IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION *RE* FILING OF ADMINISTRATIVE RECORD AND FURTHER SCHEDULING AND IN OPPOSITION TO COMMISSION'S MOTION TO STAY

Introduction

Plaintiffs Christopher Shays and Martin Meehan respectfully submit this reply in support of their motion concerning filing of the administrative record and in opposition to the Federal Election Commission's motion for a stay.[1]

The Commission has had six months since filing its answer to assemble the administrative record in this action. It reports that "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." FEC Mem. at 2; *see also id. at* 4. The Commission's filing of that record is the prerequisite to any further progress in this litigation. By their motion, plaintiffs ask only that the Commission serve and file the record by September 30, and that the parties then

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[1] *See* Defendant Federal Election Commission's Motion to Stay (filed Aug. 4, 2003). Citations to the Commission's memorandum in support of its motion to stay and in opposition to the plaintiffs' motion are denoted "FEC Mem. at __."

promptly meet, confer, and report back to the Court with respect to further scheduling. This procedure will allow the Court to address at least some of the most important and time-sensitive rulemaking issues as quickly as feasible after the Supreme Court's decision in *McConnell v. FEC*. The Court should set a schedule that ensures that the 2004 campaign is governed by rules that faithfully implement the letter and spirit of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (BCRA).[2]

The Commission objects, and has belatedly moved to stay the *Shays* litigation in its entirety "until *at least* 30 days after the Supreme Court's decision in *McConnell*." FEC Mem. at 3-4 (emphasis added). The Commission suggests that further delays might be necessary because, for example, it "may" decide to "review and reconsider[]" the challenged regulations "*even if BCRA is upheld in its entirety.*" *Id.* at 3 (emphasis added). After this period for reflection, the Commission presumably will seek even more time before having to file the administrative record (which must occur before the parties can turn to briefing the merits).

Thus, the Commission's position is that this rulemaking challenge cannot even begin to move forward until sometime next year, well into the 2004 congressional and presidential

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[2] The Commission chides plaintiffs for not having complained earlier about its failure to file the record. *See* FEC Mem. at 4. This is a curious criticism; in one breath the Commission complains that plaintiffs are premature, in the next it says plaintiffs are tardy. *All* parties share a responsibility to help move this case along toward a "just, speedy, and inexpensive determination." Fed. R. Civ. P. 1. As active participants in the defense efforts in *McConnell v. FEC* at both the district court and Supreme Court levels, plaintiffs' *pro bono* counsel well appreciate the extraordinary demands associated with the BCRA litigation and rulemakings. Now that the three-judge district court has completed its work (as of May) and the defense side in *McConnell* has completed its briefing (as of last week), and with *McConnell* about to be submitted to the Supreme Court (as of early next month), the next several months appear to be an excellent time from a case management standpoint to focus in *Shays* on submission of the record and any other threshold matters, so that the parties and this Court may turn promptly to the merits once the Supreme Court has ruled.

campaign season. As discussed in this reply brief, that would have disastrous consequences because the new rules open up a variety of additional loopholes that make a mockery of BCRA's letter and spirit. There can be no doubt these loopholes will be exploited unless and until they are closed by the courts. The Commission's position on scheduling threatens to condemn yet another election cycle to deeply flawed rules that invite massive circumvention of Congress's prescribed contribution limits, source prohibitions, and disclosure provisions.

Argument

In resolving the parties' conflicting motions, this Court should be guided by two overriding considerations. *First*, Congress intended through BCRA's expedited litigation and rulemaking provisions 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*." 148 Cong. Rec. S2142 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (emphasis added).[3] The Court should structure this litigation so as to maximize, not minimize, the chances of providing, at the earliest possible time, this "certain and sure" implementation of BCRA in the manner Congress intended.

Second, whether evaluated under the Administrative Procedure Act, 5 U.S.C. § 705, the Court's inherent authority, or by analogy to rules governing other stay situations (*e.g.,* Fed. R.

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[3] *See* BCRA §§ 402(c), 403. Senator Feingold explained that Congress was seeking to ensure "an orderly transition from the old system to the new system under this bill. Furthermore, the FEC is charged with promulgating soft money regulations well before the date that the soft money ban will take effect. In short, with enactment of the bill, promulgation of key regulations, and a prompt and efficient resolution of the litigation, we will be in a position in which a new campaign finance system can be implemented in a certain and sure fashion for the 2004 elections." 148 Cong. Rec. S2142 (daily ed. Mar. 20, 2002). Senator McCain added that Congress had "reluctantly determined that it would simply not be practical" to apply the new system during the 2002 election campaign, but emphasized that the reform system would be in place in time for 2004. *Id.* at S2142 (daily ed. Mar. 20, 2002). That time is now at hand.

