

**United States District Court
District of Columbia**

Wisconsin Right to Life, Inc.

Plaintiff,

v.

Federal Election Commission,

Defendant.

Civil Action No. 04-1260 (DBS, RWR, RJL)

THREE-JUDGE COURT

**Plaintiff's Memorandum in Opposition to
Motion of Sen. McCain et al. to Intervene**

Wisconsin Right to Life, Inc. ("WRTL") opposes the motion of Sen. John McCain et al. ("Movants") to intervene as defendants under Federal Rule of Civil Procedure 24(a) and (b) and BCRA § 403(b). The motion is not timely and the proposed Intervenors lack requisite Article III standing. In the alternative, if intervention is permitted it should be limited to participation in expeditious summary judgment briefing.

1. Parts (a) and (b) of Rule 24 both begin with the words "[u]pon timely application." So as a threshold matter an intervention application must be timely. "Timeliness is a prerequisite to any claim for intervention under Rule 24" *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 129 (D.C. Cir. 1972).

2. Movants acknowledge that the case began in July 2004, Mem. at ¶ 2, and that they have been fully aware of it from the beginning since three of them were granted leave for

amici curiae participation in this Court. Mem. at Intro. and ¶ 3; *see* Docket #19 (amici curiae motion filed Aug. 9, 2004, with memorandum). Nonetheless, they argue that the remand makes this case like “a case only recently filed,” Mem. at ¶ 2, they argue for a more lenient standard for intervention as of right, Mem. at ¶ 2, and they insist that “[n]o party will be prejudiced” because there has been no discovery, only “motions practice,” although they fail to mention that the motions were fully-briefed, fully-dispositive, cross-motions for summary judgment. Mem. at ¶ 3.

3. The D.C. Circuit, in upholding a recent decision of this Court denying expanded intervention (as of right) as untimely, declared the test for timeliness as follows:

timeliness is to be judged in consideration of all the circumstances, especially weighing the factors of 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.

United States v. British American Tobacco Australia Services, 2006 U.S. App. LEXIS 3794, at *6 (“*BATAS*”) (quoting *United States v. AT&T*, 642 F.2d 1285, 1295 (D.C. Cir. 1980)). In *BATAS*, this Court and the D.C. Circuit found that, even though *BATAS* had already been granted intervention as of right on December 5, 2003, its September 1, 2004 motion to expand the scope of its intervention was “clearly untimely.” *Id.* at *5 (quoting this Court). Judge Sentelle, writing for the D.C. Circuit, summarized the salient reasons for finding untimeliness:

As to the actual question before us, we agree with the District Court’s findings on timeliness. The District Court correctly noted that before moving to expand its intervention *BATAS* allowed nearly six months to pass after receiving the government’s witness list. Furthermore, *BATAS*’s motion came almost a year after the contents of the Gulson Affidavit became publicly available. Consequently, *BATAS* received multiple early warnings of danger to its privilege. It knew the contents of the documents — and therefore what privileged information might be disclosed — and it

knew the government's plans to call Gulson to the stand, along with the subject matter of his expected testimony. On these facts, BATAS had a reasonable expectation of potential disclosure of information in which it claims privilege well before it filed its motion for expanded intervention.

Although elapsed time alone may not make a motion for intervention untimely, *see United Mine Workers*, 473 F.2d at 129, other facts support the District Court's ruling. BATAS had already intervened once in the suit. Unquestionably, it could have requested a broader intervention initially or upon receiving the government's witness list (or any time in between or thereafter). BATAS's dilatory conduct is, therefore, all the more inexcusable considering that its motion to intervene came virtually on the eve of trial.

Id. at *9-*10. There are three key points of comparison between *BATAS* and the present motion to intervene that demonstrate that intervention should be denied in the present case.

4. First is the "time elapsed," *id.* at *6, which in *BATAS* was six months, possibly a year, after BATAS knew or should have known that its interests would be affected. *Id.* at *7, *9. The present case was filed July 28, 2004, Docket #1, and Movants seek intervention in February 2006, which is over a year a half. Even measuring from the filing of the complaint until the dismissal was ten months. Docket #59 (dismissal order filed May 10, 2005). Sen. McCain et al. knew about the case from the beginning, filing their motion to appear as amici curiae on August 9, 2004. Docket #19.

5. A second key point of comparison with *BATAS* stems from the DC Circuit's reliance on the fact BATAS had already filed a motion to intervene once and could well have asked for broader intervention at that time. *BATAS*, 2006 U.S. App. LEXIS 3794, at *10. Similarly, in the present case, three of the four Movants already moved for amici curiae participation and could just as easily have moved for intervention at that time.

6. A third key point of comparison with *BATAS* is the fact that the D.C. Circuit added that the motion to intervene was "virtually on the eve of trial." *Id.* In the present case, the

similarity is that both sides have already fully briefed fully-dispositive cross-motions for summary judgment and this Court is under a statutory duty “to expedite to the greatest possible extent” this case, BCRA § 403(a)(4), which means that the present case ought to be on the eve of resolution by this Court by summary judgment. So as the D.C. Circuit said in *BATAS*, Movants’ “dilatory conduct” should be deemed “inexcusable.” *BATAS*, 2006 U.S. App. LEXIS 3794, at *10.

