UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,	)	
	)	
Plaintiff,	)	1:05cv00049 (CKK)
	)	
v.	)	Opposition to Preliminary Injunction
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION

Lawrence H. Norton
General Counsel

Richard B. Bader
Associate General Counsel

David Kolker
Assistant General Counsel

Vivien Clair
Harry J. Summers
Greg J. Mueller
Leigh G. Hildebrand
Margaret G. Perl
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

January 24, 2005

TABLE OF CONTENTS

Page

FEDERAL ELECTION COMMISSION'S OPPOSITION TO PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

EMILY's List, one of the best-funded political committees in the United States, has entirely failed to show that it is entitled to the extraordinary relief it seeks to halt enforcement of several regulations recently issued by the Federal Election Commission. Judicial review of Commission regulations is highly deferential, and because plaintiff's case is really about the Commission's policy choices — rather than whether the Commission had the power to promulgate allocation rules or clarify when solicitations lead to statutory "contributions" — plaintiff's substantive challenge is unlikely to succeed. Procedurally, the Commission's rulemaking notice was fully adequate to inform plaintiff that the Commission was considering regulations like those at issue here, as evidenced by the wide range of comment from the regulated community, even though EMILY's List itself chose not to participate. More fundamentally, however, plaintiff has completely failed to demonstrate that it will suffer the irreparable harm necessary to justify a preliminary injunction, supplying no specific facts or evidence whatsoever about its financial status or its past or future activities. Indeed, EMILY's List has not even demonstrated that the challenged regulations require it to change its operations in any way. An injunction, however, would seriously impair the Commission's ability to implement the Federal Election Campaign Act and to provide the regulated community with the clear guidance it needs, potentially creating regulatory chaos and real harm to the public.[1]

[1] For the Court's convenience, we have attached as exhibits those documents cited in this Opposition. We note that most of the substantive documents in the administrative record, including the hearing transcript and the comments that contained nonduplicative substantive remarks, are available at http://www.fec.gov/law/law_rulemakings.shtml#political_committee_status.

II. 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 Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), 2 U.S.C. 431-455. 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) and (d).

Plaintiff EMILY's List has been registered with the Commission as a multi-candidate nonconnected political committee for more than 20 years.[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 of up to $5,000 per year from individuals or other political committees registered with the Commission, but no contributions from corporations, labor unions, or foreign nationals. EMILY's List may spend funds from 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 only use those funds in connection with nonfederal elections.

---

[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 "multi-candidate 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).

EMILY's List is one of the top federal political committees in fundraising, having raised more than $25 million in hard money contributions alone during the 2003-04 election cycle.[3] "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 (Exh. 4). During the rulemaking at issue here EMILY's List failed to submit comments, even though it later sent the Commission a letter indicating that it "wants the FEC to make clear what the rules are." Id.[4]

EMILY's List has regularly filed an H1 Schedule reporting the "allocation" ratio of federal and nonfederal dollars for shared administrative expenses and the costs of generic voter drives.[5] Over the past ten years, EMILY's List has never filed a final H1 Schedule reporting less than 50% direct federal candidate support.[6] In fact, at the end of the 1995-96 election cycle EMILY's List reported a final allocation ratio of 70% federal candidate support and 30%

---

[3] See http://herndon1.sdrdc.com/cgi-bin/cancomsrs/?_04+C00193433 (data from FEC Web site) (Exh. 3).

[4] EMILY's List failed to file comments before April 9, 2004, the deadline for rulemaking comments. After the deadline, on June 18, 2004, it submitted a letter asking the Commission to withdraw in part Advisory Opinion 2003-37, which involved related issues. During the rulemaking, the Commission had indicated that it would not consider any late-filed comments, see notice available at http://www.fec.gov/press/press2004/20040407advisory.html (Exh. 5); 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).

[5] Prior to the effective date of the new regulations, the H1 Schedule, submitted with the first report filed during a two-year election cycle, included an estimated allocation ratio based on the previous election cycle's payments for direct candidate support or on a reasonable estimate of the upcoming cycle's payments for support of federal and non-federal candidates. 11 C.F.R. 106.6(c)(1) (2004). If the actual allocation ratio for these expenses changed from the one estimated at the beginning of the cycle, the committee had to file an adjusted Schedule H1 to reflect the revised ratio. See 11 C.F.R. 106.6(c)(2) (2004).

[6] See http://query.nictusa.com/cgi-bin/fecimg/?_24981553382+0, at 6 (latest H1 for 2003-04 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_23990455760+0, at 5 (final H1 for 2001-02 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_21036814768+0, at 33 (final H1 for 1999-2000 election cycle); http://query.nictusa.com/cgi-bin/fecimg/?_99034233180+0, at 70 (final H1 for 1997-98 election cycle) (collected at Exh. 6).

nonfederal.[7]

B. STATUTORY AND REGULATORY BACKGROUND

1. Regulation of Solicitations and Allocation of Expenses by Non-Connected Political Committees Prior to the Passage of BCRA

The Commission has long regulated solicitations of contributions and allocation of expenses by political committees to enforce the contribution limitations and prohibitions established by 2 U.S.C. 441a and 441b.

Prior to the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"), the Commission examined solicitations of contributions "for the purpose of influencing any election for Federal office" to enforce the contribution limitations and prohibitions, as well as the disclaimer requirements in FECA. See 2 U.S.C. 441d(a). Although no Commission regulation addressed the wording of solicitations, the Commission applied the statutory definition of "contribution" to determine whether a particular mailing was a solicitation of contributions. In FEC v. Survival Education Fund, Inc., 65 F.3d 285 (2d Cir. 1995), the Second Circuit did that in holding that mailings sent by two nonprofit issue advocacy groups constituted solicitations of contributions under FECA because the text of the mailings "leaves 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.

Since 1977, the Commission has required political committees to allocate their administrative expenses and the costs of certain activities (such as voter registration) that affect both federal and nonfederal elections between separate federal and nonfederal accounts. See 11 C.F.R. 106.1 (1977); FEC Advisory Opinion ("AO") 1978-10. The Commission's allocation regulations were substantially amended in 1990 to "provide guidance to committees on how to

[7] Available at http://query.nictusa.com/cgi-bin/fecimg/?_97031750959+0, at 92 (Exh. 7).

allocate such costs by creating a comprehensive set of allocation rules, and by enhancing the Commission's ability to monitor the allocation process to ensure that prohibited funds are excluded from federal election activities." Regulations on Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058 (June 26, 1990). The 1990 regulations replaced the prior general standards for allocation with specific methods and percentages for political committees to use when allocating certain expenses.

Between 1990 and 2004, 11 C.F.R. 106.6(c) permitted nonconnected committees (such as EMILY's List) 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 based on prior experience or a reasonable prediction of activities. Id.; 11 C.F.R. 104.10(b) (2000). Committees were then expected to report revised ratios during the election cycle to reflect their actual disbursements. Id. "Generic voter drives" were defined as various activities which urged the general public to support candidates of a certain party or associated with a certain issue, without mentioning a specific candidate. 11 C.F.R. 106.6(b)(iii) (2000). Voter drive activity that mentioned a specific candidate could not be allocated under this formula. 11 C.F.R. 106.1(a) required committees to allocate expenditures made on behalf of one or more clearly identified federal and/or nonfederal candidates according to the benefit reasonably expected to be derived for each candidate. 11 C.F.R. 106.1(a)(2000). The rules from the 1990 amendments were still in effect at the time of the 2004 rulemaking at issue in this case.

