UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Wisconsin Right to Life, Inc., **Plaintiff,** **v.** **Federal Election Commission,** **Defendant**	**Case No. 04-1260 (DBS, RWR, RJL)** **THREE-JUDGE COURT**

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF SENATOR JOHN MCCAIN, REPRESENTATIVE TAMMY BALDWIN, REPRESENTATIVE CHRISTOPHER SHAYS, AND REPRESENTATIVE MARTIN MEEHAN TO INTERVENE AS DEFENDANTS

Introduction

This memorandum supports the motion of Senator John McCain, Representative Tammy Baldwin, Representative Christopher Shays, and Representative Martin Meehan, to intervene in this action as of right, pursuant to Section 403(b) of the Bipartisan Campaign Reform Act of 2002 ("BCRA" or "Act") and Federal Rule of Civil Procedure 24(a)(1). Movants Senator McCain, Representative Shays, and Representative Meehan have previously participated in this case as amici. Representative Baldwin is currently a candidate for federal office in Wisconsin, where plaintiff Wisconsin Right to Life, Inc. ("WRTL") is based. In light of the Supreme Court's recent decision remanding the case to this Court for further proceedings, movants seek to

participate as intervening defendants. Affidavits in support of this motion accompany this filing, as does a proposed Answer to Plaintiff's Amended Verified Complaint for Declaratory and Injunctive Relief.

1. Rule 24(a)(1) of the Federal Rules of Civil Procedure provides that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene[.]" Section 403(b) of BCRA grants these movants just such a right with respect to this suit:

> INTERVENTION BY MEMBERS OF CONGRESS.—In any action in which the constitutionality of any provision of this Act or any amendment made by this Act is raised (including but not limited to an action described in subsection (a) [*i.e.*, "any action," such as this one, "brought for declaratory or injunctive relief to challenge the constitutionality of any provision of this Act or any amendment made by this Act"]), any member of the House of Representatives . . . or Senate shall have the right to intervene either in support of or opposition to the position of a party to the case regarding the constitutionality of the provision or amendment.

This is an "action . . . brought for declaratory or injunctive relief to challenge the constitutionality of" Section 203 of BCRA. Movants seek "to intervene . . . in . . . opposition to the position of" plaintiff. Accordingly, movants have a statutory right to intervene in this action.[1]

2. Movants' intervention motion is timely in the circumstances here. Although the original complaint was filed on July 26, 2004, the Supreme Court's remand to "consider the merits of WRTL's as-applied challenge" functionally puts this case in a posture similar to a case only recently filed. "Even though the requirement of timeliness applies to . . . intervention of right," a court should be particularly "reluctant to dismiss a request for intervention [of right] as

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[1] *See generally* 6 James Wm. Moore et al., *Moore's Federal Practice* § 24.02 (3d ed. 1997); 7C Charles Wright et al., *Federal Practice and Procedure* § 1906 (1986 & Supp. 2001).

untimely." 7C Charles Wright et al., *Federal Practice and Procedure* § 1916; *see also Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.), *cert. denied*, 439 U.S. 838 (1978) ("Intervention of right motions . . . should be treated more leniently than permissive intervention motions."); *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir. 1970) (considering timeliness in the context of the "liberal treatment that is to be accorded applications for intervention of right," and concluding that such applications "may well be granted at a time in the suit when it would be wise to deny permissive intervention" (quoting J. Moore, *Federal Practice* § 24.13(1) (1969))).

3. No party will be prejudiced by movants' intervention at this stage of the proceedings. The original district court proceedings were limited to motions practice, in which three of the present movants filed an amicus brief. There has been no discovery to date. No proceedings have yet occurred on remand; the first status conference is scheduled for February 17, 2006.

4. There is an open question whether intervening defendants must demonstrate Article III standing where, as here, Congress has granted them an unconditional statutory right to intervene. The Supreme Court has suggested that in these circumstances, where a defendant seeks to intervene in an action with adverse parties, the intervenor need not independently establish Article III standing. *See Diamond v. Charles*, 476 U.S. 54, 62-64 (1986) (suggesting that an intervening defendant need not demonstrate the existence of an independent Article III case or controversy between the plaintiffs and the moving intervenors if such a case or controversy exists between the plaintiffs and the named defendant, but reserving the question); *Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998) (concluding that Article III does not require intervenors under Fed. R. Civ. P. 24(a) to possess standing); *Associated Builders & Contractors*

