ORAL ARGUMENT SCHEDULED FOR DECEMBER 13, 2005

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

No. 05-5160

EMILY'S LIST,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal From The United States District Court For The District Of Columbia

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BRIEF *AMICI CURIAE* FOR SENATORS JOHN McCAIN AND RUSSELL FEINGOLD, REPRESENTATIVES CHRISTOPHER SHAYS AND MARTIN MEEHAN, CAMPAIGN LEGAL CENTER, DEMOCRACY 21, AND THE CENTER FOR RESPONSIVE POLITICS SUPPORTING APPELLEE

TREVOR POTTER
J. GERALD HEBERT
PAUL S. RYAN
Campaign Legal Center
1640 Rhode Island Avenue, N.W., Suite 650
Washington, D.C. 20036
(202) 736-2200
Counsel for Campaign Legal Center and individual *amici*

LAWRENCE NOBLE
Center for Responsive Politics
1101 14th Street, N.W., Suite 1030
Washington, D.C. 20005
(202) 857-0044
Counsel for Center for Responsive Politics

DONALD J. SIMON
Sonosky, Chambers, Sachse, Endreson & Perry, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240
Counsel for Democracy 21

FRED WERTHEIMER
Democracy 21
1825 I Street, N.W., Suite 400
Washington, D.C. 20005
(202) 429-2008
Counsel for Democracy 21 and individual *amici*

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IN THE UNITED STATE COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMILY'S LIST,

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v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellees.

Appeal From The United States District Court For The District Of Columbia
Civil Action No. 05-0049 (CKK)

CERTIFICATE OF COUNSEL AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's Rule 28(a)(1), John McCain, Russell Feingold, Christopher Shays, Martin Meehan, Democracy 21, The Campaign Legal Center, and The Center for Responsive Politics, *amici curiae* in the above-captioned case, submit this Certificate of Counsel. Pursuant to Rule 29 of this Court, *amici* McCain, Feingold, Shays, Meehan, Democracy 21, The Campaign Legal Center, and The Center for Responsive Politics timely filed in this Court a written representation that all parties to this appeal had consented to their participation.

(A) Parties and *Amici*. All parties, intervenors, and *amici* appearing before the District Court and in this Court are listed in the brief for the Federal Election Commission.

(B) Rulings Under Review. References to the ruling at issue appear in the brief for the Federal Election Commission.

(C) Related Cases. This case has not previously been before this Court or a court other than the District Court below. *Amici* are not aware of any "related cases," as that term is defined in D.C. Cir. R. 28(a)(1)(C), currently pending in this Court or any other Court.

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STATEMENT OF INTEREST

Amici Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, and Representative Martin Meehan are the four principal sponsors of the Bipartisan Campaign Reform Act of 2002. They participated as intervening defendants in *McConnell v. FEC,* 540 U.S. 93 (2003) and have remained active in other proceedings before the Federal Election Commission ("FEC"), including the rulemaking on political committee allocation at issue in this case.[1]

Amici Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics are non-profit, non-partisan policy organizations that have extensive experience in political reforms related to the role of money in the political process, and specifically to issues related to the enactment, constitutionality and implementation of campaign finance laws. All three groups filed written comments and testified before the FEC on the rulemaking that is challenged in this action.[2]

[1] S*ee* comments of Congressional *amici* re Notice 2004-6 (April 9, 2004), *at* http://www.fec.gov/pdf/nprm/political_comm_status/comm2/02.pdf.

[2] *See* comments of organizational *amici* re Notice 2004-6 (April 5, 2004), *at* http://www.fec.gov/pdf/nprm/political_comm_status/simon_potter_nobelsanford.pdf.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, to halt the rapidly escalating flow of soft money[3] into federal elections. In the 2002 campaign, the last conducted under the discredited and corrupt soft money system, *a half billion dollars* of soft money flowed through political party accounts to influence federal campaigns. The Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003), upheld - in their entirety - the provisions of BCRA aimed at stopping the corruption and appearance of corruption caused by the soft money regime.

BCRA accomplished its basic goal in the 2004 election of ending the flow of soft money through political party committees into federal elections, and stopping federal officeholders and candidates from soliciting soft money funds. Nevertheless, soft money continued to be spent through the use of so-called "section 527" groups,[4] as well as for voter mobilization activities clearly targeted to federal elections. The prime example of the latter was America Coming Together ("ACT"), a group registered with the FEC as a political committee. ACT manipulated FEC rules governing how a political committee could "allocate" between a federal and a non-federal account its expenses for voter mobilization drives that affect both federal and non-federal elections. Even though ACT was formed, funded and operated for the overriding purpose of influencing the 2004 presidential election, it used soft money to fund *98 percent* of its activities.

[3] "Soft money" is used to refer to funds that do not comply with the contribution limits and source prohibitions of federal law.

[4] These entities, registered as "political organizations" under 26 U.S.C. § 527, did not register with the FEC as "political committees" under the federal campaign finance laws, allowing them to raise and spend funds while avoiding federal contribution limits and source prohibitions.

