UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTOPHER SHAYS and MARTIN MEEHAN,	)	
Plaintiffs,	)	Civ. No. 02-1984 (CKK)
v.	)	DEFENDANT'S MOTION FOR STAY PENDING APPEAL
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR STAY OF SEPTEMBER 18, 2004, ORDER PENDING APPEAL

Pursuant to Fed. R. Civ. P. 62, defendant Federal Election Commission ("FEC" or "Commission") moves this Court for a stay of its September 18, 2004, Order granting plaintiff summary judgment in part as to certain regulations implementing the Bipartisan Campaign Reform Act of 2002 ("BCRA") and remanding this matter to the FEC, pending the FEC's appeal to the United States Court of Appeals for the District of Columbia Circuit. The Commission's Notice of Appeal was filed on September 28, 2004. The Commission's request for a stay pending appeal should be granted under the four-part test applicable in this Circuit. The Commission's appeal will present serious legal questions, and the balance of harm in this case strongly favors the granting of such a stay.[1]

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[1] As required under Local Civil Rule 7(m), counsel for the Commission spoke by telephone with counsel for plaintiffs in a good faith effort to determine whether there is opposition to the relief sought and to narrow any areas of disagreement. On October 1, 2004, plaintiffs' counsel advised that plaintiffs are prepared to stipulate to a stay pending appeal only under conditions to which the Commission is presently unable to agree. Therefore, plaintiffs oppose the Commission's motion in its current form as it has been verbally described to plaintiffs' counsel. Plaintiffs requested that the Commission state that plaintiffs intend to file a response to this motion by 5 p.m. on October 5, 2004.

The Commission's request has two parts. We ask that the Court make clear that, until the Court of Appeals issues its final decision on the appeal, (1) the regulations found defective remain in effect and (2) the Commission is not required to initiate rulemaking proceedings under this Court's remand order. The Court remanded the regulations without vacating them, denied the plaintiffs' request for injunctive relief, and declined to restrict the Commission's discretion to determine how to proceed on remand. As we discuss below, this remedial language suggests that a stay pending appeal may not be necessary to accomplish the two purposes stated above. We are seeking such relief, nonetheless, to ensure that the Commission does not inadvertently violate the Court's actual intent and to clarify for the public the state of the law in the wake of the Court's decision.

It is the Commission's understanding that the Court's decision to remand the regulations to the Commission without stating that they are vacated reflects the established distinction the D.C. Circuit has drawn between remanding an invalid rule to the promulgating agency for further consideration or action, and vacating the regulation.[2] When a court chooses to remand without vacating, the invalidated agency action remains in effect during the remand proceedings. See, e.g., Milk Train, 310 F.3d at 755-56 (decision whether to remand or vacate depends in part on "'the disruptive consequences of an interim change that may itself be changed'") (quoting Allied-Signal, 988 F.2d at 150-51)); Northeast Maryland, 358 F.3d at 950 ("[I]t was concern over just such disruption of EPA's pollution control program that ultimately persuaded us to remand rather than vacate the … regulations, originally invalidated in [an earlier case]"). See

[2] See, e.g., Northeast Maryland Waste Disposal Authority v. EPA ("Northeast Maryland"), 358 F.3d 936, 949-50 (D.C. Cir. 2004) ("Although EPA's failure to set forth its rationale requires us to remand the 2000 Rule for further consideration, … that defect does not require us to vacate the rule"); Milk Train, Inc. v. Veneman, 310 F.3d 747, 755-56 (D.C. Cir. 2002); Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 150-53 (D.C. Cir. 1993); Fox Television Stations, Inv. v. FCC, 280 F.3d 1027, 1052 (D.C. Cir. 2002).

Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 295 (2003) ("A court's decision, after full consideration, to pronounce an agency action illegal, but to allow the action to continue in effect anyway, is sometimes known as 'remand without vacation'"). A stay order explicitly confirming that the regulations remain in effect pending a decision on appeal would, therefore, be consistent with the case law underlying this Court's remedial order and, as discussed below, would be appropriate under the relevant legal standard for a stay pending appeal. It would also have the salutary effect of clarifying the current state of the law for members of the public whose political activities are subject to those regulations.

