

Oral Argument Not Yet Scheduled

**No. 08-5526**

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

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UNITY08,

*Appellant,*

v.

FEDERAL ELECTION COMMISSION,

*Appellee.*

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

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**REPLY BRIEF OF APPELLANT**

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**GLOSSARY**

AO            Advisory Opinion

FEC           Federal Election Commission

FECA          Federal Election Campaign Act

*USDC*        *U.S. Def. Comm'n v. FEC*, 861 F.2d 765 (2d Cir. 1988)

## SUMMARY OF ARGUMENT

Unity08 is a political organization with a unique mission. It seeks to create a platform for broader, bipartisan participation in politics in order to change the tone and focus of the current political system. To achieve that goal, it will “nominate” candidates for President and Vice-President. But that “nomination” process is unlike the nomination process of any other political organization on the American political scene.

Although Unity08 intends to obtain ballot access for a Unity08 ticket and to hold an online convention in which candidates will be nominated (by ordinary Americans), Unity08 itself would have no association with an identified candidate for federal office *at any point in the process*. Unlike a conventional political party, Unity08 always intended to walk away from the process altogether once the “nominees” were selected as candidates—leaving them to form their own committees to campaign for them. Unity08 is a political organization using traditional election tools in an entirely non-traditional way. It seeks to create the structural conditions for the selection of *someone* to become the next President and Vice-President. But it has no stake or interest in deciding *who* those people will be, and never learns the identity of those people until its work is completed.

Unity08 demonstrated in its opening brief that, under *Buckley*’s “major purpose” test, as interpreted by this Court in *Machinists*, an organization like

Unity08 is not subject to regulation as a “political committee.” In an advisory opinion issued in 2006, the FEC disagreed. As a direct result of that advisory opinion, and the contribution limits that govern “political committees,” Unity08 could not achieve its goals for the 2008 election.

The FEC says that this Court cannot even reach the merits because the case is moot and that FEC advisory opinions are unreviewable. The FEC would have this Court believe that Unity08 never intended to participate in any election other than the 2008 presidential election, and that it essentially went “out of business” in 2008 once the FEC issued its advisory opinion. That is false. Unity08 never limited its objectives to the 2008 election, has never closed its doors (though it has suspended its operations due to the FEC’s unconstitutional advisory opinion), and has every intention of participating in the 2012 presidential election—*if* the advisory opinion is reversed. The FEC made it impossible for Unity08 to fulfill its mission by requiring it register as a “political committee,” and now claims that the case is “moot” because Unity08 is not today actively at work. That is not justiciability; it is a cynical game of administrative “gotcha.”

The FEC also argues that its advisory opinion is unreviewable because Congress in FECA intended to foreclose judicial review of such actions, and because they are not “final.” But the FEC has identified *no evidence* that Congress intended to foreclose judicial review of FEC advisory opinions. As to finality, the

FEC determined in its advisory opinion that Unity08 “must register” as a “political committee.” That is a mandatory agency determination that imposed real-world, consequences on Unity08, and it plainly satisfies this Court’s finality precedents.

On the merits, the FEC and its *amici* suggest that the entire campaign finance regime would crumble if Unity08—a political organization with a decidedly unique mission—did not register as a “political committee.” That is absurd. They conjure up the prospect of “massive corruption” and the “massive evasion of FECA’s contribution limits.” But these arguments erroneously presume that Unity08 is just like any other political party, and that all political parties must subject themselves to FECA regulation even *before* they formally nominate a “candidate.” Unity08 is fundamentally different. By design, Unity08 will *never* support or oppose any particular, identified candidate for federal office. Under *Buckley*’s “major purpose” test and *Machinists*, Unity08 is not a “political committee” because there is simply no risk that its activities will lead to corruption or the appearance of corruption. Because any effort to regulate Unity08 as a “political committee” would violate the First Amendment, this Court should reverse.

