Oral Argument Not Yet Scheduled

No. 08-5526

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITY08, *et al.*,

Appellants,

v.

FEDERAL ELECTION COMMISSION,

Appellee.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 1:07-cv-00053-RWR
The Honorable Richard W. Roberts

BRIEF OF APPELLANTS

J. Scott Ballenger
(D.C. Bar No. 465252)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Fax: (202) 637-2201

Alexandra A.E. Shapiro
(D.C. Bar No. 438461)
Marc E. Isserles
MACHT, SHAPIRO, ARATO & ISSERLES LLP
The Grace Building
1114 Avenue of the Americas
45th Floor
New York, NY 10036
Telephone: (212) 479-6724
Fax: (212) 202-6417

Attorneys for Appellants

DATED: May 29, 2009

APPELLANTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO D.C. CIR. RULE 28(a)(1)

Parties

The parties are appellants Unity08, Douglas Bailey, Roger Craver, Hamilton Jordan, Angus King, Jerry Rafshoon, and Carolyn Tieger and appellee Federal Election Commission.

Disclosure Required by Circuit Rule 26.1

Appellant Unity08 is a nonprofit organization based in the District of Columbia and exempt from federal income taxation under section 527 of the Internal Revenue Code. It has no parent company and there is no company with any ownership interest.

Ruling Under Review

The ruling under review is the October 18, 2008 Order of the United States District Court for the District of Columbia (Roberts, J.) granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment. That Order is unpublished, but is provided in the Joint Appendix filed with this brief, at JA 567. The accompanying memorandum opinion is published as *Unity08 v. FEC*, 583 F. Supp. 2d 50 (D.D.C. 2008).

Related Cases

This case has not been previously before this Court and appellants are unaware of any pending related cases.

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GLOSSARY

AO	Advisory Opinion
FEC	Federal Election Commission
FECA	Federal Election Campaign Act

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1331. The Order granting defendant's motion for summary judgment was entered on October 16, 2008 (JA 567) and notice of appeal was timely filed on December 15, 2008. (JA 568).

STATUTES AND REGULATIONS

Pertinent statutes and regulations have been included in a Statutory Addendum attached to this Brief.

STATEMENT OF ISSUES

1. In concluding that Unity08 is a "political committee" under the Federal Election Campaign Act ("FECA") even though it has never supported or opposed a particular candidate for federal office, did the district court erroneously disregard controlling precedent of the Supreme Court in *Buckley v. Valeo* and this Court in *FEC v. Machinists Non-Partisan Political League*—which held that to avoid constitutional doubt FECA must be narrowly construed to treat as political committees *only* those groups whose major purpose is the support or opposition of a particular candidate for federal office?

2. If FECA is interpreted to cover Unity08 as a political committee, would the statute be unconstitutional as applied to Unity08 given the absence of *any* evidence that regulation of a group like Unity08—which has never supported or opposed any particular candidate for federal office—is necessary to prevent corruption or the appearance of corruption?

STATEMENT OF THE CASE

This case involves a determination by the Federal Election Commission ("FEC") that Unity08—an organization whose major purpose is to obtain ballot access and create a platform for political change, but which has *never* supported or opposed any particular candidate for federal office—is somehow a political committee subject to the onerous regulatory scheme of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 431 *et seq*. That determination is squarely foreclosed by Supreme Court precedent and controlling authority of this Court—both of which clearly establish that an organization must have the major purpose to support or oppose a *particular* candidate in order to be considered a political committee under FECA.

In 2006, the founders of Unity08 surveyed the political landscape and were dismayed by what they saw. The two major parties seemed more interested in appealing to the political fringes and scoring political points against one another than addressing the central issues affecting a majority of voters. The founders of Unity08 therefore sought a way to refocus the country on the issues that truly affect the majority of Americans rather than "wedge issues" that serve only to divide the country. They created Unity08 for the purpose of putting together a Unity ticket for President and Vice-President. The group did not have particular candidates in mind, but instead hoped to obtain ballot access in a majority of states

and hold an online convention that would allow voters to select candidates who share a centrist approach to solving the country's most significant problems, without regard to party affiliation. Unity08 hoped to break the major parties' monopoly on the democratic process, make the 2008 presidential election about issues rather than ideology, and lay the basic groundwork for a presidential campaign that would not be captive to tired, partisan rhetoric.

In May 2006, Unity08 sought an Advisory Opinion from the FEC confirming that Unity08 would not be treated as a political committee subject to limits on individual contributions under FECA until and unless it supported an actual candidate for federal office. However, even though Unity08 did not support an identifiable candidate and sought at this stage only to raise money to host an online convention and to obtain ballot access that the two major parties are automatically granted, the FEC determined that Unity08 would have to register as a political committee and would be subject to the rigorous, speech-suppressive restrictions of FECA and FEC regulations. The district court agreed, reasoning that Unity08's major purpose was the nomination or election of a candidate for federal office even though Unity08 would not have any associated candidate at the time it undertook its ballot access activities, and would not possibly have an associated candidate for at least two years. Unity08 filed a timely notice of appeal on December 15, 2008.

STATEMENT OF THE FACTS

Unity08 is a political movement of voters who believe that having a true democracy in the United States means having more than just a choice between the two extremes represented by the vocal minorities within the Republican and Democratic parties. Compl. ¶ 11 (JA 12-13); Bailey Decl. ¶¶ 8-10 (JA 25-26). The founders of Unity08 seek to promote a new bipartisan approach to politics, which focuses on the center of the political spectrum and the critical issues facing the nation. Compl. ¶ 11 (JA 12-13); Bailey Decl. ¶¶ 8-10 (JA 25-26). Consequently, Unity08 wants to develop a political environment in which candidates are not beholden to the two-party system, and in which candidates do not focus on "wedge" issues designed to appeal to the extreme elements of the two major parties. Compl. ¶ 11 (JA 12-13); Bailey Decl. ¶ 8 (JA 25).

To pursue its goals, Unity08 had a two-phase plan leading up to the presidential election in November 2008, which involved (1) organizational ballot access, and (2) an online convention to choose its candidates. First, Unity08 sought to qualify for access to the federal election ballot in thirty-seven states. Compl. ¶ 13 (JA 13); Bailey Decl. ¶ 20 (JA 28). Unity08 targeted these states precisely because they allow an organization to qualify without an associated candidate. Compl. ¶ 13 (JA 13); Bailey Decl. ¶ 20 (JA 28). This was crucial for Unity08 because its organizational mission was to create the preconditions for a

new, less polarizing and partisan voice in American politics. A prior association or identification with any particular potential candidate would utterly defeat that objective, given the partisan spin-chamber of contemporary politics. Unity08 would not have an associated candidate until the very end of the second phase of its plan. Compl. ¶ 13 (JA 13); Bailey Decl. ¶ 42 (JA 32). Because Unity08 intended to let ordinary voters choose its candidates for President and Vice-President at the online convention, the founders considered Unity08 to be "'the perfect vehicle for voters to start a draft movement.'" (JA 46).

