

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EMILY'S LIST,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

CIVIL ACTION NO. 05-00049-CKK

**PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE**

Pursuant to LCvRs 7(h) and 56.1, Plaintiff EMILY's List hereby submits the following statement of material facts as to which there is no genuine issue, to accompany its Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. This is a facial challenge under the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*, and the First Amendment to the United States Constitution, to regulations promulgated by the Federal Election Commission ("FEC" or "the Commission").

1. On February 19, 2004, the Commission issued Advisory Opinion 2003-37. In this opinion, the Commission restructured the allocation formulas, requiring allocating committees to pay entirely with federal funds for any public communication that "promotes, supports, attacks, or opposes" federal candidates. The Commission also built this requirement into the formulas for calculating allocations, so that any communication of this kind – promoting, supporting, attacking or opposing a federal candidate – would be included in the

tally of "direct" federal candidate support used to determine the federal share of allocated expenses. (AO 2003-37 (Feb. 19, 2004), *attached as Attachment C*).

2. The Commission's Office of General Counsel later described this advisory opinion as a "substantial reinterpretation of the 'allocation' rules." (FEC Agenda Doc. No. 04-48, at 7 (May 11, 2004).

3. On March 11, the Commission issued a wide-ranging proposal of new regulations. While the regulations addressed a variety of topics, they were structured along two primary lines meant to address the concerns raised about the two types of organizations under attack in the presidential election. First, the regulations targeted section 527 organizations that were not registered with the FEC. Second, the regulations addressed "allocating committees": entities – such as EMILY's List – that were registered with the Commission, but that had nonfederal accounts as well. *See Political Committee Status*, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004).

4. The proposed rules, through a revised definition of the FECA term "political committee," *see* 2 U.S.C. § 431(4)(A), required all section 527 organizations that were considered to participate in federal elections in any manner to register with and report to the Commission. The proposed rules also codified the changes to the allocation system first addressed in Advisory Opinion 2003-37, including inclusion of the "promotes, supports, attacks, or opposes" standard. The proposed rules further treated as federal contributions those funds received in response to a fundraising solicitation expressly advocating the election or defeat of federal candidates. (*Id.*)

5. The Commission set what the FEC's General Counsel aptly described as "a highly accelerated schedule for this important and far-reaching rulemaking, targeting approval of final rules just two months after publication of the NPRM." FEC Agenda Doc. No. 04-48, at 4. Comments were due by April 9, and public hearings with thirty-one witnesses were held on April 14 and 15. 69 Fed. Reg. 11,736.

6. Even with fewer than 30 days to address the "important and far-reaching rulemaking," more than 100,000 comments were submitted, "far exceeding the number of comments received in connection with any of the rulemakings to implement BCRA." FEC Agenda Doc. No. 04-48, at 8.

7. This was the first and last noticed opportunity for members of the public to comment on the rulemaking. (Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004)).

8. The only portions of the proposed rules that received significant comment were those targeting section 527 organizations that did not register and report with the FEC. (*Id.*)

9. The final rules, approved on October 28, did not include a revised definition of "political committee," and did not address unregistered 527 organizations. (*Id.*)

10. Moreover, the new rules focused not on whether communications "promoted, supported, attacked, or opposed" candidates, but whether they referred to candidates. (*Id.*)

11. In addition, the allocation system for administrative expenses and voter drives was reduced to a system of threshold amounts. For example, a public communication that referred to a political party, but to no clearly identified candidates at all, had to be financed with no less than fifty percent federally regulated funds. The new rules took no account of a political committee's operating history or actual record of involvement in supporting federal and nonfederal candidates. (*Id.*)

12. The final rules also contained a new definition of "contribution" unlike that contained in the proposed rules, which defined contributions as funds received in response to a solicitation that "indicates that" any portion of the funds will be used to "support or oppose" federal candidates. (*Id.*)

13. The final rules, with explanation and justification and several additional amendments, were approved on October 28, 2004, and published on November 23, 2004. (*Id.*; FEC Agenda Doc. No. 04-102, at 3-5 (Nov. 18, 2004) (minutes of Oct. 28, 2004 meeting)).

14. On August 18, 2005, EMILY's List submitted an Advisory Opinion Request to the FEC asking, *inter alia*, whether a fundraising solicitation to raise money to support state legislative candidates of state legislative candidates, referring to Senator Debbie Stabenow but not to any clearly identified non-federal candidates, would have to be paid for using entirely federal funds. EMILY's List was proposing to include her in a public communication distributed outside her state, for "the purpose of stressing the importance of successes for women in State elective office." (See FEC Adv. Op. Request 2005-13 (Aug. 18, 2005), *attached at* Attachment D).

15. EMILY's List noted: "The communication will not be distributed in the Senator's home state of Michigan, will not reference the Senator's candidacy for re-election, and will not solicit funds for her campaign." (AO 2005-13 (Oct. 20, 2005), *attached as* Attachment E).