## ARGUMENT

### **I. UNITY08'S CLAIMS ARE JUSTICIABLE**

#### **A. This Case Is Not Moot**

As a consequence of the FEC's determination that Unity08 must be registered as a "political committee" and would not be permitted to accept contributions from individuals exceeding \$5,000, Unity08 determined that it would not be able to raise the approximately \$15 million it needed to achieve its goals for the 2008 presidential election. *See* Peter Ackerman Affidavit ¶4 (Unity08-Ex. 1), attached hereto. Accordingly, Unity08 declared in January 2008 that it was "scal[ing] back" its operations and "suspend[ing]" its ballot access project" (FEC-Ex. 1 at 2, attached to FEC's Brief ("FBR")), and would focus its energies instead on overturning AO 2006-20 in this litigation so that Unity08 (and perhaps other, similar movements) could achieve its goals at a later time (*id.* at 3).

The FEC now seeks to insulate AO 2006-20 from judicial review on the specious ground that Unity08's temporary suspension of its ballot access operations—which the FEC's administrative ruling brought about—somehow makes the case moot. But Unity08 remains a viable movement with a clear and definite intent to participate in the 2012 presidential election. Regardless, this Court retains jurisdiction under the "capable of repetition" exception to mootness.

**1. Unity08 Has A Clear And Definite Intent To Resume Election Activities For The 2012 Presidential Election If The Decision Below Is Reversed.**

The FEC argues that this case is moot because of Unity08's purported "permanent cessation of activity" (FBR-14) and "disclaime[r] [of] any intention of participating in any election other than the 2008 presidential race" (FBR-15). That is incorrect.

The FEC cites (without quoting) a single statement in Unity08's AO requests. Unity08 said that it "does not intend to promote, attack, support, or oppose the candidates of the major parties for public office in the 2006 elections on the federal, state or local level, and it does not intend to support or oppose candidates for Congress or State and local elections at any time." JA-159; *see also* JA-198 (same in supplemental request). That statement does not even address Unity08's plans with respect to future *presidential* races, and certainly is not a "specific disavowal" of intention to participate in such races.

The FEC's reliance on Unity08's assertion that it did not intend to become a "permanent political party" (JA-435) is similarly misleading. Unity08 never intended to be a permanent political party—but that does not mean it foreswore the possibility of participating in presidential elections after 2008. The documents that the FEC quotes show that Unity08 considered the possibility of playing a role beyond the 2008 election, and merely hoped that such a role would not be

necessary *if* its objectives could be accomplished in 2008. *See* JA-435 (“It is not our intention to become a permanent third party. *That might happen*, but it is our hope that after the 2008 election of a Unity Ticket representing both current parties, that they both would get the message and move back toward the middle where they belong. In that case, responsive ... Unity08 *will not need to be permanent.*”) (emphasis added).

Regardless of what Unity08 may have said before the 2008 election, the relevant question is whether Unity08 has a *current* intention to participate in a future presidential election. The FEC claims that Unity08 “closed its doors” and “ceased its operations” in January 2008. But its citations prove the opposite. Unity08’s website states that, “given the volatility of the present situation, we’re forced to scale back—*not cease*—our operations and suspend our ballot access project .... *But we’re not closing our doors.*” FEC-Ex. 1 at 2-3 (emphasis added).

Unity08 has suspended its ballot access activities and election-related efforts while it litigates this case, and has not engaged in any material fundraising or spending since January 2008. *See* FEC-Ex. 1. But it remains a viable political organization with a clear and definite intent to participate in the 2012 presidential election. Unity08-Ex. 1 ¶2 (“If Unity08 is successful in this litigation, Unity08 has a clear and definite intent to resume its activities—renamed ‘Unity12’—for the 2012 presidential election. The ‘Unity’ mission remains as critical today for the

2012 presidential election as it was in 2006 for the 2008 presidential election.”); *id.* ¶6 (“If the FEC ruling is reversed, Unity12 stands ready and fully intends to carry on the work that Unity08 began.”).

The FEC relies (at 16) upon *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283-85 (2001), and *Munsell v. Department of Agriculture*, 509 F.3d 572, 581-82 (D.C. Cir. 2007), but those cases were moot because the plaintiff *completely* ceased its operations *and* expressed no clear intent to resume them if the challenged action were reversed. *City News*, 531 U.S. at 281-83 (challenge to city’s denial of license became moot after store withdrew application for license, closed its business, and neither “pursued[] nor currently expresse[d] an intent to pursue a license”); *Munsell*, 509 F.3d at 581-83 (finding suit against USDA moot where plaintiff corporate entity divested itself of meat processing operation, was no longer regulated, and had no “clear” or “definite” plans to reenter that business).

