

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

_____	)	
WENDY E. WAGNER, et al.,	)	
	)	
Plaintiffs-Appellants,	)	No. 12-5365
	)	
v.	)	MOTION TO RECALL
	)	AND STAY REISSUANCE
FEDERAL ELECTION COMMISSION,	)	OF THE MANDATE
	)	
Defendant-Appellee.	)	
_____	)	

**FEDERAL ELECTION COMMISSION’S MOTION TO RECALL AND  
STAY REISSUANCE OF THE MANDATE**

The Federal Election Commission (“FEC” or “Commission”) hereby moves to recall the mandate and stay reissuance to the district court for a period of ten days to allow the Commission the opportunity to consider whether to petition for rehearing *en banc* and/or file a petition in the Supreme Court for a writ of certiorari. Courts of appeals have the “inherent power to recall their mandates” after they are issued. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998); *see also Northern Cal. Power Agency v. Nuclear Regulatory Comm’n*, 393 F.3d 223, 224 (D.C. Cir. 2004).

Earlier today, this Court issued a judgment and opinion holding that it lacked jurisdiction to hear the merits of the appeal. (Doc No. 1438703, May 31, 2013

(“Opinion”). The Court held that it lacked jurisdiction because only the entire Court sitting *en banc* could decide constitutional questions about the Federal Election Campaign Act (“FECA”) when they are brought by the “Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of President.” Opinion at 5 (quoting 2 U.S.C. § 437h). At the Court’s instruction, the Clerk issued the mandate immediately, without providing for the ordinary 45-day period in which the parties would have had an opportunity to file a motion for rehearing *en banc*. See F.R.A.P. 41(a)(1)(B); D.C. Circuit Rule 35(a).

Immediate issuance of the mandate and district court proceedings may foreclose further review of the Court’s opinion. Although this case may eventually be certified as appropriate for consideration by the Court sitting *en banc* under section 437h, a challenge to this Court’s jurisdictional ruling may be moot if section 437h proceedings have already occurred. The Commission has made no decision regarding whether to seek further review of the Court’s Opinion. To avoid the possibility that further challenges may be foreclosed by the proceedings ordered to occur on remand in the district court, however, the Commission requests that the Court recall its mandate and stay its reissuance for a period of ten days.<sup>1</sup>

---

<sup>1</sup> The Commission has consulted with counsel for Plaintiff-Appellants concerning this motion. Their position is that they do not oppose recall of the mandate, but request that the district court proceedings continue during the additional time the Commission is proposing. The

Respectfully submitted,

Anthony Herman  
General Counsel

Lisa J. Stevenson (D.C. Bar No. 457628)  
Deputy General Counsel - Law

Kevin Deeley  
Acting Associate General Counsel

Harry J. Summers  
Assistant General Counsel

Holly J. Baker  
Attorney

/s/ Seth Nesin  
Seth Nesin  
Attorney

FOR THE DEFENDANT-APPELLEE  
FEDERAL ELECTION COMMISSION  
999 E Street, N.W.  
Washington, D.C. 20463  
(202) 694-1650

May 31, 2013

---

Commission objects to such parallel proceedings. Once the mandate is recalled, the district court lacks jurisdiction to conduct further proceedings.

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA

WENDY E. WAGNER, et al.,	)	
	)	
Plaintiffs-Appellants,	)	Appeal No. 12-5365
	)	
v.	)	CERTIFICATE OF SERVICE
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant-Appellee.	)	
	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on this 31st day of May, 2013, I electronically filed the Federal Election Commission's Motion to Recall and Stay Reissuance of the Mandate by using the Court's CM/ECF system.

Service was made on the following through the CM/ECF system:

Alan B. Morrison  
George Washington Law School  
2000 H Street NW  
Washington, D.C. 20052  
abmorrison@law.gwu.edu

Arthur B. Spitzer  
American Civil Liberties Union of the Nation's Capital  
4301 Connecticut Ave., N.W., Suite 434  
Washington, D.C. 20008  
artspitzer@gmail.com

J. Gerald Hebert  
The Campaign Legal Center  
215 E. Street, N.E.  
Washington, DC 20002  
ghebert@campaignlegalcenter.org

Fred Wertheimer  
Democracy 21  
2000 Massachusetts Avenue, N.W.  
Washington, DC 20036  
fwertheimer@democracy21.org

Scott Nelson  
Public Citizen  
1600 20<sup>th</sup> Street N.W.  
Washington, DC 20009  
snelson@citizen.org

/s/ Seth Nesin  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463  
(202) 694-1650