

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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

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**DEFENDANT FEDERAL ELECTION COMMISSION’S REPLY  
MEMORANDUM IN SUPPORT OF ITS MOTION TO STAY PROCEEDINGS**

The plaintiffs do not contest that they have asked this Court to impose a burden on the Federal Election Commission (“FEC” or “Commission”) that may well be unnecessary depending on the Supreme Court’s decision in McConnell v. FEC, 251 F. Supp. 2d 176, (D.D.C.), prob. jur. noted, 123 S.Ct. 2268 (2003). Nor do they contest that, even if it upholds the constitutionality of all of BCRA’s provisions, the Supreme Court’s analysis of constitutional concerns and its construction of the statute will likely have an impact on the issues to be considered by this Court and may well require revisions of the regulations at issue in this case. Thus, holding this case in abeyance for the few months the Supreme Court will likely require for its expedited review in McConnell would clearly serve the interests of judicial economy. It would also relieve the Commission of the burden of amassing, indexing and filing an extensive record filling many boxes, a task that may well have to be redone depending upon the extent the Supreme Court’s decision impacts this case. In contrast, the plaintiffs have not asserted that a

modest delay to await the Supreme Court's decision will prejudice them in this litigation. Indeed, they indicate (Opp. at 9 n.5) that they are now contemplating expanding this litigation once again, at some yet to be determined time, to include a challenge to an additional rulemaking, which would in turn expand the administrative records the Commission would be required to file in Court.

Plaintiffs devote the bulk of their opposition to arguing that the Commission's motion does not satisfy the four-part test for granting a preliminary injunction or a stay of an order pending appeal. However, that test is inapplicable to a court's decision to hold proceedings before it in abeyance pending decision in a related case. "The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." Clinton v. Jones, 520 U.S. 681, 706 (1997) (citation omitted). "There is no question of the District Court's authority to order a stay: '[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" Bledsoe v. Crowley, 849 F. 2d 639, 645 (D.C. Cir. 1988) (brackets in original) (quoting Landis v. North American Co., 299 U.S. 248, 254 (1936); other citation omitted). Courts often exercise this discretion to hold proceedings in a case before them in abeyance pending resolution of another case that may have a substantial impact on its outcome. See, e.g. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 21 n.23 (1983) (discussing a stay, pending arbitration, of litigation among non-arbitrating parties); Oldham v. Korean Air Lines Co., 127 F. 3d 43, 49 (D.C. Cir. 1997) ("we ordered that the case be held in abeyance pending the decision of the Supreme Court" in another case), cert. denied, 523 U.S. 1005 (1998); Atlantic City Electric Co. v. FERC, 295 F. 3d 1, 6 (D.C. Cir.

2002) (petition for review was “held in abeyance pending the conclusion of the administrative proceedings” in a related matter).

Thus, the rule applicable here is that the “trial court may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case. This rule applies whether the separate proceedings are judicial, administrative, or arbitral in character, and does not require that the issues in such proceedings are necessarily controlling of the action before the court.” Leyva v. Certified Grocers of California, 593 F. 2d 857, 863-4 (9<sup>th</sup> Cir.) (citations omitted), cert. denied, 444 U.S. 827 (1979). Plaintiffs do not dispute the likely impact of the Supreme Court’s McConnell decision on this case, or that waiting for the Court’s decision before deciding how to proceed here would be more efficient for the Court and less burdensome on the Commission. Instead, they stress the obvious fact that the proper interpretation of BCRA is an issue of public import. That, however, is an additional reason to hold this case in abeyance pending the Supreme Court’s construction of the underlying statute, which will be controlling here. As the Supreme Court had repeatedly “explained, ‘[e]specially in cases of extraordinary public moment, [a plaintiff] may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted.’” Clinton, 520 U.S. at 707 (emphasis supplied, brackets in original) (quoting Landis, 299 U.S. at 256).

Arguably, it might be different if plaintiffs could show that the challenged regulations were restricting their own activities in an allegedly unlawful manner, and they would suffer continuing irreparable injury to themselves as long as such restrictions remained in effect. But plaintiffs have not even claimed any irreparable harm to themselves, much less alleged that the

regulations are improperly restricting any activities in which they would like to engage. They rely instead upon the supposed public interest in restricting the political activities of *others* more strictly than they believe the Commission's regulations will do.

Moreover, the public interest in having BCRA in effect for the 2004 election campaign, in the manner Congress provided in the BCRA itself, is not in danger here. Congress required the Commission to promulgate regulations implementing all of the statute's provisions before the end of 2002, BCRA § 402(c), a Herculean task the Commission nonetheless completed on time. Congress also provided that litigation over the constitutionality of provisions of the BCRA be expedited, BCRA § 403(a), and that mammoth litigation is now in its final stages, with argument in the Supreme Court to be held in three weeks. Thus, the McConnell district court's stay of its decision pending appeal ensures that BCRA will be in effect for this entire election cycle, subject to the Supreme Court's upcoming decision, and all of the regulations Congress directed the Commission to promulgate are also in effect for this election cycle, just as Congress intended.

In sharp contrast, however, Congress did *not* provide for expedited treatment of litigation seeking judicial review of the regulations it required the Commission to promulgate; in fact, Congress did not even address that subject in the statute, leaving such proceedings to the normal procedures for judicial review under the Administrative Procedures Act. Although Plaintiffs quote individual members of Congress expressing their expectation that BCRA and the regulations would be in effect for the 2004 election cycle, that has been accomplished. None of those members of Congress said anything about judicial review of the Commission's regulations being completed by any particular time, much less offered legislation to mandate expedition of such legislation. Plaintiffs' failure to do anything at all to advance their case for about half a

year after the answer was filed belies any claim that they really believe the BCRA mandates expedition of this type of litigation.

Finally, plaintiffs address at some length their position on the merits that the Commission regulations before this Court “go in just the *opposite* direction of what Congress intended” (Opp. at 6). Plaintiffs’ three pages of argument on the merits (Opp. 6-9) relies almost exclusively upon conclusory rhetoric rather than legal analysis, and although we disagree with their views it would be inappropriate to address the merits of the case in connection with this purely procedural motion. However, it should be noted that the Commission submitted all of these regulations to Congress pursuant to the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), and no member of Congress – including the plaintiffs here – even introduced a resolution to disapprove any of the Commission’s BCRA regulations.<sup>1</sup> As members of Congress, these plaintiffs had this alternative forum, unavailable to any other litigants, for quick invalidation of any Commission regulations that conflict with Congressional intent. Their failure to pursue that available alternative remedy further undermines their plea for utmost speed in this litigation, and it also indicates that they may not be as confident as their heated rhetoric suggests that a majority of the Congress would accept their view that the regulations contradict Congressional intent.

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<sup>1</sup> While Congress’s failure to disapprove the Commission’s regulation by no means controls the analysis of Congressional intent, the Supreme Court has found it to be, at least, an “indication that Congress does not look unfavorably upon” the Commission’s interpretation of the statute. FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 34 (1981). Accord, Sibbach v. Wilson & Co., 312 U.S. 1, 16 (1941)(“That no adverse action was taken by Congress indicates, at least, that no transgression of legislative policy was found”); Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 689-90 & n.12 (1987).

## CONCLUSION

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

Respectfully submitted,

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