By late 2003, it was apparent that these twin avenues of evasion would be used to infuse soft money into the 2004 federal elections. Efforts were made – including by *amici* here – to urge the FEC to take firm and prompt steps to shut down these loopholes. The FEC responded by instituting a rulemaking in March, 2004 to examine both of these issues. The Commission took *no* action on the problem of section 527 groups,[5] but it did modify its allocation rules in three ways. First, in order to prevent a federal political committee from spending almost exclusively soft money on voter mobilization activities for the purpose of influencing a federal election, the Commission replaced the "funds expended" method of allocation with a minimum 50 percent allocation ratio for those activities. 11 C.F.R. § 106.6(c) (2005). Second, public communications that refer exclusively to federal candidates must be funded exclusively with federal funds, those that refer exclusively to non-federal candidates can be funded exclusively with non-federal funds, and, finally, public communications that refer to both federal and non-federal candidates can be funded with a mixture of federal and non-federal funds allocated on the basis of the "proportion of space or time" devoted to each. 11 C.F.R. § 106.6(f)(3)(i) (2005). Finally, the Commission clarified the Federal Election Campaign Act ("FECA") 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).

These three rules are challenged here by appellant EMILY's List, a federal political committee headed by Ellen Malcolm, a founder and former president of ACT.[6] EMILY's List seeks to reverse the district court's denial of a preliminary injunction to enjoin the Commission's

[5] The Commission's failure to regulate 527 groups is the subject of a pending lawsuit brought by *amici* Representatives Shays and Meehan. *Shays and Meehan v. FEC*, Civ. No. 04-1597 (D.D.C.) (EGS) (complaint filed Sept. 14, 2004).

[6] Counsel for EMILY's List served as counsel to ACT in the rulemaking at issue.

rules from going into effect. Since EMILY's List failed every element of the test for a preliminary injunction, the district court properly denied the motion for a preliminary injunction.

First, appellant cannot show a likelihood of success on the merits. The "allocation" rule challenged in this action sets a floor requiring a federal political committee to spend at least 50 percent federal funds for its generic activities (such as partisan voter mobilization drives) and for its administrative expenses. Far from being arbitrary or overreaching, the rule is in fact modest: it still allows a *federal* committee to fund its activities that affect both federal and non-federal elections with 50 percent *non-federal* funds.[7] The rule regarding allocation of expenses for political communications that reference federal candidates, non-federal candidates or both, is also reasonable and narrow, tailoring the allocation of federal or non-federal funds required to the proportion of the communication focusing on each type of candidate. Lastly, the appellant's challenge to the "solicitation" rule fails, because the Commission has authority under FECA to interpret the term "contribution" and its interpretation is reasonable.

Second, EMILY's List failed to show not only irreparable harm from the new rule, but any harm at all. FEC disclosure reports filed by EMILY's List show that for the last five years it has claimed a 50-50 allocation ratio for its own allocated spending. EMILY's List has long been operating in compliance with the new rule, and has not shown it will be operating differently in the future. Moreover, EMILY's List is not harmed by the new solicitation rule. While EMILY's List claims it will possibly need to raise more federal funds, it does not explain how it is harmed by a rule requiring it to treat as "contributions" funds received in response to a message indicating that the funds will be used to support or oppose a federal candidate. This treatment is

[7] As one court found, the FEC could have concluded a federal political committee must use 100 percent federal funds to finance such activities. *Common Cause v. FEC*, 692 F. Supp. 1391, 1395 (D.D.C. 1987).

not only consistent with FECA, it is compelled by it. If appellant's 'harm' is that it must live under federal contribution limits, source prohibitions and reporting requirements for money it raises for the purpose of supporting or opposing federal candidates, its complaint has been foreclosed since the enactment of FECA more than 30 years ago, and the Supreme Court's decision in *Buckley* upholding that law.

Finally, the public interest would have been harmed by the issuance of a preliminary injunction, reinstating a failed and discredited allocation regime that was exploited in the last election for massive circumvention of the FECA. An injunction would have undermined the compelling public purposes served by the federal campaign finance laws' contribution limits and source prohibitions.

The decision of the district court to grant (or deny) a preliminary injunction is not to be disturbed "except for abuse of discretion or clear error" or if "it rests on an erroneous premise as to the pertinent law. *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982). The holding of the district court below denying a preliminary injunction is well grounded in the law and is free from error. Accordingly, the decision below should be affirmed.

ARGUMENT

I. Background

A. The allocation system

1. *Origins of allocation.* Early in its history, the FEC confronted the question of how to treat federal political committees that engage in "mixed" activities that influence *both* federal and non-federal campaigns.[8] *See McConnell v. FEC*, 251 F. Supp. 2d 176, 195 (D.D.C. 2003) (*per curiam*) (discussing the history of the allocation system, and observing that the Commission over time "struggled" with this issue). Although it determined that "mixed" activities could be allocated between federal and non-federal accounts,[9] the Commission at first did not regulate a committee's means of allocation.

