federal funds, those referring solely to nonfederal candidates may be financed with nonfederal funds, and those referring to both federal and nonfederal candidates are subject to the time/space method of allocation under 11 C.F.R. 106.1. Because Congress left these allocation rules to the Commission's discretion, and because Section 106.6(f) reasonably implements the statutory contribution limits, the regulation easily satisfies Chevron analysis.

Besides making the general arguments addressed above (supra pp. 2-9), plaintiff asserts repeatedly (Br. 2, 9-10, 11-12) that 11 C.F.R. 106.6(f) is unconstitutional and in excess of the Commission's authority because it would require that federal funds be used to finance hypothetical public communications that refer to a federal candidate in a different jurisdiction and are made well in advance of any election in which that candidate is on the ballot. Plaintiff has still supplied no real-world example of such a communication that would be subject to 11 C.F.R. 106.6(f). As we have explained (supra pp. 8-9), such an unsupported worst-case hypothetical example is not sufficient to invalidate a regulation on its face. Even if it were, 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 affect an in-state federal election. Such a communication may well suggest that its audience support a party's full slate of candidates (federal and state) on the basis of their alliance with a prominent out-of-state candidate's policies, or the out-of-state candidate's support for the in-state candidates.[6] Finally, plaintiff complains that communications are

[6] Of course, political committees like EMILY's List have frequently identified out-of-state federal candidates in their communications, especially when urging people all over the nation to contribute funds to EMILY's List's preferred candidates. On plaintiff's own Web site, for

covered without regard to time, but of course there is a time element inherent in the term "candidate," and in any event this regulation applies only to federal political committees whose major purpose is the nomination or election of candidates. See McConnell, 540 U.S. at 170 n.64; FEC Mem. 18-19, 21.

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

The Commission has shown (Mem. 25-30) that the 50% minimum allocation rule for disbursements by political committees that benefit both federal and nonfederal candidates is well within the range of reasonable regulation in this area. EMILY's List complains (Br. 15) that the 50% minimum rule was the product of a flawed rulemaking and that it is "nonsensical to conclude that, because someone does two different things, the effect of one is as significant as that of the other." This complaint misapprehends the Act, which regulates disbursements that have the purpose of influencing federal elections, regardless of whatever other effects they may also have. There is thus no statutory basis for plaintiff's assumption that the relevant inquiry must quantify the relative "effect" that dual purpose spending has on federal and nonfederal elections. Since EMILY's List concedes that this regulation governs spending that influences both federal and nonfederal elections, its complaint is little more than a policy dispute about how best to allocate expenses for activities that cannot be readily divided with scientific precision — all of which have at least some influence on federal elections.

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example, where it solicits contributions to be given directly to a list of "recommended candidates," the list of candidates to be supported recently consisted of federal candidates from Illinois, Pennsylvania and Michigan — though the page obviously reaches all 50 states. See EMILY's List, "Recommended Candidates," available at https://secure1.emilyslist.org/index.php?page=candidates (visited July 9, 2005).

EMILY's List argues (Br. 15) that "the record reflects no actual evidence to show why the Commission reached the decision it did." The plaintiff is badly mistaken in this regard. The administrative record on this point, as summarized below, is extensive. The Commission considered:

