UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Representative Christopher Shays and
Representative Martin Meehan,
Plaintiffs,

v.

Federal Election Commission,
Defendant.

Civil Action No. 04-1597 (EGS)

PLAINTIFFS' MOTION TO ENFORCE ORDER

Plaintiffs Christopher Shays and Martin Meehan respectfully move this Court for enforcement of the Court's order of March 29, 2006, requiring Defendant Federal Election Commission either to issue a new Explanation and Justification for its decision not to promulgate rules that regulate groups organized under section 527 of the Internal Revenue Code, or to begin proceedings aimed toward the promulgation of such rules.

Support for this motion is set forth in the accompanying Memorandum in Support of Plaintiffs' Motion to Enforce Order and supporting Plaintiffs' Exhibits.

Dated this 13th day of September, 2006.

Respectfully submitted,

/s/ Roger Witten

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Plaintiffs Christopher Shays and Martin Meehan respectfully request this Court to exercise its clear authority, *see Common Cause v. FEC*, 692 F. Supp. 1397, 1399 (D.D.C. 1988), to enforce its Order, dated March 29, 2006, to defendant Federal Election Commission ("FEC"). In the five months that have passed since this Court's Order, the FEC has neither issued a new rule nor a new explanation for its current rule, as required by the Order. If the FEC is left free to

proceed in this dilatory fashion, then the 2008 presidential election will see the same levels of 527 group soft money that was spent in 2004.

BACKGROUND

On March 29, 2006, this Court issued an Order and Opinion, holding that the FEC's Explanation and Justification ("E & J") for its decision not to issue any rule regulating 527 groups offered no adequate explanation for the Commission's purported conclusion that case-by-case adjudication is preferable to rulemaking as a means of ensuring that 527 groups comply with federal campaign finance law. The Court accordingly concluded that the FEC had violated the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C)-(D), and ordered the Commission either to "articulate its reasoning for its decision to proceed by case-by-case adjudication or to promulgate a rule if necessary." *Shays v. FEC*, 424 F. Supp. 2d 100, 103 (D.D.C. 2006).

To date, the FEC has neither complied with this Court's order nor even given an indication of when it intends to do so. The FEC's only public action to date has been to issue a press release on May 31, 2006, announcing that it had decided not to appeal and that it "intends to prepare a more thorough explanation of the rulemaking decisions at issue." (**Exhibit A**). The FEC issued this release after it had voted once again not to promulgate a rule regarding 527 groups. *Id.*

On June 7, 2006, counsel for plaintiffs Shays and Meehan wrote to the FEC's General Counsel, pointing out the urgent need for timely compliance with the Order, "with the 2006 congressional elections rapidly approaching and the beginning of the 2008 presidential election season to follow shortly thereafter." (**Exhibit B**) The letter asked the FEC to issue a new E & J to comply with this Court's Order "in the next thirty days," i.e., by July 7. The Commission has

neither responded to the June 7 letter nor taken any evident steps toward complying with the Order.

ARGUMENT

"[D]istrict courts clearly have the authority to enforce the terms of their mandates." *Fund for Animals v. Norton*, 390 F. Supp. 2d 12, 15 (D.D.C. 2005); *see Common Cause*, 692 F. Supp. at 1399. As this Court put it in 2004, "courts grant motions to enforce judgments when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it." *Heartland Hosp. v. Thompson*, 328 F. Supp. 2d 8, 11 (D.D.C. 2004).

Judge Flannery's ruling in *Common Cause v. FEC* is particularly instructive. In that case, the District Court had previously ordered defendant FEC to promulgate regulations regarding "soft money." 692 F. Supp. at 1398. Eleven months later, the FEC had still not promulgated soft money rules. *Id.* at 1399. Plaintiff Common Cause moved to enforce the Court's order.

The *Common Cause* Court first identified

> two jurisdictional bases for [plaintiff's] current motion: first, the court has inherent jurisdiction to interpret and enforce its prior orders, jurisdiction recognized in the federal courts' statutory authority to issue all writs "necessary or appropriate in aid of their respective jurisdiction" [28 U.S.C. § 1651(a)]; second, the court has federal question jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act [5 U.S.C. § 706(1)].