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). In 1987, the "reasonable basis" rule was found too permissive as it allowed a committee, as a practical matter, to determine its own allocation ratio, and thus "fail[ed] to regulate improper or inaccurate allocation between federal and nonfederal funds." *Common Cause*, 692 F. Supp. at 1395. In response, the Commission, in 1990, promulgated new rules that established more specific allocation formulae.

[8] Examples of "mixed" activities include (1) efforts to register and bring to the polls voters who then cast ballots in federal and non-federal campaigns, and (2) "generic" activities that urge voters to support candidates of a certain party, without mentioning specific candidates, such as "vote Democratic." 11 C.F.R. § 100.25.

[9] The Commission flip-flopped on whether a state party committee must use federal funds for voter mobilization efforts or if it could allocate those funds. Ad. Op. 1975-21 permitted a state party committee to allocate administrative and voter registration expenses; Informational Letter 1976-72, reversed and ruled that a state party committee had to use entirely federal funds for voter mobilization efforts; Ad. Op. 1978-10, reversed again and held that state parties could allocate funds for voter drive activities.

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

Under the 1990 rules, committees were 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). Committees were also permitted "to allocate payments involving both expenditures on behalf of one or more clearly identified federal candidates and disbursements on behalf of one or more clearly identified non-federal candidates." 11 C.F.R. § 106.1(a) (2002).

The latter type of spending was to be allocated "according to the benefit reasonably expected to be derived." *Id*. In the case of a publication or broadcast 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.

But the rule distinguished between party and non-party committees in how to allocate spending for administrative expenses and generic voter drive activity. A non-party committee's ratio for allocating these costs was determined pursuant to the "funds expended method." 11 C.F.R. § 106.6(c)(1) (2002).[10] For national party committees, allocation of "mixed" expenses

[10] "[E]xpenses shall 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 . . . In calculating its federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific federal candidates." 11 C.F.R. § 106.6(c)(1) (2002) (emphasis added).

was done by fixed percentages, depending on the year in which the spending was conducted.[11] State party committees were required to use a different method based on a complex calculation of the state's "ballot composition." 11 C.F.R. § 106.5(d)(1)(i) (2002).

2. *BCRA and McConnell*. Political committees operated under these allocation rules from their effective date in 1991 until the effective date of BCRA in November, 2002. In this period, party committees became major vehicles for circumventing the campaign finance laws and spending soft money to influence federal campaigns. In 1992, the national party committees raised about $80 million of soft money; by 2000, there was a six-fold increase to about $500 million. *See McConnell,* 251 F. Supp. 2d at 281 (Op. of Kollar-Kotelly, J.).

Congress concluded that the underlying premise of the allocation system devised by the FEC for political parties was largely a myth. Allocation did not magically segregate a party committee's spending of non-federal funds to only those activities that influence non-federal elections. Rather, the allocation system actually enabled circumvention of the law, because it authorized spending soft money on activities that were intended to and actually influenced federal campaigns.

In response, Congress passed BCRA which banned national party committees from raising or spending non-federal funds at all, thus mooting the allocation question for such committees. 2 U.S.C. § 441i(a). State party committees were allowed to continue to raise non-federal funds for non-federal races, but could not spend such funds on ads which "promote, support, attack or oppose" federal candidates. *Id*. at §§ 441i(b)(1) and 431(20)(A)(iii). Voter mobilization activities could be funded by state parties with an allocated mixture of federal funds

[11] In presidential election years a flat 65 percent of spending on generic activities and administrative expenses was allocated to the federal account, and 60 percent in non-presidential election years. 11 C.F.R. § 106.5(b)(2)(i-ii) (2002).

and specially regulated non-federal funds ("Levin" funds), but limits were placed on the size of these non-federal contributions, in addition to other restrictions. 2 U.S.C. § 441i(b)(2).

In reviewing BCRA's provisions, the Supreme Court explicitly recognized that the Commission's allocation rules for political parties had fundamentally undermined FECA. The Court stated:

> Because voter registration, voter identification, GOTV, and generic campaign activity *all confer substantial benefits on federal candidates*, the funding of such activities creates a significant risk of actual and apparent corruption.

McConnell, 540 U.S. at 168 (emphasis added). Furthermore, the Court found FECA "was subverted by the creation of the FEC's allocation regime," *id.* at 142, that allowed party committees "to use vast amounts of soft money in their efforts to elect federal candidates." *Id*. The Commission's allocation rules, the Court stated bluntly, "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, rejecting any argument that the allocation regime had been constitutionally compelled.[12] *Id.* at 186-89.