The Commission also requests the Court to stay the September 18 Order to the extent it may obligate the agency to initiate remand proceedings before there is a final judgment on appeal. If the Commission on remand were to rescind the invalidated regulations and promulgate new ones that reflect the Court's interpretation of BCRA, the Commission's appeal could be mooted. As a result, the agency could lose its opportunity to present its different interpretation to the appellate court. In addition, undertaking remand proceedings would require the Commission to reallocate its limited resources, at a time when it is already heavily burdened with other duties, to conducting a rulemaking the court of appeals may ultimately find to have been unnecessary. The regulated community and the public would suffer from such a diversion of resources from other agency priorities. An order making it clear that the Commission is not required to initiate proceedings on remand until final resolution of the case by the D.C. Circuit would, moreover, be consistent with this Court's rejection of the plaintiffs' request that the Court place restrictions on the Commission's discretion to determine how to proceed on remand.

The Commission is still evaluating the Court's 157-page Memorandum Opinion, which granted summary judgment to plaintiffs as to approximately 15 regulatory provisions, relying upon a variety of different rationales. If the Commission ultimately elects not to pursue appellate review regarding the merits of any of these regulations, it will promptly notify the Court of its decision and will ask the Court to exclude any such regulations from the portion of the proposed stay regarding the initiation of proceedings on remand.

ARGUMENT

The test applied in determining whether to grant a stay pending appeal contains four factors "by now familiar to both the bench and bar in this Circuit." Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc. ("WMATC"), 559 F.2d 841, 842 (D.C. Cir. 1977). "To obtain a stay pending appeal, [petitioner] 'must show (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay.' 'These factors interrelate on a sliding scale and must be balanced against each other.' " In re Verizon Internet Services, Inc., 257 F.Supp.2d 244, 268 (D.D.C. 2003) (internal citations omitted).

> Generally, such relief is preventative, or protective; it seeks to maintain the status quo pending a final determination of the merits of the suit. An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

WMATC, 559 F.2d at 844 (emphasis added).

I. THE COMMISSION HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF ITS APPEAL

To show a substantial likelihood of success for purposes of a motion like this one, the Commission need only show that a "serious legal question is presented." WMATC, 559 F.2d at 844. Thus, the Commission is not required to show that it has a better-than-fifty-percent likelihood of success on appeal, but rather

> a court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability, and indeed, as in this case, may grant a stay even though its own approach may be contrary to movant's view of the merits. The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other factors.

WMATC, 559 F.2d at 843. The Court may grant an application for a stay pending appeal without any implication that there was error in the decision being stayed. "Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision. What is fairly contemplated is that tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." Id. at 844-45

A. The Jurisdictional Issues in This Matter Present Serious Legal Questions

The Court of Appeals will review de novo this Court's jurisdictional rulings (slip op. at 6-26) that plaintiffs have standing to challenge the regulations at issue and that their claims are ripe for review. See National Wrestling Coaches Ass'n v. Department of Education, 366 F.3d 930, 937-38 (D.C. Cir. 2004). Moreover, if the Commission prevails in its appeal of either of those rulings, it will be unnecessary for the Court of Appeals to venture beyond that issue, since "[c]ompliance with the mandates of Article III is an essential prerequisite to the exercise of

federal jurisdiction." Freedom Republicans, Inc. v. FEC, 13 F.3d 412, 415 (D.C. Cir.), cert. denied, 513 U.S. 821 (1994).

Because the Commission has presented substantial arguments as to the novel and complex jurisdictional issues in this matter, this case is an especially appropriate one for a stay pending appeal. See Slip Op. at 6-26; FEC's Memorandum in Support of Its Motion for Summary Judgment ("FEC Br."), filed Feb. 27, 2004, at 3-14; FEC's Response in Support of Its Motion and Opposition to Plaintiffs' Motion for Summary Judgment ("FEC Opp."), filed March 31, 2004, at 2-13. The Court concluded (Slip Op. at 12-14, 18) that plaintiffs have standing because they are "affected by the regulations they claim improperly implement BCRA" and will have to "adjust their campaigns" in anticipation of "other actors taking advantage of the regulations to engage in activities that otherwise would be barred." However, neither plaintiffs' evidence nor the Court's opinion describes any particular adjustment that plaintiffs will have to make in response to these unspecified potential actions of unnamed third parties. Nor is there any evidence of any specific adjustments that would be required by the impact of any individual regulation. The Commission's position is that the law of this Circuit does not recognize such abstract and speculative allegations of harm — which would appear to provide standing to a wide range of other actors simply by virtue of their participation in the federal election campaign system — as sufficient to support Article III standing. See FEC Br. at 3-11; FEC Opp. at 2-8.