2. Bipartisan Campaign Reform Act

In March 2002, Congress enacted BCRA to substantially amend FECA. As a part of these amendments, BCRA defined "public communication" as a specific type of activity covered by FECA. See 2 U.S.C. 431(22). With regard to the Commission's allocation regulations, 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 address allocation by nonconnected political committees under 11 C.F.R. 106.6.

3. The Commission's Rulemaking Regarding Political Committee Status, Expenditures, Contributions, and Allocation

a. The Notice of Proposed Rulemaking

On March 11, 2004, the Commission published a detailed NPRM proposing a variety of possible amendments to regulations regarding the definitions of "political committee," "contribution," "expenditure," and the allocation requirements for nonconnected committees. See Political Committee Status; Proposed Rule, 69 Fed. Reg. 11736 (March 11, 2004) (Exh. 1). Following a four-week comment period, the Commission held public hearings on April 14 and 15, 2004. Id.

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

In the NPRM, the Commission sought public comment regarding a new rule establishing that any funds received in response to particular types of solicitation are "for the purpose of influencing any election for Federal office" and, therefore, "contributions" under FECA. 69 Fed. Reg. 11743. 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. 69 Fed. Reg. 11757 (proposed section 100.57 as a part of

Alternative 1-B). The NPRM sought public comment regarding different ways the express advocacy standard could be applied to solicitations, such as requiring that the solicitation state that the funds will be used for express advocacy, or including solicitations that expressly advocate the election or defeat of federal candidates of a particular party without specific references to clearly identified candidates. 69 Fed. Reg. 11743. The Commission also sought public comment regarding other possible standards that could be applied to solicitations:

> 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?

69 Fed. Reg. 11743.

ii. Proposed Changes to 11 C.F.R. 106.6: Allocation of Expenses

The Commission also sought comment on a number of possible changes to the allocation rules for nonconnected committees. The NPRM explained that the focus of BCRA and the Supreme Court's opinion upholding it in McConnell v. FEC, 540 U.S. 93 (2003), on the Commission's allocation regulations for political party committees prompted the Commission to examine more closely the allocation regulations in 11 C.F.R. 106.6. 69 Fed. Reg. 11753. The Commission sought public comment on the possibility of completely eliminating allocation to nonfederal accounts of any administrative expenses or generic voter drives costs for nonconnected committees (id.):

> 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?

A number of proposals in the NPRM would have imposed a minimum federal percentage on the funds expended method in 11 C.F.R. 106.6(c). 69 Fed. Reg. 11754. The NPRM sought comment on several possible examples of a minimum percentage ranging from 15% to 50%. Id. The Commission also stated that it was "considering other minimum Federal percentages as alternatives to those presented in the proposed rules," and explicitly asked for comment on whether it "[s]hould … adopt a fixed minimum Federal percentage." Id.

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. 69 Fed. Reg. 11753. The Commission proposed allocating the costs of public communications (now defined by BCRA) 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 public comment on a proposal to create a new section, 11 C.F.R. 106.6(f), requiring allocation of public communications that promote, attack, support, or oppose ("PASO"), or expressly advocate the election or defeat of, a clearly identified federal candidate and a political party. 69 Fed. Reg. 11755. Proposed section 11 C.F.R. 106.6(f) would have required a combined application of the time/space allocation method, similar to that used in 11 C.F.R. 106.1, and the 11 C.F.R. 106.6(c) method for these public communications. Id. This proposal was similar to the approach used by the Commission in Advisory Opinion 2003-37, which evaluated some post-BCRA allocation questions by a political committee under the rules in 11 C.F.R. 106.6. Id.

b. Public Comment and Hearings on the NPRM

The Commission received more than 100,000 comments from political committees, political parties, nonprofit organizations, individuals, campaign finance organizations, and Members of Congress that addressed the many contentious regulatory questions being examined

in this rulemaking. The Commission's two days of public hearings included 31 witnesses, representing numerous organizations with a broad range of opinions and concerns about many different issues. A number of commenters addressed allocation questions. Some supported the elimination of allocation in favor of 100% federal funds for all expenditures under 11 C.F.R. 106.6, and some suggested abandoning the funds expended method entirely in favor of a simpler system.[8] Others supported specific percentages to be used as a federal minimum for administrative expenses,[9] or simply urged the Commission to require a "significant minimum hard money share."[10] At least one commenter suggested that public communications should be allocated either 100% federal or 100% nonfederal based upon whether federal or nonfederal candidates were included in the communication.[11] One commenter argued that some revisions of the funds expended method would be too burdensome to committees because of the reporting and bookkeeping that would be required.[12]

There was also testimony at the hearing regarding the complexities of the current allocation system and the proposal to move to a flat minimum federal percentage.[13] Other witnesses testified that the current allocation scheme helped to circumvent the rules in BCRA,[14]

---

[8] 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).

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

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

[11] See Comments of Republican National Committee, at 7 (April 5, 2004) (Exh. 14).

[12] See Comments of Media Fund, at 20 (April 5, 2004) (Exh. 16).

[13] See Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 14, 2004 ("Apr. 14 Tr.") 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, that is a clear bright line test of how much illegal money can be used in Federal elections") (Exh. 8).

[14] See, e.g., Apr. 14 Tr. at 158-59 (testimony of Craig Holman) (stating that nothing in FECA justifies any allocation ratio) (Exh. 8); Transcript of Public Hearing regarding Political Committee Status Notice of Proposed Rulemaking, April 15, 2004 ("Apr. 15 Tr.") at 27-28 (testimony of Lawrence Noble)

and specifically discussed the possibility of a 50% federal minimum for allocated expenses.[15] Witnesses also addressed the Commission's proposal that money given in response to solicitations stating funds received would be used to support or oppose a federal candidate would be "contributions" under FECA.[16]

c. 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. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056 (Nov. 23, 2004) (Exh. 2).

New section 11 C.F.R. 100.57 includes a general rule establishing when funds received in response to certain solicitations must be treated as "contributions" under FECA, along with several exceptions to this rule "to avoid sweeping too broadly." 69 Fed. Reg. 68056. 11 C.F.R. 100.57(a) states that all money received in response to a solicitation is a "contribution" under FECA 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." 69 Fed. Reg. 68066. The rule seeks to capture solicitations that "plainly seek funds 'for the purpose of influencing Federal elections.'" 69 Fed. Reg. 68057.

(stating that the funds expended allocation method allowed a "wholesale evasion of the soft money rules as applied to political organizations") (Exh. 9).

[15] See, e.g., Apr. 15 Tr. at 80-84 (testimony of Robert Bauer, counsel for plaintiff in this case, representing ACT) (responding to possibility of 50% federal minimum and other allocation proposals) (Exh. 9); id. at 80 (testimony of Lawrence Noble) ("We do suggest the 50 percent rule. You might be able to come up with a different line, but you did come up in the proposed rulemaking with one that's 50 percent").

[16] See, e.g., Apr. 15 Tr. at 207-08 (testimony of Margaret McCormick) ("under the proposed notice of rulemaking, the idea is if you solicit contributions and you say that your solicitation specifically says it will be used to support or defeat a specific candidate, the idea is that the contributions come back in") (Exh. 9).