7. In *BATAS*, this Circuit’s next two timeliness factors, i.e., the “purpose” of the intervention and the “need” for intervention to preserve movants’ rights, received little attention. The Court effectively said that (a) these factors wouldn’t be considered where there was adequate notice and dilatoriness and (b) there was no real “need” if movants did not see fit to protect their asserted interests in a timely fashion. The same approach should be employed in the present case as to the present Movants’ less tangible interests. There is no “need” for intervention because the FEC has shown itself fully capable of defending the present case, as has the U.S. Solicitor General, who briefed and defended this case in the Supreme Court. Movants are welcome to participate again as amici curiae, as they already have done, in which capacity they may set out all the arguments they could make as intervenors. So intervention is not required on the basis of these two factors.

8. The final timeliness factor of *BATAS*, “prejudice to those already parties in the case,” 2006 U.S. App. LEXIS 3794, at *6, weighs in favor of WRTL and against granting intervention. As noted in the points of comparison with *BATAS*, this case has fully-briefed, fully-dispositive, cross-motions for summary judgment that are the most expeditious way to resolve this case, so that there is clear prejudice to WRTL if the sort of intervention with

discovery that Movants seek is granted. The motion to intervene has already delayed this case by requiring briefing and consideration by this Court. WRTL has a statutory right to expedition, and permitting intervention at this late date prejudices that right, especially as Movants indicate they intend to seek discovery instead of prompt resolution of the cross-motions for summary judgment. Mem. at ¶ 10. In sum, intervention should be denied on the basis of lack of timeliness.

9. Intervention should also be denied because Article III standing is required in this Circuit for intervention, *Building and Constr. Trades Dept., AFL-CIO v. Reich*, 40 F.3d 1275, 1282 (D.C. Cir.1994), and Movants lack Article III standing. WRTL understands that whether Article III standing is required for intervention is an open question before the United States Supreme Court, *see Diamond v. Charles*, 476 U.S. 54, 68-69 and n. 21 (1986), and that the circuits are split on the matter. *Compare Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 507 (7th Cir. 1996); *Mausolf v. Babbit*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Reich*, 40 F.3d at 1282, *with United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir.1978); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir.1994); *Yniguez v. State of Arizona*, 939 F.2d 727, 731 (9th Cir.1991).

10. WRTL knows that Sen. McConnell et al. were granted intervention in this Court in *McConnell* and in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), based on reasons that arguably apply here. It must again be emphasized that the application to intervene in *McConnell* was *timely*, unlike the present case. In *McConnell*, the intervention of Sen. McCain et al. was challenged as an issue in the U.S. Supreme Court, but the Court declined to rule on the issue because the FEC had standing and the positions of the FEC and

intervenors were “identical.” 540 U.S. at 233. WRTL preserves this issue for possible argument before the Supreme Court in this case, providing the following brief points adapted from the argument made to the Supreme Court in *McConnell*.

11. The Movants must satisfy both constitutional and prudential requirements for standing. *See, e.g., National Credit Union Admin. v. First National Bank & Trust Co.*, 522 U.S. 1146 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Section 403(b), by permitting members of Congress to intervene, removes any prudential standing concerns. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) (“Congress’s decision to grant a particular plaintiff the right to challenge an act’s constitutionality ... eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when the plaintiff brings suit”). However, “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue a plaintiff who would not otherwise have standing.” *Id.* Movants lack Article III standing.

12. First, they do not satisfy the requirement that one must suffer an “injury in fact,” consisting of an “invasion of a legally protected interest which is (a) concrete and particularized ... and (b) actual or imminent.” *Lujan*, 504 U.S. at 560 (internal quotations and citations omitted). The Movants claimed injury here is neither concrete nor particularized. In *Raines*, 521 U.S. at 829, the Supreme Court held that individual members of Congress lacked standing to challenge the constitutionality of the federal Line Item Veto Act, although the Act explicitly provided that any Member might bring suit against it, because the Members had alleged no cognizable injuries particular to themselves, and their claimed institutional injury was widely dispersed and abstract.

13. The Movants' alleged injury here, which is asserted harm to an 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, Mem. at ¶ 9, lacks particularity and concreteness to an even greater degree than the claim of the *Raines* plaintiffs. A line item veto is at least known to diminish the specific weight of every legislative vote. This is surely a more concrete and particular injury than that which Movants claim. If the *Raines* plaintiffs lacked standing, the Movants lack it, too. If the Movants here have standing, then so do all legislators whenever any statute that affects them is brought into question before the courts, which would elide the entire meaning of the "case and controversy" requirement.¹

14. Second, the Movants lack Article III standing because there is no causal connection between their alleged "injury" and the conduct complained of. *Lujan*, 504 U.S. at 560-61.

