UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITY08, et al., Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 07-00053 (RWR) MOTION FOR SUMMARY JUDGMENT

DEFENDANT FEDERAL ELECTION COMMISION'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, the Federal Election Commission ("Commission") hereby moves this Court for summary judgment on each of plaintiffs' claims. A memorandum of law in support of the Commission's motion and in opposition to plaintiffs' motion for summary judgment, along with a Statement of Material Facts As To Which There Is No Genuine Dispute, are also being filed pursuant to Local Civil Rules 7(h) and 56.1. In addition, the Commission is filing its Statement of Genuine Issues in response to Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue in Dispute.

The Commission's motion should be granted because plaintiffs lack standing and the Commission's advisory opinion that plaintiffs challenge is not a final agency action subject to judicial review. Even if this suit were properly before the Court, the Commission is entitled to summary judgment on the merits because the advisory opinion at issue is neither arbitrary and capricious nor contrary to law.

Wherefore, the Commission respectfully moves that the Court grant the Commission's motion for summary judgment, as outlined above and as explained in the memorandum of law that accompanies this motion.

Respectfully submitted,

/s/
Thomasenia P. Duncan
Acting General Counsel

/s/
David Kolker (D.C. Bar No. 394558)
Assistant General Counsel

/s/
Vivien Clair
Attorney

/s/
Steve N. Hajjar
Attorney

/s/
Adav Noti (D.C. Bar No. 490714)
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

Dated: April 11, 2007

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITY08, et al.,	)	
	)	
Plaintiffs,	)	
	)	Civil Action No. 07-00053 (RWR)
v.	)	
	)	
FEDERAL ELECTION COMMISSION,	)	FEC MEMORANDUM
	)	
Defendant.	)	
	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Thomasenia P. Duncan
Acting General Counsel

David Kolker
Assistant General Counsel

Vivien Clair
Attorney

Steve N. Hajjar
Attorney

Adav Noti
Attorney

FOR THE DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

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MISCELLANEOUS

Plaintiffs Unity08 and individual members of its Board of Directors (collectively "Unity08") intend to nominate and elect the next President and Vice President of the United States. Towards that end, Unity08 has disbursed thousands of dollars to achieve ballot access in numerous states and in preparation for an online nominating convention, and plans to continue to do so. Nonetheless, on May 30, 2006, Unity08 requested an advisory opinion from the Federal Election Commission ("FEC" or "Commission") seeking a ruling that its planned disbursements were not for the purpose of influencing a federal election and that it therefore did not have to register as a political committee under the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), 2 U.S.C. 431-455. In Advisory Opinion 2006-20, the Commission found to the contrary. As we explain below, Unity08 has neither standing to invoke the Court's jurisdiction nor a valid cause of action. Even if jurisdiction were proper and Unity08 had a valid cause of action, Advisory Opinion 2006-20 rests on a permissible construction of the Act that comfortably warrants the substantial deference it is due, and there is no basis for disturbing that opinion. Summary judgment should therefore be granted for the Commission and denied to the plaintiffs.

Consistent with its own and Supreme Court precedent, the Commission reasonably concluded that payments by Unity08 to obtain ballot access are expenditures for the purpose of influencing a federal election that would require Unity08 to register and report as a federal political committee. Unity08 conflates distinct Supreme Court doctrines in arguing that, despite its avowed electoral objectives and activities, it cannot be regulated under the FECA as a political committee until after it actually selects its nominees. Unity08 is not exempt from the Act's legitimate regulation of political committees, including the applicable contribution limits, which have been repeatedly upheld by the Supreme Court.

BACKGROUND

A. The Parties

Plaintiff Unity08 is a District of Columbia corporation organized under Section 527 of the Internal Revenue Code. FEC's Statement of Facts As To Which There Is No Genuine Dispute ("FEC Facts") ¶ 2. Its office is located in the District of Columbia. Bailey Dep. at 125 (Exh. 4). Plaintiffs Douglas Bailey, Roger Craver, Hamilton Jordan, Angus King, and Jerry Rafshoon are or were members of Unity08's Board of Directors; all but Mr. King are among Unity08's founders. Compl. ¶¶ 3-8.

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. The Commission is empowered to "formulate policy" with respect to the Act, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules … as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(a)(8) and 438(d); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7) and 437f.

B. Statutory and Regulatory Background

The Act defines a political committee as "any committee, club, association, or other group of persons which receives contributions or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A). A "contribution" includes "any gift, subscription, loan, advance, or deposit 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(8)(A)(i), and an "expenditure" includes "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." 2 U.S.C. 431(9)(A)(i).

Within ten days of qualifying as a political committee, an organization must register with the Commission and file periodic reports of all its receipts and disbursements for disclosure to the public, including its independent expenditures and in-kind contributions to candidates for federal office. 2 U.S.C. 433, 434; 11 C.F.R. Part 104. When registering with the Commission, a political committee must include in its statement of organization "the name, address, relationship and type of any connected organization or affiliated committee." 2 U.S.C. 433(b)(2).

The Act provides that no person may contribute more than $5,000 per calendar year to any political committee (except a political committee established by a state or national political party, 2 U.S.C. 441a(a)(1)(B), (C), (D)), and no "political committee shall knowingly accept any contribution" in violation of those limits, 2 U.S.C. 441a(f). Furthermore, corporations are prohibited from using their general treasury funds to make contributions or expenditures in connection with any federal election, and no political committee may "knowingly accept or receive" such corporate contributions. 2 U.S.C. 441b(a).

The Act authorizes the Commission to issue written advisory opinions within 60 days of receiving a request concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f; 11 C.F.R. 112.4. An advisory opinion is issued when it has been approved by at least four Commissioners. 11 C.F.R. 112.4. Any person involved in a specific activity "indistinguishable in all its material aspects" from the activity described in the advisory opinion who acts in good faith in accordance with the opinion is not subject to sanction under the Act. 2 U.S.C. 437f(c).

C. Statement of Facts

On May 30, 2006, Unity08 filed with the Commission a request for an advisory opinion ("AOR") as to whether Unity08 is required to register as a "political committee" under FECA. FEC Facts ¶ 5. In its advisory opinion request and supplemental administrative filings, Unity08 stated that its primary purpose is to achieve the election in 2008 of a "Unity Ticket for President and Vice President of the United States" (i.e., a ticket in which the presidential and vice-presidential candidates have different party affiliations). Id. ¶ 7. To attain this goal, Unity08 explained, it intends to (1) nominate a unity ticket at an online political convention, and (2) obtain a line on the 2008 general election ballot in all fifty states for its nominees. Id. Unity08 specifically disclaimed (and continues to disclaim) any intention to become a permanent political party or to nominate, support, or oppose any candidates in any election other than the 2008 presidential election. Id. ¶¶ 7(d), 39, 31.

Before the advisory opinion was issued (and continuing to the present), Unity08 began making disbursements to further its goal of electing the next president and vice president of the United States. See FEC Facts ¶¶ 19-26. Specifically, Unity08 has disbursed tens of thousands of dollars to create, enhance, and promote its online nomination facility. Id. ¶¶ 22-23. Unity08 also has disbursed tens of thousands of dollars to recruit "delegates" (id. ¶¶ 24-26), whom Unity08 will use to meet the signature-gathering requirements for achieving ballot access on behalf of Unity08's nominees. Id. ¶ 24. Specifically, Unity08's delegates "will be the army of workers who get the petitions signed to be on the ballot in all 50 states." Id. Unity08 also intends to give or sell the delegates' contact information to its nominees to help those nominees raise additional campaign funds. Id. ¶ 30.

Although its efforts to elect the next president and vice president require significant funds, Unity08 wishes to avoid the "mistakes" and the appearance of "big money ownership" that Unity08 believes would arise if it accepts individual donations larger than the $5,000 limit that applies to political committees. FEC Facts ¶¶ 12-13. Thus, before AO 2006-20 was issued, Unity08 voluntarily instituted a $5,000 limit on donations it would accept. Id. ¶¶ 12-14. Unity08 instituted this limit even though it believed at the time that, as a Section 527 organization, Unity08 was permitted to accept donations of unlimited amounts. Id. ¶ 14. To fund its efforts within the $5,000 limit, Unity08 decided that it would create a $1 million operational fund by seeking 200 donations of $5,000 each. Id. ¶ 15. Unity08 determined that this fund would be sufficient to support Unity08's operations until smaller contributions from delegates rendered the organization self-supporting. Id.

On October 10, 2006, after holding two public meetings and deliberating over Unity08's filings and comments filed by third parties, the Commission issued its advisory opinion. FEC Advisory Opinion 2006-20 (Oct. 10, 2006) (Exh. 3). The Commission concluded, inter alia, that Unity08's intention to gain ballot access for its nominees would render Unity08 a "placeholder" for its nominees on the general election ballot, so that Unity08's disbursements to gain this ballot access would directly benefit Unity08's presidential and vice-presidential candidates in 2008. Id. at 3-4. These disbursements, therefore, would be "for the purpose of influencing [an] election for federal office," and thus would be "expenditures" under FECA. Id. Because any organization whose "major purpose" is the nomination or election of a candidate, see infra pp. 19-20, and that makes expenditures in excess of $1,000 is a political committee under the Act, the Commission found that "Unity08 will have to register as a political committee once it makes

expenditures in excess of $1,000, and therefore will be subject to the amount limitations ... and reporting requirements of [FECA]." Id. at 1.