The Commission included numerous examples and explained that the standard in 11 C.F.R. 100.57 was drawn from the Survival Education Fund decision (see p. 4 supra). 69 Fed. Reg. 68057. 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. 69 Fed. Reg. 68058; 11 C.F.R. 100.57(b)(2). If a solicitation refers to nonfederal candidates but 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.

The Commission also adopted final rules changing the allocation scheme for nonconnected committees in 11 C.F.R. 106.6. 69 Fed. Reg. 68059-63. The Commission explained that examination of the public comments and the history of public filings regarding allocation by committees led it to conclude that a revised allocation method was needed to enhance compliance with FECA and make the system easier for committees to understand and follow, and for the Commission to administer. 69 Fed. Reg. 68060. Revised 11 C.F.R. 106.6 replaces the funds expended method with a flat 50% federal funds minimum for administrative expenses, generic voter drives, and public communications that refer to a political party without any reference to clearly identified candidates. 69 Fed. Reg. 68062. A new section 11 C.F.R. 106.6(f), which governs certain public communications and voter drives, was also adopted. 69 Fed. Reg. 68063. Public communications and voter drives that refer to one or more clearly identified federal candidates, but to no nonfederal candidates, must be financed with 100% federal funds, regardless of whether political parties are also mentioned. 69 Fed. Reg. 68063; 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 paid with 100% nonfederal funds. 69 Fed. Reg. 68063; 11 C.F.R. 106.6(f)(2). Public communications and voter drives 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. 69 Fed. Reg. 68063; 11 C.F.R. 106.6(f)(3). Only voter drives that refer to a federal candidate in the printed materials or in which written instructions are issued to employees or volunteers to refer to a federal candidate are covered by these provisions. 69 Fed. Reg. at 68061; 11 C.F.R. 106.6(b)(2)(i) & (ii).

III. EMILY'S LIST CANNOT CARRY ITS HEAVY BURDEN OF SHOWING THAT IT IS ENTITLED TO A PRELIMINARY INJUNCTION

A. THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION

"It frequently is observed that 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." Boivin v. US Airways, Inc., 297 F.Supp.2d 110, 116 (D.D.C. 2003), quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (emphasis in Mazurek). A party seeking a preliminary injunction has the burden of showing "(1) a substantial likelihood of success on the merits, (2) that it would suffer irreparable harm without injunctive relief, (3) that an injunction would not substantially harm other interested parties, and (4) that issuance of the injunction is in the public interest." Cobell v. Norton, 391 F.3d 251, 258 (D.C. Cir. 2004). "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).

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). In this case, since plaintiff has not made any serious attempt to demonstrate any factor other than its likelihood of success (see infra pp. 39-44), plaintiff's burden on the likelihood of success 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").

In this case, plaintiff has plainly failed to satisfy its burden of proof by failing to submit any affidavits or documentary evidence. This alone is fatal to its claim of irreparable injury, for there is a "requirement" in this Circuit "that the movant substantiate the claim that irreparable injury is 'likely' to occur." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). Plaintiff's "[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," id. (emphasis in original).

It is now too late, after the Commission has filed its opposition, for plaintiff to submit the required evidence. See LCv.R 65.1(c) ("An application for a preliminary injunction ... shall be supported by all affidavits on which the plaintiff intends to rely.") Yet "the basis of injunctive relief in the federal courts has always been irreparable harm," Sampson v. Murray, 415 U.S. 61, 88 (1974) (citation omitted). "Thus, if the movant makes no showing of irreparable injury, 'that alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." Societal Anonima Vina Santa Rita v. United States Dept. of the Treasury, 193 F.Supp.2d 6, 14 (D.D.C. 2001) (quoting Sampson).

B. EMILY'S LIST IS UNLIKELY TO SUCCEED ON ITS SUBSTANTIVE CHALLENGE TO THE COMMISSION'S REGULATIONS

A court may set aside a regulation under the Administrative Procedure Act ("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 v. Blue Cross & Blue Shield Ass'n, 848 F.2d 201, 205 (D.C. Cir. 1988). See also Sierra Club v. EPA, 353 F.3d 976, 978 (D.C. Cir. 2004) ("'The arbitrary and capricious standard deems the agency action presumptively valid, provided the action meets a minimum rationality standard.'" (Citation omitted.)). Where the statute simply authorizes the agency to "make ... such rules [...] as [are] necessary to carry out the provisions of this Act," as does 2 U.S.C. 437d(a)(8), the "validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 369 (1973) (citation omitted). On a facial challenge, where no regulation at issue has "yet been applied in a particular instance" so there is "no record … concerning the [FEC'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 Dept. 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. v. NRDC, 467 U.S. 837, 842 (1984). Under the "familiar two-step Chevron framework," the Court "first ask[s] 'whether Congress has directly spoken to the

precise question at issue,' in which case [the Court] 'must give effect to the unambiguously expressed intent of Congress.' If the 'statute is silent or ambiguous with respect to the specific issue,' however, [the Court] move[s] to the second step and defer[s] to the agency's interpretation as long as it is 'based on a permissible construction of the statute.'" Noramco of Delaware v. DEA, 375 F.3d 1148, 1152 (D.C. Cir. 2004) (citations omitted). Whether a competing interpretation of the statute might also be reasonable is irrelevant. "[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, Inc. v. Shalala, 158 F.3d 1313, 1321 (D.C. Cir. 1998)). 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) ("[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference.'" (Citation omitted.)).

1. The New Allocation Regulations Are Consistent with the Act, Which Does Not Specify How Federal and Nonfederal Spending Are to be Allocated

The Act does not say anything at all about allocation of expenditures by nonconnected political committees, much less mandate a particular allocation framework. In its discussion of the exploding use of soft money just before the enactment of BCRA, the Supreme Court explained that, "concerning the treatment of contributions intended 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. The Court has thus

made clear that the statutory language does not require any allocation for mixed spending that influences both federal and state elections. After all, the fact that a contribution or expenditure has an influence on state elections does not in itself negate the fact that it may simultaneously affect federal elections. See id. at 166. Indeed, years ago this Court held in Common Cause v. FEC, 692 F.Supp. 1391, 1395-96 (D.D.C. 1987), that, although the Act authorizes the Commission to permit some allocation of mixed expenditures, the Commission could just as well "conclude that no method of allocation will effectuate the Congressional goal that all moneys spent by [the political committees at issue] … be 'hard money' under the FECA."

Thus, the use of an allocation formula — any allocation formula — by a nonconnected committee for expenses that may influence both federal and nonfederal elections is a matter of administrative grace, not statutory entitlement. Before BCRA the Act did not require, or even refer to, allocation ratios of "hard" and "soft" money for a political committee's administrative expenses and generic voter drives or, in fact, for any of its "mixed purpose" activities that influence federal elections. Congress first addressed the subject 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"). BCRA expressly "gives the FEC responsibility for setting the allocation ratio" under that regime. McConnell, 540 U.S. at 163 n.58. Congress did not include in BCRA any reference to an allocation ratio for nonconnected committees, and there is nothing in the Act or legislative history indicating that it intended by silence to restrict the Commission's discretion to determine allocation ratios for such committees.

