UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY's LIST,	)	
	)	
Plaintiff,	)	
	)	
	)	
v.	)	**Civil No. 05-00049 (CKK)**
	)	
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OF *AMICI CURIAE*
SENATOR JOHN McCAIN, SENATOR RUSSELL FEINGOLD,
REPRESENTATIVE CHRISTOPHER SHAYS,
DEMOCRACY 21 AND THE CAMPAIGN LEGAL CENTER,
IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

J. Gerald Hebert (Bar No. 447676)
Paul S. Ryan (Bar No. 502514)
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

Fred Wertheimer (Bar No. 154211)
DEMOCRACY 21
1875 I Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 429-2008

Counsel for Democracy 21 and individual amici

October 9, 2007

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases*:** ***Page(s)

***Statutes**:*

Regulations:

Other Authorities:

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 halt the rapidly escalating flow of soft money (funds that do not comply with the contribution limits and source prohibitions of federal law) 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. Because soft money was found to cause corruption and the appearance of corruption, the provisions of BCRA aimed at stopping soft money were upheld on a facial basis, in their entirety, by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003).

BCRA accomplished its basic goal in the 2004 and 2006 elections: it ended the flow of soft money through political party committees into federal elections and stopped federal officeholders and candidates from soliciting soft money funds. Nevertheless, new vehicles have arisen to continue the spending of soft money to influence federal elections. This was particularly evident in the 2004 presidential campaign.

Two principal techniques were exploited there. The first involved the use of so-called "section 527" groups, entities registered with the Internal Revenue Service as "political organizations" under section 527 of the tax code, 26 U.S.C. § 527, but not registered with the Federal Election Commission (FEC) as "political committees" under the Federal Election Campaign Act (FECA). These 527 groups, such as The Media Fund and Swift Boat Veterans for Truth, thus operated outside the federal campaign finance laws, and spent tens of millions of

dollars of soft money in the 2004 election for broadcast ads that overtly promoted or opposed the presidential candidates.[1]

The second technique – at issue in this case – involved soft money funds spent for voter mobilization activities. The prime example of this was America Coming Together ("ACT"), a group that did register with the FEC as a political committee, but that manipulated the then-existing FEC rules governing how a political committee could "allocate" between federal "hard" money and non-federal "soft" money its spending for voter mobilization drives that affect both federal and non-federal elections. Even though it was patently clear that ACT was formed, funded and operated 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 the costs of its activities with soft money. ACT spent over $100 million dollars, virtually all of it soft money, for voter mobilization efforts to influence the presidential election in key presidential battleground states.[2]

By late 2003, it had become apparent that these twin avenues of evasion would be used by political operatives to partially continue the soft money system in the 2004 federal elections. Efforts were made – including by *amici* – to urge the FEC to take firm and prompt steps to shut down these avenues for circumvention of the campaign finance laws. The FEC responded by instituting a rulemaking in March, 2004 to examine both of these issues.

This rulemaking ultimately concluded nine months later in November, 2004 – too late to have any impact on the 2004 campaign. The Commission issued no new rule on the problem of

---

[1] The spending by section 527 groups in the 2004 campaign is compiled on the website of the Center for Responsive Politics, *at* http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2004.

[2] *See* discussion of ACT's spending at pp. 12-18, *infra.*

section 527 groups that fail to register as political committees,[3] but it did modify its allocation rules to prevent, on a prospective basis, the kind of manipulation of those rules that resulted in a federal political committee, such as ACT, spending almost exclusively soft money on voter mobilization activities that were plainly for the purpose of influencing a federal election. 11 C.F.R. § 106.6(c) (2005). The Commission also clarified the 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).

It is these two rules that are challenged in this action. This Court first reviewed these regulations in early 2005 when it denied plaintiff's motion for a preliminary injunction, finding that EMILY's List failed to demonstrate a likelihood of success on the merits of its challenge. *EMILY's List v. FEC*, 362 F. Supp. 2d 43 (D.D.C. 2005). This decision was affirmed on appeal by the Court of Appeals for the District of Columbia Circuit. Order, No. 05-CV-00049 (D.C. Cir. Dec. 22, 2005).

Following the recent Supreme Court decision in *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"), the Court dismissed without prejudice pending cross motions for summary judgment, and asked the parties to re-brief the issues in this case in light of the Supreme Court's decision. Plaintiff has renewed its motion for summary judgment, arguing that *WRTL II* provides significant legal support for its First Amendment challenge to the Commission's regulations.

To the contrary, the *WRTL II* case is simply not relevant to the instant matter and provides no support for plaintiff's position: it addresses a different provision of the federal

---

[3] *See Shays v. FEC*, 2007 WL 2446159 (D.D.C. Aug. 30, 2007).

campaign finance law, a different type of regulated entity, and a different set of facts. The case in no way requires this Court to alter the analysis used when it earlier rejected plaintiff's motion for preliminary relief. For the reasons set forth below, plaintiff's renewed motion for summary judgment should be denied.

I. Interests of the Amici

As set forth in greater detail in the accompanying Motion for Leave to file this *amici* brief, Senator John McCain, Senator Russell Feingold and Representative Christopher Shays are Members of Congress and are three of the four principal sponsors of the Bipartisan Campaign Reform Act of 2002.[4] They participated as intervening defendants in *McConnell v. FEC*,[5] and have remained active in other proceedings before the FEC involving the interpretation and implementation of BCRA and the federal campaign finance laws generally, including the rulemaking on political committee allocation that is at issue in this case.[6]

Democracy 21 and the Campaign Legal Center are both non-profit, non-partisan policy organizations that have experience in political reforms relating to the role of money in the political process, and specifically to issues related to the enactment, constitutionality and implementation of the campaign finance laws. Both groups actively participated in the

---

[4] The fourth principal sponsor, Rep. Martin Meehan, resigned from Congress in July, 2007.

[5] *See* Order of May 3, 2002 in Civ. No. 02-582 (D.D.C.) (three-judge court) (Order granting intervention).

[6] *See* Comments of Senator John McCain, Senator Russell Feingold, Representative Christopher Shays and Representative Martin Meehan re Notice 2004-6 (April 9, 2004), which can be found in the record of this rulemaking on the Commission's website, *at* http://www.fec.gov/pdf/nprm/political_comm_status/comm2/02.pdf

rulemaking that is challenged in this action, filing written comments and testifying at the public hearing held in this matter.[7]

II. Summary of Argument

The two regulations challenged in this action represent a reasonable exercise of the FEC's authority to implement the federal contribution limits, 2 U.S.C. § 441a, and source prohibitions, *id.* § 441b, and to prevent funds not raised in compliance with those restrictions from being used to influence federal elections. These rules do not violate the Administrative Procedure Act, nor do they curtail First Amendment rights.

The "allocation" rule 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. 11 C.F.R. § 106.6(c). Far from being arbitrary or overreaching, the rule is modest: it still allows a *federal* committee to fund many of its activities with 50 percent *non-federal* funds. And as this Court has found, 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, 1395 (D.D.C. 1987).

Nonetheless, the new rule is a vast – and sorely needed – improvement on the prior rule, which allowed federal political committees to manipulate their spending in order to calculate an absurdly low federal allocation ratio for expenditures that were clearly for the purpose of influencing federal elections. This is not a hypothetical circumvention: a graphic example occurred during the 2004 election when one such federally registered committee – America

[7] *See* Comments by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics re Notice 2004-6: Political Committee Status (April 5, 2004), which can be found in the record of this rulemaking on the Commission's website, *at* http://www.fec.gov/pdf/nprm/political_comm_status/simon_potter_nobel_sanford.pdf

Coming Together – claimed the right under the former rule to spend *98 percent* soft money on voter mobilization activities which it publicly stated were for the purpose of influencing the presidential election, and which were concentrated in the 17 presidential battleground states. ACT spent nearly $100 million dollars of soft money to influence federal elections through this allocation manipulation. The Commission was urged to close this loophole in its rulemaking, and it did so with its new allocation rule, albeit too late for the 2004 campaign.

