UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS COMMITTEE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Case Number 1:04CV00007 (JDB) MOTION FOR VOLUNTARY REMAND

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR VOLUNTARY REMAND

The Federal Election Commission ("Commission") hereby moves this Court for a voluntary remand of this case. A remand will allow the Commission to apply an intervening decision of the United States Supreme Court to the facts of this case and facilitate the efficient resolution of this matter.

The Commission is also submitting with this motion a motion to hold summary judgment proceedings in abeyance pending resolution of this motion to avoid extensive briefing that is likely to be unnecessary.

Pursuant to LCvR 7(m), counsel for the Commission conferred with counsel for plaintiff who stated that they oppose this motion. A memorandum of points and authorities and a proposed order is attached.

Respectfully submitted,

/s/ Lawrence H. Norton
Lawrence H. Norton
General Counsel

/s/ Richard B. Bader

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

/s/ David Kolker

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

Vivien Clair
Greg J. Mueller
Kai Richter
Attorneys
FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650
(202) 219-0260 (FAX)

February 7, 2005

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KEAN FOR CONGRESS COMMITTEE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Case Number 1:04CV00007 (JDB) MEMORANDUM

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR A VOLUNTARY REMAND

The Federal Election Commission ("Commission" or "FEC") is moving this Court to remand the administrative matter, designated Matter Under Review ("MUR") 5024, for further consideration by the Commission. The Commission's decisionmaking in MUR 5024 took place prior to the landmark Supreme Court decision in McConnell v. FEC, 540 U.S. 93 (2003). In particular, McConnell extensively discussed the "express advocacy" standard, the application of which is central to this case. In view of this development, the Commission seeks a remand so it can apply McConnell to the facts of this case and thereby facilitate the efficient resolution of this matter.

The Commission intends to expedite its consideration and to act on the remand within 60 days. If the Commission finds "reason to believe" that a violation of the Federal Election Campaign Act ("Act") took place and reverses its decision to dismiss plaintiff's administrative complaint, then the outcome desired by the plaintiff will occur and this case will be moot. If, on the other hand, the Commission reconsiders the

administrative complaint and again dismisses the complaint, its written Statement of Reasons will address the Supreme Court's decision in McConnell and facilitate efficient judicial review.

I. BACKGROUND

On May 31, 2000, the Kean Committee filed an administrative complaint with the Commission, designated MUR 5024. First Amended Complaint ¶ 17. According to the Committee's court complaint, its administrative complaint requested that the Commission take action against the Council for Responsible Government, Inc., a Virginia corporation, and its "Accountability Project" (collectively "CRG"). First Amended Complaint ¶¶ 2, 22. In its amended court complaint, the Committee alleges that in May 2000, CRG financed and mailed advertisements advocating the defeat of Mr. Kean in the primary election and in doing so violated various provisions of the Act. First Amended Complaint ¶¶ 12, 14, 15, 18, 19.

On November 4, 2003, the Commission considered the Kean Committee's administrative complaint and was equally divided, 3-3, on whether to find there was "reason to believe" that the FECA had been violated. Exh. 1 (certification of Commission vote). Lacking the necessary four votes to proceed to the next administrative stage, the Commission then voted unanimously to dismiss the complaint and close the file in the case. Id. By letter dated November 10, 2003, the Commission advised plaintiff that it was equally divided on whether to find "reason to believe" and that it had "closed the file on this matter."

On December 10, 2003, the Supreme Court issued its decision in McConnell v. FEC, 540 U.S. 93 (2003). Among other things, this lengthy and comprehensive decision

resolved a longstanding controversy regarding the express advocacy standard by explaining that "the express advocacy limitation, in both the expenditure and the disclosure contexts, was the product of statutory interpretation rather than a constitutional command." McConnell, 540 U.S. at 191-92.

