

ORAL ARGUMENT NOT YET SCHEDULED

No. 08-5422

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

EMILY'S LIST,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

**BRIEF *AMICI CURIAE* FOR
CAMPAIGN LEGAL CENTER AND DEMOCRACY 21
IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE**

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CERTIFICATE OF COUNSEL FOR *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS TO PARTIES, CORPORATE DISCLOSURE, RULINGS AND RELATED CASES

I. Parties and *Amici*

EMILY's List was the plaintiff in the district court and is the appellant in this Court. The FEC was the defendant below and is the appellee in this Court. *Amici curiae* in the district court were Democracy 21, the Campaign Legal Center (CLC), the Center for Responsive Politics, John McCain, Russell Feingold, Christopher Shays, and Martin Meehan. In this Court, the CLC and Democracy 21 are participating as *amici curiae*.

II. Corporate Disclosure Statement

The CLC is a nonprofit, nonpartisan corporation. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in the CLC. Democracy 21 is a nonprofit, nonpartisan corporation. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21.

III. Ruling Under Review

The ruling under review is the opinion and order issued by District Judge Colleen Kollar-Kotelly on July 31, 2008, granting the FEC's motion for summary judgment, and denying EMILY's List's motion for summary judgment. The court's opinion is reported as *EMILY's List v. FEC*, 569 F. Supp. 2d 18 (D.D.C. 2008).

IV. Related Cases

There are no related cases pending in this Court or in any other court. This case was previously before this Court on EMILY's List's appeal of the district court's denial of its motion for a preliminary injunction. This Court affirmed the denial. *EMILY's List v. FEC*, 362 F. Supp. 2d 43 (D.D.C.), *aff'd*, 170 Fed. Appx. 719 (D.C. Cir. 2005) (No. 05-5160).

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STATEMENT OF INTEREST

Amici curiae Campaign Legal Center and Democracy 21 are non-profit organizations that have extensive experience working for the enactment and effective implementation of the campaign finance laws. Both groups represented intervening defendants in *McConnell v. FEC*, 540 U.S. 93 (2003) and *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) (“*WRTL II*”). *Amici* also filed written comments and testified before the FEC in the rulemaking that resulted in the rules challenged in this action.¹

SUMMARY OF ARGUMENT

In 2002, Congress enacted landmark campaign finance reform legislation, the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), to stop the political parties from using massive amounts of “soft” money raised outside of the federal contribution limits and source requirements to influence federal elections. BCRA accomplished its basic goal in the 2004, 2006 and 2008 elections: it ended the flood of corrupting soft money that once flowed through party committees into federal campaigns.

¹ See comments of Democracy 21, Campaign Legal Center, *et al* re Notice 2004-6 (Apr.5, 2004), available at http://www.fec.gov/pdf/nprm/political_comm_status/simon_potter_nobel_sanford.pdf.

Despite the success of BCRA, new techniques were developed in the 2004 election cycle to continue the spending of soft money in federal elections through *non-party* entities.

One technique was the use of so-called “527 groups.” These were “political organizations” registered with the Internal Revenue Service under section 527 of the tax code, 26 U.S.C. § 527, that attempted to influence federal elections, but refused to register with the FEC as “political committees” subject to the Federal Election Campaign Act (FECA). Operating in defiance of the federal election laws, these groups spent millions of dollars of soft money to broadcast ads attacking or promoting federal candidates in the 2004 elections – a practice that continued in the 2006 and 2008 elections.

The second technique – at issue in this case – involved the manipulation of the FEC’s former rules governing how federal political committees could “allocate” between federal “hard” money and non-federal “soft” money accounts when financing “generic” or “mixed” activities that affected both federal and non-federal elections. The prime example of this in 2004 was America Coming Together (“ACT”), a *federal* political committee that contrived to finance a \$100-million voter mobilization effort almost entirely with *non-federal* money. Even though ACT was formed for the overriding purpose of influencing the 2004

presidential election, it claimed a right under the then-existing FEC allocation rules to fund *98 percent* of its activities with soft money.

To close these emerging avenues for circumventing the law, the FEC initiated a rulemaking in 2004 to address the proliferation of 527 groups, as well as the manipulation of the allocation rules. Although the FEC did not issue a new rule to address the circumvention of the law practiced by 527 groups, it did amend its then-existing allocation regulations to prevent, on a prospective basis following the 2004 election, the kind of manipulation of the allocation system that resulted in ACT's soft money abuses. 11 C.F.R. § 106.6(c), (f) (2005). The Commission also clarified FECA's definition of "contribution" to include funds raised in response to solicitations that indicate the money will be spent to influence federal elections. 11 C.F.R. § 100.57 (2005).

It is these rules that are challenged in this case. The district court below upheld the regulations, granting summary judgment for the FEC in July 2008. *EMILY's List v. FEC*, 569 F. Supp. 2d 18 (D.D.C. 2008).

This Court should affirm the district court's well-reasoned decision. The regulations are consistent with the First Amendment, represent a reasonable exercise of the FEC's statutory authority, and are not arbitrary and capricious. They serve the important governmental goals of preventing the circumvention of

the federal contribution limits and shutting down the soft money abuses that developed after the passage of BCRA.

