

No. 08-1977

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

THE REAL TRUTH ABOUT OBAMA, Inc.,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of
Virginia, Richmond Division, Case No. 3:08-cv-00483-JS

**UNOPPOSED MOTION OF CAMPAIGN LEGAL CENTER AND
DEMOCRACY 21 FOR LEAVE TO FILE BRIEF *AMICI CURIAE*
SUPPORTING DEFENDANTS-APPELLEES AND URGING
AFFIRMANCE**

The Campaign Legal Center (CLC) and Democracy 21 respectfully move for leave to participate as *amici curiae* and to file the attached Brief *Amici Curiae* in Support of Defendants-Appellees and Urging Affirmance. Counsel for both appellant and appellees have consented to this motion; it is unopposed.

In support of this motion, *amici* movants state:

1. Plaintiff-appellant The Real Truth About Obama, Inc. (RTAO) is appealing the decision of the U.S. District Court of the Eastern District of Virginia to deny its motion for a preliminary injunction to enjoin certain Federal Election Commission (FEC) regulations and policies. *See RTAO v. FEC*, Memorandum

Opinion, No. 08-CV-483, 2008 WL 4416282 (E.D. Va. Sept. 24, 2008) (Spencer, J.); *see also* Order, No. 08-CV-483 (E.D. Va. Sept. 11, 2008). These regulations and policies collectively establish when a political organization such as RTAO must abide by the “political committee” requirements in the Federal Election Campaign Act (FECA), as well as when a corporation is prohibited from using general treasury funds to pay for an “electioneering communication.” Specifically, RTAO sought to have enjoined FEC regulations defining “expressly advocating” (11 C.F.R. § 100.22(b)), defining “contribution” (11 C.F.R. § 100.57), and interpreting the Supreme Court’s 2007 decision in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007) (“*WRTL II*”), (11 C.F.R. § 114.15).

2. The CLC is a non-profit, non-partisan organization created to represent the public perspective in administrative and legal proceedings interpreting and enforcing the campaign and media laws throughout the nation. It participates in rulemaking and advisory opinion proceedings at the FEC to ensure that it is properly enforcing federal election laws, and files complaints with the Commission requesting that enforcement actions be taken against individuals or organizations which violate the law.

3. Democracy 21 is a non-profit, non-partisan policy organization that works to ensure the integrity of our democracy. It supports campaign finance and other political reforms, and conducts public education efforts to accomplish these

goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented.

4. The *amici* movants have substantial experience and expertise in the issues raised in this case. The *amici* movants participated in the litigation below, and filed an *amici* brief with the district court to oppose RTAO's motion for a preliminary injunction and to defend the constitutionality of the FEC regulations and policies.

5. The *amici* movants also participated extensively in the FEC rulemaking proceedings that produced several of the regulations challenged here. The *amici* movants filed public comments in the rulemaking that produced 11 C.F.R. § 100.57, regarding the solicitation of contributions.¹ This rulemaking also dealt more generally with the FEC's policy of regulating groups, such as RTAO, that are organized under section 527 of the Internal Revenue Code, 26 U.S.C. § 527, as federal political committees, which RTAO likewise challenges in the present case. Further, the *amici* movants participated in the FEC rulemaking proceedings to interpret the Supreme Court decision in *WRTL II*, which led to the

¹ Comments of Democracy 21, Campaign Legal Center and Center for Responsive Politics on FEC Notice 2004-6 (Political Committee Status) (April 5, 2004), available at http://www.fec.gov/pdf/nprm/political_comm_status/simon_potter_nobel_sanford.pdf.

FEC's promulgation of another regulation challenged in this law suit, 11 C.F.R. § 114.15.² The *amici* movants have also filed numerous administrative complaints with the FEC challenging the failure of various 527 groups to register as federal political committees in violation of the FEC's political committee enforcement policy.³ The *amici* movants thus have a significant interest in this case and can materially contribute to the Court's consideration of RTAO's claims.

6. The *amici* movants also have substantial expertise in litigation regarding the specific laws at issue in this case and campaign finance laws more generally. The CLC and Democracy 21 have provided legal counsel to parties or *amici* in numerous campaign finance cases, including representing intervening defendants in *McConnell v. FEC*, 540 U.S. 93 (2003). More recently, the CLC and Democracy 21 represented parties in *Wisconsin Right to Life v. FEC*, 126 S.Ct. 1016 (2006) (*WRTL I*) and *WRTL II*, 127 S.Ct. 2652 (2007), lawsuits which substantially underlie RTAO's claims in the present case. The CLC and

² Comments of the Campaign Legal Center, Democracy 21, the Brennan Center, Common Cause, the League of Women Voters and U.S. PIRG on FEC Notice 2007-16 (Electioneering Communications) (Oct. 1, 2007), available at http://www.fec.gov/pdf/nprm/electioneering_comm/2007/campaign_legal_center_democracy21_brennan_center_for_justice_commoncause_league%20of_women_voters_uspirg_eccomment7.pdf.

³ *E.g.*, Complaint, *Democracy 21 et al. v. America Coming Together* (FEC June 22, 2004) (MUR 5403); Complaint, *Democracy 21 et al. v. The Media Fund*, (FEC Jan. 15, 2004) (MUR 5440); Complaint, *Democracy 21 et al. v. Progress for America Voter Fund* (FEC July 21, 2004) (MUR 5487); Complaint, *Democracy 21 et al. v. Swift Boat Veterans for Truth* (FEC Aug. 10, 2004) (MUR 5511).

