IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Rifle Association of America, *et al.,*	)	
Plaintiffs,	)	Case No. 02-0581 (CKK)
v.	)	
Federal Election Commission, *et al.,*	)	
Defendants.	)	

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

Introduction

This memorandum is submitted in support of the motion by Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, and Representative Martin Meehan, principal sponsors of the Bipartisan Campaign Reform Act of 2002 (the "Reform Act" or "Act") in the Senate and House, and Senators Olympia Snowe and James Jeffords, as principal supporters of the Act and authors of a portion of the Act (collectively, the "Reform Act sponsors"), to intervene in this action, as of right, pursuant to section 403(b) of the Act and Federal Rule of Civil Procedure 24(a)(1). Counsel for the proposed intervening defendants has conferred with counsel for plaintiffs, who has indicated that plaintiffs consent to the proposed intervention.

The moving Reform Act sponsors will show that the provisions of the Act challenged by the plaintiffs are constitutional, and that the Act affirmatively promotes and enhances core First Amendment values. As the legislative record reflects, the American electorate is losing confidence in the democratic process because of the spectre of actual and apparent corruption created by campaign finance abuses, and because of the climate of evasion of legitimate regulation that has come to characterize our political system. By closing loopholes in current law and prohibiting clearly identifiable abuses, the Reform Act encourages renewed citizen confidence and participation in all aspects of our democracy, thereby strengthening First Amendment values. At the same time, the Act ensures that candidates, parties, and citizens have robust opportunities to exercise their fundamental rights of expression and association. Both as citizens and as direct participants in the political process -- who are candidates or potential candidates for federal office, who seek to persuade other citizens to vote, who raise campaign funds, and who actively engage in party electoral and other activities -- the Reform Act sponsors have a substantial personal stake in the outcome of this litigation.

Argument

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 the Act grants the movants here 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 (including a Delegate or Resident Commissioner to the Congress) 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.

In light of the nature of plaintiffs' claims *(see, e.g.,* Complaint ¶ 2) and the clear, mandatory language of both Rule 24(a)(1) and section 403(b), the Reform Act sponsors are entitled to intervene in this action as of right. *See, e.g., Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R. Co.,* 331 U.S. 519, 529, 531 (1947) (Where Congress has provided an "unmistakable" and "unconditional" right to intervene, "there is no room for the operation of a court's discretion.")[1/]

2. To be maintained, of course, this action must satisfy constitutional as well as statutory requirements. Plaintiffs have alleged that the Reform Act's provisions addressing corporate electioneering, including related disclosure and coordinated-expenditure provisions, will unconstitutionally restrict their ability to influence federal elections. To the extent that the Complaint states claims that are appropriate for adjudication at this time, the Reform Act sponsors have personal interests in supporting the validity and enforcement of the Act.[2/]

The movants are direct participants in the electoral process. As federal officeholders and candidates for, or potential candidates for, election to federal office, they are among those whose

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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).

[2/] The Supreme Court has strongly suggested that an intervenor need not have an independent Article III controversy with the plaintiff simply in order to intervene and participate in litigation in support of the named defendant, so long as there is a live controversy between the named parties and the named defendant remains engaged in the action. *See Diamond v. Charles,* 476 U.S. 54, 62-64 (1986). The Court ultimately reserved that question, however, *see id.* at 68 69, and the D.C. Circuit has held that intervenors must establish Article III standing in order "to participate [in an action] on an equal footing with the original parties to the suit," *Rio Grande Pipeline Co. v. FERC,* 178 F.3d 533, 539-40 (D.C. Cir. 1999) *(quoting City of Cleveland v. NRC,* 17 F.3d 1515, 1517 (D.C. Cir. 1994) (per curiam)). The point is academic in this case, both because the named defendants here may be expected to remain actively involved throughout the proceedings, and because, as explained in the text, movants in any event have sufficiently concrete personal interests in the outcome to satisfy the requirements of Article III.