3. <u>*ACT and allocation in the 2004 campaign*</u>**.** *McConnell* addressed the operation of the allocation rules for *party* committees. Its conclusion that allocation as a regulatory mechanism "subverted" the law and "invited widespread circumvention" is equally applicable to the old "funds expended" allocation rule for *non-party* committees as well. Since the "funds expended" method applicable to non-party committees imposed no minimum federal allocation percentage, political committees engaged in an even more egregious soft money abuse than the Court in *McConnell* found the party allocation rules had permitted. In particular, the "funds expended"

[12] The Court also recognized that measures taken to avoid circumvention of the law themselves serve compelling governmental purposes. *McConnell,* 540 U.S. at 144.

allocation method allowed non-party committees to massively circumvent FECA by structuring their activities so that the federal portion of their allocated spending could be calculated at zero or close to zero – even if the committee's spending was almost entirely directed at influencing the outcome of a federal election.

This manipulation took place because of how the "funds expended" formula worked. The percentage of federal funds required to pay for a committee's generic activity and administrative costs was based entirely on the committee's *candidate-specific* disbursements. The formula compared a committee's federal candidate-specific expenditures to its total candidate-specific disbursements (excluding overhead or other generic expenses). The resulting ratio, calculated as a percentage, was then used as the federal percentage for that committee's *non-candidate-specific* spending, *i.e.*, for administrative costs and generic activities. 11 C.F.R. § 106.6 (2002).[13]

After BCRA shut down the flow of soft money through party committees into federal elections, allocation manipulation by non-party committees quickly became more than a theoretical matter. Although this case was brought by EMILY's List, the context and the background to the issuance of the FEC allocation rule challenged here is best understood by reviewing the activities of another political committee, America Coming Together ("ACT"), under the prior allocation rule.

[13] This allocation approach could readily be manipulated. If a non-connected political committee made a single small disbursement on behalf of a specific non-federal candidate, but did not undertake any expenditures on behalf of specific federal candidates, the "funds expended" allocation formula would put zero in the numerator of the fraction and calculate a zero federal allocation requirement. Thus, a committee could pay for a generic partisan voter drive – even one intended to elect a presidential candidate – *entirely* with soft money. This would be true even if the sole and explicit purpose of the committee and its donors was to elect a presidential candidate

In mid-2003, ACT organized as a federal political committee and announced its purpose to engage in massive generic voter mobilization activities to elect the Democratic presidential nominee.[14] ACT carefully avoided all but a minimal amount of federal *candidate-specific* activity. It filed FEC reports claiming an allocation ratio, calculated under the "funds expended" method, of 2 percent federal and 98 percent non-federal.[15] This percentage was applied to all of its generic spending, as well as to its administrative and overhead expenses. Since ACT was doing almost nothing other than generic voter drive activity on behalf of the Democratic presidential nominee, virtually all of its spending was funded as allocated activity. Almost all of that spending – 98 percent – was funded out of its non-federal account with soft money, even though ACT was plainly and publicly engaged in these voter mobilization activities in order to defeat President Bush, and to elect the Democratic nominee.[16]

ACT spent over $75 million dollars of soft money on these activities,[17] receiving the bulk of its funding from a handful of large donors.[18] Referring expressly to ACT, George Soros, who

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[14] Ellen Malcolm, then-president of ACT, stated ACT would conduct "a massive get-out-the-vote operation that we think will defeat George W. Bush in 2004." Thomas Edsall, *Liberals Form Fund to Defeat President; Aim is to Spend $75 Million for 2004*, THE WASHINGTON POST, Aug. 8, 2003.

[15] *See* Forms H-1 and H-2, submitted by ACT as part of its public disclosure reports filed with the FEC in 2003 (88-12) and 2004 (98-2), *at* http://query.nictusa.com/cgi-bin/fecimg/?C00388876.

[16] *See* Comments of organizational *amici*, *supra* n.2, *incorporating* Comments by organizational *amici* on AOR 2004-5 (Feb. 12, 2004), *at* http://www.fec.gov/aos/2004/aor2004-05com2.pdf (providing extensive materials about ACT's activities in support of the Democratic presidential nominee).

[17] A compilation of ACT's disclosure reports by the Center for Responsive Politics shows it spent a total of $76,270,931, *at* http://www.opensecrets.org/527s527cmtes.asp?level=C&cycle=2004.

[18] A list of ACT's donors is on the Center for Responsive Politics' website, *at* http://www.opensecrets.org/527s/527cmtedetail.asp?ein=200094706&cycle=2004&format=&tname=America+Coming+Together. George Soros was the largest individual donor; he also gave over $12 million to a 527 group, "Joint Victory Campaign 2004," which in turn donated $18.3 million to ACT. *Id.* ACT

(footnote continued)

gave $7.5 million directly to ACT, wrote 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."[19]

B. The 2004 Rulemaking

ACT's activities in early 2004 were an important backdrop for the FEC's rulemaking. In late 2003, Americans for a Better Campaign ("ABC"), a Republican political committee, submitted an advisory opinion request to the FEC seeking clarification of the law in these areas. The Commission issued a narrowly crafted response to the questions posed, Ad. Op. 2003-37,[20] but also announced that it would undertake a rulemaking on these same issues due to their scope and significance. The organizational *amici* wrote to the Commission, urged it to deal with the allocation issue in its planned rulemaking, and specifically called the Commission's attention to the manipulation of the allocation rules by ACT.[21]

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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.*

[19] George Soros, *Why I Gave*, THE WASHINGTON POST, Dec. 5, 2003. *See also,* Mark Gimein, *George Soros Is Mad As Hell*, FORTUNE, Oct. 27, 2003 (describing Soros as meeting "with half a dozen top Democratic political strategists" in an effort "to try to figure out how he could help bring down [President] Bush…").

