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

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| CHRISTOPHER SHAYS and MARTIN MEEHAN, | ) | |
| Plaintiffs, | ) | Civ. No. 02-1984 (CKK) |
| v. | ) | DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR STAY PENDING APPEAL |
| FEDERAL ELECTION COMMISSION, | ) | |
| Defendant. | ) | |

**DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF MOTION FOR STAY OF SEPTEMBER 18, 2004, ORDER PENDING APPEAL**

Pursuant to Fed. R. Civ. P. 62, defendant Federal Election Commission ("FEC" or "Commission") has moved this Court for a stay pending appeal of its September 18, 2004, Order granting plaintiffs summary judgment in part as to certain regulations implementing the Bipartisan Campaign Reform Act of 2002 ("BCRA") and remanding this matter to the FEC. The Commission's request for a stay should be granted because the Commission has satisfied the four-part test for such a stay applicable in this Circuit, which plaintiffs do not dispute. In fact, plaintiffs' response is internally inconsistent: if, as plaintiffs now concede, a stay is "unnecessary" because the Commission already has the discretion to do as it sees fit pursuant to the Court's ruling, then plaintiffs could suffer no harm if it is granted. Similarly, if the Court's Order has already left the Commission with such discretion, there is no basis for plaintiffs' argument that the Court should impose new conditions before issuing the stay.

In any event, plaintiffs' current claim that a stay is "unnecessary" is contrary to their own counsel's earlier strenuous public arguments that the Court's ruling rendered the Commission's regulations immediately ineffective; the confusion they helped create would be eliminated if the

Court grants the Commission's motion. As a result of the Commission's expedited filing of its notice of appeal, the D.C. Circuit has already designated November 8 as the date for the Commission to file a docketing statement setting out the issues to be presented on appeal and for the parties to file motions affecting scheduling of the case. See Attachment ("Att.") #1. Plaintiffs provide no support for their attempt to condition a stay on requiring the Commission to make these decisions earlier, an effort that appears to be little more than an attempt to revive their request for an expedition order that the Court has already rejected.

## I. A STAY PENDING APPEAL IS NECESSARY TO DISPEL CONFUSION ABOUT THE EFFECT OF THE SEPTEMBER 18 ORDER

In its motion for a stay pending appeal, the Commission explained that the stay is necessary "to clarify for the public the state of the law in the wake of the Court's decision." Stay Mot. at 2. See also id. at 3 (stay order "would also have the salutary effect of clarifying the current state of the law for members of the public whose political activities are subject to those regulations"). In particular, the Commission asked the Court to "make clear that, until the Court of Appeals issues its final decision on the appeal, (1) the regulations found defective remain in effect and (2) the Commission is not required to initiate rulemaking proceedings under this Court's remand order." Id. at 2.

In response, the plaintiffs assert that the stay is "entirely unnecessary" to help guide the Commission and the public. Response at 1. "Plaintiffs do not believe the Court's remand order is ambiguous" (id. at 3), for it "clearly" rejected the plaintiffs' requested remedies "and instead remanded the case to the Commission '"to determine how to proceed next."' " Id. at 3-4 (quoting Court's Memorandum Opinion). While that has been the Commission's consistent understanding, as stated in our motion, counsel for plaintiffs previously advocated to the public a contrary view, which has left the public unsure about the current state of the law.

The press has reported that some members of the regulated community believe that the regulations are no longer in effect, others believe they are still in effect, and yet others are simply bewildered.[1] Public statements by counsel for the plaintiffs have created much of this confusion. Contrary to the position they are now taking, shortly after the Court issued its decision in this case counsel for the plaintiffs claimed that the regulations found invalid by this Court are no longer in effect. Fred Wertheimer, one of the plaintiffs' attorneys and the president of Democracy 21, is quoted as stating that "'[t]hese regulations are now unlawful and the F.E.C. cannot enforce unlawful regulations.'" Glen Justice, U.S. Judge Orders Election Agency to Tighten Rules, N.Y. TIMES, Sept. 21, 2004 (Att. #5), at A1. See also Att. #2, at 10 ("[M]embers of Shay's and Meehan's legal team and other reformers argued that the regulations have been vacated entirely and immediately"); Lisa Getter, Judge Rebukes Elections Panel For Its Finance Reform Rules, LOS ANGELES TIMES, Sept. 21, 2004 (Att. #6) ("Fred Wertheimer, … the spokesman for the legal team that won the court victory before Kollar-Kotelly, contended Monday that the decision went into effect immediately, leaving only the McCain-Feingold law in place").