In determining whether plaintiffs have presented facts sufficient to meet their burden of showing that they personally will suffer an "actual or imminent" injury, the unusual nature of this lawsuit is pivotal. Plaintiffs, as federal officeholders and candidates, are regulated by some (though not all) of these rules, and the Court found (Slip Op. at 12-14) that they had standing because they would be "affected" by the rules, but the flaw plaintiffs alleged in the regulations

was the failure to regulate the activities of others more strictly. When "the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992) (citation omitted). Thus, whether plaintiffs' conclusory allegations of indirect harm satisfy the standing requirements of Article III presents a "serious legal question" under WMATC, 559 F.2d at 844, and a stay pending appeal is therefore warranted. See also Winpisinger v. Watson 628 F.2d 133, 139 (D.C. Cir. 1980) ("The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event"), cert. denied, 446 U.S. 929 (1980).

The Commission's arguments that plaintiffs' claims are not ripe for review present equally serious legal issues. This Court, acknowledging that plaintiffs' action was "of a type 'ordinarily' considered unripe for review," Slip Op. at 21 (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990)), nevertheless found that plaintiffs' claims were fit for immediate review because they were "purely legal" challenges that did not rely on speculation as to how the regulations would be applied, and because the Court saw "no judicial or agency considerations warranting delay in reviewing the regulations." Slip Op. at 22-24.[3] However, as the FEC explained (FEC Br. at 11-14, FEC Opp. at 8-13), the ripeness doctrine protects federal agencies and the courts from the kind of premature, abstract facial challenge that plaintiffs' claims present. "Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an

[3] The Court did find (Slip Op. at 112) plaintiffs' challenge to the description of get-out-the-vote activity in 11 CFR 100.24(a)(3)(i) to be unripe.

administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.'" National Park Hospitality Ass'n v. Department of Interior, 538 U.S. 803, 807-08 (2003) ("NPHA") (emphasis added) (quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 148-149 (1967) (footnote omitted). But plaintiffs have not alleged that any of the features of the Commission's regulations they challenge would require them to change their own conduct. When, as here, "there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 386 (1999) (emphasis added).

Moreover, agency action is not ripe for judicial review under the Administrative Procedure Act if there is an adequate alternative remedy in court. See National Wrestling Coaches, 366 F.2d at 945. Here, as the Commission noted (FEC Opp. at 12), plaintiffs can file an administrative complaint if they believe that someone has violated the Federal Election Campaign Act ("FECA" or "the Act"), and if the Commission dismisses the complaint based upon the application of one of the regulations at issue, plaintiffs can seek review of the dismissal in this Court (provided that they have standing). See 2 U.S.C. 437g(a)(8).

In sum, plaintiffs' facial challenge to the regulations relies largely upon arguments at a high level of generality about how words in certain regulations might be construed and applied to the hypothetical activities of others in situations that may or may not arise. Therefore, any appeal will present "serious legal questions" as to jurisdiction, and a stay pending appeal is appropriate.

B. The Court of Appeals Will Apply A Highly Deferential Standard of Review to the Commission's Regulations, and That Review Will Present Serious Legal Questions

If the court of appeals reaches the merits, it is clear from the difficulty and complexity of the issues addressed in this Court's 157-page Memorandum Opinion analyzing the validity of some 19 distinct Commission regulations that an appeal will present "serious legal questions." The FEC promulgated these regulations to implement parts of an intricate statute that regulates the political advocacy of diverse actors, and it has long been recognized by the D.C. Circuit that the Commission enjoys broad discretion to construe that statute in a way that reflects the significant constitutional concerns inherent in this area. Indeed, this Court itself acknowledged "the constitutional and practical difficulties the Commission faces in promulgating such regulations." Slip Op. at 72. The heightened deference the Commission will be afforded in this context increases the likelihood that the Commission's position might prevail on appeal.

