IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Senator Mitch McConnell, *et al.*,	)	
Plaintiffs,	)	Case No. 02-0582 (CKK, KLH, RJL)
v.	)	
Federal Election Commission, *et al.*,	)	
Defendants.	)	

REPLY OF
SENATOR JOHN McCAIN, SENATOR RUSSELL FEINGOLD,
REPRESENTATIVE CHRISTOPHER SHAYS,
REPRESENTATIVE MARTIN MEEHAN, SENATOR OLYMPIA SNOWE, AND
SENATOR JAMES JEFFORDS
IN SUPPORT OF THEIR MOTION TO INTERVENE AS DEFENDANTS
SUPPORTING THE CONSTITUTIONALITY OF
THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

Introduction

The proposed intervenors, like the lead plaintiff, are Members of Congress who have an unqualified statutory right to participate as parties in this litigation. *See* Reform Act § 403(b)-(c). As candidates and potential candidates, they all have a "self-evident"

Senator McConnell, the National Rifle Association, and the United States have all consented to the movants' intervention under § 403(b) of the Reform Act and Fed. R. Civ. P. 24(a)(1). Not so some of the new plaintiffs who have just joined the case by way of the April 12th First Amended Complaint. A faction of the new plaintiff coalition (15 of the 27 plaintiffs listed on the amended pleading) claims that, while *they* have standing to participate as parties in this litigation, Senator McCain and the other elected officials who seek to intervene as defendants do not. The new plaintiffs did not join this litigation until after the movants had filed their uncontested intervention papers, yet they now urge that the Court should forbid new parties (other than them) because "'additional parties always take additional time [and] are the source of additional questions, briefs, arguments, motions and the like which tend to make the proceeding a Donnybrook Fair.'" (Opposition at 14, citation omitted.)

With all respect, it is untenable for the objecting plaintiffs to insist that *they* have the right to appear as parties in this litigation while objecting to the participation of Members of Congress who (1) are directly regulated and/or proximately affected by every one of the Reform Act's provisions governing campaigns for federal elective office, and (2) have expressly been authorized by Congress to participate as party defendants. In particular, two of the objectors are themselves elected public officials:

the issue are not.[1/] Indeed, some of the objectors' arguments against standing are so sweeping that, if applied even-handedly, they would require a dismissal of the objectors' own claims.[2/]

The objectors' arguments should be rejected, and the motion to intervene should be granted, for three fundamental reasons: *First*, even assuming for the sake of decision that Rule 24(a)(1) intervening defendants must have independent Article III standing, the movants clearly have a concrete personal stake in the outcome of this dispute because they are elected officials who are regulated by the Act and whom the Act seeks to insulate from the actual or apparent corrupting influence of special interest money. The

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[1/] Representative Mike Pence asserts that he "is a United States citizen, member of Congress, candidate, voter, recipient, fundraiser, and party member, and has been, and will continue to be, injured by the BCRA in each of these capacities." Sen. McConnell's First Amended Cpt. ¶ 17. Alabama Attorney General Bill Pryor likewise asserts that he "hopes and intends" to receive soft money contributions in the future and to engage in various other conduct that he believes will be prohibited by BCRA. *Id.* ¶ 18. Senator McConnell, who has consented to movants' proposed intervention, himself claims standing as "a United States citizen, member of Congress, candidate, voter, donor, recipient, fundraiser, and party member, and has been, and will continue to be, injured by the BCRA in each of these capacities." *Id.* ¶ 15.

[2/] *See, e.g.*, Opposition at 11 (movants should be denied party status because "[a]ll U.S. citizens, parties, candidates and organizations participating in our democratic process are regulated and affected by the Act"; allowing movants to intervene would therefore allow any citizen to become a party). The objectors do not explain why this

courts have repeatedly held that candidates and potential candidates have Article III standing with respect to the machinery that governs the campaign process. *See* Part I below.

Second, many of the objectors' arguments are not of constitutional dimension, but instead are policy or prudential concerns that have no force given Congress's plain, unconditional command that members of the House and Senate "shall have the right to intervene either in support of or opposition to" the Reform Act's constitutionality. Reform Act § 403(b). *See* Part II below.