A stay would protect both the public and the Commission. An order clearly stating that the regulations are in effect until the Court of Appeals decides the Commission's appeal and/or the Commission adopts revised rules would give the regulated community the clear guidance it needs; an order confirming that the Commission is not required to initiate rulemaking

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[1] See, e.g., Alexander Bolton, FEC is left in limbo by ruling, THE HILL, Sept. 21, 2004 (Att. #2), at 1, 10 ("In the absence of a stay, … confusion reigns"); Amy Keller, Judge Upends FEC Guidelines, ROLL CALL, Sept. 21, 2004 (Att. #3); Sharon Theimer, Lawmakers oppose FEC bid to stay decision overturning campaign finance rules, Associated Press, Oct. 5, 2004 (Att. #4) ("The decision created some confusion among campaign strategists; while Kollar-Kotelly declined to issue an order blocking the [C]ommission from enforcing the old rules for this election, she didn't specifically say what, if any, FEC regulations people should follow while new ones were being written").

proceedings now for those regulations it defends on appeal would assure the Commission that it would not be violating the Court's September 18 Order if it decides not to undertake rulemaking proceedings for such regulations before the Court of Appeals decides the case. Moreover, as the Commission explained in its motion, it is especially concerned that its appeal could be mooted if it were to complete a rulemaking to revise the invalidated regulations before the D.C. Circuit decides the appeal. See Stay Mot. at 3, 13-14. This harm can also be avoided by granting the Commission's motion.

If the Order of September 18 was already intended to provide all of these protections, then the Commission would not object to the Court's denying the motion for a stay on that basis, accompanied by a clarifying explanation. If the Order does not already protect the FEC and the public to the full extent the Commission has requested in its motion, plaintiffs should have no objection to a stay since they will have assumed, mistakenly, that a stay is unnecessary.

## II. PLAINTIFFS DO NOT DENY THAT THE COMMISSION HAS SATISFIED THE APPLICABLE FOUR-PART TEST FOR A STAY PENDING APPEAL

Plaintiffs do not appear to dispute that the Commission has satisfied the specific legal requirements for a stay pending appeal in this matter. As the Commission explained (Stay Mot. at 4), "[t]o obtain a stay pending appeal, [petitioner] 'must show (1) that it has a substantial likelihood of success on the merits; (2) that it will suffer irreparable injury if the stay is denied; (3) that issuance of the stay will not cause substantial harm to other parties; and (4) that the public interest will be served by issuance of the stay.'… 'These factors interrelate on a sliding scale and must be balanced against each other.' " (Citations omitted.) The Commission has explained (Stay Mot. at 5-16) why its motion satisfies this test. Although plaintiffs assert generally (Response at 2) that the Commission has not met the "stringent standards" for a stay

pending appeal, they do not argue specifically that the Commission has failed to meet the standards that actually apply.[2] In fact, they barely address the controlling factors at all.

Plaintiffs argue briefly (Response at 3 n.2, 7-8) that the Commission has not shown a "substantial likelihood of success" on appeal, primarily because (according to plaintiffs) the Commission has offered "nothing new" on the jurisdictional issues or the regulations at issue, and because the Commission is "unlikely to convince" the Court of Appeals that any of the agency's positions on these matters is correct. However, plaintiffs fail to address the actual standard, as made clear by the D.C. Circuit: whether a "serious legal question is presented." Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc. ("WMATC"), 559 F.2d 841, 844 (D.C. Cir. 1977). See Stay Mot. at 5-11. Moreover, plaintiffs' apparent suggestion that the Commission cannot show a "likelihood of success" if it presents "nothing new" is plainly wrong. Appellate success is obviously not predicated on making "new" arguments, since appeals are generally limited to the issues raised before the district court. See, e.g., Flynn v. Commissioner of IRS, 269 F.3d 1064, 1068-69 (D.C. Cir. 2001).[3] Plaintiffs do not dispute that the