Qualifying for federal ballot access requires substantial resources. Compl. ¶ 14 (JA 14); Bailey Decl. ¶¶ 18, 26-28 (JA 27, 29). The established political parties do not have to engage in this fight for federal ballot access, because all states grant the Republican and Democratic Parties positions on the ballot for their chosen candidates automatically. Compl. ¶ 13 (JA 13); Bailey Decl. ¶ 29 (JA 30). In each state, Unity08 would need to present petitions with signatures from tens of thousands of supporters. Compl. ¶ 14 (JA 14); Bailey Decl. ¶ 22 (JA 28). Unity08 would need to hire a paid director for each state, as well as seven to ten paid regional ballot access coordinators. Bailey Decl. ¶ 26 (JA 29). Unity08 also would need time and money to print educational materials and train volunteers in each state. Bailey Decl. ¶ 27 (JA 29). Unity08 estimated that the cost to qualify

for the federal ballot in the 37 targeted states was approximately $10 million. Compl. ¶ 14 (JA 14).

Developing the technology to hold Unity08's online convention was also projected to be extremely expensive. Unity08 intended to design an online platform that would permit delegates to discuss issues with candidates and vote in a secure way. Bailey Dep. 95:8-97:15 (JA 327). Unity08 believed that the cost of designing the technology platform for its online convention would be several million dollars. Bailey Dep. 97:16-97:21 (JA 327).

To raise this money, Unity08 planned to solicit funds through the Internet and from personal contacts. Compl. ¶ 15 (JA 14); Bailey Decl. ¶ 18 (JA 27). At no time during this first phase of Unity08's plan would there have been any associated candidate. Compl. ¶ 16 (JA 14); Bailey Decl. ¶¶ 15-16 (JA 27). Indeed, if Unity08 had an associated candidate during this phase, this would have allowed the group to seek federal ballot access in all 50 states. Compl. ¶ 13 (JA 13); Bailey Decl. ¶ 20 (JA 28). Unity08 restricted its objectives to working for ballot access in the 37 states that allow ballot access to groups without associated candidates, as Unity08 did not intend to endorse any particular person until the summer of 2008. Compl. ¶ 13 (JA 13); Bailey Decl. ¶ 20 (JA 28).

The group's second phase would have entailed the creation and hosting of an online convention in the summer of 2008. Compl. ¶ 11 (JA 12-13); Bailey Decl.

¶¶ 17, 38-42 (JA 27, 32). Participants in the online convention would have been able to discuss the issues, and would have selected candidates for President and Vice President who would run on Unity08's ticket. Compl. ¶ 11 (JA 12-13); Bailey Decl. ¶¶ 35, 39 (JA 31, 32). Unity08 envisioned that the online convention would produce Presidential and Vice Presidential candidates from different parties (Republican, Democratic, or independent). Compl. ¶ 11 (JA 12-13); Bailey Decl. ¶ 10 (JA 26). Interested candidates would submit their names at the beginning of the online convention. (JA 48). When balloting reduced the field to four, each remaining candidate would select a running mate from the opposing party. *Id.* Independent candidates could select either a Republican or Democratic running mate but would be required to name a senior cabinet official from the other party as well. *Id.*

It was not until the very end of the online convention process that Unity08's ballot would have associated candidates. Bailey Decl. ¶ 42 (JA 32). Unity08 did not intend to provide financial support to the nominated candidates after the online convention. Bailey Decl. ¶¶ 43-44 (JA 32). Rather, it expected the candidates to form their own committees and raise their own money under the federal election laws. Bailey Decl. ¶ 43 (JA 32).

On May 30, 2006, Unity08 filed an advisory opinion ("AO") request with the FEC asking whether Unity08 would be considered a political committee before

the conclusion of its online convention in the summer of 2008. Compl. ¶ 16 (JA 14-15). If found to be a political committee under FECA, Unity08 would be subject to strict fundraising and spending restrictions, as well as filing requirements. Memo. Op. at 3 (JA 550). In the interim, before the FEC issued its AO, Unity08 voluntarily refused to accept contributions of more than $5,000 from individuals—the limit imposed by FECA on political committees. Memo. Op. at 3 (JA 550); Compl. ¶ 18 (JA 15); Bailey Decl. ¶ 52 (JA 34). If not for this self-imposed restriction, Unity08 would have raised contributions from individuals, including the individual plaintiffs, substantially in excess of $5,000. Compl. ¶ 18 (JA 15-16); Bailey Decl. ¶¶ 55, 64 (JA 34, 35); Bailey Reply Decl. ¶ 12 (JA 533); Craver Reply Decl. ¶¶ 3-4 (JA 537-38); Rafshoon Decl. ¶¶ 12-13 (JA 543); Ackerman Decl. ¶¶ 3-4 (JA 546-47). Indeed, several individuals testified that they would have given Unity08 well in excess of $5,000 in support of its ballot access and online political convention activities. Bailey Decl. ¶ 64 (JA 35); Bailey Reply Decl. ¶ 12 (JA 533); Craver Reply Decl. ¶¶ 3-4 (JA 537-38); Rafshoon Decl. ¶¶ 9-13 (JA 543); Ackerman Decl. ¶¶ 3-4 (JA 546-47). This limit on size of contribution was due solely to the threat of FEC regulation. Bailey Reply Decl. ¶¶ 12-13 (JA 533); Craver Reply Decl. ¶¶ 3-4 (JA 537-38); Rafshoon Decl. ¶¶ 12-13 (JA 543); Ackerman Decl. ¶¶ 3-4 (JA 546-47).

On July 20, 2006, the FEC held a public meeting to consider Unity08's request and the proposed draft opinion. *See* Agenda Document No. 06-52, Minutes of an Open Meeting of the Federal Election Commission, Dkt. Entry # 17.16 (JA 189-92). At that meeting, Commissioner Mason stated that FECA and the regulations promulgated thereunder were designed to address the major parties, party organizations that were candidate driven, or parties built from the local level up—organizations that were clearly either functioning in support of an actual candidate or that were established political parties by the time they participated in federal elections. *See* Audio recording: FEC Opening Meeting (July 20, 2006), http://www.fec.gov/audio/2006/20060720_02.mp3 (audio recording of the meeting regarding AO 2006-20 on the FEC's website). At this meeting, the FEC seemed to recognize that Unity08 was a different kind of organization, one without association to an "actual" candidate.

