ORAL ARGUMENT NOT YET SCHEDULED

No. 08-5526

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

UNITY08,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

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CERTIFICATE OF COUNSEL FOR *AMICI CURIAE* CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 AS TO PARTIES, RULINGS, RELATED CASES AND CORPORATE DISCLOSURE

I. Parties and *Amici*

Unity08, Douglas Bailey, Roger Craver, Hamilton Jordan, Angus King, Jerry Rafshoon and Carolyn Tieger were the plaintiffs in the district court. Unity08 is the appellant in this Court. The FEC was the defendant below and is the appellee in this Court. *Amici curiae* in the district court and in this Court are Democracy 21 and the Campaign Legal Center (CLC).

II. Ruling Under Review

The ruling under review is the opinion and order issued by District Judge Richard W. Roberts on October 16, 2008, granting the FEC's motion for summary judgment, and denying Unity08's motion for summary judgment. The district court's opinion is reported as *Unity08 v. Federal Election Comm'n*, 583 F. Supp. 2d 50 (D.D.C. 2008).

III. Related Cases

There are no related cases pending in this Court or in any other court of which counsel to *amici* movants are aware.

IV. Corporate Disclosure Statement

The CLC is a nonprofit, nonpartisan corporation. The CLC has no parent corporation and no publicly held corporation has any form of ownership interest in

the CLC. Democracy 21 is a nonprofit, nonpartisan corporation. Democracy 21 has no parent corporation and no publicly held corporation has any form of ownership interest in Democracy 21.

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STATUTES AND REGULATIONS

The relevant statutes and regulations are set forth in the addendum to Unity08's brief.

STATEMENT OF INTEREST

Amici curiae the Campaign Legal Center and Democracy 21 are non-profit organizations that work for the enactment and effective implementation of campaign finance laws. *Amici* have participated in numerous campaign finance cases in federal and state court, including representing intervening defendants in *McConnell v. FEC*, 540 U.S. 93 (2003), and *FEC v. Wisconsin Right to Life, Inc.*, 127 S. Ct. 2652 (2007) ("*WRTL II*"). *Amici* also filed written comments with the Federal Election Commission (FEC) in the administrative proceedings that resulted in the advisory opinion challenged in this action.[1]

SUMMARY OF THE ARGUMENT

On May 30, 2006, appellant Unity08, a self-proclaimed "nascent political party," filed an advisory opinion request seeking guidance from the FEC as to whether it was a "political committee" under the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431, *et seq*. *See* Advisory Opinion Request ("AOR") 2006-20 (May 30, 2006).

In its AOR, Unity08 declared that its "Goal One" was "to elect a Unity Ticket for President and Vice President of the United States in 2008…." AOR 2006-20 at 2. Unity08 further explained that it intended "to qualify for ballot

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[1] *See* CLC and Democracy 21 Comments on AOR 2006-20 (June 19, 2006); CLC and Democracy 21 Supplemental Comments (August 23, 2006).

positions" as a party "in certain key states for the offices of President and Vice President of the United States," and then "to select, using a 'virtual' convention over the Internet, candidates for the office of President and Vice President of the United States to run in those ballot positions." *Id.* at 3, 4.

Although Unity08 was thus, by all appearances, organized solely for the purpose of running candidates for President and Vice President in the 2008 election, it wished to be exempt from the campaign finance laws that apply to all federal political parties and political committees, until such time as it actually nominated its presidential and vice-presidential candidates. To this end, Unity08 urged the FEC to opine that it was not a political committee and, consequently, was not bound by the contribution limits, source prohibitions and disclosure requirements that apply under FECA to political committees.

On October 10, 2006, the FEC issued Advisory Opinion 2006-20 (Oct. 10, 2006), advising Unity08 that its proposed activities would meet the two-prong test for "political committee" status. First, the FEC found that Unity08 met the "major purpose" test set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), because its "major purpose" was "the nomination or election" of a "Unity Ticket" in the 2008 elections. *Id*. at 79. Second, the FEC found that Unity08 met the statutory definition of "political committee" because it had made over $1,000 in

"expenditures" in the form of "monies spent by Unity08 to obtain ballot access." *See* AO 2006-20 at 3-5.

Unity08 sued the FEC, claiming AO 2006-20 violated its First Amendment rights, and was arbitrary and capricious and contrary to law. Complaint, No. 07-CV-00053 (Jan. 10, 2007). Its theory was that it would not make "expenditures" under FECA – a predicate act to establish "political committee" status – until it actually nominated its "Unity Ticket," because until that point, its spending would not be connected to a "clearly identified" candidate. *See Unity08 v. FEC*, 583 F. Supp. 2d 50, 60 (D.D.C. 2008); *see also* Brief of Appellant (Br.) at 35-37. Based on the same theory, Unity08 also claimed that it did not have as its "major" purpose "the nomination or election of a candidate." In other words, until it nominated its candidates, Unity08 asserted it was not a political committee, and therefore had the right to raise and spend "soft money" (*i.e.*, contributions unrestricted in source or size) to support its efforts to influence the 2008 presidential election.