Plaintiff's claim (Mem. 34-35) that the new allocation regulations are invalid because the Commission did not explicitly state the regulations' role in preventing corruption is

disingenuous. The Commission has wrestled with allocation issues for almost 30 years;[17] the rulemaking at issue here is but the latest installment. That extensive history plainly demonstrates that all of these allocation formulas are crafted to implement the Act's contribution restrictions, 2 U.S.C. 441a, 441b, and to ensure that funds that do not conform to those restrictions are not used to influence federal elections. See, e.g., Methods of Allocation Between Federal and Non-Federal Accounts, 55 Fed. Reg. 26058 (1990); Allocation of Federal and Non-Federal Expenses, 57 Fed. Reg. 8990 (1992). Since Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court has repeatedly held that the statutory contribution restrictions serve the important governmental purposes of preventing corruption and the appearance of corruption and has upheld measures intended to foreclose circumvention of those provisions. See, e.g., Buckley, 424 U.S. at 26-28, 46-47; FEC v. Colorado Republican Federal Campaign Comm., 533 U.S. 431 (2001); FEC v. Beaumont, 539 U.S. 146, 160 (2003); McConnell, 540 U.S. at 143-45.

2. Regulation 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." 69 Fed. Reg. 68060. 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

[17] Over the years, the Commission has considered a variety of allocation methods for both party committees and other political committees. See, e.g., McConnell, 540 U.S. at 123 n.7 (describing various FEC allocation rules for political parties); NPRM, 55 Fed. Reg. 26058, 26059 (1990) (referring to allocation regulations promulgated in 1977); AO 1975-21, 40 Fed. Reg. 52794 (1975); AO 1978-10 [1976-1990 Transfer Binder] Fed. Election Camp. Fin. Guide (CCH) ¶ 5340.

> 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. The final rules do not change the allocation methods in 11 C.F.R. 106.1, which are based on the benefit reasonably expected to be derived by each candidate.

69 Fed. Reg. 68059. As the Commission further explained, the new rules "should reduce the burden of compliance on SSFs and nonconnected committees. Incorporation of certain voter drives and public communications into 11 C.F.R. 106.6 provides more specific guidance to committees that conduct such activity. 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." 69 Fed. Reg. 68063.

Because, as shown above, Congress clearly has not "spoken to the precise question at issue" regarding allocation methods, 11 C.F.R. 106.6(f) easily passes step one of Chevron, 467 U.S. at 842. Moreover, because 11 C.F.R. 106.6(f) reasonably implements the Act's contribution limits, it also satisfies Chevron step two.

It is important that 11 C.F.R. 106.6(f) applies only to political committees, specifically SSFs and nonconnected committees like EMILY's List, which are by definition electorally-focused entities that receive contributions or make expenditures to influence federal elections. See 2 U.S.C. 431(4), (8), (9). As the Supreme Court has interpreted the Act for nearly thirty years,

> 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."

McConnell, 540 U.S. at 170 n.64 (quoting Buckley, 424 U.S. at 79 (emphasis added)). Thus, because of the inherent characteristics of federal political committees like EMILY's List, the law presumes that their expenditures are for the purpose of influencing elections.

EMILY's List emphasizes that 11 C.F.R. 106.6(f) requires allocation of certain expenditures that "refer to" a clearly identified federal candidate. But since EMILY's List is a federal political committee whose major purpose is the nomination or election of candidates, it was well within the Commission's discretion to conclude that when such a committee's voter drives and public communications refer explicitly 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.

The Supreme Court has repeatedly held that different kinds of political entities may be regulated differently, to account for their basic nature and the potential for abuse. See McConnell, 540 U.S. at 158. The challenged regulations of nonconnected committees are not as burdensome as the Act's restrictions on 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. EMILY's List, in contrast, can still solicit and spend nonfederal funds, subject to certain restrictions to ensure that such funds are not used to influence federal elections. To that end 11 C.F.R. 106.6(f) merely requires that nonconnected political committees allocate expenses for

public communications and voter drives that refer to a mixture of clearly identified federal and nonfederal candidates according to the pre-existing time/space method of 11 C.F.R. 106.1. [18]

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).

EMILY's List poses several hypothetical examples (Mem. 12-17) designed to show that some applications of 11 C.F.R. 106.6(f) might exceed the Commission's statutory authority, although, as shown supra pp. 15-16, the statute itself does not require the Commission to authorize allocation at all. But plaintiff does not really contend that even the hypothetical

---

[18] EMILY's List suggests (Mem. 14) that BCRA's failure to address the prior allocation system contained in 11 C.F.R. 106.6, together with an asserted lack of legislative history reflecting concern about that system, indicates that Congress would disapprove of the new 11 C.F.R. 106.6(f). However, the complete congressional silence about allocation by nonconnected committees hardly evidences congressional intent to prohibit any change, and plaintiff concedes that it "does not preclude the FEC from adjusting" the allocation rules. Mere congressional awareness of an agency's administrative interpretation does not preclude the agency from later adopting another reasonable interpretation, see McCoy v. United States, 802 F.2d 762, 764 (4th Cir. 1986), and the D.C. Circuit "has [] consistently required express Congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated." AFL-CIO v. Brock, 835 F.2d 912, 915 (D.C. Cir. 1987).

communications it crafted to support its argument cannot have any influence on federal elections. Nor does it provide evidence of a single communication or expenditure it has any actual plans to make that would be adversely affected by the regulations it challenges. Rather, its arguments are largely a rehash of those rejected by the Supreme Court when it upheld BCRA's regulation of electioneering communications. In that context, the Court noted that BCRA's bright-line definition of "electioneering communication" might well regulate "genuine issue ads" because its only content requirement was that the communication "refer" to a clearly identified candidate. McConnell, 540 U.S. at 206. But the Court did not find that to be an unconstitutional burden, in part because corporations and unions who wished to run genuine issue ads in the period before an election could still do so in the future "by simply avoiding any specific reference to federal candidates, or … by paying for the ad from a segregated fund." Id.

The same reasoning applies to plaintiff's hypothetical communications (Mem. 15-16). For example, in plaintiff's first hypothetical, 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. Moreover, the first three examples all involve references to both federal and nonfederal candidates, which easily could influence federal elections, and to the extent the federal references are a small part of the communication as plaintiff implies, the federal share of the expenditure would be proportionately small under the time/space allocation rules of 11 C.F.R. 106.1. Plaintiff's last hypothetical example is equally meritless. The regulation requires a "communication supporting a political party generally and that refers to no candidates" (Mem. 16) to be allocated equally between federal and nonfederal funds regardless of when it is run, because undifferentiated support of a political party denotes support of all of its candidates,

federal and nonfederal. What plaintiff fails to acknowledge, however, is that 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. 68059. (And if plaintiff does not want to reword its communication to make clear it is focused on nonfederal candidates, an even more reasonable inference is that it also intends the communication to have a long-term influence on federal elections.)

Finally, plaintiff's First Amendment claim that the Commission has failed to show that 11 C.F.R. 106.6(f) is "connected" to the risk of corruption is spurious; as discussed supra, pp. 4-5, 16-17, the entire allocation system implements the contribution restrictions that have been held to serve an anti-corruption purpose. Moreover, contrary to plaintiff's assertion (Mem. 35), it is entirely proper for the Commission "to make ease of administration and enforceability a consideration in setting its standard," WorldCom, Inc. v. FCC, 238 F.3d 449, 459 (D.C. Cir. 2001), and the explanation of 11 C.F.R. 106.6(f) cited not only "administrative convenience" but also enhancing compliance. See 69 Fed. Reg. 68060.