The FEC nevertheless concluded in its AO 2006-20 that Unity08 would be a political committee once it spent more than $1,000 for ballot access because spending money for ballot access is an "expenditure" under FECA. Complaint ¶ 17 (JA 15). The FEC determined that Unity08 met the major purpose test for a political committee and therefore found that the First Amendment did not prevent the FEC from exercising jurisdiction over Unity08. Memo. Op. at 4-5 (JA 551-52); Complaint ¶ 17 (JA 15). The FEC reasoned that although Unity08 planned to

qualify for ballot access for itself as an organization, and not for any named candidates, Unity08 was, in effect, using its name as a "placeholder" for future-designated candidates. Memo. Op. at 3-4 (JA 550-51) (quoting AO 2006-20, at 3-4 (JA 300-01)).

The FEC's determination stopped all of Unity08's political activity in its tracks. Compl. ¶¶ 18-19 (JA 15-16); Bailey Decl. ¶ 63 (JA 35). Unity08 was unable to pursue ballot access in the thirty-seven states it had targeted, and was unable to take steps toward having its planned online convention. Compl. ¶¶ 18-19 (JA 15-16); Bailey Decl. ¶ 63 (JA 35); Bailey Reply Decl. ¶ 13 (JA 533-34). Unlike well-established groups and the major parties, a fledgling organization like Unity08 that has no candidate lacks the broad base of support that makes raising money in small-dollar increments a viable strategy. Craver Decl. ¶ 10 (JA 40). With its ability to raise funds severely restricted by the FEC, Unity08 could not qualify for ballot access, petition voters, or attract potential nominees to compete for Unity08's endorsement. Craver Decl. ¶¶ 10-11 (JA 40); Bailey Reply Decl. ¶ 13 (JA 533-34).

On January 10, 2007, Unity08, along with individual plaintiffs Douglas Bailey, Roger Craver, Hamilton Jordan, Angus King, and Jerry Rafshoon, filed suit in the United States District Court for the District of Columbia to enjoin the FEC from enforcing AO 2006-20, and sought a declaratory judgment that AO 2006-20

violated their First Amendment rights. Memo. Op. at 5 (JA 552). Both sides moved for summary judgment, and the FEC challenged Appellants' standing. The district court determined that Appellants have a concrete, redressable injury in fact, fairly traceable to AO 2006-20, because the AO had prevented Unity08 from obtaining loans or contributions in excess of $5,000. Memo. Op. at 9-10 (JA 556-57). But the court denied Unity08's motion and granted the FEC's motion for summary judgment, determining that Unity08's actions in support of its political activities constituted expenditures under FECA and that consequently, Unity08 was a political committee. Memo. Op. at 19 (JA 566). The district court reasoned that "Unity08 will be providing resources that are certain to benefit candidates who will be identified by party affiliation and office sought, and who will have declared their intentions to run for federal office when this benefit is conferred upon them." Memo. Op. at 19 (JA 566). Unity08 now appeals that judgment.

SUMMARY OF THE ARGUMENT

In *Buckley v. Valeo*, 424 U.S. 1 (1976) the Supreme Court narrowly interpreted the definition of political committee to avoid doubt of FECA's constitutionality. Recognizing that FECA impinged on the speech and associational rights of organizations falling within its reach, and to ensure that FECA's reach did not extend beyond the government's interest in preventing corruption or the appearance of corruption, the Court limited the definition of political committee so that it would cover only those organizations whose major purpose is the support or opposition of a candidate for federal office. This Court applied *Buckley* in *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (1981), and expressly held that a group must support or oppose a *particular* candidate for federal office in order to be considered a political committee under FECA.

Because Unity08 has never supported or opposed *any* particular candidates for federal office, *Buckley* and *Machinists* prohibit regulation of Unity08 as a political committee under FECA. In concluding otherwise, the district court flatly disregarded binding precedent of both the Supreme Court and this Court. The district court reasoned that Unity08 did in fact have the major purpose of supporting a particular candidate for federal office because its ballot access campaign might *eventually—i.e.*, once the online convention was held and a

nominee selected for the Unity ticket—lead to the support of a particular candidate for federal office. This reasoning relies on a plain misreading of *Buckley* and *Machinists*, and creates the precise constitutional concern that those decisions expressly sought to avoid—namely, subjecting to the onerous regulatory regime of FECA a group whose major purpose is not the support or opposition of a particular federal candidate and whose activities pose little risk of corruption.

If the mere possibility that a group might—some day in the future—support or oppose a particular candidate for federal office were a sufficient basis to regulate that group as a political committee under FECA, the statute would effectively regulate all manner of pure issue groups that have no *current* association with any particular, identifiable candidate for federal office. But that is precisely the constitutionally suspect result that the Supreme Court and this Court sought to avoid in establishing the major purpose test in the first place. As this Court squarely held in *Machinists*, absent a current identification with a particular candidate, there is simply no realistic concern that a group's political activities will create a risk of corruption or the appearance of corruption, and thus no constitutionally sound justification for regulating such a group as a political committee. Because the district court's interpretation of the major purpose test would permit application of FECA in situations where corruption is not an issue,

its ruling flouts both *Buckley* and *Machinists* and raises serious doubts about FECA's constitutionality. That decision therefore must be reversed.

Even if Unity08 could satisfy the major purpose test, it still cannot be regulated as a political committee because it has not made expenditures in support of a clearly identified candidate. Courts in this Circuit have recognized that an organization is not a political committee until it makes expenditures in support of a candidate. Under the Supreme Court's holding in *Buckley*, a payment is not an expenditure unless it is used for communications that expressly advocate the election or defeat of a *clearly identified* candidate. Because Unity08 does not yet support a clearly identified candidate, and has never done so, it cannot possibly make expenditures under *Buckley*, and therefore cannot be regulated as a political committee.