The district court below rejected this novel theory, holding that the "FEC's interpretation of the Act is reasonable and does not impermissibly infringe on [Unity08's] rights under the First Amendment." 583 F. Supp. 2d at 54. This decision is plainly correct, and should be affirmed.

As an initial matter, Unity08's challenge has been rendered moot in the course of this appeal. The 2008 presidential election has come to a close, as has Unity08's effort to nominate and elect a Unity President and Vice-President. This case thus presents no live controversy and should be dismissed.

Furthermore, Unity08's theory that it would not be a "major purpose" group, nor would make any "expenditures," until it nominated a "*clearly identified*" candidate misconstrues the law. The "clearly identified" language is drawn from the Supreme Court's narrow "express advocacy" construction of the statutory definition of "expenditure." *Buckley*, 424 U.S. at 79-80. It is not a component of the "major purpose" test, and thus does not bear upon the question of whether Unity08 has as its major purpose the "nomination or election of a candidate." Further, the express advocacy standard – and its "clearly identified" language – also does not govern whether "major purpose" groups, such as Unity08, have made "expenditures" within the meaning of FECA. *Id*. Instead, the spending of such groups is regulated by the broader statutory definition of "expenditure," *i.e.*, spending "for the purpose of influencing any Federal election." *Id.* at 79-80; *see also* 2 U.S.C. § 431(9)(A)(i). Unity08's spending as a "nascent political party" surely falls within that definition, just as the spending by any other political party does.

Moreover, even applying Unity08's own narrow standard for "expenditure," Unity08 spent funds to support candidates who are "clearly identified" by descriptive terms such as election cycle (2008), party affiliation (Unity08) and office sought (President). As the district court recognized, these descriptive terms are more than sufficient to "clearly identify" specific federal candidates, and therefore Unity08's spending constituted "expenditures" even under an "express advocacy" construction of the term. 583 F. Supp. 2d at 60-61.

In addition to its statutory argument, Unity08 also asserts that application of FECA's contribution restrictions and disclosure requirements to its activities is unconstitutional because its "activities pose little risk of corruption." Br. at 15. In so arguing, Unity08 suggests that the FEC must present "evidence" of a particular political committee's corruptive potential before it can require that committee to comply with federal law. Br. at 41. But the regulation of political committees as a class has long been upheld by the Supreme Court because it furthers compelling governmental interests, including the prevention of corruption and the appearance of corruption. *See, e.g., California Medical Ass'n v. FEC (CalMed)*, 453 U.S. 182 (1981). The futility of Unity08's argument is underscored by the fact that it must resort to challenging the constitutionality of *Buckley* to make its case – a foundational decision that was cited and applied as recently as the Supreme

Court's decision in the field, *Davis v. FEC*, 128 S. Ct. 2759, 2771-72 (2008). *See* Br. at 42.

In any event, Unity08's activities did present the potential for corruption. The district court correctly noted that Unity08 had "fail[ed] to consider that the appearance of *quid pro quo* corruption is present when a candidate receives the benefit of appearing on a party ballot – a ten to twelve million dollar benefit – solely due to the efforts of Unity08." 583 F. Supp. 2d at 61. The Supreme Court recognized in *McConnell v. FEC*, 540 U.S. 93, 154-61 (2003), that unlimited "soft money" contributions to federal political party committees pose a threat of corruption to such parties, their candidates and their officeholders – regardless of *when* such funds are raised (*e.g.*, prior to the party's nomination of its candidates). So too would unlimited contributions to Unity08 pose a threat of corruption to Unity08's eventual nominees.

For all these reasons, the Court should reject Unity08's attempt to create a massive loophole in the campaign finance laws and should affirm the district court's decision.

ARGUMENT

I. Unity08's Challenge is Moot.

Article III courts may only adjudicate "actual, ongoing cases or controversies," and "this case-or-controversy requirement subsists through all

stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp*., 494 U.S. 472, 477 (1990). Here, however, in the course of Unity08's appeal, the 2008 election has taken place, and Unity08's effort to nominate and elect a "Unity Ticket" in the 2008 presidential election has concluded. Yet Unity08's claims relate exclusively to this effort in the 2008 election: it challenges the constitutionality of FECA as applied to its 2008 effort, as well as AO 2006-20, which addresses the unique facts of this effort. Unity08 thus does not present any live controversy that this court is able to redress, and its case is moot.

Nor can Unity08 avail itself of the exception to the mootness doctrine for cases "capable of repetition yet evading review." *Davis,* 128 S. Ct. at 2769. This exception applies only when "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *WRTL II*, 127 S. Ct. at 2662. In an election case, the second prong of this test is satisfied if the aggrieved party states a credible intention to repeat the action that precipitated the controversy. *Id.* at 2663. For example, in *WRTL II*, although WRTL no longer planned to broadcast the specific political advertisements that were the subject of its constitutional challenge, its case was justiciable because it had "credibly claimed" that it planned on running "materially similar" advertisements in the future. *Id*. at 2663 (internal quotations omitted). In contrast,

in *Ass'n of Am. Physicians & Surgeons (AAPS) v. Brewer*, 486 F.3d 586 (9th Cir. 2007), the Ninth Circuit ruled that AAPS's claim was moot because it had disbanded its political action committee and had not "unequivocally declared" an intention to continue its independent spending. *Id*. at 89; *but see AAPS*, 494 F.3d 1145 (9th Cir. 2007) (reversing upon rehearing mootness judgment as to appellant Dean Martin, who had alleged an intent to run again for state office, but not as to appellant AAPS).