The new “allocation” regulation sets a floor requiring a federal political committee to spend at least 50 percent federal funds for its “generic” activities and its administrative expenses. 11 C.F.R. § 106.6(c). This rule is modest in scope: it still allows a *federal* committee to fund many of its activities with 50 percent *non-federal* funds. And as the district court below found in an earlier case, the FEC could have concluded that a federal political committee must use 100 percent federal funds to finance such activities. *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987).

The allocation regulation also specifies how federal political committees should allocate their expenses for political communications that reference clearly-identified federal candidates and/or non-federal candidates. 11 C.F.R. § 106.6(f). The rule for such candidate-specific expenditures follows the reasonable, common-sense principle that the allocation of federal funds should be proportionate to the percentage of the communication focusing on federal elections.

Finally, the contribution solicitation regulation provides that funds received in response to a solicitation that “indicates that any portion of the funds will be used to support or oppose the election of a clearly identified Federal candidate” are “contributions” subject to FECA. 11 C.F.R. § 100.57. By clarifying FECA’s

definition of “contribution,” the rule serves the governmental interest in preventing circumvention of the federal contribution limits, and represents a permissible exercise of the FEC’s statutory authority.

BACKGROUND

A. The Allocation System

1. Origins of allocation. The 1974 Amendments to FECA imposed a \$5,000 limit on contributions to a federal political committee not connected to a political party. 2 U.S.C. § 441a(a)(1)(C). Throughout its history, the FEC has “struggled” to enforce this federal contribution limit in circumstances where federal political committees engage in “mixed” or “generic” activities that influence *both* federal and non-federal campaigns, such as voter mobilization efforts that register and bring to the polls voters who then cast ballots in both federal and non-federal campaigns. *McConnell v. FEC*, 251 F. Supp. 2d 176, 195 (D.D.C. 2003) (three-judge court) (per curiam).

In 1977, the Commission adopted rules that allowed political committees, including non-party committees, to establish federal and non-federal accounts and to allocate expenses “on a reasonable basis” between the two. 11 C.F.R. § 106.1(e) (1977); *see McConnell*, 251 F. Supp. 2d. at 196. In 1987, a district court below held that this “reasonable basis” rule was too permissive because it allowed a committee to determine its own allocation ratio, and thus “fail[ed] to regulate

improper or inaccurate allocation between federal and non-federal funds.” *Common Cause*, 692 F. Supp. at 1395. In response, the Commission in 1990 promulgated new rules that established more specific allocation formulae.²

Under the new rules, committees were permitted to allocate funds from federal and non-federal accounts for payments made on behalf of both “one or more clearly identified federal candidates” and “one or more clearly identified non-federal candidates.” 11 C.F.R. § 106.1(a) (2002). This type of spending was to be allocated “according to the benefit reasonably expected to be derived.” *Id.* Thus, in the case of an ad that referred to both federal and non-federal candidates, “the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.” *Id.* This rule applied to both party and non-party committees alike.

Committees were also permitted to allocate payments for their administrative expenses, and for “[g]eneric voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.” 11 C.F.R. § 106.6(b)(2)(iii) (2002).

² See “Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting,” 55 Fed. Reg. 26,058 (June 26, 1990).

But the 1990 rules distinguished between party and non-party committees in connection to this type of “generic” spending. A non-party committee’s ratio for allocating these costs was determined pursuant to the so-called “funds expended method.” 11 C.F.R. § 106.6(c) (2002). Under this method, expenses were be allocated based on the ratio of federal expenditures to total federal and non-federal disbursements made by the committee during the two-year federal election cycle. 11 C.F.R. § 106.6(c)(1) (2002).

The rules were different for party committees. For national party committees, allocation of “generic” expenses was done by fixed percentages, depending on the year in which the spending was done. National party committees in a presidential election year were required to allocate to their federal account a flat 65 percent of their spending on generic voter drives and administrative expenses, and 60 percent in non-presidential election years. 11 C.F.R. § 106.5(b)(2)(i), (ii) (2002).

2. BCRA and McConnell. Political committees operated under these allocation rules starting from their effective date of 1991. In this period, party committees became major conduits for soft money entering federal elections. In 1992, the national party committees raised about \$80 million of soft money; by 2000, that increased more than six-fold to about \$500 million. *See McConnell*, 251 F. Supp. 2d at 440-41.

To address this problem, Congress in BCRA banned national party committees from raising or spending any non-federal funds, thus mooted the allocation question for such committees. 2 U.S.C. § 441i(a) (2002). State party committees were allowed to continue to raise non-federal funds for non-federal races, but could not spend such funds on ads that “promote, support, attack or oppose” federal candidates. 2 U.S.C. §§ 441i(b)(1), 431(20)(A)(iii) (2002). State parties were also required to fund certain specified voter mobilization activities (identified as “federal election activities”) with either federal funds or a mixture of federal funds and specially regulated non-federal funds, dubbed “Levin” funds. 2 U.S.C. § 441i(b)(2).