- **A Review of Disclosure Reports**: "In examining public disclosure reports filed by SSF's over the past ten years the Commission discovered that very few committees chose to allocate their administrative and generic voter drive expenses under the former section 106.6(c)." 69 Fed. Reg. 68062;
- **Confusion Under Former Rule**: The Commission explained its experience that "Committees have consistently requested guidance on the proper application of the allocation methods under the former section 106.6 at various Commission conferences, roundtables, and education events." Id;
- **Experience of Commission Auditors**: Based on reports by the Commission's Audit Division, the Commission discovered that some committees were not properly allocating under the old allocation rules. Id. (citing final FEC audit reports);
- **Administrative Burden**: The Commission took into account the multiple steps required to comply with the old rule. "[C]ompliance required committees to monitor their Federal expenditures and non-Federal disbursements, compare their current spending to the ratio reported at the start of the election cycle, and then adjust the ratio to reflect their actual behavior." Id; see also Comments of Media Fund, at 20 (April 5, 2004) (Exh. 16); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 14, 2004 ("Apr. 14 Tr.") at 160 (Exh. 8);
- **Comments Supporting 100% Federal Funds**: 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);
- **Comments Supporting a Specific Percentage**: See Comments of Democracy 21, Campaign Legal Center, Center for Responsive Politics, at 17-19 (April 5, 2004) (Exh. 15); Comments of Senators McCain and Feingold, Representatives Shays and Meehan, at 3 (April 9, 2004) (Exh. 10); Comments of Republican National Committee, at 7 (April 5, 2004) (Exh. 14); and
- **Witness Testimony that the Prior Rule Permitted Circumvention**: See Apr. 14 Tr. at 158-59 (Exh. 8); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 15, 2004 ("Apr. 15 Tr.") at 27-28 (Exh. 9).

EMILY's List attempts to brush past this evidence from the administrative record, but it amply supports the Commission's conclusion.

EMILY's List also objects to the Commission's reliance on its review of disclosure reports that committees have filed with the Commission, all of which are posted on its Web site. While plaintiff concedes that it is "technically true" that this information is publicly available, it complains that these reports are too voluminous to review and that any review would require it to look at "untold thousands of reports" (Br. 15, 20). In fact, however, only 188 political committees (other than political parties) allocated their expenses between federal and nonfederal accounts in the 2001-2002 election cycle.[7] For whatever reason, EMILY's List has either chosen not to review this information or decided not to present any arguments to the Court about what the information demonstrates. In any event, in the absence of any showing of prejudice from the Commission's reliance on these publicly available disclosure reports, plaintiff's argument on this point must fail. See Personal Watercraft Industry Ass'n v. Dept. of Commerce, 48 F.3d 540, 544 (D.C. Cir. 1995) (party objecting to the use of data must show "how it might have responded if given the opportunity") (citations omitted); see FEC Mem. 43-44.

Finally, EMILY's List has criticized (Br. 15) the line drawn by this regulation as "arbitrary." However, there is an inherent degree of arbitrariness in any line-drawing endeavor, but that does not render it unlawful. See Mathews v. Diaz, 426 U.S. 67, 83 (1976) ("But it remains true that some line is essential, that any line must produce some harsh and apparently arbitrary consequences…."); American Federation of Government Employees v. OPM, 821 F.2d 761, 277 (D.C. Cir. 1987) ("The lines drawn as a result of this [rulemaking] process may well be,

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[7] Obtaining this information is not as complicated as plaintiff suggests. Plaintiff erroneously states (Br. 20) that the lack of "sorting ability" within the Commission's databases "makes segregating out allocating committees practically impossible." However, the Commission's Web site posts both disclosure reports and data summary files. The data summary files can be easily 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. This Web page also provides instructions on how to use these data summaries and a help-line telephone number.

in one sense, 'arbitrary' without being 'capricious'"); Kamargo Corp. v. FERC, 852 F.2d 1392, 1398 n.7 (D.C. Cir. 1988) (same). See also Worldcom, Inc. v. FCC, 238 F.3d 449, 461-462 (D.C. Cir. 2001). EMILY's List has presented no basis for denying the Commission deference and substituting a different line for the one drawn by the Commission.

C. Regulation 11 C.F.R. 100.57 Establishes Permissible Rules for Solicitation of Contributions by Political Committees Like EMILY's List

The Commission explained (Mem. 30-34) that 11 C.F.R. 100.57 clarifies the circumstances in which funds that federal political committees like EMILY's List receive in response to their solicitations will be considered "contributions" under the Act. Specifically, the rule provides that funds are contributions when received in response to a solicitation that "indicates that any portion of funds received will be used to support or oppose the election" of a clearly identified federal candidate. 11 C.F.R. 100.57(a) (emphasis added). When such a solicitation refers to both federal and nonfederal candidates, at least 50% of the total funds received are considered contributions. 11 C.F.R. 100.57(b)(2). Because it is reasonable for the Commission to infer that donations received in response to such solicitations are "for the purpose of influencing" federal elections, 11 C.F.R. 100.57 easily satisfies Chevron analysis.

