



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Commissioners Bauerly and Weintraub regarding failure of the Commission to seek rehearing en banc in *EMILY's List v. FEC*

We are disappointed that, on October 22, 2009, the Commission failed by a vote of 3-3 to approve the General Counsel's recommendation to file a petition for rehearing en banc in the case of *EMILY's List v. FEC* (D.C. Cir. Sept 18, 2009), which struck down Commission regulations regarding the allocation of hard and soft money in connection with federal elections. The Commission's inability to reach an agreement to seek rehearing is troubling because the divided panel's majority opinion reaches constitutional conclusions that were not necessary to its holding and were not briefed by either party at any stage in the litigation. We also believe the decision will inject confusion into the interpretation and application of the Supreme Court's decisions in *McConnell v. FEC*, 540 U.S. 93 (2003), *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), and *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981). As Judge Brown concluded in her concurrence, the majority's reasoning "results in tension – perhaps irreconcilable tension – with *McConnell*," and could "have profound results on campaign finance regulation."

Under the Federal Rules of Appellate Procedure, rehearing by the full Court of Appeals is warranted because the majority opinion both conflicts with Supreme Court precedent and implicates constitutional questions of exceptional importance. Fed. R. App. P. 35(a)(2). Moreover, seeking a rehearing en banc is particularly important in the District of Columbia Circuit to provide guidance that reflects the views of the entire Circuit, where much of the Commission's litigation is brought, either by choice or as mandated by statute.

Although we do not believe it appropriate to appeal every adverse decision from a court, in cases where a divided opinion reaches significant constitutional questions not briefed by either party, we believe it is imperative to seek guidance from the full Circuit on behalf of the Commission and all who must comply with the FECA. Indeed, we voted to seek rehearing en banc because we consider it our duty as officials charged with administering the federal campaign finance laws to do so in this matter.