As a result of registering as a political committee, Unity08 would be prohibited from receiving more than $5,000 in contributions from any individual in a single year. 2 U.S.C. 441a(a)(1). Because of its self-imposed $5,000 donation limit, however, Unity08 has conceded that AO 2006-20 did not affect Unity08's fundraising or operations in any way. FEC Facts ¶ 17. Unity08 continues to adhere to its donation limit, not because of the advisory opinion, but "[b]ecause it's the right thing to do." Id. ¶ 16. Furthermore, as of March 12, 2007, two months after the complaint in this case was filed, Unity08 had not identified any person who wished to "lend" Unity08 more than $5,000. Id. ¶ 18.

After plaintiffs had filed their complaint, the Commission became aware that, in addition to having made the expenditures described above, Unity08 also has received contributions under the FECA, 2 U.S.C. 431(8). See FEC Facts ¶¶ 32-39. Specifically, beginning prior to the advisory opinion and continuing to the present, Unity08 has received donations in response to solicitations that informed potential donors that their donations would be used to support Unity08's presidential and vice-presidential nominees in the 2008 general election. Id. For example, Unity08 has raised approximately $375,000 through personal solicitations that generally inform potential donors that Unity08's "Goal One" is to "[e]lect bipartisan Unity Ticket for President & Vice-President in 2008," and that "[y]our financial contribution ... helps give us a good chance to win the White House in November 2008 with a Unity Ticket." Id. ¶¶ 32-34. Unity08 has also raised approximately $100,000 through its website, whose solicitation page states that contributions to the organization will be used to fund Unity08's "goal of electing a bi-partisan Unity Ticket in the 2008 presidential election." Id. ¶¶ 35-36.

ARGUMENT

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THIS SUIT

This Court lacks jurisdiction over this suit because Unity08 lacks standing under Article III of the Constitution. The federal courts "presume that … [they] lack jurisdiction unless the contrary appears affirmatively from the record," DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1861 n.3 (2006), and the party invoking federal jurisdiction bears the burden of establishing "the requisite standing to sue," Whitmore v. Arkansas, 495 U.S. 149, 154 (1990). Unity08 did not even mention this threshold jurisdictional issue in its opening summary judgment brief.

A. The Legal Requirements to Demonstrate Article III Standing

Unity08 bears the burden of establishing that it satisfies the three elements constituting the "irreducible constitutional minimum" of standing: an injury-in-fact that is (1) "concrete," "distinct and palpable," and "actual or imminent"; (2) fairly traceable to the Commission's AO 2006-20 and not to the actions of plaintiffs themselves or a third party; and (3) "substantial[ly] likel[y]" to be redressed by the requested relief. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-66 (1992); McConnell v. FEC, 540 U.S. 93, 225-26 (2003). "'Participation in agency proceedings is alone insufficient to satisfy [these] judicial standing requirements.'" Gettman v. Drug Enforcement Admin., 290 F.3d 430, 434 (D.C. Cir. 2002) (quoting Fund Democracy, LLC v. SEC, 278 F.3d 21, 27 (D.C. Cir. 2002)). See also, e.g., City of Orrville, Ohio v. FERC, 147 F.3d 979, 985 (D.C. Cir. 1998) (same).

These elements of standing are not "mere pleading requirements but rather an indispensable part of … the plaintiff's case" that must be supported with the same manner and degree of evidence required to prove the merits of the plaintiff's claims at each successive stage

of litigation. Lujan, 504 U.S. at 561. Because the parties have moved for summary judgment, Unity08 cannot rely simply on "general factual allegations of injury." Id. Nor can it establish its standing by relying on alleged facts presented only in its briefs and argument. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990). Instead, to support its jurisdictional allegations, Unity08 must produce evidence of "specific facts" demonstrating that it indeed satisfies the requirements for Article III standing. Lujan, 504 U.S. at 561.

B. Unity08 Cannot Satisfy Article III's Requirements for Standing

Unity08 cannot satisfy the minimum constitutional requirements for standing. Its own documents and statements by its own board members and employees show that its alleged injury — fundraising limitations — is either self-imposed or speculative and would not be redressed by a favorable judicial opinion here.

Shortly after its inception and months before the Commission issued AO 2006-20, Unity08 voluntarily placed a $5,000 limit on the donations it would accept. Pls.' Statement of Material Facts As To Which There Is No Genuine Issue in Dispute ("Unity08 Facts") ¶ 66; FEC Facts ¶ 12; Memorandum in Support of Plaintiffs' Motion for Summary Judgment ("Unity08 Mem.") at 5. It did so for ideological and practical political reasons (FEC Facts ¶¶ 12-14; supra p. 5), even though plaintiffs believed that Unity08 was not governed by the FECA's contribution restrictions. FEC Facts ¶ 14.[1] Unity08 continued the policy after the Commission issued AO 2006-20, not because of that advisory opinion, but, as board member and chief executive officer Doug Bailey explained, "[b]ecause it's the right thing to do." Exh. 4, at 44:21-45:3; see also

[1] Unity08 has similarly "voluntarily refused to accept contributions from corporations, labor unions, foreign nationals or government contractors." Unity08 Facts ¶ 65.

FEC Facts ¶ 16.[2] Thus, any problems Unity08 has encountered in its fundraising are not "fairly … trace[able]" to the Commission's issuance of AO 2006-20 nor redressable by this Court. Lujan, 504 U.S. at 560; McConnell, 540 U.S. at 228 (alleged inability to compete stems not from the operation of the statute but from plaintiffs' "personal choice"); Sturm, Ruger & Co. v. Chao, 300 F.3d 867, 875 n.7 (D.C. Cir. 2002) ("[I]f … the court conclude[s] that the company did voluntarily answer the survey, then its injury will have been due to its own voluntary action, and it will lack standing to complain."). See also UNI 032 ("[N]othing about our operations will change."); FEC Facts ¶ 17.

In its opening brief and statement of facts, Unity08 focuses on its claim that AO 2006-20 supposedly forecloses Unity08's receiving and spending "loans" greater than $5,000, the amount the Act imposes as a cap on contributions to political committees. See, e.g., Unity08 Mem. at 1, 8; Unity08 Facts ¶¶ 27, 28, 49; 2 U.S.C. 431(8) ("The term 'contribution' includes … any gift, subscription, loan …."). However, "the purely speculative nature of the harm [alleged] and its remediability" precludes standing here. Gettman, 290 F.3d at 434.

Although this case is at the summary judgment stage, Unity08 has produced no evidence that, when it filed its complaint, anyone was willing to lend the organization more than $5,000. See Lujan, 504 U.S. at 569 n.4 ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.") (internal quotation marks and citation omitted; emphasis by Lujan Court). Indeed, as of March 12, 2007, Unity08 had not identified any person who wished to lend more than $5,000 to the organization. FEC Facts ¶ 18. Furthermore, there was "no way to know [at that time] whether anyone would beat a path to … [Unity08's] door,"

[2] This evidence completely refutes the unsupported allegation in plaintiffs' complaint (¶ 18) that Unity08 "voluntarily restricted donations from individuals to $5,000 per year" because of a supposed "threat of prosecution by the FEC."

Gettman, 290 F.3d at 434, were the Court to overturn the advisory opinion and open the door to Unity08's seeking sizable loans. "These sort[s] of speculative claim[s] fall[ ] far short of establishing the 'core constitutional component that a plaintiff must allege.'" Id. (internal citation omitted). See also id. at 435 ("Not only is it sheer speculation and conjecture to claim that the DEA could have generated business … for Gettman by … [taking the administrative action sought], the remedy of that supposed injury depends entirely upon 'the independent action of some third party not before the court.'") (quoting Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 42 (1976)).[3]

Unity08 also lacks standing for another, independent reason: its acceptance of more than $1,000 in contributions. Because these contributions provide an alternative basis for finding that Unity08 is a political committee, a decision by this Court overturning the advisory opinion would not alter Unity08's status as a political committee, and thus would not redress Unity08's alleged injury. As explained supra pp. 5-6, in AO 2006-20 the Commission advised Unity08 that once its planned expenditures were greater than $1,000, it would become a political committee. Under 2 U.S.C. 431(4), however, an organization can become a political committee either by making more than $1,000 in expenditures or by accepting more than $1,000 in contributions. Evidence obtained in discovery, along with evidence previously obtained, shows that by January 10, 2007, when Unity08 filed this action, it had received much more than $1,000 in "contributions" within the meaning of the Act. See FEC Facts ¶¶ 32-39. Unity08 raised most of these funds through personal contacts with potential contributors and from Unity08's solicitations on its website. See supra p. 6; FEC Facts ¶¶ 35-37. Unity08's standard solicitations explicitly state that Unity08 will use the solicited funds to help the organization attain its goal of

[3] The individual plaintiffs have not demonstrated any injury to themselves but instead appear to rest any claim of standing on their association with Unity08.

nominating and electing a Unity presidential and vice-presidential ticket in 2008. Id. The donations were thus made "for the purpose of influencing [an] election for Federal office," 2 U.S.C. 431(8)(A)(i), and "earmarked for political purposes," Buckley v. Valeo, 424 U.S. 1, 78 (1976).