conduct the Act regulates, and among those whom the Act seeks to insulate from the actual or apparent corrupting influence of special interest money. They want to run in elections, participate in a political system, and serve in a government in which all participants comply with the reasonable federal campaign finance regulations that the Act imposes in order to stop evasion and to prevent actual and apparent corruption. If any of the reforms embodied in the Act are struck down, Congress's considered effort to reduce the influence of special interests on the political process will be compromised, and movants will once again be forced to attempt to discharge their public responsibilities, raise money, and campaign in a system that is widely perceived to be, and in many respects is, significantly corrupted by special-interest money. "[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." *Vote Choice, Inc. v. DiStefano,* 4 F.3d 26, 37 (1st Cir. 1993); *see also 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").[3/]

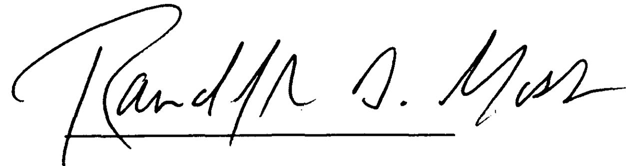
[3/] This case is, accordingly, unlike *Raines v. Byrd,* 521 US. 811, 826, 829 (1997), which held that any "abstract dilution of institutional legislative power" caused by the Line Item Veto Act of 1996 was too impersonal and "widely dispersed" an injury to give particular Members of Congress, as such, standing to challenge the constitutionality of the Act. The movants' direct, campaign-related interests in the enforcement of the Reform Act give them just the sort of "personal, particularized, [and] concrete" stake in the outcome of this case that the Court concluded was missing in *Raines. See id.* at 820; *see also Powell v. McCormack,* 395 U.S. 486, 496, 512-14 (1969). Indeed, the lead parties in the Supreme Court's most prominent modem campaign finance decision included a presidential candidate and a senator who was seeking reelection. *See Buckley v. Valeo,* 424 U.S. 1, 7-8, 12 & n. 11 (1976); *see also Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 383 (2000) (challenge by candidate for state office to state contribution limits); *Becker v. FEC,* 230 F.3d 381, 386-87 (1st Cir. 2000) (challenge by presidential candidate to funding of debate programs), *cert. denied sub nom. Nader v. FEC,* 532 U.S. 1007 (2001); *Vote Choice,* 4 F.3d at 36-37 (challenge by gubernatorial candidate to public campaign finance eligibility incentives); *Buchanan v. FEC,* 112 F. Supp. 2d 58, 63-64 (D.D.C.

(Footnote continued)

3. For these reasons, the Court should grant the moving Reform Act sponsors leave to intervene as of right as defendants in this action in support of the constitutionality of the Bipartisan Campaign Reform Act of 2002. [4/] Consistent with the final sentence in section 403(b) of the Act, the movants and their counsel will strive to avoid duplication of effort and reduce litigation burdens, including, where appropriate, through the filing of joint papers and the consolidation of presentations at oral arguments.

Dated this 2nd day of April, 2002.

Respectfully submitted,



Roger M. Witten (D.C. Bar No. 163261)
Seth P. Waxman (D.C. Bar No. 257337)
Randolph D. Moss (D.C. Bar No. 417749)
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

2000) (analysis of "competitor standing" doctrine, collecting authorities); *Marshall v. Meadows,* 921 F. Supp. 1490, 1492 (ED. Va. 1996) (incumbent U.S. Senator "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).

[4/] As noted in the motion to intervene (¶ 10), the movants also meet the criteria for intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b)(2). We do not address these grounds separately here, because Rule 24(a)(1) is a sufficient, and the most appropriate, ground for intervention, given the mandatory language of that provision and of section 403(b) of the Act.

David J. Harth
Charles G. Curtis, Jr.
Monica P. Medina
HELLER EHRMAN WHITE &
MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

Prof. Burt Neuborne
Frederick A.O. Schwarz, Jr.
E. Joshua Rosenkranz
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, NY 10013

Trevor Potter
The CAMPAIGN AND MEDIA LEGAL CENTER
1101 Connecticut Ave., N.W.,
Suite 330
Washington, DC 20036

Counsel for Movants Senator John McCain, Senator Russell Feingold, Representative Christopher Shays, Representative Martin Meehan, Senator Olympia Snowe, and Senator James Jeffords

Bradley S. Phillips
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Fred Wertheimer
DEMOCRACY 21
1825 Eye Street, N.W., Suite 400
Washington, DC 20006