v. Perry, 16 F.3d 688, 690 (6th Cir. 1994) (same); *Yniguez v. State of Ariz.*, 939 F.2d 727, 731 (9th Cir. 1991) (same); *Chiles v. Thornburgh*, 865 F.2d 1197, 1212 n.16 (11th Cir. 1989) (same); *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (same). The Court of Appeals for the D.C. Circuit has concluded that an intervening defendant must establish standing in certain contexts. *See, e.g.*, *Rio Grande Pipeline Co. v. FERC*, 178 F.3d 533, 539-540 (D.C. Cir. 1999) (concluding that Article III standing is a prerequisite to intervention under 28 U.S.C. § 2348). But a three-judge court more recently explained that the Court of Appeals had not addressed whether demonstration of Article III standing is required where, as is the case here, a statute specifically provides for unconditional intervention as of right and the movants therefore seek intervention under Fed. R. Civ. P. 24(a)(1). *McConnell v. FEC*, 2004 U.S. Dist. LEXIS 22496, at *9 (D.D.C. May 3, 2002). In contrast to the statute at issue in *Rio Grande Pipeline*, Congress left no ambiguity in its intent to allow certain parties, including these movants, an unconditional right to intervene in this case. And unlike Fed. R. Civ. P. 24(a)(2), Fed. R. Civ. P. 24(a)(1) does not require the movant to show any interest in the subject matter of the suit. To the extent a live case or controversy already exists in this case, Article III dictates are satisfied.

5. In any event, some or all of the movants have Article III standing under the standards set forth by the three-judge court in *McConnell v. FEC*, *id.*, and by the Court of Appeals in *Shays v. FEC*, 414 F.3d 76, 84-95 (D.C. Cir. 2005). "As opposed to members of the general public, the movants have a concrete, direct, and personal stake—as candidates and potential candidates—in the outcome of a constitutional challenge to a law regulating the processes by which they may attain office." *McConnell*, 2004 U.S. Dist. LEXIS 22496, at *9. In *Shays v. FEC*, moreover, the Court of Appeals concluded that as plaintiffs in that case, movants Shays and Meehan had demonstrated standing because an adverse ruling would "depriv[e] the

Congressmen of their right to reelection contests conducted in accordance with that statute." 414 F.3d at 92; *see also Shays v. FEC*, 337 F. Supp. 2d 28, 45 (D.D.C. 2004) (explaining that plaintiffs Shays and Meehan had standing because "the rights they seek to vindicate—in essence, to campaign in a regime that reflects Congress' mandate as articulated in the BCRA—are legally cognizable").[2]

6. Representative Baldwin is a direct participant in the electoral process in Wisconsin. Plaintiff is a Wisconsin-based organization that has alleged that it intends to run broadcast advertisements that refer to "clearly identified candidates for federal office" and that "fall [] within the electioneering communication prohibition periods before future primary and general elections in Wisconsin." Amended Verified Complaint for Declaratory and Injunctive Relief ¶ 16. As an officeholder and candidate for office in Wisconsin, Representative Baldwin thus faces a significant risk that corporate money will be used to pay for advertisements in an attempt to influence federal elections in which she is a candidate, including the upcoming election in November 2006. Indeed, plaintiff has endorsed her opponent in the past, and has made clear that it may run ads directed at candidates' stands on a broad range of issues, from

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[2] *See also Buchanan v. FEC*, 112 F. Supp. 2d 58, 65 (D.D.C. 2000) ("Precluding candidates from challenging [election] rules under the FECA would leave few others to do so . . . . It is relatively self-evident that the people who have the most to gain and lose from the criteria governing [the electoral process] are the candidates themselves."); *Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 37 (1st Cir. 1993) ("[S]uch an impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing."); *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) (intervenors had an interest in "maintaining the election system that governed their exercise of political power, a democratically established system that the district court's order had altered"). Moreover, except to the extent that WRTL has conclusively disavowed any challenge to the reporting requirements for electioneering communications (*see* Amended Verified Complaint for Declaratory and Injunctive Relief ¶ 37), movants also have informational standing, because whether a communication is covered by Title II-A determines whether it is subject to the comprehensive disclosure provisions of 2 U.S.C. § 434(f) governing electioneering communications. *See Akins v. FEC*, 524 U.S. 11, 20-23 (1998).

