ORAL ARGUMENT NOT YET SCHEDULED

No. 08-5526

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITY08, Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION, Defendant-Appellee.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant D.C. Cir. R. 28(a)(1), the Federal Election Commission ("Commission") submits the following Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici. The parties are plaintiff-appellant Unity08 and defendant-appellee Federal Election Commission. Other parties before the district court were plaintiffs Douglas Bailey, Roger Craver, Hamilton Jordan, Angus King, Jerry Rafshoon, and Carolyn Tieger. Democracy 21 and Campaign Legal Center were *amici* in the district court and are *amici* in this Court.

(B) Rulings Under Review. The ruling at issue is reported at *Unity08 v. FEC*, 583 F. Supp. 2d 50 (D.D.C. 2008). (J.A. 548-67.)

(C) Related Cases. The Commission knows of no "related cases" as that term is defined in D.C. Cir. R. 28(a)(1)(C).

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Federal Election Campaign Act ("FECA"):

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GLOSSARY

AO	Advisory Opinion
AOR	Advisory Opinion Request
APA	Administrative Procedure Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
J.A.	Joint Appendix

COUNTERSTATEMENT OF JURISDICTION

The final order of the district court granting summary judgment to the Commission was entered on October 16, 2008 (J.A. 548-67), and a notice of appeal was timely filed on December 15, 2009 (J.A. 568). Appellant Unity08 invokes this Court's jurisdiction under 28 U.S.C. § 1331. Jurisdiction, however, is not proper here because this appeal is moot.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether Unity08's permanent cessation of activity rendered this appeal moot.

2. Whether an agency's prospective advisory opinion that an organization's desired activities would be regulable is subject to direct judicial review and constitutes "final agency action" under the Administrative Procedure Act, 5 U.S.C. § 704.

3. Whether funds spent to obtain positions on general election ballots, with the intention of later providing those ballot positions to a candidate for President of the United States, are spent "for the purpose of influencing" a federal election and therefore constitute "expenditures" under 2 U.S.C. § 431(9).

4. Whether an organization dedicated to nominating and electing the next President of the United States has as its major purpose "the nomination or

election of a candidate," such that it constitutionally may be regulated as a political committee under *Buckley v. Valeo*, 424 U.S. 1 (1976).

STATUTES AND REGULATIONS

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

COUNTERSTATEMENT OF THE CASE

Under the Federal Election Campaign Act ("FECA"), any organization that spends $1,000 or more to influence a federal election and that has the "major purpose" of nominating or electing a candidate for federal office must register with the Federal Election Commission ("Commission") as a "political committee." Political committees generally may not accept contributions of more than $5,000 per contributor per year, and they must file with the Commission reports listing their receipts and disbursements.

Unity08 was a corporation whose primary purpose was to nominate and elect the next President and Vice President of the United States in the 2008 election. To that end, Unity08 intended to spend millions of dollars to select its candidates and place them on the general election ballots of as many states as possible. Shortly after its formation, Unity08 asked the Commission to opine prospectively on whether it would qualify as a political committee under FECA. In light of Unity08's intention to spend more than $1,000 to achieve its avowed

purpose of nominating and electing the next President, the Commission opined that if Unity08 put its plans into effect it would indeed meet the criteria for political committee status.

Displeased by the prospect of operating within the same legal framework as all other political committees, Unity08 challenged the Commission's opinion in court. While the suit was pending below, Unity08 — having gained insufficient support from the electorate — ceased its operations due to lack of funds. The district court subsequently ruled that because Unity08's planned ballot-access activity was intended to influence a federal election, and because Unity08's major purpose was the nomination or election of a federal candidate, the Commission's advisory opinion was not contrary to law.

Unity08 cannot demonstrate any factual or legal error in the district court's holding, which accordingly would be entitled to affirmance if this Court were to decide this appeal on its merits. But the Court need not and should not reach that question, as Unity08's cessation of activity and the passage of the 2008 elections have rendered this case moot. Furthermore, there is no statutory basis for direct review of the Commission's advisory opinion.

COUNTERSTATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

FECA defines a "political committee" to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A). 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).

In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court held that defining political committee status "only in terms of amount[s] of annual 'contributions' and 'expenditures'" might cause "groups engaged purely in issue discussion" to be subject to regulation as campaign organizations. Accordingly, 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*. (emphasis added). Thus, pursuant to *Buckley*'s interpretation of FECA, an organization is a "political committee" if (a) it meets the $1,000 contribution or expenditure threshold, and (b) its "major purpose" is the nomination or election of a federal candidate.

Political committees must register with the Commission and file periodic reports of their receipts and disbursements for disclosure to the public. 2 U.S.C. §§ 433, 434; 11 C.F.R. Part 104. FECA 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).[1]

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See* 2 U.S.C. §§ 437c(b)(1), 437d. The Commission is empowered, *inter alia*, to issue advisory opinions concerning the application of FECA and the Commission's regulations to proposed transactions or activities, 2 U.S.C. §§ 437d(a)(7), 437f; 11 C.F.R. § 112.4. Any person who engages in a specific activity "indistinguishable in all its material aspects" from the activity described in the advisory opinion and who acts in good faith in accordance with the opinion is not subject to sanction under the Act. 2 U.S.C. § 437f(c).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Unity08 was incorporated on May 24, 2006. (J.A. 166.) The next day, Unity08 filed with the Internal Revenue Service an application for tax-exempt

[1] Political committees established by a state or national political party are subject to higher contribution limits. *See* 2 U.S.C. § 441a(a)(1)(B)-(D); *see also infra* pp. 50-54 (discussing why Unity08 is not a political party committee).

"political organization" status under 26 U.S.C. § 527. (J.A. 423-24.) When describing "the purpose of the organization," Unity08 stated:

> Our goal is the election of a Unity Ticket for President and Vice-President of the United States in 2008 to be headed by a woman and[/]or man from each major party or by an independent who presents a Unity Team from both parties. We also aim to effect major change and reform in the 2008 national elections by influencing the major parties to adopt the core features of our national agenda.

(J.A. 423; *see also* J.A. 373 ("**Goal One** is the election of a Unity Ticket for President and Vice-President of the United States in 2008 . . . ."); J.A. 426 ("Our Three Goals . . . 1. Elect a truly bipartisan Unity Ticket to the White House team in 2008 . . . ."); J.A. 428 ("Unity08 has three specific goals: 1. Elect a Unity Ticket to the White House in 2008 . . . ."); J.A. 432 (asking for donations to support "our goal of electing a bi-partisan Unity Ticket in the 2008 presidential election").)

On May 30, 2006, Unity08 filed with the Commission an advisory opinion request ("AOR"). (J.A. 156-72; *see also* J.A. 196-223 (supplemental AOR filings).) In its AOR, Unity08 stated that its "*Goal One*" was to "elect a Unity Ticket for President and Vice President of the United States in 2008 that will have on the ticket a person from each of the two major parties." (J.A. 157, 197.) To achieve this goal, Unity08 explained, it planned to (1) nominate candidates for President and Vice President at an online political convention, and (2) obtain placement for those nominees on the 2008 general election ballot in every state

where it could. (*See* J.A. 158-59, 197-99.) The group's ballot-access activity was to consist primarily of "petition drives" through which Unity08, as an organization, would obtain placeholder spots on states' general election ballots — spots that ultimately would be given to Unity08's nominees. (*See* J.A. 198-99.) Unity08 specifically disclaimed any intention of becoming a permanent political party or of nominating, supporting, or opposing any candidate in any election other than the 2008 presidential election. (*See* J.A. 159, 198; *see also* J.A. 308 ("Q. Does Unity08 have any plans to become a permanent political party? A. No."); J.A. 435 ("It is not our intention to become a permanent third party.").) Unity08's AOR asked the Commission to opine, in light of the foregoing, that disbursements to further the nomination of Unity08's candidates and to gain ballot access for them would not constitute expenditures under FECA, and that Unity08 would not be required to register with the Commission as a political committee. (J.A. 159.)

On October 10, 2006, after holding two public meetings and deliberating over Unity08's filings and comments filed by third parties, the Commission issued Advisory Opinion ("AO") 2006-20. (J.A. 54-59.)[2] The AO concluded, *inter alia*,

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[2] Unity08 cites (Unity08 Br. 11) the remarks of a Commissioner during the Commission's meeting to discuss draft AO 2006-20. Under this Circuit's law and the Commission's regulations, however, 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); *Kan. State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) (granting motion to

that Unity08's plan to gain ballot access for its nominees as a "placeholder" and then give that access to presidential and vice-presidential candidates would directly benefit those candidates. (J.A. 56-57.) These disbursements, therefore, would be "for the purpose of influencing [an] election for federal office," which would make them "expenditures" under 2 U.S.C. § 431(9). (J.A. 56-57.) On the question of Unity08's major purpose, the Commission noted that, as demonstrated by the AOR and Unity08's other public statements, "Unity08's self-proclaimed major purpose is the nomination and the election of a presidential candidate and a vice-presidential candidate." (J.A. 58.) Because any organization that makes expenditures of $1,000 or more and whose major purpose is the nomination or election of a candidate is a political committee under FECA, the Commission opined that "Unity08 will have to register as a political committee once it makes expenditures in excess of $1,000." (J.A. 54, 57-58.)