16. The FEC concluded that the communication must be paid for using entirely federal funds "[r]egardless of its context." (*Id.*).

17. Moreover, the FEC stated, "This analysis does not change if a candidate for election in a year other than 2006 [the year of the communication, when Senator Stabenow was running for re-election] were to be substituted for Senator Stabenow in EMILY's List public communication" (*See id.*).

18. EMILY's List also proposed to fund a communication solely on a ballot initiative, including in it an appeal to Democrats. The FEC ruled that this communication would trigger a 50% federal financing requirement. It held: "A discussion of a State legislative initiative or referendum does not alter the application of these rules." (*Id.*).

19. EMILY's List also asked whether three solicitations, all of which refer to Senator Stabenow but not to any clearly identified non-federal candidates, would require that the funds received in response be treated as federal contributions. The FEC ruled that two of the three communications did require that all of the funds received in response be treated as federal contributions, including a solicitation containing only this statement: "We are asking for your support, so that EMILY's List can support candidates, who, like me, could never succeed as women in politics without the combined commitment of all [of] us." (*Id.*)

20. EMILY's List is a political organization whose purpose is to recruit and fund viable women candidates for local, state and federal office; to help them build and run effective campaign organizations; and to mobilize women voters to help elect progressive candidates across the country. (B. Cocanour Aff. ¶ 2).

21. EMILY's List identifies viable opportunities to elect pro-choice Democratic women to local, state and federal office, recruits qualified candidates, trains them to be effective fundraisers and communicators, and works with them throughout the campaign to make sure that they are executing winning strategies. (*Id.* ¶ 3).

22. EMILY's List also works through its Women Vote! Program to mobilize women voters for local, state and federal elections through broadcast advertising, web sites, direct mail and personal voter contact. (*Id.* ¶ 4).

23. EMILY's List was founded in 1985. At that time, no Democratic woman had ever been elected to the U.S. Senate in her own right, no woman had ever been elected governor of a large state, and the number of Democratic women in the U.S. House had declined to twelve. (*Id.* ¶ 5).

24. Since 1985, EMILY's List has helped to elect sixty-eight Democratic women to Congress, thirteen to the U.S. Senate, eight to governorships, and over 350 to other state and local offices. (*Id.* ¶ 6).

25. The federal account of EMILY's List is a nonconnected political committee that is registered with, and reports to, the Federal Election Commission. (*Id.* ¶ 7).

26. For the purpose of raising and disbursing funds for nonfederal elections, EMILY's List also maintains a nonfederal account. This account accepts funds from sources, and in amounts, that the states authorize for use in supporting local and state candidates, but that may not be permissible under federal campaign finance law for the support of federal candidates. (*Id.* ¶ 8).

27. Because of the rules published at 69 Fed. Reg. 68,056, EMILY's List is required to devote funds from its federal account to pay for fifty percent of its administrative expenses, generic voter drives, and public communications that do not refer to clearly identified federal or nonfederal candidates. (*Id.* ¶ 9).

28. These rules prevent EMILY's List from spending a higher proportion of nonfederal funds on activities which exclusively or predominantly reflect nonfederal electoral purposes. (*Id.* ¶ 10).

29. For example, among EMILY's List's administrative expenses is a program called Campaign Corps, which trains young people in campaign skills and assists in placing them on campaigns. Campaign Corps is a unique grassroots program dedicated to politically empowering young people. Each year, EMILY's List trains talented individuals just out of college at an intense week-long Campaign School and then places them on campaigns for the last 3 months of the campaign. (*Id.* ¶ 11).

30. In odd-numbered years such as 2007, there are no regularly scheduled federal races on the ballot; therefore, the vast majority of the students are placed on campaigns for state and local office in New Jersey and Virginia, which hold elections in these years. In even years, graduates are placed with both federal and nonfederal campaigns. (*Id.* ¶ 12).

31. During the 2006 election cycle, 77% of the graduates trained by the program ultimately worked on nonfederal races. (*Id.* ¶ 13).

32. The rules published at 69 Fed. Reg. 68,056 requires EMILY's List to pay at least half of the expenses of the Campaign Corps with funds from EMILY's List's federal account. (*Id.* ¶ 14).

33. Were it not for these rules, EMILY's List would pay for this expense with a higher proportion of nonfederal funds, to reflect its predominantly nonfederal purpose. (*Id.* ¶ 15).

34. EMILY's List will continue to sponsor the Campaign Corps during the 2007-2008 electoral cycle. (*Id.* ¶ 16).

35. EMILY's List has drawn national attention for its success in electing clearly identified federal candidates. These victories have been a powerful inducement in branding EMILY's List as an effective political organization. The national reputation of the committee encourages persons to donate to EMILY's List's nonfederal programs, because donors are confident that if EMILY's List has succeeded with the election of federal candidates in high-profile national elections, it possesses the skills and resources required for success in local and state elections as well. (*Id.* ¶ 17).

