



Wiley Rein & Fielding LLP

MEMORANDUM

TO: WRF Clients and Interested Persons

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RE: The Stay Of The *McConnell v. FEC* Campaign Finance Decision.

Today the special three-judge district court suspended the effectiveness of its recent judgment holding unconstitutional parts of the Bipartisan Campaign Reform Act (“BCRA”). (See our May 6 memorandum). For the moment, all of BCRA is reinstated until the Supreme Court issues its final ruling or modifies the stay, even provisions that all three judges held unconstitutional.

Judges Henderson and Kollar-Kotelly based the stay on their “desire to prevent the litigants from facing potentially three different regulatory regimes in a very short time span and the Court’s recognition of the divisions among the panel about the constitutionality of the challenged provisions of BCRA.”

Judge Leon, who largely controlled the May 2 outcome, dissented from most of the stay. He argued that none of the standards for a stay – irreparable injury, likely success, and the public interest – were met and that it was unusual to infringe the First Amendment to avoid confusion. He pointed out that even provisions that all three judges agreed were unconstitutional were being reinstated. However, he agreed that one aspect of the judgment should be stayed.

After holding unconstitutional BCRA’s primary definition of “electioneering” as speech that refers to a candidate within 30 days of a primary or 60 days of an election, Judges Leon and Judge Kollar-Kotelly sustained part of a backup provision that defined “electioneering” as speech that “promotes or supports” or “attacks or opposes a candidate.” Judge Leon acknowledged that the backup standard failed to give sufficient “guidance,” so he proposed to stay reinstate the unconstitutional primary definition for just long enough to let the FEC issue clarifying regulations. Instead, the other two judges reinstated the primary definition indefinitely, apparently reasoning that the Supreme Court likely will rule before the primary season gets under way in January, 2004..

Government defendants and the members of Congress who sponsored BCRA sought a total stay. Various plaintiffs argued that only parts of the ruling, particularly the backup standard, should be stayed. The Supreme Court refused to consider stay motions until May 20 to permit the district court to act. Whether it now will be asked to intervene, and what it will do, cannot be predicted.

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Wiley Rein & Fielding LLP represents Senator McConnell, as well as the Chamber of Commerce, the National Association of Manufacturers, and the Associated Builders & Contractors in this case. For more information about the firm visit www.WRF.com.