On January 10, 2007, Unity08 and several of its founders filed the complaint in this action, arguing that AO 2006-20 was contrary to law in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). While this action was being litigated, Unity08 began making disbursements to further its goal of electing the next President and Vice President of the United States. Specifically,

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strike transcript of agency deliberation); *see also* 11 C.F.R. § 2.3(c) (providing that Commission meeting "is not part of the formal or informal record of decision of the matters discussed therein," and "[s]tatements . . . made by Commissioners . . . at meetings are not intended to represent final . . . beliefs").

Unity08 disbursed tens of thousands of dollars to create and promote its online nomination facility. (*See* J.A. 249-77 (listing disbursements); J.A. 410-19 (discussing services received from vendors).) Unity08 also disbursed tens of thousands of dollars to recruit "delegates," whom Unity08 intended to use to meet the signature-gathering requirements for achieving ballot access on behalf of Unity08's nominees. (*See* J.A. 249-77 (listing disbursements); J.A. 410-19 (discussing services received from vendors); J.A. 435 ("[T]he delegates . . . will pick the nominees, and will get them on the ballot in all 50 states . . . ."); J.A. 439 ("[Q:] How would the ticket get on the ballot? [A:] The millions of Unity08 convention delegates would be organized to get that job done, state by state.").) By building this ballot-access machinery, which Unity08 anticipated would ultimately cost more than $10 million (J.A. 549), the organization hoped to entice candidates to seek its nomination. (J.A. 314 ("[T]o the degree that . . . the process of ballot access would in turn cause candidates to want to seek the nomination, that's an important part of this process.")); J.A. 464 (listing, as reason for candidates to seek Unity08 nomination, "Ballot Access in all 50 states").) In all, Unity08 raised and spent over $2 million in pursuit of its electoral goal.[3]

[3] When the parties filed their summary judgment briefs below, Unity08's disbursement information was available only for 2006, during which the organization received and spent approximately $425,000. (*See* J.A. 249-77.) Unity08 subsequently reported to the IRS that it had received $1.5 million (including $1.1 million in putative loans from its principals) and spent $1.7 million

In January 2008, after the parties had filed their summary judgment briefs below but before the district court had ruled, Unity08 replaced its website with a notice stating that it was "scal[ing] back" operations because "we don't have enough members or enough money to take the next necessary step — achieving ballot access in 50 states — to reach the goal of establishing our on-line convention and nominating a Unity ticket for president and vice president this coming fall." *See* www.unity08.com (posted on or about January 10, 2008; last visited June 23, 2009; text in Exhibit to this brief). As Unity08 then explained to the district court, its "severe financial straits" had caused it "to suspend its efforts to get on the ballot . . . and to suspend its efforts to prepare for its planned online convention." (Mot. for Expedited Consideration ¶ 2 (Jan. 22, 2008) (Docket No. 28).) Unity08 did not officially dissolve or disband because of its desire to continue this lawsuit (*see* FEC Exh. at 3 ("We believe it is important to see our case against the FEC through . . . .")), but the group made clear to both the public and the district court that Unity08 would not become active again unless it were granted relief in time for the 2008 election. (*See* Mot. for Expedited Consideration ¶ 4 ("A favorable ruling *in the near term* may make it possible to revive Unity08 . . . . If such a revival is possible, *it needs to be undertaken immediately* if Unity08 is

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during 2007 and early 2008. *See* http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp (Unity08's filings available under employer number 20-4931560).

to return to being a viable and effective organization.") (emphasis added); *see also* FEC Exh. at 3 (stating that Unity08 would be "ready to gear up if (when) we win our case and political circumstances warrant *later this spring*") (emphasis added).) Since April 2008, according to its IRS filings (*see supra* p. 9 n.3), Unity08 has raised no funds and has spent a total of $97.

On October 16, 2008, the district court granted summary judgment to the Commission. (J.A. 548-67.) Although the court agreed with Unity08 that AO 2006-20 was "final agency action" under the APA (J.A. 558-60), the court rejected Unity08's claim that the advisory opinion was contrary to law. First, as to Unity08's argument that its ballot-access spending was not an "expenditure," the court held that "allowing the eventual Unity08 nominees to use Unity08's ballot access may be deemed an expenditure by the FEC . . . because ballot access will give between $10 million and $12 million worth of support to the nominees." (J.A. 564; *see also id*. at 564-65 ("[T]he appearance of quid pro quo corruption is present when a candidate receives . . . a ten to twelve million dollar benefit — solely due to the efforts of Unity08.").) Second, the court rejected Unity08's assertion that its major purpose was anything other than the nomination and election of a candidate, noting that Unity08 intended to provide its ballot access to the specific individuals who would be chosen during the group's nominating convention. (J.A. 566.) The district court therefore granted summary judgment to

the Commission, finding AO 2006-20 not contrary to FECA or the Constitution. (*See* J.A. 566-67.)

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over this appeal because it is moot. Unity08 has ceased its activities and has no intention of restarting them regardless of the outcome of this case. Indeed, the organization's goals expired with the 2008 election, and there is no possible result here that could affect or influence that election. Because federal courts do not have jurisdiction to decide cases lacking concrete significance to the parties, this appeal should be dismissed.

Even if the Court were to have jurisdiction, FECA precludes judicial review of the Commission's advisory opinions. The structure of the Act demonstrates clear congressional intent not to permit entities to circumvent FECA's extensive administrative enforcement mechanism by filing a civil action to review an advisory opinion. Furthermore, AO 2006-20 is not "final agency action" reviewable under the APA: The Commission's advisory opinion did not determine Unity08's rights or responsibilities, nor did it subject Unity08 to any governmental action. AO 2006-20, which only opines on the legality of proposed future activity, does not predetermine any decision the Commission might make in the enforcement context and is not the culmination of the agency's decisionmaking as to Unity08's actual activities.

Even if AO 2006-20 were reviewable, it would be a reasonable construction of FECA. The primary question presented to the Commission in Unity08's AOR was whether spending millions of dollars for ballot access for a presidential ticket would be activity "for the purpose of influencing" the presidential election, and therefore an "expenditure" under FECA. Because Unity08's ballot-access spending was for the purpose not only of influencing — but actually winning — the presidency in 2008, the Commission's interpretation of the statute (which is entitled to *Chevron* deference) deeming such spending to be an "expenditure" was not arbitrary, capricious, or contrary to law.

Finally, there has never been any genuine dispute about the fact that Unity08 — whose avowed goal was to nominate and elect the next President of the United States — meets *Buckley*'s major purpose test. In seeking to avoid regulation as a political committee, Unity08 conflates distinct campaign finance doctrines and misreads *Buckley*, which held that an organization can meet the major purpose test even if it has not yet chosen its nominees. Unity08 is materially indistinguishable from the thousands of other political committees to which FECA is constitutionally applied during every election cycle.

ARGUMENT

I. THIS CASE IS MOOT

The Court lacks jurisdiction over this appeal because Unity08's permanent cessation of activity has rendered the case moot. Under Article III of the Constitution, the judicial power of the federal courts extends only to "cases" and "controversies." *See* U.S. CONST. art. III, § 2. The party invoking a court's jurisdiction has the burden of showing that its action presents a case or controversy. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104 (1998); *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 n.3 (2006) ("[B]ecause we presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record, the party asserting federal jurisdiction when it is challenged has the burden of establishing it.") (internal citation, quotation marks, and alterations omitted).

"To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Davis v. FEC*, 128 S. Ct. 2759, 2768 (2008) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate."). Thus, an "actual controversy" ceases and a case becomes moot if events transpire

such that the party seeking the court's ruling cannot demonstrate that it will be affected by the outcome of the case. *See 21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 198 (D.C. Cir. 2003) (citing *Clarke v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990)) (holding challenge to license cancelation moot where challenger had shown no intention of seeking license again); *Liu v. INS*, 274 F.3d 533, 535 (D.C. Cir. 2001) (citing *Am. Family Life Assurance Co. v. FCC*, 129 F.3d 625, 628 (D.C. Cir. 1997)) (holding challenge to agency's decision regarding work visa moot where challenger could not show that receiving visa would affect his employment). The fact that a case may raise constitutional issues does not change this analysis: The party bringing the challenge still must show that *it* has a "specific live grievance" against the government's action; the mere possibility of future grievances — or grievances that might be brought by other similarly situated entities — does not make a moot case justiciable. *See Lewis*, 494 U.S. at 479-80 ("[T]he Article III question is not whether the requested relief would be nugatory as to the world at large, but whether [the current party] has a stake in that relief.").

