

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DAVID KEATING, <i>et al.</i>)	
)	
Plaintiffs,)	OPPOSITION
)	No. 09-5342
v.)	(Consolidated with
)	No. 08-5223)
FEDERAL ELECTION COMMISSION)	
)	
Defendant.)	

**DEFENDANT FEDERAL ELECTION COMMISSION’S OPPOSITION TO
PLAINTIFFS’ MOTION FOR IMMEDIATE
ISSUANCE OF THE MANDATE**

In accord with D.C. Circuit Rule 41, this Court has ordered the Clerk to withhold issuance of the mandate until seven days after disposition of any timely petition for rehearing without prejudice to any party moving for expedited issuance of the mandate for good cause shown. If granted, plaintiffs’ motion will deprive the government of the default length of time specified by the Federal Rules of Appellate Procedure to decide whether to seek further review of the Court’s ruling, and whether to seek a stay of the mandate pending a petition for writ of certiorari.

As reflected in the Court’s March 26 order, Federal Rule of Appellate Procedure Rule 41 ordinarily provides that a court’s mandate will not issue until after the parties have had sufficient time to consider whether to seek rehearing or to move to stay the mandate pending the filing of a petition for a writ of certiorari.

See Fed. R. App. P. 41, cmt. 1994 Amendment, Subdivision (a) (explaining that “[b]ecause the amendment to Rule 40(a) lengthens the time for filing a petition for rehearing in civil cases involving the United States from 14 to 45 days, the rule requiring the mandate to issue 21 days after the entry of judgment would cause the mandate to issue while the government is still considering requesting a rehearing”); *Cf.* Fed. R. App. P. 40, cmt. 1994 Amendment (explaining that amendment extending time to file a notice of appeal in cases involving the United States “recognizes that the Solicitor General needs to time conduct a thorough review of the merits of a case before requesting a rehearing”).

The Commission should receive the usual number of days specified in the appellate rules to review the merits of the case and determine its future course of action, including what it may recommend to the Solicitor General regarding a petition for certiorari. In this Circuit, “[a] court may order immediate issuance of the mandate when satisfied (1) that [the] Court would not change its decision upon hearing, much less hear the case *en banc*, and (2) that there is no reasonable likelihood that the Supreme Court would grant review.” *Johnson v. Bechtel Assocs Prof'l Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (internal quotation marks omitted). Plaintiffs have failed to establish that “there is no reasonable likelihood that the Supreme Court would grant review” if sought. *Id.* Plaintiffs’ motion should therefore be denied.

Respectfully submitted,

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April 23, 2010

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DAVID KEATING, <i>et al.</i>)	
)	
Plaintiffs,)	
)	
v.)	CERTIFICATE
)	No. 09-5342 (Consolidated
FEDERAL ELECTION COMMISSION)	with No. 08-5223)
)	
Defendant.)	

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April 2010, I caused to be filed with the Clerk of the Court by the CM/ECF System the Defendant Federal Election Commission’s Opposition to Plaintiffs’ Motion for Immediate Issuance of the Mandate. I further certify that I also caused to the requisite number of paper copies of the Commission’s Opposition to be filed with the Clerk.

I also certify that on this date I caused an electronic copy of the Commission’s Opposition to be served on the following counsel of record through the Court’s CM/ECF System:

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April 23, 2010

/s/ Vivien Clair
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