[20] The Commission held that (1) a public communication that "promotes, supports, attacks or opposes" a federal candidate is "'for the purpose of influencing a Federal election' when made by a [registered federal] political committee," and must accordingly be funded entirely with hard money, Ad. Op. 2003-37, at 10, and (2) generic voter drive activities that do not mention a clearly identified federal candidate are subject to allocation under its section 106.6 rule, *Id.* at 13.

[21] Letter of February 25, 2004 to FEC Commissioners from Democracy 21, the Campaign Legal Center and the Center for Responsive Politics, at 1-2, *at* http://www.fec.gov/pdf/nprm/political_comm_status/exparte_commissioners.pdf.

The Commission's Notice of Proposed Rulemaking ("NPRM"), "Political Committee Status," 69 Fed. Reg. 11,736 (Mar. 11, 2004), 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. 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.*

Various alternative proposals for comment and consideration were presented in the NPRM. In addition to proposing a modification to the "funds expended" allocation method, *id.* at 11,754-55, the NPRM specifically proposed setting a minimum level of federal funds for allocated spending by non-party political committees. *Id.* at 11,759-60; 11 C.F.R. § 106.6(c)(ii)(A), (B) (Alternatives 3-A, 3-B) (proposed). It expressly raised the question and invited comment on whether a 50 percent minimum federal percentage should be imposed on some or all political committees. 69 Fed. Reg. at 11,754.

EMILY's List and all other interested parties were thus put on notice that a 50 percent minimum allocation was under consideration by the Commission. EMILY's List did not file comments in response to the NPRM, nor did EMILY's List testify during the two-day public hearing held on this rulemaking. The *amici* organizations herein supported the proposal establishing a 50 percent minimum federal allocation,[22] as did *amici* Congressional sponsors.[23]

[22] *See* Comments of organizational *amici*, *supra* n.2 at 3, 14-20. Organizational *amici* also commented that "the Commission should revise the time-space allocation method in section 106.1 to include a minimum federal percentage for communications that refer to clearly identified federal candidates." *Id.* at 15.

[23] *See* Comments of Congressional *amici, supra* n.1, at 3.

Other campaign finance groups, such as Public Citizen[24] and the League of Women Voters,[25] also filed comments supporting changes to the allocation rules. ACT, the principal beneficiary of the allocation loophole in the 2004 election, submitted comments opposing all proposed changes to the allocation rules, and specifically criticized the proposal for "a minimum federal percentage for non-connected PACs" as "arbitrary and unsupported by law."[26] There was also extensive discussion of the proposed changes to the allocation rules during the two-day public hearing on the NPRM in April, 2004.[27]

The clarified definition of "contribution" and the modification of the allocation rules passed by a vote of 4-2. Final publication of the rules was approximately two weeks after the 2004 election. "Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees," 69 Fed. Reg. 68,056 (Nov. 23, 2004). The Explanation & Justification noted that "little attention" was focused on the allocation

[24] Comments of Public Citizen, "Political committee status" [NPRM 2004-06] (April 5, 2004), *at* http://www.fec.gov/pdf/nprm/political_comm_status/public_citizen_holman.pdf.

[25] Comments of the League of Women Voters Urging Regulation of Soft Money by Section 527 Organizations (April 7, 2004).

[26] Comments of America Coming Together (April 5, 2004), at 35, *at* http://www.fec.gov/pdf/nprm/political_comm_status/america_coming_tghr_svoboda.pdf. *See also* Comments of The Media Fund, (April 5, 2004) at 20, *at* http://www.fec.gov/pdf/nprm/political_comm_status/media_fund_utrecht.pdf (calling the proposed use of minimum federal percentages a step that would make allocation "more complicated and burdensome").

[27] *See* FEC, Transcript from April 14, 2004 Public Hearing on Political Committee Status Notice of Proposed Rulemaking; Testimony of Mr. Laurence Gold, Associate General Council of the AFL-CIO, pp. 43, 114-117; Testimony of Mr. Donald Simon, Counsel to Democracy 21, pp. 47-48, 87; Testimony of Mr. Craig Holman, Public Citizen, pp. 158-61. *See also* FEC, Transcript from April 15, 2004 Testimony of Mr. Lawrence Noble, Executive Director of the Center for Responsive Politics, pp. 27, 78-80; Testimony of Mr. Robert F. Bauer, Perkins Coie LLP on behalf of America Coming Together, pp. 81-84; Testimony of Ms. Lyn Utrecht, Ryan, Phillips, Utrecht and MacKinnon on behalf of Media Fund, pp. 183-86.

issues during the public comment period, *id.* at 68,061, however, this description was made only in relative terms. Almost all of the 100,000 comments received in the rulemaking dealt not with the allocation rule, but with the impact on section 501(c) non-profit groups of other proposed regulations. But the fact that ACT, organizational and Congressional *amici*, and others all commented on the allocation rule demonstrates that the NPRM provided sufficient notice regarding the final rule.

