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August 4, 2003

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CHRISTOPHER SHAYS and)	
MARTIN MEEHAN,)	
)	
Plaintiffs,)	
)	
v.)	Civil Action No. 02-1984 (CKK)
)	
FEDERAL ELECTION COMMISSION,)	
)	FEC MEMORANDUM
)	AND OPPOSITION
Defendant.)	
)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S MEMORANDUM
IN SUPPORT OF THE COMMISSION’S MOTION TO STAY, AND
IN OPPOSITION TO PLAINTIFFS’ MOTION *RE* FILING OF
ADMINISTRATIVE RECORD AND FURTHER SCHEDULING**

The plaintiffs have asked this Court to require the defendant Federal Election Commission (“Commission”) to file the administrative record for the regulations they have challenged implementing Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat.81 (2002) (“BCRA”) and to issue a scheduling order for the dispositive briefing of this case. As this Court is aware, the Supreme Court has ordered expedited briefing of significant challenges to the constitutionality of the provisions of BCRA underlying the regulations challenged in this case and has scheduled oral argument for September 8, 2003. Therefore, the Commission opposes the plaintiffs’ motion and moves for a stay of this case to avoid the unnecessary burden on the parties and this Court that would occur if the Supreme Court’s decision invalidates parts of BCRA or the Commission reconsiders its regulations in light of the Supreme Court’s decision. Furthermore, a stay will not prevent the plaintiffs from working on

their dispositive briefs, should they wish to, because the documents that will be in the administrative record are available at the Commission and most of them can be found on the Commission's internet web site.

DISCUSSION

Plaintiffs' instant motion seeks an order (i) establishing September 30, 2003 as the date by which the entire administrative record for all challenged BCRA rulemakings must be filed and served, and (ii) requiring the parties to negotiate and file a proposed case scheduling order within 21 days after the filing of the record (i.e., no later than October 21, 2003). Plaintiffs also request the Court to set a scheduling conference "as soon . . . as the Court's docket will permit" to "consider further scheduling issues in light of the pendency of" the appeal of McConnell v. FEC, 251 F. Supp. 2d 176, (D.D.C.), prob. jur. noted, 123 S.Ct. 2268 (Mem), 71 USLW 3753, 3757 (2003). Motion at 1 and 3.

Plaintiffs' motion suggests expedited briefing to "ensure the early resolution of as many of the rulemaking issues as possible." Motion at 2. Plaintiffs assert that, "at the very least, the Court should consider early briefing of those rulemaking issues that relate to portions of BCRA that have been upheld by the three-judge district court. * * * Given the impending 2004 elections, it is important that the Court put these issues on a track that ensures they may be addressed and resolved at the earliest feasible opportunity." Id. at 3. Even though some portions of BCRA were found unconstitutional by the three-judge district court and that decision was stayed pending an expedited appeal to the Supreme Court, plaintiffs nevertheless "recommend that the Court require the Commission to serve and file its administrative record on all issues covered in the First Amended Complaint" by September 30, 2003. Id.

Plaintiffs' motion, if granted, will create substantial, potentially unnecessary work for the Commission. Reviewing, organizing, duplication and collation of the administrative records of the challenged regulations would generate significant cost to the government, given the large number of documents in the multiple rulemakings. Moreover, briefing this case prior to the Supreme Court's decision in McConnell also could result in substantial unnecessary work for the parties (and this Court) if the Supreme Court invalidates or significantly narrows many of BCRA's provisions. If the Supreme Court declares any of the relevant statutory provisions unconstitutional, the plaintiffs' contentions that the implementing regulations permit activity that BCRA prohibits obviously would be moot. To the extent that the Supreme Court construes a statutory provision differently than the Commission has, the Court's decision might necessitate Commission review (and perhaps revision or revocation) of the challenged regulations even if the underlying provision is upheld. Thus, all or major portions of the existing "administrative record" could be rendered irrelevant, and resources expended by the government to produce that record to the Court would have been wasted. In fact, even if BCRA is upheld in its entirety, the Supreme Court's construction of its provisions may result in a Commission review and reconsideration of its regulations. The Commission therefore should be afforded an opportunity to consider the impact of the Supreme Court's decision upon the regulations challenged by plaintiffs here before it is required to advise this Court about an appropriate schedule for litigating the legality of regulations that might need to be withdrawn or significantly changed.

Accordingly, the Commission requests that this Court await the Supreme Court's decision before requiring a substantial investment of time and resources that may never be necessary if the Supreme Court's decision requires a significant overhaul of the challenged regulations. The Commission, therefore, requests that this litigation be stayed until at least

30 days after the Supreme Court's decision in McConnell. Once the Supreme Court renders its decision, the parties to this litigation can reevaluate their positions, and discuss a proposed scheduling order that takes into consideration the Supreme Court's decision and any necessary agency action in light of that decision.

Denying plaintiffs' motion will not impede their access to the documents that would comprise the administrative record. Those documents are already publicly available in the Commission's Public Records Room and on the Commission's website at http://www.fec.gov/pages/bcra/rulemakings/rulemakings_bcra.htm. Plaintiffs have waited more than six months since the Commission answered the Amended Complaint to seek any action in this case, and at this time it seems clear that the better course would be to stay this litigation pending completion of the Supreme court's expedited review of the underlying statute

The three-judge district court stayed its decision pending final disposition of the eleven consolidated actions in the Supreme Court based, in part, on the district court's "recognition of the divisions among the panel about the constitutionality of the challenged provisions of BCRA." McConnell v. FEC, 253 F.Supp. 18, *21 (D.D.C. 2003). This Court should similarly stay this parallel litigation pending the McConnell decision.

Counsel for defendant conferred with counsel for plaintiffs regarding the Commission's motion. Counsel for plaintiff advised the Commission that plaintiffs oppose the motion for a stay.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be denied, and the Commission's motion to stay this litigation until 30 days after the Supreme Court's decision in McConnell should be granted.

Respectfully submitted,

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