Id. (footnotes omitted).[1]

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[1] Subsequent authority fully confirms a district court's power to compel federal agency action that has been unreasonably delayed. *See, e.g.*, *St. Lawrence Seaway Pilots' Ass'n v Collins* ("*Pilots' Ass'n*"), 362 F. Supp. 2d 59, 66 (D.D.C. 2005), *vacated on other grounds*, 2005 WL 1138916 (D.D.C. May 13, 2005); *Public Citizen Health Research Group v Comm'r, FDA*, 724 F. Supp. 1013, 1019 (D.C. Cir. 1989); *see also Potomac Elec. Power Co., v. ICC*, 702 F.2d 1026, 1028 (D.C. Cir 1983) ("We find . . . the Commission has unreasonably delayed . . . and

Judge Flannery then considered the factors enumerated in *Telecommunications Research and Action Center v. FEC* ("*TRAC*"), 750 F. 2d 70, 80 (D.C. Cir. 1984), for assessing what courts should do when an agency delays in complying with a court order. *Common Cause*, 692 F. Supp. at 1399-1400. These factors relevantly include: the length of the delay; the nature of the interests harmed by the delay; and the effect of expedition on competing or higher agency priorities. *Id.*; *see TRAC*, 750 F.2d at 80.[2] In considering the *TRAC* factors, the *Common Cause* Court recognized "the federal courts' settled reluctance to insinuate themselves into the administration of an agency simply because that agency has been less than expeditious." *Common Cause*, 692 F. Supp. at 1399. Nevertheless, Judge Flannery found the FEC's delay warranted judicial relief, pointing to factors that apply in the present case as well.

Under the first *TRAC* factor, courts consider the length of an agency's delay according to a "rule of reason." *TRAC,* 750 F.2d at 80. Reason, among other things, requires agencies to complete their actions within a timeframe that does not degrade their public credibility. *See, e.g., Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) (noting that "excessive delay saps the public confidence in an agency's ability to discharge its responsibilities" (citations omitted)); *MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980) ("Complex regulation must still be credible regulation; the delay at issue threatens the FCC's credibility . . . ."). In *Common Cause,* Judge Flannery observed that "public attention to allegations of 'soft money' abuses by the major political parties has increased . . .

invoke the power granted this court in 5 U.S.C. § 706(1) . . . to order the Commission to proceed expeditiously to a final resolution.").

[2] These factors are not ironclad standards, but provide useful guidance to courts in assessing agency delay. *TRAC*, 750 F.2d at 80; *see also, e.g., Beyond Pesticides/Nat'l Coalition Against the Misuse of Pesticides v. Johnson*, 407 F. Supp. 2d 38, 40 (D.D.C. 2005); *Pilots' Ass'n*, 362 F. Supp. 2d at 66.

there is a public perception of widespread abuse." 692 F. Supp. at 1399. Likewise, here, the FEC's credibility is undermined by its inaction regarding 527 groups -- for years before this Court's order and, now, for months thereafter -- because "there is a public perception of widespread abuse." *See, e.g.*, Editorial, "The FEC's Reluctant Regulators," Wash. Post (June 9, 2006) (**Exhibit C**) (pointing out that the FEC's "case-by-case adjudication" of the 527 issue "has resulted in almost no enforcement at all," as "anyone familiar with the glacial pace of FEC operations" would expect).

In *Common Cause*, the FEC's failure to promulgate a new rule after eleven months troubled the Court because -- as in the present case -- "this particular rulemaking was preceded by years of inaction," 692 F. Supp. at 1400-01, and the agency was "not starting from scratch," *id.* at 1401. Here, the task facing the FEC on remand is relatively simple and straightforward -- to write an explanation for a policy decision it has previously made. Unlike the situation in *Common Cause*, the FEC here need not navigate the cumbersome procedural hurdles involved in promulgating a new rule or the challenges of making a policy choice. Thus, by comparison, the five-month delay here appears even more unreasonable than the eleven-month delay that the *Common Cause* Court criticized.[3]

In addition to considering the reasonableness of the FEC's delay, it is "perhaps most critical[]" that the Court consider the consequences of agency delay. *Cutler v. Hayes,* 818 F.2d 879, 898 (D.C. Cir. 1987). Addressing those consequences in terms pertinent here, Judge

[3] Indeed, Congress in BCRA required the Commission to initiate and complete a complicated rulemaking *within 90 days* of enactment of the statute, for all of the rules under Title I of that law (relating to party soft money), sec. 402(c)(2); P.L. No. 107-155, 116 Stat. 81, "so that Congress' intended campaign finance structure would be available at the next possible election cycle and in place as early as possible." *Shays v. FEC,* 340 F. Supp. 2d 39, 54 (D.D.C. 2004) (*Shays I).*