Similarly, the contribution solicitation rule reasonably 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" will be deemed federal "contributions" subject to FECA. 11 C.F.R. § 100.57. Plaintiff's argument that this regulation exceeds the FEC's authority is without merit. The FEC is empowered under FECA to regulate contributions to political committees that are made "for the purpose of influencing" federal elections, *see* 2 U.S.C. § 431(8)(A)(i). Because the new rule clarifies this definition of "contribution," thereby preventing circumvention of the federal contribution limits and source prohibitions, it falls squarely within the Commission's jurisdiction. Further, contrary to plaintiff's assertions, this rule does not suffer from vagueness or overbreadth, as it is narrower than the statutory definition of "contributions" and thus provides the regulated committees with more guidance, not less.

III. Background

A. The allocation system

1. ***Origins of allocation***. The post-Watergate Federal Election Campaign Act Amendments, enacted in 1974, imposed a limit of $5,000 per year on contributions by a person to a federal political committee, where such funds are to be used to influence federal elections. 2

U.S.C. § 441a(a)(1)(C). Longstanding federal law also prohibits corporations and labor organizations from making contributions to political committees "in connection with" a federal election. *Id.* § 441b.[8]

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. For instance, voter mobilization efforts – such as voter identification, voter registration drives, and get-out-the-vote drives – identify, register and bring to the polls voters who then cast ballots in both federal and non-federal campaigns. The same is true of "generic" efforts conducted by political committees, which are defined in FEC regulations as activities that urge voters to support candidates of one party or the other, without mentioning specific candidates. 11 C.F.R. § 100.25 (2003). Ads that say "Vote Democratic" benefit both federal and non-federal candidates of that party, and influence both kinds of elections. The same is also true of public campaign communications that refer to both federal and non-federal candidates, such as ads that say, "Vote for Senator X and Governor Y."

The *per curiam* opinion of the three-judge district court in *McConnell v. FEC,* 251 F. Supp. 2d 176 (D.D.C. 2003), discussed in detail the history of the allocation system, observing that the Commission over time "struggled" with this issue. 251 F. Supp. 2d at 195. In the Commission's first opinion on the matter, Ad. Op. 1975-21, it permitted a state party committee to allocate its administrative and voter mobilization expenses between the committee's federal and non-federal accounts. The Commission then reversed itself in Informational Letter 1976-72, and ruled that a state party committee had to use entirely federal funds for voter mobilization

[8] Notwithstanding this broad prohibition, section 441b(b)(2)(C) allows the connected organization of a separate segregated fund to pay for its administration and solicitation costs.

efforts, notwithstanding the impact of that spending, in part, on non-federal elections. In Ad. Op. 1978-10, the Commission reversed itself again, and held that state parties could allocate their voter mobilization activities between their federal and non-federal accounts.

At first, the Commission did not regulate the calculus by which a committee allocated its federal and non-federal spending. The Commission adopted rules in 1977 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* 251 F. Supp. 2d. at 196. In 1987, this Court held that this "reasonable basis" rule was too permissive in that 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 non-federal funds." *Common Cause v. FEC*, 692 F. Supp. 1391, 1395 (D.D.C. 1987). In response, the Commission in 1990 promulgated new rules that established more specific allocation formulae.[9]

Under the new 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).

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

The latter type of spending – for payments that refer to both Federal and non-Federal candidates – was to be allocated "according to the benefit reasonably expected to be derived." *Id.* Thus, in the case of a publication or broadcast ad that refers 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 rules distinguished between party and non-party committees (including non-connected committees such as EMILY's List) in how to allocate spending for administrative expenses and generic voter drive activity – i.e., spending that is *not* for candidate-specific disbursements.

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). The Commission's regulations described this as follows:

> Under this method, expenses 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. Calculation of total federal and non-federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs.

11 C.F.R. § 106.6(c)(1) (2002) (emphasis added).

The rules were different for party committees. For national party committees, allocation of "mixed" 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). 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). *See generally, McConnell,* 540 U.S. at 123 n.7 (describing party allocation rules).

As noted above, there were no minimum percentages imposed on allocation by non-party committees under the "funds expended" method, such as there were for national party committees.

2. *BCRA and McConnell*. Political committees operated under these allocation rules from the effective date of the rules in 1991. In this period, party committees became major vehicles for circumventing the campaign finance laws by spending soft money to influence federal campaigns. 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* 251 F. Supp. 2d at 440-41 (Op. of Kollar-Kotelly, J.). Congress concluded that the underlying premise of the allocation system devised by the FEC 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; it authorized the spending of soft money funds on activities that were intended to, and had the effect of, influencing federal campaigns. As Judge Kollar-Kotelly said in *McConnell*:

> For well over two decades, the Commission has sought to regulate the use of non-federal funds by permitting the national, state, and local political party committees to allocate expenses on "non-federal" activities between their federal and non-federal accounts. The vast record in this case demonstrates that this system – a cobbled-together aggregation of FEC regulations and advisory opinions – is in utter disarray with all of the different political party units spending non-federal money to influence *federal* elections. Congress was correct in finding that in many instances, the allocation regime was a failure.

251 F. Supp. 2d at 651. (Op. of Kollar-Kotelly, J.).

In BCRA, Congress banned national party committees from raising or spending non-federal funds at all, thus mooting the allocation question for such committees, since they would have only federal funds. 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. 2 U.S.C. §§ 441i(b)(1), 431(20)(A)(iii). Voter mobilization activities could be funded by state parties with an allocated mixture of federal funds and specially regulated non-federal funds (deemed "Levin" funds), but limits were placed on the size of these non-federal contributions, and other restrictions were imposed on how such funds could be solicited and what they could be spent for, in order to prevent circumvention of federal law. 2 U.S.C. § 441i(b)(2).

In reviewing these provisions aimed at ending the baleful effects of soft money, the Supreme Court in *McConnell* explicitly recognized that the Commission's allocation rules for political parties had fundamentally undermined the FECA. The Court found that voter mobilization and generic activities plainly benefit federal candidates:

> Common sense dictates . . . that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office. 251 F. Supp. 2d at 460 (Kollar-Kotelly, J.). It is equally clear that federal candidates reap substantial rewards from any efforts that increase the number of like-minded registered voters who actually go to the polls. See, *e.g., id.*, at 459.

540 U.S. at 167-68. The Court further said:

> 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.

Id. at 168. The Court found that the FECA "was subverted by the creation of the FEC's allocation regime," *id.* at 142, which allowed party committees "to use vast amounts of soft money in their efforts to elect federal candidates." *Id.* The rules made possible the virtually

unrestricted flow of soft money through the political parties into federal elections, so much so that the Court described these rules as "FEC regulations [that] permitted more than Congress, in enacting FECA, had ever intended." *Id*. at n.44. 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, 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).[10]

3. *ACT and allocation in the 2004 campaign*. Although the Court in *McConnell* directly addressed only the operation of the allocation rules for party committees, its conclusion that allocation as used by the party committees "subverted" the law and "invited widespread circumvention" is equally applicable to the pre-2005 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 massively circumvent the FECA by structuring their activities so that the federal portion of their allocated spending could be calculated at zero or close to zero – even where the committee's spending was directly almost entirely at influencing the outcome

[10] The Court also recognized that measures taken to avoid circumvention of the law themselves serve compelling governmental purposes: "[B]ecause the First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law,' *Colorado II,* 533 U.S. at 457, these interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits. ('[A]ll Members of the Court agree that circumvention is a valid theory of corruption')." *McConnell*, 540 U.S. at 144, *quoting FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001). Similarly, in *Cal. Med. Ass'n. v. FEC*, 453 U.S. 182, 197-98 (1981), the Court upheld the limit on contributions to multi-candidate political committees, 2 U.S.C. § 441a(a)(1)(C), in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*."

of a federal election. Because the "funds expended" allocation method imposed no minimum federal allocation percentage on non-party political committees, the rule permitted such committees to engage in an even more egregious soft money abuse than the Court in *McConnell* found the party allocation rules had permitted.