Plaintiff, in addition to making the general arguments addressed above (supra pp. 2-9), argues (Br. 10, 12) that 11 C.F.R. 100.57 is unconstitutional and beyond the Commission's authority because it would override express statements in solicitations that a lower percentage of funds received would be used to support federal candidates. However, plaintiff identifies no language in the statute inconsistent with this regulation, and plaintiff's unsupported worst-case hypothetical example is, like the others, inconsequential. Plaintiff provides no evidence that this issue was raised before the Commission, and it has supplied no real-world evidence of solicitations that expressly state that a certain low percentage of the funds collected will be used

to support or oppose the election of clearly identified federal candidates. See supra p. 8. Plaintiff does argue (Br. 17), without evidentiary support, that before 11 C.F.R. 100.57 was promulgated, allocating committees would "issue solicitations that would devote the first $5,000" collected to "federal purposes," with "the rest" going to "solely nonfederal purposes." However, because 11 C.F.R. 100.57 would not even apply to such solicitations unless they indicate that funds received would be used to support or oppose the election of a clearly identified federal candidate, nothing in 11 C.F.R. 100.57 would change how funds received in response to these alleged solicitations would be treated. Moreover, while such general solicitations may very well have been used because of the $5,000 annual limit for individuals contributing to multicandidate committees, there is no discernable reason for any committee to issue a specific "low percentage" solicitation that clearly identifies only federal candidates and voluntarily restricts its own receipt of federal funds.

Section 100.57 leaves countless options for sophisticated political committees like EMILY's List to raise nonfederal funds, which the Supreme Court has found significant in reviewing comparable restrictions. See McConnell, 540 U.S. at 206 (upholding electioneering communications restrictions in part because entities could avoid specific references to federal candidates or use federal funds). If EMILY's List wants some or all of the funds raised in response to a given solicitation to be nonfederal funds, all it need do is avoid stating (for 100% nonfederal proceeds) that the funds collected will be used to support or oppose the election of a clearly identified federal candidate (as in plaintiff's own $5,000 example, above), or (for 50% federal proceeds) also include an indication that some of the funds raised will be used to support or oppose an identified nonfederal candidate. 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.

III. THE COMMISSION'S RULEMAKING SATISFIED APA NOTICE REQUIREMENTS

The Commission has shown that it has fully complied with the notice and comment requirements in the APA regarding all three provisions plaintiff has challenged. See FEC Mem. 34-42. The plaintiff's response fails entirely to present argument about (or even mention within the APA notice section of its brief) two of the three provisions it challenged in its complaint. Pl. Br. 18-20. By ignoring these two provisions (11 C.F.R. 100.57, the solicitation regulation, and 106.6(c), the fifty percent federal minimum requirement), EMILY's List makes no effort to refute the Commission's showing (Mem. 34-40) that it complied with the notice requirements, and fails to provide the Court any reason to depart from its decision denying EMILY List's motion for a preliminary injunction. See EMILY's List, 362 F.Supp.2d. at 52-55.

In its opposition, EMILY's List addresses the adequacy of notice only regarding section 106.6(f), the provision that governs allocation of the financing of communications that refer to federal candidates or to both federal candidates and political parties. EMILY's List argues (Br. 19) that the Commission fails to show "how the final rules were a logical outgrowth of either the initial proposed rule, or of the subjects and issues involved." This is an erroneous statement of law. If the Commission provided notice of the subjects and issues involved, there is no reason even to reach the logical outgrowth test. Only when a rule "reflects substantial