Flannery found that judicial relief was warranted in part because "the climate of concern surrounding soft money threatens the very 'corruption and appearance of corruption' by which 'the integrity of our system of representative democracy is undermined,' and which the FECA was intended to remedy." 692 F. Supp. at 1401 (footnotes omitted) (quoting *Buckley v. Valeo*, 424 U.S. 1, 25-27 (1976)). More recently, in denying the FEC's request for a stay pending appeal of the court's order requiring it to rewrite multiple regulations that failed to properly implement the Bipartisan Campaign Reform Act of 2002, Judge Kollar-Kotelly said she "declines to stamp the Commission's 'business-as-usual' tactics and request for delay with the judicial imprimatur of approval" and that "the public interest is best served by enforcing Congress' intended campaign finance system expeditiously in order to assuage the harms produced by the Commission." *Shays v. FEC*, 340 F. Supp. 2d at 41, 54; *see also McConnell v. FEC*, 540 U.S. 93, 142, 145 (2003) (describing how the FEC's failure to regulate soft money "subverted" the law and "invited widespread circumvention").

Likewise here, if 527 groups are left effectively unregulated through continued FEC inaction, the same vital concerns are implicated. The FEC has failed to act in response to this Court's order despite press reports of new 527 groups that intend to raise and spend money to influence the 2006 Congressional elections, as pointed out in the June 7 letter to the FEC. *See* Exhibit B (citing J. Kurtz, "Democrats Form New 527 to Win Back House," Roll Call (June 5, 2006)). When the Commission announced this past May that it would issue a new E & J instead of a new rule, 527 groups took that as a sign that they were free to continue their soft money practices for the 2006 election.[4] Furthermore, in a very real practical sense, the issue here is

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[4] *See* K. Ackley & M. Reynolds, "527 Groups Mostly Breathe Sigh of Relief," Roll Call (June 5, 2006) (**Exhibit D**) ("Now that the Federal Election Commission last week opted not to

whether the Commission's continued dilatory behavior will allow 527 groups to replicate in the 2008 campaign the more than $400 million in 527 soft money spending that tainted the 2004 presidential campaign. In the 2004 cycle, 527 groups were raising soft money and planning their campaign activities by the summer of 2003. *See Democracy 21 v. America Coming Together et al.* (F.E.C. Jan. 2004) (MUR 5403) (**Exhibit H**). If the same pattern holds, that means that by mid-2007, 527 groups will once again be engaged in soft money activities directed to the 2008 presidential election. In other words, the question whether there will be effective rules in place for the 2008 election is very much at stake for this Court *now*, and each day the Commission is permitted to prolong even initiating the process to comply with this Court's order, the greater the threat that this matter will remain unresolved as the 2008 campaign begins in earnest a little more than a year from now.

This point has force even though the FEC's forthcoming E & J, when it issues, presumably will attempt to articulate reasons that support its decision not to issue a 527 rule.

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take its rules on 527 political groups back to the drawing table, most of these groups are expressing satisfaction with the decision. And, some say, they can move ahead with activities without fear of having the FEC rules change on them as the 2006 election approaches."); K. Doyle, "Soros, Lewis Contributing Again to 527 Groups Favoring Democrats," BNA Money & Politics Report (July 17, 2006) (**Exhibit E**) ("George Soros and Peter Lewis, the biggest contributors to Democratic-leaning political organizations in the 2004 election campaign, have begun to move money into so-called Section 527 groups again, gearing up for the 2006 congressional elections by contributing more than $2 million so far this year….The new contributions provide concrete evidence that the nonparty groups could continue to get substantial funding in this year's campaign despite the controversy over their past activities and proposals to limit their activities debated in Congress and the Federal Election Commission."); *see also* J. Kurtz, "Democrats Form New 527 Group to Win Back House," Roll Call (June 5, 2006) (**Exhibit F**) ("With the Republican National Committee poised to dump tens of millions of dollars into key House races this year, Democratic operatives and party leaders on Friday launched a new 527 fundraising committee to help the party win control of the House in November."); P. Kane, "527 Eyes Senate GOPers," Roll Call (March 16, 2006) (**Exhibit G**) ("Top Democratic campaign operatives opened a new 527 group this week, hoping to fill a void with an outlet for airing ads in key Senate battleground states in the midterm elections.").

That E & J will have to explain and justify the FEC's conclusion "that adjudication is preferable to rulemaking for regulating 527 groups," even though, as the Court noted, "case-by-case adjudication appears to have been a total failure." 424 F. Supp. 2d at 115. At the time of the Court's Order last March, cases against 527 groups arising from the 2004 campaign had been "languish[ing] on the Commission's docket for as long as 23 months, with no end in sight, even as the 2006 campaign has begun." *Id.* at 116. Now, five months later, the cases still "languish[]," with no publicly available evidence the Commission has acted yet -- other than simply to dismiss one case[5] -- even as the 2006 campaign approaches its culmination. The "patent inadequacy of the case-by-case approach," *id.,* that was evident to the Court five months ago is even more patently inadequate now.