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 generic activity and administrative costs was entirely based 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* 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).

This allocation approach could readily be manipulated in order to work absurd results. For instance, 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, this "funds expended" allocation formula would put zero in the numerator of the fraction, and thus calculate a zero federal allocation requirement. This would permit the committee to pay for a generic partisan voter drive – even one intended to elect a presidential candidate – *entirely* with soft money, since the committee would have no expenditures "on behalf of specific federal candidates." Under the old rule, this would be true even if the sole and explicit purpose of the committee and its donors was to conduct voter mobilization efforts to elect a presidential candidate.

After BCRA shut down the flow of soft money through party committees into federal elections, effective the day after the 2002 election, this kind of allocation manipulation by non-party committees quickly became more than a theoretical matter.

Although this case has been brought by EMILY's List, it is impossible to understand the context of this case, and the background to the FEC's issuance of the rule challenged here, without a discussion of the activities conducted by ACT 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.[11] 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 or contributions to federal candidates. Because it alleged it was doing little such federal activity, it filed reports with the FEC claiming 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 and overhead expenses.

[11] This discussion of ACT is drawn from submissions and materials that were discussed in comments submitted in the underlying rulemaking by the organizational *amici* here. *See* Comments of Democracy 21 et al., *supra* n.7, *incorporating* Comments by Democracy 21, the Campaign Legal Center and the Center for Responsive Politics on AOR 2004-5 (Feb. 12, 2004), which can be found on the FEC website, *at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=207&START=413198.pdf.

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.[12]

This occurred despite the fact that ACT was plainly and publicly engaged in these voter mobilization activities in order to defeat President Bush, and to elect the Democratic nominee. That overriding federal purpose was made clear by ACT's founders, its funders, and its public communications.

According to a report in *The Washington Post* about the formation of ACT, its president, Ellen Malcolm (also president of EMILY's List), said that ACT would conduct "a massive get-out-the-vote operation that we think will defeat George W. Bush in 2004."[13] This overriding purpose was confirmed by ACT's direct mail fundraising solicitation materials. For one such solicitation, signed by ACT president Malcolm, the outside of a large envelope in which the solicitation was mailed stated:

17 States;

25,000 Organizers;

200,000 Volunteers,

10 Million Doors Knocked On

---

[12] The allocation schedules, Forms H-1 and H-2, submitted by ACT as part of its public disclosure reports filed with the FEC in 2003 and 2004 show, with one exception, an allocation ratio of 98 percent non-federal and 2 percent federal. These reports were attached as Exhibit A to the Memorandum previously filed by *amici* in this case at the preliminary injunction stage (Dkt. 8, filed on January 24, 2005). They are also are available online at the Commission's website, at http://query.nictusa.com/cgi-bin/fecimg/?C00388876. (In its 2004 Post General Report, ACT modified its allocation ratio to 88 percent non-federal, 12 percent federal, but reverted to the 98-2 split in the 2004 Year End Report.)

[13] 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*.

. . . and a one-way ticket back to Crawford, Texas[14]

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 home . . . .
>
> In communities all across America, people are hurting because Bush's mindless devotion to tax cuts for the wealthy is making a shambles of our economy. Bush has turned record budget surpluses into record deficits in no time flat.
>
> He has worked to undermine a woman's right to choose. His reckless disregard for the environment has eroded decades of progress. He's set timber companies loose on our national forests – and he's set John Ashcroft loose on our civil liberties.
>
> But, wishing won't make Bush, Cheney, Ashcroft, DeLay and their extremist agenda go away. People-to-people organizing will – and organizing is what ACT is all about.[15]

A June, 2004 version of the same solicitation also specifically referenced the presidential campaign of Senator Kerry:

> We can't match them dollar-for-dollar. But, we can – and must – match them door-for-door. And in many critical states we'll be at work in places where the Kerry Campaign and the Democratic Party simply don't have the resources to operate.[16]

ACT's enclosed "Bold Action Plan" confirmed that its focus was on influencing the 2004 presidential campaign. The plan was premised on *all* of ACT's efforts taking place only in the seventeen "battleground" states that, in ACT's assessment, would determine the presidential election:

---

[14] This solicitation was discussed in comments in the administrative record below. *See supra*, n.11. A copy of this solicitation is attached as Exhibit B to *amici's* earlier Memorandum (Dkt. 8).

[15] Exhibit B, Solicitation Letter at 1-2.

[16] Solicitation Letter at 1. A copy of the full letter is attached as Exhibit C to *amici's* earlier Memorandum (Dkt. 8).

> As the 2004 elections approach, Democrats have a firm grasp on 168 electoral votes. They're in states that the Democratic candidate is almost guaranteed to win. President Bush, on the other hand, seems an almost certain winner in states that add up to 180 votes.
>
> That leaves seventeen states with 180 electoral votes as the competitive battleground in this election . . . .
>
> Our America Coming Together Action Plan will focus all of our attention in these key states – the ones that will decide in which direction America goes after the 2004 election.[17]

According to public reports, ACT spent over $100 million dollars of soft money on these activities.[18] It received the bulk of its funding from a handful of large donors, most prominently George Soros, who gave $7.5 million directly to ACT.[19] Soros made clear that this money was given for the purpose of defeating President Bush. Referring expressly to ACT, Soros wrote in an op-ed column in *The Washington Post* that he and others were "contributing millions of dollars to grass-roots organizations engaged in the 2004 presidential election" because they "are

---

[17] Ex. B and Ex. C to Dkt. 8 (Action Plan at 1-2) (emphasis added). While ACT carefully noted that these same 17 presidential battleground states would also "be the home of dozens of key…state and local races as well," *id.* at 2, the fact that ACT had no apparent interest in "key" state or local races outside of the 17 presidential battleground states confirms what is stated in its various solicitation materials – that its overriding focus was on the presidential race.

[18] *See* p. 24, *infra* (citing FEC Conciliation Agreement with ACT).

[19] 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/527cmtedetail.asp?ein= 200094706&cycle=2004&format =& tname =America+Coming+Together. It shows that Soros was the largest individual donor to ACT. Soros also gave over $12 million dollars to a section 527 group, "Joint Victory Campaign 2004," which in turn donated $18.3 million to ACT. *Id.* In total, Soros gave $23.5 million to section 527 groups in the 2004 election cycle. *See* http://www.opensecrets.org/527s/527contribs.asp?cycle=2004.

Other 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. (Lewis gave an additional $16 million to "Joint Victory Campaign 2004," and a total of $22.4 million to all 527 groups in the 2004 cycle). 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. *See* ACT donor list, *available at* http://www.opensecrets.org/527s/527cmtedetail.asp?ein= 200094706&cycle= 2004&format=&tname= America+Coming+Together.

deeply concerned with the direction in which the Bush administration is taking the United States and the world." [20]

Another article describes Soros 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 ..."[21] Following this meeting, Soros, *id.*:

> agreed to lead several other major donors in what Democrats hope will be $75 million in spending on a grass-roots get-out-the-vote effort in 17 battleground states. Called America Coming Together, it's directed by top Democratic fundraisers Steve Rosenthal and Ellen Malcolm. That makes Soros a key player in the huge 'soft money' push that the Democrats . . . hope will be one of the keys to matching Bush's formidable fundraising apparatus in the 2004 election.

B. The 2004 Rulemaking

The fact that ACT in early 2004 was claiming a right to fund its voter mobilization activities to elect a Democratic president with 98 percent soft money under the existing allocation rule was an important backdrop for the FEC's 2004 rulemaking. So also were published reports at the same time that other Democratic groups, such as The Media Fund, operating under section 527 of the tax code, were intending to spend massive amounts of soft money on broadcast ads to defeat President Bush. The Media Fund took the position it could engage in this activity without registering as a federal political committee. Similar efforts were being undertaken by pro-Republican 527 groups.