Moreover, treating Unity08 as a political committee under FECA poses particularly pernicious constitutional problems because it effectively ensures that Unity08 will not be able to raise sufficient funds to obtain the ballot access that it seeks in order to promote and disseminate its core political ideas. Ballot access is the biggest practical obstacle to establishing even the basic preconditions for the emergence of a non-partisan political movement in this country. States generally grant a spot on the ballot to the two major political parties as a matter of right, but everyone else has to establish sufficient voter interest through petition drives and

similar means. The contribution limits for political campaign fundraising in federal election laws can be extremely onerous for a political campaign with a concrete, identifiable candidate. But for a nascent political party like Unity08—which has no association with any particular candidate, and whose core mission of political change and reform is broad—FECA's stringent contribution limits would effectively deny Unity08 any meaningful opportunity to obtain ballot access. Thus, to avoid the serious constitutional problems posed by the discriminatory effect of applying FECA to nascent political parties like Unity08, this Court should interpret FECA not to encompass organizations like Unity08 that do not support a clearly identified candidate.

Finally, for the same reasons, if Unity08 were deemed a political committee under FECA, the statute would be unconstitutional as applied.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* the district court's ruling on a motion for summary judgment. *See Orion Reserves Ltd. P'ship v. Salazar*, 553 F.3d 697, 701 (D.C. Cir. 2009); *Maydak v. United States*, 363 F.3d 512, 515 (D.C. Cir. 2004). In reviewing motions for summary judgment, the Court must view all facts and draw all inferences in the light most favorable to the nonmoving party. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Montgomery v. Chao*, 546 F.3d 703, 706 (D.C. Cir. 2008). As the district court recognized, the FEC's Advisory Opinion is not entitled to *Chevron* deference because it is "'necessarily based upon the Commission's interpretation of the Constitution as construed by the Supreme Court and our Court of Appeals.'" Memo. Op. at 14 (JA 561) (quoting *FEC v. GOPAC*, 917 F. Supp. 851, 860 (D.D.C. 1996)); *see also Chamber of Commerce v. FEC*, 69 F.3d 600, 604-05 (D.C. Cir. 1995) (holding that the FEC was not entitled to *Chevron* deference because its interpretation of FECA could burden First Amendment rights).

II. UNITY08 IS NOT A POLITICAL COMMITTEE SUBJECT TO REGULATION UNDER FECA

A. "Political Committee" Must Be Interpreted Narrowly To Avoid Constitutional Doubt

FECA is a comprehensive regulatory scheme that places limits on campaign-related expenditures and contributions, compels disclosure of contributions and expenditures over certain threshold levels, and establishes the FEC to administer and enforce the legislation. FECA regulates, among other groups, political committees, which the Act defines as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). Under the Act, political committees are subject to a panoply of regulations. For example, they must file a statement of organization with the FEC, 2 U.S.C. § 433(a), file disclosure reports of their receipts and disbursements, *id.* § 434(a)(1), and adhere to a strict $5,000 limitation on their contributions, *id.* § 441a(a)(1)(C).

1. The Supreme Court addressed FECA's constitutionality in its landmark decision in *Buckley*. Recognizing that "[t]he Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," 424 U.S. at 14, the Court held that the *only* interest that justified regulation in this area was "the prevention of corruption and the

appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." *Id.* at 25. Ten years later, the Court reiterated that "[w]e held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are *the only* legitimate and compelling government interests thus far identified for restricting campaign finances." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) (internal citations omitted; emphasis added). The Court was particularly concerned with the corrupting effect of large contributions that could be given to candidates to secure a *quid pro quo* from current and potential officeholders. *Buckley*, 424 U.S. at 26-27.

In order to avoid constitutional doubt, the Supreme Court narrowly interpreted certain of the Act's provisions to ensure that it is only applied to activities that give rise to potential corruption or the appearance of corruption. In particular, the Court observed in *Buckley* that FECA's definition of "political committee" "could raise . . . vagueness problems, for 'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures,' and could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. To avoid this problem, the Court limited the definition of a "political committee" under FECA to "only encompass organizations that are under the control of a

candidate or the major purpose of which is the nomination or election of a candidate." *Id.*

Balancing the government's interest in preventing corruption or the appearance of corruption with the burden on First Amendment rights imposed by FECA, the Court held that FECA's contribution limits were "only a marginal restriction upon the contributor's ability to engage in free communication," *id.* at 21-22, and thus (barely) constitutional in light of the government's interest in preventing corruption and the appearance of corruption, *id.* at 29. However, the Court held that because the advocacy restricted by FECA's *expenditure* limits did not pose a danger of corruption or the appearance of corruption, FECA's limitations on independent expenditures were unconstitutional. *Id.* at 51. The Supreme Court has thus expressly held that FECA's limitations on campaign finances cannot constitutionally be applied in situations where there is little potential for corruption or the appearance of corruption. *Id.* at 46-51; *see also Nat'l Conservative Political Action Comm.*, 470 U.S. at 497 ("In *Buckley* we struck down FECA's limitation on individuals' independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption.").

Without a candidate, there is no nexus between a contributor who seeks a *quid pro quo* arrangement with a potential officeholder and the candidate who may

be inclined to grant or appear to grant favors to said contributor. The Supreme Court and this Circuit have both recognized that when an organization's activities are not coordinated with an actual, existing candidate, the potential for corruption or the appearance of corruption is negligible, at best. As the Supreme Court explained in striking down contribution limits to committees formed to support or oppose ballot initiatives, "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*." *Citizens Against Rent Control/Coalition for Housing v. City of Berkeley*, 454 U.S. 290, 296-97 (1981). Also, this Court emphasized in *Machinists* that "where a group's activities are not related in any way to a person who has decided to become a candidate, the 'actuality and potential for corruption' are far from having been 'identified.'" 655 F.2d at 392 (quoting *Buckley*, 424 U.S. at 28). Likewise, the Supreme Court observed in the expenditure context that "[t]he absence of prearrangement and coordination of an expenditure with the candidate . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Nat'l Conservative Political Action Comm.*, 470 U.S. at 497 (quoting *Buckley*, 424 U.S. at 47) (internal quotation marks omitted). Without a candidate, the potential for corruption or the

appearance of corruption is severely limited because one cannot seek a *quid pro quo* from someone who does not yet exist.

Against that backdrop, the major purpose test articulated by the Supreme Court in *Buckley* simply must be understood to restrict the constitutional application of FECA to groups whose major purpose is the election of a *particular, identified* candidate for public office. Any other interpretation would sever the major purpose test from its intended function, which is to confine FECA to restrictions that are closely tailored to preventing political corruption or its appearance. A broader interpretation of the major purpose test would render the Act unconstitutional—or, at a bare and obvious minimum, raise serious constitutional issues that the Act should be interpreted to avoid. *See, e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) (statutes must "be construed where fairly possible so as to avoid substantial constitutional questions"); *Machinists*, 655 F.2d at 394 ("In this delicate first amendment area, there is no imperative to stretch the statutory language . . . . Achieving a reasonable, constitutionally sound conclusion in this case requires just the opposite. 'It is our duty in the interpretation of federal statutes to reach a conclusion which will avoid serious doubt of their constitutionality.'") (quoting *Richmond Co. v. United States*, 275 U.S. 331, 346 (1928)).

