UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPUBLICAN NATIONAL COMMITTEE, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civ. No. 08-1953 (RJL)
FEDERAL ELECTION COMMISSION,	)	RESPONSE TO MOTION TO EXPEDITE
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S RESPONSE TO PLAINTIFFS' MOTION TO EXPEDITE

Defendant Federal Election Commission ("Commission") hereby responds to Plaintiffs' motion to expedite this action. The Commission agrees with Plaintiffs that section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 113-14, provides for expedited judicial review of certain constitutional challenges to BCRA, and the Commission accordingly concurs that this case should be advanced pursuant to the statute. The schedule proposed by Plaintiffs' motion, however, would not merely speed consideration of this action, but also severely restrict the Commission's procedural rights in at least two respects.

First, Plaintiffs propose a briefing schedule that would effectively eliminate the Commission's right to respond to the complaint. The Commission's responsive pleading is due on January 13, 2009, at which time the Commission may file a motion to dismiss pursuant to Federal Rule of Civil Procedure 12. If the Commission were compelled to proceed directly to summary judgment briefing, as Plaintiffs' proposed schedule would require, the Commission would be deprived of its opportunity to challenge the complaint's facial sufficiency. In a case such as this, where Plaintiffs have asserted nine distinct constitutional claims, a dispositive

motion narrowing the claims in dispute is particularly crucial to the defense of the action. Indeed, a Rule 12 motion is likely to speed ultimate resolution of this case, as there will be no need for the parties to develop a factual record (as discussed below) regarding any claims eliminated by the preliminary motion. For these reasons, the Commission is unwilling to waive its right to move to dismiss this action. Nothing in BCRA requires the Commission to effect such a waiver: While section 403 shortens the time period for filing certain documents (such as notices of appeal, BCRA § 403(a)(3)), it does not alter the standard rules for responsive pleadings.[1]

Second, Plaintiffs' proposed schedule would drastically limit time for record development and entirely foreclose any opportunity for discovery. If the Commission files a motion to dismiss and that motion is denied, it may be necessary for the Commission to conduct limited discovery into the factual allegations that form the basis of Plaintiffs' complaint. In enacting section 403 of BCRA, Congress did not intend for courts to bypass development of a factual record in evaluating constitutional challenges. On the contrary, as one of BCRA's principal Senate sponsors stated during floor debate:

> Finally, and most importantly, although [BCRA § 403] provides for the expedition of these cases to the greatest possible extent, we do not intend to suggest that the courts should not take the time necessary to develop the factual record and hear relevant testimony if necessary. . . . By expediting the case, we in no way want to rush the Court into making its decision without the benefit of a full and adequate record.

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[1] The mandatory expedition requirement of section 403 expired on December 31, 2006. BCRA § 403(d)(1). Since then, expedition has been required only in actions where the plaintiff "elects such provisions to apply to the action." BCRA § 403(d)(2). Accordingly, because expedition was not directly mandated in this case by Congress, and because Plaintiffs' request for expedition is made in the context of relitigating issues already decided under the expedited process in *McConnell v. FEC*, 540 U.S. 93 (2003), the importance of expedition is greatly reduced in the instant case.

147 Cong. Rec. S3189 (Mar. 30, 2001) (remarks of Sen. Feingold); s*ee also id*. at S3189-90 (remarks of Sen. Dodd). This need for a developed factual record is heightened by the importance of concrete factual settings to constitutional decisions, particularly in campaign finance cases. The D.C. Circuit has found it "undesirable to decide a constitutional issue abstracted from its factual context," *International Ass'n of Machinists v. FEC*, 678 F.2d 1092, 1097 (D.C. Cir. 1982) (en banc), and the Supreme Court has repeatedly emphasized the importance of a full factual record in constitutional challenges to campaign finance statutes. *See, e.g.*, *Bread Political Action Comm. v. FEC*, 455 U.S. 577, 580 (1982) (requiring district court to make findings of fact before certifying constitutional question to en banc court of appeals under 2 U.S.C. § 437h); *California Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) ("[I]mmediate adjudication of constitutional claims . . . would be improper in cases where the resolution of such questions required a fully developed factual record."); *see also Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 618 (1996) (opinion of Breyer, J.) (discussing importance of record evidence in reviewing constitutionality of limits on political party expenditures). Accordingly, any expedited schedule should allow the Commission a reasonable opportunity to gather facts supporting its defense of the significant provisions of federal law at issue.[2]

Plaintiffs cite (Pls.' Mot. to Expedite at 4) statements by two Justices in the principal opinion in *Wisconsin Right to Life v. FEC*, 127 S. Ct. 2652, 2666 (2007) ("*WRTL*"), including

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[2] Plaintiffs assert that no discovery is necessary because this case involves purely legal issues. (*See* Pls.' Mot. to Expedite at 4.) That assertion, however, provides no guarantee that Plaintiffs will not submit incomplete, inaccurate, or untested affidavits in support of their summary judgment motion. Eliminating discovery would deny the Commission any opportunity to investigate the veracity of factual assertions by Plaintiffs. In light of the well-established need for factual record development in campaign finance cases, the Court should not issue a schedule allowing for the issues presented in this case to be decided solely on the basis of unexamined, unchallenged declarations from individuals who hold a stake in the outcome of the litigation.

that there should be "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation." Those statements, however, were made in the context of an as-applied challenge to a direct limit on expenditures for speech. Because the relevant question in *WRTL* was whether the plaintiff could be prohibited from spending its corporate funds to pay for particular advertisements, the Court applied strict scrutiny and set forth a standard for as-applied challenges consistent with its prior holding that BCRA's spending restrictions on electioneering communications was constitutional "to the extent the speech in question was the 'functional equivalent' of express campaign speech." *Id.* at 2659 (quoting *McConnell v. FEC*, 540 U.S. 93, 204-05, 06 (2003)). The controlling opinion in *WRTL* was specifically concerned about setting a workable standard that did not depend upon the personal, subjective intent of persons financing certain communications.

Those concerns are largely absent here, because Plaintiffs' complaint does not appear to involve the same sort of line drawing that arose in *WRTL.* When the Court in *McConnell* upheld BCRA's limits on political parties' fundraising for "soft money," it did so because "there [was] substantial evidence to support Congress' determination that large soft-money contributions to national political parties give rise to corruption and the appearance of corruption," regardless of how that money is ultimately spent. *McConnell*, 540 U.S. at 154. In any event, the Court in *WRTL* did not purport to eliminate record development in all future constitutional challenges, especially not in challenges to contribution limits. Nothing in *WRTL*, therefore, stands for the proposition that the Commission is precluded from conducting discovery to verify or disprove the factual allegations upon which Plaintiffs' claims are predicated.

As noted above, the Commission recognizes BCRA's expedition requirement, and we therefore concur with Plaintiffs' request that the Court hold a scheduling conference in the near

future. The Commission stands ready to confer with Plaintiffs pursuant to Fed. R. Civ. P. 26(f) when Plaintiffs initiate that conferral process, and the Commission is prepared to negotiate — as it has in previous cases — a schedule that balances BCRA's expedition mandate with the time required for appropriate record development and briefing at each stage of this action. But the Commission opposes Plaintiffs' attempt to deprive the Commission of its right to fully litigate all legal and factual aspects of this constitutional case.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court reject the particular schedule proposed in Plaintiffs' motion to expedite.

Respectfully submitted,

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