---

[20] George Soros, *Why I Gave*, THE WASHINGTON POST, Dec. 5, 2003, , *available at*: http://www.washingtonpost.com/ac2/wp-dyn/A37126-2003Dec4?language=printer.

[21] Mark Gimein, *George Soros Is Mad As Hell*, FORTUNE, Oct. 27, 2003, *available at*: http://money.cnn.com/magazines/fortune/fortune_archive/2003/10/27/351671/index.htm.

A political committee organized by operatives associated with the Republicans, Americans for a Better Campaign (ABC), submitted an advisory opinion request to the FEC in late 2003, seeking clarification of the law in these areas. In February, 2004, the Commission issued a narrowly crafted response to the questions posed, Ad. Op. 2003-37,[22] but it also announced that it would undertake a rulemaking on these same issues, because of their scope and significance.

As the same time, the organizational *amici* wrote to the Commission and urged it to deal with the allocation issue in its planned rulemaking:

> Democracy 21, the Campaign Legal Center and the Center for Responsive Politics jointly request the Federal Election Commission to adopt new rules on the allocation formula for non-connected political committees. It is essential for the Commission to take this action as part of the expedited rulemaking process the Commission plans to initiate shortly with the publication of a Notice of Proposed Rulemaking regarding political committees and section 527 organizations.
>
> Recent events have only served to confirm that the Commission's existing allocation rules in Part 106 of its regulations are fundamentally flawed, and do not properly implement the meaning and language of the Federal Election Campaign Act. These events also demonstrate why it is essential for the FEC to act in this area on an expedited basis in order to prevent the current regulations from being used to improperly channel soft money into the 2004 federal elections.[23]

---

[22] In this advisory opinion, the Commission held that 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. The Commission also held that 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. (In the Explanation and Justification issued in November, 2004 on the rules challenged here, the Commission said that this advisory opinion was "superseded" by the Commission's new rules. 69 Fed. Reg. 68,063 (Nov. 23, 2004)).

[23] Letter of February 25, 2004 to FEC Commissioners from Democracy 21, the Campaign Legal Center and the Center for Responsive Politics at 1 (footnotes omitted). A copy of the letter is in the rulemaking record and can be found on the Commission's website, *available at* http://www.fec.gov/pdf/nprm/political_comm_status/exparte_commissioners.pdf.

The *amici* 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, as we have previously demonstrated.
>
> ACT's position illustrates the fundamental flaw in the Commission's existing Part 106 regulations – a flaw that currently licenses a blatant charade. 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 manipulation of the allocation ratio in order to set the soft money percentage at a fictional and absurdly high level.[24]

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 group 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. It raised the fundamental question of whether the Commission should permit allocation at all:

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

[24] *Id.* at 2.

Id.[25]

Over 100,000 comments were filed on the NPRM. Almost all of these were focused on a different question of whether section 501(c) non-profit groups might be required to register as political committees under the proposed rules.[26]

As to the entirely distinct issue of allocation by registered political committees, comments were filed by ACT, The Media Fund, the congressional *amici*, the organizational *amici*, and others, even though EMILY's List did not itself take advantage of the opportunity to do so (or to testify at the public hearing on the proposed rules). The *amici* organizations

---

[25] The NPRM specifically raised the question – and invited comment on – whether a 50 percent minimum federal percentage should be imposed on some or all political committees:

> The Commission is considering other minimum Federal percentages as alternatives to those presented in the proposed rules. . . . Should the Commission adopt a fixed minimum Federal percentage? Should it select a higher minimum for committees that conduct activities in several States? *For example, the allocation rule could specify that nonconnected committees and separate segregated funds that conduct activities in fewer than 10 States must use a minimum Federal percentage of 25 percent, while those that do so in 10 or more States would face a minimum Federal percentage of 50 percent*. . . . [T]he 50 percent figure was chosen to reflect the broader scope of activities and as a slight reduction to the 60 percent or 65 percent applicable to national party committees under previous 11 C.F.R. 106.5(b)(2), prior to its sunset on December 31, 2002. . . . If the final rule should take such an approach, what should the minimum Federal percentages be?

69 Fed. Reg. 11,736, 11,754 (emphasis added).

[26] In addition to dealing with the allocation issue for political committees, and with the question of when a section 527 group has a "major purpose" to influence federal elections and thus has to register as a federal "political committee," the NPRM raised a host of collateral issues about whether and when other kinds of entities, such as nonprofit organizations operating under sections 501(c)(3) and 501(c)(4) of the tax code, would potentially trigger "political committee" status under FECA. This one issue alone proved to be tremendously contentious and was primarily responsible for the overwhelming volume of comment that was generated. It had nothing to do with the allocation question, or the question of when 527 groups should register as political committees.

supported the proposal for a 50 percent minimum federal allocation,[27] as did *amici* congressional sponsors.[28]

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, and specifically criticized the proposal for "a minimum federal percentage for non-connected PACs" as "arbitrary and unsupported by law."[29] So too did The Media Fund, which called the proposed use of minimum federal percentages a step that would make allocation "more complicated and burdensome."[30] 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.[31]

In August, 2004, the general counsel proposed that the Commission adopt new rules that embodied four key proposals: (1) a codified definition of the "major purpose" test for "political committee" status, with special treatment of section 527 groups; (2) an expanded definition of the statutory term "expenditure" to include ads that promote, support, attack or oppose federal

---

[27] *See* Comments of Democracy 21 *et al.*, *supra* n.7 at 3, 14-20.

[28] *See* Comments of Senator John McCain, *et al.*, *supra* n.6, at 3.

[29] Comments of America Coming Together (April 5, 2004) at 35, which can be found on the Commission website at: http://www.fec.gov/pdf/nprm/political_comm_status/america_coming_tghr_svoboda..pdf.

[30] Comments of The Media Fund (April 5, 2004) at 20, which can be found on the Commission website at http://www.fec.gov/pdf/nprm/political_comm_status/media_fund_ utrecht.pdf.

[31] *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 Public Hearing on Political Committee Status Notice of Proposed Rulemaking; 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.

candidates, (3) 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, and (4) revisions to the allocation rules for non-party political committees.[32]

As to the last, the general counsel proposed replacing the "funds expended" allocation method with a 50 percent federal minimum percentage that would be applied to generic activities and administrative costs. The general counsel's allocation proposal also addressed spending for a "public communication" that refers to specific Federal or non-Federal candidates, or political parties.[33] Where such a communication refers only to Federal candidates, the proposal stated that it needed to be funded entirely with Federal funds; where a communication refers only to non-Federal candidates, it could be funded entirely with non-Federal funds; and where the communication refers to a political party, it would be subject to allocation as a generic activity (and thus would have to be funded with at least 50 percent federal funds). Finally, where the public communication refers to both Federal and non-Federal candidates, it would be allocated "based on the proportion of space or time" devoted to the Federal candidates as compared to the non-Federal candidates, and funded accordingly.

At its decision-making meeting, the Commission rejected the general counsel's four-part proposal by a vote of 2-4.[34] The latter two portions of the general counsel's proposal – the

---

[32] Agenda Document 04-75 (August 19, 2004) *available at* http://www.fec.gov/agenda/2004/mtgdoc04-75.pdf.

[33] "Public communication" is defined by the law as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 2 U.S.C. § 431(22).

[34] The minutes of this meeting are available on the Commission's website, *at* http://www.fec.gov/agenda/2004/approve04-77.pdf.

clarified definition of "contribution" and the modifications to the allocation system – were then severed and moved separately. This motion passed by a vote of 4-2. Final publication of the rules was made on November 23, 2004, approximately two weeks after the 2004 election.[35] The two new rules took effect on January 1, 2005.