2. This Circuit's precedents applying *Buckley* are fully consistent with that principle. In *Machinists*, this Court considered whether "draft groups" whose purpose was to convince Senator Edward Kennedy to run for the Democratic nomination for President in 1980 were political committees under FECA. The *Machinists* Court observed that the Supreme Court in *Buckley* had found only one constitutionally sufficient justification for the contribution limits of FECA: "'to limit the actuality and appearance of corruption resulting from large individual financial contributions' to candidates." 655 F.2d at 392 (quoting *Buckley*, 424 U.S. at 26). The Court concluded that "where a group's activities are not related in any way to a *person who has decided to become a candidate*, the 'actuality and potential for corruption' are far from having been 'identified.'" *Id.* (quoting *Buckley*, 424 U.S. at 28) (emphasis added).

Even though the draft groups had identified the candidate they supported, the Court reasoned that they "aim to produce some day a candidate acceptable to them, but they have not yet succeeded. Therefore none are promoting a 'candidate' for office, as Congress uses that term in FECA." *Id.* The Court found it to be "clear . . . that in this case the contribution limitations [imposed on political committees] did not apply to the nine ['Draft Kennedy'] groups whose activities did not support an *existing* 'candidate,' but merely represented attempts to convince the voters or Mr. Kennedy himself that he would make a good

'candidate,' or should become a 'candidate.'" *Id.* at 396 (emphasis added). Because draft groups were not promoting a clearly identified candidate for federal office, they could not be regulated as political committees under FECA. *Id.* at 395-96.

Similarly, *GOPAC* squarely holds that for the FEC to regulate an organization as a political committee, the organization's major purpose must be the nomination or election of a *particular* federal candidate. 917 F. Supp. at 861. The defendant in *GOPAC* was a Republican group whose mission was "'to create and disseminate the doctrine which defines a caring, humanitarian, reform Republican Party in such a way as to elect candidates, capture the U.S. House of Representatives and become a governing majority at every level of government.'" *Id.* at 854 (citation omitted). GOPAC sought to create a "farm team" of future Republican federal candidates by contributing money and resources only to state and local Republican candidates; it never provided direct support to Republicans running for federal office. *Id.* at 854, 858. The court found that "[a]lthough GOPAC's *ultimate* major purpose was to influence the election of Republican candidates for the House of Representatives, GOPAC's immediate major purpose . . . was to elect state and local candidates and to develop ideas and circulate them generally to Republican party candidates and supporters including, but not limited to, unidentified Republican candidates for federal office." *Id.* at 858.

The FEC argued in *GOPAC* that an organization need not support the nomination or election of a particular candidate to be considered a political committee, but need only engage in "partisan politics" or "electoral activity." *Id.* at 859. The district court found that interpretation to be "troubling" because it raised virtually the same vagueness concerns that the Supreme Court had identified and attempted to address in *Buckley*. *Id.* at 859, 861. Noting this Court's preference for bright-line rules in the First Amendment area, the *GOPAC* court held that an organization is a political committee only if its major purpose is the nomination or election of a *particular* federal candidate. *Id.* at 861. Because GOPAC supported Republican candidates generally but did not support particular federal candidates, it could not be regulated as a political committee.

B. Unity08 Does Not Meet the Major Purpose Test Because It Has Never Had a Clearly Identified Candidate

1. Under these precedents, Unity08 simply was not a political committee under the major purpose test, and the district court's ruling must be reversed. Unity08 has never been associated with a particular candidate for federal office, and applying FECA to it would throw the Act right back onto the constitutional skillet that the major purpose test was designed to avoid.

Unity08 *never* had a particular candidate for federal office. Unity08 did not have a candidate at the time of the decision, still has no candidate to this day, and (due to the FEC's unconstitutional interference) may never have a candidate.

Although Unity08 did seek one day to produce an acceptable candidate through a broad-based internet selection process (and planned to have the candidate register a political committee once nominated), its immediate major purpose was to spread its message regarding the need for a moderate alternative to the two-party system and the danger of using "wedge issues" to appeal to the political fringes rather than governing from the center. Unity08 hoped to amass the resources necessary to obtain ballot access and to create a revolutionary online nominating system to one day nominate candidates for office. But until Unity08 supported the nomination or election of a clearly identified candidate for federal office, its activities would not be "related in any way to a person who has decided to become a candidate," *Machinists*, 655 F.2d at 392, and it therefore could not be regulated as a political committee without violating the First Amendment.

Indeed, the case for exempting Unity08 from regulation as a political committee is even *stronger* than it was for the draft groups that this Court exempted from FECA in *Machinists*. Those "draft groups" were vigorously attempting to persuade a *particular individual* (Senator Kennedy) to become a candidate for federal office, and this Court held that the "draft groups" could not be deemed political committees consistently with the First Amendment because Senator Kennedy was not an actual, declared candidate. Here, Unity08 essentially sought to "draft" as candidates for federal office individuals—*i.e.*, the individuals

who might eventually be nominated on the Unity08 ticket—who had not yet even been identified. *See* JA 46 ("'[Unity08 is] the perfect vehicle for voters to start a draft movement.'"). Because the attempt to "draft" a particular individual to become a candidate does not satisfy the major purpose test under *Machinists*, it follows *a fortiori* that the attempt effectively to "draft" an *unidentified* person to become a candidate cannot satisfy that test either. At any rate, in both cases, the absence of any political activity in support of an actual, identified candidate is fatal to any attempt to bring that activity under the rubric of a political committee. As this Court explained in *Machinists*:

> Draft groups may vary widely in character, from those wishing to encourage a particular individual's entrance as a candidate, to those encouraging a whole field of possible candidates, all of whom meet the group's particular policy or personal qualifications. Draft groups do have one thing in common, however: they aim to produce some day a candidate acceptable to them, *but they have not yet succeeded.*"

655 F.2d at 392 (emphasis added).

2. There is no realistic possibility that Unity08's activities present a risk of corruption or the appearance of corruption. *Cf. McConnell v. FEC*, 540 U.S. 93, 150 (2003) ("The record in the present case is replete with . . . examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations."). The district court's conjecture to the

contrary, Memo. Op. at 17-18 (JA 564-65), finds no record support and defies common sense.[1]