By contrast, Unity08 remains “open” and has a clear and definite plan to resume its activities for the 2012 presidential election if it prevails here. *E.g.*, *Clark v. City of Lakewood*, 259 F.3d 996, 1012 & n.9 (9th Cir. 2001) (distinguishing *City News* and holding that expiration of business’s license did not moot controversy where entity expressly stated its intention to return to business if challenged ordinance were overturned); *Dolls, Inc. v. City of Coralville*, 425 F. Supp. 2d 958, 985-86 (S.D. Iowa 2006) (challenge to licensing and zoning

ordinances not moot where business closed at former location and could not construct a new business under existing ordinances, yet expressed intent to reopen); *see also Church of Am. Knights of Ku Klux Klan v. City of Gary*, 334 F.3d 676, 678 (7th Cir. 2003) (case not moot where group that had ceased holding rallies stated clear intent to hold another rally if fee requirement were struck down).

Moreover, Unity08 suspended its activities because of the FEC's administrative ruling. It would be perverse to permit the FEC effectively to shut down a nascent political movement as a result of a constitutionally-suspect interpretation of FECA, and then insulate its action from review because the agency has shut down the group's activities. *Skysign Int'l, Inc. v. City & County of Honolulu*, 276 F.3d 1109, 1114 (9th Cir. 2002) (no mootness where plaintiff alleged that "challenged ordinance itself is what caused it to cease operations, and that the removal of that obstacle would put it back in business").<sup>1</sup>

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<sup>1</sup> The FEC's *amici* argue that Unity08's claims are moot because they "relate exclusively" to the 2008 election. *Amici's Br. ("ABR")-7*. But AO 2006-20 addresses whether Unity08 would be required to register as a "political committee" if it engaged in the planned activities for the 2008 election—a requirement that persists to this day and has prevented Unity08 from engaging in the fundraising necessary to effectuate its goals.

## 2. This Case Falls Under The “Capable Of Repetition” Exception To The Mootness Doctrine

In any case, Unity08’s appeal is not moot because it falls within the “capable of repetition” exception to mootness. *See, e.g., FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2663 (2007); *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

This Court has held that “controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters ‘capable of repetition, yet evading review.’” *Branch v. FCC*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987) (citing *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)). The FEC’s argument that an election cycle is too long to qualify under this exception fails under well-settled law establishing that “[c]ontroversy surrounding election laws ... is one of the paradigmatic circumstances in which the Supreme Court has found that full litigation can never be completed before the precise controversy (a particular election) has run its course.” *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 & n.6 (5th Cir. 2006) (citing *Norman v. Reed*, 502 U.S. 279, 288 (1992); *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974)). This Court has likewise held, in the context of a four-year presidential election, that a case was not moot where its issues, “and their effects on minor-party candidacies, will persist in future elections, and within a time frame too short to allow resolution through

litigation.” *Johnson v. FCC*, 829 F.2d 157, 159 n.7 (D.C. Cir. 1987); *see also Shays v. FEC*, 424 F. Supp. 2d 100, 111 (D.D.C. 2006).

Unity08 intends to participate in future elections if it wins this case.

Regardless, a plaintiff can satisfy the “capable of repetition” exception to mootness *in the election context* by demonstrating that the issue being litigated could affect a similar organization in the future. Thus, in *Johnson v. FCC*, this Court held that a controversy surrounding the 1984 presidential election was not moot under the “capable of repetition” exception without regard to whether the candidates had any intention of running again. 829 F.2d at 159 n.7 (reasoning that “[t]he issues properly presented, and their effects on minor-party candidacies, will persist in future elections, and within a time frame too short to allow resolution through litigation”); *see Storer*, 415 U.S. at 737 n.8 (case was not moot even though election was over because effects of issues on independent candidacies would persist in future elections); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (applying similar rule); *Honig v. Doe*, 484 U.S. 305, 335-36 (1988) (Scalia, J., dissenting) (recognizing that the Court had “dispens[ed] with the same-party requirement” in the context of election law disputes).<sup>2</sup> Because the issues that

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<sup>2</sup> In two recent election law disputes the Supreme Court found that the “capable of repetition” exception was satisfied because the particular plaintiff was likely to be subject to the challenged law in a subsequent election cycle. FBR-18 n.6. But the Court did not suggest that a case should be dismissed as moot where a plaintiff in an election case cannot make that showing. It therefore left undisturbed