In reviewing BCRA’s soft money provisions, the Supreme Court in *McConnell* explicitly recognized that the Commission’s allocation rules for political parties had fundamentally undermined FECA. The Court found that voter mobilization and generic activities plainly benefit federal candidates, stating that “[c]ommon sense dictates . . . that a party’s efforts to register voters sympathetic to that party directly assist the party’s candidates for federal office.” 540 U.S. at 167-68 (citing 251 F. Supp. 2d at 460 (Kollar-Kotelly, J.)). Yet, as the Court noted, the FEC’s allocation regime allowed parties to “to use vast amounts of soft money in their efforts to elect federal candidates” through such voter mobilization efforts and other generic activities. *Id.* at 142. The Court concluded that the FECA “was

subverted by the creation of the FEC’s allocation regime,” *id.*, which “invited widespread circumvention” of the law. *Id.* at 145. The Court accordingly upheld in their entirety the provisions of BCRA that ended national party committee allocation, and in so doing, rejected any argument that the allocation regime had been constitutionally compelled. *Id.* at 186-89 (rejecting claims based on the Elections Clause, the Tenth Amendment and the Due Process Clause). The Court also upheld the BCRA soft money provisions relating to state party spending. *Id.* at 164-71.

3. ACT and allocation in the 2004 campaign. Although the Court in *McConnell* addressed only the operation of the allocation rules for party committees, its conclusion that allocation “invited widespread circumvention” is applicable to the pre-2005 FEC allocation rule for *non-party* committees as well.

In particular, the “funds expended” allocation method devised in the 1990 rulemaking allowed non-party committees to finance their allocable generic activities and administrative expenses almost entirely with non-federal funds by manipulating how their allocation ratio was calculated – even if the committees focused almost exclusively on federal elections.

This manipulation could take place because of how the “funds expended” formula worked. The percentage of federal funds required to pay for a committee’s allocable activities was based entirely on the committee’s *candidate-*

specific disbursements. The formula compared the amount of a committee's federal *candidate-specific* expenditures to the committee's total *candidate-specific* disbursements (not including overhead or other generic costs). The resulting ratio was then used as the federal percentage for that committee's *non-candidate-specific* allocable spending, *i.e.*, for administrative costs and generic activities. And unlike for party committees, no minimum federal percentage was imposed. 11 C.F.R. § 106.6 (2002).

For instance, if a non-connected political committee made no expenditures on behalf of specific federal candidates, but made a single small disbursement on behalf of a specific non-federal candidate, this "funds expended" allocation formula would calculate a zero federal allocation requirement. This would permit the committee to pay for a generic partisan voter drive – even one admittedly intended to elect a presidential candidate – *entirely* with soft money, since the committee would have no expenditures "on behalf of specific federal candidates."

This is essentially what ACT did in 2004. Although this case has been brought by EMILY's List, the FEC's rules challenged here cannot be understood without a discussion of the problem they were addressing, epitomized by ACT's activities in the 2004 presidential election under the prior allocation rule.

ACT was organized for the overriding purpose of engaging in massive generic voter mobilization activities to elect the Democratic presidential nominee.³ ACT registered as a federal political committee (with a non-federal account) but avoided federal candidate-specific activity – eschewing, for example, express advocacy communications on behalf of federal candidates. Because it alleged it was doing little such candidate-specific federal activity, it claimed an allocation ratio, calculated under the “funds expended” method, of 2% federal and 98% non-federal. It then applied this ratio to all of its generic spending, as well as to its administrative expenses.

Since ACT alleged that it focused almost entirely on generic voter drive activity, virtually all of its spending was funded as allocated activity, and virtually all of that spending – 98 percent – was funded out of its non-federal account with soft money.

This occurred despite the fact that ACT openly engaged in these voter mobilization activities in order to defeat President Bush, and to elect the Democratic nominee. According to *Washington Post* report about the formation of ACT, its president, Ellen Malcolm (also president of EMILY’s List), admitted that

³ See Comments of Democracy 21 *et al.*, *supra* n.1.

ACT would conduct “a massive get-out-the-vote operation that we think will defeat George W. Bush in 2004.”⁴

This overriding purpose was confirmed by ACT’s direct mail fundraising materials. The envelope of one such solicitation stated:

17 States;

25,000 Organizers;

200,000 Volunteers;

10 Million Doors Knocked On

. . . and a one-way ticket back to Crawford, Texas⁵

The solicitation letter itself is focused on the presidential election:

[I]f we can count on your personal support and active participation, 2004 will be a year of America Coming Together and George W. Bush going home⁶

⁴ Thomas Edsall, *Liberals Form Fund to Defeat President; Aim is to Spend \$75 Million for 2004*, THE WASHINGTON POST, Aug. 8, 2003, available at <http://www.commondreams.org/headlines03/0808-08.htm>.

⁵ This solicitation was discussed in comments in the administrative record below. *See supra*, n.1. It was also appended to various FEC filings by *amici*. *See, e.g.*, Comments of Democracy 21, *et al.* in AOR 2004-5 (February 12, 2004), which can be found using the FEC’s search engine at <http://saos.nictusa.com/saos/searchao?SUBMIT=continue>.

⁶ *See Solicitation, supra* n.5, at 1-2.