Here, Unity08 has not alleged that it intends to continue *any* political activities, much less that it will conduct a "materially similar" campaign to nominate a "Unity Ticket" in a future election. Indeed, the founder of Unity08 admitted in his deposition that Unity08 did not intend to become a permanent political party. Bailey Dep. 122:1-14 (JA 334); s*ee also* Bailey Dep. 123:9-10 (JA 334) ("So the answer to the question is what happens to Unity08 beyond '08? I have no idea."). There is no reason to believe that Unity08 intends to continue its operations in a future election, and thus it is not entitled to the "capable of repetition, yet evading review" exception to the mootness doctrine.

II. The FEC Correctly Advised Unity08 That its Activities Render It a Federal Political Committee.

As the district court held below, the FEC correctly determined that Unity08 met the two-part test for "political committee" status: its public statements

indicated that its "major purpose" was the nomination and election of a "Unity Ticket," and its spending would constitute "expenditures" under FECA.

A. An Entity Whose "Major Purpose" Is "the Nomination or Election of a Candidate" and That Makes "Expenditures" or Accepts "Contributions" in Excess of $1,000 Is a Political Committee.

FECA defines a "political committee" as a group which "receives contributions" or "makes expenditures" "aggregating in excess of $1,000 during a calendar year…." 2 U.S.C. § 431(4)(A). The statute, in turn, defines "contribution" and "expenditure" to encompass any spending or fundraising, respectively, "for the purpose of influencing any election for Federal office." *Id.* §§ 431(8)(A)(i) (defining "contribution"), (9)(A)(i) (defining "expenditure").

In *Buckley*, the Supreme Court addressed constitutional concerns that the statutory definition of "political committee" was overbroad and, to the extent it incorporated the definition of "expenditure," vague as well. 424 U.S. at 76-80. The Supreme Court feared that the definition of "expenditure" potentially "encompass[ed] both issue discussion and advocacy of a political result." *Id*. at 79. Because the definition of "political committee" relies on the term "expenditure," the Court also worried that the regulation of "political committees" might "reach groups engaged purely in issue discussion." *Id.* at 79.

To resolve these constitutional concerns, the *Buckley* Court imposed two different limiting constructions.

First, it narrowed the definition of "political committee" to encompass only "organizations that are under the control of a candidate *or the major purpose of which is the nomination or election of a candidate*." *Id.* (emphasis added).

Second, where the actor is "an individual other than a candidate or a group other than a 'political committee,'" the Court narrowly construed the term "expenditure" to reach "only funds used for communications that *expressly advocate* the election or defeat of a *clearly identified* candidate" *Id.* at 79-80 (emphasis added). This narrow "express advocacy" construction of the term "expenditure" thus applies only to the spending of groups whose major purpose does not relate to elections. *Id*. *See also Shays v. FEC*, 511 F. Supp. 2d 19, 27 (D.D.C. 2007) ("[T]he [*Buckley*] Court imposed the narrowing gloss of express advocacy on the term "expenditure" only with regard to groups other than "major purpose" groups."). By contrast, in the case of a "major purpose" group, the Court held that the broader statutory definition of "expenditure" – spending "for the purpose of influencing" an election – was not vague because all disbursements by such groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, *by definition, campaign related*." *Id.* at 79 (emphasis added).

The Supreme Court reaffirmed this approach in *McConnell* in its review of a provision of Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), that requires state parties to use hard money to pay

for public communications that "promote, "attack," "support" or "oppose" ("PASO") a federal candidate. *McConnell,* 540 U.S. at 170 n.64; *see also* 2 U.S.C. §§ 431(20)(A)(iii), 441i(b)(1). The Court rejected the claim that the provision was unconstitutionally vague, in part because the PASO language applies only to party committees. 540 U.S. at 170 n.64. It quoted *Buckley* for the principle that "a general requirement that political committees disclose their expenditures raised no vagueness problems because the term 'political committee' 'need 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' and thus a political committee's expenditures 'are, by definition, campaign related.'" *Id.* Thus, the Court in *McConnell* reaffirmed that the express advocacy test set forth in *Buckley* does not apply to groups whose major purpose is to influence federal elections.

This precedent makes clear that the "express advocacy" test – and its "*clearly identified* candidate" language – is not relevant to the question of whether a "major purpose" organization is spending money to influence the election of federal candidates, and whether it is, accordingly, making "expenditures." Instead, the determination of whether a major purpose group's spending constitutes "expenditures" is governed by the broader statutory definition of expenditure – spending "for the purpose of influencing any Federal election."