C. The ACT Enforcement Proceeding

The epilogue to the 2004 rulemaking was a subsequent FEC enforcement proceeding, in which the Commission recently concluded that ACT illegally spent about $100 million of soft money to influence the 2004 presidential election, in violation of the Commission's pre-2005 allocation regulations. As part of a settlement, ACT agreed to pay a civil penalty of $775,000. *See* Conciliation Agreement in the Matter of America Coming Together, MUR 5403 and 5466 (August 23, 2007).[36] Although the FEC's enforcement action was a small step forward in that it addressed a clear abuse of the prior allocation system, it also served to highlight the limitations of the pre-2005 allocation rules, and their vulnerability to manipulation.

The FEC investigation of ACT was initiated by complaints filed on January 15, 2004 and again on June 21, 2004 by the *amici* Democracy 21 and the Campaign Legal Center (and also by the Center for Responsive Politics). *See* Complaint, MUR 5403 (Jan. 15, 2004); Complaint, MUR 5466 (June 21, 2004).[37] The complainants' central allegation was that ACT was funding its "mixed" or "generic" activities almost exclusively with non-federal soft money even though

---

[35] "Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees," 69 Fed. Reg. 68,056 (Nov. 23, 2004).

[36] *See* http://eqs.nictusa.com/eqsdocs/000061A1.pdf. The papers filed in the ACT enforcement proceeding, MUR 5403 and 5466, are available through the FEC's online search engine, *at* http://eqs.nictusa.com/eqs/searcheqs?SUBMIT=documents.

[37] The two complaints are available at http://eqs.nictusa.com/eqsdocs/0000614E.pdf , and http://eqs.nictusa.com/eqsdocs/00006175.pdf .

the group had made clear that its "major, indeed overriding purpose is to defeat President W. Bush in the 2004 election." Complaint (Jan. 15, 2004) at ¶¶ 12, 19.

The conciliation agreement resolving the matter stated that ACT raised approximately $137 million in connection with the 2004 elections, of which only $33.5 million was raised pursuant to federal contribution limits and source restrictions. Agreement ¶ 3. ACT characterized approximately $100 million of its disbursements as "administrative expenses," which it funded almost exclusively with non-federal funds as allocated activity. ACT did so because it claimed that the pre-2005 allocation regulations – the "funds expended" method – provided that the federal part of the allocation ratio need be comprised only of contributions to candidates and expenditures that expressly advocated the election or defeat of a clearly identified candidate. *Id*. ¶¶ 10, 16. Pursuant to this interpretation, ACT estimated that its "funds expended" allocation ratio for most of the 2004 election was 2% federal funds and 98% non-federal funds, which it later adjusted to 12% federal funds and 88% non-federal funds. *Id*. ¶ 11.

The FEC concluded, first, that ACT mischaracterized approximately $70 million of the $100 million in disbursements it had claimed as "administrative expenses." The FEC found that this $70 million was actually used for public communications that specifically referenced President Bush and/or Senator Kerry, and thus were attributable in whole or part to clearly identified federal candidates. *Id*. ¶¶ 12-13. Accordingly, ACT should not have treated these expenses as allocable administrative costs, but rather should have paid such costs either with 100% federal funds or allocated the costs between federal and non-federal candidates according to the relative benefit derived from the communications.

Second, the FEC concluded that ACT had not used sufficient federal funds to pay for the remaining $30 million in disbursements that it had correctly claimed as administrative expenses.

Id. ¶ 17. Because of its failure to treat $70 million in disbursements as federal "expenditures," as described above, ACT's claimed "funds expended" ratio of 2% federal and 98% non-federal did not accurately reflect its actual expenditures for candidate-specific activity. This miscalculation resulted in ACT spending far more non-federal funds for its $30 million of allocable administrative expenses than was permitted by law. The Commission determined that ACT should have used a "funds expended" ratio of at least 90% (instead of 2%) federal funds and 10% (instead of 98%) non-federal funds for its allocable activity. Its $30 million in administrative expenses should have been paid for with $27 million in federal funds, instead of the $3.4 million it used. *Id*. ¶¶ 17, 19.

Although the FEC's enforcement proceeding determined that ACT violated the pre-2005 allocation rules,[38] it also highlighted how ineffectively the prior rule had protected against the circumvention of the federal contribution limits and source restrictions.

First, it illustrates that if ACT had eschewed references to specific federal candidates in its public communications, it could have treated them as "administrative expenses." If the $70 million ACT claimed in administrative expenses had been *bona fide* allocable disbursements, the pre-2005 regulations would have allowed ACT to allocate these expenses according to its claimed 2% - 98% allocation ratio. *Id.* at ¶ 12, citing 11 C.F.R. § 106.6(b)(2)(i-iii)(2002). This allocation scheme would have been permissible under the old rule even if the overriding purpose of the generic activities was to promote the defeat of President Bush in the 2004 federal presidential elections. The ACT conciliation agreement thus underscores the irrationality of

[38] The civil penalty of $775,000 paid by ACT pursuant to the Conciliation Agreement represented less than one percent of the amount – $100 million dollars – that the Commission concluded ACT illegally spent to influence the 2004 presidential election.

basing the allocation ratio on a committee's *candidate-specific* disbursements, instead of an analysis of the committee's overall purpose and activities as a federal political committee.

Second, the enforcement proceeding highlighted certain ambiguities in the pre-2005 regulations. ACT claimed that the federal funds part of the allocation ratio should consist of only those expenditures that expressly advocated the election or defeat of a clearly identified candidate – not disbursements for communications that "merely referenced" or even that "promoted or opposed" federal candidates. Agreement ¶¶ 10, 16. This confusion – whether real or feigned – regarding a key aspect of the allocation rules highlighted the need for revised regulations that would provide more precise guidance to the regulated community. As the Commission said in its explanation for the new rule, the rulemaking was necessary to "establish a simpler bright-line rule.… The previous rules were a source of confusion for some … nonconnected committees and resulted in time-consuming reporting." 69 Fed. Reg. 68059 (Nov. 23, 2004). The ambiguities in the allocation rules, and the continuing threat of circumvention they licensed, confirms that the 2004 rulemaking was a necessary and reasonable exercise of the FEC's regulatory authority.

IV. Plaintiff's Motion for Summary Judgment Should Be Denied.

In response to the Supreme Court decision in *WRTL II*, this Court dismissed without prejudice the parties' pending cross-motions for summary judgment, and ordered the parties to submit renewed motions that would "accurately reflect" any changes *WRTL II* may have effected in the governing case law. Order, No. 05-49 (CKK) (D.D.C. July 12, 2007). Plaintiff has taken this opportunity to significantly alter its case. Its updated summary judgment motion largely abandons its improper notice claim, and in its place puts forward a host of new First Amendment arguments relating loosely to the *WRTL II* case. *See* Memorandum in Support of Plaintiff's

Motion for Summary Judgment (Sept. 14, 2007) ("Pl. Mem."). As we demonstrate below, however, the *WRTL II* decision has no bearing on the constitutionality of the allocation and solicitation regulations. It does not provide legal support for plaintiff's challenge, and it does not disturb this Court's analysis of the regulations as set forth in its earlier order denying the preliminary injunction.

A. *WRTL II* Has No Application to This Case.

WRTL II considered the constitutionality of a ban on the expenditure of treasury funds by corporations and labor organizations to pay for ads that refer to a federal candidate and that are broadcast close to an election; this case focuses on contribution restrictions that apply to federal political committees. It is no exaggeration to state that these two cases are fundamentally different in almost all respects.

WRTL II considered an as-applied challenge to the provisions in Title II of BCRA which prohibit corporations and unions from using treasury funds to make expenditures for "electioneering communications." 2 U.S.C. §§ 441b(b)(2), (c).[39] The Supreme Court in *McConnell* upheld these restrictions as facially constitutional, but acknowledged that BCRA's bright-line definition of "electioneering communication" might capture "genuine issue ads" as well as election-related speech. *McConnell*, 540 U.S. at 207. The plaintiff non-profit corporation in *WRTL II* argued that its proposed broadcast ads were examples of just such "genuine issue ads," and the Supreme Court agreed. The Court did not overturn *McConnell's* holding on the facial validity of Title II, but instead carved out an exception to the Title II

[39] "Electioneering communications" are broadcast, cable, or satellite communications which refer to a clearly identified candidate, target the relevant electorate and air in the 30-day window before a primary election or the 60-day window before a general election. 2 U.S.C. § 434(f)(3)(A)(i).

funding restrictions for electioneering communications that are neither express advocacy nor the "functional equivalent of express advocacy." *WRTL II*, 127 S. Ct. at 2667.

