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01/28/2010 12:25 PM

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Subject NPRM

Attached are the comments of the Sierra Club in response to this NPRM.

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January 28, 2010

By Electronic Mail to emilyslistrepeal@fec.gov.

Mr. Robert M. Knop
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking, "Funds Received in Response to Solicitations; Allocation of Expenses by Separate Segregated Funds and Nonconnected Committees," 74 Fed. Reg. 68720 (Dec. 29, 2009)

Dear Mr. Knop:

The following comments are submitted on behalf of the Sierra Club in response to the above-referenced Notice of Proposed Rulemaking ("NPRM") issued by the Federal Election Commission ("FEC" or "Commission") in response to the decision of the United States Court of Appeals for the District of Columbia Circuit in *EMILY's List v. FEC*, 581 F.3d 1 (DC Cir. 2009) ("*EMILY's List*").

The Sierra Club is a national organization dedicated to protecting the environment and conserving our nation's natural resources. The Sierra Club maintains a connected federal political committee, Sierra Club Political Committee, that is registered with the Commission. The Sierra Club also maintains a separate nonfederal committee, Sierra Club Voters Education Fund, which is registered with and reports to the Internal Revenue Service under sections 527(i)-(j) of the Internal Revenue Code, as well a number of nonfederal committees at the state level that are registered with various states. See FEC Advisory Opinion 2009-23.

The NPRM invites comment on whether the decision in *EMILY's List* is subject to a reading that the ruling, as well as the District Court's order that the rules are vacated, is limited only to nonprofit, non-connected entities, meaning that the decision and order would not apply to

separate segregated funds (“SSF”). *See* 74 Fed. Reg. at 68721. For the following reasons, we believe that such a reading would not be reasonable, especially with respect the allocation rules for certain solicitations in 11 CFR § 100.57.

1. The Court of Appeals ruled that the regulations in question were invalid in their entirety and without any exception for separate segregated funds:

The FEC rules challenged by EMILY’s List - §§106.6(c), and 106.6(f) and 100.57 – violate the First Amendment. Sections 106.6(f) and 100.57 also exceed the FEC’s authority under the Federal Election Campaign Act as does the provision of §106.6(c) that applies to administrative expenses. The FEC may not enforce §§ 106.6(c), 106.6(f), or 100.57. We reverse the judgment of the District Court and direct it to enter judgment for EMILY’s List and to vacate the challenged regulations.

581 F.3d at 25. The breadth of the court’s decision in this regard follows from the fact that EMILY’s List challenged the regulations as *facially* invalid, a fact on which the Commission repeatedly relied in its arguments regarding the plaintiff’s burden of proof in the case. *See* Brief For the Federal Election Commission 16-19, 27, 29,37, 40, 41, 44, 45 (hereinafter “FEC Brief”). Since the Commission never contested the plaintiff’s right to challenge facially the regulations in issue, it cannot now claim that the court’s decision should be treated as if it were an as-applied challenge.

2. In it merits briefing in *EMILY’s List*, the Commission relied on arguments that are equally applicable to separate segregated funds as they are to nonconnected committees . Thus, in seeking to justify the challenged regulations before the court, the Commission relied heavily on the fact that they applied to federal political committees which were subject to the primary purpose test and therefore were likely to have an intent to influence federal elections. *See e.g.* FEC Brief, 13-14, 24, 28, 31-32, 50, 54. Separate segregated funds are subject to the primary purpose test in the same manner and to the same extent as nonconnected committees, and there is no basis for distinguishing them in this regard. Similarly, the Commission sought to defend its regulations on the ground that political committees subject to the challenged regulations are not immune from corruption or the appearance of corruption because of their “close relations” with federal candidates, political parties, and officeholders. *See* FEC Brief, 20. Separate segregated funds are no more able to serve as vehicles of corruption than nonconnected committees, and the Commission did not suggest otherwise in its arguments. Finally, the Commission relied heavily on the Supreme Court’s decision in *California Medical Ass’n v. FEC*, 453 I.S. 182 (1981), *see* FEC Brief, 21, 26-28,34, a case which involved separate segregated funds.

3. The authorities on which the court of appeals relied in *EMILY’s List* did not distinguish between nonconnected committees and separate segregated funds. The majority opinion stated that the “central issue” in the case was whether political committees should be treated like individual

which under the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003), do not have such a right. See 581 F.3d at 8. Judge Kavanaugh found that this issue had been settled by the Supreme Court in *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 202-03 (1981) (opinion of Blackmun, J.), a case involving the constitutionality of FECA's limits on contributions to separate segregated funds. Similarly, the majority relied on the Fourth Circuit's decision in *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 292-93 (4th Cir. 2008), a case involving a connected political committee established under state law by a nonprofit advocacy organization. See 525 F.3d at 278, 306.

4. In addition to the authorities on which the court of appeals relied, the decision's reasoning applies with equal force to separate segregated funds. The foundation of the *EMILY's List* opinion is its finding that the "anti-corruption rationale, which constitutes the sole basis for regulating campaign contributions and expenditures ...," 581 F.3d at 11, does not apply to political committees that only make independent expenditures. *Id.* As the court put it, "to the extent a non-profit ... spends its donations on activities such as advertisements, get-out-the-vote efforts, and voter registration drives, those expenditures are not considered corrupting." *Id.* And, these activities are no more corrupting when conducted by connected political committees than when conducted by nonconnected committees. Like nonconnected committees, separate segregated funds "receive full First Amendment protection and are entitled to receive donations and make expenditures because they offer an opportunity for ordinary citizens to band together to speak on the issue or issue most important to them." 581 F.3d at 11, quoting *N.C. Right to Life, Inc. v. Leake*, 525 F.3d at 295. Similarly, in distinguishing the Supreme Court's holding in *McConnell* concerning soft-money contributions to political parties, *EMILY's List* emphasized, in terms as clearly applicable to separate segregated funds as they are to connected committees, "there is no record evidence that non-profit entities have sold access to federal candidates and officeholders in exchange for large contributions ... [and] non-profit groups do not have the same inherent relationship with federal candidates and officeholders that political parties do." 581 F.3d at 14.

5. While the court of appeals did state in footnote 7 that by "non-profit entities" it meant "non-connected non-profit corporations" and unincorporated non-profit groups that did not include committees established by corporations and unions, this paragraph appears simply to be a description of how that term is used in the opinion. Since "non-profit entities" does not appear in FECA or the regulations, an explanation of the court's terminology was helpful to understand the opinion, but it does not take away from the fact that the challenged regulations reach both connected and nonconnected political committees and that plaintiffs challenged these regulations on their face, that is with respect to all of their applications.

6. Finally, the court of appeals found that 11 CFR § 100.57 in particular is "badly flawed," 581 F.3d at 18, because political committees "are entitled to raise money for their soft-money accounts to help support their preferred candidates, yet this regulation prohibits non-profits from saying as much in their solicitations," in violation of the First Amendment. *Id.* This reasoning is as applicable to separate segregated funds as to nonconnected committees.

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Thank you for your consideration of these comments.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael B. Trister". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael B. Trister
B. Holly Schadler