Why would Unity08's eventual candidate feel compelled to perform political favors for a donor who had not known which candidate he was supporting and whose donation, rather than going directly to the candidate for use as he saw fit, only indirectly benefited the candidate in the direct service of an abstract and idealistic cause? And why would anyone seeking to pay for political favors contribute to third-party candidates for President and Vice-President, in a country where no third party has won a presidential election in the United States in over 150 years? *See Buckley*, 424 U.S. at 98 ("Since the Presidential elections of 1856 and 1860, when the Whigs were replaced as a major party by the Republicans, no third party has posed a credible threat to the two major parties in Presidential elections."). This is not rational basis review, where courts defer to far-fetched but thinly plausible assertions of governmental interests. The FEC's action in this case strikes directly at the most fundamental freedoms protected by our Constitution,

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[1] Notably, the Supreme Court has struck down regulations in cases where there was greater risk of potential corruption. In *National Conservative Political Action Committee*, the Court held that a provision regulating expenditures of political action committees violated the First Amendment even though it was "hypothetically possible . . . that candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages." 470 U.S. at 498. The Court nonetheless struck down the provision because "[o]n this record, such an exchange of political favors for uncoordinated expenditures remain[ed] a hypothetical possibility and nothing more." *Id.*

and the governing standard is that its interference with those liberties must meet the much more *exacting scrutiny* required by the First Amendment. The district court's strained and tenuous hypothesis of a potential for corruption in this context cannot possibly satisfy that standard.

3. The district court purported to distinguish *Machinists* and *GOPAC* on the ground that, in those cases, the money that the defendant organizations spent would not necessarily benefit any person who would decide to be a candidate for federal office. Memo. Op. at 18-19 (JA 565-66). In other words, it was not certain in *Machinists* that Senator Kennedy would run for President and it was not certain that the state and local candidates receiving funds in *GOPAC* would ever become candidates for federal office. *Id.* The district court noted, in contrast, that Unity08 would be "providing resources that are certain to benefit candidates who will be identified by party affiliation and office sought, and who will have declared their intentions to run for federal office when this benefit is conferred upon them." *Id.* at 19 (JA 566).

That is a distinction without a difference, and is a flat misreading of *Machinists* and *GOPAC*. This Court did not base its holding in *Machinists* on a predictive assessment of how likely or certain it was that Senator Kennedy would eventually become a candidate. Nor did the Court suggest that, if Senator Kennedy eventually *became* a candidate, then the draft groups' prior activities would

retroactively be transformed into the activities of a political committee. To the contrary, the Court held that the draft groups' activities could not be considered those of a political committee because, *at the time those activities occurred*, Senator Kennedy was not a candidate. So too here: Unity08's ballot access activities cannot be considered those of a political committee because, at the time those activities were to take place, they could not possibly be in furtherance of any identified, actual candidate.

If anything, the district court's distinction between funds that are uncertain to be used for an identified candidate, and funds that are certain to be used for an as-yet unidentified candidate, cuts the other way. This Court recognized in *Machinists* that "where a group's activities are not related in any way to a person who has decided to become a candidate, the 'actuality and potential for corruption' are far from having been 'identified.'" 655 F.2d at 392 (quoting *Buckley*, 424 U.S. at 28). If the uncertainty over whether Senator Kennedy would decide to run for President was sufficient to prevent any meaningful possibility of a link between the draft group's activities and potential corruption, Unity08's lack of knowledge of *who its candidate would be* would utterly destroy any possible nexus between its activities and potential corruption. At the very least, the *relevant* uncertainty—*i.e.*, uncertainty over the identity of the actual candidate who ultimately is to receive the funds—should have the same effect in both cases.

4. The error in the FEC's (and the district court's) understanding of the major purpose test is apparent from the fact that it risks ensnaring issue groups that the Supreme Court has repeatedly held cannot be regulated as political committees consistently with the First Amendment. *See Buckley*, 424 U.S. at 79 (narrowing the definition of political committee to prevent FECA from regulating groups engaged purely in issue discussion). Like Unity08, issue groups engage in activities that will ultimately benefit a candidate—sometimes dramatically and predictably. For example, the activities of a pro-life organization surely benefit pro-life candidates, and because many elections contain one pro-life candidate and one pro-choice candidate, it is often easy to determine which candidate a pro-life organization supports. But there is no doubt that such organizations cannot be regulated as political committees under *Buckley*, even if their activities are certain to eventually confer a benefit on pro-life candidates, because their major purpose is not the nomination or election of a *particular* candidate. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986) (pro-life organization not political committee under major purpose test because "[i]ts central organizational purpose [was] issue advocacy, although it occasionally engage[d] in activities on behalf of political candidates"). Like a traditional "issue" group, Unity08 was pursuing an impact on the political process but in a manner carefully designed to avoid entanglement with the seamier elements of electoral politics.

5. The district court's conclusion that Unity08's eventual candidate could be "clearly identified by party affiliation and by the offices they seek to run for," Memo. Op. at 17 (JA 564), is insufficient to support regulation of Unity08 as a political committee, both under both this Circuit's precedents and the First Amendment. If a candidate could be "clearly identified" by party and office sought alone, the draft groups in *Machinists* and the Republican political organization in *GOPAC* would both have satisfied the major purpose test. In *Machinists*, Senator Kennedy was identified both by party (Democratic) and office sought (President), as well as by name. 655 F.2d at 382-83. In *GOPAC* the group in question's mission statement identified both the party it supported (Republican) and the offices it hoped to capture (U.S. House of Representatives). *See GOPAC*, 917 F. Supp. at 854. Because Unity08 was willing to accept candidates from any party as its Presidential and Vice-Presidential nominees, its candidate was far less identifiable by party than in *Machinists* or *GOPAC*. Unity08 would not even be able to identify its candidates by political party (if any) until the very end of the second phase of its plan, the online nominating convention.

6. The district court's reasoning is also inconsistent with the text of FECA. In holding that Unity08 was a political committee even though it lacked a candidate, the district court reasoned that Unity08 was "using its name as a placeholder for its candidates' names on the ballot." Memo. Op. at 17 (JA 564).