3. Regulation 11 C.F.R. 106.6(c) Is a Permissible Allocation Formula for Federal and Nonfederal Shared Expenses

Revised paragraph 11 C.F.R. 106.6(c) governs, inter alia, the allocation by nonconnected committees of their administrative expenses[19] and the costs of their "generic voter drives"[20] between federal and nonfederal funds. These disbursements benefit both federal and nonfederal

[19] 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).

[20] "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).

candidates, and thus influence both federal and nonfederal elections.[21] 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. 69 Fed. Reg. 68056.

As the Commission explained (69 Fed. Reg. 68059), 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)." 69 Fed. Reg. 68062.[22] 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. 69 Fed. Reg. 68060.

The Commission acted reasonably in adopting a flat minimum federal rate. As noted above, the Commission concluded that a sizable majority of the regulated community neither used nor understood the complicated funds expended method of allocation, which needed to be recalculated throughout the two-year election cycle. Suggestions for adjusting the funds expended method appeared merely to increase the complexity of the necessary calculations.

---

[21] See McConnell, 540 U.S. at 167 ("Common sense dictates, and it was 'undisputed' below, that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office") (citing 251 F.Supp.2d at 460 (Kollar-Kotelly, J.)).

[22] "Fewer than 2% of all registered nonparty political committees…allocate[ed] administration and generic voter drive expenses under former section 106.6(c)…." 69 Fed. Reg. 68062.

Therefore, the Commission embraced instead a workable, easy-to-grasp and easier-to-enforce bright-line minimum flat rate method, and gave committees the option of paying for their administrative and generic voter drive expenses with a higher percentage of federal funds. "A flat minimum percentage makes the allocation scheme easier to understand and apply, while preserving the overall rationale underlying allocation." 69 Fed. Reg. 68062. As noted supra, p. 22, it is well settled that simplifying regulation to promote ease of administration and enforcement is a valid rulemaking objective.

As the Commission noted, "[n]either FECA nor any court decision dictates how the Commission should determine appropriate allocation ratios." 69 Fed. Reg. 68062. See also, id. at 68063. The chosen federal flat minimum of 50% for activities that cannot be divided with scientific precision into exclusively federal and exclusively nonfederal components fairly reflects the dual nature of the disbursements. In fact, many of those few committees who have used the funds expended method "already use 50% or more as their Federal allocation ratio." 69 Fed. Reg. 68066. EMILY'S List itself has consistently allocated its costs on this same 50% basis. FEC Exh. 6. 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 plaintiff's name makes that very point; "EMILY" is an acronym for "Early Money Is Like Yeast." FEC Exh. 17. 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. FEC Exh. 20 (excerpts from 1,051-page report for December 31, 2001). 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, 238 F.3d at 461.

EMILY'S List again counters by concocting extreme hypotheticals without evidentiary support. (Mem. 17-18, 32-33). Plaintiff also again ignores the important fact that the regulation applies only to political committees, groups that have as their major purpose the nomination or election of candidates. See pp. 18-19, supra. As the Commission explained in the rulemaking, "[t]he 'major purpose' test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status. The Commission has been applying this construct for many years …, and it will continue to do so in the future." 69 Fed. Reg. 68065. [23]

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, a view that plainly does not coincide with plaintiff's concept of how allocation must be done.

Plaintiff's claim (Mem. 35-36) that the 50% minimum flat federal rate violates the First Amendment and is subject to strict scrutiny is meritless. EMILY's List has offered absolutely no evidence to controvert the Commission's conclusion, 69 Fed. Reg. 68063, that the flat rate would result at most in "only a minimal increase in federal funds expended" even by those few

[23] Plaintiffs' speculative hypotheticals are also telling in their emphasis on the $1,000 statutory threshold for political committee status. See 2 U.S.C. 431(4)(A) (contributions or expenditures of more than $1,000 in a calendar year). That emphasis strongly suggests that the real subject of plaintiff's discontent is that this monetary threshold is too low; if so, plaintiff's quarrel is with Congress, not the Commission.

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%. See McConnell, 540 U.S. at 173 ("The question is not whether § 323(b) 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'") (quoting Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377, 397 (2000)). Moreover, the allocation regulations do not impose any sort of ceiling on a committee's administrative and generic voter drive expenditures. If a nonconnected committee needs more money to finance all the activities it wishes to undertake, it can appeal to its existing supporters or find new supporters. See Buckley, 424 U.S. at 21-22 ("The overall effect of the Act's contribution ceilings is merely to require … political committees to raise funds from a greater number of persons….").

Thus, the revised regulation, which implements the Act's contribution restrictions, easily satisfies the "less rigorous scrutiny applicable to contribution limits," McConnell, 540 U.S. at 141. Plaintiff does not challenge the Commission's authority to require it to allocate at least a portion of these expenditures to its federal account, only the size of the allocation the Commission adopted.[24] As with the underlying contribution limits themselves, however, "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe, whether, say, a $2000 ceiling might not serve as well as $1000.'" Buckley, 424 U.S. at 30 (quoting lower court).

In any event, even if the regulation hypothetically might burden some committees, EMILY's List is not among them. As discussed supra, pp. 3, 24, EMILY'S List has been able to

[24] In advocating that the Commission return to the funds expended method of allocation, plaintiff implicitly concedes that the Commission has statutory authority to establish an allocation regime. See 2 U.S.C. 437c(b)(1) and 437d(a)(8) (granting the Commission broad rulemaking and policymaking powers).

raise far more federal funds than almost any other nonconnected committee, and its president has publicly stated that a lack of hard money has not been an issue, even though EMILY'S List has been using the 50% allocation ratio required by the new regulation.

4. Regulation 11 C.F.R. 100.57 Is a Permissible Interpretation of When Donations to a Political Committee Are "Contributions" Under the Act

As EMILY's List notes (Mem. 20), the Act authorizes the Commission to regulate contributions to political committees that are made "for the purpose of influencing" federal elections. 11 C.F.R. 100.57 specifies when funds received in response to a solicitation will be considered "contributions" under the Act, and so the subject of this regulation is plainly within the Commission's statutory authority. Plaintiff's challenges to the Commission's solicitation regulation at 11 C.F.R. 100.57 are predicated on a fundamental misunderstanding of the regulatory standard, and there is little likelihood of plaintiff's success on this claim.

The Supreme Court has always construed the statutory term "contribute" broadly, to include money either "earmarked for political purposes" by the donor, or money spent by the donor "in cooperation with" a candidate or campaign committee. Buckley, 425 U.S. at 78. It also includes money given to a multicandidate political committee, like EMILY'S List, even if the gift is to be used solely for administrative expenses rather than support of federal candidates. California Medical Ass'n v. FEC, 453 U.S. 182, 199 n.19 (1981) ("contributions for administrative support clearly fall within the sorts of donations limited by § 441a(a)(1)(C)") (plurality); id. at 203 (Blackman, 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.

Despite plaintiff's assertions (Mem. 18-19) to the contrary, the solicitation provision does not apply to every solicitation of funds that "refers to" a federal candidate, or even every solicitation that "supports or opposes" a candidate. Rather, the text of 11 C.F.R. 100.57 states plainly that it 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). Thus, the new provision is narrowly focused on solicitations that not only "refer to" a clearly identified federal candidate, but also state that the funds received will be used to support or oppose the election of that candidate. Clearly, funds received in response to such solicitations are "for the purpose of influencing" a federal election.