No live controversy remains in this case. From its inception, Unity08 specifically disclaimed any intention of participating in any election other than the 2008 presidential race. *See supra* p. 7. It also consistently disavowed any desire to become a permanent political party, *see id.*, and noted, when it closed its doors almost eighteen months ago, that it would restart its activities only if it were to be

afforded relief in time to influence the 2008 campaign. *See supra* pp. 10-11. Because the 2008 elections have passed, and because there is no evidence that Unity08 intends — regardless of the outcome of this appeal — to conduct any further activity after this lawsuit is concluded, the effect of Unity08's victory or defeat in court would be purely symbolic. *See City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283-85 (2001) (dismissing First Amendment challenge as moot where appellant went out of business during pendency of appeal and had no evidence of plans to reopen); *Munsell v. Dep't of Agric.*, 509 F.3d 572, 581-82 (D.C. Cir. 2007) ("[A] controversy may become moot if a regulated business challenges a government regulatory policy or action and then terminates its operation during the pendency of the litigation.") (citing *City News*).

The district court held that Unity08 had a live grievance against the Commission at the time the complaint was filed because AO 2006-20 prevented Unity08 from taking certain loans from its principals. (*See* J.A. 553-57.)[4] But that rationale cannot be the basis for jurisdiction in this Court, as Unity08 would have no reason to take any such loans now, regardless of AO 2006-20. To the contrary, Unity08 ceased its operations in January 2008, and it engaged in no electoral activity leading up to the 2008 general election, despite having the legal ability at

[4] This case was not moot when the district court ruled because Unity08 had asserted that it might recommence its activities if it were to win its lawsuit prior to the 2008 election. *See supra* pp. 10-11. Thus, the case did not become moot until the election passed, which was several weeks after the court issued its opinion.

all times to raise funds in increments of $5,000 per donor per year (as it had done during 2006 and 2007). Nor has Unity08 conducted any activity since the 2008 election: It has not posted a word on its website or raised a cent. Because there is nothing in the factual record indicating how Unity08's status as a political committee has any continuing significance to the appellant, this appeal is moot.

This case does not qualify for the mootness exception for cases that are capable of repetition yet evading review. "That 'exception applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that *the same complaining party* will be subject to the same action again.'" *Davis*, 128 S. Ct. at 2769 (quoting *FEC v. Wisc. Right to Life, Inc*., 127 S. Ct. 2652, 2662 (2007)) (emphasis added). Neither of these prongs is satisfied here. First, the "duration" requirement applies to situations where "the challenged activity is *by its very nature short in duration*, so that it could not, or probably would not, be able to be adjudicated while fully live." *Pharmachemie B.V. v. Barr Labs., Inc*., 276 F.3d 627, 633 (D.C. Cir. 2002) (internal quotation marks omitted); *cf. Fund For Animals, Inc. v. Hogan*, 428 F.3d 1059, 1064 (D.C. Cir. 2005) ("As a general rule, two years is enough time for a dispute to be litigated."); *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders*, 264 F.3d 52, 53-56 (D.C. Cir. 2001) (noting that Supreme Court and this Court generally consider periods "of less than two years' duration" to

evade review). Because a presidential election cycle is four years long, there is no reason that litigation regarding any such cycle "could not, or probably would not" be litigated within the entirety of that cycle.[5]

Second, there is no "reasonable expectation" that Unity08 will litigate the issues in this lawsuit again in the future, given that the group's entire reason for being was the 2008 election. *See Armstrong v. FAA*, 515 F.3d 1294, 1296 (D.C. Cir. 2008) (case was moot where plaintiff failed to show that it was "at all likely" that he would again undertake action causing him to be subject to agency action) (citing *PETA, Inc. v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005));[6] *Pharmachemie*, 276 F.3d at 633-34 (although future litigation between same parties was possible, extensive series of events that would have to occur for such litigation to become reality was too speculative to confer jurisdiction).[7]

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[5] Even though this case was filed approximately halfway through a presidential election cycle, the instant appeal likely would have been decided before the 2008 presidential election if the court below had issued its ruling shortly after summary judgment briefing was completed in May 2007.

[6] In the recent campaign finance cases found by the Supreme Court to be capable of repetition yet evading review, the factual record had demonstrated the plaintiffs' intent to repeat their conduct in future election cycles. *See Davis*, 128 S. Ct. at 2769 (no mootness where plaintiff political candidate had run for office multiple times and planned to do so again); *Wisc. Right to Life*, 127 S. Ct. at 2652 (no mootness where plaintiff advertiser "planned on running materially similar future . . . ads") (internal quotation marks omitted). Unity08 has made no equivalent demonstration.

[7] In *Pharmachemie*, the Court also noted that the interests of entities that had been parties to the lower court proceeding but were not parties to the appeal were

Moreover, Unity08's challenge to the Commission's interpretation of the statutory term "expenditure" would not "evade review" because Unity08 could not be subject to any adverse action arising from that interpretation unless the Commission were to begin an enforcement proceeding under 2 U.S.C. § 437g(a). In that event, Unity08 would have multiple opportunities to assert its objections both before the Commission and, if necessary, in court. *See infra* pp. 24-25 (discussing Commission's statutory enforcement procedures). As the Supreme Court has noted, the availability of such a subsequent forum to raise a claim is fatal to the argument that the claim would "evade review" if dismissed. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983) (dismissal of plaintiff's suit for injunctive relief would not cause underlying constitutional challenge to "'evade' review" because that challenge "remain[ed] to be litigated in [plaintiff's] suit for damages"); *see also PETA*, 396 F.3d at 425 (moot First Amendment challenge would not "evade review" because challenger could raise its arguments in subsequent litigation if necessary).

In sum, because the record does not demonstrate that Unity08 has either the intent or the ability to recommence its electoral activities after this case is concluded, the Court lacks jurisdiction over this moot appeal.

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irrelevant for determining whether the case was moot or capable of repetition. *See* 276 F.3d at 633. Thus, Unity08 cannot rely on the interests of the individual plaintiffs below, none of whom chose to join this appeal.

II. THE COMMISSION'S ADVISORY OPINIONS ARE NOT SUBJECT TO DIRECT JUDICIAL REVIEW, AND AO 2006-20 IS NOT FINAL AGENCY ACTION UNDER THE APA

Even if this appeal were not moot, Unity08's challenge to AO 2006-20 would fail because there is no statutory basis for direct judicial review of that advisory opinion. In any event, AO 2006-20 is not "final agency action" under the APA because it is not a final determination of Unity08's rights or responsibilities.

A. FECA Precludes Direct Judicial Review of AO 2006-20

"[B]efore any review [under the APA] may be had, a party must . . . clear the hurdle of § 701(a)," *Heckler v. Chaney*, 470 U.S. 821, 828 (1985), which states that the APA's judicial review provisions do not apply if the relevant statutes "preclude judicial review." 5 U.S.C. § 701(a)(1). Here, the structure and legislative history of FECA show that Congress did not intend to permit direct review of FEC advisory opinions. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345, 349 (1984) (preclusion "is determined not only from [a statute's] express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved"); *United States v. Fausto*, 484 U.S. 439, 449-52 (1988). As the Second Circuit has noted, "[n]othing in the legislative history of section 437f indicates that Congress thought advisory opinions would be reviewable." *U.S. Defense Comm. v. FEC*, 861 F.2d

765, 771 (2d Cir. 1988) (no jurisdiction over challenge to advisory opinion due to lack of ripeness).

Congress set out an unusually elaborate framework for the Commission's enforcement of FECA, *i.e.*, a well-defined series of processes — requiring multiple majority votes of the Commission — that must be completed before an administrative proceeding becomes the subject of a court action. *See* 2 U.S.C. § 437g(a). These respondent-protective procedures prevent a party from leaping directly from an administrative action to the judiciary. *See In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 542-43, 545 (D.C. Cir. 1980) (FECA-mandated enforcement mechanism precluded filing of court action until statutory process was complete); *cf. Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1370 (D.C. Cir. 1988) (Postal Service could not enforce FECA provisions where there was "gap" between Postal Service's procedures and FEC's procedures).

FECA provides a private right of action against the Commission in only two specific instances. *See* 2 U.S.C. § 437g(a)(8) (suits by administrative complainants), 437g(a)(4)(C)(iii) (suits regarding administrative fines). There is no equivalent provision authorizing judicial review of the Commission's advisory opinions. Congress's decision not to include in the detailed procedures of FECA any provision authorizing judicial review of advisory opinions thus evidences congressional intent to preclude direct judicial review of those opinions. *See, e.g.*,

Fausto, 484 U.S. at 448-52 (finding preclusion where statute devoted substantial "attention" to rights of certain employees but did not include those employees in judicial review provision); *Block*, 467 U.S. at 346-47; *United States v. Erika, Inc.*, 456 U.S. 201, 207-08 (1982) (availability of review under Medicare Part A demonstrated intent to preclude review under Part B).