There are two fundamental distinctions between *WRTL II* and this case. This first is the type of campaign finance regulation under review, and thus the type of judicial scrutiny involved. *WRTL II* applied strict scrutiny to review whether Title II of BCRA could constitutionally "prohibit WRTL from running these three ads." 127 S. Ct. at 2663. "Because BCRA § 203 burdens political speech, it is subject to strict scrutiny." *Id.* at 2664. This is consistent with the prior rulings of the Court, which have held that a restriction on corporate spending, such as that imposed by 2 U.S.C. § 441b, is subject to strict scrutiny. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 256 (1976) (*MCFL*) (applying strict scrutiny to section 441b as applied to a non-profit ideological corporation); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990) (state law ban on corporate expenditures "is constitutional because the provision is narrowly tailored to serve a compelling state interest.").

By contrast, the Court has analyzed the issue in this case – whether a political committee can be required to use hard money for its spending – as a restriction on contributions, which is constitutional so long as 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).[40]

The issue here is precisely analogous to the question presented to the *McConnell* Court by Title I of BCRA, which requires national political party committees to use only federally

[40] Further, as we discuss below, there is a fundamental difference for purposes of the campaign finance laws between an entity, such as a political committee, that has a "major purpose" to influence elections, and a corporation or similar entity that does not have such a "major purpose." *See infra* at 31-33.

regulated hard money funds for all their spending, and state party committees to do so for their federally related spending. As the Court noted in *McConnell*, "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 regulation here: it does not limit the total amount of spending by a non-connected committee like EMILY's List, but rather requires it to use federally regulated funds for some or all of that spending, a point made by this Court in its earlier ruling in this case:

> [T]he new rules do not in fact prevent Plaintiff from engaging in whatever political speech it seeks to undertake. While under the new allocation rule, committees such as EMILY's List are required to fund certain types of communications using at least 50 percent federal funds, this does not limit their right to undertake their desired political expression.

362 F. Supp. 2d at 58. Just as the Supreme Court upheld contribution limits in *Buckley* by noting their effect is to require political committees "to raise funds from a greater number of persons," *Buckley*, 424 U.S. 1, 21-22 (1976), so too this Court correctly recognized that EMILY's List "is free to undertake the same political speech as before, but may be required to raise money from a greater number of donors." 362 F. Supp. 2d at 58.

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, unlike the far more exacting standard of review applied in *WRTL II.*

The analogy to *McConnell* works at another level as well. Plaintiff's discussion of the standard of review attempts to distinguish *McConnell* by addressing only the Court's review of the Title I provisions that apply to national parties. *See* Pl. Mem. at 19. But Title I also governs state parties, and draws precisely the same kind of line – between federal and non-federal activities – that is at issue here. Congress deemed certain enumerated activities by state parties to be federally related, and required state parties to fund those activities with hard money (or federally regulated "Levin" funds). 2 U.S.C. § 441i(b)(1). State parties (like EMILY's List here) can fund non-federal activities with non-federal funds. Yet in upholding this scheme, which is similar to the line drawn here between federal and non-federal activity by a non-connected committee, the Court again applied the less rigorous standard of review related to contribution limits. 540 U.S. at 169 (finding section 441i(b) "closely drawn" to meet "sufficiently important" governmental interests).

The second key distinction between this case and *WRTL II* is that the regulated entities in the two cases are wholly different: *WRTL II* is about spending by corporations (and by extension, labor organizations), whereas this case is about spending by federal political committees. Because the purpose and electoral role of these entities differ importantly, the constitutionally permissible reach of regulation under the federal campaign finance laws differs accordingly.

In arguing that strict scrutiny applies here, EMILY's List claims that it is "in an identical position to the plaintiff" in *WRTL II*. Pl. Mem. at 19. By that, it appears to mean that WRTL (the corporation) should essentially be considered to be the non-federal account of WRTL's federal PAC, and that 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*. Thus, plaintiff argues

that strict scrutiny should apply to allocation rules that require spending from the federal account of EMILY's List's instead of from its non-federal account.

But the analogy is a false one: a corporation and the non-federal account of a federal political committee 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.

EMILY's List has registered with the FEC as a federal political committee, thereby acknowledging that it meets both the statutory definition of a "political committee"[41] and that it has a "major purpose" to influence elections. This latter test was originally formulated as a narrowing construction to resolve constitutional concerns of vagueness and overbreadth about the statutory definition of the term "political committee." The *Buckley* Court construed that term 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).

According to the Court, 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). The Court reiterated this point in *McConnell*. 540 U.S. at 169 n.64 ("[A] political committee's expenditures 'are, by definition, campaign related.'").[42]

---

[41] FECA defines a "political committee" as a group "which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year . . ." 2 U.S.C. § 431(4)(A). The statute, in turn, defines "expenditure" and "contribution" to encompass any spending or fundraising, respectively, "for the purpose of influencing any election for Federal office." *Id.* §§ 431(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure").

[42] In *McConnell*, the Court also twice noted that section 527 groups (such as the EMILY's List non-federal account), are "organized for the express purpose of engaging in partisan political activity." 540 U.S. at 174 n.67; *see also id.* at 177 (527 groups "by definition engage in partisan political activity").

It was for this reason that the Court in *Buckley* held that the express advocacy test does not apply to expenditures by political committees, but rather applies only when the spender "is an individual other than a candidate or a group other than a 'political committee'…." *Id.; see Shays v. FEC*, 2007 WL 2446159 at *6 (D.D.C. Aug. 30, 2007) ("Thus, the Court imposed the narrowing gloss of express advocacy on the term 'expenditure' only with regard to groups other than 'major purpose' groups.").

The Supreme Court has long recognized that political committees – because they have a "major purpose" to influence elections – are subject to a host of regulations that are not imposed on corporations. In *MCFL*, the Court held that the section 441b ban on corporate independent expenditures could not constitutionally be applied to a non-profit ideological corporation that did not engage in business activities or accept funds from business corporations. *MCFL*, 479 U.S. at 263.[43] But, the Court said, should that corporation's "independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. *As such it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns*." *Id.* at 262 (citations omitted) (emphasis added).

Thus, EMILY's List status here as a federal political committee, unlike the plaintiff corporation in *WRTL II*, means that its expenditures are presumptively election-related, and that it is "automatically … subject to the obligations and restrictions," 479 U.S. at 262, applicable to such "major purpose" groups. The Court in *WRTL II* did not address constitutional limits on the regulation of federal political committees. The far different question before it related only to

[43] The non-profit corporation in *WRTL II* did not qualify for this exemption. *Wisconsin Right to Life v. FEC*, 466 F. Supp. 2d 195, 197 n.2 (D.D.C. 2006) (three judge court).

drawing the line between campaign discussion and issue discussion for an entity that, unlike EMILY's List, does not have a "major purpose" to influence elections and whose spending, unlike EMILY's List, is not "by definition, campaign related." *Buckley*, 424 U.S. at 79.