Unity08 raises could easily affect a similar organization in the future, the “capable of repetition” exception applies.<sup>3</sup>

**B. AO 2006-20 Is Subject To Judicial Review**

**1. FECA Does Not Preclude Judicial Review Of AO 2006-20**

The FEC argues that AO 2006-20 is unreviewable because Congress in FECA intended to “preclude judicial review” over such decisions. 5 U.S.C. §701(a)(1). However, “there is a ‘well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action,’ and [courts] will accordingly find an intent to preclude such review only if presented with ‘clear and convincing evidence.’” *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (citations omitted). The FEC is unable to point to any such evidence.

The FEC admits that FECA is silent on whether advisory opinions are reviewable. But it asserts that review is precluded because FECA contains two provisions specifically creating a private right of action, but no express cause of action for challenging advisory opinions. FBR-21-22. However, as the Supreme

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its long line of precedent holding that an election case survives mootness where it is “capable of repetition” with respect to other, similarly-situated parties. *See Kucinich v. Tex. Democratic Party*, 563 F.3d 161, 164 (5th Cir. 2009).

<sup>3</sup> The FEC also argues that the “capable of repetition” exception does not apply because Unity08 could assert its claims as a defense in a subsequent enforcement action (FBR-19), but its cases hold only that the availability of an *affirmative claim* for monetary damages would prevent an otherwise moot injunction claim from “evading review.” *See City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983); *PETA v. Gittens*, 396 F.3d 416, 425 (D.C. Cir. 2005) (same).

Court has explained, “[t]he mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others. The right to review is too important to be excluded on such slender and indeterminate evidence of legislative intent”; the interpretive question is always “phrased in terms of ‘prohibition’ rather than ‘authorization’ because ... judicial review of a final agency action by an aggrieved person will not be cut off unless there is a persuasive reason to believe that such was the purpose of Congress.” *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967). That a statute specifically authorizes *post-enforcement* judicial review does not establish Congress’s intent to preclude *pre-enforcement* review. The whole point of *Abbott Laboratories* and the Declaratory Judgment Act is that individuals should not have to expose themselves to civil or criminal penalties to obtain judicial review of agency interpretations. *See MedImmune v. Genentech*, 549 U.S. 118, 128-29 (2007).

## **2. AO 2006-20 Is Reviewable “Final Agency Action”**

Actions are “final,” and therefore reviewable under the APA, if they “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) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)). The FEC admits that the first prong

is met because “the issuance of an advisory opinion marks the conclusion of FECA’s advisory opinion process.” FBR-23.

The FEC suggests, however, that AO 2006-20 does not determine Unity08’s “rights or obligations” or result in “legal consequences.” Elsewhere in its brief, the FEC treats its advisory opinions as binding precedent. FBR-30-32. Regardless, the FEC’s ability to later change its mind does not itself render an advisory opinion non-final. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

Additionally, this Circuit, unlike the Second Circuit, does not require agency action to be *formally* binding to be reviewable. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (Circuit’s cases “make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding”) (citation and quotation omitted); *cf. U.S. Def. Comm’n v. FEC*, 861 F.2d 765, 770-72 (2d Cir. 1988) (“*USDC*”) (cited at FBR-24-25) (requiring that the advisory opinion be *formally* binding for finality). AO 2006-20 appears on its face to be binding because its language is unconditional as to what would happen should Unity08 make more than \$1,000 in expenditures: “Unity 08 *must* register with the Commission by filing a statement of organization within ten days after becoming a political committee, and it *will* be subject to the provisions of the Act

and Commission regulations applicable to political committees.” JA-58 (emphasis added). AO 2006-20 is also practically binding because as a result of the opinion, and the strict contribution limits that registration would require, Unity08 was effectively thwarted from achieving its goals. JA-15-16, 35; see *Her Majesty the Queen ex rel. Ontario v. U.S. EPA*, 912 F.2d 1525, 1531 (D.C. Cir. 1990) (“To determine finality, courts must decide ‘whether the agency’s position is definitive and whether it has a direct and immediate . . . effect on the day-to-day business of the parties challenging the action.’”) (citation omitted) (omission in original).