Unity08 has therefore met the statutory criteria for political committee status in two ways: by making expenditures greater than $1,000 and by accepting more than $1,000 in contributions.[4] Because the advisory opinion was based on the former but not the latter, even if this Court were to overturn the Commission's determination that Unity08's planned disbursements would be "expenditures" under the Act, Unity08 would still be a political committee because of the contributions it has accepted. Thus, a decision overturning the Commission's advisory opinion would not remedy Unity08's alleged harm of having to abide by the Act's regulation of political committees. As a result, Unity08 cannot satisfy the redressability requirement of Article III standing, and a decision overturning the advisory opinion would be a judicial advisory opinion not permitted by Article III.[5]

II. UNITY08'S CHALLENGE TO ADVISORY OPINION 2006-20 FAILS TO STATE A CAUSE OF ACTION

Even if Unity08 had standing, it has failed to state a cause of action under the statute it invokes, the Administrative Procedure Act ("APA"). See 5 U.S.C. 701-06; Compl. ¶ 1 and

[4] As discussed infra pp. 20-21, the Supreme Court in Buckley, 424 U.S. at 79, construed "political committee" to reach only those organizations that are "under the control of a candidate" or that have as their "major purpose … the nomination or election of a candidate." Unity08 does not dispute that its "major purpose" since its inception has been to influence the 2008 election for president and vice president of the United States. Unity08 therefore meets the "major purpose" criterion regardless of how it meets the statutory criteria in 2 U.S.C. 431(4).

[5] If Unity08 received more than $1,000 in contributions only after it filed its complaint on January 10, 2007, then this Court would still lack jurisdiction, but on the basis of mootness, because no relief could be provided from the Act's regulation of political committees. See FEC Facts ¶¶ 32-39; National Black Police Ass'n v. District of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997).

Prayer for Relief, p.11; Trudeau v. Fed. Trade Comm'n, 456 F.3d 178, 185 (D.C. Cir. 2006) ("Although the APA does not confer jurisdiction, what its judicial review provisions … do provide is a limited cause of action for parties adversely affected by agency action.") (emphasis added). The APA supplies no cause of action here for two independent reasons: First, a Commission advisory opinion that, like AO 2006-20, gives a negative answer to a requester is not "final agency action," a prerequisite under the APA, see 5 U.S.C. 704,[6] and, second, the FECA does not allow for direct judicial review of Commission advisory opinions. See 5 U.S.C. 701(a)(1).

A. Because AO 2006-20 Is Not "Final Agency Action," It Is Not Directly Reviewable Under the APA

"When … review is sought … only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.' See 5 U.S.C. § 704." Lujan v. National Wildlife Fed'n, 497 U.S. 871, 882 (1990). See also Nevada v. Dep't of Energy, 457 F.3d 78, 85 (D.C. Cir. 2006) ("Final agency action pursuant to the Administrative Procedure Act is a crucial prerequisit[e] to ripeness.") (internal quotation marks and citation omitted). For agency action to be "final" and reviewable under the APA, it must "'mark the consummation of the agency's decisionmaking process' and either determine 'rights or obligations' or result in 'legal consequences.'" Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin., 452 F.3d 798, 806 (D.C. Cir. 2006) (emphasis in original; quoting Bennett v. Spear, 520 U.S. 154, 178 (1997)).

[6] Section 704 provides, inter alia, that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

Although the issuance of an advisory opinion marks the conclusion of the FECA's advisory opinion process, a negative opinion — that is, one that opines that the proposed behavior is unlawful or must conform to unwanted restrictions — neither determines "rights or obligations" nor results in "legal consequences." Under 2 U.S.C. 437f, an advisory opinion is binding only in the sense that it may be relied on affirmatively by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or activity. 2 U.S.C. 437f(c)(1)(B), (2). Thus, if the opinion advises a requester that his proposed actions satisfy the Act's requirements and the requester relies in good faith on that advice in proceeding with his plans, his reliance protects him from sanctions for his actions.[7] In contrast, if the opinion advises that the proposed actions would run afoul of the Act, the opinion does not bind the Commission or the requester. See 2 U.S.C. 437f(c)(2); United States Defense Comm. v. FEC ("USDC"), 861 F.2d 765, 771 (2d Cir. 1988) ("[T]o the extent that the advisory opinion does not affirmatively approve a proposed transaction or activity, it is binding on no one — not the [Federal Election] Commission, the requesting party, or third parties.").[8]

Because it is not binding, a negative advisory opinion makes no final determination of any "rights or obligations" nor changes any legal relationships. See 2 U.S.C. 437f(b) (Commission may initially propose a "rule of law" "only as a rule or regulation"). When the Commission issues such an opinion, it does not bind itself to investigate the requester's actions in the future or to bring an enforcement action against that person. Rather, the Commission

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[7] If material facts are different, however, the advisory opinion provides no protection from sanctions. See FEC v. National Conservative PAC, 647 F. Supp. 987, 992, 995 (S.D.N.Y. 1986) (reliance on advisory opinion unwarranted where facts different).

[8] The lack of binding effect makes particular sense in this context because an advisory opinion, although highly fact-dependent, rests on the "facts" presented by the requester in his request; the Commission undertakes no independent investigation of those purported facts, which usually concern proposed future activity.

retains the discretion to review the activity later, change its view, and find no violation or exercise its prosecutorial discretion. Moreover, if the Commission adheres to its advisory opinion decision in an enforcement proceeding, it can seek voluntary compliance with the FECA and resolve alleged violations of the law through conciliation; it has no authority, with one exception inapplicable here, to make binding adjudications of liability for violations of the statute.[9] Instead, if the Commission cannot successfully conciliate with an alleged violator of the Act, its enforcement authority is limited to filing a federal court complaint alleging a violation and litigating de novo the allegation that the defendant violated the Act. Only a federal court can issue a final, legally binding decision that determines liability under the Act. See 2 U.S.C. 437g(a)(6). And if the requester's activity becomes the subject of a Commission investigation, the requester retains his full range of rights to defend himself before the Commission during any administrative proceedings, see 2 U.S.C. 437g(a)(1)-(5), and if an enforcement suit is filed, in federal court, see 2 U.S.C. 437g(a)(6).[10]

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[9] The one exception concerns the Commission's administrative fines program, 2 U.S.C. 437g(a)(4), under which the Commission informally adjudicates fines for certain reporting violations, e.g., failure to report and tardy reporting.

[10] Unity08 refers to a supposed "threat of prosecution." See, e.g., Compl. ¶ 18; Unity08 Mem. at 1, 8. As explained above, however, the issuance of AO 2006-20 mandates no enforcement action by the Commission. If the Commission one day exercises its prosecutorial discretion and files an enforcement suit, Unity08 could defend itself by presenting to the court the same arguments it now presents to this Court. In California Medical Ass'n v. FEC, 453 U.S. 182, 187 (1981), for example, the Supreme Court found that constitutional claims could be raised as defenses to section 437g enforcement cases. A number of other cases raising constitutional claims have come to court only at the conclusion of the FECA's administrative enforcement process. See, e.g., FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 244-45 (1986); FEC v. National Right to Work Comm., 459 U.S. 197 (1982). See also, e.g., W.E.B. DuBois Clubs v. Clark, 389 U.S. 309, 311-13 (1967) ("It is evident that Congress has provided a way for appellants to raise their constitutional claims."). Thus, in terms of the APA, this is not an "agency action for which there is no other adequate remedy in court." 5 U.S.C. 704.

AO 2006-20 is a negative advisory opinion. As the Second Circuit explained in describing such an opinion, it is

> final only in a "tautological sense." Indeed, if a person proceeded to act contrary to an FEC advisory opinion, she would be entitled to all of the enforcement protections, including conciliation, conference, persuasion and the like, provided under 2 U.S.C. § 437g. How may we call an advisory opinion "final" if the FEC might later be convinced to change its mind and agree to a compromise?

USDC, 861 F.2d at 772 (quoting ITT v. Local 134, Int'l Bhd. of Elec. Workers, 419 U.S. 428, 443-44 (1975)). Unity08 sought a Commission opinion that Unity08 would not become a "political committee" under the Act so that it could take proposed actions that political committees cannot. Relying on the facts supplied by Unity08, the Commission opined that the organization would become a political committee, subject to the regulations for such an entity, if it made expenditures of more than $1,000, and that its proposed disbursements to gain ballot access would be expenditures under the Act. Because Unity08 would not be legally bound in any future enforcement proceeding by the opinion that its proposed activities would be unlawful, the AO does not conclusively determine Unity08's legal rights or obligations and it is not "final agency action" subject to judicial review under the APA.

B. The Act Does Not Allow for Direct Judicial Review of AO 2006-20

Although any person "adversely affected or aggrieved by agency action," 5 U.S.C. 702, is entitled under the APA to judicial review, "before any review at all may be had, a party must … clear the hurdle of § 701(a)." Heckler v. Chaney, 470 U.S. 821, 828 (1985). That section states in relevant part that the judicial review provisions apply "except to the extent that" the relevant statutes "preclude judicial review." 5 U.S.C. 701(a)(1). The FECA includes no provision for direct review of Commission advisory opinions, and the statute precludes judicial review of plaintiffs' challenge to AO 2006-20.