For all these reasons, it is likely that the FEC's new E & J will itself be subject to judicial review. It will not survive APA scrutiny if the Commission once again does not adequately answer the questions posed by the Court, by explaining, for instance, how the "complexities of rulemaking" proffered as a defense by the Commission become "more manageable if the FEC pursues case-by-case adjudication," how the resolution of individual cases "would be effective as a means to provide guidance to 527 groups generally," whether First Amendment or due process concerns might "impair" the ability to bring enforcement actions "in the absence of a regulation

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[5] By letter dated August 28, 2006, the Commission notified Democracy 21 that it had determined to close its file and take no action against The Leadership Forum ("TLF"), one of the three 527 groups named in the January 15, 2004 complaint, *Democracy 21 v. America Coming Together et al.* (F.E.C. Jan. 2004) (MUR 5403) (**Exhibit I**). The Commission left unresolved the charges against the other two 527 groups named as respondents in that complaint, and there still is no publicly available information that the Commission has taken any action against those groups or against the other 527 groups named in the related 2004 complaints. The Commission's dismissal of the complaint against TLF did not address the 527 issue and could not possibly be viewed as indicative of an effort by the Commission to address that issue on a case-by-case basis.

providing clear guidance" to 527 groups, and most pointedly, how – given its dismal track record on the multiple administrative complaints still pending (now, for even five months longer) from the 2004 election – it can adequately enforce the law on a case-by-case basis, without a new rule. 424 F. Supp. 2d at 115-6.

The judicial review that will almost surely follow the issuance of a new E & J will take some time, as will a subsequent FEC rulemaking if the Court were then to order the Commission to promulgate a rule after again finding the E & J to be inadequate. (The 2004 rulemaking on this matter stretched for more than eight months, from publication of the notice of proposed rulemaking on March 11, 2004 until publication of the final E & J, on November 23, 2004). It is highly possible that, absent strong judicial stewardship, the process that follows from the implementation of the Court's Order could stretch into 2008, by which time 527 groups are expected to have begun activities aimed at the elections.

Although in *Common Cause* the Court stopped short of imposing a deadline on the FEC, instead requiring the FEC to report back to the Court, 692 F. Supp. at 1398,[6] this Court would be fully justified in ordering the FEC to issue its new E & J by a date certain -- for example, within 30 days after entry of an order on this motion. *See Cutler*, 818 F. 2d at 899 ("The District Court may find it appropriate . . . to impose a binding timetable on the FDA . . . ."); *Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 35 (D.C. Cir. 1984) ("If the court finds

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6 *See also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003) (noting that "if the district court is unable to conclude that the delay to date has been unreasonable, then it may nevertheless retain jurisdiction over the case in order to monitor the agency's assurances that it is proceeding as diligently as possible"); *Pilot's Ass'n,* 362 F. Supp. 2d at 75 (retaining jurisdiction and ordering regular reports on the agency's compliance with the Court's order, "[t]o ensure that the delay does not move *into* the realm of unreasonableness" (emphasis added)); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 556 (D.C. Cir. 1999) (retaining jurisdiction until there was a final agency disposition)

unreasonable delay, it must fashion an appropriate remedy, which may include ordering rulemaking to begin immediately and proceed expeditiously . . . ."); *Nader v. FCC*, 520 F.2d 182, 207 (D.C. Cir. 1975) (after finding unreasonable delay, ordering the agency to submit a schedule for addressing unresolved regulatory issues within thirty days). The Commission will by then have had at least half a year to issue an explanation for a decision -- an extremely generous amount of time given the simple task facing the FEC, no matter what else the Commission has on its agenda. At a minimum, this Court should (a) require the FEC to identify a date certain in the near future when it will comply with this Court's order; and (b) retain jurisdiction to monitor the FEC's progress and to take additional steps as may be warranted.

CONCLUSION

For these reasons, plaintiffs Shays and Meehan respectfully urge the Court to take appropriate actions to compel the Commission to comply with the Court's Order of March 29, 2006.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7(f), plaintiffs respectfully request a hearing on their Motion.

LOCAL RULE 7(m) CERTIFICATION

Pursuant to Local Rule 7(m), plaintiffs state that they have discussed this motion in good faith with opposing counsel in an effort to determine if the motion would be opposed, and, if so, whether the areas of disagreement could be narrowed. This motion is opposed in full.

Dated this 13th day of September, 2006.

Respectfully submitted,

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