IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Republican National Committee, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No. 08-1953 (BMK, RJL, RMC)**
	)	
Federal Election Commission,	)	**THREE-JUDGE COURT**
	)	
Defendant.	)	

REPLY TO PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION OF REPRESENTATIVE CHRISTOPHER VAN HOLLEN, JR. TO INTERVENE AS A DEFENDANT SUPPORTING THE CONSTITUTIONALITY OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002

1. Plaintiffs concede that Representative Christopher Van Hollen, Jr. meets the requirements for intervention of right under Federal Rule of Civil Procedure 24(a)(1) and that Section 403(b) of the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, confers statutory standing on Representative Van Hollen. Plaintiffs advance only the meritless contention that Representative Van Hollen lacks Article III standing to intervene in this challenge to BCRA's constitutionality. Pls.' Opp'n at 1.[1]

2. Plaintiffs offer no authority for their contention that the Court of Appeals for the D.C. Circuit requires a movant seeking intervention under Rule 24(a)(1) to establish Article III standing. The sole D.C. Circuit case cited by Plaintiffs addresses intervention under Rule 24(a)(2)—not Rule 24(a)(1). *See Bldg. & Constr. Trades Dep't., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994). Indeed, Plaintiffs acknowledge this Court's subsequent decision in

[1] Defendant Federal Election Commission has consented to Representative Van Hollen's motion to intervene as of right under Rule 24(a)(1).

McConnell, which concluded that "whether Article III standing is required for intervention under Rule 24(a)(1) is an open question." Pls.' Opp'n at 2; *McConnell v. FEC*, 2004 U.S. Dist. LEXIS 22496, at *6-*9 (D.D.C. May 3, 2004) (three-judge court) (noting that while the D.C. Circuit requires an intervenor under Rule 24(a)(2) to establish Article III standing, it has not spoken to whether an intervenor under Rule 24(a)(1) must establish Article III standing).

3. Plaintiffs do not and cannot dispute the Supreme Court's holding in *McConnell* that it need not consider whether an intervenor-defendant has Article III standing when he takes the same position as the original defendant. *See McConnell v. FEC*, 540 U.S. 93, 233 (2003). Nor do they dispute that here, as in *McConnell*, the intervenor-defendant and the FEC take the same position. Accordingly, whether Representative Van Hollen possesses Article III standing in his own right need not be considered.

4. In any event, Van Hollen does possess Article III standing. The three-judge Court in *McConnell* held that, "[a]s opposed to [a] member[] of the general public," a member of Congress "ha[s] a concrete, direct, and personal stake—as [a] candidate[] and potential candidate[]—in the outcome of a constitutional challenge to a law regulating the processes by which [he] may attain office." *McConnell*, 2004 U.S. Dist. LEXIS 22496, at *9. The three-judge court was also unequivocal that "the injury the movant[] allege[s] here—that [he] will be forced to raise money in a corrupt system in the event the Act is struck down—plainly would be redressed by a favorable decision upholding the Act's provisions." *Id.* at *12.[2] Plaintiffs'

---

[2] *See also Shays v. FEC*, 414 F.3d 76, 92 (D.C. Cir. 2005) (concluding that Representatives Christopher Shays and Martin Meehan had demonstrated standing because an adverse ruling would "depriv[e] the Congressmen of their right to reelection contests conducted in accordance with [BCRA]"). This case is, accordingly, unlike *Raines v. Byrd*, 521 U.S. 811, 826, 829 (1997). Representative Van Hollen does not seek to intervene in this action to protect his "institutional legislative power" against "abstract dilution." *Id.* at 826. Rather, he seeks to protect his interest in not being "forced to raise money, campaign, and attempt to discharge [his] important public

assertions to the contrary turn on accepting the ultimate merits of their case: that party spending must be "unambiguously campaign related" in order for soft-money contributions to have a corrupting influence on federal elections. The Supreme Court rejected precisely that argument in *McConnell*, 540 U.S. at 154-55, 164-69, but, in any event, the question of Article III standing cannot presuppose the result of the litigation.

5. Plaintiffs also ignore the line of decisions by three-judge panels of this Court, which have consistently permitted members of Congress to intervene as defendants in actions challenging the constitutionality of BCRA. *See, e.g., Wisconsin Right to Life v. FEC*, 466 F. Supp. 2d 195 (D.D.C. 2006) (three-judge court) (permitting intervention of Senator John McCain and Representatives Christopher Shays and Martin Meehan), *aff'd*, 127 S. Ct. 2652 (2007); *Christian Civic League of Maine v. FEC*, 433 F. Supp. 2d 81 (D.D.C. 2006) (three-judge court) (permitting intervention of Senators John McCain and Russell Feingold and Representatives Thomas Allen, Christopher Shays, and Martin Meehan), *vacated on other grounds*, 127 S. Ct. 3052 (2007) (mem.); *McConnell v. FEC*, 251 F. Supp. 2d 176 (D.D.C. 2003) (three-judge court) (per curiam) (same), *aff'd in part and rev'd in part*, 540 U.S. 93 (2003).

6. Plaintiffs argue that, if intervention is granted, "all intervenors [should be required] to submit joint briefs and motions with the FEC[,] . . . that any oral argument time allotted to intervenors should come out of the time allocated to the FEC [and that] . . . Van Hollen should not be permitted to conduct any discovery of Plaintiffs." Pls.' Opp'n at 5. This would effectively reduce Van Hollen's role in the district court to that of *amicus curiae*; in

---

responsibilities in a system that is perceived to be, and [he] believe[s] in many respects is, significantly corrupted by the influence of soft money." Decl. Van Hollen at ¶ 3. Representative Van Hollen's direct, campaign-related interest in the enforcement of BCRA gives him just the sort of "personal, particularized, [and] concrete" stake in the outcome of this case that the Court concluded was missing in *Raines*. 521 U.S. at 820.

effect, it would be a denial of intervention. The duty of this Court "to expedite to the greatest possible extent the disposition of th[is] action," BCRA § 403(a)(4), does not countenance these restrictions, let alone ruling on the constitutionality of BCRA on the basis of an insufficient or skewed record. Plaintiffs cannot simultaneously argue that the factual basis for this lawsuit is fundamentally different from the basis for *McConnell* and suggest that the Court not permit appropriate discovery to test the veracity of that assertion.

7. For these reasons and those previously offered, Representative Van Hollen respectfully requests that the Court grant his Motion to Intervene as a defendant as of right.

Dated this 12th day of February, 2009.

Respectfully submitted,

Roger M. Witten (D.C. Bar No. 163261)
Shane T. Stansbury
Lauren E. Baer
WILMER CUTLER PICKERING HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
Tel.: (212) 230-8800
Fax: (212) 230-8888
E-mail: roger.witten@wilmerhale.com

Fred Wertheimer (D.C. Bar No. 154211)
DEMOCRACY 21
1875 I Street, N.W.
Suite 500
Washington, D.C. 20006
Tel.: (202) 429-2008
Fax: (202) 293-2660
E-mail: FWertheimer@democracy21.org

Seth P. Waxman (D.C. Bar No. 257337)
Randolph D. Moss (D.C. Bar No. 417749)
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
E-mail: seth.waxman@wilmerhale.com

Counsel for proposed intervening defendant Representative Christopher Van Hollen, Jr.