Civ. P. 62 and Fed. R. App. P. 8), the Commission's request for a stay pending the outcome in *McConnell* requires an "equitable" balancing of various factors, including "the interests of judicial administration." *National Airmotive v. Government & State of Iran*, 491 F. Supp. 555, 556 (D.D.C. 1980) (Greene, J.); *see also Judicial Watch, Inc. v. National Energy Policy Development Group,* 230 F. Supp. 2d 12, 14 (D.D.C. 2002) (Sullivan, J.). The Court should consider the burdens on the Commission of proceeding with the litigation in the manner plaintiffs have proposed, the likelihood that the Supreme Court's decision in *McConnell* might moot all or nearly all of this litigation, and the impact on the "public interest." *See generally Cuomo v. United States Nuclear Regulatory Comm'n,* 772 F.2d 972, 974 (D.C. Cir. 1985) (*per curiam*). "On a motion for stay, it is the movant's obligation to justify the court's exercise of such an extraordinary remedy." *Id.* at 978.

The Commission has not come close to carrying its burden with respect to *any* of the relevant factors:

Degree of burden on the Commission. The Commission complains that it will incur a "substantial" burden in "[r]eviewing, organizing, duplicat[ing] and collat[ing]" the administrative record, which suggests that it has done none of the necessary record compilation in the six months since filing its answer. FEC Mem. at 3. At the same time, the Commission notes that "the documents that would comprise the administrative record . . . are already publicly available in the Commission's Public Records Room and on the Commission's website ...." *Id.* at 4; *see also id.* at 2. Plaintiffs believe the Commission greatly overstates the burden of compiling and filing the record that is necessary to evaluate the challenged BCRA rules. Plaintiffs respect the demands on the time and resources of the Commission and its personnel,

and would be pleased to work together in compiling the record, narrowing any disputes, and streamlining the submissions to the Court.

Likelihood that rulemaking disputes will be rendered moot. Plaintiffs believe there is a very strong likelihood that the Supreme Court will sustain the constitutionality of all or most of BCRA's challenged provisions. Many of the most significant rulemaking issues in this action relate to provisions of BCRA that already have been upheld by the three-judge district court. This includes all aspects of the coordination rules promulgated pursuant to BCRA § 214(c) and the new definitions of "agent," "solicit," and "direct," as they relate to BCRA § 323(e)'s soft money restrictions on federal officeholders and candidates. *See* First Amended Cpt. ¶¶ 32-37, 40-42, 85-100. Plaintiffs believe the Supreme Court will sustain a much larger portion, if not all, of the new Act. As support, plaintiffs refer to this Court's May 2 separate opinion in *McConnell* and to the Supreme Court briefs filed last week by the Solicitor General and the congressional intervenor-defendants.

The Commission is certainly correct that the Supreme Court's ultimate decision in *McConnell* could moot some of the rulemaking issues and therefore render portions of the administrative record unnecessary. But the Commission is just as surely wrong in claiming that "all or major portions" of the rulemaking record are likely to be "rendered irrelevant." Plaintiffs believe there is, at the very least, a substantial likelihood that large parts of the administrative record *will* remain pertinent to this action, and that the comparatively small ministerial burden of assembling the record is outweighed by the strong likelihood that all or most of BCRA will be upheld. *See Cuomo v. United States Nuclear Regulatory Comm'n,* 772 F.2d at 974 (in deciding whether a stay is warranted, "[p]robability of success is inversely proportional to the degree of irreparable injury evidenced").

The public interest. Finally, the public interest strongly favors taking all reasonable steps to structure this action so that key rulemaking questions can be resolved in time to have a bearing on the 2004 campaign. The challenged rules are now in effect and have the force of law. As detailed in plaintiffs' First Amended Complaint, however, those rules have opened up gaping new loopholes in the federal campaign finance regulatory structure. The Commission's attempted explanations and justifications for these new loopholes are contrary to BCRA's language, structure, and purposes, to the Commission's own historic practices and interpretations, and to governing judicial precedents. As history repeatedly has taught, there is an enormous public interest in not allowing errant FEC rules to remain in force during a federal election campaign.