B. The FEC Correctly Applied FECA to Determine that Unity08 Meets the Definition of "Political Committee."

1. The First Prong: Unity08 Meets the "Major Purpose" Test.

In its advisory opinion, the FEC determined that Unity08 meets the "major purpose" test, and thus the first prong of the definition of "political committee." The district court was right to uphold this determination.

Several cases have established that a group's "major purpose" can be demonstrated by its public statements or positions. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (finding that "major purpose" evidenced through organization's materials that described the organization's goal of supporting the election of Republican candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (finding that the "organization's [major] purpose may be evidenced by its public statements of its purpose or by other means"). A group's actual activities can also evidence its "major purpose." *See, e.g., FEC v. Massachusetts Citizens for Life (MCFL)*, 479 U.S. 238, 262 (1986) (noting that a group's independent spending activities to influence political campaigns can "become so extensive that *the organization's major purpose may be regarded as campaign activity*") (emphasis added); *see also McConnell*, 540 U.S. at 170 n.64.

Here, Unity08's self-proclaimed goal was to nominate and elect candidates for President and Vice President in the 2008 election. In 2006, Unity08's Web site stated prominently that "Unity08 is a citizens' movement to get our country back

on track by nominating and electing a Unity Ticket in the '08 presidential election to promote leadership, not partisanship." *See* http://www.unity08.com (visited August 18, 2006). Similarly, Unity08 stated in its AOR that "Goal One is to elect a Unity Ticket for President and Vice President of the United States in 2008…." AOR 2006-20, at 2. Given this description of its goals, it cannot be contested that Unity08 was a group "the major purpose of which is the nomination or election of a candidate," as set forth by *Buckley*.

The FEC's conclusion regarding Unity08's "major purpose" is also buttressed by Unity08's decision to register with the Internal Revenue Service under section 527 of the Internal Revenue Code. *See* AO 2006-20, at 1; Complaint, ¶ 3. A section 527 "political organization" is "organized and operated primarily" for the purpose of "accepting contributions or making expenditures" to "*influence the selection, nomination, election, or appointment of any individual* to any Federal, State, or local public office." *See* 26 U.S.C. § 527(e)(1), (2).

Thus, any entity that registers as a section 527 political organization is formed for the "primary" purpose of "influencing or attempting to influence the selection, nomination, election or appointment of" an individual to public office. The Supreme Court in *McConnell* confirmed that section 527 groups are primarily engaged in influencing elections, stating that "section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in

partisan political activity." 540 U.S. at 174 n.67. *See also Shays*, 511 F. Supp. 2d at 30 ("[A]n organization's usage of 527 status is inherently indicative of its choice to principally engage in electoral activity…."). Accordingly, Unity08's registration as a "political organization" under section 527 is further confirmation that its "major purpose" is the "nomination or election of a candidate."[2]

Although Unity08 does not dispute its tax status or deny that its "Goal One" was the nomination and election of a "Unity Ticket," it nevertheless attempts to argue that it was not a "major purpose" group. It asserts that the "major purpose" test "simply must be understood to restrict the constitutional application of FECA to groups whose major purpose is the election of a *particular, identified* candidate." Br. at 23 (emphasis in original). Unity 08 then posits that until it nominated its candidates, its spending would not relate to a "clearly identified" candidate, and thus its "major purpose" would not be the nomination or election of candidate.

The flaw in this argument is that the "major purpose" test does not turn on whether a candidate is "*clearly identified*." That language originates from the

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[2] Of course, if the 527 group is involved in influencing only State and local candidate elections or influencing only the nomination or appointment of individuals to appointive office, it would not be a federal political committee. Here, however, Unity08 indicates that *all* of its political activity will be directed to federal elections. AOR 2006-20, at 2-4.

express advocacy standard which determines whether a non-major purpose group is making "expenditures" – *i.e.*, whether such a group is expressly advocating the election or defeat of a "*clearly identified* candidate." *Buckley,* 424 U.S. at 80 (emphasis added). Unity08 engages in doctrinal sleight-of-hand by excising the "clearly identified" language from its proper context and grafting it onto the "major purpose" test which, contrary to Unity08's assertion, asks only whether a group's major purpose relates to the "nomination or election of a *candidate*" – not a "*clearly identified candidate*."

Unity08 offers no valid legal authority for its reading of the "major purpose" test, which makes that test far narrower than the Court intended in *Buckley.* It relies almost exclusively upon the "Draft Kennedy" cases, whose facts are clearly distinguishable from the instant case. *See FEC v. Machinists Non-Partisan Political League* (*Machinists*), 655 F.2d 380 (D.C. Cir. 1981); *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281 (11th Cir. 1982).