Moreover, the FEC has given no indication that it will ever change the position it took in AO 2006-20, which was adopted after an extensive administrative process—including Unity08 twice supplementing the record, two public hearings, public comments, and two extensions of the statutory time limit for rendering a decision. JA-155-240. The AO was not tentative and did not suggest that more facts were necessary or might lead to a different conclusion. There is absolutely no indication that the FEC can “later be convinced to change its mind.” *USDC*, 861 F.2d at 772. By contrast, in *USDC*, the advisory opinion was “particularly inappropriate for judicial resolution” because the FEC was “engaged in a rulemaking proceeding which could alter the very regulations applied in” the challenged advisory opinion as a result of a new Supreme Court decision. *Id.*

AO 2006-20 speaks in mandatory terms about Unity08's obligation to register as a "political committee" and caused Unity08 to suspend *all* of its efforts. Consequently, it is a reviewable final agency action.

## II. UNITY08 IS NOT A "POLITICAL COMMITTEE"

Unity08 demonstrated that, under settled law of the Supreme Court and this Circuit, it is not a "political committee" under FECA. In response, the FEC and its *amici* offer a series of rhetorically overblown reasons why Unity08 *must* be regulated under FECA in order to prevent "massive corruption" and a "massive evasion of FECA's contribution limits." The "parade of horrors" that the FEC and its *amici* identify is pure fiction.

### A. AO 2006-20 Is Not Entitled To *Chevron* Deference

The FEC argues broadly that AO 2006-20 should be upheld because it is a "reasonable construction" of FECA—implying that the whole of its AO is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). But the FEC's interpretation of *Buckley*'s "major purpose" test, *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)—the main question on appeal—implicates core constitutional protections, and is thus not entitled to any deference. *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (FEC is not entitled to *Chevron* deference where its interpretation of word burdened First Amendment rights); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568,

575 (1988) (*Chevron* deference does not apply “where an otherwise acceptable construction of a statute would raise serious constitutional problems”). In one sentence in its brief, the FEC concedes that this is the law. FBR-29 (“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*.”). Because AO 2006-20 is premised on the FEC’s construction of the “major purpose” test, it cannot be upheld as a “reasonable construction” of the FECA.<sup>4</sup>

**B. The Major Purpose Of Unity08 Was To Create A Different Type Of Political Organization, Unassociated With Any Candidate**

The FEC’s argument is built around the false premise that Unity08’s objectives and activities are similar, for statutory and constitutional purposes, to traditional political parties or political action committees. The FEC simply ignores or refuses to engage with the important features that make Unity08 wholly unlike those groups.

Unity08 was never intended to be a political party, and its “major purpose” was never to promote the nomination or election of any particular candidate or candidates for office. Unity08’s goal was to create an open-source platform for

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<sup>4</sup> The FEC does argue that its construction of “expenditures”—unlike “major purpose”—is entitled to *Chevron* deference (FBR-27-29), but that argument is premised entirely on its contention that *Buckley* and its progeny do not impose any constitutional limits on how the term “expenditures” is applied to Unity08. *See* Unity08’s Brief (“UBR”)-35-37 and *infra* at 28-29).

broader, bipartisan participation in order to change the tone and focus of political issues and to promote a new bi-partisan approach to politics focusing on the center of the political spectrum. UBR-6.

Unity08 sought to pursue its goals through a two-phase plan focused on changing the electoral *process*. The first phase involved obtaining ballot access for a Unity08 ticket in the 37 states that allowed an organization a ballot position without an associated candidate. The second phase involved using technology to create an online nomination convention whereby any person could register as a delegate to vote for candidates for President and Vice-President. No individuals would even declare themselves as candidates for Unity08's nomination until that convention was held, at which point Unity08's own purpose and activities would have been completed. At no time during either of these two phases would Unity08 have been affiliated in any way with any candidate, nor would it have sought to promote the nomination or election of any particular candidate. UBR-6-7.

Unity08 essentially intended to walk right up to the point at which it would have become a traditional political party, and then step away. By the time any particular candidate was identified and chosen, Unity08's planned work would have been complete. Compl. ¶13 (JA-13); Baily Decl. ¶42 (JA-32). Unity08 never intended to actively campaign for any candidates; it always expected that the eventual candidates would form their own political committees and comply with

FECA's requirements. UBR-8-9. That the group's founders expressed the hope or goal that the eventual Unity08 nominees would go on to win the election (FBR-6, 36-37) does not alter the analysis; Unity08 never intended to *pursue* that goal in any fashion subject to regulation under FECA.