changes from the proposal" is it necessary for the court to examine whether the final rule was a "logical outgrowth" of the original proposal. 1 Richard J. Pierce, Administrative Law Treatise, § 7.3 (4th ed. 2002) (citing NRDC v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988)); see e.g., Ass'n of Battery Recyclers, Inc. v. EPA, 208 F.3d 1047, 1052 (D.C. Cir. 2000) (finding final rule did not match rule proposed in NPRM, but was a logical outgrowth of it); Northeast Maryland Waste Disposal Auth. v. EPA, 358 F.3d 936, 951-52 (D.C. Cir. 2004) (same). As we previously explained (Mem. 40-42), the Commission complied with the APA requirement in 5 U.S.C. 553(b)(3) by providing notice of the "subjects and issues" involved. The NPRM identified the subject — allocation of communications that discuss candidates and parties — and the issue — what the allocation formula should be. In any event, even if the logical outgrowth test were applicable, the notice requirement was easily satisfied. The NPRM — which explicitly noticed a new provision allocating expenses for communications discussing candidates and parties — plainly put anyone concerned about such a formula on notice that this subject was "on the table" for revision. Career College Ass'n v. Riley, 74 F.3d 1265, 1276 (D.C. Cir. 1996).

EMILY's List suggests (Br. 19) that the fact that it did not provide comments but later asked the Commission to re-open the comment period is evidence that the comment period itself was defective. Other persons, however, did submit timely comments, so plaintiff's silence during the rulemaking simply suggests its own indifference or negligence at that time. As we have shown (see Mem. 8-10, 36-37), the fact that others commented is a strong indication that the notice was adequate, both factually and legally. Moreover, plaintiff offers no explanation about the nature of the comments it would have made, and the D.C. Circuit has held that such an absence can be dispositive. "The short of the matter is that petitioners have identified no relevant information they might have supplied had they anticipated EPA's final rule. We

therefore hold that EPA complied with the notice and comment requirements." Ass'n of Battery Recyclers, 208 F.3d at 1059.[8]

In sum, in its opposition EMILY's List continues to challenge the adequacy of notice for only one of the three substantive provisions it has challenged. The notices for all three provisions, however, easily satisfy the requirements of 5 U.S.C. 553(b)(3).

IV. EMILY'S LIST HAS FAILED TO MEET ITS EVIDENTIARY BURDEN AT SUMMARY JUDGMENT

At summary judgment, the failure of a party to come forward with evidence "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," requires entry of summary judgment against that party. Haynes v. Williams, 392 F.3d 478, 481 (D.C. Cir. 2004) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). Indeed "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims" like what plaintiff has presented here. Celotex, 477 U.S. at 323-24. Here, plaintiff's statement of material facts is largely unsupported by citation to the record, see Defendant Federal Election Commission's Statement of Genuine Issues and Objections, and its opposition brief also includes factual assertions that lack evidentiary support.

EMILY's List argues (Br. 7) that its allegations should be deemed presumptively true "where the record is undeveloped due to mutual agreement of the parties," but the parties' agreement to forego discovery is irrelevant to plaintiff's burden to prove the facts upon which it relies. Moreover, most of the unsupported facts in plaintiff's statement of material facts are about itself, i.e., not a subject for which plaintiff ever needed discovery. EMILY's List then

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[8] In our opening memorandum (at 41-42), we also showed that the type of notice the Commission provided was adequate under the reasoning of three recent D.C. Circuit decisions. See Northeast Maryland Waste Disposal Auth., 358 F.3d at 951-52; Ass'n of Battery Recyclers, 208 F.3d at 1058; Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1300 (D.C. Cir. 2000). Plaintiff does not distinguish these cases or respond to this argument.

states (id.) that "[t]he Commission cannot now pretend to be surprised at the paucity of the record," but there is no "paucity" of evidence in the record to support the Commission's motion for summary judgment. The administrative record under review is well developed and described at length in the Commission's briefs and statement of material facts. See FEC Mem. at 6-12; FEC Statement of Material Facts ¶¶ 9-32. The record is massive and includes more than 130,000 comments the Commission received by e-mail and by necessity was submitted to the Court on five CD-ROMs. See Administrative Record, filed May 4, 2005. Even if the record were undeveloped or could support multiple conclusions, that does not relieve EMILY's List from its burden to support its own motion factually. See State of New York v. EPA, 2005 WL 1489698 *23 (D.C. Cir. June 24, 2005) ("Nor does the fact that the evidence in the record may also support other conclusions ... prevent us from concluding that [the agency's] decisions were rational and supported by the record") (ellipsis and brackets in original, quotation marks omitted). In short, the administrative record is developed, but it does not support plaintiff's motion for summary judgment.