In those cases, the groups at issue were engaged in "attempts to convince the voters – or Mr. Kennedy himself – that he would make a good 'candidate,' or should become a 'candidate'" for U.S. President. *Machinists,* 655 F.2d at 396. There was no certainty, or even likelihood, that Kennedy would ever become a presidential "candidate" under FECA because the "draft" committees had no control over whether he would ultimately enter the race. Whether the draft

committees' activities – and by extension, major purpose – would ever relate to the "the nomination or election of a candidate" was thus entirely speculative. The courts therefore found that the draft committees "cannot constitute a 'political committee' under the Act." *Id*. at 392.

Unity08 argues that it was similarly attempting to "draft" candidates for the presidential and vice-presidential nomination – and that consequently, it too should not be deemed a "political committee." Br. at 27-28. In so arguing, however, Unity08 overlooks a key distinction between draft committees and its own activities. Unlike draft committees, which by definition "have not yet succeeded" in producing a "candidate acceptable to them," *Machinists*, 655 F.2d at 392, the nomination of a "Unity" presidential candidate and vice-presidential candidate was wholly within the control of Unity08. There is no doubt that Unity08 was able to "produce" a "Unity Ticket," and Unity08 does not dispute that it was able to do so. There is equally no doubt that its expenditures to obtain ballot access for its putative nominees therefore furthered "the nomination or election of a candidate."

Unity08's reliance upon *GOPAC* is similarly misplaced. Br. at 25-26. There, GOPAC made expenditures to support *state and local* candidates for the purpose of building a "farm team" that it hoped would some day help the Republican Party take over the U.S. House of Representatives. 917 F. Supp. at 854, 58. GOPAC, however, "did not make any direct contribution to any particular

federal candidates." *Id.* at 858. Because GOPAC avoided directly supporting any "person who has decided to become a candidate for *federal* office," the Court concluded that it had not made expenditures for the purpose of influencing *federal* elections, and was not a political committee subject to federal law. *Id*. at 859 (emphasis added).

Unity08 attempts to use *GOPAC* to argue that political committee status requires expenditures in support of an *already-nominated* candidate. But *GOPAC* does not stand for this proposition. The court simply made clear that GOPAC's direct support of state and local candidates would not trigger federal political committee status simply because of any indirect effect this support had on federal elections. *GOPAC* thus turned upon the distinction between *state* and *local* election activity and *federal* election activity. In contrast, Unity08 has stated that its only goal is to nominate and elect *federal* candidates in the 2008 election cycle. It is thus indisputable that Unity08's major purpose relates to influencing *federal* elections.

In addition to lacking legal support, Unity08's argument also defies common sense. Whether a group's major purpose relates to the nomination and election of federal candidates does not depend on its "identification" of particular candidates by name. A group that devotes its resources to promoting "Republican congressional candidates," "female candidates for Senate," or any other class of

candidates is clearly a "major purpose" group, regardless whether all its expenditures expressly support one or more particular "clearly identified" candidates.

The logic of Unity08's argument also stands for the remarkable proposition that funds raised by the national committees of any political party – including the Republican National Committee and the Democratic National Committee – cannot constitutionally be regulated until the party has held its primary election (or nominating convention) and identified *by name* its nominee to a particular federal office. Indeed, Unity08's theory would mean that the RNC and DNC would not themselves be "major purpose" groups – and thus would not be federal "political committees" – until they had actually nominated "clearly identified" candidates. According to Unity08's argument, the parties therefore would be permitted to raise unlimited soft money for the presidential campaign prior to their nominating conventions. Such an absurd result illustrates the flaws of Unity08's argument. The Supreme Court made clear in *McConnell* that any and all funds raised by political parties – even in the period prior to nominating a specific candidate – may constitutionally be subject to the contribution limits, source prohibitions and disclosure requirements of FECA in order to deter the actuality and appearance of corruption. In other words, the parties *are* "political committees" under FECA,

even before they nominate their candidates. *See McConnell*, 540 U.S. at 154-56. The same, necessarily, is true of Unity08.

2. The Second Prong: Unity08 Meets the $1,000 Expenditure Test.

Relying on its earlier decisions, the FEC found that Unity08's proposed spending to obtain ballot access through petition drives would constitute "expenditures" pursuant to 2 U.S.C. § 431(9)(A)(i) and 11 C.F.R. § 100.111(a). *See* AO 2006-20, at 3-4; *see also* AO 1994-05 n.1 (April 18, 1994) ("[E]xpenditures to influence your election would include amounts you spend … to promote yourself for the general election ballot by seeking signatures on nomination petitions."); *see also* AO 1984-11 (May 3, 1984) (determining that expenses made to collect petition signatures are expenditures). The district court agreed that Unity08's disbursements for this purpose were "expenditures," and that Unity08 therefore satisfied the second prong of the test for political committee status. 583 F. Supp. 2d at 60-61.

The district court's decision should be affirmed. Unity08 argues that because an "expenditure" under the express advocacy standard must be connected to a "clearly identified" federal candidate, it would not make "expenditures" until it had nominated its "Unity ticket." Br. at 35-37. But Unity08 is mistaken on at least two counts: first, the definition of "expenditure" in the case of Unity08 is not limited by the "express advocacy" test and its "clearly identified candidate"

language; and second, even under the narrow "express advocacy" construction of "expenditures," Unity08's spending would still have constituted an "expenditure."