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), which construed a statutory provision governing solicitations of contributions under the pre-BCRA Act. That court held that contributions "for the purpose of influencing" a federal election would result from a solicitation that "[left] no doubt" that funds given in response would be used to help defeat a particular candidate in a federal election. Id. at 295.

The Commission's explanation of the final rule describes the operation of this standard and provides examples to guide committees in complying with the rule. See 69 Fed. Reg. 68057. 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. First, 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. This gives groups soliciting funds complete control over the

wording of their solicitations, without having to worry about whether factors external to the text of their message will be construed in conjunction with it. Thus, 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 references to an election, or all references to federal candidates.

The Commission gave examples of phrasing in a solicitation that would be for contributions under 11 C.F.R. 100.57(a), and also included the following example of a solicitation which would not be for federal contributions:

> The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight for the President's tax cuts. Send us money for our important work.

69 Fed. Reg. 68057. This example directly contradicts plaintiff's characterization (Mem. at 19) of the regulation as one that "limit[s] the use of 'references' to federal candidates in solicitations for state and local election purposes, and [] impair[s] fundraising messages that discuss federal officeholders who make and execute government policy." As the Commission explained, this sample solicitation does refer to a clearly identified Federal candidate ("the President"), but it discusses his policies as an officeholder and does not indicate that funds received will be used to support or oppose the election of this candidate. Id. Therefore, this solicitation would not trigger the rule, regardless of the timing of the mailing or the nature of the soliciting group.

EMILY's List also argues (Mem. 33-34) that 11 C.F.R. 100.57 is arbitrary because if a solicitation meets the standard in 100.57(a), but also refers to at least one clearly identified nonfederal candidate, then 50% of the money received from the solicitation must be treated as a contribution. 69 Fed. Reg. 68058; 11 C.F.R. 100.57(b)(2). Plaintiff again fails to present any evidence whatsoever about its own solicitations (or anyone else's), but instead hypothesizes (Mem. 20) a solicitation stating that only one percent of funds received will be used to support

named federal candidates and the rest will be used to support nonfederal candidates. Again, McConnell makes clear that in the future, EMILY's List can adjust the wording of its solicitations, or simply separate its federal and nonfederal solicitations, to avoid the self-imposed problem plaintiff hypothesizes. See 540 U.S. at 206. In any event, plaintiff offers no evidence that solicitations like that are actually used by anyone, and merely imagining possible worst-case scenarios is insufficient to support a facial challenge like this one. Florida League of Professional 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.").

Next, EMILY's List complains (Mem. 36) that the "indicates that" standard is not further defined in this regulation and the Commission's examples "exacerbate the confusion." However, the constitutional test for vagueness requires only that a provision "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply them." Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). We have shown above that 11 C.F.R. 100.57 provides adequate guidance as to what solicitations fall under the rule, and makes it easy for a political committee seriously interested in complying with the regulation, rather than crafting an argument for challenging it, to structure its solicitations to control whether donations received will be federal contributions. The regulation is certainly no more vague than the one in 2 U.S.C. 431(20)(A)(iii) ("promotes, supports, attacks, or opposes") upheld by the Supreme Court in McConnell, 540 U.S. at 170 n.64, especially as applied to sophisticated political committees like EMILY'S List well versed in campaign finance rules and advised by experienced election lawyers. As also noted in McConnell, "should plaintiff[] feel that [it] need[s] further guidance, [it is] able to seek advisory opinions for clarification, 2 U.S.C.

§ 437f(a)(1), and thereby 'remove any doubt there may be as to the meaning of the law.'" Id. (citation omitted).

Finally, EMILY's List again asserts (Mem. 35) that this regulation is not supported by an explicit discussion of its effect on corruption. Like the other regulations discussed above, however, 11 C.F.R. 100.57 is clearly designed to enforce the Act's contribution restrictions, which have repeatedly been held to serve the interest in preventing the reality and appearance of corruption. In fact, the Commission explicitly stated that it adopted this rule to further implement and enforce the Act's definition of contribution. See 69 Fed. Reg. 68056.

C. 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 plaintiff itself describes (Mem. 7-8) as a "wide-ranging proposal of new regulations" that "addressed a variety of topics[.]" EMILY's List acknowledges (Mem. 21) that "[t]he NPRM was an extraordinary document, proposing regulations that were radically different from the regulations in place at the time." Plaintiff describes the NPRM as, "put[ting] the regulated community on notice that it was considering action on a variety of fronts." Id. Despite all that, EMILY's List claims that it did not have notice that the "drastic changes" were a "realistic possibility." Id.

The APA provides two independent ways to comply with its notice requirements, and the Commission has complied with both. The APA requires that a "[g]eneral notice of proposed rule making shall be published in the Federal Register" and "[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). The Commission met this requirement with a belt and

suspenders approach by meeting both prongs of the disjunctive APA notice requirement. EMILY's List focuses exclusively on the option under section 553(b)(3) to describe the "terms or substance" of the proposed rule, and has thus entirely failed even to argue that the alternative type of notice permitted by section 553(b)(3) was not satisfied. [25]

The Commission proposed as "subjects" a new regulation regarding solicitations (11 C.F.R. 100.57) and requested public comment on a variety of proposals for amending and revising the allocation regulations for nonconnected committees at 11 C.F.R. 106.6. 69 Fed. Reg. 11743, 11753-55. The Commission carefully identified a broad range of issues related to these topics, and asked "what, if any, changes are advisable" and whether the enactment of BCRA or the decision in McConnell "requires, permits, or prohibits changes." 69 Fed. Reg. 11753. The Commission asked, for example, should a political committee "be required to pay for all of its disbursements out of Federal funds and therefore be prohibited from allocating any of its disbursements?" In identifying these issues, much was placed on the table for comment, ranging from preserving the status quo to requiring spending to be exclusively from federal funds.

"[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 that rigidity were required, the purpose of the notice and comment — to allow an agency to reconsider, and sometimes change, its proposal based on the comments of affected persons — would be undermined." Id. If every change required an additional notice and comment period "agencies would either refuse to make changes in response to comments or be forced into perpetual cycles of new notice and comments periods." Id. Taking this into account, the D.C.

[25] Contrary to plaintiff (Mem. 22-23), the 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 regulation proposed receive more or less prominence than others.

Circuit has explained that "[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). See also American Medical Ass'n v. United States, 887 F.2d 760, 768 (7th Cir. 1989) ("the relevant inquiry is whether or not potential commentators would have known that an issue in which they are interested was 'on the table' and was to be addressed by a final rule" (citation omitted)).

Here, EMILY's List had the same opportunity to comment on each of the new rules as the many organizations that actually did provide comments. Compare, 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 disbursements out of Federal funds"),[26] with 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"). "[T]he 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

[26] Americans Coming Together has the same president, Ellen Malcolm (see FEC Exh. 21), as EMILY's List (FEC Exh. 18), and ACT's comments were presented to the Commission by the same counsel that is representing EMILY'S List (see n. 14, p. 10, supra). Thus, EMILY's List had the same actual notice, through Malcolm, as ACT, which both commented and provided testimony on the regulation. A party that has actual notice of an agency's proposal does not have standing to challenge the validity of a rule for lack of notice. See 5 U.S.C. 553(b)(3) (providing exception for "persons subject thereto" who "otherwise have actual notice" from the formal notice requirements). Moreover, given their common leadership, there is no basis for assuming EMILY'S List would have said anything to the Commission different from what ACT actually submitted in comments and testimony. See West Virginia v. EPA, 362 F.3d 861, 869 (D.C. Cir. 2004) (rejecting notice challenge where "the only evidence petitioning States offer … was, in fact, before the EPA").