Thus, nothing in FECA or its legislative history suggests that Congress intended to permit organizations to circumvent the "first-amendment-prompted arrangements Congress devised for FECA enforcement actions," *Galliano*, 836 F.2d at 1370, by seeking an advisory opinion and then requesting judicial resolution if the answer is unfavorable. *Cf. C&E Services, Inc. v. D.C. Water and Sewer Auth.*, 310 F.3d 197, 201-02 (D.C. Cir. 2002) (upholding dismissal where lawsuit "would constitute an end-run around Congress's clear intent that the [agency] interpret and enforce the [statute] in the first instance"); *Sturm, Ruger & Co. v. Chao*, 300 F.3d 867, 874-75 (D.C. Cir. 2002) (holding that statute precluded suit until enforcement action was actually brought and concluded). This Court should therefore reject Unity08's attempt to obtain direct judicial review of AO 2006-20.

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

Even if FECA did not preclude judicial review of the Commission's advisory opinions, Unity08's challenge to AO 2006-20 would fail because that

advisory opinion is not "final agency action" under the APA. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When . . . review is sought . . . only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'") (quoting 5 U.S.C. § 704). 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, 807 (D.C. Cir. 2006) (emphasis in original; quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

Although the issuance of an advisory opinion marks the conclusion of 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 any person involved in the specific activity discussed in the opinion (or in materially indistinguishable activity) may rely on the opinion as a defense to a charge of violating FECA. *See* 2 U.S.C. § 437f(c)(1)(B),(2). Thus, if the opinion advises a requestor that its proposed actions satisfy the Act's requirements, and the requestor relies in good faith on that advice, the requestor's reliance protects it from sanctions for its actions. *See id*. In contrast, if the opinion advises that the

proposed actions would run afoul of FECA, the opinion does not bind the Commission or the requestor. *See U.S. Defense Comm.*, 861 F.2d at 771 ("[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 Commission, the requesting party, or third parties.").

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) (providing that Commission may propose "rule of law" "only as a rule or regulation"); *see also Ctr. for Auto Safety*, 452 F.3d at 811 (no final agency action where official who issued challenged statement lacked authority to make legally binding determinations). When the Commission issues such an opinion, it does not bind itself to investigate the requestor's actions in the future or to bring an enforcement action against that person. Rather, the Commission retains the discretion to review the activity later, change its view, find no violation, or exercise its prosecutorial discretion. Moreover, even if the Commission were to adhere to its advisory opinion in an enforcement proceeding, it must attempt to resolve alleged violations of the law through conciliation; it has no authority to make binding adjudications of liability for violations of the statute.[8]

[8] The only exception, not relevant here, 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.

If the Commission cannot successfully conciliate, its enforcement authority is limited to filing a federal court complaint alleging a violation and litigating *de novo* whether 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). At each stage of this process, the requestor retains its full range of rights to defend itself before the Commission, *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).[9] Thus, as the Second Circuit explained in describing a negative advisory 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?

U.S. Defense Comm., 861 F.2d at 772 (quoting *ITT v. Local 134, Int'l Bhd. of Elec. Workers*, 419 U.S. 428, 443-44 (1975)); *see generally id*. at 770-72 (examining FECA's legislative history and AO, enforcement, and conciliation provisions, and holding that direct review of AOs would lead to duplicative and premature litigation inconsistent with APA's finality requirement).

Unity08's AOR asked the Commission to opine that Unity08 would not become a political committee under FECA, such that the group could receive

[9] Stated in terms of the APA, an advisory opinion is therefore not an "agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

larger contributions than political committees are permitted to receive. Relying on the facts supplied by Unity08, the Commission opined that the organization would become a political committee if it made expenditures of more than $1,000 to gain ballot access. Thus, AO 2006-20 is a negative advisory opinion, which neither approves any proposed conduct nor binds the Commission to begin a subsequent enforcement proceeding.[10] Because AO 2006-20 does not mean that Unity08 would be found in any future proceeding to have violated the law — or that any such proceeding will ever occur — the AO does not conclusively determine Unity08's legal rights or obligations, and it is not final agency action. *See Natural Res. Defense Council v. EPA*, 559 F.3d 561, 565 (D.C. Cir. 2009) (finding no final agency action where "[h]ow [the agency] will use or rely on or interpret what it said in the [challenged action] is uncertain. We can see no significant hardship to the parties from waiting for a real case to emerge.") (citation omitted); *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 22 (D.C. Cir. 2006) (noting "this court's consistent refusal to review agency orders 'that do[ ] not [themselves] adversely affect complainant but only affect[ ] his rights adversely on the contingency of future administrative action'") (quoting *DRG Funding Corp. v.*

[10] In the district court, the parties disputed whether AO 2006-20 had any practical consequences for Unity08 (*see* J.A. 559 (district court's holding that Unity08 would have received certain large contributions but for the AO)); even if it did, however, "this does not demonstrate that the [agency's action] ha[d] had *legal consequences*" sufficient to meet the standard for "final agency action" under the APA. *Ctr. for Auto Safety*, 452 F.3d at 811 (emphasis in original).

Sec'y of Housing & Urban Dev., 76 F.3d 1212, 1214 (D.C. Cir. 1996)); *Nevada v. Dep't of Energy*, 457 F.3d 78, 85 (D.C. Cir. 2006) (finding no final agency action where application of agency's plan "'rest[ed] upon contingent future events that may not occur as anticipated, or indeed may not occur at all'") (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

III. ADVISORY OPINION 2006-20 IS A REASONABLE CONSTRUCTION OF FECA

The Commission concluded in Advisory Opinion 2006-20 that Unity08's planned efforts to achieve ballot access would result in expenditures that would 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 the Commission reasonably found, in a construction entitled to *Chevron* deference, that Unity08's ballot-access disbursements would be "expenditures" under FECA, and because Unity08 conceded that its major purpose was to nominate and elect candidates for President and Vice President in 2008, AO 2006-20 was not arbitrary, capricious, or contrary to law.

A. Standard of Review

The Commission's advisory opinions are entitled to deference under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837 (1984). *See FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185-86 (D.C. Cir. 2001); *see*

also FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 37 (1981) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded."); *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) ("[T]his court has noted in several opinions that . . . . 'the FEC's interpretation of [FECA] should be accorded considerable deference.'") (quoting *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986), and collecting cases).

Under the "familiar two-step *Chevron* framework," the court "first ask[s] 'whether Congress has directly spoken to the precise question at issue' . . . . 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., Inc. v. DEA*, 375 F.3d 1148, 1152 (D.C. Cir. 2004)). The possibility that other interpretations of the statute might 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." *Nat'l Rifle Ass'n*, 254 F.3d at 187 (quoting *Serono Labs, Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)).

Because FECA is silent as to whether spending to gain ballot access is an "expenditure," this Court reviews the Commission's construction of that term in

AO 2006-20 under the deferential *Chevron* standard. The question of whether regulating Unity08 as a political committee would be constitutional under *Buckley*'s major purpose test is a matter of law that this Court reviews *de novo*.

B. The Commission Reasonably Determined that Spending to Gain Ballot Access Is an "Expenditure" Under FECA

Under FECA, 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). In light of this expansive definition and the facts presented by Unity08 when it requested the advisory opinion, the Commission reasonably concluded in AO 2006-20 that "[m]onies spent by Unity08 to obtain ballot access through petition drives will be expenditures." (J.A. 300.)

In its advisory opinion request, Unity08 stated that it planned to qualify for ballot access in certain key states "through petitions and, if required, litigation." (J.A. 281.) Unity08 anticipated that it would spend $10 million to $12 million to complete this activity. (J.A. 549; Unity08 Br. 7-8.) While it was obtaining ballot access, Unity08 also intended to nominate its candidates for President and Vice President, and then Unity08 would give them the ballot position that the group had spent millions of dollars obtaining. (*See* J.A. 198-99.) Unity08's avowed "Goal One" in conducting this activity, of course, was "to elect [the] President and Vice President of the United States in 2008." (J.A. 280; *see supra* p. 6.) Not only was

ballot access a prerequisite for that goal, but Unity08 also planned to use its ballot access to entice established candidates — who might otherwise have been leery of abandoning their parties — onto the Unity08 ticket. *See supra* p. 9. Gaining ballot access thereby served to increase the chances both of attracting a viable candidate and of that candidate's becoming the next President of the United States. Thus, on its face, Unity08's ballot-access spending was "for the purpose of influencing an[ ] election for Federal office," 2 U.S.C. § 431(9)(A)(i), *i.e.*, the presidency. Given these facts, even if the Commission had decided AO 2006-20 based on no authority beyond the text of the statute itself, that decision would have been a reasonable construction of FECA.