First, for the reasons discussed above, the "express advocacy" test is not relevant to the question of whether Unity08, a "major purpose" group, had spent money "for the purpose of influencing" the election of federal candidates, and whether it, accordingly, had made "expenditures." As *Buckley* made clear, the narrowing construction of the express advocacy test is only necessary to prevent vagueness with respect to non-"major purpose" groups. *See Buckley*, 424 U.S. at 79-80. As a section 527 "political organization," and as a group that had proclaimed its purpose was to nominate and support candidates for President and Vice President, Unity08 was – like any other "major purpose" entity – subject to the statutory definition of "expenditure," without the limiting "express advocacy" gloss developed by the *Buckley* Court. *Every penny* spent by Unity08 was "for the purpose of influencing" the nomination and election of a 2008 presidential ticket and, therefore, constituted "expenditures" under FECA.

Second, even if the express advocacy standard is deemed relevant to the evaluation of Unity08's expenditures, Unity08 met this more stringent standard. Unity08 spent monies on behalf of specific candidates – *i.e.* its Unity presidential and vice-presidential nominees – who were clearly identified by election year, office sought and party affiliation. "Express advocacy" does not require a

candidate be identified only by name instead of other “placeholder” attributes. *See* 11 CFR § 100.22(a) (“Expressly advocating means any communication that … [u]ses phrases such as … ‘support the Democratic nominee,’ ‘cast your ballot for the Republican challenger for U.S. Senate in Georgia’ ... ‘reject the incumbent’”). It is difficult to see how a communication to “support the Unity ticket in 08” or “elect a Unity President” is any less “express advocacy” than the examples provided in Section 100.22, such as “support the Democratic nominee” or “cast your ballot for the Republican challenger.” *Id.*; *see also Buckley*, 424 U.S. at 44 n.51.

Unity08 nonetheless argues that “express advocacy” requires more than identification by office and party, claiming that the “candidate” in *Machinists*, *i.e.*, Senator Kennedy, and the Republican “candidates” in *GOPAC* could also have been identified by such attributes, yet the groups at issue in these cases were not deemed federal “political committees.” Br. at 33. This argument simply misstates the facts of the *Machinists* and *GOPAC* cases. Senator Kennedy could not be identified by the office of “President” for the obvious reason that *he had not actually decided to run for such office* and the Draft Kennedy committees had no control over whether he would do so. The *GOPAC* candidates, on the other hand, could be identified by their “offices,” but these “offices” were state and local positions. GOPAC’s spending on their behalf therefore could not constitute

"express advocacy" as defined by *Buckley* because it did not expressly advocate the election or defeat of a *federal* candidate. Here, by contrast, the identifying attributes of office, party and election cycle did single out *federal* candidates – *i.e.*, Unity08's presidential and vice-presidential nominees. Unity08's spending therefore satisfied even the express advocacy definition of "expenditure."

Finally, the FEC's position that Unity08's spending relates to "clearly identified" candidates is consistent with longstanding administrative precedent. In Advisory Opinion 2003-23 (Nov. 7, 2003), the FEC considered whether to allow a political committee to collect "earmarked" contributions for the Democratic Party's "presumptive nominee" pursuant to the FEC's earmarking rules that generally apply to contributions to a "clearly identified candidate." *See* 11 CFR § 110.6(b)(1). The opinion thus deals squarely with the argument raised by Unity08, namely whether a specific candidate must be "identified" by name – *i.e*., already nominated – in order for the earmarking rules to apply. The FEC said its rules apply to a party's yet-to-be-selected "presumptive nominee" for a *specific federal office* in a *specific federal election*:

> In Advisory Opinion 1982-23, the Commission concluded that it was permissible for a local committee to earmark $1,000 through a local party committee to *the as-yet unknown Republican nominee* for New York's 24th Congressional District. In Advisory Opinion 1977-16, the Commission concluded that it was permissible for a local committee to accept contributions and make expenditures on behalf of *an undetermined Federal candidate*. In both instances, the Commission concluded that it was permissible to earmark contributions to

> undetermined Federal candidates because *the candidates were identifiable as to specific office, party affiliation, and election cycle, although the names of the eventual nominees were not known*.
>
> Under WE LEAD's proposal, *because the presumptive nominee is identifiable as to specific office (President of the United States), party affiliation (Democratic Party), and election cycle (2004)*, the Commission concludes that contributors may earmark contributions to the presumptive nominee through WE LEAD….

AO 2002-23, at 3-4 (emphasis added).

The same is true here. Although "as-yet unknown," this "presumptive nominee" of the Unity08 committee was "identifiable as to specific office" (President) as well as to "party affiliation" (Unity08) and "election cycle" (2008).