36. EMILY's List has also found that the use of the names, association with EMILY's List and endorsements of certain well-known federal candidates and officeholders are uniquely effective at raising funds for EMILY's List and its efforts on behalf of federal and nonfederal candidates. These candidates and officeholders have "superstar" status: the use of their names, and their endorsement of EMILY's List's goals, carry power well beyond their home states. (*Id.* ¶ 18).

37. Under the rules published at 69 Fed. Reg. 68,056, EMILY's List must treat as a federal contribution the funds received in response to a communication that indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. This regulation permits some funds to be treated as nonfederal contributions only if a non-federal candidate is also clearly identified, and in no case may more than fifty percent of the funds received be treated as nonfederal. (*Id.* ¶ 19).

38. Before these regulations, EMILY's List has made solicitations to raise funds for its nonfederal programs that refer to clearly identified federal candidates, and that do not refer to any clearly identified nonfederal candidates. EMILY's List did deposit some funds received as a result of these solicitations in nonfederal accounts. (*Id.* ¶ 20).

39. As a result of the new regulations, EMILY's List has altered its solicitations in order to be able to accept nonfederal funds as a result of a solicitation. It has either eliminated references to clearly identified candidates in solicitations, especially "superstar" federal candidates, or if it seeks to use some portion of the funds received for its local and state elections activity, it has been compelled to add references to clearly identified nonfederal candidates. For instance, Attachment A is a solicitation sent by EMILY's List. In its final form, it included a reference to Arizona Governor Janet Napolitano. This reference was included solely so that some funds could be treated as nonfederal contributions, for use in local and state elections. (*Id.* ¶ 21).

40. Prior to the enactment of the new regulations, EMILY's List would ask for contributions by referencing its work on gubernatorial and state legislative races, but it would not commonly reference any clearly identified nonfederal candidates but would in appropriate cases determine that a reference to a federal officeholder, also a candidate, would most effectively persuade the intended target audience. (*Id.* ¶ 22).

41. EMILY's List has begun to include references to clearly identified nonfederal candidates in its solicitations, solely to be able to treat some funds received as nonfederal contributions under the new regulations, for use in its activities in local and state elections. (*Id.* ¶ 23).

42. EMILY's List has, in the past, paid for public communications that refer to federal candidates, the purpose of which is not to support or oppose federal candidates; for reasons relating to the choice of the most effective message, these communications have not often referred to any clearly identified non-federal candidates. (*Id.* ¶ 24).

43. The new regulations require that communications that merely refer to a clearly identified federal candidate must be paid for with at least some federal funds, and with entirely federal funds if no clearly identified nonfederal candidate are mentioned—regardless of the purpose of the communications and specifically, its relationship to the nonfederal program. As a result, even in communications that are not made for the purpose of influencing federal elections, EMILY's List is forced to cease to either include references to federal candidates, or else to pay for the communications with federal funds. (*Id.* ¶ 25).

44. For example, Attachment B contains five advertisements supporting two ballot initiatives in Missouri that were paid for and distributed by EMILY's List. None of these advertisements contain, in their final form, a reference to a clearly identified federal candidate. (*Id.* ¶ 26).

45. EMILY's List would have preferred to include a reference to a clearly identified federal candidate in these advertisements to endorse the ballot initiatives while continuing to pay for them with nonfederal funds. EMILY's List's communication would have included a federal candidate in the state of Missouri, or a "superstar" federal candidate outside the state. Ballot initiatives very often present questions of national scope, and endorsements by a national spokesperson such as federal-level officeholders or candidates are more effective in raising funds for or delivering persuasive messages about those initiatives. These communications would not have the purpose of influencing those candidates' elections. (*Id.* ¶ 27).

46. The new regulations would have required the advertisements for this ballot initiative to be paid with entirely federal funds if they included a reference to a clearly identified federal candidate, even though the advertisements would remain focused on the ballot initiative. As a result, EMILY's List declined to include such references. (*Id.* ¶ 28).

47. EMILY's List will continue to support and oppose state ballot initiatives, and will be prevented from including references to federal candidates in its ballot initiative communications so long as these regulations remain in effect. (*Id.* ¶ 29).

48. Because of these rules, EMILY's List is prohibited from spending nonfederal funds to influence nonfederal elections or ballot initiatives conducted and financed under state law, if it chooses to include references to federal candidates in its communications. (*Id.* ¶ 30).

49. Overall, the rules have impeded and will impede the ability of EMILY's List to raise and spend money in support of and in opposition to candidates for local and state office, or for other nonfederal purposes. (*Id.* ¶ 31).

Respectfully submitted,

Dated September 14, 2007

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