On January 5, 2004, the Kean Committee filed its initial complaint for judicial review of the Commission's dismissal of the administrative complaint, and on March 4, 2004, the Committee filed an amended court complaint. The amended complaint alleges that the Commission's dismissal of the administrative complaint was arbitrary, capricious, and contrary to law. First Amended Complaint ¶¶ 7, 33. The Committee seeks a judicial declaration that the Commission acted unlawfully and an order directing the agency to conform to the Court's declaration. First Amended Complaint plea for relief ¶¶ a), b).

On January 13, 2004, the three Commissioners — Bradley A. Smith, David M. Mason, and Michael E. Toner — who had voted against finding "reason to believe" issued a Statement of Reasons explaining their votes. Exh. 2. That statement was an explanation of the Commission's decision on November 4, 2003, which was made more than a month before McConnell was decided. As these Commissioners explained, "[a]ccordingly, the Commission evaluated this matter under the governing law that existed prior to McConnell v. FEC." Exh. 2 at 2 n.4.[1]

[1] The plaintiff has also noted that the Commission's decision to dismiss the underlying administrative matter was made before the Supreme Court decision in McConnell. See Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, filed May, 19, 2004, ("Pl's. Mem.") at 6 ("the Commission decided these cases prior to the Supreme Court's decision in McConnell ... ").

II. THE COURT SHOULD REMAND THIS CASE TO ALLOW THE COMMISSION TO RECONSIDER ITS DECISION IN LIGHT OF McCONNELL

A voluntary remand is entirely appropriate in this case because the intervening Supreme Court decision was not part of the Commission's decisionmaking. Such an agency request for voluntary remand should be granted as a matter of course. See Ethyl Corp. v. Browner, 989 F.2d 522, 524 (D.C. Cir. 1993) (explaining that agency requests for voluntary remand are "commonly grant[ed]").

A. A Remand Will Enable The Commission To Consider McConnell v. FEC

The D.C. Circuit has a "tradition of allowing agencies to reconsider their actions where events pending appeal draw their decision into question." Browner, 989 F.2d at 524. This tradition is reflected, not only in Browner, but in several other decisions granting agency motions for remand where an intervening judicial opinion had a bearing on the agency's earlier ruling. See, e.g., Granholm v. FERC, 180 F.3d 278, 280 (D.C. Cir. 1999) (describing earlier remand); Natural Resources Defense Council, Inc. v. Reilly, 976 F.2d 36, 38 (D.C. Cir. 1992) (same); Nat'l Fuel Gas Supply Corp. v. FERC, 899 F.2d 1244, 1249 (D.C. Cir. 1990). Under these circumstances, remand is "typically grant[ed]." Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta, 375 F.3d 412, 416-17 (6th Cir. 2004). Indeed, one circuit has described it as "required." SKF USA, Inc. v. United States, 254 F.3d 1022, 1028 (Fed. Cir. 2001) (citing Browner, 989 F.2d at 524). Here, because the Commission took final action to dismiss the underlying administrative complaint before the Supreme Court's decision in McConnell, there is no reason to deny the Commission's request for a remand to consider the impact of that decision.

Granting the Commission's request for a remand is especially warranted here in light of this Court's own obligation to apply the law as explained in McConnell. Under the retroactivity doctrine, Supreme Court decisions are applied retroactively in pending proceedings, even if the underlying factual activity subject to review occurred before the decision was handed down. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 532 (1991); Harper v. Virginia Dep't of Taxation, 509 U.S. 86, 97-98 (1993). "[W]hen th[e] Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule." Harper, 509 U.S. at 97. As Justice Scalia has put it, the decision of an Article III court announces the law "as though [it] were 'finding' it — discerning what the law is, rather than decreeing what it is … changed to, or what it will tomorrow be." Beam, 501 U.S. at 549 (Scalia, J., joined by Marshall, J., and Blackmun, J., concurring) (emphasis omitted). Thus, in this case, the Court will have to decide whether the Commission's interpretation of the law was reasonable in light of the McConnell decision; in turn, the Commission should have the opportunity to consider how that decision applies to the facts of this case.