The Commission's construction was bolstered, however, by the same result it had reached in two previous advisory opinions. (*See* J.A. 301.) In Advisory Opinion 1994-05, the requestor stated that he intended to "obtain ballot access in the general election by gathering the 'nominating signatures' of qualified electors," and he asked the Commission to opine on when he would be considered to have made $5,000 in expenditures (which is the statutory threshold for "candidate" status under FECA). (*See* J.A. 61.) The Commission responded that the requestor would become a "candidate" when he spent $5,000 "to influence [the] election . . . includ[ing] amounts you spend . . . seeking signatures on nomination petitions." (J.A. 62, 64 n.1.) In Advisory Opinion 1984-11, the Commission similarly

observed that the requestor, who sought to be nominated as a third-party candidate for President, would be making "expenditures . . . to collect petition signatures for the general election ballot." (J.A. 69.) Thus, in deciding that Unity08's spending to gain ballot access would be an expenditure under FECA, the Commission adhered to the reasonable view it has held for more than two decades. This longstanding interpretation is therefore entitled to great deference. *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (upholding agency's twenty-year-old statutory interpretation and noting that Supreme Court "will normally accord particular deference to an agency interpretation of 'longstanding' duration") (citing *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 522 n.12 (1982)); *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 7-8 (D.C. Cir. 2003) ("[W]e give weight to the fact that the agency that administers the statute . . . has interpreted [it] the same way for more than 25 years.") (citing *Barnhart*).

Unity08 contends that the Commission's prior advisory opinions are inapposite because the requestors in those situations were named candidates, unlike Unity08, which had not yet chosen its candidate. (Unity08 Br. 36.) But Unity08's argument is factually incorrect and, in any event, irrelevant. In AO 1994-05, the requestor had *not* become a Senate "candidate" within the meaning of the Act because he had not yet met the statutory threshold of expenditures. (*See* J.A. 61-62.) To the contrary, his AOR asked the Commission the same question

Unity08 presented in AO 2006-20, *i.e.*, whether disbursements for ballot access would count as "expenditures" for purposes of meeting a statutory monetary threshold. (*See* J.A. 62 & 64 n.1 ("The question of whether you are a candidate under the Act . . . depends upon the amount of financial activity by you . . . .").) In response, AO 1994-05 explicitly found that disbursements for ballot access would be treated as "expenditures" *before* the requestor had become a "candidate," and those expenditures would count towards the statutory requirement to reach candidate status. Similarly, in AO 1984-11, the requestor sought the Commission's opinion on *when* he would become eligible for certain matching funds available to candidates for President, which the Commission said would be available when his expenditures — including those for ballot access — hit the statutory threshold. (*See* J.A. 69.) Neither of these advisory opinions suggested that expenses to achieve ballot access were only "expenditures" if conducted by a requestor who had already qualified as a candidate or by a political committee that had already chosen its nominees. Thus, the Commission's opinion in AO 2006-20 that Unity08's ballot-access expenses would count as "expenditures" towards the $1,000 threshold necessary for political committee status was entirely consistent with the Commission's own prior decisions.

Unity08 also argues that the Commission erred in finding that spending to achieve ballot access was an expenditure because, according to Unity08, the

Supreme Court in *Buckley* limited the definition of "expenditure" to spending that supports a "clearly identified" candidate. (Unity08 Br. 35-36.) This simply misunderstands *Buckley*.

The "clearly identified" language on which Unity08 relies was part of the Supreme Court's test for "express advocacy," which has no bearing on this case. The express advocacy standard arose out of the Court's concern that vagueness in FECA's original statutory definition of expenditures might lead to regulation of certain *communications* regarding issues of public concern financed by groups that were *not* political committees. *See Buckley*, 424 U.S. at 79-80 (noting that statute might encompass "issue discussion" by non-political committees); *see also id*. at 42-43 (discussing how vagueness might "compel[ ] the speaker to hedge and trim"); *McConnell v. FEC*, 540 U.S. 93, 190-91 (2003) (discussing *Buckley*). The Court therefore held that when funds are spent — by a group "other than a political committee" — to finance public communications, those funds are regulable as expenditures only when they "expressly advocate the election or defeat of a clearly identified candidate." *Buckley*, 424 U.S. at 79-80. But *Buckley* explicitly held that this narrowing construction of "expenditure" was unnecessary for political committees because their spending "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related." *Id*. at 79; *see also Shays v. FEC*, 511 F. Supp. 2d 19, 27 (D.D.C. 2007) ("[T]he

Court imposed the narrowing gloss of express advocacy on the term 'expenditure' only with regard to groups other than [political committees].") (citing *Buckley*, 424 U.S. at 80). In other words, because a political committee is, "by definition," an organization whose major purpose is the nomination or election of a candidate, *see infra* pp. 35-37, the law may constitutionally "assume[ ]" that funds spent by such committees are spent "for the purpose of influencing" an election.

Furthermore, Unity08's proposed spending on ballot access was not even in the category of spending about which *Buckley* was concerned — *i.e.*, public communications — and Unity08 cites no authority holding that the "express advocacy" standard applies to the financing of activities other than such communications. Indeed, given that it would be nonsensical to analyze whether non-communicative spending — such as employee payroll and other expenses for distributing, collecting, and submitting ballot-access petitions — "expressly advocates" for or against a candidate, Unity08's novel attempt to graft the express advocacy standard onto the entirety of the "expenditure" definition must fail.

In sum, 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. The Commission's interpretation of 2 U.S.C. § 431(9) was reasonable.

C. The Commission and the District Court Correctly Found that Unity08's Major Purpose Was to Nominate or Elect a Federal Candidate

The Commission opined in AO 2006-20 that Unity08 would satisfy *Buckley*'s major purpose test because Unity08's major purpose was to elect the next President and Vice President of the United States. (J.A. 58.) Unity08 has never disputed that this was, in fact, its primary purpose. Nonetheless, Unity08 attempts to cobble together an entirely new constitutional doctrine regarding political committees — a doctrine under which the First Amendment demands that any group devoted to nominating and electing a federal official must be free to receive massive (*i.e.*, unlimited) donations until that group has officially chosen its nominee, at which point the group must be permitted to transfer to the nominee all the goods and services that the group has acquired with its unlimited contributions. This construct has no basis in the Constitution, law, or logic.

1. Under the Plain Holding of *Buckley*, Unity08 Meets the Major Purpose Test

The only constitutional test relevant here is the major purpose test, which the Court adopted in *Buckley* to limit FECA's definition of "political committee" to avoid improper regulation of "groups engaged purely in issue discussion." 424 U.S. at 79. Construing FECA's statutory definition of political committee narrowly to avoid this potential constitutional problem, the Court held that the statute "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); *see also FEC v. Mass. Citizens For Life, Inc*., 479 U.S. 238, 252 n.6 (1986) ("*MCFL*"); *McConnell*, 540 U.S. at 170 n.64.

An organization's major purpose may be established by, *inter alia*, its public statements of purpose and its organic documents. *See FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and fax alerts sent to potential and actual contributors); *FEC v. GOPAC, Inc*., 917 F. Supp. 851, 859, 864-66 (D.D.C. 1996); *see generally* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5603-05 (Feb. 7, 2007) (explaining Commission's methodology of determining political committee status). Virtually every statement and document in the record of this case confirms what Unity08 told the Commission in its AOR: Unity08's "*Goal One* [was] to elect a Unity Ticket for President and Vice President of the United States in 2008." (J.A. 157, 197 (emphasis in original); *see also* J.A. 12 ¶ 11 (defining "Unity08's . . . goal as getting our country back on track by nominating and electing a Unity Ticket in the '08 presidential election") (internal quotation marks omitted); *supra* p. 6 (noting Unity08's other statements of its electoral goal in other public statements).) It is difficult to imagine a more clear articulation of a stated purpose to nominate and elect a federal candidate. Thus, as the Commission correctly noted in AO 2006-20, Unity08's "self-proclaimed major purpose is the

nomination and the election of a presidential candidate and a vice-presidential candidate." (J.A. 58.)

Because Unity08 has never claimed (nor could it plausibly do so) that it was a group "engaged purely in issue discussion," *Buckley*, 424 U.S. at 79, the vagueness concerns the Court raised in *Buckley* concerning pure issue advocacy groups are simply inapplicable here. Unity08's statement that it was "*[l]ike* a traditional 'issue' group" because it was "designed to avoid entanglement with the seamier elements of electoral politics" (Unity08 Br. 32 (emphasis added)) is a non-sequitur: The Court's distinction between groups engaged in issue advocacy versus campaign activity does not turn on how "seamy" their respective practices are. In any event, Unity08 vehemently denied that its goal was simply to affect the public discourse surrounding the election: "I'll say it a thousand times, (and have), we plan to elect this ticket. . . . We are playing to win." (J.A. 486 (statement of Unity08 co-founder Jerry Rafshoon).)

2. The Major Purpose Test Does Not Apply Only to Groups that Have Already Selected Their Candidates

Failing to avoid regulation under the plain words of the major purpose test, Unity08 asserts a panoply of arguments as to why that test should be construed to mean something other than what it says. None of these arguments, however, has merit.