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[2] Plaintiffs also exaggerate the "extraordinary" nature of the relief the Commission seeks. In fact, the Commission was granted a similar stay pending appeal just a few days ago in Hagelin v. FEC, Civ. No. 1:04-cv-731 (D.D.C. Oct. 6, 2004). In the absence of a stay in that case, the Commission might have found itself in the untenable position of being forced to advocate conflicting legal positions in different proceedings, a problem that could also arise in the instant case if a stay is not granted. See Stay Mot. at 15.

[3] Plaintiffs cite United States v. Judicial Watch, Inc., 241 F. Supp. 2d 15, 16 (D.D.C. 2003), which noted, in finding a failure to show likelihood of success, that the plaintiff had merely repeated arguments that had consistently been rejected by a Treasury Inspector General and a congressional Joint Committee, as well as the Court. That case involved enforcement of an IRS subpoena, a matter that is supposed to be summary and on which the district court's decision is generally reviewable only for "clear error" or "abuse of discretion." United States v. Judicial Watch, 371 F.3d 824, 828-9, 831 (D.C. Cir. 2004). In contrast, this case involves a complex 157-page opinion that is subject to de novo review by the Court of Appeals, addressing issues on which the Commission's position is entitled to substantial deference from that court. If Judicial Watch were read to require that a party moving for a stay must convince a district court to

Commission's appeal will present "serious legal questions."

In a footnote (Response at 4 n.3), plaintiffs briefly address the Commission's showing (Stay Mot. at 11-16) that the balance of harms favors a stay, but they do not argue that a stay is unwarranted, only that it should be conditioned on the Commission's immediately declaring which issues it will raise on appeal and agreeing to seek expedition. See Response at 5-7. Plaintiffs assert, without explanation or support, that the very real harms the Commission described, including the potential mooting of its own appeal, are "greatly exaggerated," that the cases the Commission cites are "inapposite," and that the Commission could proceed on remand "contingent upon the outcome of its appeal." However, plaintiffs present nothing beyond these conclusory assertions and do not argue that the Commission has failed to satisfy the balance-of-harm elements in the WMATC test. Plaintiffs state (id.) that the FEC has "no legitimate interest in delaying further action on remand" as to regulations it does not appeal, but the Commission has already explained (Stay Mot. at 4) that it will not ask that the stay be maintained as to any such regulations.

Rather than address in any depth the legal standard that actually governs the granting of a stay pending appeal, plaintiffs attempt to impose extraneous conditions on any stay — even as they argue (Response at 1, 3-4) that no stay is necessary. Without citing any legal authority, plaintiffs first urge the Court to require the Commission to specify "immediately" (Response at 5) which rulings it will appeal. The Court's 157-page Memorandum Opinion was issued on September 18, and the Commission is carefully reviewing each adverse ruling, in light of applicable legal and policy considerations, in order to make decisions that are consistent with its

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"change its conclusion" based on "new arguments," however, it would be contrary to well-established D.C. Circuit law. See Stay Mot. at 4-5; WMATC, 559 F.2d at 844-45 ("Prior recourse to the initial decisionmaker would hardly be required as a general matter if it could properly grant interim relief only on a prediction that it has rendered an erroneous decision").

public responsibilities. Requiring the Commission to make decisions about such matters "immediately," without time for proper consideration and discussion, is not an appropriate condition for a stay, and plaintiffs offer no authority in support of their demand. On the contrary, the Commission has the right to decline to pursue rulings even after it has appealed them, just as plaintiffs, at the summary judgment stage, withdrew their challenges to three of the Commission's regulations. See Slip Op. at 32 n.22.