According to public reports, ACT spent approximately \$100 million dollars of soft money on these activities.⁷ It received the bulk of its funding from a handful of large donors, most prominently the financier, George Soros, who gave \$7.5 million directly to ACT.⁸ Soros made clear that this money was given to ACT for the purpose of defeating President Bush, writing in a *Washington Post* op-ed that he and others were “contributing millions of dollars to grass-roots organizations engaged in the 2004 presidential election” because they “are deeply concerned with the direction in which the Bush administration is taking the United States and the world.”⁹

B. The 2004 Rulemaking

The fact that ACT in early 2004 was claiming a right under the then-existing allocation rule to use 98 percent soft money to fund its voter mobilization activities

⁷ See FEC Conciliation Agreement with ACT, at 6-12, *infra* n.16.

⁸ A list of the donors to ACT can be found on the website of the Center for Responsive Politics, at <http://www.opensecrets.org/527s/527cmtdetail.asp?ein=200094706&cycle=2004&format=&tname=America+Coming+Together>. Large donors to ACT include the Service Employees International Union (SEIU), which gave \$4 million, InterService Corp., which gave \$3 million, and businessman Peter Lewis, who gave almost \$3 million. ACT received \$52 million, or about two-thirds of its total receipts of about \$78 million, from a group of just 14 donors, who each gave \$1 million or more. *Id.*

⁹ George Soros, *Why I Gave*, THE WASHINGTON POST, Dec. 5, 2003.

to elect a Democratic president was an important backdrop for the FEC's 2004 rulemaking.

In February 2004, in light of press reports about ACT's formation and intended activities, as well as reports about the activities of 527 groups not registered as political committees, the Commission announced an expedited rulemaking to address these continuing soft money abuses.

Amici wrote to the Commission to support the planned rulemaking, and to urge it to "adopt new rules on the allocation formula for non-connected political committees."¹⁰ The *amici* also called the Commission's attention to the manipulation of the allocation rules that was being undertaken by ACT:

Thus, ACT is currently claiming a right to pay for its partisan generic voter mobilization activity with 98 percent soft money funding, despite the fact that ACT and its donors have made publicly clear that its overriding purpose is to spend money to mobilize voters to defeat President Bush in the 2004 elections....

ACT's position illustrates the fundamental flaw in the Commission's existing Part 106 regulations.... Simply put, the existing regulations completely fail to protect against the improper flow of soft money into federal elections through partisan voter mobilization activities of section 527 groups. Instead, the regulations authorize easy

¹⁰ Letter of February 25, 2004 to FEC Commissioners from Democracy 21, the Campaign Legal Center and the Center for Responsive Politics at 1, *available at* http://www.fec.gov/pdf/nprm/political_comm_status/exparte_commissioners.pdf.

manipulation of the allocation ratio in order to set the soft money percentage at a fictional and absurdly high level.¹¹

The Commission published its Notice of Proposed Rulemaking (NPRM) on March 11, 2004. “Political Committee Status,” 69 Fed. Reg. 11,736 (March 11, 2004). The NPRM, in part, addressed the question of when a 527 organization was required to register as a political committee, and in part addressed the allocation issue.

It sought general comment on “whether either BCRA or *McConnell* requires, permits, or prohibits changes to the allocation regulations for separate segregated funds and nonconnected committees.” *Id.* at 11,753. In addition to proposing a modification to the “funds expended” allocation method, *id.* at 11,754-55, the NPRM expressly invited comment on whether a 50 percent minimum federal percentage should be imposed on some or all political committees. *Id.* at 11,754. The NPRM also raised the fundamental question of whether the Commission should permit allocation at all, “[g]iven *McConnell’s* criticism of the Commission’s prior allocation rules for political parties.” *Id.* at 11,753.

As to the issue of allocation by registered political committees, comments were filed by ACT, The Media Fund, the congressional sponsors of BCRA, the

¹¹ *Id.* at 2.

amici, and others. EMILY’s List, however, did not itself take advantage of the opportunity to do so. *Amici* supported the proposal for a 50 percent minimum federal allocation.¹² Not surprisingly, ACT, the principal beneficiary of the allocation loophole in the 2004 election, filed written comments opposing all proposed changes to the allocation rules.¹³

In August, 2004, the FEC’s general counsel proposed that the Commission adopt several new rules, including revisions to the allocation rules for non-party political committees, and a clarified definition of the statutory term “contribution” to include funds received in response to solicitations that indicate the funds will be used to promote or oppose federal candidates.¹⁴

The Commission approved the general counsel’s proposal to modify the allocation system and to clarify the definition of “contribution.”¹⁵ The new rules took effect on January 1, 2005.¹⁶

¹² Comments of Democracy 21 *et al.*, *supra* n.1 at 3, 14-20.

¹³ Comments of America Coming Together re Notice 2004-6 (Apr. 5, 2004) at 35.

¹⁴ Agenda Document 04-75 (Aug. 19, 2004), *available at* <http://www.fec.gov/agenda/2004/mtgdoc04-75.pdf>.

¹⁵ “Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees,” 69 Fed. Reg. 68,056 (Nov. 23, 2004).