III. The FEC's Determination that Unity08 Is a "Political Committee" Does Not Violate the First Amendment.

The Supreme Court has rejected First Amendment challenges to FECA's regulation of "political committees," as defined by 2 U.S.C. § 431(4)(A), and has found that such regulation is supported by important governmental interests, including the prevention of corruption and the appearance of corruption. *See, e.g., Buckley*, 424 U.S. at 23-29, 64-68; *CalMed*, 453 U.S. at 193-99. Because Unity08 meets the definition of a "political committee," it follows that it is subject to FECA, and that this regulation is supported by the same governmental interests found to support FECA in *Buckley* and *CalMed*.

Unity08 attempts to turn this reasoning on its head, suggesting that Congress and the FEC must make a particularized showing that its specific factual situation

presents the potential for corruption. *See* Br. at 41 ("There is simply no evidence in the record to suggest that Unity08's activities posed a threat of corruption or the appearance of corruption."). But the First Amendment does not require that the government make a case-by-case demonstration of potential corruption before regulating a group as a political committee. If an organization meets the federal law definition of "political committee," it can be constitutionally obligated to comply with FECA based on the wholly justifiable presumption that unregulated fundraising and spending by such entities poses a threat of real and apparent corruption of federal candidates.

Nevertheless, although the burden does not lie with the FEC to make an individualized showing in this case, it is clear that allowing Unity08 to operate outside of FECA's "political committee" disclosure requirements, contribution limits and source prohibitions would pose a serious threat of real and apparent corruption. Large donations to Unity08 would have created actual or apparent indebtedness on the part of the Unity08 presidential and vice-presidential nominees – regardless of when the contributions were made.

A. The Supreme Court Has Found That the Regulation of Political Committees Is Consistent With the First Amendment.

Contrary to Unity08's insistence that only "the prevention of corruption and the appearance of corruption" will justify campaign finance regulation, Br. at 19-20, the Supreme Court has recognized that a number of government interests are

served by the regulation of political committees, including not only the anti-corruption interest noted by Unity08, but also the public's informational interest in disclosure, and the government's interest in preventing circumvention of campaign finance requirements.

In *Buckley*, the Supreme Court considered whether the disclosure requirements and contribution restrictions imposed by FECA on political committees comported with the First Amendment. Even though the Court recognized that these legal requirements represented a "significant interference with protected rights of political association," it sustained these requirements as a "closely drawn" means to further "sufficiently important interests" of the state. 424 U.S. at 25 (internal quotations omitted). It recognized that contribution limits prevented "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*. Disclosure was supported by a broader array of interests including: "provid[ing] electorate with information as to where political campaign money comes from … [and] the interests to which a candidate is most likely to be responsive," "deter[ing] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," and "gathering the data necessary to detect

violations of the contribution limitations." *Id*. at 66-68 (internal quotations omitted).

The Supreme Court expanded upon its holding in *Buckley* when it considered FECA's $5,000 annual limit on contributions to independent political committees in *CalMed*. *See* 2 U.S.C. § 441a(a)(1)(C). As Unity08 does here, the appellants in *CalMed* asserted that the danger of corruption discussed in *Buckley* did not apply to contributions to non-candidate-controlled political committees. 453 U.S. at 197-98. The Supreme Court disagreed. It found that the $5,000 limit "further[ed] the governmental interest in preventing the actual or apparent corruption of the political process" by "prevent[ing] circumvention of the very limitations on contributions [to candidates] that this Court upheld in *Buckley*." *Id*. at 197-98.

In *McConnell*, the Court further developed its analysis of the government's anti-corruption interest in its consideration of the soft money provisions of BCRA that prohibited party committees from raising and spending money that was not in compliance with the federal contribution limits and source requirements. 540 U.S. at 133-73. Indeed, the political parties in *McConnell* are the direct analogue to Unity08, and the governmental interests identified in *McConnell* as justifying their regulation also justifies the regulation of Unity08.

The "core" soft money provision at issue in *McConnell* subjected all funds raised and spent by the national political parties to federal contribution limits and source prohibitions, regardless of when the funds were raised or spent, or for what purposes. *See* 2 U.S.C. § 441i(a). In reviewing these provisions, the Court noted that because of the "close connection and alignment of interests" between parties and their affiliated candidates and officeholders, "large soft-money contributions to national parties are likely to create actual or apparent indebtedness" on the part of such candidates and officeholders. *Id*. at 155. This sense of indebtedness in turn enabled large contributors to the party to gain access to and influence over candidates. *Id*. at 146-48 (influence), 149-51 (access and influence). For this reason, the Court found that the soft money ban was justified by the government's interest in preventing actual and apparent corruption.

B. <u>The Regulation of Unity08 as a Political Committee Is Justified by Important Government Interests.</u>

Unity08 has not shown that it is distinguishable from the political committees considered in the case law above. Because Unity08 is a political committee, regulation of its activities is supported by the strong governmental interests articulated in *Buckley*, *CalMed* and *McConnell*. Financial disclosure by political committees, such as Unity08, provides the electorate with useful information and deters corruption through publicity, while limits on contributions to political committees combat corruption and the appearance of corruption in the

electoral system, and prevent large donors from circumventing the limits on direct contributions to candidates by using committees as a pass-through for their donations.