The Commission's new rules on coordination are illustrative. Congress repealed the old FEC coordination rules as "far too narrow to be effective in defining coordination in the real world of campaigns and elections," and instructed the Commission to develop new rules that "make more sense in light of real life campaign practices than do the current regulations." 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statements of Sens. McCain and Feingold); *see* BCRA § 214(b)-(c). The district court majority rejected all of the *McConnell* plaintiffs' challenges to Section 214's rulemaking provisions in a detailed and comprehensive analysis. *See* 251 F. Supp. 2d 176, 252-64 (D.D.C. 2003) (*per curiam*). There is little reason to doubt that the Supreme Court will affirm the district court's resolution with respect to Section 214 in all respects.

The Commission has responded to Section 214, however, with rules that go in just the *opposite* direction of what Congress intended, and that open up gaping *new* loopholes in the regulation of coordinated expenditures. Among many other flaws, the new rules create for the

first time ever a "time frame" test that carves large areas of coordinated political advertising out from regulatory control, in the name of a "bright-line" content standard. As detailed in ¶¶ 93-97 of plaintiffs' First Amended Complaint, under the new rules an outside political advertisement that is run more than 120 days before a general election, primary, or convention may now be completely coordinated with a candidate or political party so long as the advertisement does not simply "republish" the candidate's own campaign materials or engage in outright "express advocacy." *See* 11 C.F.R. § 109.21(c)(1)-(4); 68 Fed. Reg. 421, 427-31 (Jan. 3, 2003). In these circumstances, the candidate or party will literally be able to write an "outside" ad attacking the candidate's opponent, target the ad's placement, and choose the times the ad will run, without these activities being treated as "coordinated" under the new regulation. Under the Commission's flawed "time frame" test, a very large loophole is going to begin opening up next spring, because there will be a gap in regulatory coverage between the spring primaries and the following July (*i.e.,* 120 days before the November general election). During this spring and early summer period, candidates, parties, and outside spenders will be able to engage in rampant coordination so long as they avoid express advocacy and the mere republication of candidate materials.

The Commission's explanations and justifications for this new "time frame" loophole do not make it past "step one" of the judicial review standard set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984), because they so completely conflict with the language, structure, and purposes of the governing statutory provisions. It is in the public interest to follow a schedule that permits this Court to close this looming loophole as soon as feasible. The Court can take judicial notice that a variety of corporate, union, and ideological interest groups are already amassing vast war chests to employ

in the 2004 campaign, including for voter registration, GOTV, and media advertising activities.[4] Such efforts are permissible so long as they are "totally independent[]" and not coordinated with a candidate or political party. *Buckley v. Valeo,* 424 U.S. 1, 47 (1976) (*per curiam*). For all of the reasons summarized in the district court's recent *per curiam* opinion on this subject, allowing coordinated activities of this sort to go unregulated during *any* "time frame" within the election cycle would undermine the heart of the contribution limits, source prohibitions, and disclosure requirements of federal law. The Commission's new rules simply invite a repeat of past abuses. That is why it is important for the parties to take the necessary steps now to move this litigation forward so the Court can adjudicate this issue, as well as other important issues respecting the Commission's new rules, in a timely fashion.

Conclusion

By requiring the Commission to submit its rulemaking record and the parties to then meet, confer, and report on further scheduling, the Court can put this case in a posture so that key rulemaking issues can be subject to early briefing after the Supreme Court's decision in *McConnell.* The comparatively slight inconvenience to the Commission is strongly outweighed by the public interest in resolving the legality of the Commission's regulations in a timely manner for the 2004 campaign. Given the weight of the public's interest in ensuring that BCRA will in practice work as Congress intended, the small inconvenience to the Commission in taking the modest initial steps of compiling and filing the record by September 30, and of then

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[4] *See, e.g.,* Thomas B. Edsall, *Liberals Form Fund To Defeat President,* Wash. Post, Aug. 8, 2003; Brody Mullins, *Business Changes Course; Turnout Becomes Focus,* Roll Call, Jul. 9, 2003.

discussing case management issues with plaintiffs' counsel and reporting back to the Court in October, is more than justified.[5]

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[5] On July 24, 2003, the Commission adopted revised regulations governing the financing of national party conventions. These rules, and their accompanying Explanation and Justification, have just been published in the *Federal Register*. *See* 68 Fed. Reg. 47,386 (Aug. 8, 2003). Plaintiffs are reviewing these new rules.