ARGUMENT

A. The Challenged Rules Regulate Contributions and Are Therefore Subject Only to “Less Rigorous” Scrutiny.

The district court properly rejected EMILY’s List’s argument that the allocation regulations, 11 C.F.R. § 106.6(c), (f), are the “functional equivalent of spending limits” and, as such, are subject to strict scrutiny. Brief of Plaintiff-Appellant (“Br.”) at 20; *see also* 569 F. Supp. 2d at 38-40. This court should do the same. This court should likewise reject EMILY’s List’s argument, raised for the first time on appeal, that the solicitation regulation, *see* 11 C.F.R. § 100.57(a), also warrants strict scrutiny.

The reason EMILY’s List attempts to cast the regulations as “spending limits” is because the Supreme Court has found a “fundamental constitutional difference” between contribution limits and expenditure limits for the purposes of First Amendment review. *Colorado Republican Campaign Committee v. FEC*, 518 U.S. 604, 614 (1996). Because expenditure limits bar individuals from “any

¹⁶ The epilogue to the rulemaking was a subsequent FEC enforcement proceeding, in which the Commission concluded that ACT illegally spent about \$100 million of soft money to influence the 2004 presidential election, in violation of the FEC’s pre-2005 allocation regulations. As part of a settlement, ACT agreed to pay a civil penalty of \$775,000 – less than one percent of the amount of its illegal spending. *See* Conciliation Agreement in the Matter of America Coming Together, MUR 5403 and 5466 (Aug. 23, 2007), *available at* <http://eqs.nictusa.com/eqsdocs/000061A1.pdf>.

significant use of the most effective modes of communication,” *see Buckley v. Valeo*, 424 U.S. 1, 19-20 (1976), the Court holds them to strict scrutiny. *Id.* at 44-45; *McConnell*, 540 U.S. at 134-35. Contribution limits are less burdensome of speech because they “permit[] the symbolic expression of support” for a candidate, and hence warrant “less rigorous” review. *McConnell*, 540 U.S. at 135, 137.

Although EMILY’s List’s motivation for classifying the challenged regulations as “spending limits” is clear, its rationale for such a classification is not. It offers no reason why the solicitation regulation – which clarifies the FECA’s definition of “contribution” – warrants the strict scrutiny reserved for expenditure limits, making only the extraneous claim that the regulation is “overbroad” and “nebulous.” Br. at 21.

EMILY’s List fares little better with respect to the allocation rules. It asserts that these rules function as an expenditure limit because they “prohibit EMILY’s List from supporting state and local candidates in certain ways when its federal funds are exhausted.” Br. at 20. But this is simply incorrect. The allocation rules in no way “prohibit” or limit the amount of EMILY’s List’s expenditures on behalf of state and local candidates. They merely establish the circumstances in which EMILY’s List is required to use funds raised in compliance with the federal contribution limits.

Indeed, the allocation regulations are directly analogous to the soft money provisions in Title I of BCRA, which were upheld in their entirety in *McConnell*. Title I requires national political party committees to use only federally-regulated hard money for all their spending, *see* 2 U.S.C. § 441i(a), and state party committees to do so for certain defined “federal election activities,” *see* 2 U.S.C. § 441i(b). As the Court noted in *McConnell*, however, “neither provision in any way limits the total amount of money parties can spend. Rather, they simply limit the source and individual amount of donations. That they do so by prohibiting the spending of soft money does not render them expenditure limitations.” 540 U.S. at 139.

Precisely the same is true of the Commission’s allocation regulations here: they do not limit the total amount of spending by a non-connected committee like EMILY’s List, but rather require it to use federally regulated funds for some or all of that spending. Thus, like Title I of BCRA, the allocation provision “does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.” *McConnell*, 540 U.S. at 138. In *McConnell*, the Court reviewed the constitutionality of Title I by “the less rigorous scrutiny applicable to contribution limits.” *Id.* at 141. That same standard should apply here.

Nor does EMILY's List's invocation of the Supreme Court's decision in *WRTL II* provide support for the application of strict scrutiny here.

WRTL II considered the constitutionality of Title II of BCRA, which *banned* corporations and unions from spending treasury funds for "electioneering communications," *i.e.*, advertisements referencing a federal candidate that are broadcast shortly before an election. Strict scrutiny was appropriate in *WRTL II* because the challenged regulation was a direct *prohibition* of corporate expenditures. This level of review was consistent with the prior rulings of the Court, which have held that a prohibition on corporate spending is subject to strict scrutiny. *See, e.g., Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990).

By contrast, the rule at issue here seeks to enforce the federal contribution limits by regulating how a federal political committee must allocate its spending between its federal and non-federal accounts. *McConnell* made clear that such an allocation rule is merely a restriction on contributions, and is therefore constitutional if it is "closely drawn to match a sufficiently important interest." *McConnell*, 540 U.S. at 136, *quoting FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (internal quotations omitted).

