IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| Christopher Shays and Martin Meehan,<br><br>Plaintiffs,<br><br>v.<br><br>United States Federal Election Commission,<br><br>Defendant. | Civil Action No. 02-CV-1984<br>(Judge Kollar-Kotelly) |

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

**Introduction and Summary of the Argument**

The Federal Election Commission's October 1, 2004 Motion for Stay — filed thirteen days following this Court's September 18 Order remanding this case to the Commission — is entirely unnecessary for at least two reasons. *First*, as the Commission acknowledges, this Court expressly denied plaintiffs' request for an injunction against the continued enforcement of the deficient rules, chose not to vacate any of those rules, and instead remanded for the Commission "'to determine how to proceed next.'" Mem. Op. at 155-56 (citation omitted); *see* FEC Mot. at 2-3. This Court thus gave the Commission the discretion — and the responsibility — to decide in the first instance (subject to judicial review) how best to proceed. Rather than exercising its responsibility and giving the regulated community and public any guidance, the Commission has now belatedly returned to this Court and insisted that it is for the *Court* "to clarify for the public the state of the law in the wake of the Court's decision." FEC Mot. at 2. That is a complete abdication of the Commission's responsibility. *See* Part I below.

*Second*, as plaintiffs' counsel advised the Commission prior to the filing of its motion, plaintiffs are prepared, given the proximity to the November 2 elections and the Commission's failure to provide any guidance, to stipulate to an appropriate stay pending appeal subject to two reasonable conditions: (a) that the Commission immediately decide which aspects of the Court's rulings it is actually challenging, with the stay to extend only to those portions of the Court's decision;[1] and (b) that the Commission join plaintiffs in seeking expedited review by the Court of Appeals so that the appeal may be submitted for decision in early 2005, in order to allow new rules to be in effect as early in the 2006 election cycle as possible. Incredibly, the Commission has *refused* to agree to these modest conditions, claiming that it has not yet decided exactly which of the Court's rulings it wants to challenge and that any discussion of expediting the appeal is "premature." *See* the accompanying Declaration of Charles G. Curtis, Jr. ¶ 4 ["Curtis Decl."]. The Commission thus wants everyone else, including this Court, to treat this matter as an emergency while it remains free to proceed on its business-as-usual pace. *See* Part II below.

Under these circumstances, the Commission has not come close to meeting the "stringent standards" that must be met to justify the "extraordinary remedy" of a stay pending appeal. *Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 978 (D.C. Cir. 1985); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group*, 230 F. Supp. 2d 12, 14 (D.D.C. 2002) (internal quotation and citation omitted). In particular, it is unreasonable — and contrary to the public interest — for the Commission to move for a stay without even bothering to decide which

[1] In announcing on September 28 that it had decided to file a Notice of Appeal, the Commission cautioned that it "has not yet determined whether it will ask the court of appeals to review all, or only some, of the rules remanded to the Commission by the district court." *See* FEC Press Release attached as Exhibit A to the accompanying Declaration of Charles G. Curtis, Jr. The Commission's motion advises that it is "still evaluating" this Court's opinion and offers no hint as to when the Commission thinks it may "ultimately" decide what it is appealing. FEC Mot. at 4.

aspects of the Court's rulings it is appealing and without agreeing to seek expedition in the Court of Appeals so that new regulations can be in effect in a timely manner for the 2006 election cycle. This Court should accordingly either deny the Commission's motion for a stay or subject any stay to the two conditions requested by plaintiffs.[2]

## I. A Stay Is Unnecessary.

The Commission's articulated basis for its motion is baffling. The Commission argues that a stay is entirely *unnecessary*, given that "[t]he 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." FEC Mot. at 2-3. The Commission argues, however, that "[a] stay order *explicitly confirming* that the regulations remain in effect" is needed for two reasons: (a) "to ensure that the Commission does not inadvertently violate the Court's actual intent," and (b) to achieve "the salutary effect of clarifying the current state of the law for members of the public whose political activities are subject to those regulations." *Id.* (emphasis added).