Third, the objectors' arguments on the merits are premature at best. At the motion-to-intervene stage, courts "accept a party's well-pleaded allegations [of standing] as valid," and a motion to intervene as of right "should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved . . . ." *Lake Investors Dev. Group, Inc. v. Egidi Dev. Group*, 715 F.2d 1256, 1258 (7th Cir. 1983) (citation omitted); *United States v. AT&T*, 642 F.2d 1285, 1291 (D.C. Cir. 1980) (citation omitted). Thus if the Court has any questions about the nature of the movants' interests at stake, how those interests are protected and regulated by the Reform Act, and how those interests would be affected by an invalidation of the Act, it should [illegible] those issues to be developed through discovery and presented on a full

Argument

I. As Elected Federal Officials, The Proposed Intervenors Have A Concrete, Particularized, And Personal Stake In Laws Regulating The Federal Campaign Finance Process.

The movants demonstrated in their opening papers that, if they must have independent Article III standing to intervene, they meet this requirement because they are elected officials with a tangible and personal stake in the campaign finance system.[3/] Rather than focus on this issue of individual candidate standing, the objectors claim that the movants are trying to base standing on various other grounds and proceed to focus their arguments on these straw men. For example, the objectors claim that the movants' real interest "is seeing that the Act is not struck down, rendering for naught the substantial labor and resources devoted to sponsoring it"; the objectors proceed to argue at length that "legislative sponsors . . . do not have a legally protectible interest" by virtue

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3/ *See* Mem. at 3 n.2. As previously discussed, the Supreme Court has reserved the question whether an intervening defendant must have independent Article III standing under Rule 24(a)(2) so long as the named defendant has standing and remains fully engaged. *Id.*, citing *Diamond v. Charles*, 476 U.S. 54, 62-64 (1986). Most of the courts of appeals considering the issue have held that independent Article III standing is *not* required in these circumstances. *See, e.g., Ruiz v. Estelle*, 161 F.3d 814, 830-32 (5th Cir. 1998) (collecting cases). Moreover, neither the D.C. Circuit nor any other court appears

of their sponsorship. (Objection at 8-9; *see also id.* at 10.) But the movants never claimed such a sponsorship "interest," let alone that it is legally "protected."

Similarly, the objectors claim that that the movants have no interest "distinct from that of every other citizen," that the claimed injuries are to "the political system and the public at large," and that the movants are simply acting in "a self-assumed role as representatives of the public" without any "personal stake" in the outcome. (*Id.* at 8-9, 11-12.) Here again, movants made clear in their opening papers that they seek to vindicate their own personal interests as candidates, potential candidates, fundraisers, recipients, and the like – not simply to represent what they believe to be the broader public good.[4/] The objectors' arguments against "institutional standing" are similarly misplaced (*id.* at 11); the movants have never invoked that basis for standing, and thus this case is readily distinguishable from *Raines v. Byrd*, 521 U.S. 811 (1997), as discussed at page 4, note 3 of the movants' opening memorandum.

What the movants *did* demonstrate in their opening papers was that, as direct participants in the electoral process, they have personal standing in this controversy because "they are among those whose conduct the Act regulates, and among those whom the Act seeks to insulate from the actual or apparent corrupting influence of special

interest money." (Mem. at 3-4.) Each of the Reform Act's major provisions has a direct impact on each of the proposed intervenors. For example:

- The ban on solicitation of soft money by federal office-holders and candidates in Title I of the Reform Act directly affects the movants; if it is not upheld, they face the strong risk that unregulated soft money contributions will again be used in an attempt to influence federal elections in which the movants are among the principal participants. The ban also affects the perception the public will form of the movants, their fellow office-holders, and fellow party members.
- Likewise, the loophole-closing extension of the soft money provisions to the funding for certain state and local activities that affect federal elections (*e.g.*, certain get-out-the-vote efforts in elections where federal candidates are on the ballot) would directly and personally impact the movants as candidates who run in elections that could be affected by those very state and local party activities, as well as in their capacities as party members who might be expected to raise soft money directly or indirectly for use at the state and local party level.

The [illegible] provisions in Title II of the Reform Act also directly

campaigns mounted by corporations and labor unions seeking to evade the ban on corporate and union expenditures by omitting "magic words" like "Vote Against McCain."