EMILY's List nevertheless maintains that, under *WRTL II*, strict scrutiny applies here because, it argues, EMILY's List's non-federal fund is analogous to

WRTL, the non-profit corporation in *WRTL II*. EMILY's List further theorizes that its federal account is analogous to WRTL's federal PAC. According to EMILY's List, the Court in *WRTL II* strictly scrutinized a law which required certain communications to be funded from the federal account (*i.e.*, from WRTL's PAC) instead of from the non-federal account (*i.e.*, from WRTL's corporate treasury funds). *Id.* Continuing this strained analogy, EMILY's List argues that this Court likewise should apply strict scrutiny to the allocation rules that require spending from EMILY's List's federal account, instead of from its non-federal account.

But this analogy is a false one: a corporation (*e.g.*, WRTL) and the non-federal account of a federal political committee (*e.g.*, EMILY's List's non-federal account) are completely different kinds of entities, and the scrutiny applied to the regulation of the former says little about the permissible scope of regulation of the latter. *See, e.g., California Medical Association (CalMed) v. FEC*, 453 U.S. 182, 201 (1981) (noting that the "differing restrictions" applicable under FECA to political committees and corporations "reflect a judgment by Congress that these entities have differing structures and purposes, and that they therefore may require different forms of regulation").

EMILY's List has registered as a federal political committee, thereby acknowledging that it meets both the statutory definition of a "political committee"

and that it has a “major purpose” to influence elections. This latter test was originally formulated as a narrowing construction to resolve concerns of vagueness and overbreadth relating to the statutory definition of “political committee.” The *Buckley* Court construed the term “political committee” to encompass only “organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate.*” 424 U.S. at 79 (emphasis added). The activities of such “major purpose” groups “can be assumed to fall within the core area sought to be addressed by Congress. They are, *by definition, campaign related.*” *Id.* (emphasis added).

Thus, EMILY’s List status here as a federal political committee means that its expenditures are presumptively related to federal elections. Requiring a federal political committee to fund presumptively campaign-related activities with its federal account, *i.e.* with funds raised under federal contribution limits, does *not* constitute a “substantial burden” on its political speech warranting strict scrutiny review.

The Court in *WRTL II*, by contrast, did not address the regulation of a “major purpose” group, such as EMILY’s List. The far different issue before the Court was the constitutionality of a law that restricted the spending of treasury funds by a corporation, an entity that does *not* have a “major purpose” to influence elections and whose spending is *not* “by definition, campaign related.” *Buckley*,

424 U.S. at 79. Requiring a “non-major purpose” group such as the WRTL corporation to form a federal PAC (*i.e.* a federal account) in order to buy *any* ad that refers to a federal candidate in the pre-election period was, in the Court’s view, a significant burden that justified heightened scrutiny, and could be sustained only if the spending was clearly campaign-related, *i.e.*, for express advocacy or the “functional equivalent of express advocacy.” *WRTL II*, 127 S.Ct. at 2667. The same is not true of a federal political committee such as EMILY’s List, whose activities are, by definition, campaign-related.

B. The Challenged Regulations Implement the Federal Contribution Limits and Therefore Serve the State Interest in Preventing Corruption and the Appearance of Corruption.

EMILY’s List complains that the FEC’s Explanation and Justification for the challenged rules did not include “a record of attempted circumvention by nonconnected committees” or “record evidence that nonconnected committees had been complicit in corrupt practices.” Br. at 26-27. From this observation, EMILY’s List leaps to the unfounded conclusion that there is *no* governmental interest furthered by the challenged regulations sufficiently important to pass muster under the First Amendment.

This argument is deliberately short-sighted. The purpose of the allocation regulations, 11 C.F.R. § 106.6(c), (f), is to prevent circumvention of the federal contribution limits in circumstances where a federal political committee engages in

both federal and non-federal activity. The purpose of the contribution solicitation rule at 11 C.F.R. § 100.57 is to clarify the statutory definition of “contribution,” *see* 2 U.S.C. § 431(8)(A)(i). Thus, because the challenged regulations both implement the federal contribution limits, it follows that the regulations serve the same governmental purposes served by the contribution limits. And the contribution limits applicable to non-connected political committees were specifically upheld in the Supreme Court’s *CalMed* decision because they advance the governmental interest in “preventing circumvention of the very limitations on [individual] contributions that [the Supreme] Court upheld in *Buckley*.” *CalMed*, 453 U.S. at 197-98. EMILY’s List overlooks this decision entirely, failing to cite it even once in its brief. But the FEC could justifiably rely on the *CalMed* decision and the record developed in that litigation as a basis for promulgating the challenged regulations; there is no legal requirement that an administrative agency restate the settled case law supporting the constitutionality of its governing statute every time it adopts or amends a regulation to implement the statute.

Moreover, EMILY’s List’s assertion that there was no “record of attempted circumvention” is plainly wrong. *Amici* submitted multiple filings into the record of the 2004 rulemaking detailing the evasion of the FEC’s then-existing allocation rules by ACT. *See supra* Background, Section B; *see also* 569 F. Supp. 2d at 28 n.7. Admitting as much, EMILY’s List makes the alternative argument that the

evidence of ACT's abuses was an insufficient basis for the promulgation of the challenged allocation rules. Br. at 27. But ACT was the largest non-party committee active in the 2004 election,¹⁷ and was found to have improperly financed approximately \$100 million of campaign activities with soft money.¹⁸ Not only was it permissible for the FEC to adopt a rule halting circumvention of the federal contribution limits by ACT (and similar organizations), but the FEC would have been in dereliction of its statutory obligation to enforce FECA had it ignored such flagrant abuses.