"[W]hether … a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." Block v. Community Nutrition Inst., 467 U.S. 340, 345 (1984). See also id. at 349 (referring to "specific language or specific legislative history that is a reliable indicator of congressional intent ... [or] … inferences drawn from the statutory scheme as a whole"); Chaney, 470 U.S. at 828. The language, structure, and legislative history of the FECA show that Congress did not intend to permit direct review of FEC advisory opinions.

The FECA establishes detailed administrative schemes, and Congress narrowly provided for judicial consideration only of two specified Commission actions under the statute: (1) the Commission's dismissal of, or arbitrary failure to proceed with consideration of, an administrative complaint, 2 U.S.C. 437g(a)(8) (suit by the administrative complainant), and (2) Commission adjudications under the administrative fines program, 2 U.S.C. 437g(a)(4)(C)(iii).[11] Neither of these provisions authorizes direct review of Commission advisory opinions.[12] Congress's decision not to include in the detailed procedural structure of the FECA any

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[11] In addition, the Commission itself may seek judicial resolution of some matters: e.g., subpoena enforcement petitions, 2 U.S.C. 437d(b); enforcement suits it files against alleged violators of the Act (after attempted conciliation fails), 2 U.S.C. 437g(a)(6); petitions for civil contempt for violation of a court order entered in an enforcement action, 2 U.S.C. 437g(a)(11); and suits brought by the Commission (or certain private parties) under 2 U.S.C. 437h to seek a declaratory judgment construing the constitutionality of a provision of the FECA.

[12] Congress provided for broad judicial review of Commission determinations under the Presidential Election Campaign Fund Act, 26 U.S.C. 9001, 9011(a), and the Presidential Primary Matching Payment Act, 26 U.S.C. 9031, 9041(a). In sharp contrast, the judicial review provisions of the FECA are very limited. When Congress empowered the Commission to issue advisory opinions regarding these public financing statutes, it chose not to place that authority in the financing statutes themselves and instead granted the Commission authority to issue advisory opinions about the Title 26 statutes as part of the FECA. See 2 U.S.C. 437f. Congress thereby indicated that it was treating advisory opinions as a special category of Commission actions not subject to the broad judicial review authorized in the public funding statutes.

provision authorizing judicial review of advisory opinions evidences a congressional intent to preclude direct judicial review of those opinions. See, e.g., Block, 467 U.S. at 346-47; Pinar v. Dole, 747 F.2d 899, 910 (4th Cir. 1984) ("The absence of a provision for direct judicial review of prohibited personnel actions among the carefully structured remedial provisions of the CSRA is evidence of Congress' intent that no judicial review in district court be available for the actions involved in this case."). Indeed, legislative history shows that, although Congress debated whether to provide for congressional review of some advisory opinions, no one even advocated judicial review of advisory opinions. See H.R. Rep. No. 1057, 94th Cong., 2d Sess. 44-45 (1976), reprinted in FEC, Legislative History of the Federal Election Campaign Act Amendments of 1976, at 1038-39 (1977).

Congress set out an unusually elaborate framework for the Commission's administrative enforcement of the Act. The framework gives respondents multiple opportunities to respond to allegations against them and requires the Commission to attempt conciliation if it nonetheless concludes that a violation has occurred. See generally 2 U.S.C. 437g(a). The Commission may bring the matter to court only if conciliation fails and a Commission majority chooses to exercise its prosecutorial discretion to bring a civil enforcement suit in district court. 2 U.S.C. 437g(a)(6)(A). Thus, Congress not only charged the Commission with enforcement of the Act, but also set out special procedures tailored to the delicate area in which it regulates. See Galliano v. U.S. Postal Service, 836 F.2d 1362, 1370 (D.C. Cir. 1988); In re Carter-Mondale Reelection Comm., 642 F.2d 538, 542-43, 545 (D.C. Cir. 1980).

Permitting judicial review of negative advisory opinions would create an end run around Congress's carefully designed enforcement scheme and would bring issues to court unnecessarily and prematurely. Unity08 has presented nothing to suggest that Congress

intended, without any mention in the Act or legislative history, to permit organizations to bypass the "first-amendment-prompted arrangements Congress devised for FECA enforcement actions," Galliano, 836 F.2d at 1370, by the simple expedient of seeking an advisory opinion and then requesting judicial resolution if the answer is negative. As the court in USDC found, "[n]othing in the legislative history of section 437f indicates that Congress thought advisory opinions would be reviewable." 861 F.2d at 771. This Court should therefore reject Unity08's attempt to obtain direct judicial review of AO 2006-20.

III. EVEN IF THE COMMISSION'S DECISION IN ADVISORY OPINION 2006-20 IS REVIEWABLE, THAT DECISION IS A REASONABLE CONSTRUCTION OF THE ACT

A. Standard of Review

The Commission's advisory opinions are entitled to substantial deference under Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842 (1984). "FEC advisory opinions … reflect the Commission's considered judgment made pursuant to congressionally delegated lawmaking power…." FEC v. National Rifle Ass'n of America ("NRA"), 254 F.3d 173, 184-86 (D.C. Cir. 2001). Cf. In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000) (holding that Commission's probable cause determination and underlying statutory interpretation warrant Chevron deference).

Under the "familiar two-step Chevron framework," a court "first ask[s] 'whether Congress has directly spoken to the precise question at issue,' in which case [the court] 'must give effect to the unambiguously expressed intent of Congress.' If the 'statute is silent or ambiguous with respect to the specific issue,' however, [the court] move[s] to the second step and defer[s] to the agency's interpretation as long as it is 'based on a permissible construction of the statute.'" Rhinelander Paper Co. v. FERC, 405 F.3d 1, 6 (D.C. Cir. 2005) (quoting Noramco

of Del. v. DEA, 375 F.3d 1148, 1152 (D.C. Cir. 2004) (other citations omitted)). Whether a competing interpretation of the statute might also be reasonable is irrelevant. "[U]nder Chevron, courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." NRA, 254 F.3d at 187 (quoting Serono Labs, Inc. v. Shalala, 158 F.3d 1313, 1321 (D.C. Cir. 1998)).

Moreover, the Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981). Accord, United States v. Kanchanalak, 192 F.3d 1037, 1049 (D.C. Cir. 1999) ("[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference.'") (citation omitted).

B. The Commission Reasonably Determined that Unity08's Purpose and Planned Expenditures Would Require It to Register and Report as a Political Committee

The ultimate issue in AO 2006-20 is whether Unity08's purpose and planned activities require the organization to register and report as a political committee, and the Commission reasonably concluded that they do. The Act defines "political committee" as "any committee, club, association, or other group of persons which receives contributions … or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. 431(4)(A). In turn, a "contribution" includes "any gift, subscription, loan, advance, or deposit 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(8)(A)(i), and an "expenditure" includes "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." 2 U.S.C. 431(9)(A)(i).[13]

When the Supreme Court construed these statutory criteria, however, it found that they "could be interpreted to reach groups engaged purely in issue discussion" because "'political committee' is defined [in the Act] only in terms of amounts of annual 'contributions' and 'expenditures.'" Buckley v. Valeo, 424 U.S. 1, 79 (1976). Thus, to avoid "vagueness problems," the Court concluded that "[t]o fulfill the purposes of the Act [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." Id. at 79 (emphasis added). See also FEC v. Massachusetts Citizens For Life ("MCFL"), 479 U.S. 238, 252 n.6 (1986) ("[T]his Court said [in Buckley] that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'") (quoting Buckley, 424 U.S. at 79). Accordingly, under the Act, Unity08 must register and report as a political committee if its "major purpose" is the nomination or election of federal candidates and it meets the $1,000 threshold level of contributions or expenditures in 2 U.S.C. 431(4).

An organization's major purpose may be established by, inter alia, its public statements of purpose. FEC v. Malenick, 310 F. Supp. 230, 234 (D.D.C. 2004); FEC v. GOPAC, Inc., 917 F.Supp. 851, 859 (D.D.C. 1996).[14] It is undisputed that when Unity08 requested an advisory

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[13] The Commission's regulations define "anything of value" to include, among other things, all in-kind contributions; that is, "the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services" is a contribution, 11 C.F.R. 100.7(a)(1)(iii), and/or an expenditure, 11 C.F.R. 100.8(a)(1)(iv)(A).

[14] Unity08 mischaracterizes (Unity08 Mem. at 20 n.11) Malenick. Contrary to Unity08's claims, the court did rely in part upon the defendant's public statements of its purpose.

opinion, it informed the Commission that its "Goal One is to elect a Unity Ticket for President and Vice President of the United States in 2008." FEC Facts ¶ 7 (quoting Exh. 2 at 2) (emphasis in original). See also Compl. ¶ 11 ("Unity08's website defines its goal as 'getting our country back on track by nominating and electing a Unity Ticket in the '08 presidential election.'"). Unity08 further explained to the Commission that to accomplish its goal, it "intends to qualify for ballot positions in certain key states for the offices of the President and Vice President of the United States" and intends "to select, using a 'virtual' convention conducted over the Internet, candidates for the office of President and Vice President of the United States to run in those ballot positions." FEC Facts ¶ 7. It is hard to imagine a more clear articulation of a stated purpose to nominate and elect federal candidates, and Unity08 has never claimed or implied that it is a group "engaged purely in issue discussion." Buckley, 424 U.S. at 79. Thus, the Commission correctly concluded that Unity08's "self-proclaimed major purpose is the nomination and the election of a presidential candidate and a vice-presidential candidate" (Exh. 3 at 5 (AO 2006-20)), and the vagueness concerns the Court raised in Buckley concerning pure issue advocacy groups are simply inapplicable here.