The new rules are targeted to end a manipulation that proved to be a clear abuse during the 2004 cycle. As the Supreme Court noted in *McConnell,* "the entire history of campaign finance regulation" teaches "the hard lesson of circumvention." 540 U.S. at 165. It is clear that this technique for manipulating the allocation rules would have grown as a means of circumvention if the rule had not been changed to limit it. The two new rules adopted by the Commission took effect on January 1, 2005.

II. The Denial of the Motion for a Preliminary Injunction Should Be Affirmed.

> In this Circuit, a party seeking a preliminary injunction must meet a four-part test:
>
> 1) they had a substantial likelihood of success on the merits; 2) they would suffer irreparable injury if the injunction were not granted; 3) granting the injunction would not injure other parties; and 4) the public interest would be furthered by the injunction.

Al Fayed v. CIA, 254 F.3d 300, 303 (D.C. Cir. 2001); *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1317-18 (D.C. Cir. 1998). The district court correctly held that "all four of the considerations…weigh in favor of denial of Plaintiff's request" for a preliminary injunction.

EMILY's List v. FEC, No. 05-49 (CKK) (D.D.C. Feb. 25, 2005).[28] Thus, the decision below should be affirmed.

A. Appellant Has Not Demonstrated a Substantial Likelihood of Success on the Merits.

1. The allocation rules.

a. Appellant has no entitlement to the "funds expended" allocation rule.

As a registered federal political committee, the "major purpose" of EMILY's List is, and must be, to influence elections. *Buckley v. Valeo,* 424 U.S. 1, 79 (1976) (construing the statutory term "political committee," 2 U.S.C. § 431(4), to "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*") (emphasis added).

Appellant misguidedly argues that the 50 percent allocation method adopted by the Commission is overbroad and exceeds the Commission's statutory authority, because the rule may require it to use federal funds to pay certain non-federal voter drive expenses. This argument ignores what the Court found in *McConnell*: "federal candidates reap substantial rewards from *any* efforts that increase the number of like-minded registered voters who actually go to the polls." 540 U.S. at 167-68 (emphasis added). Rather than exceeding the Commission's authority, regulating these 'mixed activities' is clearly within its statutory authority because such

[28] Here, the third and fourth elements merge since the harm to the "other interested party," a federal agency, is reflective of the harm to the public itself. Federal campaign finance laws serve the compelling governmental purposes of preventing both "actual corruption…and the eroding of public confidence in the electoral process through the appearance of corruption." *McConnell,* 540 U.S. at 136, (quotations omitted). In this case, the Commission had powerful evidence that its prior rule resulted in massive circumvention of the laws. The district court correctly decided that enjoining the new rule would strongly harm the public and disserve the public interest by permitting the continuation, and potential expansion, of this massive circumvention, thereby undermining the compelling public interest served by the statute.

activities in substantial part do influence federal elections and thus "create[] a significant risk of actual and apparent corruption." *Id.* at 168.

Furthermore, the regulation is not overbroad. In *Common Cause,* the court stated that the FEC could have chosen to have *no* allocation at all for federal political committees, and to require that federal committees fund their generic or "mixed" activities, as well as their administrative costs, entirely with hard money. 692 F. Supp. at 1396.

Nothing in FECA mandates allocation for federal non-party political committees.[29] To the contrary, what FECA mandates is that funds spent "for the purpose of influencing" a federal election be subject to the contribution limits, source prohibitions and reporting requirements of the law. 2 U.S.C. § 431(9). It is certainly a permissible interpretation of the statute for the Commission to conclude that when a federal political committee spends funds on "mixed" or generic activities, such as voter mobilization drives – where such activities clearly have an impact on federal elections, even if only in part – that such spending is "for the purpose of influencing" federal elections and accordingly should be funded exclusively with federal funds. Indeed, as recounted above, the Commission took this position in the 1970's, if only for a brief time, with regard to state party committees. *See* Informational Letter 1976-72, *supra*, p. ____. In short, the allocation system is a matter of administrative discretion. As a federal political committee, EMILY's List is not entitled to any particular system of allocation, or indeed, to any system at all.

McConnell makes clear that the allocation system for political parties was a means for widespread circumvention of the law, not a statutory mandate. The Court upheld Congress'

[29] The only exception to this, and the only mention of allocation in FECA, is the recently enacted provision of BCRA that permits state party committees to spend "Levin" funds on an allocated basis for certain voter drive activities. 2 U.S.C. § 441(i)(b)(2).