C. The Challenged Regulations Are Constitutional and Do Not Exceed the FEC's Statutory Authority.

1. The Minimum Allocation Percentage Does Not Violate the First Amendment and Represents a Reasonable Exercise of the FEC's Authority.

The fallacy of EMILY's List's challenge to the minimum allocation percentage is its apparent assumption that the pre-2005 "funds expended" allocation method was constitutionally and statutorily *required*.

¹⁷ The Center for Responsive Politics calculates that ACT was the largest non-connected PAC in the 2003-04 election cycle in terms of both its receipts and expenditures. See "Top PACs" at <http://www.opensecrets.org/pacs/toppacs.php?cycle=2004&Type=E&filter=P>.

¹⁸ See Conciliation Agreement at *supra* note 16.

As a federally registered political committee, which has never denied that its major purpose is to influence federal elections, EMILY's List does not have a constitutional or statutory entitlement to any particular system of allocation, or indeed, to any system of allocation at all. *See* 569 F. Supp. 2d at 45. FECA does not mandate allocation for federal political committees. To the contrary, FECA mandates that funds spent “for the purpose of influencing” a federal election be subject to the contribution limits and source prohibitions of the law. 2 U.S.C. § 431(9)(A)(i). It would certainly be a permissible interpretation of the statute for the Commission to conclude that when a federal political committee spends funds on “mixed” or generic activities that clearly impact federal elections, such spending is “for the purpose of influencing” federal elections and accordingly should be funded exclusively with federal funds.

The *Common Cause* court reached this conclusion, holding that the Commission had the discretion to require that such “mixed” activities be funded entirely with federal funds: “[I]t is possible that the Commission may conclude that *no* method of allocation will effectuate the Congressional goal that *all* monies spent by state political committees on those activities permitted in the 1979 amendments be ‘hard money’ under the FECA.” 692 F. Supp. at 1396 (emphasis in original).

In *McConnell*, the Supreme Court made a similar point, noting, with justified skepticism, that the law did not mandate the FEC's decision to permit party committees to allocate:

Shortly after *Buckley* was decided, questions arose concerning the treatment of contributions intended to influence both federal and state elections. *Although a literal reading of FECA's definition of "contribution" would have required such activities to be funded with hard money*, the FEC ruled that political parties could fund mixed-purpose activities – including get-out-the-vote drives and generic party advertising – in part with soft money.

540 U.S. at 123 (emphasis added). The Court upheld Congress' decision to abolish allocation entirely for national party committees – in large part because it found that FECA “was subverted by the creation of the FEC's allocation regime,” which enabled party committees “to use vast amounts of soft money in their efforts to elect federal candidates.” *Id.* at 142. If allocation as created by the FEC actually *subverts* FECA, it certainly cannot be a regulatory mechanism that is *required* by FECA.

The allocation system, thus, is little more than an act of administrative grace. The FEC could have chosen to require that federal committees fund their generic activities entirely with hard money.

EMILY's List nonetheless complains that the new rule lacks “proportionality” because the 50 percent requirement for funding generic activities

may not relate well to the federal proportion of a committee's candidate-specific activities. Br. at 32.¹⁹

But the supposed “proportionality” that EMILY’s List commends in the old rule was a regulatory illusion. The proportion of a committee’s candidate-specific spending that relates to federal elections may, or may not, relate well to the separate issue of whether the committee’s generic voter mobilization activities relate to federal elections. A committee could choose to run a couple of candidate-specific ads about the gubernatorial contests in Idaho and West Virginia, while also deciding to spend the vast majority of its funds on generic voter drive activity to influence the presidential race in battleground states such as Ohio and Florida. Under the FEC’s prior rule, the committee would nevertheless be able to fund its voter drive in Ohio and Florida entirely with soft money, notwithstanding its evident goal to influence the presidential race in those battleground states. Thus it

¹⁹ EMILY’s List postulates the unlikely scenario that “[i]f” it supports “just one federal candidate or allocates just one percent of its total budget to the entire class of federal candidates supported in an election cycle,” it must still pay its administrative expenses with 50 percent federal funds. Br. at 38. This is, of course, simply hypothetical, since EMILY’s List does not spend trivially on federal elections and boasts that it has “helped to elect” dozens of women to Congress. Br. at 3-4. Furthermore, this hypothetical ignores the legal point that an entity that spends only trivial amounts on federal elections would not meet the “major purpose” test, and thus would not be classified as a federal political committee in the first place.

was the Commission's *prior* rule that was arbitrary and irrational and, as was clearly demonstrated in the 2004 election cycle, subject to blatant abuse.