But FECA § 431(2) makes clear that Congress never intended the definition of "candidate" to encompass organizations such as Unity08:

> The term "candidate" means *an individual* who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, *an individual* shall be deemed to seek nomination for election, or election—
>
> > (A) if such *individual* has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or
> >
> > (B) if such *individual* has given *his or her* consent to *another person* to receive contributions or make expenditures on behalf of such *individual* and if such *person* has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

2 U.S.C. § 431(2) (emphasis added). The use of the terms "individual" and "person" and the use of masculine and feminine pronouns foreclose any argument that an organization can be a candidate such that it satisfies the major purpose test—even if that organization is acting as a "placeholder," as the district court reasoned. Indeed, if organizations could be candidates under FECA, then corporations and labor unions could be considered candidates for elected office under the Act. This defies both the clear intent of Congress and common sense. The FEC cannot circumvent the requirements of the major purpose test by asserting that Unity08—which cannot itself meet the definition of "candidate" under FECA—was acting as a "placeholder" for an unidentified, unknown, and unnamed individual.

C. Unity08 Also Is Not A Political Committee Because It Has Not Made Expenditures

The district courts in this Circuit, applying *Buckley*, have stated that "even if the organization's major purpose is the election of a federal candidate or candidates, the organization does not become a 'political committee' unless or until it makes 'expenditures' in cash or in kind to support a 'person who has *decided to become a candidate*' for federal office." *GOPAC*, 917 F. Supp. at 859 (citing *Machinists*, 655 F.2d at 392) (emphasis added); Memo. Op. at 16 (JA 563) (same) (quoting *GOPAC*, 917 F. Supp. at 859).

This requirement derives directly from *Buckley*. FECA defines "expenditure" as a "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i); 11 C.F.R. § 100.111(a). When considering the term "expenditure" under the Act, the *Buckley* Court concluded that the term "expenditures" includes only "funds used for communications that expressly advocate the election or defeat of a *clearly identified candidate*" so as to restrict the definition "precisely to that spending that is *unambiguously related to the campaign of a federal candidate*." 424 U.S. at 79-80 (emphasis added); *see also Machinists*, 655 F.2d at 391 n.23 (quoting *Buckley*, 424 U.S. at 79-80).

The FEC itself has concluded in its own AOs that money spent for ballot access is an "expenditure" when it is directly related to the election or defeat of a particular candidate. AO 2006-20, at 3-4 (JA 300-01) (citing AO 1994-05 (White) (JA 506-10); AO 1984-11 (Serrette) (JA 512-15)). In accordance with *Buckley*, that candidate must be *clearly identified.* 424 U.S. at 80 ("We construe 'expenditure' . . . to reach only . . . that spending that is unambiguously related to the campaign of a particular federal candidate.").

The district court analogized the present case to certain FEC rulings relating to expenditures, but those AOs are inapposite. For example, the district court cited AO 1994-05, in which the FEC considered whether a person who had already announced his intent to be a U.S. Senate candidate in 1994 and had designated a campaign committee under his name was a "legally qualified candidate" under FECA. The FEC advised that the person would be required to file as a Senate candidate once "financial activity to influence [his] election exceed[ed] $5,000 in either contributions received or expenditures made." AO 1994-05, at 2 (JA 507). The FEC noted that "expenditures" include "amounts *you* spend . . . to *promote yourself* for the general election ballot by seeking signatures on nomination petitions." *Id.* at 4 n.1 (JA 509) (emphasis added). Based on this language, this opinion clearly related to a situation involving a *particular* candidate. Memo. Op.

at 3-4 (JA 550-51); AO 2006-20, at 3-4 (JA 300-01) (discussing AO 1984-11 (JA 512-15)).

In AO 1984-11, a candidate for President requested the FEC's opinion regarding matching contributions and qualified expenses. AO 1984-11, at 1-2 (JA 512-13). The FEC explained that money spent to collect petition signatures would be considered expenditures which are "made in connection to a *candidate's* campaign for nomination." *Id.* at 3 (JA 514) (emphasis added). As with AO 1994-05, this AO related directly to the campaign of a particular person whose efforts in collecting petition signatures could have been characterized as promotional activity. *Id.* at 1-3 (JA 512-14). As such, the spending was deemed to be "expenditures" by the FEC. *Id.* at 3 (JA 514).

These AOs simply do not apply to Unity08. Unity08's anticipated spending to achieve ballot access would have been for *organizational* ballot access—not for or by a "clearly identified candidate." Unity08 therefore would not have made "expenditures" as that term is defined by FECA and as applied by the FEC itself in its AOs.

D. Treating Unity08 As A Political Committee Would Effectively Deny Ballot Access for Nascent Political Parties, Raising Serious Constitutional Problems

Subjecting Unity08 to regulation as a political committee is also constitutionally suspect because it would effectively deny Unity08—a nascent political party not associated with an identified candidate for federal office—any meaningful access to the ballot. The Supreme Court has held consistently that restrictions on the ability of minor parties or their candidates to obtain ballot access are subject to strict scrutiny under both the First Amendment and the Equal Protection Clause because voting is a "fundamental right." *See, e.g., Norman v. Reed*, 502 U.S. 279, 288-89 (1992) (recognizing the "constitutional right of citizens to create and develop new political parties" and requiring that restrictions on new parties' access to the ballot "be narrowly drawn to advance a state interest of compelling importance"); *Williams v. Rhodes*, 393 U.S. 23, 31, 38 (1968) (stating that "the right to vote [is] a 'fundamental political right' that is 'preservative of all rights'" and requiring a compelling state interest to justify imposing burdens on the right to vote and associate) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *see also Lubin v. Panish*, 415 U.S. 709, 716 (1974) ("'The right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot.'") (quoting *Williams*, 393 U.S. at 31).

For minor parties that are not granted automatic ballot access, as the major parties are, compliance with state ballot access laws is extremely burdensome and expensive. Indeed, Unity08 estimated these costs to be approximately $10 million. Compl. ¶ 14 (JA 14). Unity08 also estimated that the cost of developing the infrastructure to hold its online nominating convention would be several million dollars. Bailey Dep. 97:16-97:21 (JA 327). The operation of FECA in conjunction with state election laws nationwide effectively requires large expenditures of money by minor parties (but not major parties) to obtain ballot access at the same time that a federal law severely restricts minor parties' ability to raise that money. *See Williams*, 393 U.S. at 25 (holding that Ohio voting laws violated equal protection because "[t]ogether these various restrictive provisions make it virtually impossible for any party to qualify on the ballot except the Republican and Democratic parties"); *see also Lubin*, 415 U.S. at 716-17 (stating that "the process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars"). That Catch-22 is particularly pointed for a nascent political party, like Unity08, that has no particularly identified charismatic candidate to help attract the small donations permitted under FECA, and whose broad organizational mission (promoting nonpartisan political change) makes fundraising inherently difficult. Indeed, the very features that define Unity08's

core political objectives render it particularly vulnerable to disruption—if not premature termination—by the FEC's regulatory scheme.