"abortion" to "embryonic stem cell research" to "Medicare policy" to "the freedom to advance [WRTL's] issues in the public forum." *Id.* Representative Baldwin wants to run in elections, participate in a political system, and serve in a government in which all participants comply with the reasonable restrictions placed on "electioneering communications" and in which corporate funds are not used to influence federal elections.

7. Because Representative Baldwin plainly has standing, it is not necessary for this Court to determine whether Senator McCain and Representatives Shays and Meehan also have standing. *See Buckley v. Valeo*, 424 U.S. 1, 12 (1976) (Article III "case or controversy" requirement satisfied because "at least some of appellants ha[d] a sufficient personal stake" in the case). Yet, even if the Court were to engage in this separate inquiry, there is reason to believe that each of the proposed intervenors can satisfy Article III dictates.

8. Plaintiff is far from clear with respect to the relief sought in this case. Plaintiff has sought a declaration that BCRA is unconstitutional as applied to the particular "electioneering communications" that WRTL sought to run in 2004 and a declaration that any future "electioneering communications" that WRTL may seek to run in the future that meet the WRTL's test for "grass-roots lobbying" are also exempt from BCRA. *See* Amended Verified Complaint for Declaratory and Injunctive Relief. But plaintiff's request of the Supreme Court was seemingly more expansive, asking that the Court "find the electioneering communication prohibition unconstitutional as applied to grassroots lobbying *generally*, or as applied to the three broadcast advertisements here." Brief for Appellant, *Wisconsin Right to Life, Inc. v. FEC*, No. 04-1581, at 45 (emphasis added). Similarly, on remand from the Supreme Court, plaintiff has at times suggested that it seeks a sweeping decision addressing "what is the appropriate standard for an exception for grassroots lobbying" that will govern all future elections—both in

Wisconsin and around the country. *See* Plaintiff's Reply Memorandum in Support of Its Motion to Reinstate, Order Supplemental Briefing on, and Expedite Cross-Motions for Summary Judgment at 20. Indeed, in urging that this Court drastically expedite further consideration of this case, plaintiff points to the impending primaries in Illinois, Texas, Arkansas, Idaho, Indiana, Kentucky, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, and West Virginia. *See* Plaintiff's Motion to Reinstate, Order Supplemental Briefing on, and Expedite Cross-Motions for Summary Judgment ¶ 8. And, plaintiff asserts that this Court and the Supreme Court "need to provide appropriate guidance to WRTL *and the public* as to fundamental constitutional rights before" the "electioneering communications" periods commence in any of these jurisdictions. *Id.* (emphasis added).

9. To the extent plaintiff seeks a decision that establishes a binding test that will apply in all future federal elections, Senator McCain and Representatives Shays and Meehan have standing. Each is currently, or intends in the future to be, a candidate for federal office, and each has a strong interest in running in elections, participating in a political system, and serving in a government in which all participants comply with the reasonable restrictions placed on "electioneering communications" and in which corporate funds are not used to influence federal elections. Accordingly, to the extent plaintiff seeks a ruling regarding how BCRA's electioneering communications rules will "generally" apply in future races, each of the proposed intervenors has "a concrete, direct, and personal stake—as candidates and potential candidates—in the outcome of a constitutional challenge to a law regulating the processes by which they may attain office." *McConnell*, 2004 U.S. Dist. LEXIS 22496, at *9.

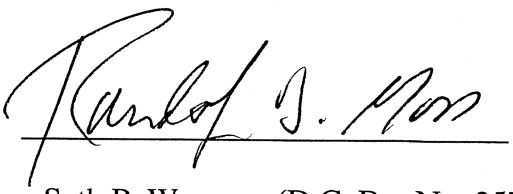
10. If permitted to intervene, movants will (like the FEC) suggest to the Court that the case is not now in a position to be disposed of through cross motions for summary judgment,

as plaintiff has urged, because genuine disputes exist regarding facts material to the constitutional analysis required on remand. Accordingly, movants will suggest that discovery is needed. If the Court permits discovery, consistent with the final sentence in section 403(b) of BCRA, movants will strive to avoid duplication of effort and to reduce litigation burdens.

11. For these reasons, movants respectfully request that the Court grant their motion to intervene as defendants as of right.[3]

Dated this 16th day of February, 2006.

Respectfully submitted,



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[3] Movants also meet the criteria for permissive intervention under Fed. R. Civ. P. 24(b)(2).

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