Furthermore, even where there is no intervening event, as there is here, "the agency may request a remand (without confessing error) in order to reconsider its previous position." SKF USA, 254 F.3d at 1029. Such remand requests fall squarely within the "inherent authority of an agency to reconsider a prior decision." Mineta, 375 F.3d at 416; Natural Resources Defense Council v. United States Dep't of Interior, 275 F. Supp. 2d 1136, 1141 (C.D.Cal. 2002). Accordingly, courts grant remand requests

for reconsideration of an agency decision, unless the party opposing remand "clearly articulate[s]" why remand should not be allowed, Mineta, 375 F.3d at 416, and the court concludes that "the agency's request is frivolous or in bad faith," SKF USA, 254 F.3d at 1029. No such exceptional facts are presented here. The Commission's remand request is well-justified in light of subsequent judicial developments, and the relatively brief period contemplated on remand (60 days) will not prejudice the Kean Committee. Therefore, the Commission should be allowed to reconsider its earlier ruling on remand, just as other agencies have been allowed to reconsider their decisions in the past. See, e.g., Southwestern Bell Tel. Co. v. FCC, 10 F.3d 892, 896 (D.C. Cir. 1993); Browner, 989 F.2d at 332; Wilkett v. ICC, 710 F.2d 861, 863 (D.C. Cir. 1983); accord, Anchor Line Ltd. v. Federal Maritime Comm'n, 299 F.2d 124, 125 (D.C. Cir. 1962) ("when an agency seeks to reconsider, it should move the court to remand").

B. A Remand Will Preserve Judicial Resources And Facilitate the Efficient Resolution Of This Case

Finally, a remand will conserve the Court's scarce judicial resources and may obviate the need for further judicial proceedings entirely, depending on what position the Commission ultimately adopts in light of McConnell. It is vastly preferable "to allow an agency to cure its own mistakes, if indeed any have been made here, rather than waste the courts' and the parties' resources." Browner, 989 F.2d at 524. For this reason as well, the Commission's motion should be granted. See Burlington Resources Oil & Gas Co. v. FERC, No. 96-1285, 1997 WL 150072, *1 (D.C. Cir. Feb. 7, 1997) ("a remand is

appropriate to avoid needless expenditure of judicial resources"); SKF USA, 254 F.3d at 1029 ("remand may conserve judicial resources").[2]

At the very least, on remand the Commission will be able to "provide further explanation for the basis for its decision." See Public Serv. Comm'n of Ky. v. FERC, No. 03-1092, 2004 WL 2229000, *1 (D.C. Cir. Jan. 21, 2004) (granting remand on this basis). In particular, the plaintiff here has argued extensively in its brief on the merits about the implications of McConnell. See Pl's. Mem. at 6 n.2, 15-16, 19-20, 32-33. Plaintiff has argued, for example, that "as McConnell makes clear, the controlling Commissioners gravely misinterpret the Supreme Court precedent governing this case...." Pl's. Mem. at 20. Since the Commission itself did not apply McConnell to the facts of this case, an explanation in a summary judgment brief of how McConnell applies might reflect only the views of the Commission's counsel. However, "[i]n evaluating agency action, [courts] look at the reasons given by the agency, not counsel's post hoc rationalizations." American Forest and Paper Ass'n. v. EPA, 294 F.3d 113, 120 n.8 (D.C. Cir. 2002) (quoting Motor Vehicle Manufacturers Ass'n v. State Farm, 463 U.S. 29, 50 (1983)). "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself," Motor Vehicle Manufacturers Ass'n., 463 U.S. at 50, and a remand would enable the Court to review the Commission's own articulation of McConnell's application to the facts of this case.

[2] Regardless of whether the Commission ultimately reaches a different result upon further consideration of the issues, remand is appropriate. See Southwestern Bell Tel. Co, 10 F.3d at 896 (noting that commission "reaffirmed its essential holding"); Wilkett,710 F.2d at 863 (commission "reached the same conclusion" on remand).

Conclusion

For the reasons stated above, the Court should grant the Commission's motion for a voluntary remand.

Respectfully submitted,

/s/ Lawrence H. Norton
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General Counsel

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

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