The Commission also properly concluded that "[m]onies spent by Unity08 to obtain ballot access through petition drives will be expenditures," and that once it spends more than $1,000 on those efforts it will become a political committee. Id. at 3. Because the Act is silent with respect to whether ballot access expenses are expenditures, under Chevron step two the question before the Court is whether the Commission's interpretation of the term "expenditure" to include such expenses is reasonable. It is.

Furthermore, the court did not, as Unity08 suggests, find that the defendant had paid money directly to any candidate.

In its advisory opinion request, Unity08 stated its plans to qualify for ballot access in certain key states through petitions and, if necessary, litigation. Exh. 2 at 3. In concluding that Unity08's expenses to qualify for ballot access would be payments for the purpose of influencing a federal election, and hence expenditures within the meaning of the Act, the Commission reasonably relied upon two previous advisory opinions. In Advisory Opinion 1994-05, the Commission had noted that amounts spent seeking signatures on nomination petitions were "expenditures." Exh. 28. In Advisory Opinion 1984-11, the Commission had similarly observed that the requestor's expenses included "expenditures" to obtain signatures for nomination petitions to achieve ballot access in several states as a presidential candidate. Exh. 29. Thus, the Commission adhered to the reasonable view it has held for more than two decades that expenses for ballot access are "expenditures" under the Act, and Congress, despite opportunities to overrule that interpretation when amending the Act, has not done so. This longstanding interpretation is therefore entitled to "particular deference." Barnhart v. Walton, 535 U.S. 212, 220 (2002) (courts "will normally accord particular deference to an agency interpretation of longstanding duration"); Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 7-8 (D.C. Cir. 2003) (same).

Although Unity08 does not deny as a general matter that gaining a place on the ballot is an action whose purpose is to influence an election, it nevertheless contends (Unity08 Mem. at 18-19) that the Commission improperly relied upon its prior advisory opinions because they purportedly turned on the status of the requestors as "candidates." But Unity08's argument is based on a false premise and, in any event, irrelevant. In AO 1994-05, the requestor had not yet become a Senate "candidate" within the meaning of the Act, and the Commission addressed one

of the same questions presented in this case: whether disbursements for ballot access count as "expenditures" for purposes of meeting one of the Act's statutory thresholds.

> The question of whether you are a candidate under the Act and Commission regulations depends upon the amount of financial activity by you…. When financial activity to influence your election exceeds $5,000 in either contributions received or expenditures made, you are required to file as a Senate candidate.

Exh. 28 at 2. In a footnote immediately following this text, the Commission further explained that "expenditures to influence your election would include amounts you spend … to promote yourself for the general election ballot by seeking signatures on nomination petitions." Id. at 4 n.1 (emphases added). Similarly, in AO 1984-11, the Commission observed that the requestor's expenses included "campaign expenditures" to obtain signatures for nomination petitions that would qualify as "qualified campaign expenses" under the Presidential Primary Matching Payment Account Act. Exh. 29 at 3.

Neither of these prior advisory opinions suggested that the Commission's determination that expenses to achieve ballot access were "expenditures" turned on whether the spending was done by someone who was already a candidate. To the contrary, AO 1994-05 explicitly found the opposite: that such disbursements would be treated as "expenditures" before someone has become a "candidate" and would count towards the statutory requirement to reach that very status. For the same reason, the Commission found in AO 2006-20 that Unity08's ballot access expenses would count as "expenditures" towards the $1,000 threshold necessary for political committee status. What matters is the nature of the ballot access activity, not who is doing it. Obtaining a place on the ballot as a choice for voters in a particular election is unambiguously an act whose purpose is to influence that election, regardless of whether the actor has already achieved status as a "candidate" or a "political committee."

Moreover, "unlike organizations that secure ballot access for themselves in order to field a slate of federal and non-federal candidates" (Exh. 3 at 4 (AO 2006-20)), Unity08 has stated that its goal is limited to nominating and electing the president and vice president in 2008, so it has already declared exactly which federal offices and which election cycle it seeks to influence. Thus, the Commission reasonably concluded that even though Unity08 plans to qualify for ballot access as an organization rather than in the name of identified candidates, it "is, in effect, using its name as a placeholder for its candidates' names on the ballot," and that payments by Unity08 to obtain ballot access for its two candidates will therefore be expenditures. Id. In other words, "in promoting itself though petition drives to obtain ballot access, Unity08 is promoting its presidential and vice-presidential candidates." Id.[15]

The Commission's conclusion in AO 2006-20 is also consistent with its "testing the waters" regulation, which creates a limited exemption from the Act's definition of "expenditure": "Payments made solely for the purpose of determining whether an individual should become a candidate are not expenditures." 11 C.F.R. 100.131. The regulation specifically provides, however, that expenses for activities that indicate that an individual has decided to become a candidate are not covered by this limited exemption. 11 C.F.R. 100.131(b). The regulation then specifically provides that "tak[ing] action to qualify for the ballot under State law" is not exempt activity. 11 C.F.R. 100.131(b)(5). Thus, under this regulation, disbursements for such ballot access activity are expenditures.

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[15] The Commission's conclusion that payments by Unity08 for its petition drives will be expenditures for the purpose of influencing a federal election is buttressed by the fact that Unity08 hopes to attract electable candidates through a successful ballot access campaign. Unity08 itself has argued that that the two are inextricably linked: It concedes (Unity08 Facts ¶¶ 30, 79) that its ability to entice qualified candidates to seek the Unity08 nomination will depend on the success of its ballot access efforts, so it wants to gain ballot access both as a prerequisite for having its candidates elected and to increase its chances of being able to attract a candidate to run on its ticket who has a credible chance of winning.

Nevertheless, Unity08 conclusorily asserts (Mem. at 23) that its present efforts are somehow not truly electoral, but rather "more akin to those activities having to do with ballot initiatives and other activities in which there are substantial efforts to communicate directly with members of the public on matters relating to governance and political philosophy." The facts demonstrate otherwise. Unity08 has provided no evidence to the Commission or this Court that it has spent or plans to spend any time or money creating or supporting ballot initiatives or communicating with the public about specific issues — other than to explain, as a reason to support its ticket, that the two-party system is broken. Its expenditures are directed towards developing an online system to nominate its choices for president and vice president, gaining ballot access to elect those nominees, and raising money to further those efforts.[16] FEC Facts ¶¶ 20-25. Moreover, although Unity08 has at times described itself as a "nascent political party" (id. ¶ 4), it has expressly disavowed any interest at this time in creating a permanent political party, nominating state and local candidates, and nominating or supporting any federal candidates other than for the offices of president and vice president in 2008. Unity08 Facts ¶¶ 28, 30.[17]

In sum, having found that Unity08's major purpose was campaign activity and that Unity08 would make expenditures conducting petition drives to obtain ballot access, the Commission concluded that once Unity08 has made more that $1,000 in expenditures, it would

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[16] A group whose primary objective is to nominate and elect the next president and vice-president (FEC Facts ¶¶ 7(a), 29; Compl. ¶ 11) cannot, by definition, be a ballot initiative group. "Referenda are held on issues, not candidates for public office." First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978). Because Unity08 is not a ballot initiative group, its reliance (Unity08 Mem. at 24) on Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 297 (1981), where the Court struck down an ordinance placing a $250 limit on contributions to committees formed to support or oppose ballot measures, is misplaced.

[17] Even if Unity08 could be considered a political party, it would not change the conclusion that its ballot access expenses are "expenditures" under the Act. Political parties are one type of political committee. See infra p. 27.

be required to register and report to the Commission pursuant to the Act as a political committee. This reasonable conclusion, consistent with the statute and applicable precedent, is entitled to deference under Chevron and should be upheld.

C. Contrary To Unity08's Arguments, Political Committee Status Does Not Depend Upon An Organization's Having Already Selected Specific Candidates To Support Or Nominate

Unity08's arguments suffer from a repeated, fatal flaw: the assumption that an organization like itself cannot become a political committee until after it has identified a specific candidate whom it will support or nominate for a federal office.

1. Unity08 Conflates the "Major Purpose" Test with the "Express Advocacy" Test

As explained above, the Supreme Court in Buckley adopted the major purpose test to limit the scope of the Act's definition of "political committee" to avoid improper regulation of "groups engaged purely in issue discussion." 424 U.S. at 79. According to that test, "'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." Id. (emphasis added). The Court did not state or suggest, however, that the "major purpose" of an organization needs to be the nomination or election of a "specific" or "already identified" candidate.