- Similarly, the movants have a concrete and personal stake relating to the provisions in Title II-B of the Reform Act that call on the FEC to promulgate realistic and effective coordination regulations; these regulations will affect the ways in which movants as candidates, and their primary and general election opponents, interact with supporters who wish to run advertising campaigns.

In every respect, the proposed intervenors therefore have a concrete, direct, and personal stake as candidates, potential candidates, and party members in the outcome of this challenge to a historic bipartisan effort to redesign the electoral landscape to close the loopholes in earlier campaign finance laws, reduce actual and apparent corruption in our system, and thereby reinvigorate citizen participation in our democracy in a way that preserves and promotes core First Amendment values.

Candidates and potential candidates have long been recognized to have standing to participate as parties in litigation involving campaign finance and disclosure laws; the [illegible] campaign finance decision included a Presidential candidate

themselves," who therefore may participate in litigation involving those rules under the doctrine of "political competitor standing." *Buchanan*, 112 F. Supp. 2d 63-69 (D.D.C. 2000) (collecting authorities); *see also Gottlieb v. FEC*, 143 F.3d 618, 620-21 (D.C. Cir. 1998) (limiting "political competitor" standing to those who "personally compete[]" in the political arena) (quotations and citations omitted).[5/] Indeed, one of the cases relied upon by the objectors held that a candidate had Article III standing under the "political competitor" doctrine even though his supporters and the general public could not claim a sufficient personal stake or "derivative" standing. *See* Objection at 7, *citing Becker v. FEC*, 230 F.3d 381, 385-89 (1st Cir. 2000) (challenge by Presidential candidate to funding of debate programs), *cert. denied sub nom. Nader v. FEC*, 532 U.S. 1007 (2001).[6/]

[5/] Courts evaluate claims of political injury on a deferential basis, and "do not think it proper to second-guess a candidate's reasonable assessment" of how a challenged practice might "force[] him to make significant adjustments to his campaign strategy and use of funds. . . . To probe any further into these situations would require the clairvoyance of campaign consultants or political pundits – guises that members of the apolitical branch should be especially hesitant to assume." *Becker v. FEC*, 230 F.3d 381, 386-87 (1st Cir. 2000), *cert. denied sub nom. Nader v. FEC*, 532 U.S. 1007 (2001).

[6/] For other cases involving candidate standing with respect to campaign finance and disclosure laws, *see, e.g., Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 383 (2000) (challenge by candidate for state office to state contribution limits; another state

The objectors appear to believe that, although someone may have Article III standing to *challenge* a law, there can be no such standing by a similarly situated person on the other side of the issue who wishes to *defend* the law. That is not the rule of standing, as shown in various cases previously cited by the movants but entirely ignored by the objectors. *See, e.g., Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993) (movants seeking to intervene as defendants in support of existing law 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"); *Marshall v. Meadows*, 921 F. Supp. 1490, 1492 (E.D. Va. 1996) (incumbent U.S. Senator seeking leave to intervene as a defendant supporting the constitutionality of

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the judgment) ("Actions such as the present one challenging ballot provisions have in most instances been brought by the candidates themselves, and no one questions the standing of [candidates] to raise a First Amendment challenge to such laws."); *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983) (Presidential candidate's challenge to early ballot-access filing deadline); *Brown v. Hartlage*, 456 U.S. 45, 47 (1982) (suit by county commissioner candidates *re* restrictions on candidate speech embodied in Kentucky Corrupt Practices Act); *Storer v. Brown*, 415 U.S. 724, 727 (1974) (challenge by Presidential and Congressional candidates to state ballot access laws); *Pittman v. Cole*, 267 F.3d 1269, 1273, 1283-85 (11th Cir. 2001) (challenge by judicial candidates to ethical restrictions on responding to candidate questionnaires); *Krislov v. Rednour*, 226 F.3d 851, 857-58 (7th Cir. 2000) (challenge by House and Senate candidates to ballot access regulations), *cert. denied sub nom. McGuffage v. Krislov*, 531 U.S. 1147 (2001); *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472, 477-78 (7th Cir. 1986) (challenge

Virginia's open primary law "has 'as a practical matter' a vital interest in a procedure through which he is currently seeking election and toward which he has expended considerable money and time"), *appeal dismissed*, 105 F.3d 904 (4th Cir. 1997); *see also American Horse Protection Ass'n v. Veneman*, 200 F.R.D. 153, 156-57 (D.D.C. 2001) (party may intervene in support of government defendants where "it will be injured in fact by the setting aside of the government's action it seeks to defend," the injury is caused by the invalidation, and "the injury would be prevented if the government action is upheld").