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." 540 U.S. at 142. If allocation as created by the FEC actually *subverts* FECA, it certainly cannot be a regulatory mechanism *required* by FECA.

b. The 50 percent federal allocation rule for federal political committees is not arbitrary or capricious.

The Commission had strong grounds to end the "funds expended" method of allocation, and to provide for a minimum federal percentage for allocated spending. There was strong evidence that its existing "funds expended" allocation method was being manipulated on a massive scale to inject soft money into federal campaigns, as exemplified by ACT's activities. It was entirely proper for the Commission to take action to prevent the same abuse from recurring in future elections.

The Commission's new rule will substantially limit the kind of circumvention of the law exemplified by ACT. By requiring all non-party committees to spend "at least" 50 percent federal funds for their generic and voter drive activities, the new rule, 11 C.F.R. § 106.6(c) (2005), will prevent a federal committee from calculating a near-zero federal allocation ratio through the simple expedient of eschewing all candidate-specific federal activity. It will thus prevent a federal committee from spending almost exclusively soft money funds for generic activities and voter mobilization drives that are for the purpose and have the effect of influencing federal elections. Since the FEC could have required 100 percent federal funds to be spent, as observed by the court in *Common Cause v. FEC,* a rule requiring a minimum of 50 percent federal funding is a reasonable and modest approach.

Appellant complains that the new rule is an unreasonable "one size fits all" approach, Appellant's Br. at 17, that is not "proportional," *id*. at 4, because the 50 percent requirement for funding administrative costs and generic activities may not relate well, or even at all, to the federal proportion of a committee's candidate-specific activities. *Id*. at 26. But the supposed "proportionality" that appellant commends in the old rule was itself no more than a regulatory illusion. For example, the fact that only 2 percent of ACT's *candidate-specific* spending was federally oriented had no meaningful correlation to the purpose and effect of its generic and voter mobilization spending, which was overwhelmingly for a federal purpose – to influence the 2004 presidential election. In enabling ACT to fund tens of millions of dollars of that activity with only 2 percent federal funds, the prior rule fostered a superficial "proportionality" that was itself a falsehood. By setting a floor on the percentage of *federal* funds that must be spent by a *federal* committee on activities intended to influence, at least in part, *federal* elections, the new rule guards against a wild disproportionality that was evident in ACT's claim of right under the old rule to use 98 percent non-federal money for activity that even it claimed was for a federal purpose. The 50 percent floor is particularly appropriate for such generic voter drive activities since, as *McConnell* recognized, "federal candidates reap substantial rewards" from such activities. 540 U.S. at 167-68.

c. It is reasonable to require federal committees to use federal funds for ads that "refer" to federal candidates.

The Commission also modified the allocation rule for candidate-specific spending by a non-party political committee on public communications: those that refer exclusively to federal candidates must be funded exclusively with federal funds; those that refer exclusively to non-federal candidates can be funded exclusively with non-federal funds, and those that refer to both federal and non-federal candidates can be funded with a mixture of federal and non-federal funds

allocated on the basis of the "proportion of space or time" devoted to each in the public communication. 11 C.F.R. § 106.6(f)(3)(i) (2005). There is no minimum federal percentage required by this provision.

EMILY's List first attacks this rule on the grounds that an allocation rule based on a "reference" to a candidate is overbroad because it is not tailored to only regulate communications that influence federal elections. Appellant's Br. at 19-22. Yet this allocation rule applies to federal political committees – groups whose "major purpose," by definition, is to influence elections. When a group whose major purpose is to influence elections "refers" in a public communication to a clearly identified federal candidate running in an election, it takes no leap of faith to conclude the political committee is trying to influence the election of that candidate. By tying the amount of federal funds to the actual content of the advertisement, rather than to an arbitrary estimation of the expected "potential influence [on] federal elections" that the ad might have, Appellant's Br. at 16, the regulation is both reasonable and sufficiently narrowly tailored.

The new rule has the added advantage of providing a "bright line" test that is easily understood by political committees and easily administered by the Commission. It is reasonable for the Commission to assume that when a political committee spends money to refer to a candidate in a public communication, it is spending that money "for the purpose of influencing" the candidate's election. As such, and when it is a *federal* candidate who is "referenced" in the ad, the spending by the federal political committee falls within the scope of FECA.

Appellant's second attack on the rule is that it is beyond the Commission's statutory authority. *Id*. at 20. Instead of using its 20 years of actual experience to provide an example of how this rule could possibly effect a communication that references a federal candidate but does not influence an election, EMILY's List offers only hypotheticals at the outer reaches of the rule,

such as an ad for a state candidate that includes a reference to a federal candidate in the name of legislation (*e.g.,* "McCain-Feingold"), or that mentions an endorsement by a federal candidate. *Id.* at 20.