B. Plaintiff's Challenge to Constitutionality of the Regulations and the FEC's Statutory Authority Has No Merit

1. ***The allocation rules*.**

EMILY's List attacks both the minimum allocation percentage and the requirement to use some or all federal funds for ads that "refer" to a Federal candidate. It claims these rules violate plaintiff's First Amendment rights and contravene the principles articulated in *WRTL II*. It also argues that both regulations exceed the statutory authority of the FEC, and are arbitrary and capricious because they lack any proportional relationship to a committee's federal spending. None of these arguments has merit.[44]

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

The underlying fallacy of plaintiff's merits argument is its apparent assumption that the pre-2005 "funds expended" allocation method was statutorily *required*. It plainly was not: as a federally registered political committee, EMILY's List is not entitled to any particular system of allocation, or indeed, to any system of allocation at all. As this Court previously noted in denying the motion for a preliminary injunction, "Plaintiff has not demonstrated any right, statutory or otherwise, to the former system of allocation rules. . . .[T]he fact remains that Plaintiff is not entitled to the previous arrangement simply because Plaintiff prefers it." 362 F. Supp. 2d at 55-56.

---

[44] In its updated motion for summary judgment, plaintiff appears to have abandoned its earlier argument (already rejected by the Court, 362 F. Supp. 2d at 53-55) that the final allocation rules violated the APA "notice" requirement.

FECA does not mandate allocation for federal political committees.[45] 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)(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, such as voter mobilization drives – where such activities clearly have an impact on federal elections, even if only in part –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 did take 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. 7.

This was also the conclusion reached by the court in *Common Cause v. FEC*, 692 F. Supp. 1391 (D.D.C. 1987), which held that allocation was not *per se* contrary to the 1979 Amendments to FECA, and thus the Commission had discretion to permit allocation. But the court also said the Commission had the discretion *not* to permit allocation, and instead to require that "mixed" activities be funded entirely with federal funds: "Indeed, it 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. That is an issue for the Commission to resolve on remand." *Id.* at 1396 (emphasis in original).

McConnell makes the same point. The Supreme Court there made clear that the allocation system was a means for widespread circumvention of the law, not a statutory mandate.

---

[45] 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. § 441i(b)(2).

The Court noted, with justified skepticism, the FEC's decision to permit party committees to allocate at all:

> 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.[46]

The allocation system, thus, is little more than an act of administrative discretion. 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. Relying both on Judge Flannery's decision in *Common Cause*, as well the Supreme Court's discussion in *McConnell*, this Court correctly

---

[46] Plaintiff tries to downplay the significance of the *McConnell* Court's criticism of the allocation system by noting it was directed to allocation by party committees which, plaintiff notes, are "controlled by federal candidates and officeholders." Pl. Mem. at 20. This Court has already correctly rejected, for these purposes, the distinction between party and non-party committees. 362 F. Supp. 2d at 56 n.9. Further, *McConnell* based its criticism on the fact that the allocation regime was being used as a means to circumvent federal contribution limits and source restrictions. *E.g.* 540 U.S. at 124 ("Many contributions of soft money were dramatically larger than the contributions of hard money permitted by FECA."). Contribution limits and source restrictions apply to non-party committees as well as party committees. *Cal. Med. Ass'n. v. FEC*, 453 U.S. at 197-98 (upholding the limits on contributions to multi-candidate federal political committees). Thus, an ineffective allocation system can plainly undermine the system of FECA limits and restrictions imposed on non-party committees, just as the *McConnell* Court found it did in the context of party committees.

concluded, "It is clear, then, that the FEC's decision to allow any given allocation formula by a political committee such as EMILY's List, with respect to its expenditures intended to influence both federal and non-federal elections, is within the Commission's purview." 362 F. Supp. 2d at 56.

Nothing in *WRTL II* changes this analysis. Plaintiff claims the *WRTL II* Court rejected campaign finance regulations that are premised on the identity of the speaker, and argues that the Commission cannot use EMILY's List's political committee status as a reason for "more aggressively regulating" its activities. *See* Pl. Mem. at 25-26.

But the entire regime of federal campaign finance law is structured on the basis of the speaker's identity and electoral role, and the Court has repeatedly confirmed that different types of entities may be regulated differently. "We have recognized that 'the 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process…'" *McConnell*, 540 U.S. at 158 (quoting *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982)); *see also Cal. Med. Ass'n.*, 453 U.S. at 200-01 (same).

The *WRTL II* decision did not disrupt this foundational principle of the campaign finance laws. In ruling on an as-applied challenge brought by a non-profit corporation, the Court did not say that the constitutional principles that apply to speech by such corporations also apply in exactly the same way to federal candidates, party committees or non-party federal political committees. And no other case supports that radical proposition either.

b. The 50 percent Federal allocation rule for federal political committees is not arbitrary or capricious for lack of "proportionality."

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 the pre-2005 "funds expended" allocation method was being manipulated on a massive scale to inject soft money into federal elections, such that at least one federal political committee, ACT, was claiming it could use tens of millions of dollars of soft money for the avowed purpose of influencing the 2004 presidential election. While the Commission is certainly subject to criticism for failing to take action to stop this abuse in time for the 2004 election, it was entirely proper for the Commission to take action, at least prospectively, to prevent the same abuse from recurring. As this Court has already noted of the allocation rules, "it is apparent that the FEC promulgated these new rules in an effort to close an oft-exploited loophole in federal election law." 362 F. Supp. 2d at 57.

The Commission's new rule is not a perfect safeguard, but it will substantially limit the kind of circumvention of the law that ACT engaged in. It will prevent a federal committee from calculating a near-zero federal allocation ratio by the simple expedient of eschewing all candidate-specific federal activity, as it could under the former rule. And 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. By requiring all non-party committees to spend "at least" 50 percent federal funds for their generic and voter drive activities, 11 C.F.R. § 106.6(c) (2005), the new rule partially repairs the fundamental flaw that was exposed in the prior "funds expended" method.

It is the Commission's *prior* rule that was arbitrary and irrational and, as was clearly demonstrated, subject to blatant abuse. For the Commission to replace it with a 50 percent federal minimum allocation appropriately establishes a federal floor under the spending of a federal committee. As the Commission correctly explained in its E&J:

> These committees have registered as Federal political committees with the FEC; consistent with that status, political committees should not be permitted to pay for

> administrative expenses, generic voter drives and public communications that refer to a political party with a greater amount of non-Federal funds than Federal funds.

69 Fed. Reg. 68,062 (Nov. 23, 2004). Furthermore, since the FEC could have required 100 percent federal funds to be spent, as this Court found in the *Common Cause* case, a rule requiring a minimum of 50 percent federal funding is a more modest approach to solving the problem.

EMILY's List complains that the new rule lacks "proportionality" 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. Pl. Mem. at 38 (federal share under the prior rule was "in proportion to [a committee's] actual financial commitment to federal elections").[47]

But the supposed "proportionality" that plaintiff commends in the old rule was a regulatory illusion. The ratio of a committee's candidate-specific spending may, or may not, relate well, or at all, to the entirely separate issue of whether the committee's generic voter mobilization activities are for the purpose of influencing federal elections. A committee could

---

[47] EMILY's List postulates the unlikely and counter-factual 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. Pl. Mem. at 38. This is, of course, simply hypothetical, since EMILY's List does not trivially spend on federal campaigns. Indeed, it boasts that it has "helped to elect" *sixty eight* Democratic women to Congress and *thirteen* to the United States Senate. Pl. Mem. at 3; *see also id.* at 10 ("EMILY's List has drawn national attention for its success in elected clearly identified federal candidates.") Nor does it identify any other federal political committee that has only this kind of trivial level of federal spending it posits in its hypothetical.

The other hypothetical scenarios posed by plaintiff, such as "a multi-million-dollar state political committee that spends $1,000.01 on a billboard supporting a federal candidate as its only federal activity," Pl. Mem. at 39, also remain just that – hypothetical. No such committee took the opportunity to object to the proposed rule on this basis during the rulemaking. And it would be the odd state political committee that found itself in this position. Such a committee would presumably segregate its multi-million dollar non-federal activity in a non-federal committee, and set up an entirely separate federal committee, registered with the FEC, to pay for the single billboard supporting a federal candidate.

choose to run candidate-specific ads only about gubernatorial contests in Idaho and West Virginia, while also deciding to spend almost all of its funds on generic voter drive activity to influence the presidential race in battleground states such as Ohio and Florida. The committee's candidate-specific activity in some states says nothing about the purpose of its voter mobilization activities in others.