Electrical Inst. v. EPA, 2 F.3d 438, 450 (D.C. Cir. 1993) (comments "are at least probative evidence that the notice was adequate").

1. 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. 69 Fed. Reg. 11743. Within the NPRM the Commission published a proposed text for the solicitation regulation as well as permutations on that text. A comparison of the text in the NPRM and in the final rule shows how one provision was stricken and one provision was added, entirely consistent with what the NPRM indicated was a possibility.

NPRM:	Final Rule:
A gift, subscription, loan advance, or deposit of money or anything of value made by any person in response to any communication that includes material expressly advocating, as defined in 11 C.F.R. 100.22, a clearly identified Federal candidate is a contribution to the person making the communication. 67 Fed. Reg. 11757.	A gift, subscription, loan advance, or deposit of money or anything of value made by any person in response to any communication ~~that includes material expressly advocating, as defined in 11 C.F.R. 100.22, a clearly identified Federal candidate~~ is a contribution to the person making the communication **if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate.** 69 Fed. Reg. 68066 (striking express advocacy requirement and adding bold text).

The Commission also explicitly sought public comment regarding other possible standards that could be applied to solicitations, asking, "[s]hould 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?" 69 Fed. Reg. 11743 (emphasis

added). Since the very words used in final regulation were also in the NPRM, under the "terms or substance" option within 5 U.S.C. 553(b)(3), it is clear that the Commission provided adequate notice of the new rule.

The Commission also satisfied the second option of section 553(b)(3) by providing notice of the "subjects and issues." In the NPRM, the Commission sought public comment regarding a new rule that would establish 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. 69 Fed. Reg. 11743. The notice identified the fundamental issue that it was addressing as whether a "standard other than express advocacy, such as a solicitation that promotes, attacks, or opposes a Federal candidate" be used in the solicitation rule. This was ample to put the public on notice that the substance of a solicitation would determine whether a donation is a contribution and that parties interested in the standard to be used should comment. "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.

2. The Commission Provided Ample Notice Of Revisions To Its Allocation Regulation, 11 C.F.R. 106.6

a. The Fifty Percent Federal Funds Minimum Requirement Was Adequately Noticed

The Commission provided notice that it was considering setting a federal funds floor at 50% for administrative expenses and voter drive activities. As one option, the Commission simply asked, "Should the Commission adopt a fixed minimum Federal percentage?" 69 Fed. Reg. 11754. The notice also sought comment on a number of other options, including a minimum Federal percentage to be added to the funds expended method in 11 C.F.R. 106.6(c) — a change that would require committees to calculate the funds expended ratio and then use the

greater of either the funds expended ratio or the minimum percentage. Id. The NPRM also proposed using the same percentage applicable to State, district and local party committees (a range of 15% to 36% depending upon the Federal candidates on the ballot), or establishing a two tier system where committees' Federal minimum percentage would depend upon the number of states in which the committee operated (perhaps 25% for less than 10 states, but 50% for more than 10 states). In addition to these specific proposals, the Commission made clear that it was "considering other minimum Federal percentages as alternatives to those presented in the proposed rules." Id. The NPRM also specifically asked, "what should the minimum Federal percentages be?" Id. This was more than adequate to put EMILY's List on notice that a change to the allocation ratio for administrative and voter drive activities could result in a fixed minimum percentage. See, e.g., United Steelworkers v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980) (notice adequate when final rule is twice as stringent as the proposed rule); American Medical Ass'n, 887 F.2d at 769 ("The final rule dealt with the identical issue of dues allocation, merely altering the allocation regime to assure greater consistency and fairness").

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 or that refer to federal candidates together with political parties. 69 Fed Reg. 11753-55. 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. 69 Fed. Reg. 11755. The proposed section 106.6(f) would require a combination of the time/space allocation method similar to that used in 11 C.F.R. 106.1 and an application of the 11 C.F.R. 106.6(c) method for these public communications. Id. The final rule adopted a somewhat more stringent approach, but nonetheless one easily within the range of noticed possibilities, and the NPRM plainly put anyone concerned about the formula for allocating communications discussing candidates and parties on notice that this subject was "on the table" for revision. Career College Ass'n, 74 F.3d at 1276.

Plaintiff argues (Mem. 27-28) that the Commission was required to use an allocation formula that gave greater weight to the mention of a political party. 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)). The language in the NPRM does not preclude the development of more specificity in the final regulations. For example in District of Columbia v. Train, 521 F.2d 971, 997 (D.C. Cir. 1975), a general notice in an air quality rulemaking about "alternative forms of transportation controls" was found to be adequate when the final rule produced regulations on bicycle lanes. The specific language in the final rule was well with the "subjects and issues" identified in the NPRM.

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

Finally, EMILY's List argues (Mem. 23-24) that the notice provided by the NPRM was inadequate because it did not "contain any mention of data on which the Commission was relying" and that an agency cannot base a rule on data that is known only to the agency. 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. 69 Fed. Reg. 68062. These disclosure reports are publicly available on the Commission's Web site and in its public records office. See http://www.fec.gov/disclosure.shtml. Plaintiff's claim, therefore, that "there is simply no way to compile that data and determine how committees were allocating" (Mem. 24) is simply not true.

The Commission's review of this public information in analyzing the comments and formulating its final rule was entirely proper. "Agencies 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. Dept. 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). 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, which would be particularly difficult since EMILY'S List chose not to participate in the rulemaking at all.

The cases plaintiff relies upon regarding inadequate notice of data or studies all involved results from formal studies conducted by experts using data not available to the public. See Solite v. EPA, 952 F.2d 473, 477-78 (D.C. Cir. 1991) (volumetric studies of potentially hazardous waste from mining operations); Community Nutrition Inst. v. Block, 749 F.2d 50, 51 (D.C. Cir. 1984) (health and safety study of use of mechanically separated meat); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973) (results from particulate testing at cement plant). In this case, the Commission simply reviewed reports equally available to the plaintiff, and just determined what was reported, rather than conducting any secret scientific test.

Furthermore, the cases plaintiff relies upon require that "prejudice [be] shown" as a result of undisclosed data relied upon by an agency. See Community Nutrition Inst., 749 F.2d at 58 (agency may undertake "new scientific studies, without the consequence appellants would impose, unless prejudice is shown"); Solite, 952 F.2d at 484-85. Even though the data at issue here are still publicly available, plaintiff has shown no reason to question the Commission's conclusion about what is contained in its public disclosure reports, so no prejudice has been shown.

D. EMILY'S LIST HAS FAILED TO SHOW IRREPARABLE HARM

EMILY's List barely even tries (Mem. 36-37) to establish the kind of irreparable harm that would justify a preliminary injunction, devoting precisely one page of its 39-page brief to the subject. Plaintiff's cursory 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 to finance electoral activity in the coming election cycle. Even if EMILY'S List were not one of the wealthiest committees in hard money, conclusory speculation like that would not satisfy its burden of proving irreparable harm. Regardless of the strength of plaintiff's case on the merits, its total failure to demonstrate irreparable harm alone is sufficient grounds for denying a preliminary injunction. See supra, pp. 12-13.