A court may set aside a regulation under the Administrative Procedure Act only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This standard is "highly deferential" and "presumes the validity of agency action." Cellco Partnership v. FCC, 357 F.3d 88, 93 (D.C. Cir. 2004). Moreover, the D.C. Circuit will review this Court's decision on the parties' cross-motions for summary judgment de novo, applying the same standard of review as the district court. See, e.g., United States ex rel. Siewick v. Jamieson Science and Engineering, Inc., 214 F.3d 1372, 1375 (D.C. Cir. 2000); Nikoi v. Attorney General, 939 F.2d 1065, 1068 (D.C. Cir. 1991). This Court recognized (slip op. at 27-30) that the Commission's construction of its own governing statute is entitled to deference under Chevron U.S.A. v. NRDC, 467 U.S. 837, 842 (1984). The Commission has broad discretionary authority over the administration, interpretation and civil enforcement of the Act, 2

U.S.C. 437c(b)(1), 437d(a) and 437g, and the Supreme Court has explained that the FEC "is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981).

The D.C. Circuit's precedent suggests that the appellate court will afford particular deference to the Commission in this case because plaintiffs' claims all rest on the proposition that the Commission's regulations do not construe or apply the statute as broadly as they would like. As the D.C. Circuit recently noted, the Commission is "[u]nique among federal administrative agencies" in that "its sole purpose [is] the regulation of core constitutionally protected activity — 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" AFL-CIO v. FEC, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 387 (D.C. Cir.), cert. denied, 454 U.S. 897 (1981)). In this "delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique inferences of Congressional intent," Machinists, 655 F.2d at 394. "The [Federal Election C]ommission has been vested with a wide discretion in order to guarantee that it will be sensitive to the great trust imposed in it to not overstep its authority by interfering unduly in the conduct of elections." In re Carter-Mondale Reelection Committee, 642 F.2d 538, 545 (D.C. Cir. 1980).

Thus, construing the statute narrowly to avoid unnecessary interference with constitutionally protected political advocacy is a policy choice the D.C. Circuit has previously found to be well within the Commission's discretion. AFL-CIO, 333 F.3d at 179 (in drafting regulations the "Commission must attempt to avoid unnecessarily infringing on First Amendment interests"). Indeed, in McConnell v. FEC, 124 S. Ct. 619 (2003), the Supreme Court repeatedly construed the provisions of BCRA narrowly to avoid unnecessary intrusion on

political activity, relying in several instances on some of the same Commission regulations under review in this case. See, e.g., id. at 670, 675, 678-82; FEC Br. at 19. The constitutional concerns inherent in the regulation of political advocacy provide an important additional reason for giving particular deference to the Commission's narrow construction of provisions of the Act that regulate political speech, and serve to underline the seriousness of the legal questions that will be presented in any appeal of the Court's rulings.

II. THE BALANCE OF HARMS AND THE PUBLIC INTEREST FAVOR THE GRANT OF A STAY PENDING APPEAL

A. Failure to Keep the Invalidated Regulations in Effect During the Appeal and Proceedings On Remand Will Cause the Public and the Commission Irreparable Harm, But Keeping the Regulations in Place Will Cause the Plaintiffs Little or No Injury

If the Court's remedial order renders the invalidated regulations unenforceable, see supra pp. 2-3, a stay pending appeal will be necessary to prevent irreparable harm to the public and the Commission. The regulations implement BCRA, a complex landmark statute that amends the intricate regulatory regime previously created by the Federal Election Campaign Act. The resulting complex law, which affects core First Amendment activity, benefits from regulations that define terms undefined by the statute, resolve statutory ambiguities, and fill statutory gaps. Congress recognized the urgent need for the Commission to provide further guidance to political participants, for, as this Court noted, it included in BCRA itself the directive that the Commission "promulgat[e] the regulations implementing BCRA, in particular those related to BCRA Title I, … under significant time constraints." Slip Op. at 94 n.61. See also id. at 4; BCRA §§ 402(c)(1), 402(c)(2). Therefore, requiring the Commission, during the pendency of the appeal or during proceedings on remand, to enforce the bare words of the Act as amended by

BCRA without regulations in place implementing some of the key statutory provisions would contravene congressional intent.