The objectors refuse to acknowledge that people who disagree with their views about campaign finance might have a legitimate Article III stake in the controversy. They repeatedly argue that movants have no standing because "no litigant has a legally protected interest in upholding an unconstitutional statute." Objection at 10.[7] This of course assumes the outcome before the parties have had the opportunity to present their evidence and arguments. The movants could just as easily contend that no one has a legally protected interest in maintaining a corrupt political system and in seeking to

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[7] "Indeed, how can the Proponents claim to be injured as the result of an unconstitutional Act being struck down? This they cannot do." Objection at 7. "It is difficult to understand how Proponents' alleged interests impact an analysis of the constitutionality of the Act. If the Act is unconstitutional, they should welcome its

overturn a necessary, proper, and constitutional law. The movants believe the record to be established in this case will demonstrate both that the Reform Act is constitutional and that it will effectively protect candidates and the broader public from the inherently corrupting influence of special interest money.

II. Section 403(b) Of The Reform Act Resolves All Prudential Considerations In Favor Of Intervention.

The objectors also raise a number of prudential arguments against allowing the movants to intervene. In particular, they argue that intervention is unwarranted because "the Government is required to defend the Act, and stands ready, willing and able" to do so. Objection at 2. They contend that the defense side should be required to "'speak with one voice,'" without bothering to explain why the same rule should not govern their faction. *Id.* at 14 (citation omitted). The objectors also argue that granting the movants leave to intervene would enable other Members of Congress to intervene, and that there are too many parties already (apparently not including themselves). *Id.* at 10, 14.

These policy objections have all been overridden by Congress's absolute and unconditional command in § 403(b) that any member of the House 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 [Reform Act]." This language represents a

the sort of prudential determination that is for Congress to make and to which the courts should defer.[8/]

III. Any Further Consideration Of Standing Issues Should Await A Fully Developed Evidentiary Record.

Finally, the objectors are seeking to apply standards of pleading and proof that are inappropriate at the motion-to-intervene stage. Intervention papers are "construed liberally in favor of the pleader and the court will accept as true the well-pleaded allegations" in those papers; intervention of right will not be denied "unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved ...." 7C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 1914, at 418 (1986) (collecting authorities); *Lake Investors Development Group, Inc. v. Egidi Development Group*, 715 F.2d 1256, 1259 (7th Cir. 1983). One consequence is that general allegations of injury suffice at the pleading stage because courts "'presum[e] that

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8/ *See, e.g., FEC v. Akins*, 524 U.S. 11, 19-20, 24-26 (1998) (provisions in Federal Election Campaign Act authorizing "any person" to file a complaint with the FEC and then seek judicial review of any agency dismissal of that complaint override all "prudential" restrictions on standing); *Raines v. Byrd*, 521 U.S. at 820 n. 3 (express statutory grant of authority to Members of Congress to bring suit "eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch"); *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (same

general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Thus, any objections to the *bona fides* of the movants' – or any other parties' – standing claims should be resolved only on the full evidentiary record that will be developed over the next several months. Any remaining questions about any party's standing with respect to any particular claims can be addressed at that time; all standing issues with respect to all parties should be considered together. *See id.* (discussing different burdens for establishing standing at the different stages of litigation).

Conclusion

For these reasons, the objectors' arguments should be rejected and the movants should be allowed to intervene. The movants and their counsel reiterate that they stand ready to work with all parties and the Court "[t]o avoid duplication of efforts and reduce the burdens placed on the parties" and the Court, as provided in § 403(b) of the Reform Act.[9/]

Dated this 22rd day of April, 2002.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anja Manuel, hereby certify that on the 22nd day of April, 2002, I caused a true and accurate copy of the foregoing Motion to Intervene, Memorandum of Law in Support of Motion to Intervene, Declarations and Answer and Affirmative Defenses to be served upon the following individuals via first class mail.

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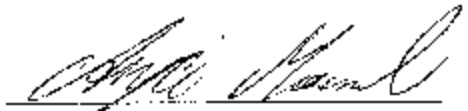

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