



Office of the Attorney General
Washington, D. C. 20530

December 16, 2009

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Re: EMILY's List v. FEC, No. 08-5422 (D.C. Cir.)

Dear Madam Speaker:

In accordance with 28 U.S.C. 530D, I write to advise you of the Department of Justice's decision not to petition the Supreme Court to review the decision of the U.S. Court of Appeals for the District of Columbia Circuit in this case. A majority of the appellate panel held that three regulations promulgated by the Federal Election Commission (FEC), 11 C.F.R. 106.6(c), 106.6(f), and 100.57, violate the First Amendment. The third judge on the panel concluded that the regulations were invalid on statutory grounds.

Two of the regulations involved in this case identify the political activities that a nonconnected political committee must finance from its federal bank account—*i.e.*, from funds raised in accordance with the limitations on funding sources and contribution amounts set out in the Federal Election Campaign Act (FECA). Section 106.6(c) provides that administrative expenses and the cost of generic voter drives and partisan public communications must be funded “at least 50 percent” from the federal account. Section 106.6(f) provides that public communications or voter drives that refer to a federal candidate must be funded from the federal account in a percentage commensurate with the content; a communication or voter drive that refers to a federal candidate, and not to any non-federal candidate, must be funded entirely from the federal account.

The third regulation, Section 100.57, provides that the sources and amounts of contributions to a nonconnected political committee are limited based on the content of the committee's solicitation. If the solicitation “indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate,” then between 50 and 100 percent of any donation made in response to the solicitation is subject to FECA's limitations on funding sources and contribution amounts.

The court of appeals panel concluded that each of these regulations violates the First Amendment. The panel majority further held that the regulations (except for portions of Section 106.6(c)) are also invalid because they exceed the FEC's authority under FECA. Concurring in part and in the judgment, Judge Brown would have held all of the regulations invalid on the statutory ground alone.

The FEC declined to seek rehearing en banc in the court of appeals.

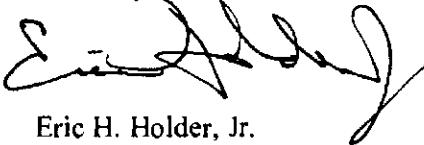
The D.C. Circuit has already scheduled an en banc hearing in a case involving related issues, *Speechnow.org v. FEC*, Nos. 08-5223(L) and 09-5342. That case involves a direct challenge to provisions of FECA, and under that statute, the court of appeals will hear the case initially en banc. Accordingly, the court in *Speechnow.org* will not be bound by—and could potentially overrule—any adverse portions of the court of appeals’ reasoning in this case. Oral argument in *Speechnow.org* is set for January 27, 2010. By contrast, in this case, the FEC’s decision not to seek rehearing en banc means that the constitutional arguments have not yet been presented to the full court of appeals.

Because the court of appeals’ decision in this case does not involve the constitutionality of an Act of Congress, does not conflict with any other circuit court decision, and may potentially be reviewed by the full court of appeals in the very near future, it does not meet the criteria for Supreme Court review. In addition, as the concurrence demonstrates, the case presents a potential statutory ground for rejecting the regulations. If the Supreme Court agreed with the concurring judge that the regulations are invalid on that ground, it would not reach the constitutional issue at all.

A petition for a writ of certiorari would be due December 17, 2009.

Please let me know if we can be of further assistance in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", written in a cursive style.

Eric H. Holder, Jr.
Attorney General