The lack of regulations explaining these provisions would be particularly disruptive during the weeks remaining before the upcoming federal elections. Political parties, candidates, contributors, political committees, and independent groups have relied on those regulations to plan their activities for this entire election cycle. If the regulations do not continue in force, political participants will have to conduct their activities during the remainder of the campaign season under different and uncertain legal requirements, which might later be changed again, retroactively, by the court of appeals. That alone would create confusion, especially for legally unsophisticated participants. However, because the Commission cannot possibly address all the issues raised by the Court's decision in the short time remaining before the elections, and thus cannot provide timely detailed guidance for the regulated community, even greater confusion would likely result. Similar considerations led the three-judge court in McConnell to stay its May 1, 2003, final judgment invalidating portions of BCRA pending the Supreme Court's disposition of the parties' appeals. See Order and Memorandum Opinion at 7-8 in McConnell v. FEC, Civ. No. 02-582 (CKK, KLH, RJL) (D.D.C. May 19, 2003), and consolidated cases (referring to "[t]his Court's desire to prevent the litigants from facing potentially three different regulatory regimes in a very short time span"). See also, e.g., Northeast Maryland, 358 F.3d at 950 ("[I]t was concern over just such disruption of EPA's pollution control program that ultimately persuaded us to remand rather than vacate the … [invalidated] regulations"). Thus, failure to preserve the status quo by leaving the regulations at issue in effect during the appeal and proceedings on remand would harm large numbers of political participants who are not parties to this case and would impede the Commission's ability to administer the Act in a

consistent manner, thereby injuring the public's interest in the integrity of the campaign finance system.

These harms to the public and the Commission clearly outweigh any harm the plaintiffs might suffer if the invalidated regulations remain in effect. The plaintiffs complain that the regulations they challenge implement BCRA with insufficient vigor, but the plaintiffs can point to no evidence that they will suffer any concrete, personal, imminent injury if those regulations continue in effect while the Commission pursues its appeal and/or conducts proceedings to reconsider those regulations on remand. See A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995) ("[N]othing in the record suggests that significant harm would result from allowing the approval to remain in effect pending the agency's further explanation"). See also Fertilizer Inst. v. EPA, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (leaving exemptions in place where successful petitioners' "only complaint about the exemptions is that they are not broad enough"); Chemical Mfrs. Ass'n v. EPA, 870 F.2d 177, 236 (5th Cir. 1989) (remanding but not vacating water pollution rules, "which, if anything, may be too lenient"), cert. denied, 495 U.S. 910 (1990).

B. Requiring the Commission to Proceed With Rulemakings on Remand While the Appeal Is Pending Will Cause the Commission and the Public Irreparable Harm

The rulemakings and other actions required of the Commission on remand will cause the public and the Commission substantial and irreparable harm that a stay of remand proceedings pending appeal would prevent. First, if the Commission on remand rescinds the invalidated regulations and promulgates new ones that incorporate the Court's interpretation of BCRA, the Commission risks losing its opportunity to present its own views to the Court of Appeals, which might conclude that the Commission had mooted its own appeal. See County of Los Angeles v.

Shalala, 192 F.3d 1005, 1012 (D.C. Cir. 1999) ("Because an agency must conduct its proceedings and render its decision pursuant to the legal standard that the district court articulates in its remand order, '[u]nless another party appeals [the agency's subsequent] decision, the correctness of the district court's legal ruling will never be reviewed by the court of appeals, notwithstanding the agency's conviction that the ruling is erroneous.'") (brackets in original; quoting Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 330 (D.C. Cir. 1989)), cert. denied, 530 U.S. 1204 (2000). The prospect of the Commission's losing the ability to obtain appellate review on the merits strongly supports granting the Commission's requested stay pending appeal. See, e.g., Population Inst. v. McPherson, 797 F.2d 1062, 1081 (D.C. Cir. 1986); Center for Int'l Environmental Law v. Office of the U.S. Trade Representative, 240 F.Supp.2d 21, 23 (D.D.C. 2003) (irreparable harm found where acting as directed by district court's order would work a "de facto deprivation of the basic right to appeal"); Center for Nat'l Security Studies v. United States Dep't of Justice, 217 F.Supp.2d 58 (D.D.C. 2002). Cf. John Doe Agency v. John Doe Corp., 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals") (internal quotation marks and citation omitted)).