Unity08's primary argument, citing *FEC v. GOPAC* and *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), is that the major purpose test is satisfied only by a group that intends to nominate or elect a "clearly identified" individual for federal office, *i.e.*, that an organization cannot become a political committee until it has already identified the specific candidate whom it will nominate or support for a federal office. This "clearly identified" criterion, however, is not part of the Court's "major purpose" test; as discussed previously, "clearly identified" is part of the "express advocacy" standard that applies only to public communications by groups or individuals *other than* political committees. *See supra* pp. 33-34.[11]

The cases Unity08 cites do not provide otherwise. In *GOPAC*, the district court held that an organization did not meet the major purpose test where, although it hoped to have a long-term effect on congressional elections, the organization limited its direct support to state and local candidates and "avoided directly supporting federal candidates." 917 F. Supp. at 857 (emphasis omitted). Thus,

[11] Both the Supreme Court and the Commission have concluded that candidates identified by party affiliation, office sought, and election cycle (*e.g.*, "the Democratic presidential nominee") are "clearly identified" within the meaning of FECA, 2 U.S.C. § 431(18), and the Commission's regulations. *See Buckley*, 424 U.S. at 43-44 n.51; 11 C.F.R. § 100.17; J.A. 519-20 (FEC Advisory Opinion 2003-23). Because the "Unity08 candidate for President" would be identifiable in this manner — and because the Commission's interpretation of Section 431(18) is entitled to *Chevron* deference — Unity08's stated purpose of getting its presidential candidate elected would satisfy the major purpose test even if that test required a "clearly identified" candidate, as Unity08 proposes.

GOPAC had not engaged in sufficient *federal* campaign activity to qualify as a political committee. *See id.* Unity08's methods and goals were the antithesis of GOPAC's: Unity08 sought to nominate and elect only the next President and Vice President, and it disavowed any interest in influencing state and local elections. *See supra* p. 7. Furthermore, whereas GOPAC provided no direct support to federal candidates, Unity08 planned to give its presidential ticket — at a minimum[12] — a $10 million gift in the form of ballot access. Because GOPAC's major purpose was to support *non*-federal candidates, the district court's single statement that it would have preferred, as a policy matter, to interpret the major purpose test as requiring support for a "particular" federal candidate is dictum. *See GOPAC*, 917 F. Supp. at 861. Despite Unity08's focus on it, such dictum from a nonbinding decision involving a group nothing like Unity08 does not trump *Buckley*'s clear statement of its own major purpose test.

Unity08 relies heavily on *Machinists* to argue that an organization cannot become a political committee until it first identifies a specific candidate to support.

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[12] Unity08 states that it "did not intend to provide financial support to [its] nominated candidates." (Unity08 Br. 9.) But not only did Unity08 intend to give its nominees $10 million worth of ballot access, it also planned to "work with" and "support" its ticket after the nomination (J.A. 332), including by soliciting its members to donate hundreds of millions of dollars directly to the candidates. (J.A. 503 ("[W]e do plan to ask all Unity08 delegates after they nominate their ticket to contribute $100 to the ticket. If we have ten million delegates and if 25% give, that will mean a campaign fund of $250,000,000 for the Unity08 ticket . . . ."); *see also* J.A. 464 (referring to "$200,000,000 campaign fund" as incentive for candidates to seek Unity08's nomination).)

In *Machinists*, this Court held that the Commission lacked subject-matter jurisdiction to investigate several organizations seeking to encourage, or "draft," Senator Kennedy to become a candidate for President. 655 F.2d 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 on 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* Senator Kennedy, but only 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 Court concluded that the draft organizations did not fall within the *Buckley* Court's limited definition of "political committee." *Id*.

Applying the same analysis here only bolsters the conclusion that Unity08 meets the major purpose test. The uniqueness of a draft group is that, once it succeeds or fails in convincing its favored candidate to run, it has exhausted its only purpose; a draft group takes no steps to actually "nominate or elect" the candidate. In contrast, Unity08's whole purpose — even if it truly had planned to disband immediately after its convention — would still have been at least to

nominate its "unity ticket" for federal office. Furthermore, in reality, Unity08 planned to go well beyond mere nomination by gaining ballot access for the ticket and then giving that access away to help the ticket get *elected*. In short, not only did Unity08 disavow any intention "to draft any candidate" (Pls.' Statement of Material Facts as to Which There Is No Genuine Issue in Dispute ¶ 56 (Docket No. 17)), its actual plan was to conduct the very activities that a draft group, by definition, does not do. Under the reasoning of *Machinists*, Unity08's activities to influence the outcome of the presidential election therefore satisfy the major purpose test.

Finally, Unity08's argument that a group cannot have the major purpose of nominating a candidate until it has already selected its candidate fails as a plain matter of logic. The whole point of a nomination process is to identify which candidate a organization will support. Thus, 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. Indeed, under Unity08's reasoning, all political parties (which are one type of political committee, *see* 11 C.F.R. § 100.5(e)(4)), including the Democratic and Republican parties, would be constitutionally exempt from regulation 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 they would 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 completely reads the term "nomination" out of the major purpose test, which would undo huge amounts of political party activity regulation that the Supreme Court has held to be constitutional in their entirety. *See infra* pp. 43-50 (discussing potential for corruption under Unity08's desired system), 50-54 (discussing political party regulation).[13]

3. Unity08's Interpretation of the Major Purpose Test Would Create an Opportunity for Massive Corruption

Unity08 argues that, until it has officially selected its presidential nominee, Unity08's activities raise no possibility of actual or apparent corruption sufficient to justify regulating the group as a political committee. This argument has no basis

[13] Unity08 also cites *MCFL* for the proposition that the major purpose test is limited to groups whose major purpose is to support "a *particular* candidate." (Unity08 Br. 32.) But neither party in *MCFL* contended that MCFL was a political committee. *See* 479 U.S. at 252 n.6 (plurality) (noting that "[i]t is undisputed on this record" that MCFL does not meet major purpose test). Indeed, the parties agreed that MCFL failed the major purpose test because its *major* purpose was to conduct "issue advocacy," and any electoral activity it engaged in was only a minimal aspect of its overall activities. *See id.*; *see also id*. at 262 (noting that MCFL would become a political committee if its spending on elections were to "become so extensive that the organization's major purpose may be regarded as campaign activity"). In short, *MCFL* did nothing to undermine *Buckley's* explanation of the major purpose test.

in law and, factually, ignores the Supreme Court's view of corruption. Unity08 is not materially different from other regulated political committees that raise and spend millions of dollars to nominate or support their preferred candidates.

The main regulation that Unity08 has sought to avoid is FECA's $5,000 per-person/per-year limit on contributions to political committees.[14] 2 U.S.C. § 441a(a)(1)(C). There is no dispute as to the constitutionality of that contribution limit, which is closely related to the important governmental interest of preventing the actual or apparent corruption that arises from unlimited donations to groups whose major purpose is federal election activity. *See, e.g., McConnell*, 540 U.S. at 143-45; *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 456 (2001); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding contribution limits as applied to independent political committees); *Buckley*, 424 U.S. at 26-28.[15] Rather, Unity08 compares itself to two types of groups that are

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[14] Unity08's brief erroneously refers at one point to FECA's "strict fundraising *and spending* restrictions." (Unity08 Br. 10 (emphasis added).) FECA imposes no spending restrictions whatsoever on political committees. *See FEC v. NCPAC*, 470 U.S. 480 (1985) (striking down limits on independent expenditures by political committees); *see also Buckley*, 424 U.S. at 39-59 (striking down expenditure limits in earlier version of FECA).

[15] This wealth of precedent belies Unity08's assertions that FECA is "barely" or "marginal[ly]" constitutional. (Unity08 Br. 21, 40.) To the extent Unity08 seeks to imply that the current Supreme Court would not reach the same result as the *Buckley* and *McConnell* Courts did (*see* Unity08 Br. 41-42), such speculation is irrelevant. *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *United*

not subject to the contribution limit because they are not political committees: draft groups and ballot-initiative groups.

Unity08, of course, is not a draft group, and it possesses none of the characteristics that make such groups unique. *See supra* pp. 38-41. Nor is it a ballot-initiative group, which is an organization dedicated to the success or failure of an initiative or referendum submitted to a vote by the public. Indeed, a group whose primary objective is to nominate and elect the next President and Vice President cannot, by definition, be a ballot initiative group, for "[r]eferenda are held on issues, not candidates for public office." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). The Supreme Court has held that ballot-initiative organizations are constitutionally exempt from contribution limits because their activity has nothing to do with any candidates; a ballot initiative does not produce officeholders beholden to the donors who put them in office. *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 297-98 (1981) (distinguishing initiatives from candidate campaigns); *Bellotti*, 435 U.S. at 790-91. Unity08, in contrast, had everything to do with candidates — indeed, its entire premise was that the party affiliation of its *candidates* (*i.e.*, one from each major party, or two independents) would present a new and successful alternative to the

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States v. Webb, 255 F.3d 890, 897-98 (D.C. Cir. 2001) ("[Defendant] asks us to disregard the earlier [Supreme Court] case because he counts five Justices as no longer supporting its holding. That, of course, we may not do.") (citing *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

major party nominees for the presidency. The vast majority of its spending was 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 these efforts. Thus, there is no basis for treating Unity08 like a ballot-initiative group for constitutional purposes.