**C. A Political Committee Is A Group Whose Major Purpose Is The Nomination Or Election Of A Particular Candidate**

A "political committee" under 2 U.S.C. §431(4)(a) must be an organization "under the control of a candidate or the major purpose of which is the nomination or election of a candidate," *Buckley*, 424 U.S. at 79, that receives contributions or make expenditures in excess of \$1,000 during a calendar year. UBR-19. To satisfy the major purpose test of the political committee determination, the activities and disbursements of an organization must support and relate to an actual, specific person. UBR-20-26; *see also FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004). As this Court explained in *FEC v. Machinists Non-Partisan Political League*, this limitation is essential because the FEC is constitutionally entitled to regulate political speech only for the narrow and specific purpose of preventing actual corruption or the risk of corruption, which is not present "where a group's activities are not related in any way to a person who has decided to become a candidate." 655 F.2d 380, 392 (D.C. Cir. 1981).

1. The FEC claims that a "candidate" must be "clearly identified" only in the context of "express advocacy." FBR-33. However, both the controlling

case law and the plain language of FECA require that a “candidate” be an *actual person* in all contexts, not just the “express advocacy” context. First, *Buckley* states that “political committee” must be construed narrowly under the First Amendment to “only encompass organizations that are *under the control of a candidate* or the major purpose of which is the *nomination or election of a candidate*.” 424 U.S. at 79 (emphasis added). Clearly, an organization can only be “under the control of” an actual person, and not a placeholder. And the Court could not have meant an identifiable person when it referred to “a candidate” in the “under the control” context but meant something different (*i.e.*, a person who may be identified later) when it used the same precise phrase (“a candidate”) later in the same sentence when referring to nomination or election. The statutory language lends further support to this conclusion. FECA defines “candidate”—the term that *Buckley* used to define the boundaries of the “major purpose” exception—as “*an individual* who seeks nomination for election, or election, to Federal office.” 2 U.S.C. §431(2) (emphasis added). The definition also refers to a “*person*” and “his or her” activities, signifying that “candidate” must mean an actual, particular person—not a placeholder, as the FEC suggests. *Id.* §431(2)(B) (emphasis added).

Second, in *Machinists* this Court expressly endorsed Unity08’s reading of *Buckley*. The Court quoted the “major purpose” passage from *Buckley*, and explained that it narrowly construed “political committee” to be limited to groups

presenting “the actuality and potential for corruption,” which is not present “where a group’s activities are not related in any way to a person who has decided to become a candidate.” 655 F.2d at 391-92 (citation omitted). The Court further held that groups that “aim to produce some day a candidate acceptable to them, but [who] have not yet succeeded” are not “promoting a ‘candidate’ for office, as Congress uses that term in FECA.” *Id.* at 392. And the Court quoted the very language in *Buckley* that the FEC contends does *not* require a specific, identifiable candidate (the major purpose language) to support its holding that “candidate” means a specific person. *Id.* & n.24 (quoting statutory definition of candidate).

The FEC attempts to distinguish *Machinists* on the ground that a draft group “has exhausted its only purpose” once it convinces the candidate to run, whereas Unity08’s “whole purpose ... [was] at least to *nominate* its ‘unity ticket’ for federal office.” FBR-40-41. This misunderstands the role of the word “nominate” in the statute and in the major purpose test. A group whose goal is to help a particular person secure the nomination of a party is certainly a political committee. But one merely seeking to ensure that *someone* is nominated is not a political committee. The FEC’s logic would, for example, subject to regulation a group formed to ensure that the Democratic convention is not disrupted by protests or terrorism, so that *someone* would secure the Democratic nomination. To the extent that Unity08 was working toward the “nomination” of a candidate, its purposes were similarly

abstract and do not remotely implicate the “actuality and potential for corruption” associated with support for particular candidates at the heart of the major purpose test.

Third, district courts in this Circuit have understood *Machinists* to require a showing that the group in question is supporting a particular, identified candidate. In *FEC v. GOPAC, Inc.*, the court held that although the group supported future hopeful candidates for federal office, GOPAC’s major purpose activity did not “constitute support for an *actual, particular* federal candidate or candidates.” 917 F. Supp. 851, 864 (D.D.C. 1996) (emphasis added). Similarly, in *Malenick*, the court held that because the major purpose of the group at issue “was the nomination or election of *specific* candidates,” the organization was a political committee. 310 F. Supp. 2d at 237 (emphasis added).