This Court should thus hold that FECA does not apply to Unity08 because regulating a nascent organization as a political committee before it has an associated candidate makes it nearly impossible for the organization to obtain the same ballot access that the major parties receive for free. The district court's interpretation of FECA and the major purpose test would permit regulation of organizations and minor parties long before they acquire the critical mass of support necessary to raise sufficient money to procure ballot access under FECA's restrictive contribution limits. As a practical matter, that interpretation turns FECA into an engine for the perpetual preservation of two-party dominance over the American electoral system. For a statute whose marginal constitutionality has been the subject of over three decades of careful judicial scrutiny, and whose continued validity is currently in substantial doubt, *see* Section III, *infra*, this biasing of the electoral marketplace in favor of the major parties is simply a bridge too far. The Constitution of the United States never mentions the Democratic or the Republican Parties. It guarantees to every citizen the right to speak and to participate in the electoral process.

III. IF UNITY08 WERE DEEMED A POLITICAL COMMITTEE UNDER FECA, THE STATUTE WOULD BE UNCONSTITUTIONAL AS APPLIED

As discussed above, FECA's limitations on the contributions and expenditures of political committees cannot be applied constitutionally in situations where there is little potential for corruption or the appearance of corruption. *Buckley*, 424 U.S. at 51. There is simply no evidence in the record to suggest that Unity08's activities posed a threat of corruption or the appearance of corruption. The district court's speculation to the contrary is insufficient to justify abridging Unity08's First Amendment rights, as the Supreme Court "ha[s] never accepted mere conjecture as adequate to carry a First Amendment burden . . . ." *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 392 (2000). Nor is there any serious argument that imposing FECA's restrictions on Unity08's ability to obtain ballot access could survive strict scrutiny under the Equal Protection Clause. Accordingly, FECA's provisions regulating political committees would be unconstitutional as applied to Unity08 if the district court's reasoning were upheld.

In addition, several Justices of the present Supreme Court have opined that *Buckley* is insufficiently protective of political expression and was in that respect wrongly decided. *See Nixon*, 258 U.S. at 405-11 (Kennedy, J., dissenting); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 635-44 (1996) (Thomas, J., concurring in the judgment and dissenting in part); *Randall v. Sorrell*, 548 U.S.

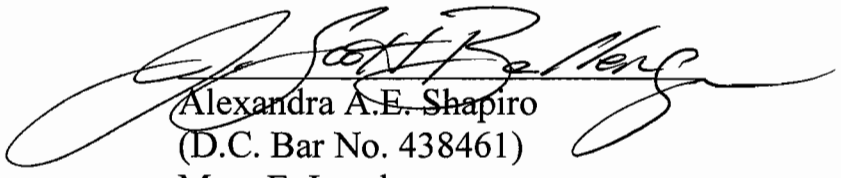
230, 265-73 (2006) (Thomas, J., concurring, joined by Scalia, J.). If this Court concludes that Unity08 is a political committee under FECA and this application of FECA would not violate the First Amendment under *Buckley*, Unity08 reserves its right to challenge *Buckley* before the Supreme Court.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court and remand these proceedings with a direction to grant Unity08's motion for summary judgment.

DATED: May 29, 2009

Respectfully submitted,



Alexandra A.E. Shapiro
(D.C. Bar No. 438461)
Marc E. Isserles
MACHT, SHAPIRO, ARATO & ISSERLES LLP
The Grace Building
1114 Avenue of the Americas
45th Floor
New York, NY 10036
Telephone: (212) 479-6726
Fax: (212) 202-6417

J. Scott Ballenger
(D.C. Bar No. 465252)
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004-1304
Telephone: (202) 637-2200
Fax: (202) 637-2201

Attorneys for Appellants

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Federal Rules of Appellate Procedure 32(a)(4), (5), the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 9,059 words exclusive of the certificates required by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(a)(1), table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The undersigned used Microsoft Word to compute the count.

DATED: May 29, 2009

Respectfully submitted,

J. Scott Ballenger

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2009, I caused the original and fourteen (14) copies of the foregoing **APPELLANTS' BRIEF** and ten (10) copies of the accompanying **JOINT APPENDIX (Volumes 1 and 2)** to be delivered by hand to the Clerk of the Court, United States Court of Appeals for the District of Columbia Circuit.

I further certify that pursuant to Federal Rule of Appellate Procedure 25(c)(1)(D), I caused a copy of the foregoing Brief and accompanying Joint Appendix (Volumes 1 and 2) to be served via electronic mail upon the following:

David Kolker
Kevin Deeley
Steve N. Hajjar
Adav Noti
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650
Email: dkolker@fec.gov
Email: kdeeley@fec.gov
Email: shajjar@fec.gov
Email: anoti@fec.gov

J. Scott Ballenger

ADDENDUM

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STATUTES

REGULATIONS

2 U.S.C. § 431

§ 431. Definitions

When used in this Act:

* * *

(2) The term "candidate" means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of $5,000 or has made expenditures aggregating in excess of $5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of $5,000 or has made such expenditures aggregating in excess of $5,000.

* * *

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

* * *

(9)(A) The term "expenditure" includes—

(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and

* * *

2 U.S.C. § 433

§ 433. Registration of political committees

(a) Statements of organizations

Each authorized campaign committee shall file a statement of organization no later than 10 days after designation pursuant to section 432(e)(1) of this title. Each separate segregated fund established under the provisions of section 441b(b) of this title shall file a statement of organization no later than 10 days after establishment. All other committees shall file a statement of organization within 10 days after becoming a political committee within the meaning of section 431(4) of this title.

* * *

2 U.S.C. § 434

§ 434. Reporting requirements

(a) Receipts and disbursements by treasurers of political committees; filing requirements

(1) Each treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report.

* * *

2 U.S.C. § 441a

§ 441a. Limitations on contributions and expenditures

(a) Dollar limits on contributions

(1) Except as provided in subsection (i) of this section and section 441a-1 of this title, no person shall make contributions—

* * *

(C) to any other political committee (other than a committee described in subparagraph (D)) in any calendar year which, in the aggregate, exceed $5,000; or

* * *

11 C.F.R. § 100.111(a)

§ 100.111 Gift, subscription, loan, advance or deposit of money.

(a) A purchase, payment, distribution, loan (except for a loan made in accordance with 11 CFR 100.113 and 100.114), advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office is an expenditure.

* * *