UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEMOCRATIC NATIONAL COMMITTEE'S MOTION TO INTERVENE

The Democratic National Committee ("DNC") moves, by and through counsel, to intervene pursuant to Fed. R. Civ. P. 24(a) and (b).

Pursuant to Loc. R. Civ. P. 7(m), counsel for the DNC has discussed this motion with counsel for Plaintiffs and the Federal Election Commission ("FEC"). Counsel for Plaintiffs does not consent to the DNC's proposed intervention. The FEC has indicated that it is in the process of conferring and will express its position in a separate filing.

Attached hereto is a Proposed Answer to Plaintiffs' Complaint, setting forth the claims and defenses for which intervention is sought. The grounds for intervention are set forth in the DNC's Memorandum in Support of Its Motion, which the DNC incorporates herein by reference.

Dated: January 29, 2009.

Respectfully submitted,

PERKINS COIE LLP

By: /s/ Robert F. Bauer

Robert F. Bauer (D.C. Bar No. 938902)
RBauer@perkinscoie.com
Kate Andrias (D.C. Bar No. 983674)*
607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
Telephone: 202.628.6600
Facsimile: 202.434.1690

Attorneys for Democratic National Committee

Joseph E. Sandler (D.C. Bar No. 255919)
sandler@sandlerreiff.com
SANDLER REIFF & YOUNG PC
300 M Street, S.E. Suite 1102
Washington, D.C. 20003
Telephone: 202.479.1111
Facsimile: 202.479.1115

Of Counsel to the Democratic National Committee

* *Application for admission to the District Court for the District of Columbia pending.*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

MEMORANDUM OF LAW IN SUPPORT OF DEMOCRATIC NATIONAL COMMITTEE'S MOTION TO INTERVENE AS A DEFENDANT

I. INTRODUCTION

This memorandum supports the Motion of the Democratic National Committee ("DNC") to intervene as a matter of right as a defendant in this action, in which plaintiffs challenge the constitutionality of 2 U.S.C. § 441a. In the alternative, the DNC moves for permissive intervention pursuant to Federal Rule of Civil Procedure Rule 24(b).

II. THE NATURE OF THE DNC'S INTEREST IN THIS CASE

The DNC is an unincorporated association that is the governing body of the Democratic Party of the United States. It is also the "national committee" of the Democratic Party within the meaning of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431(14). The DNC actively supports Democratic candidates in federal, state, and local elections throughout the nation.

The DNC is subject to the FECA, including the "soft money" restrictions that were added to the statute by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81. Those restrictions prohibit national political parties and their officers

from soliciting, receiving, or disbursing soft money. BCRA § 101(a) (codified at 2 U.S.C. § 441i(a)). They also restrict the ability of state and local parties to receive soft money for "Federal election activity." 2 U.S.C. § 441i(b). In *McConnell v. Federal Election Commission*, 540 U.S. 93, 154, 173, 188-89 (2003), the Supreme Court upheld BCRA's soft-money restrictions in their entirety.

Since 2002, when BCRA was enacted, and particularly since 2003, when the Supreme Court ruled in *McConnell*, the DNC has conformed its activities to comply with the law. It has invested considerable sums in revamped compliance procedures and training of its officers, employees, and those supporting its operations with fundraising and in other ways. No less significantly, the DNC has endeavored to explore fresh avenues of "hard money," including through fundraising using the Internet and other means. The DNC has planned its political activity, since the enactment of BCRA and now in the future, in reliance on the changed legal rules mandated by BCRA. Of course, in all these activities, the DNC acts as a competitor to plaintiff Republican National Committee ("RNC") and its state and local affiliates, representing one of the two major parties in the promotion of their candidacies and the advocacy of their adherents' positions on the issues of the day.

III. THE DNC IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT

Rule 24(a)(2) governs motions for intervention as of right. The Rule provides:

> On timely motion, the court must permit anyone to intervene who … claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). Under this Circuit's precedent, an applicant must be granted leave to intervene if (1) it has an interest in the action; (2) the action potentially impairs that interest; (3) the applicant is not adequately represented by existing parties to the action; and

(4) the motion to intervene is timely. *See Karsner v. Lothian*, 532 F.3d 876, 885 (D.C. Cir. 2008); *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003). In addition, a movant seeking leave to intervene under Rule 24(a)(2) must have standing under Article III of the Constitution. *See, e.g.*, *Bldg. & Constr. Trades Dep't v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir. 1994).

The DNC meets each of these requirements. It has a concrete interest in this case sufficient to satisfy both Article III and Rule 24(a)(2); that interest may be impaired by this action; the only existing defendant, a government agency, cannot adequately represent the DNC's interest as a national political party; and the application for intervention is timely. The DNC is therefore entitled to intervene as of right under Rule 24(a)(2).