To show irreparable injury, "[a] litigant must do more than merely allege the violation of First Amendment rights." Wagner v. Taylor, 836 F.2d 566, 576 n.76 (D.C. Cir. 1987). See also NTEU v. United States, 927 F.2d 1253, 1254-55 (D.C. Cir. 1991). It must also "show that [t]he injury complained of [is] of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm." Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir.

1985) (internal citation and quotation marks omitted). This harm "must be both certain and great," and "actual and not theoretical." Id.

Moreover, if — as here — the requested relief "would alter, not preserve, the status quo … [a plaintiff] must meet a higher standard…." Veitch v. Danzig, 135 F.Supp.2d 32, 35 (D.D.C. 2001). "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. at 395; accord KOS Pharmaceuticals v. Andrx Corp., 369 F.3d 700, 708 (3d Cir. 2004). But the new regulations have been in effect, and the old ones eliminated, since January 1, 2005, and this case was not filed until January 12. EMILY's List thus seeks to alter the current status quo while its request for permanent relief is pending.

Even apart from plaintiff's complete failure to support its claim with evidence, it is plain that the regulations at issue do not impose any irreparable harm on EMILY'S List. The requirement in 11 C.F.R. 106.6(c) to 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 pp. 3-4, supra). See Sociedad Anonima, 193 F.Supp.2d at 27 (no irreparable harm where government viticultural designation did not change plaintiff wine producer's current labeling practice). We have shown above that the regulations regarding allocation of expenditures for communications referring to candidates (11 C.F.R. 106.6(f)) and the treatment of contributions given in response to certain solicitations (11 C.F.R. 100.57), were carefully crafted to ensure that a political committee can easily control how its communications will be treated under those regulations.

Moreover, none of these regulations really restricts speech; their only effect is to determine how much federal money must be used to finance certain activities. Thus, nothing

more is at stake for EMILY'S List while this case is pending than the amount of federal money it will use to finance these activities, and it is well settled that "financial harm alone cannot constitute irreparable injury unless it threatens the very existence of the movant's business." Sociedad Anonima, 193 F.Supp. at 14. Accord Wisconsin Gas, 758 F.3d at 674. It can hardly be argued that the new allocation regulations "threaten the existence" of EMILY's List, one of the most successful committees in the nation in raising hard money.[27]

Finally plaintiff argues (Mem. at 36) that it "must know now" what resources it has available to spend in the current election cycle, but the existing regulations give precisely that information, and a preliminary injunction would not improve plaintiff's understanding. Even if this Court were to enter the preliminary injunction, if the regulations at issue were ultimately upheld by this Court or a higher court — or if the preliminary injunction itself were reversed on appeal — plaintiff would be subject to a civil enforcement action by the Commission under the retroactivity doctrine. See Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97-98 (1993) ("an opinion announcing a rule of federal law ... 'appl[ies] retroactively to the litigants then before the Court'"). As the D.C. Circuit noted in a previous case in which a preliminary injunction against the Commission's allocation regulation was denied, a preliminary "injunction wouldn't protect a party against an adverse final decision on the merits" and "the decision to grant or deny a preliminary injunction has no bearing on the ultimate allocation between hard and soft accounts." Republican National Comm. v. FEC, 172 F.3d 920, 1998 WL 794896 (D.C. Cir. Nov. 6, 1998).[28]

---

[27] Plaintiff's assertion that the new rules might decrease the amount it will spend on speech does not convert this claim of economic harm into a constitutional one. See 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.")

[28] The court did find that there was some possibility of irreparable harm in that case involving claims not raised by the plaintiff here. It concluded, however, that because the evidence of harm was so

Plaintiff invokes the First Amendment, but this case is nothing like Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality), the only case plaintiff cites on irreparable injury (Mem. at 37). In Elrod the Supreme Court held that employee dismissal based on political party patronage was an unconstitutional infringement on employees' First Amendment rights. Id. at 372. But in that case, the 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. In this case, EMILY'S List has not been punished for its political views, and 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. Contrary to plaintiff's apparent assumption, 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 impaired. NTEU, 927 F.2d at 1254-55; 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 applicable only to cases in which "First Amendment rights were totally denied by the disputed Government action").[29] That is a burden EMILY'S List has made no effort to sustain.

"weak … appellants would have to show an exceptional likelihood of success on the merits," and affirmed the denial of a preliminary injunction. Id., 1998 WL 794896 at *2.

[29] An "assertion of First Amendment rights does not automatically require a finding of irreparable injury, thus entitling a plaintiff to a preliminary injunction if he shows a likelihood of success on the merits." Hohe v. Casey, 868 F.2d 69, 72-73 (3d Cir. 1989). See also Time Warner Cable of New York City v. Bloomberg L.P., 118 F.3d 917, 924 (2d Cir. 1997) ("[It is often] more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of those consequences is likely to violate any of the plaintiff's rights").

E. A PRELIMINARY INJUNCTION WOULD CAUSE THE PUBLIC, THE COMMISSION, AND OTHERS SUBSTANTIAL HARM

Even a temporary injunction against the challenged regulations would change the status quo to open the door to 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. In addition, an injunction would harm all nonconnected committees by creating chaos and uncertainty in the allocation rules. 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 soft money from influencing federal elections.

More fundamentally, an injunction would create confusion and uncertainty in the regulated community. Plaintiff is incorrect in its assumption (Mem. 37-38) that the former allocation regulation already repealed on January 1 would spring back to life if the Commission were enjoined from enforcing the new ones. Revised paragraph 11 C.F.R. 106.6(c) has already replaced the former paragraph 106.6(c), so the Commission would have to complete a new rulemaking in order to reinstate the now-repealed rule. Thus, if the Commission were enjoined from enforcing the current regulations, it is unclear how political committees would be legally required to allocate their activities.

Moreover, the bulk of plaintiff'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 plaintiff 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 that 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). Moreover, just last year this Court refused to enjoin the Commission from enforcing existing regulations even after it had found those regulations invalid and remanded them to the Commission. Shays v. FEC, 337 F.Supp.2d 28, 129-130 (D.D.C. 2004), appeal filed (D.C. Cir. No. 04-5352, Sept. 30, 2004). Plainly, a preliminary injunction against enforcing regulations that have not been found invalid is even less justified than an injunction after a final judgment of invalidity.

Finally, "[t]he harm to the … Federal Election Commission is evident. Everyone agrees that it is the statutory duty of the [FEC] to enforce the [Act]. If we enter the preliminary injunction, then, to the extent of that injunction, the Commission cannot perform its duty. We hold that an injunction against the performance of its statutory duty constitutes a substantial injury to the Commission." Wisconsin Right to Life, Inc. v. FEC, Civil No. 04-1260 (DBS, RWR, RJL) (D.D.C. Aug. 17, 2004), slip op. at p.8 (FEC Exh. 19).

IV. CONCLUSION

For the reasons given above, the motion of plaintiff EMILY's List for a preliminary injunction should be denied.

Respectfully submitted,

s/
Lawrence H. Norton
General Counsel

s/
Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

s/

David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

Vivien Clair
Harry J. Summers
Greg J. Mueller
Leigh G. Hildebrand
Margaret G. Perl
Attorneys

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

January 24, 2005