The moving party must direct "the district judge and the opponent of summary judgment to the parts of the record which the movant believes support his statement." Jackson v. Finnegan, Henderson, Farabow, Garrett, and Dunner, 101 F.3d 145, 150-51 (D.C. Cir. 1996) (quotations omitted). "[F]ailure to file a proper Rule [7(h)] statement may be fatal to the delinquent party's position." Id. at 151. EMILY's List argues (Br. 6) that the Jackson case is only dispositive when a party submits a summary judgment motion "containing a grossly insufficient statement of material facts in the face of a developed record," but that is exactly what plaintiff has done here. All of the evidence EMILY's List relies upon for its claim that the rulemaking was arbitrary and capricious, see EMILY's List Facts ¶¶ 12-15, 20, 25-27, are

entirely unsupported by record citation. For example, as evidence for plaintiff's claim that the Commission's rulemaking was flawed, EMILY's List asserts that "[t]his rulemaking effectively began when a sham Republican PAC, mimicking the activities of a prominent Democratic organization, sought an advisory opinion inviting the Commission to disallow these activities," Pl. Br. at 15; Facts ¶ 12, an allegation that is not supported by any citation to any evidence and that amounts to nothing more than self-serving speculation.

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

Plaintiff's arguments (Br. 7-8) in support of its request that the Court "immediately vacate" the Commission's regulations and impose extreme rulemaking deadlines are meritless. As the Commission explained (Mem. 44-45), plaintiff's proposed Order is a verbatim reproduction of requested relief that this Court recently rejected in another case, Shays v. FEC, 337 F.Supp.2d 28, 130 (D.D.C. 2004). EMILY's List does not address the reasoning of that decision, or even acknowledge it. Instead, plaintiff argues (Br. 7-8) that agency rules may be vacated, based on an evaluation of the "seriousness" of the defect and the "disruptive consequences" of such an action. Plaintiff then makes the conclusory assertions that the Commission has "shown no willingness or capability to satisfy the requirements of the APA," that there is "no way for the Commission to correct its violations" of law, and that "any disruption would be minimal" because there were functioning regulations in place prior to the adoption of the ones at issue. However, plaintiff offers absolutely no evidence to show that the Commission could not or would not correct any alleged defects the court might find in the regulations at issue here. In fact, the Commission is currently engaged in extensive rulemaking regarding a number of regulations in response to this Court's remand in the very case cited above. See FEC's BCRA-Related Proposed Regulations,

http://www.fec.gov/pages/bcra/rulemakings/rulemakings_bcra.shtml#proposed. Moreover, plaintiff's argument about disruption implies that the Commission's prior regulations would somehow spring back to life if the regulations at issue were vacated. But as this Court noted in denying preliminary relief in the current case, such relief would in fact leave the Commission "hastily cobbling together an alternative, interim set of regulations." EMILY's List, 362 F.Supp.2d at 59. Thus, even if the Court were to rule in plaintiff's favor on the merits, there is no basis for awarding the unwarranted relief it requests.[9]

VI. CONCLUSION

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

Respectfully submitted,

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[9] The cases on which plaintiff relies, which involve agency determinations on the application of health and safety standards, are inapposite. See FEC v. Rose, 806 F.2d 1081, 1091-92 n.17 (D.C. Cir. 1986) ("notwithstanding the obvious importance of the political process, [FEC cases are] not case[s] in which human health and welfare are at stake"). The only one that actually vacated an agency action dealt with the EPA's decision to place a specific chemical on a list of high risk air pollutants where there was no "alternative basis in the record" for doing so. See Chemical Mfrs. Ass'n v. EPA, 28 F.3d 1259, 1268 (D.C. Cir. 1994). The regulations at issue here, by contrast, are adjustments to an interconnected framework of regulation of political committees. Vacating these rules would leave that framework in disarray.

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