The rule itself provides the best answer to these hypothetical applications. For an ad that "refers to" both federal and non-federal candidates – the hypothetical endorsement ad, for instance – the rule requires only an allocation of federal funding that is "based on the proportion of space or time devoted to each" candidate. 11 C.F.R. § 106.6(f)(3)(i) (2005). An incidental reference to the federal candidate making the endorsement would thus require only a small amount of federal funding. Thus, the rule requires federal funding only if, and only to the extent, that a federal candidate is referenced, and thus only to the extent an ad will influence a federal election.

2. The solicitation rule.

FECA broadly defines a "contribution" as any "gift, . . . deposit of money. . . or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). This statutory definition has long been implemented through similarly phrased Commission regulations. *See* 11 C.F.R. §§ 100.51 – 100.56 (2002). The Commission's new rule supplements this definition to encompass any gift or 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." § 100.57 (2005).

EMILY's List challenges the rule by first mischaracterizing it. Appellant argues that if "the solicitation *refers* to a nonfederal as well as a federal candidate, at least 50 percent of the funds received must be treated as federal contributions; if the solicitation does not *refer* to a

clearly identified nonfederal candidate, 100 percent of the funds received are federal contributions." Appellant's Br. at 7 (emphasis added). But the new definition of "contribution" does *not* apply merely because a solicitation "refers" to 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 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.

B. Appellant Failed To Demonstrate It Would Suffer Irreparable Harm in the Absence of a Preliminary Injunction

There are three reasons why EMILY's List failed to demonstrate it would suffer irreparable harm in the absence of an immediate preliminary injunction. First, throughout its recent history, EMILY's List has reported a 50-50 ratio for allocating spending between its federal and non-federal accounts.[30] Thus, appellant has long characterized its own activities as embodying precisely the same allocation split that the regulation it challenges now requires.

Second, EMILY's List can engage in all of the spending for all of the speech it wishes. This includes spending on generic or voter drive activity for which some portion must be funded with federal money. The *only* issue is whether that federal portion is 50 percent or some lower percentage. As the Supreme Court said in *Buckley,* "the overall effect of [FECA] contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons." 424 U.S. at 21-22. The same is true here. EMILY's List is free to engage in all of the generic spending it wants. If the new rule requires it to use a greater percentage of federal funds in the future than it has in the past (a point not obvious from the record of its past

[30] In H-1 and H-2 schedules filed by EMILY's List for the last five years, it has claimed a 50-50 allocation ratio. *Available at,* http://query.nictusa.com/cgi-n/dcdev/forms/.

allocation), then EMILY's List simply has to raise additional federal funds to satisfy the new allocation rule. Having to raise such funds does not constitute cognizable injury. *E.g., Buckley v. Valeo,* 424 U.S. 1, 22 (1976) (effect of contribution limits "is merely to require candidates and political committees to raise funds from a greater number of persons.") There is no harm to its speech, irreparable or otherwise, in being required to fund its election-related speech with hard money, much less with just 50 percent hard money.

V. Conclusion

Amici respectfully submit that the decision below should be affirmed.

Respectfully submitted,

/s/ J. Gerald Hebert

Trevor Potter (Bar No. 413778) J. Gerald Hebert (Bar No. 447676) Paul S. Ryan CAMPAIGN LEGAL CENTER 1640 Rhode Island Avenue, N.W. Suite 650 Washington, D.C. 20036 (202) 736-2200 *Counsel for the Campaign Legal Center and individual amici*	Donald J. Simon (Bar No. 256388) SONOSKY, CHAMBERS, SACHSE ENDRESON & PERRY, LLP 1425 K Street, N.W. Suite 600 Washington, D.C. 20005 (202) 682-0240 *Counsel for Democracy 21*
Lawrence Noble (Bar No. 244434) CENTER FOR RESPONSIVE POLITICS 1101 14th Street, N.W. Suite 1030 Washington, D.C. 20005 (202) 857-0044 *Counsel for Center for Responsive Politics*	Fred Wertheimer (Bar No. 154211) DEMOCRACY 21 1825 I Street, N.W. Suite 400 Washington, D.C. 20005 (202) 429-2008 *Counsel for Democracy 21 and individual amici*

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

As required by Fed.R.App.P. 32(a)(7)(C)(i), I hereby certify that the foregoing brief complies with the length requirements of Fed.R.App.P. 32(a)(7)(B). I have relied upon the word count feature of the Microsoft Word software application; the brief contains 6948 words.

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

/s/ J. Gerald Hebert

J. GERALD HEBERT
(D.C. Bar No. 447676)
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., NW, Ste 650
Washington, D.C. 20036
Tel: (202) 736-2200

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of October, 2005, two copies of the foregoing Brief *Amici Curiae* for Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Democracy 21, the Campaign Legal Center, and the Center for Responsive Politics was served by regular mail, first-class, postage prepaid, and addressed as follows:

Robert F. Bauer, Esq.
Marc E. Elias, Esq.
Ezra W. Reese, Esq.
PERKINS COIE, LLP
607 14th Street, N.W.
Washington, D.C. 20005
(202) 628-6600

Richard B. Bader
David Kolker
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202)694-1650

/s/ J. Gerald Hebert

J. Gerald Hebert