IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

JOINT STATUS REPORT

This Court's September 29, 2003 Memorandum Order directs the parties "to file a joint status report within fourteen calendar days of the Supreme Court's decision in *McConnell v. FEC,* explaining the impact of that decision on this case and proposing how this case should proceed."

Impact of *McConnell*. The Supreme Court's December 10, 2003 decision in *McConnell* upheld the constitutionality of all provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA") that are involved in this rulemaking challenge. Although the parties are continuing to consider *McConnell*'s impact on this litigation and on the rules that plaintiffs have challenged, they agree that there is no reason for this Court not to adopt an initial schedule for the resolution of this case, subject to alteration if necessary in light of further developments.

Administrative Record. The parties agree that the Commission should not be required to serve and file the entire administrative record, which is voluminous. The principal materials that constitute the record already are public documents and are readily available, most on the Commission's website at www.fec.gov. The Court should allow each party to submit with its briefs those materials that it believes should be considered by the Court, with each party

reserving the right to object to any tendered materials that it believes are not properly before the Court. The Commission will make available to plaintiffs for review at its offices the "whole record," 5 U.S.C. § 706, that would otherwise be filed with the Court.

Proposals for Motion Practice. The parties disagree about how motion practice in this case should proceed. The principal disagreement concerns whether the Commission's standing and ripeness defenses should be separately briefed and decided at the outset, or whether those defenses should instead be briefed and considered together with the merits, and whether substantial briefing should be conducted concurrently or sequentially.

(a) Plaintiffs' proposal. Plaintiffs believe that all claims and defenses should be briefed and considered together on simultaneous, comprehensive cross-motions for summary judgment, with two rounds of briefing. Each side should serve and file its cross-motion with supporting brief 45 days from the date of the Court's scheduling order, and its responsive brief 30 days thereafter. Plaintiffs believe it is necessary and desirable to extend the usual page lengths given the number and complexity of the issues in this litigation. Plaintiffs recommend that each side's opening brief be limited to 90 pages, and that each side's second brief be limited to 60 pages. Plaintiffs note that they are challenging many provisions of the Commission's BCRA implementing rules, and that their First Amended Complaint is itself 45 pages long.

Plaintiffs believe that defendant's standing and ripeness defenses should be considered in conjunction with briefing on the merits for four reasons: (1) Plaintiffs will seek to demonstrate that the challenged rules frustrate the purposes and intended operation of BCRA. These problems grow more acute each day that we move further into the 2004 election season and the level of federal election activity increases. Accordingly, there is a substantial public interest in reaching and resolving the merits of plaintiffs' claims at the earliest possible time. Comprehensive cross-motions for summary judgment offer the best means for putting this case

in a posture that permits the Court to decide the merits sooner rather than later in the election year. (2) Comprehensive cross-motions would be a far more efficient procedure given the overlap between standing, ripeness, and the merits. The standing and ripeness issues are best considered in the context of a full analysis of the challenged rules, how those rules operate, and how they are likely to affect BCRA's implementation. (3) Because the Commission could have moved to dismiss on the identical grounds it now asserts at any time beginning in October 2002, it should not now be heard to complain about consolidated briefing. (4) The Commission is unlikely to prevail on its threshold defenses. The three-judge court unanimously held that Representatives Shays and Meehan had standing to defend BCRA from constitutional challenge. *See* May 3, 2002 Order Granting Motion to Intervene in *McConnell v. FEC,* D.D.C. Civ. No. 02-582. The same analysis leads to the conclusion that plaintiffs (who were active participants in the rulemaking process) likewise have standing (under both Article III and 5 U.S.C. § 702) to defend BCRA from implementing rules that undermine the statute's letter, intent, and effectiveness. Plaintiffs do not believe there is anything in the Supreme Court's *McConnell* decision that is inconsistent with the three-judge court's standing analysis.

(b) Defendant's proposal. The Commission proposes that the Court follow the usual practice of addressing jurisdictional motions to dismiss the complaint before entertaining the briefing of summary judgment motions on the substantive issues described in the complaint. *Cf. McConnell v. FEC,* 251 F. Supp. 2d 176, 716 (D.D.C.) (Three-Judge District Court) (Kollar-Kotelly) ("Since I have found that Plaintiffs lack standing to raise claims under the Elections Clause and Tenth Amendment, I do not proceed further. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101-02, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) ('For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to

do so is, by very definition, for a court to act ultra vires')"), *aff'd in part, rev'd in part,* 2003 WL 22900467 (Dec. 10, 2003).

The Commission intends to file a motion to dismiss because the plaintiffs do not have standing and, even if they do, their pre-enforcement challenges to regulations that have yet to be applied are not ripe. The Commission is prepared to file this motion promptly, and we believe it may be ready for decision within a month of the status conference. Thus, the plaintiffs will not be significantly prejudiced even if the Court denies the Commission's motion.

On the other hand, if the Court agrees with the Commission, following the normal practice of first briefing any jurisdictional issues, the parties will be spared the considerable expense required to prepare substantive summary judgment motions on the many issues presented by the Complaint. *See* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and *inexpensive* determination of every action") (emphasis added). It is noteworthy that the Supreme Court decided not to determine whether the intervenors-candidates had standing, *McConnell v. FEC,* 2003 WL 22900467, at *72, but did determine that the Adams plaintiffs-candidates, who alleged competitive injury due to their "wish [not] to solicit or accept large campaign contributions" permitted by BCRA, failed "to allege an injury in fact that is 'fairly traceable' to BCRA." *Id.* at *70. In addition, when "the issue tendered is a purely legal one... issues still may not be fit for review where the agency retains considerable discretion to apply the new rule on a case-by-case basis, particularly where there is a complex statutory scheme or there are other difficult legal issues that are implicated by the agency action." *Sprint Corp. v. FEC,* 331 F.3d 952, 956 (D.C. Cir. 2003) (citations omitted). *See also AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 386 (1999) (when "there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements") (citations omitted).

Moreover, it is premature for plaintiffs to be afforded a judicial forum to expand upon their allegations that the Commission is undermining the will of Congress without first showing that they are the proper persons to raise these charges and that this is the proper time and forum to do so, especially since it is well settled that a "presumption of regularity" applies to agency rulemakings. *Natural Resources Defense Council, Inc. v. EPA,* 822 F.2d 104, 111 (D.C. Cir. 1987) (citation omitted).

Accordingly, consistent with normal practice, this Court should order that the Commission file its Motion to Dismiss within two weeks after the issuance of the Scheduling Order and that the parties brief this motion in accordance with Local Civil Rule 7.

The Commission further recommends that to the extent, if any, that the Court finds it has jurisdiction, then the normal sequential briefing of the substantive issues should take place, with the extended time and page limits proposed by the plaintiffs. Thus, the plaintiffs should file their Motion for Summary Judgment within 45 days after the Court rules on the Commission's threshold motion. The Commission should file its Opposition and Cross-Motion for Summary Judgment 45 days thereafter; the plaintiffs will file their Reply and Opposition within 30 days after the Commission's brief is filed; and finally, the Commission will file its Reply 30 days thereafter.

Additional matters. The parties request that the Court hold a status conference at its earliest convenience for the purpose of establishing a schedule. Whichever motion option the Court selects, the parties further request that the Court proceed to final decision as soon as practicable following the close of briefing.

Dated this 23rd day of December, 2003.

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