If the Commission really believes the Court's Order is unclear, it should have filed a motion for *clarification* rather than a motion for *stay*. Plaintiffs do not believe the Court's remand order is ambiguous. Although plaintiffs respectfully disagree with the Court's decision on remedies, the Court clearly rejected plaintiffs' request for an order "'enjoin[ing] the FEC

[2] If the Court grants a conditional stay, however, it should make clear that its action is not premised on any determination that the Commission has demonstrated a substantial likelihood of success on the merits of its appeal. To the contrary, the Commission has shown no such likelihood; its arguments on the merits are simply a cut-and-paste "rehash[]" of arguments that this Court "thoroughly addressed and rejected" in its 157-page Memorandum Opinion. *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 16 (D.D.C. 2003). The Commission "has failed to provide any reason for the Court to change its conclusion" on either the jurisdictional issues or the substantive merits. *See* Part III below.

from enforcing the unlawful Title I and Title II regulations until such time as they are corrected to comply'" with the Court's ruling, declined to vacate the rules, and instead remanded the case to the Commission "'to determine how to proceed next.'" Mem. Op. at 155-56 (citations omitted). There has been a vigorous public debate since September 18 about "how to proceed next" in the wake of the Court's decision. Plaintiffs, their counsel, and many others have urged the Commission to move quickly and decisively to implement the Court's rulings. Under this approach, the Commission would adopt interim regulations or policy guidance ensuring that the most egregious regulatory flaws identified in the Court's opinion are promptly addressed. Other participants in the process have offered a variety of justifications for leaving the *status quo* alone.

Everyone seems to agree, however, that the Court clearly placed the responsibility for addressing and resolving these disagreements on the *Commission* in the first instance. The Commission has presented absolutely no explanation for why it is incapable of taking any steps to exercise the leadership and make the determinations required under this Court's remand.[3]

[3] The Commission also claims that it would be irreparably harmed by having to proceed with the new rulemakings and other actions required under this Court's remand because such measures might "moot[] its own appeal" or force it "to advocate incompatible legal positions." FEC Mem. at 13, 15; *see generally id.* at 13-16. These claimed harms are greatly exaggerated, the cases cited by the Commission are inapposite, and the Commission could certainly take further action on remand contingent upon the outcome of its appeal and reserving all rights. But in any event, all of these claimed harms could be avoided by the conditional stay discussed in Part II below. The Commission has no legitimate interest in delaying further action on remand as to any portions of this Court's ruling that are not ultimately challenged on appeal. Moreover, an expedited appeal would address the Commission's claimed workload concerns while increasing the chances that required revisions in the rules can be implemented in time for the 2006 elections.

## II. Any Stay Should Be Conditioned On The Commission Deciding Which Of This Court's Rulings It Is Going To Challenge And Agreeing To Cooperate With Plaintiffs In Seeking Expedited Review In The Court Of Appeals.

Although plaintiffs believe a stay is unnecessary, they have decided not to oppose a narrowly tailored stay given the impending elections and the Commission's failure to do anything to give the regulated community and public any guidance. The Commission did not contact plaintiffs to discuss a possible stay until approximately 4 p.m. on Thursday, September 30 — twelve days following this Court's decision. *See* Curtis Decl. ¶ 2. Plaintiffs' counsel told the Commission's counsel during that call that, while he believed a stay was unnecessary, he also believed that plaintiffs would be willing to stipulate to an appropriate stay subject to certain conditions. *Id.* Plaintiffs' counsel confirmed to the Commission in writing over the noon hour the next day (October 1) that plaintiffs were prepared to stipulate to a stay subject to two conditions:

> Plaintiffs believe a contested motion is unnecessary. Plaintiffs are prepared to stipulate to an appropriate stay pending appeal. Such a stay should be conditioned on (1) the Commission immediately specifying which rules it is appealing, with the stay to be restricted to those rules; and (2) the parties agreeing to cooperate in seeking expedited review by the Court of Appeals so that the appeal may be submitted for decision in early 2005.

*Id.* ¶ 3. The Commission rejected both of these conditions, advising plaintiffs' counsel later that afternoon that (a) it could not agree to specify which aspects of this Court's ruling it was appealing because it hadn't yet decided; and (b) until it had decided which issues it was going to raise on appeal, any discussion of expedition was "premature." *Id.* ¶ 4.

The Commission's demand for a stay without these two reasonable conditions is spurious. The Commission offers no explanation why, given its request that everyone else treat this as an emergency matter, it cannot similarly move with dispatch and simply decide what is and is not within the scope of its appeal, and therefore what should and should not be within the

scope of a stay. The Commission will not even hint as to when it proposes to make such a decision, promising only that it will "promptly notify the Court of its decision" when it "*ultimately*" decides. FEC Mot. at 4 (emphasis added). Plaintiffs are aware of no precedent for a stay to give the appellant more time to ponder the scope of its appeal, and do not see how such a stay could serve the public interest. To the contrary, the public interest would seem to be best promoted by the Commission immediately deciding the scope of its appeal and then moving ahead with remand proceedings as to any rules that are not included in its appeal.