Despite the plain language of Buckley, Unity08 erroneously argues (Mem. at 13; emphasis added) that "[b]ecause Unity08 does not have as its purpose the nomination or election of any specific individual it is not a 'political committee' as Buckley has defined that term." But the whole point of a nomination process is to identify which candidate the organization will support. Thus, Unity08's interpretation is nonsensical: No organization that undertakes a competitive nomination process could meet the major purpose test if that test required the

organization to have already selected the "specific individual" it will nominate.[18] Indeed, if Unity08's view of the law were applied to political parties — which are one type of political committee, see 2 U.S.C. 431(4)(C), 431(16); 11 C.F.R. 100.5(e)(4) — it would create a vast hole in the Act's regulatory framework. Under Unity08's reasoning, no political parties, including the Democratic and Republican parties, would qualify as political committees in each election cycle until they had nominated their candidates for federal office. Under such an interpretation, the parties would be free to solicit donations unlimited in amount for most of each election cycle, and become subject to the statutory contribution limits only for the relatively short period between the primary and general elections. Besides being illogical and contrary to the plain language of Buckley, Unity08's interpretation in effect reads the term "nomination" out of the major purpose test and would deregulate huge amounts of political party activity.

Unity08's error seems to derive from its conflation of the "major purpose" test with the "express advocacy" test. The two tests are distinct, and the express advocacy test is irrelevant to the Commission's decision in AO 2006-20. The "express advocacy" test arose out of the Supreme Court's concern that because of vagueness in the statutory definition of "expenditure," certain statutory regulation of expenditures might impermissibly burden communications dedicated solely to addressing issues of public concern. Buckley, 424 U.S. at 40-42, 79-80. See also McConnell, 540 U.S. at 190-91. The Court held that when "expenditures" are made by candidates or political committees, the term "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." Buckley, 424 U.S. at 79. The Court explained, however, that when the maker of the expenditure is not under the

[18] Unity08's argument cannot be that it lacks identified candidates to compete for its nomination, because at least one person has already identified himself as a candidate for the Unity08 ticket and a few dozen potential candidates have been identified by Unity08 itself. See FEC Facts ¶ 27.

control of a candidate, or its major purpose is not the nomination or election of a candidate, "the relation of the information sought to the purposes of the act may be too remote." Id. at 79-80. For such organizations, the Court construed the term "expenditure" as used in the Act's disclosure provisions to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80 (emphasis added). This "clearly identified" criterion, however, is not part of, or relevant to, the Court's "major purpose" test.[19]

Unity08's reliance upon MCFL is similarly flawed. Unity08 erroneously argues (Mem. at 19-20) that MCFL stands for the proposition that unless an organization's major purpose is the election of a particular candidate, it cannot be a "political committee" under the Act. In MCFL, however, neither party contended that MCFL was a political committee, and the Court simply noted that MCFL was not. See 479 U.S. at 252 n.6 (plurality) (citing two ways organization could meet Buckley's major purpose test, Court explained that "[i]t is undisputed on this record that MCFL fits neither of these descriptions. Its central organizational purpose is issue advocacy."). The Court also noted that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." Id. at 262 (emphasis added). The Court's general reference in dicta to "campaign activity" did not remotely suggest that an

[19] Unity08's argument is also mistaken to the extent it appears to import the express advocacy concept of a clearly identified candidate into the issue of whether the Commission reasonably concluded that Unity08's expenses for ballot access are expenditures. The express advocacy test makes no sense in relation to spending for campaign activities that do not involve public advocacy. In Buckley, the Court established the express advocacy test to avoid vagueness that could "compel[] the speaker to hedge and trim." 424 U.S. at 42-43 (quoting Thomas v. Collins, 323 U.S. 516, 535 (1945)). So long as they are made for the purpose of influencing a federal election, disbursements that qualify as "expenditures" under the Act, 2 U.S.C. 431(9), include purchases, payments, distributions, loans, advances, and gifts, which like payments for ballot access, do not implicate the concerns about chilling issue speech that led the Court to articulate the express advocacy test.

organization's major purpose had to focus on specific, already identified candidates in order for the organization to become a political committee.

In any event, the contested issues in MCFL concerned whether the corporation's newsletters were prohibited corporate expenditures under 2 U.S.C. 441b, and if so, whether that provision could be constitutionally applied to MCFL. To resolve those issues, the Court construed the term "expenditure" as it regulates independent spending under 2 U.S.C. 441b and concluded, as the Buckley Court had, that the term must be limited to "communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. at 248-49. The Court never suggested, however, that the express advocacy test was to be applied in determining the nature of MCFL's major purpose. To the contrary, the Court noted that MCFL was not a political committee because its central purpose was issue advocacy; MCFL's newsletters had indeed clearly identified candidates, but that fact was irrelevant to the Court's analysis. See id. (finding MCFL's communications expressly advocated the election of clearly identified candidates).

Thus, MCFL's relevance to this case rests upon the Court's reaffirmation of the major purpose test as articulated in Buckley and the dichotomy it describes between whether an "organization's major purpose may be regarded as campaign activity," MCFL, 479 U.S. at 262, or "issue advocacy," id. at 252 n.6 — without defining "campaign activity" as requiring specifically identified candidates. As explained above, Unity08 is not an issue advocacy organization. Rather, it has repeatedly affirmed that its principal objective is to nominate and elect the next president and vice president of the United States.

2. Unity08's Statutory Interpretation and Concept of Corruption Are Contrary to the Plain Language of the Act and Supreme Court Precedent

As part of its argument that it is not a political committee, Unity08 makes the extraordinarily claim (Mem. at 12) that even donations to political committees cannot be "contributions" under the Act unless the committee already knows which specific candidates will be supported with the donations. There is no support for this view in either the plain language of the Act or Supreme Court precedent. Nowhere in the Act's definition of "contribution," 2 U.S.C. 431(8), is there any limiting language stating that candidates must be specified or clearly identified in order for "anything of value" to be given for the "purpose of influencing any election for Federal office," and Unity08 has not cited a single case that supports its novel construction of section 431(8). As explained below, Unity08's argument ignores the Act's broad definition of the term "contribution," Supreme Court cases interpreting that term, and the Court's longstanding concept of corruption.

Unity08 asserts (Mem. at 9) that "[s]ince corruption, actual or potential, has been deemed to be related to the existence of actual candidates who have declared themselves as running for elected office, regulation of donations or expenditures is not constitutionally permissible in the absence of such actual candidates." In Buckley, however, the Supreme Court rejected that kind of narrow construction and explained that it construed the term "contribution" broadly

> to include not only contributions made directly or indirectly to a candidate, political party, or campaign committee, and contributions made to other organizations or individuals but earmarked for political purposes, but also all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate.

424 U.S. at 78 (emphasis added). More generally, the Court has deferred to Congress "as to the need for prophylactic measures where corruption is the evil feared." FEC v. National Right to

Work Comm., 459 U.S. 197, 210 (1982). The Court has repeatedly upheld the Act's contribution restrictions and measures to foreclose circumvention of them because they serve compelling governmental interests in preventing corruption and the appearance of corruption. See Buckley, 424 U.S. at 26-28, 46-47; McConnell, 540 U.S. at 143-45; FEC v. Colorado Republican Federal Campaign Comm., 533 U.S. 431, 456 (2001) ("[A]ll Members of the Court agree that circumvention is a valid theory of corruption."); FEC v. Beaumont, 539 U.S. 146, 160 (2003); California Medical Ass'n v. FEC ("CMA"), 453 U.S. 182, 197-98 (1981) (upholding contribution limits applied to independent political committees). In particular, the Court has upheld limits on the amount of money that individuals and groups may contribute to intermediaries, such as political parties and other political committees, in order to prevent circumvention of the Act's limits on contributions to candidates. In those circumstances, the Court has upheld these contribution limits even though the money did not flow directly or indirectly to identified candidates.

In Buckley, the Court upheld the $25,000 limitation on total contributions by an individual in any calendar year because the restriction "serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party." 424 U.S. at 38. The Court's focus on "unearmarked contributions" clearly forecloses Unity08's argument that money donated to a political committee cannot be considered a contribution unless a committee and donor already know which specific candidate will be supported by that

contribution at the time it is given. See Unity08 Mem. at 15 ("[A] donation is not a contribution unless it is used in support or opposition of a specific candidate.").[20]

Similarly, in CMA, the Court upheld the Act's $5,000 limit on contributions to multicandidate political committees as a means of preventing the circumvention of the contribution limitation upheld in Buckley, which otherwise "could be easily evaded." CMA, 453 U.S. at 198 (plurality). But CMA went even further in demonstrating that the Court's broad concept of corruption has nothing to do with whether a donation is made for the purpose of supporting or opposing a particular candidate. In that case, the appellant organization argued, inter alia, that donations earmarked for "administrative support" lacked any potential to corrupt the political process and that the Act's $5,000 contribution limitation to multicandidate political committees, 2 U.S.C. 441a(a)(1)(C), was unconstitutional as applied to this type of non-candidate specific donation. CMA, 453 U.S. at 198 n.19. The Court rejected that argument, holding that donations for administrative support were indeed contributions under that Act. Id. at 198 n.19, 201. The Court explained at length that due to the fungibility of money, it did not matter that a donation was not made to support a specific candidate; it could still be converted into a form with corruptive potential:

> If unlimited contributions for administrative support are permissible, individuals and groups like CMA could completely dominate the operations and contribution

[20] Even if Unity08 were correct that a donation cannot be a "contribution" unless it is tied to the support of a specific or clearly identified candidate, it would still be the case that Unity08 has accepted contributions. Unity08 has accepted funds to support two specific candidates: its choices for president and vice-president in the 2008 election. As the Commission explained in AO 2006-20, Unity08 "is, in effect using its name as placeholder for its candidates." Exh. 3 at 4. In Advisory Opinion 2003-23 (Exh. 30), the Commission had similarly concluded that candidates identifiable as to specific office, party affiliation, and election cycle were "clearly identified" within the meaning of the Commission's earmarking regulations, 11 C.F.R. 110.6(b)(1). In Buckley, 424 U.S. at 43-44 n.51, the Court found that phrases such as the "Democratic Presidential nominee" meet the statutory definition of "clearly identified" — so, too, would a reference to the "Unity08 Presidential and Vice-Presidential Candidates."