2. *The Rule Requiring Federal Committees to Use Federal Funds for Ads that “Refer” to Federal Candidates Is Neither Unconstitutional Nor Unreasonable.*

The Commission also modified the allocation rule for candidate-specific spending based on simple and intuitive propositions: spending that refers exclusively to federal candidates should be funded with federal funds; spending that refers exclusively to non-federal candidates can be funded with non-federal funds, and spending that refers to both federal and non-federal candidates can be funded with a mixture of federal and non-federal funds in “proportion” to the “space or time” devoted to each in the public communication. 11 C.F.R. § 106.6(f)(3).

EMILY's List argues that this allocation rule based on a “reference” to a federal candidate is overbroad and beyond the Commission's statutory authority. Br. at 29. It argues that the Supreme Court in *WTRL II* refused to allow the regulation of communications based on such a “reference standard,” and instead limited the application of Title II of BCRA to communications that were “express advocacy or its functional equivalent.” *Id.*, citing 127 S.Ct. at 2671. But that does not mean the same is required here. The Supreme Court in *Buckley* applied the narrowing construction of “express advocacy” only to expenditures by “an

individual other than a candidate or a group *other than a ‘political committee.’*” 424 U.S. at 79 (emphasis added). *Buckley* found, however, that such a construction is not necessary in connection with the spending of political committees, whose activities are, “by definition, campaign-related.” 424 U.S. at 79-80. Thus, when a political committee, such as EMILY’s List, “refers” in a public communication to a clearly identified federal candidate, it is not unreasonable to suppose the political committee is trying to influence the election of that candidate. By contrast, when a corporation – a group that does not have a “major purpose” to influence elections – refers to a federal candidate, the same presumption does not arise.

EMILY’s List also attempts to show the rule is overbroad by offering a list of improbable hypotheticals – such as an ad for a state candidate that mentions an endorsement by a federal candidate. Br. at 28-29.

The rule itself provides the best answer to these hypothetical applications. Although EMILY’s List suggests that a “mere reference” to a federal candidate in a communication may require use of “100 percent federal funds” or “at least 50 percent federal money,” *id.* at 28, this is wrong as to the hypotheticals cited. For an ad that “refers to” both federal and non-federal candidates, the rule requires only an allocation of federal funding that is “based on the proportion of space or time devoted to each clearly identified Federal candidate as compared to the total

space or time devoted to all clearly identified candidates.” 11 C.F.R. § 106.6(f)(3)(i). Thus, if the hypothetical endorsement ad is primarily about the state candidate, and refers only incidentally to the federal candidate’s endorsement, the rule requires only small amount of federal funding *proportional* to the space devoted to the federal candidate.

In other words, the rule governing “references” to both federal and non-federal candidates embodies the very proportionality that EMILY’s List faults the rule on allocation of generic activities for lacking.

3. The Solicitation Rule Is Constitutional and Within the FEC’s Statutory Authority.

FECA broadly defines a “contribution” to include “anything of value” given “for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). The Commission’s new rule clarifies that a “contribution” encompasses any donation made “in response to any 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.” 11 C.F.R. § 100.57. As the district court held, the new rule, “prevent[s] the circumvention of these contribution limits,” and thereby “serve[s] the important governmental purposes of preventing corruption and the appearance of corruption.” 569 F. Supp. 2d at 45; *see also The Real Truth About Obama v. FEC*, 2008 WL 4416282 at *11-

13 (E.D.Va. 2008) (finding that plaintiff was unlikely to succeed on the merits of its constitutional challenge to solicitation rule).

EMILY's List challenges the rule by mischaracterizing it – arguing that the rule is not properly tailored because it “creat[es] peril for any organization raising funds while mentioning a federal candidate.” Br. at 34. But the new definition of “contribution” does *not* apply merely because of a solicitation's “mention” of a federal candidate. Rather it applies only if the solicitation refers to a candidate *and also* indicates that the donated funds will be used to support or oppose the election of the referenced candidate. There is no “risk” to EMILY's List by merely referring to a federal candidate in a solicitation, unless the language of the solicitation goes beyond that. Indeed, the one example EMILY's List proffers of a communication that would be improperly covered by the solicitation rule goes far beyond a mere reference to a federal candidate: the hypothetical message from Senator Debbie Stabenow concludes with the classic fundraising pitch, “That's why I need your help.” *Id.*, citing FEC AO 2005-13.

More fundamentally, EMILY's List's complaint about the tailoring of the solicitation rule overlooks that the rule is far narrower than the statutory definition of contribution – which, despite its breadth, was approved in *Buckley* despite claims of unconstitutional vagueness. 424 U.S. at 24. As the solicitation rule

provides the regulated committees with more, not less, guidance than the statutory definition, the rule is clearly constitutional.

CONCLUSION

For these reasons, the district court's decision should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)
AND CIR. R. 32(a)(2)**

Pursuant to Fed. R. App. P. 29(c)(5) and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing *amici* brief complies with the length requirements of Fed. R. App. P. 29(d), Fed. R. App. P. 28.1(e)(2)(A)(i) and Cir. R. 32(a)(2). I have relied on the word count feature of Microsoft Word 2000 to calculate that the brief contains 6986 words. I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionately spaced typeface using Microsoft Word 2000 in Times New Roman font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2009, I served a copy of the foregoing BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE on the following counsel of record, via email (where email addresses are available and known) and by United States mail, first-class postage prepaid:

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