Unity08 responds by asking rhetorically: "Why would Unity08's eventual candidate feel compelled to perform political favors for a donor who had not known which candidate he was supporting . . . ?" (Unity08 Br. 29.) But courts have repeatedly recognized actual and apparent corruption that arises from a group's use of massive contributions to influence federal elections. For example, in *California Medical*, the Supreme Court upheld FECA's $5,000 limit on contributions to political committees as a means of preventing the circumvention of the limit on contributions to candidates upheld in *Buckley*, which otherwise "could be easily evaded." *Cal. Med*., 453 U.S. at 198 (plurality). In doing so, *California Medical* demonstrated 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 solely for "administrative support" lacked any potential to corrupt the political process and that the Act's $5,000 contribution limitation to political committees — the same statute at issue here, 2 U.S.C.

§ 441a(a)(1)(C) — was unconstitutional as applied to this type of non-candidate-specific donation. *Cal. Med*., 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 policies of [other] political committees . . . . 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.[16]

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[16] 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, *Cal. Med.*, 453 U.S. at 203, and his concern that such a limit might be problematic if applied to a "political committee established for the purpose of making independent expenditures," *id*., is not relevant here because Unity08 intended to use the contributions it received to nominate its own candidates and directly give them $10

This rationale applies precisely to Unity08, given that it planned to become the dominant force in the 2008 presidential election. In other words, if the limits on contributions to political committees had not applied to Unity08, one wealthy individual (or corporation) could have financed the entirety of its operations, including its ballot-access efforts. Unity08's presidential and vice-presidential nominees would doubtless have known the identity of the benefactor who made their appearance on the ballot possible.[17] Indeed, one of the individuals who founded Unity08 and planned to finance much of its activity (*see* J.A. 35 ¶ 64) was also the person who met with potential candidates to convince them that they should seek to be on Unity08's ticket because it would give them ballot access. (*See* J.A. 321 (discussing briefings of candidates); J.A. 464 (listing, as reason for candidates to seek Unity08 nomination, "Ballot Access in all 50 states").) Unity08's ballot-access efforts would have been particularly valuable — and therefore gratitude-inducing — to its eventual nominees because they otherwise would have been required to expend their own campaign funds to gain it. "It is not

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million worth of ballot access. Likewise, *MCFL* acknowledged 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." 479 U.S. at 261.

[17] Even if Unity08 were not subject to FECA's disclosure requirements for political committees, the identities of its large donors would still be public information because they would be disclosed to the IRS. (*E.g.*, J.A. 249-77.)

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 (upholding limits on contributions used for purposes other than direct candidate support), thereby giving rise to the actual or apparent corruption that FECA was intended to prevent.

Courts have also consistently upheld FECA's contribution limits 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 the district court erred in failing to defer to the Commission's finding that a donation to a candidate was a regulable contribution despite its being made after the election, which the candidate had 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, and despite the candidate's protestations that the timing of the contributions established that their purpose was not to influence an election, the court held that the Commission's conclusion that post-election loan guarantees made for him were "contributions" was a reasonable construction of FECA. *Id*. at 1115-16. Similarly, in *United States v. Goland*, 959 F.2d 1449, 1452-53 (9th Cir. 1992), the court found that the defendant made excessive campaign contributions to an independent

candidate for the Senate, even though the candidate did not know the source of the contribution and the contributor was actually trying to elect a different candidate.[18]

Not only is Unity08's statutory interpretation and theory of corruption directly contrary to all of the foregoing authority, but it would also, as a practical matter, eviscerate FECA's contribution limits. Unity08 was no different from other political committees that collect hundreds of millions of dollars in contributions before they know which specific candidates they may ultimately nominate or support. Indeed, thousands of political committees (commonly known as PACs) solicit contributions during each election cycle, but very few of these committees ever conduct an "official" process to select the candidates they will help nominate and/or elect. So, under Unity08's theory, money received before the political committees have formally declared their candidate-support intentions (*i.e.*, the majority of each election cycle) would not be regulable. Such a system would be utterly unadministrable, and the end result would simply be a massive evasion

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[18] Unity08 relies on cases, such as *NCPAC*, involving limits on *independent expenditures* to argue that its receipt of unlimited *contributions* would not present a threat of corruption. (Unity08 Br. 20-22, 29 n.1) Since *Buckley*, 424 U.S. at 19, however, the Supreme Court has subjected limits on contributions to lesser scrutiny than the "strict scrutiny" applicable to restrictions on expenditures. *See, e.g., McConnell*, 540 U.S. at 134-37; *FEC v. Beaumont*, 539 U.S. 146, 161 (2003); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387-88 (2000). And in *NCPAC*, the Court noted that the organizations were challenging "limitations on expenditures by PACs, not on the contributions they receive." 470 U.S. at 495. Thus, Unity08's attempt to import the Court's reasoning about independent expenditures into Unity08's challenge to contribution limits has no support in any precedent.

of FECA's contribution limits. This is precisely why Unity08's narrow view of corruption, and the appearance thereof, has been rejected by the Supreme Court and cannot undermine the reasonableness of the Commission's decision in AO 2006-20.

4. There Is No Constitutional Exception for Self-Proclaimed "Nascent" Political Parties

Unity08's final argument is that regulating it as a political committee would be "constitutionally suspect" because, as a "nascent political party," it required a "critical mass" of large contributions to achieve its goals. (*See* Unity08 Br. 38-40.) This argument is contrary to the uniform body of law upholding contribution limits to political parties.

As noted previously, there is no doubt that Congress may constitutionally limit contributions made to political committees, of which political parties are a subset. *See supra* p. 43; *see also McConnell*, 540 U.S. at 170 n.64 ("[A]ctions taken by political parties are presumed to be in connection with election campaigns."). Unity08 does not discuss, or even acknowledge, any of this case law but rather implies that there should be different rules for new or small political parties than for older or established ones. In *Buckley*, however, the Court specifically upheld FECA's contribution limits against this precise challenge from minor parties and independent candidates, concluding that "the impact of the . . . contribution limitation on major-party challengers and on minor-party candidates

does not render the provision unconstitutional on its face." 424 U.S. at 33-35.[19] 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.[20] And more recently, in *McConnell*, the Court again recognized that

> 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

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[19] The Court also expressed doubt as to whether minor parties were actually harmed by contribution limits at all, given that, prior to FECA, major parties received substantially more contributions above the then-$1,000 limit than did minor parties and independents. *Buckley*, 424 U.S. at 33.

[20] The significant influence that third-party candidates can have on elections even when they do not win (*see, e.g.*, 2000 Official Presidential General Election Results, http://www.fec.gov/pubrec/2000presgeresults.htm), demonstrates the fallacy in Unity08's rhetorical question regarding how a candidate with long odds of success might be implicated in corrupt financing. (*See* Unity08 Br. 29 ("And why would anyone seeking to pay for political favors contribute to third-party candidates for President and Vice-President, in a country where no third party has won a presidential election . . . in over 150 years?").) Not only might an individual or corporation seek to directly bankroll a presidential candidate (a candidate who, unlike the well-financed major party candidates, would be hugely dependent on that single donor), but a supporter of one of the major-party candidates might also bankroll the third-party candidate to draw votes away from the major-party candidate s/he opposed. *See, e.g.*, *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) (upholding constitutionality of contribution limit where donor attempted to assist Democratic candidate for Senate by contributing to "ultra-conservative" third-party candidate in order to "divert Republican votes"); Nathan Littlefield, *Nader Republicans*, THE ATLANTIC, Sept. 2004, *available at* http://www.theatlantic.com/doc/200409/littlefield2 (discussing major Republican donors' contributing to Ralph Nader to help President Bush and hinder Senator Kerry in 2004 presidential election).

> 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 (emphasis added).