Nor is it reasonable for the Commission to demand emergency relief without agreeing to seek expedited appellate review. The longer the parties delay in submitting the case to the Court of Appeals, the further into the 2006 election cycle we will be before obtaining a definitive appellate resolution. If that resolution sustains this Court's judgment in whole or in part — and the Commission has offered no good reason to suppose this Court has erred (*see* Part III below) — the Commission will then be required to proceed with the new rulemakings and other administrative actions required by this Court. If that occurs too far into the 2006 election cycle, the Commission's position is easily predicable: it will be too late to change the flawed rules in time for the 2006 elections, and we will then be asked to wait until 2008.

We have traveled this road before. Congress "reluctantly" decided not to implement the Bipartisan Campaign Reform Act during the 2002 election cycle, but expected that the reform rules would be fully in place by the time of the 2004 elections.[4] If the full and faithful

[4] 148 Cong. Rec. S2142 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (Congress had "reluctantly determined that it would simply not be practical" to apply the new system during the 2002 election campaign, but expected the reforms to be in place in time for the 2004 campaign); *see also id.* (statement of Sen. Feingold) (Congress intended to encourage "prompt and efficient" resolution of disputes so that "a new campaign finance system can be implemented in a certain and sure fashion for the 2004 elections").

implementation of Congress's reforms is to be further delayed, it is appropriate at the very least to require the parties to take reasonable measures to seek expedited review so that the Court of Appeals is in a position to decide the appeal in time to have a meaningful impact on the 2006 election cycle. Plaintiffs have not suggested any unreasonable schedule — simply that the parties work out a reasonably expedited schedule so that the appeal may be submitted to the Court of Appeals in early 2005.

## III. The Commission Has Not Demonstrated Any Likelihood Of Success On Either The Jurisdictional Issues Or The Merits.

The Commission correctly notes that "[t]he Court may grant an application for a stay pending appeal without any implication that there was error in the decision being stayed." FEC Mem. at 5. The Commission nevertheless proceeds to devote the bulk of its motion to arguing that this Court reached the wrong result on both the jurisdictional issues and the rulemaking merits. *See id.* at 5-13. Although a stay — subject to plaintiffs' proposed conditions — may be appropriate for other reasons, it certainly is not warranted on these grounds. This is the same kind of situation as described in *United States v. Judicial Watch, Inc.*, 241 F. Supp. 2d 15, 16 (D.D.C. 2003): the party moving for a stay "has offered no new arguments in its motion, but rather it rehashes arguments" that already have been "thoroughly addressed and rejected" by the Court.

*First*, the Commission offers nothing new on the standing or ripeness issues. It simply refers the Court back to the Commission's two prior submissions on these issues and offers some selected quotes from cases cited in those previous submissions. *See* FEC Mem. at 5-8. This Court already has carefully considered all of the Commission's arguments and correctly rejected them. The Commission is unlikely to convince the Court of Appeals that plaintiffs lack standing or that their challenge is not ripe for judicial review, for all of the reasons painstakingly set forth

on pages 6-26 of the Court's Memorandum Opinion as well as in plaintiffs' prior submissions on these issues.[5]

*Second*, the Commission likewise offers nothing new on the merits of the challenged regulations, but simply repeats its prior arguments about the presumptive validity of agency regulations and the highly deferential standard of judicial review. FEC Mem. at 9-11. But as the Commission concedes, this Court already has acknowledged the deferential standard of review and concluded in a rigorous analysis that, even under this standard, most of the challenged rules do not pass muster. *See id.* at 9; *see generally* Mem. Op. at 27-32. The Commission is unlikely to convince the Court of Appeals that the challenged rules are valid, for all of the reasons set forth on pages 32-155 of the Court's Memorandum Opinion as well as in plaintiffs' prior submissions on these issues.[6]

[5] *See* Feb. 27, 2004 Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 84-89 (Dkt. No. 29); Mar. 31, 2004 Plaintiffs' Memorandum in Opposition to Defendant Federal Election Commission's Motion for Summary Judgment, at 2-17 (Dkt. No. 47).

[6] *See* Plaintiffs' Feb. 27, 2004 Memorandum, at 7-84; Plaintiffs' Mar. 31, 2004 Memorandum, at 17-60.

**Conclusion**

For the reasons set forth above and in plaintiffs' earlier submissions, the Court should either deny the Commission's motion for a stay or grant the stay subject to plaintiffs' two proposed conditions.

Dated this 5th day of October, 2004.

Respectfully submitted,


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