Democracy 21 are presently participating as *amici curiae* in *SpeechNow.org v. FEC*, --- F. Supp. 2d ---, 2008 WL 2698652 (D.D.C. July 1, 2008) (Memorandum Order Denying Motion for Preliminary Injunction), a pending civil action that likewise challenges the FEC's regulation of political organizations as "political committees." The CLC and Democracy 21 have also represented parties or *amici* in the following cases relating to the interpretation of the federal and state campaign finance laws: *Randall v. Sorrell*, 126 S.Ct. 2479 (2006); *Shays v. FEC* ("*Shays I*"), 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir. 2005); and *Shays v. FEC* ("*Shays III*"), 528 F.3d 914 (D.C. Cir. 2008).

7. *Amici* movants believe the attached Brief *Amici Curiae* in Support of Defendants-Appellees and Urging Affirmance will assist the Court in considering the issues presented in this case. This filing is timely because this motion and the attached memorandum are being filed on the date that the principal briefs of appellees are due.

9. Pursuant to Fed. R. App. P. 29(a) and Local Rule 27(a), counsel for appellant RTAO and appellees FEC and United States Department of Justice were contacted about their consent to the filing of the attached memorandum. All parties have consented to the *amici*-movants' participation.

Wherefore, *amici*-movants respectfully request that the Court grant leave to file the attached Brief *Amici Curiae* in Support of Defendants-Appellees and Urging Affirmance.

Respectfully submitted,

Donald J. Simon
(D.C. Bar No. 256388)
SONOSKY, CHAMBERS, SACHSE
ENDRESON & PERRY, LLP
1425 K Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 682-0240

Fred Wertheimer
(D.C. Bar No. 154211)
DEMOCRACY 21
1875 I Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 429-2008

Counsel for *Amicus Curiae*
Democracy 21

/s/ J. Gerald Hebert
J. Gerald Hebert
(Va. Bar No.38432)
Paul S. Ryan
(D.C. Bar No. 502514)
Tara Malloy
(NY Bar No. 4251005)
THE CAMPAIGN LEGAL CENTER
1640 Rhode Island Ave., N.W.
Suite 650
Washington, DC 20036
Tel: (202) 736-2200

Counsel for *Amicus Curiae*
Campaign Legal Center

Dated: October 28, 2008

CERTIFICATE OF FILING AND PROOF OF SERVICE

This is to certify that on October 28, 2008, I electronically filed the foregoing UNOPPOSED MOTION OF THE CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 FOR LEAVE TO FILE MEMORANDUM AS *AMICI CURIAE* using the Court's CM/ECF system, which will then send a notification of such filing to the following:

James Bopp, Jr., jboppjr@aol.com

Clayton James Callen, ccallen@bopplaw.com

Richard Eugene Coleson, rcoleson@bopplaw.com

Eric Fleisig-Greene, eric.fleisig-greene@usdoj.gov

Debra J. Prillaman, debra.prillaman@usdoj.gov

Adav Noti, anoti@fec.gov

David Kolker, dkolker@fec.gov

In addition, a courtesy copy of the motion was sent on October 28, 2008 by email, where email addresses were available and known, to the following counsel:

Michael Boos, michael.boos@gte.net
Attorney & Counselor at Law
4101 Chain Bridge Road, Suite 313
Fairfax, VA 22030

James Bopp, Jr., jboppjr@aol.com
Barry Alan Bostrom,
bbostrom@bopplaw.com
Clayton James Callen,

John Richard Griffiths,
john.griffiths@usdoj.gov
United States Department of Justice
Civil Division, Federal Programs
Branch
Post Office Box 883
Washington, DC 20044

Debra Jean Prillaman,

ccallen@bopplaw.com
Richard Eugene Coleson,
rcoleson@bopplaw.com
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, IN 47807-3510

Counsel for Plaintiff-Appellant

debra.prillaman@usdoj.gov
Office of the U.S. Attorney
600 East Main Street, Suite 1800
Richmond, VA 23219

Audra Hale-Maddox, ahale-
maddox@fec.gov
Thomasenia P. Duncan,
tduncan@fec.gov
David B. Kolker, dkolker@fec.gov
Kevin Deeley, kdeeley@fec.gov
Holly Baker, hbaker@fec.gov
Vivien Clair, vclair@fec.gov
Seth Nesin, snesin@fec.gov
Adav Noti, anoti@fec.gov
Claire Rajan, crajan@fec.gov
Federal Election Commission
999 E Street NW
Washington, DC 20463

Counsel for Defendants-Appellees

A courtesy copy of the motion was also mailed on October 28, 2008 via
United States mail, first-class postage prepaid, to the following counsel:

Charles Philip Rosenberg
Office of the United States Attorney
2100 Jamieson Avenue
Alexandria, VA 22314-5194

Thomasenia P. Duncan
Federal Election Commission
999 E Street NW
Washington, DC 20463

Michael Boos
Suite 313
4101 Chain Bridge Road
Fairfax, VA 22030

/s/ Tara Malloy
Tara Malloy
The Campaign Legal Center
1640 Rhode Island Ave. NW, Ste. 650
Washington, DC 20036
(202) 736-2200

Dated: October 28, 2008