A. The DNC Has a Cognizable Interest in the Subject of the Action

The DNC comes to this case in defense of the challenged provisions of BCRA and, in doing so, possesses precisely the kind of interest found sufficient to establish both standing to sue and right of intervention.

To establish Article III standing, a party seeking to intervene as a defendant must demonstrate that it would suffer an injury in fact if the action were to be resolved in favor of plaintiffs. *See Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1 (D.D.C. 2008); *see also Am. Horse Prot. Ass'n v. Veneman*, 200 F.R.D. 153, 156 (D.D.C. 2001). The DNC unquestionably satisfies this requirement.

As a national party committee, the DNC's operations would be directly and substantially injured if this Court were to declare 2 U.S.C. § 441i unconstitutional in the situations that the RNC deems "as-applied": BCRA established a wholly new legal regime for national political parties; the Court in *McConnell* upheld it, in its entirety; and the DNC has since followed the law, re-organizing its operations and reforming fundraising and other

programs accordingly. The RNC seeks, through this action, by revisiting the claims it unsuccessfully made in *McConnell*, to turn back the clock—effectively destabilizing the established terms of legal compliance and major party competition. If the RNC were somehow to prevail, the DNC would be forced to change the way it has allocated resources, and anticipate and respond to changes in the fundraising and organization of its political opposition, the RNC.[1]

The DNC's substantial interest in the outcome of this litigation is also sufficient to establish its interest in the action for purposes of Rule 24(a). "The standing inquiry is repetitive in the case of intervention as of right because an intervenor" who has Article III standing will also satisfy Rule 24(a)'s interest requirement. *See Akiachak*, 584 F. Supp. 2d at 7 (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003)).

B. Absent Intervention, the DNC's Interest Could Be Greatly Impaired

It is incontrovertible that the DNC's interests could be impaired by this action. In determining whether a movant's interests will be impaired, courts look to the "practical consequences" of denying intervention. *Fund for Animals*, 322 F.3d at 735. As the Advisory Committee Notes to the 1966 amendments to Rule 24(a) explain, "[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene."

Failure to allow intervention would, as discussed above, prevent the DNC—the national committee of the Democratic Party—from participating in a proceeding initiated to

[1] The fact that the cost of reorganizing operations has not been estimated—and even assuming such cost may be slight—does not affect standing, which requires only a minimal showing of injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-84 (2000); *see also Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (holding that Democratic Party had standing to sue), *aff'd*, 128 S. Ct. 1610 (2008). Indeed, for the inverse reason that the RNC has standing to be a plaintiff in this action, the DNC has standing to intervene as a defendant.

alter the financing rules for national party committees. Any changes in the rules would clearly, directly, and greatly affect its interests as a regulated political entity—the particular type of entity to which these changes would by definition apply.

The practical effects on the DNC's interests would be both operational and competitive. As noted, success by the RNC in revisiting *McConnell* and vitiating BCRA's requirements would throw into uncertainty the DNC's current structure, manner of operation, and planning for the coming election cycle. The competitive implications would be similarly vast. Indeed, the RNC has conceded that its interests in this litigation are competitive in nature: Faced with a comparative disadvantage in raising "small donor" hard money, the RNC is looking to travel back to the pre-BCRA era in campaign finance, regaining the license to raise unlimited soft-money donations.[2] What the RNC has styled as an as-applied constitutional challenge, mounted in the interests of all parties, is a tactical move to roll back reforms and obtain redress for its own competitive difficulties.[3]

In short, there can be little doubt that an unfavorable ruling would greatly impair the DNC's interests. But absent intervention, there is little the DNC can do to challenge such a ruling. The possibility of bringing a future suit is no assurance. Because the very purpose of Rule 24's "interest" test is to be "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process" intervention should not be denied merely because "applicants may vindicate their interests in some later, albeit more burdensome, litigation." *Natural Resources Defense Council v. Costle*, 561 F.2d 904, 910-11 (D.C. Cir. 1977); *see also Fund for Animals*, 322 F.3d at 735.

---

[2] *See, e.g.*, RNC Memorandum in Support of Its Motion for Summary Judgment at 20 (purporting to present authority for the proposition that a subsequent decision of the Supreme Court "guts" *McConnell*).

[3] *See* Aff. of Richard Clinton Beeson, filed in support of RNC Summary Judgment Motion, ¶ 21 (citing the competitive difficulties experienced by the RNC in adjusting to BCRA, including being "negatively affected by the explosion of internet fundraising"); *see also Republican Party Challenges 'Soft Money' Laws*, Assoc. Press, Nov. 13, 2008, *available at* http://www.msnbc.msn.com/id/27699900/ (quoting RNC Chairman and plaintiff Mike Duncan as stating that the purpose of the suit is to "strengthen the Republican Party and bring a more level playing field to campaign finance").