The alleged purity of Unity08's intentions and its purported stand against "two-party dominance" (Unity08 Br. 40) are irrelevant. In *Colorado Republican*, the Court explained how large donors use intermediaries like political parties to exert improper influence on an election and on elected officials, noting that "whether they like it or not, [parties] act as agents for spending on behalf of those who seek to produce obligated officeholders." 533 U.S. at 451-52; *see also McConnell*, 540 U.S. at 145 (quoting *Colorado Republican*). If anything, the threat of actual or apparent corruption identified in *Colorado Republican* is more pronounced here. Unlike political parties, which nominate and attempt to elect a slate of candidates at multiple levels of government and thereby generally spread donor largesse among numerous candidates, Unity08 seeks to nominate and elect only two candidates. Thus, large contributors to Unity08 would know that their unlimited contributions would be used to help those two candidates alone — candidates to whom the donor would otherwise be able to contribute only $4,600. *See* FEC, Contribution Limits for 2007-08, http://www.fec.gov/info/contriblimits0708.pdf (noting $2,300 limit on

contributions for each of candidate's primary and general elections). As the Commission and the district court each noted, this single-election goal effectively rendered Unity08 a "placeholder" for its eventual candidates, such that every contributor to Unity08 knew in advance that his or her contribution would be spent to benefit those candidates, whether through ballot-access activity or other programs. (*See* J.A. 57 (AO 2006-20 at 4); J.A. 564 (slip op. at 17).)[21]

This potential for a single-candidate committee to serve as a conduit is a major reason why the Commission requires that, in order to take advantage of the higher contribution limits available to political parties, a committee must support multiple candidates in multiple states. *See, e.g.*, FEC Advisory Opinion 2001-13, at 3, http://saos.nictusa.com/aodocs/2001-13.pdf (Nov 8, 2001). Unity08 does not challenge this requirement. To the contrary, Unity08 expressly disavowed any intention of becoming a political party and pledged never to run any candidates besides its unity ticket in 2008. *See supra* p. 7. Because Unity08 never would have qualified — or even tried to qualify — as a political party, its claim that it should now be treated like one rings hollow.

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[21] Indeed, many of Unity08's solicitations informed donors that their funds would be used to further the campaigns of Unity08's nominees. (*E.g.*, J.A. 432 (stating that funds will be used to meet "goal of electing a bi-partisan Unity Ticket in the 2008 presidential election"); J.A. 492 ("Your financial contribution … helps give us a good chance to win the White House in November 2008 with a Unity Ticket.").)

This disconnect is further highlighted by Unity08's requested relief, which is not to be subject even to the political party contribution limits; instead, Unity08 seeks to avoid being subject to any contribution limits whatsoever. (*See* J.A. 19, Prayer for Relief ¶ b (seeking injunction against contribution limits).) There is no warrant in the Constitution for Unity08's claim that it, as a single-candidate organization, is burdened by not having the same resources as political parties that support hundreds of candidates nationwide, much less for the assertion that the First Amendment requires Unity08 to be given a fundraising advantage over those parties.

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In sum, Unity08's challenges were not unique. Like most political parties and other political committees, Unity08 would have preferred to raise money from contributions in larger increments.[22] Thus, as with every other political committee,

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[22] In reality, Unity08 presented two distinct pictures of its fundraising desires. To the public, Unity08 maintained from its inception that it had voluntarily self-imposed a $5,000 limit on the contributions it would accept because such a limit "was appropriate" and "to avoid the appearance of big money ownership of the process or the party." (J.A. 315 at 40:3-11; J.A. 350; J.A. 361; *see also* J.A. 363 ("[U]nder the law we can ask for and receive contributions of unlimited amount, but frankly we don't want to slip into the mistakes that the rest of politics has embraced. So we are sticking to the $5000 per person limit . . . ."); J.A. 374 ("Unity08 intends to . . . elect[ ] a bipartisan 'Unity Ticket' . . . *funded solely by small-dollar donations* from everyday Americans.") (emphasis added).) Thus, when the Commission issued AO 2006-20, Unity08 reassured its members that it "had long ago *voluntarily* instituted a $5,000 cap as part of our promise to reduce the influence of money on politics. . . . *So nothing about our operations will*

the limits forced Unity08 to diversify its fundraising: 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 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 was unable to motivate a sufficient number of persons to underwrite its ballot-access efforts adequately, that is not an unconstitutional burden. "[P]olitical 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 (internal quotation marks omitted).

CONCLUSION

An organization that is avowedly committed to electing the next President and Vice President of the United States, and that disburses thousands of dollars toward that end, is required to register as a federal political committee. Thus, and for all the foregoing reasons, the district court's grant of summary judgment to the Commission should be affirmed, or this appeal should be dismissed.

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change." (J.A. 382 (emphasis added).) It was only in affidavits prepared for this litigation that Unity08 stated a desire to take unlimited contributions from its principals (*see* Unity08 Br. 10), as well as "loans" that Unity08 would have no legal obligation to repay (J.A. 524).

Respectfully submitted,

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June 29, 2009

EXHIBIT

Text of www.unity08.com (originally posted on or about January 10, 2008; last visited June 23, 2009):

Dear fellow members of Unity08,

One of our principles at the outset of this audacious project was transparency and openness. Too often in our recent political history, what you see is not what you get.

For this reason, we are writing you today to lay out the current status of Unity08 and possible paths going forward.

First, however, it's important to reflect upon what we - together - have accomplished in shaping the current political discussion and building a sense of what is possible in this crucial election year. Two of our core ideas - the importance of a centrist, bi-partisan approach to the solving of our nation's problems and the possibility of an independent, unity ticket for the presidency have already gone from far-out to mainstream.

Barack Obama, for example, has made the theme of unity and the necessity of bridging the partisan divide an absolutely central theme of his campaign. And just last week, a group of former and present national office holders - independents, Republicans and Democrats - met in Oklahoma for the sole purpose of stating their belief that at the present perilous moment, a unity government is the only hope of solving the nation's mounting problems. When you have agreement among the likes of former RNC chairman Bill Brock and Gary Hart, you're onto something.

And, of course, waiting in the wings should the divide persist, is the potential of a serious non-partisan candidacy in the person of the Mayor of New York (two of our founders Doug Bailey and Gerald Rafshoon have stepped down from the board and may have more to say about their plans in the near future).

Can Unity08 take full credit for these remarkable developments? Of course not, but through this website, your active involvement, innumerable news stories, op-eds, and public appearances by friends like Sam Waterston, we certainly have helped to bring these ideas to the forefront of the current political discussion.

So in a larger sense, we have accomplished a major portion of what we set out to do. But in the specifics and logistics, we have fallen short.

At the current moment, we don't have enough members or enough money to take the next necessary step - achieving ballot access in 50 states - to reach the goal of establishing our on-line convention and nominating a Unity ticket for president and vice president this coming fall.

The past year has taught us that it's tough to rally millions to a process as opposed to a candidate or an issue. In the past, third party movements that have broken through the monopoly of the established parties have always been based on a person (Teddy Roosevelt in 1912 or Ross Perot in the last decade) or a burning issue (slavery in the case of the insurgent Republican party in 1860). Stirring people and moving them to action about a process change - replacing the quirky primary system that tends to drive candidates to the extremes with something more inclusive and sensible - has proven to be a lot harder than we expected.

And the Federal Election Commission hasn't helped. The Commission has taken the position that we are subject to their jurisdiction (even though two United States Supreme Court decisions hold exactly opposite) and, therefore, that we are limited to $5000 contributions from individuals (even though the Democrat and Republican Parties are able to receive $25,000 from individuals). Needless to say, this position by the FEC effectively limited our fundraising potential, especially in the crucial early going when we needed substantial money fast to get on with ballot access and the publicity necessary to build our membership.

We were caught in a peculiar catch-22; we wanted to break the dependence on big money by getting lots of small contributions from millions of members, but needed some up-front big money to help generate the millions of members to make the small contributions. And the FEC (in effect, an arm of the parties) didn't let that happen. We have challenged this ruling in the federal courts, but are still awaiting a decision and time is running out.

And so reluctantly, especially given the volatility of the present situation, we're forced to scale back - not cease - our operations and suspend our ballot access project. Our website will become less interactive (it takes staff to answer hundreds of e-mails a day) and we can't in good faith make the $5 million commitment necessary to make a serious start on ballot access.

But we're not closing our doors. We believe it is important to see our case against the FEC through (both for Unity08 and any similar movement in the future) and be ready to gear up if (when) we win our case and political circumstances warrant later this spring. Unity is in the air right now, and Mayor Bloomberg seems poised to run on his own (and the fact is that two independent candidacies wouldn't work) if the parties leave the sensible center open - but all this could change in a matter of weeks.

We still believe strongly that we have the right idea, but it just might (emphasize might because who knows what can happen in the next month) not be the right time. In the meantime, a sincere, profound thanks for your help, involvement and support so far and please keep pushin' - for the simple but very powerful idea that solutions to our nation's problems are going to take ideas and hard work from all sources, and that a political system whose stock-in-trade is division may well be the biggest problem of all.

Please know that you have already made a difference and are at the forefront of a movement that may yet save the country.

Robert Bingham
Angus King
Peter Ackerman
Zach Clayton
Lindsay Ullman
Board of Directors, Unity08

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

/s/ Adav Noti

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June 29, 2009

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2009, I will file the foregoing electronically via the Court's ECF system pursuant to D.C. Cir. R. 25(a), I will cause eight paper copies to be hand-delivered to the Court pursuant to D.C. Cir. R. 31(b), and I will serve copies on the following by e-mail pursuant to Fed. R. App. P. 25(c)(1)(D):

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