Plaintiffs then insist (Response at 6-7), again without support, that a stay must be conditioned on the Commission's immediate agreement to seek expedition of the court of appeals schedule. They argue that a normal appellate schedule may result in the final resolution of these issues "too far into the 2006 election cycle" and that it is not "reasonable" for the Commission to request a stay without agreeing to expedited review. However, as plaintiffs themselves note, the Commission has not rejected seeking expedition of its appeal, but merely views it as premature (and not required) that it make this decision immediately after the Court's ruling, when it has not yet determined the scope of its appeal. Nor have plaintiffs provided any evidence to suggest that the Commission has any intent or reason to delay its appeal. Indeed, although the Commission is allowed 60 days in which to file a notice of appeal, it did so in this case on September 28, a mere seven business days after this Court's Order. Because of the Commission's expedited filing of its notice of appeal, the Court of Appeals has already issued a scheduling order setting November 8 as the date for the Commission to file a docketing statement setting out the issues to be presented on appeal and for the parties to submit motions regarding the scheduling of the case. Plaintiffs, by contrast, have yet to provide any indication of whether they will appeal at all, much less which of the Court's rulings against them they will appeal. In such circumstances, there is certainly no basis for plaintiffs' demand that this Court

override the D.C. Circuit's authority to set the schedule for the parties to address these issues, a matter that relates solely to the procedures of that court.

Plaintiffs next suggest (Response at 2, 5) that the Commission wants to proceed at a "business-as-usual" pace while asking others to treat the matter as an "emergency." However, the Commission has not asked others to act as if there is an emergency, and its expedited initiation of the appellate process shows that it is not proceeding at a "business-as-usual" pace. This Court, in its summary judgment ruling, declined (Slip Op. at 155) to order the Commission to initiate new rulemakings within 15 days, as plaintiffs had requested, to set any specific schedule on remand, or even to retain jurisdiction to monitor the Commission's progress, and plaintiffs have offered no reason for the Court to change that decision now by requiring the Commission to expedite its deliberations. Plaintiffs have cited no precedent for the conditional order they propose in their Response, and if the Commission already has the discretion to "address[ ] and resolv[e] these disagreements … in the first instance," as plaintiffs contend (Response at 4), then the conditions plaintiffs seek to impose are inconsistent with the Court's September 18 Order.

Plaintiffs suggest (Response at 6-7) that requiring expedition is "appropriate" because Congress expected that BCRA would be in place for the 2004 election cycle, and the appeal should at least be decided in time to have a "meaningful impact" on the 2006 cycle. However, while Congress provided for expedition of certain constitutional challenges to BCRA in section 403 of that statute, and for a highly expedited schedule for the Commission's promulgation of

regulations in section 402, it did not even include in BCRA a provision for judicial review of the Commission's regulations, much less provide that such litigation should be expedited.[4]

In sum, as the Commission explained in its Motion, this case clearly presents more than one "serious legal question," WMATC, 559 F.2d at 844, and the balance of the hardships favors the Commission and the public. That is sufficient to justify a stay pending appeal of this Court's judgment.

**CONCLUSION**

For the reasons stated above and in the Federal Election Commission's October 1, 2004, Motion for a Stay, the Commission respectfully requests that this Court stay its September 18, 2004, Order pending resolution of the Commission's appeal to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Lawrence H. Norton
General Counsel

[4] It is difficult to understand plaintiffs' criticism of the Commission's post-judgment actions, or the purpose of their detailed account of the parties' discussions of this motion pursuant to Local Rule 7(m). See Response at 1-3, 5; Declaration of Charles G. Curtis Jr. in Response to Defendant's Motion. Plaintiffs seem to suggest both that the Commission waited too long to ask for a stay, and that it should have waited even longer in order to negotiate further with plaintiffs about the unacceptable demands that plaintiffs imposed as a condition of their consent. Of course, the Commission's motion for a stay only 13 calendar days following the issuance of a 157-page Memorandum Opinion is quite prompt in light of the 60 days the Commission was entitled to take to decide whether to appeal, and plaintiffs do not even argue that the Commission's prior notice to them failed to comply with Rule 7(m). As for plaintiffs' curious contention (Response at 1) that the Commission's request for a stay represents an "abdication" of responsibility, it is plainly not within the Commission's power to provide definitive "guidance" as to the effect intended by the Court in its ruling.

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