Unity08 does not explain why these compelling governmental interests are relevant only *after* it nominates its presidential and vice-presidential candidates. Its analysis boils down to the claim that "without a candidate, the potential for corruption or the appearance of corruption is severely limited." Br. at 22-23.

This assertion is at best myopic; at worst, simply untrue. If Unity08 had proceeded, as planned, to its online nominating convention in the summer of 2008, it would have produced two party nominees who would have been the beneficiaries of all activities conducted by Unity08 prior to their nomination, including all expenditures made to obtain ballot positions. This situation would have created actual or apparent indebtedness on the part of the nominees to Unity08 and its financial backers. Indeed, because Unity08 seeks to operate entirely outside the campaign finance laws, nothing would prevent it from relying upon only a few multi-million-dollar contributors – or alternatively, upon a single huge corporate contributor. Unity08 provides no explanation why its nominees would disregard these types of contributions solely because they were made prior to their nomination.

Unity08 attempts to analogize its situation to the Draft Kennedy committees in *Machinists* and *Florida for Kennedy*, arguing that because Unity08 also lacked a "clearly identified candidate," its activities likewise did not "present a risk of corruption or the appearance of corruption." Br. at 28; *Machinists*, 655 F.2d at 392. This argument overlooks the radically different relationship between the Draft Kennedy committees and their favored candidate and the relationship between Unity08 and its eventual nominees. The draft committees operated entirely independently from Senator Kennedy, and indeed, had been "formally disavowed" by Kennedy, *see* 655 F.2d at 383. Because the committees did not coordinate their activities with Kennedy or directly support Kennedy either before or after his decision regarding the presidential race, their independent activities posed little "potential for corruption," as the *Machinists* court recognized. 655 F.2d 392.

Unity08, by contrast, intended to serve as the official political party of the "Unity Ticket." It would have therefore enjoyed the same "close connection and alignment of interests" with its Unity Ticket as the major political parties enjoy with their candidates and officeholders. *McConnell*, 540 U.S. at 155. Indeed, Unity08 freely admits that it intended to provide *direct support* to its eventual nominees by providing them with a campaign infrastructure, including a promotional Web site, as well as the results of Unity08's $10-million effort to

secure ballot positions. *See*, *e.g.*, AOR 2006-20 at 3-4. This is a far cry from the independent and "disavowed" Draft Kennedy committees.

Unity08 nevertheless claims that its nominees would not feel obligated to its large donors because such donors intended only to support "an abstract and idealistic cause." Br. at 29. This claim, however, even if credited, runs counter to the conclusion drawn in *McConnell* that the "special relationship and unity of interest" between political parties and their nominees enabled large contributors to the party to obtain undue influence over party nominees and officeholders. 540 U.S. at 145. There is no reason to believe that that Unity08's candidates would be any less susceptible to the large contributions made to Unity08 than the federal candidates considered in *McConnell* were susceptible to the large contributions made to their own parties. After all, the soft money donors to the major parties undoubtedly also claimed they wished only to support "an abstract and idealistic cause." As was the case with soft money contributors to party committees prior to BCRA, however, large donors to Unity08 can potentially obtain undue access and influence over Unity08's candidates, and thereby pose a threat to the integrity of the political system. *Id.* at 146-51.

The same is true with regard to public disclosure. If Unity08 had been exempt from the campaign finance laws, it would have built the infrastructure for its presidential campaign, including securing ballot positions for its nominees,

without any obligation to report its financial activity to the FEC prior to its nominating convention. Upon its nomination of candidates, Unity08 would have been the only party committee running federal candidates that would not have provided the public with complete information regarding its financial activities. This "blackout" in campaign finance disclosure would be particularly troubling because Unity08 would have also, under its reasoning, been exempt from contribution limits and source prohibitions. The public has a strong interest in receiving information about the financial activity of Unity08, including disclosure of early contributors to the Unity08, in order to be able to evaluate the "interests to which [the Unity08 nominees] would most likely to be responsive" and to make "predictions of [their] future performance in office." *Buckley*, 424 U.S. at 66-67.

CONCLUSION

For these reasons, the district court's decision should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7) AND CIR. R. 32(a)(2)

Pursuant to Fed. R. App. P. 29(c)(5) and Fed. R. App. P. 32(a)(7)(C)(i), I certify that the foregoing *amici* brief complies with the length requirements of Fed. R. App. P. 29(d), Fed. R. App. P. 28.1(e)(2)(A)(i) and Cir. R. 32(a)(2). I have relied on the word count feature of Microsoft Word 2000 to calculate that the brief contains 6965 words. I further certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Cir. R. 32(a) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionately spaced typeface using Microsoft Word 2000 in Times New Roman font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July 2009, I served a copy of the foregoing BRIEF *AMICI CURIAE* FOR CAMPAIGN LEGAL CENTER AND DEMOCRACY 21 IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE on the following counsel of record, via email (where email addresses are available and known) and by United States mail, first-class postage prepaid:

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