Yet under the old "funds expended" method, it was simply *assumed* that the ratio of spending for the latter should be determined by the ratio of spending for the former. The old rule would have calculated the committee's federal allocation ratio based only on its spending in the governor races in Idaho and West Virginia – and thus set its federal ratio at zero. The committee would then claim a right to fund its voter drive activity in Ohio and Florida entirely with soft money, notwithstanding its avowed purpose to influence the presidential race in those battleground states.

c. It is not unreasonable nor unconstitutional 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, based on simple and intuitive propositions: spending that refers exclusively to federal candidates should be funded exclusively with federal funds; spending that refers exclusively to non-federal candidates can be funded exclusively 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 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) (2005). There is no minimum federal percentage required by this provision.

EMILY's List claims that an allocation rule based on a "reference" to a candidate is overbroad and beyond the Commission's statutory authority. Pl. Mem. at 23-25, 39-41. It

argues that the Supreme Court in *WTRL II* "stepped in and sharply limited the application of [the electioneering communication] prohibition to communications containing 'the functional equivalent of express advocacy,'" Pl. Mem. at 35. But that does not mean the same is required here. As *Buckley* made clear, the limiting construction of "express advocacy" is necessary only for non-major purpose groups; *Buckley* plainly did *not* impose that construction on the spending of political committees, whose activities are, "by definition, campaign-related." 424 U.S. at 79-80. When such a group "refers" in a public communication to a clearly identified federal candidate, it is hardly a novel idea 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 may not arise.

Plaintiff's second attack on the rule is that it will have an unreasonable – even "operationally debilitating" – impact on EMILY's List. Pl. Mem. at 35. Here, EMILY's List recites a list of improbable hypotheticals at the outer reaches of the rule – an ad for a state candidate that includes a reference to a federal candidate in the name of legislation (*e.g.*, "'Kerry-Hatch' legislation"), or an ad for a state legislative candidate that mentions an endorsement by a federal candidate. Pl. Mem. at 35-36.

The rule itself provides the best answer to these hypothetical applications. Although plaintiff claims that a "simple reference" to a federal candidate "converts" the communication into activity "subject to significant financing restrictions," *id.* at 36, this is wrong as it applies to the examples cited. 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 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) (2005). Thus, if the endorsement ad posited by plaintiff is primarily about the state candidate, and refers only incidentally to the federal candidate's endorsement, the rule does not require "significant" or "debilitating" federal funding, but only *proportional* federal funding that reflects the space devoted to the federal candidate. An incidental reference to the federal candidate making the endorsement would thus require only a small amount of federal funding. (The same is true of an ad promoting a gubernatorial candidate, with an incidental mention of a federal candidate's name as part of the name of legislation). Conversely, if the federal candidate making the endorsement is prominently featured in the ad, it is reasonable to require a larger federal allocation because the ad may promote the federal candidate's own campaign as well as that of the non-federal candidate.

In other words, the rule governing "references" to both federal and non-federal candidates embodies the very proportionality that plaintiff faults the rule on allocation of generic activities for lacking.[48]

2. *The solicitation rule*.

FECA broadly defines a "contribution" to include any "gift, . . . deposit of money. . . or anything of value made by any person for the purpose of influencing any election for Federal

[48] As another example of the "infirmity" of the "mere references" rule, plaintiff points to Ad. Op. 2005-13, in which the Commission advised EMILY's List that it must use 100 percent federal funds for a planned public communication featuring a federal candidate, Senator Debbie Stabenow, speaking in support of women in state elective offices, but not referring to any specific non-federal candidate. Pl. Mem. at 24 (citing Ad. Op. 2005-13). EMILY's List complains that although the communication was not directed to Senator Stabenow's electorate, and was therefore allegedly non-federal in nature, the "entire communication [was] colored by simple reference" to a federal candidate under the FEC's allocation rules. Pl. Mem. at 25. But even as applied to this mailing, the allocation regulation is not unreasonable. The FEC might reasonably conclude that the communication would encourage readers outside Michigan to contribute to Stabenow's own campaign in current or future elections, or otherwise benefit her by raising her national profile. But even if not so, this one unusual fact-pattern would not support the *facial* invalidity of the rule.

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 adds a supplementary 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." 11 C.F.R. § 100.57 (2005).

EMILY's List challenges the rule by first mischaracterizing it: plaintiff argues that if it "now refers to a federal candidate in a communication designed to raise monies for its state and local election program, it risks a Commission finding that its communication 'indicates' that some portion of the monies received may be used to 'support or oppose' the federal candidate." Pl. Mem. at 39. But the new definition of "contribution" does *not* apply merely because of a solicitation's "reference" 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.

Plaintiff also challenges the rule for vagueness, complaining that it does not define the term "indicate," and so its application is "ambiguous," "confusing" and "highly uncertain." *Id.* at 40. It complains that the regulation "skirts the requirement of express advocacy," Pl. Mem. at 30, although (as noted earlier) there is *no* express advocacy requirement for political committees. *Buckley*, 424 U.S. at 79-80. Of course, the current (and longstanding) statutory definition of "contribution" is phrased quite generally as money donated "for the purpose of influencing" a federal election. The longstanding regulations implementing that broad standard do little more than simply repeat the same general test. *E.g.* 11 C.F.R. § 100.52(a). If EMILY's List has had

no problem for twenty years determining whether the funds it has been receiving are "for the purpose of influencing" a federal election, it should have no problem in understanding if its own solicitation letters "indicate" whether the funds it receives will be used to support or oppose a candidate.

In any event, the operative standard in the new rule is not "indicates," but the "support or oppose" test. And that standard is one that the Supreme Court upheld in *McConnell*, where it took no more than a footnote to dismiss a void-for-vagueness challenge to a comparable standard that BCRA applies to public communications by state party committees. 540 U.S. at 170, n.64. The words "support" or "oppose," the Court said, "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.* (*quoting Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The Court said this was "particularly true" in BCRA, "since actions taken by political parties are presumed to be in connection with election campaigns." *Id.* The same observation applies to federal political committees generally, including EMILY's List, all of which have a "major purpose" to influence elections. *E.g. Shays v. FEC*, 2007 WL 2446159 at *6 (express advocacy test does not apply to "major purpose" groups like political committees). And as the Court also said in *McConnell*, if any doubt about the meaning of the standard remains, plaintiff is "able to seek advisory opinions for clarification and thereby 'remove any doubt there may be as to the meaning of the law.'" *Id.* (*quoting Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 580 (1973)). Again, the same is true here, both about the new rule's use of the terms "support" and "oppose" as well as its use of the term "indicates."

Finally, EMILY's List posits two malevolent motives to the new rule that simply do not exist. It says that the rule's "intended" effect is to "limit the use of 'references' to federal candidates" in solicitations for state and local election purposes, "and to impair fundraising

messages that discuss federal officeholders who make and execute government policy." Pl. Mem. at 40. As to the first point, it is again based on a mischaracterization of the rule, which does not limit mere "references" to federal candidates, but only references that are accompanied by statements indicating that the funds will be used to support or oppose those federal candidates. And as to the second, EMILY's List does not explain how it "impairs" a fundraising message that solicits funds to support or oppose a federal candidate, when the funds received in response are simply treated as contributions. This treatment is not only consistent with FECA, it is compelled by it. If by "impairment," plaintiff means having to 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.

V. Conclusion

For the above reasons, *amici* submit that plaintiff's updated motion for summary judgment should be denied.

Respectfully submitted,

/s/ Donald J. Simon

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

J. Gerald Hebert (Bar No. 447676)
Paul S. Ryan (Bar No. 502514)
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

Fred Wertheimer (Bar No. 154211)
DEMOCRACY 21
1875 I Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 429-2008

Counsel for Democracy 21
and individual amici

October 9, 2007