> policies of independent political committees such as CALPAC. Moreover, if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions, the use of which might well be dictated by the committee's main supporter. In this manner, political committees would be able to influence the electoral process to an extent disproportionate to their public support and far greater than the individual or group that finances the committee's operations would be able to do acting alone. In so doing, they could corrupt the political process in a manner that Congress, through its contribution restrictions, has sought to prohibit.

Id. at 198 n.19.[21] Likewise, in MCFL the Court acknowledged that many contributions are made without knowledge of what the money will be used for, including whether a specific candidate will be the beneficiary of the donation.

> It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support.… Any contribution therefore necessarily involves at least some degree of delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor.

MCFL, 479 U.S. at 261.

The lower courts have also consistently applied the Act's definition of "contribution" in circumstances that did not involve the specific threat of corruption vis-à-vis an identified candidate as posited by Unity08. In FEC v. Ted Haley Congressional Comm., 852 F.2d 1111 (9th Cir. 1988), the Ninth Circuit held that a donation to a candidate was, in fact, a contribution even though made after the election, which the candidate had already lost. Although the candidate was no longer running for office and indicated that he would not be a candidate for public office again, id. at 1112, the court held that post-election loan guarantees made for him were contributions, despite the candidate's protestations that the timing of the guarantees established that their purpose was not to influence an election. Similarly, in United States v.

[21] Justice Blackmun's concurrence also concluded that contributions to political committees could be limited to prevent evasion of the limitations on contributions to a candidate or his authorized committee. CMA, 453 U.S. at 203.

Goland, 959 F.2d 1449, 1453 (9th Cir. 1992), the court found that the defendant made excessive campaign contributions to an independent candidate for Senate even though the candidate did not know the source of the contribution and the contributor was actually trying to elect a different candidate. And in Malenick, the court held that the defendant had accepted excessive contributions, although the court did not make any findings that the contributor knew that his donations would support or oppose any particular candidates. 310 F. Supp. 2d at 236; 2005 WL 588222, at *1 (D.D.C. Mar. 7, 2005) (granting FEC's motion for reconsideration) (citing CMA).

Finally, Unity08's statutory interpretation and theory of corruption would eviscerate the Act's contribution limits. Thousands of political committees (commonly known as PACs) collectively raise hundreds of millions of dollars in contributions each election cycle. Very few of these committees ever seek ballot access for any candidates but instead make contributions or expenditures to support or oppose candidates. Today, more than a year and a half from the 2008 elections, it is likely that most of these political committees have not yet identified which candidates they will support and may not do so for many months. Under Unity08's interpretation of "contribution," determining whether political committees' receipts are contributions requires tracing the use of those funds to determine if they are actually used to support or oppose specific candidates. So, under this theory, money received today might not become a "contribution" for a year or more, and tracing such receipts and disbursements would at best be an accounting nightmare.[22] Even if such an accounting task were feasible, however, because money is fungible (as the CMA decision explains), the end result of such a system

[22] Moreover, under 2 U.S.C. 431(4), an organization becomes a political committee if it either receives contributions or makes expenditures in excess of $1,000 per year, so it could satisfy the statutory criteria without ever spending a dime to support a specific candidate, as long as it receives more than $1,000 "for the purpose of influencing an election for Federal office." 2 U.S.C. 431(8)(A)(i).

would be an invitation to widespread evasion of the Act's contribution limits. In short, Unity08's interpretation of "contribution" and narrow view of corruption has been rejected by the Supreme Court and cannot undermine the reasonableness of the Commission's decision in AO 2006-20.

3. Unity08 Is Not an Organization Seeking Only to Convince a Person to Become a Candidate for Federal Office

Unity08 relies (Mem. at 15-23) upon FEC v. Machinists Non-Partisan Political League ("Machinists"), 655 F.2d 380 (D.C. Cir. 1981), to argue again that the organization cannot become a political committee until it first identifies a specific candidate to support, but that case actually bolsters the Commission's position, not Unity08's. In Machinists, the D.C. Circuit held that the Commission lacked subject-matter jurisdiction to investigate several organizations seeking to "draft" Senator Kennedy to become a candidate for president. Id. at 396. The court determined that the draft groups were not political committees and, therefore, not within the Commission's statutory jurisdiction. But the court's analysis relied directly upon the language from Buckley discussed above and examined whether the draft groups' "major purpose … [wa]s the nomination or election of a candidate." Id. at 392 (quoting Buckley, 424 U.S. at 79). The court determined that the draft groups were not organized to nominate or elect Mr. Kennedy, but for the limited purpose of "attempt[ing] to convince the voters — or Mr. Kennedy himself — that he would make a good 'candidate,' or should become a 'candidate.'" Id. at 396. Relying on this distinction, the D.C. Circuit concluded that the draft organizations did not fall within the Buckley Court's limited definition of "political committee." Id. at 396.

The same analysis applied here leads to a contrary result because the facts are completely different. Unity08 has presented uncontroverted evidence that "as an organization [it] has no plans to draft any candidate." Unity08 Facts ¶ 56. Thus, by its own proof, it is not a draft group.

Instead, as discussed above, its goal is to nominate and elect the next president and vice president of the United States. Once a true draft group succeeds or fails to convince its favored candidate to run, it has exhausted its only purpose. Unity08 not only disavows any interest in drafting any particular candidate to seek its nomination, but it is also already engaged in work to support activities beyond the precise point where a true draft group's activities end. Unity08 is trying to gain ballot access for its eventual nominees and to hold a convention to nominate and then elect presidential and vice-presidential candidates for the November 2008 election. Under the reasoning of Machinists, Unity08's activities to influence the outcome of the presidential election satisfy the major purpose test.[23]

In sum, the Commission concluded in Advisory Opinion 2006-20 that Unity08's planned efforts to achieve ballot access would result in expenditures that will require Unity08 to register and report as a political committee. The Commission's conclusions were consistent with its own precedent, as well as with the Supreme Court's major purpose test. Because Unity08 concedes that its principal goal is to nominate and elect candidates for president and vice president in 2008 and because the Commission reasonably found that Unity08's ballot access disbursements would be "expenditures" under the Act, Advisory Opinion 2006-20 is a permissible construction of the FECA.

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[23] Unity08's reliance on FEC v. GOPAC, 917 F. Supp. 851 (D.D.C. 1996), is similarly misplaced. In that case, the court held that an organization that limited its direct support to state and local candidates was not a political committee under the Act. Although GOPAC ultimately hoped to increase the number of Republicans in Congress by building a "farm team" at the state and local level, the Court emphasized that GOPAC "avoided directly supporting federal candidates." Id. at 857 (emphasis in original). Unity08's methods and goals have nothing in common with GOPAC's. GOPAC supported candidates only at the state and local level. Unity08, on the other hand, seeks to nominate and elect the next president and vice president and disavows any interest in influencing state and local elections. Exh. 4 at 12 (Bailey Dep.); Unity08 Facts ¶16. In any event, to the extent the district court in GOPAC interpreted the major purpose test to require support for a particular federal candidate, such dicta cannot be reconciled with the language and logic of Buckley. See supra pp. 26-29.

IV. THE ACT'S LIMITATIONS ON CONTRIBUTIONS ARE CONSTITUTIONAL AS APPLIED TO UNITY08

The primary consequence of Unity08's becoming a political committee is its having to abide by the Act's $5,000 annual limit on contributions it can receive from any one person. 2 U.S.C. 441a(a)(1)(C). Specifically, the Act provides that no person may contribute more than $5,000 per calendar year to any political committee, and no "political committee shall knowingly accept any contribution … in violation" of those limits. 2 U.S.C. 441a(f). Furthermore, corporations and unions are prohibited from using their general treasury funds to make contributions or expenditures in connection with any federal election, and no political committee may "knowingly … accept or receive" such a corporate or union contribution. 2 U.S.C. 441b(a).[24] Thus, the obligations that Unity08 would be subject to as a political committee, other than the reporting requirements that Unity08 does not appear to challenge, limit the source and amount of contributions to Unity08, not its expenditures.

By concluding that Unity08 will have to register and report as a political committee, the Commission has not, as plaintiffs suggest, placed any restrictions on Unity08's spending. The Act simply does not limit the timing or amount of Unity08's expenditures (or those of any other political committee). Nor does the Act dictate when or where Unity08 may pursue its ballot access efforts or limit the total amount that Unity08 can spend on these activities. Thus, there is no expenditure limit at issue in this case. Indeed, since the Supreme Court's decision in FEC v. National Conservative Political Action Comm., 470 U.S. 480, 497-98 (1985), it has been

[24] Unity08 claims that it has not accepted contributions from corporations (Unity08 Facts ¶ 65), and nowhere indicates that it wishes to do so.

established that Congress may not place limits on political committees' independent expenditures.[25]

Nevertheless, Unity08 repeatedly suggests that it cannot constitutionally be treated as a political committee because that status would unduly infringe upon its right to engage in "core political speech." Unity08 Mem. at 14. See also id. at 18 (arguing that courts should "avoid permitting regulation … [that] would unconstitutionally limit political speech of the group or party."). Indeed, Unity08 even goes so far as to argue that the regulation at issue here is not a contribution limit but rather an expenditure limit subject to strict scrutiny. Id. at 24 ("Regulation of the sort imposed here burdens Unity08's ability to organize and compete in the political arena and should therefore be subject to strict scrutiny as it burdens core rights beyond contribution limits …."). These arguments confuse the difference between contribution and expenditure limits, and the appropriate level of scrutiny the Supreme Court applies to each.