C. The Existing Parties Do Not Adequately Represent the DNC's Interests

The DNC is also not adequately represented in this action. The Supreme Court has held that the burden of making this showing is "minimal"; the movant must simply show that representation "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). Intervention should therefore be permitted "unless it is clear that the [existing] party will provide adequate representation for the absentee." 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1909 (3d ed. 2007). "Although there may be a partial congruence of interests, that does not guarantee the adequacy of representation." *Fund for Animals*, 322 F.3d at 737.

In this case, the existing defendant—the Federal Election Commission ("FEC")—has no clear interest to defend the interests of the DNC. The FEC has a duty to defend the statute, not to support the legal, political, or financial interests of the Democratic Party. Nor can the FEC fully represent, as can the DNC as the national committee of the Democratic party, the full range of this action's implications for current and future political party operations.

D. The Motion to Intervene Is Timely

Finally, the DNC Motion is timely. "'[T]imeliness is to be judged in consideration of all the circumstances'" including "the 'time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case.'" *Akiachak*, 584 F. Supp. 2d at 5 (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). The critical factor is whether any delay in moving for intervention will prejudice the existing parties to the case. *Id.* And "[e]ven though the timeliness

requirement applies to . . . intervention of right," a court should be particularly "reluctant to dismiss such a request for intervention [of right] as untimely." 7C Wright et al., § 1916; *see also Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004) (reversing district court's denial of United States' motion to intervene where motion came after the court had already entered judgment in the case but case had undeniable impact on government's interest); *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246 (10th Cir. 2001) (motion to intervene was timely, even though filed two and a half years after the suit, when all that had occurred prior to the motion to intervene were document discovery, discovery disputes, and motions by defendants seeking dismissal on jurisdictional grounds); *Foster v. Gueory*, 655 F.2d 1319, 1324 (D.C. Cir. 1981) (intervenors satisfied the timeliness requirement even though the motion was not made until approximately ten months after the filing of the complaint because there was little likelihood of prejudice to the other parties; *Me-Wuk Indian Cmty. of Wilton Rancheria v. Kempthorne*, 246 F.R.D. 315, 319 (D.D.C. 2007) (motion to intervene, filed almost three months after the complaint, was timely).

In the totality of the circumstances in this case, the DNC Motion is timely. The RNC filed its original Complaint only two and a half months ago. There has been no discovery to date, defendant's motion to dismiss was just filed on January 26, 2009, and plaintiffs' motion for summary judgment was filed that same day. Those motions are still pending. The DNC does not seek to modify the scheduling order issued on December 22, 2008, and intends to comply with that order if this Motion is granted. Accordingly, no party will be prejudiced by intervention at this stage of the proceedings. Moreover, the DNC held its elections for a new Chair and other officers on January 21, only eight days ago; the newly elected leadership's decision to seek intervention was made, and the Motion prepared and filed with this Court, within one week.

IV. THE DNC SHOULD BE ALLOWED PERMISSIVE INTERVENTION

If this Court determines that intervention of right is not appropriate, the DNC requests that the Court grant permissive intervention under Rule 24(b). The Rule provides:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b). This Circuit has held that permissive intervention is appropriate when there is (1) an independent basis for subject-matter jurisdiction; (2) a timely motion; and (3) a claim or defense that shares a common question of law or fact with the action in which intervention is sought. *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). The requirements for permissive intervention are to be construed liberally, with all doubts resolved in favor of permitting intervention. *See id*.

As discussed above, the DNC Motion is timely and the organization has an independent basis for subject-matter jurisdiction. Moreover, the DNC's unique perspective as the national committee of the Democratic Party—and as the RNC's direct competitor in electoral and party politics—ensures that it will contribute substantially to the Court's consideration of this matter.

V. CONCLUSION

For the foregoing reasons, this Court should grant the DNC intervention of right under Rule 24(a)(2) or, in the alternative, permissive intervention under Rule 24(b).

Dated: January 29, 2009.

Respectfully submitted,

PERKINS COIE LLP

By: /s/ Robert F. Bauer

Robert F. Bauer (D.C. Bar No. 938902)
RBauer@perkinscoie.com
Kate Andrias (D.C. Bar No. 983674)*
607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
Telephone: 202.628.6600
Facsimile: 202.434.1690

Attorneys for Democratic National Committee

Joseph E. Sandler (D.C. Bar No. 255919)
sandler@sandlerreiff.com
SANDLER REIFF & YOUNG PC
300 M Street, S.E. Suite 1102
Washington, D.C. 20003
Telephone: 202.479.1111
Facsimile: 202.479.1115

Of Counsel to the Democratic National Committee

* *Application for admission to the District Court for the District of Columbia pending.*