Their claimed injury would arise from the unregulated conduct of other parties. However,

¹In *Karcher v. May*, 484 U.S. 72, 78 (1987), the Supreme Court held that New Jersey legislators had standing to defend a statute that the state's Attorney General refused to defend, if they acted "in their official capacities as presiding officers on behalf of the . . . Legislature," but lost standing when acting as individual legislators. *Id.* In *INS v. Chadha*, 464 U.S. 919, 930, n.5 (1983), this Court held that Congress was a proper party to defend a one-House veto provision when a government agency refused to defend the provision and both Houses authorized the intervention of Congress to defend the provision. But Movants here have not sought to intervene in any official capacity, only as individual legislators. And the challenged provision is actively and ably defended by the government. Moreover, this is not a case where precluding candidates from standing would mean that no one could challenge election rules, as Movants suggest, Mem. at n.2, because Movants seek to intervene as *defendants*.

And informational standing, which Movants assert, Mem. at n.2, is also unavailing because WRTL has indicated that it would fully comply with the disclosure and reporting requirements for electioneering communications and does not challenge those provisions. In any event, there have not yet been any electioneering communications by WRTL as to which anyone could assert an informational interest.

“[i]n those cases where a plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (*or lack of regulation*) of someone else, it is substantially more difficult to establish injury in fact, for in such cases one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.” *Common Cause v. FEC*, 108 F.3d 412, 417 (D.C. Cir. 1997) (quotations and citations omitted) (emphasis added).

15. “[B]ecause an intervenor participates on equal footing with the original parties to a suit, a movant for leave to intervene ... must satisfy the same Article III standing requirements as original parties.” *Building and Constr. Trades Dept., AFL-CIO*, 40 F.3d at 1282 (citations omitted). As the Eighth Circuit held:

[A]n Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy. An Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party must have standing as well. The Supreme Court has made it very clear that “[those] who do not possess Art. III standing may not litigate as suitors in the courts of the United States.”

Mausolf, 85 F.3d at 1300 (citation omitted).

16. The Article III standing requirement cannot be mitigated by Congress. Congressional power to create standing is subject to the limitations of Article III. *See, e.g., Warth v. Seldin*, 422 U.S. 490 (1975); *Linda R.S. v. Richard D.*, 410 U.S. 64 (1973). Article III’s injury in fact requirement limits Congress’ power to confer standing. *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring). “In no event ... may Congress abrogate the Art. III minima.” *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). The fact that Representative Baldwin is from Wisconsin adds nothing to her Article III standing and the arguments set out

here, it only highlights that the other Movants have even less concrete claims. Since Article III standing is required for intervention and Movants lack such standing, intervention should be denied.

17. In the alternative, if Movants are permitted to intervene, WRTL asks that intervention be permitted only to the extent of expeditiously participating in briefing the cross-motions for summary judgment, by filing a single supplemental brief as WRTL has proposed for the parties (or by engaging in whatever summary judgment briefing the Court may order). This approach is in keeping with the language of the intervention provision in BCRA, § 403(b), which provides that “the court in any such action may make such orders as it considers necessary” Movants should not be permitted to impose discovery and delay burdens, to the prejudice of WRTL.

18. Finally, intervention should either be denied or limited to briefing existing motions for summary judgment because there is something decidedly unseemly about members of Congress, including Representative Baldwin from Wisconsin, engaging in discovery of persons who wish to be free to lobby them. The notion that the people’s representatives are free to impose discovery burdens and probe the files and thoughts of persons having the temerity to seek recognition of a constitutional right to engage in authentic grassroots lobbying is contrary to the First Amendment’s protections of the right to free expression, association, and petition and the very structure of representative, participatory government.

19. For the foregoing reasons, WRTL respectfully requests that the Court deny Movants’ intervention request, or in the alternative that it be limited to expeditious summary judgment briefing.

James Bopp, Jr.
Richard E. Coleson
Jeffrey P. Gallant
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiff

Respectfully submitted,

/s/ Michael S. Nadel
M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff

Certificate of Service

I, Michael S. Nadel, a member of the bar of this Court, certify that on February 27, 2006, I caused a true and correct copy of the foregoing memorandum in opposition to the motion to intervene to be served on counsel for the Defendant Federal Election Commission under the electronic filing system of this Court and on counsel for the proposed intervenors by First Class mail, facsimile transmission, and email transmission on:

Seth P. Waxman, *Counsel of Record*
Randolph D. Moss
WILMER CUTLER PICKERING HALE AND DORR LLP
2445 M Street, NW
Washington, DC 20037
Fax: 202/663-6363
Email: Seth.Waxman@wilmerhale.com; Randolph.Moss@wilmerhale.com

Respectfully submitted,

/s/ Michael S. Nadel
M. Miller Baker, D.C. Bar # 444736
Michael S. Nadel, D.C. Bar # 470144
McDERMOTT WILL & EMERY LLP
600 Thirteenth Street, NW
Washington, D.C. 20005-3096
202/756-8000 telephone
202/756-8087 facsimile
Local Counsel for Plaintiff