The Court has explained that, unlike a "limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." Buckley, 424 U.S. at 20-21. Beginning with Buckley and continuing in Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 387-88 (2000), FEC v. Colorado Republican Federal Campaign Comm. ("Colorado II"), 533 U.S. 431, 440-41 (2001), and FEC v. Beaumont, 539 U.S. 146, 161 (2003), the Court has consistently held that limits on contributions are subject to a "less rigorous degree of scrutiny" than limits on expenditures. McConnell, 540 U.S. at 137. "[A] contribution limit involving even significant interference with

[25] Expenditures made in coordination with a candidate or political party are considered contributions to such candidates or parties under the Act. 2 U.S.C. 44la(a)(7). See also Buckley, 424 U.S. at 46-47 & n.53.

associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest." Id. at 136 (citations and internal quotation marks omitted).

Unity08 cannot transform a contribution limit into an expenditure limit by arguing that limits on the money it receives may reduce the funds it has available to spend. Consistent with its prior decisions, the Court in McConnell clearly rejected that kind of argument. When it addressed the Bipartisan Campaign Reform Act's new prohibitions on national political parties' receiving or spending nonfederal money (and its limits on state party committees' spending nonfederal money on certain federal election activity), the Court analyzed these provisions solely as contribution limits.[26] The Court observed that "neither provision in any way limits the total amount of money parties can raise. Rather, they simply limit the source and individual amount of donations." 540 U.S. at 139 (internal citation omitted).

> [F]or the purposes of determining the level of scrutiny, it is irrelevant that Congress chose … to regulate contributions on the demand rather than the supply side. See, e.g., FEC v. National Right to Work, [459 U.S.] at 206-11 (upholding a provision restricting PACs' ability to solicit funds). The relevant inquiry is whether the mechanism adopted to implement the contribution limits, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would not. That is not the case here.

540 U.S. at 138-39. Thus, Unity08 has no basis for suggesting (Unity08 Mem. at 24) that strict scrutiny is applicable here.[27]

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[26] The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002), amends the FECA.

[27] Unity08 also cites (Mem. at 12 n.7) Boy Scouts of Am. v. Dale, 530 U.S. 640, 657-59 (2000), to argue that strict scrutiny is applicable here. In Dale, the Supreme Court upheld the Boy Scouts' right not to associate with individuals whose participation would impair the group's ability to express its message. The instant matter, however, clearly does not involve any forced association or speech.

The Supreme Court has repeatedly upheld limitations on contributions to all manner of entities that fall within the Act's regulatory ambit (see supra pp. 30-33), and Unity08 has provided no basis for finding that the Act would be unconstitutional as applied to its circumstances. Unity08 variously claims that it is akin to a nascent political party (FEC Facts ¶ 5) or, perhaps, an independent candidate (Unity08 Mem. at 19 ("Unity08 disagrees that expenses incurred by candidates to obtain ballot access for themselves as independent candidates constitute an expenditure.")).[28] Regardless of whatever analogy Unity08 wishes to draw, the Supreme Court has already addressed entities like Unity08. In Buckley, 424 U.S. at 33-35, the Court upheld the Act's limits on contributions to minor parties and independent candidates, concluding that "the impact of the Act's $1,000 contribution limitation on major-party challengers and on minor-party candidates does not render the provision unconstitutional on its face." The Court explained that "any attempt to exclude minor parties and independents en masse from the Act's contribution limitations overlooks the fact that minor-party candidates may win elective office or have a substantial impact on the outcome of an election." Id. at 34-35. More recently in McConnell, the Court again recognized that

[28] To support its argument that it is somehow unique, Unity08 relies upon (Unity08 Mem. at 6 n.6) remarks that a single FEC Commissioner allegedly made during the July 20, 2006, meeting on Draft Advisory Opinion 2006-20. Under this Circuit's precedents and Commission regulations, however, pre-decisional, staff-drafted documents and pre-decisional views expressed by any Commissioner provide no basis for inferring the intent or views of the Commission as an agency or even the final views of the Commissioner. See, e.g., PLMRS Narrowband Corp. v. FCC, 182 F.3d 995, 1001 (D.C. Cir. 1999); Kansas State Network, Inc. v. FCC, 720 F.2d 185, 191 (D.C. Cir. 1983) (granting motion to strike transcript of agency deliberation at Sunshine Act meeting); AdHoc Metals Coal. v. Whitman, 227 F.Supp.2d 134, 143 (D.D.C. 2002) ("Judicial review of agency action should be based on an agency's stated justifications, not the predecisional process that led up to the final, articulated decision."); Common Cause v. FEC, 676 F.Supp. 286, 289 n.3 (D.D.C. 1986). See also 11 C.F.R. 2.3(c) (Commission meeting "is not part of the formal or informal record of decision of the matter discussed therein ...," and "[s]tatements ... made by Commissioners ... at meetings are not intended to represent final ... beliefs."); 2 U.S.C. 437c(c) (affirmative votes of four Commissioners necessary for agency action).

> the relevance of the interest in avoiding actual or apparent corruption is not a function of the number of legislators a given party manages to elect. It applies as much to a minor party that manages to elect only one of its members to federal office as it does to a major party whose members make up a majority of Congress. It is therefore reasonable to require that all parties and all candidates follow the same set of rules designed to protect the integrity of the electoral process.

540 U.S. at 159.[29]

Unlimited contributions to Unity08 and organizations like it would clearly pose a threat of corruption. If the limits on contributions to political committees did not apply to Unity08, one wealthy individual could finance the entirety of its operations, including its ballot access efforts. Unity08's eventual presidential and vice-presidential nominees would doubtless know the identity of the benefactor who made their appearance on the ballot possible. "It is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." McConnell, 540 U.S. at 145.[30]

The alleged purity of Unity08's intentions is irrelevant. In Colorado II, the Court explained how large donors could use intermediaries like political parties to exert improper influence on an election and on elected officials:

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[29] The speculative impact of the Act's contribution limits on Unity08's efforts to jumpstart its mission, and the possibility that Unity08 may fail to do so, do not make those limits unconstitutional. In Buckley, the Court addressed the claim that the limitations on contributions to candidates "will prevent the acquisition of seed money necessary to launch campaigns." 424 U.S. at 34 n.40. The Court explained that it had no record to evaluate the claim as it related to the new contribution restrictions. Since Buckley, however, third party candidacies, including those of John Anderson, Pat Buchanan, and Ralph Nader, have meaningfully influenced presidential elections. Unity08 has not argued, or presented any evidence to suggest, that its situation is constitutionally distinguishable from other third-party candidacies or new or minor political parties.

[30] Unity08's ballot access efforts would be particularly valuable to its eventual nominees if they might otherwise have run for the presidency and vice-presidency as independents. Unity08 alleges (Compl. ¶ 13) that it plans to achieve ballot access in the 37 states that allow political organizations to qualify for the ballot as an organization, prior to nominating any candidate. To the extent Unity08 successfully achieves ballot access in these 37 states, it would spare the candidates from having to expend their own campaign funds to do that work themselves.

> Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one narrow issue, or even to support any candidate who will be obliged to the contributors.... Parties thus perform functions more complex than simply electing candidates; whether they like it or not, they act as agents for spending on behalf of those who seek to produce obligated officeholders.

533 U.S. at 451-52. If anything, the threat of corruption identified in Colorado II is more pronounced here; unlike political parties, which nominate and attempt to elect a slate of candidates at multiple levels of government and thus, at least theoretically, spread donor largesse among numerous candidates, Unity08 seeks to nominate and elect only two candidates. Thus, large contributors to Unity08 could more severely circumvent the Act's limits on contributions by individuals to candidates, as well as create an appearance of corruption.

In sum, Unity08's challenges are not unique. Although the costs of ballot access vary by state, the requirements for ballot access apply the same to Unity08 as they do to any other organization. The "overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would have otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression." Buckley, 424 U.S. at 21-22. If Unity08 is unable to motivate a sufficient number of persons to underwrite its ballot access efforts adequately, that is not a burden created by the Commission's advisory opinion or the FECA. "Political free trade does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." McConnell 540 U.S. at 227 (quoting MCFL, 479 U.S. at 257) (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for summary judgment and deny Unity08's motion for summary judgment.

Respectfully submitted,

/s/
Thomasenia P. Duncan
Acting General Counsel

/s/
David Kolker (D.C. Bar No. 394558)
Assistant General Counsel

/s/
Vivien Clair
Attorney

/s/
Steve N. Hajjar
Attorney

/s/
Adav Noti (D.C. Bar No. 490714)
Attorney

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street NW
Washington, DC 20463
(202) 694-1650

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