Second, even if the Commission is successful in its appeal, without a stay it will have irretrievably lost the resources and time expended on remand in reconsidering a substantial number of regulations concerning complex topics. Redrafting regulations, holding any additional hearings, and reviewing public comments will be particularly burdensome because those activities will require the Commission to siphon off significant staff resources from other agency priorities for a substantial period. The agency's resources are already heavily taxed by

both ordinary duties and the additional duties arising from the presidential election. Thus, not only would Commission and staff time and energy spent on the invalidated regulations have been for naught if the D.C. Circuit overturns this Court's grant of summary judgment for the plaintiffs, but the other matters to which the Commission would otherwise have dedicated those resources would suffer, to the detriment also of the public and the regulated community. See Occidental Petroleum, 873 F.2d at 331 ("'[T]he district court's decision …, if wrong, would result in a totally wasted proceeding' on remand, … and may yet bind the agency in future cases. Surely, … these burdens may constitute 'substantial irreparable harm to the [agency].'") (second bracket in original; internal citations omitted)).

Third, if the Commission is required to proceed with the remand during the appeal, the agency could find itself in the untenable position of having to advocate incompatible legal positions. In particular, regarding those regulations the Court invalidated under Chevron, the Commission might feel constrained in the remand rulemaking proceedings to adopt the Court's reading of BCRA, even though it is defending its own initial interpretation in the appellate proceedings at the same time. The Commission might even have to defend the revised regulations in a suit challenging them as overly burdening First Amendment activities, while at the same time defending before the court of appeals its own view that narrower regulation is preferable. The Commission surely would suffer irreparable harm if it were forced to defend this Court's views after remand but, convinced that its own views as reflected in the original regulations were correct, at the same time defended those views in the court of appeals.[4]

[4] In FEC v. National Republican Senatorial Comm. ("NRSC"), 966 F.2d 1471 (D.C. Cir. 1992), the Commission felt compelled to adopt the district court's view of the law on remand in a suit arising under 2 U.S.C. 437g(a)(8). Therefore, pursuant to the court's order, the Commission proceeded against the administrative respondent. But when the subsequent enforcement suit reached the court of appeals, it deferred to the Commission's original views and

In contrast, the plaintiffs would suffer no harm if this Court stayed its remand order. Plaintiffs have not alleged in this case that they have actually been the victims of any of the activities they believe should have been restricted by the Commission's regulations, and if they run for re-election again it will not be for another two years. The plaintiffs' general interest in the effective enforcement of BCRA, see Slip Op. at 13-14, is no different from that of all the other participants in the electoral process, and we have shown above that this general interest will be served rather than harmed by maintaining clarity during the appellate and remand processes. Moreover, the efficient use of the Commission's resources furthers the plaintiffs' claimed interest in the agency's ability to enforce the campaign finance laws more effectively.

In sum, at the very least, this case presents several "serious legal question[s]," WMATC, 559 F.2d at 844, and the balance of the hardships favors the Commission and the public. That is sufficient to justify a stay pending appeal of this Court's judgment and the accompanying remand order.

CONCLUSION

For the reasons stated above, defendant Federal Election Commission respectfully requests that this Court stay its grant of summary judgment in part for plaintiffs and the

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dismissed the case. The appellate court noted that "[t]he district judge's decision in the first phase of this case did not cause the scales to fall from the Commissioners' eyes, did not persuade them, did not in any way cause them to exercise their expertise or policymaking judgment — the twin fonts from which our deference to the Commission flows." 966 F.2d at 1476. NRSC thus illustrates both the potential futility of forcing the Commission to proceed on the basis of a judicial interpretation that has not yet been subject to appellate review, and the inefficiencies that can result when a district court requires the agency to expend considerable resources to correct an allegedly unlawful action prior to such review.

accompanying remand Order pending completion of the Commission's appeal to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

/s

Lawrence H. Norton
General Counsel

/s

Richard B. Bader
Associate General Counsel
(D.C. Bar # 911073)

/s

David Kolker
Assistant General Counsel
(D.C. Bar # 394558)

/s

Colleen T. Sealander
Acting Assistant General Counsel

/s

Vivien Clair
Attorney

/s

Harry J. Summers
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

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