The FEC claims that *GOPAC* is distinguishable because that group did not provide direct support to federal candidates, and it dismisses the district court’s analysis of the major purposes test as dictum. FBR-39. However, the *GOPAC* court’s extensive analysis of both *Buckley* and *Machinists*—and its rejection of the FEC’s argument that the major purpose test was so broad as to cover any group engaging in “partisan politics or “electoral activity”—belies that characterization. *E.g.*, 917 F. Supp. at 859 (“Circuit precedent indicates ... that even if the organization’s major purpose is the election of a federal candidate or candidates,

the organization does not become a ‘political committee’ unless or until it makes expenditures in cash or in kind to support a ‘person who has decided to become a candidate’ for federal office.” (citing *Machinists*, 655 F.2d at 392)); *id.* (noting that the court relied on *Buckley* and subsequent D.C. Circuit cases to deny a motion to dismiss in order to afford the FEC an opportunity to address “‘the *controlling relevant legal question* ... [of] whether, at the times in question, the *organization’s* ‘major purposes ... [was] the nomination or election’ of an identified candidate or candidates for *federal* office”) (initial emphasis added) (alterations in original).

The FEC also argues that *GOPAC* “provided no direct support to federal candidates,” whereas Unity08 “planned to give its presidential ticket—at a minimum—a \$10 million gift in the form of ballot access.” FBR-39 (footnote omitted). But ballot access is a benefit that the major parties get *for free*. Merely trying to equalize the playing field between major party candidates and independent candidates does not constitute electioneering on behalf of independent candidates. Unity08 could have pursued exactly the same goals, for example, by lobbying for the liberalization of ballot access laws in the 37 states to make it substantially easier for independent candidates to get on the ballot. That approach would have been far too slow and expensive to bear fruit in time for the 2008 election, but presumably even the FEC would have conceded that such a group cannot be regulated as a “political committee.” Unity08’s objectives were

similarly agnostic as to the identity of the particular candidates who would ultimately be benefited, and hence it did not have as a major purpose the nomination or election of any particular candidate.

Any interpretation of FECA that would render structural efforts to level the playing field, like Unity08's, subject to FECA's strict limitations would raise very serious constitutional problems of discrimination against independent candidates and minor parties. *See* UBR-38-40; *cf. Communist Party of Ind. v. Whitcomb*, 414 U.S. 441, 449 (1974) (holding ballot access restriction that discriminated against minor party unconstitutional because it violated ““basic constitutional”” ““right to associate with the political party of one's choice”” (citation omitted)).

2. The FEC argues that “[t]he whole point of a nomination process is to identify which candidate an organization will support” and that if Unity08 does not qualify as a political committee, “all political parties ... would be constitutionally exempt from regulation as political committees in each election cycle until they had nominated their candidates for political office.” FBR-41; *see also* ABR-18. This argument is a red herring because political parties are subject to FECA without regard to *Buckley*'s “major purpose” test so long as they have (at any time) actually obtained ballot access for a candidate, so anything this Court says about

that test could not exempt the major parties from regulation at any point.<sup>5</sup> The Supreme Court crafted the “major purpose” test because the term “political committee”—unlike the term “political party”—is defined by reference to campaign “expenditures” and “contributions.” The test winnows out groups not defined elsewhere in the statute that might otherwise be caught in the net of the vague and overbroad language of §431(4)(A) and does not exempt otherwise regulated entities from FECA’s ambit.

Regardless, the major parties (and many political action committees) always intend to campaign for the election of a particular individual at some point, even before that individual is identified. Unity08, by contrast, *never* would have supported the nomination or election of any particular person. There is a world of difference between an intent to support the election of a particular person (even if not yet identified) and an abstract intent to support the nomination or election of *someone* while remaining forever indifferent to who that person is.

3. The FEC’s *amici* cite AO 2003-23 (Nov. 7, 2003) for the proposition that an organization need only support a candidate who can be identified by office, party, or election cycle for any campaign finance laws to apply. ABR-22-23. But AO 2003-23 deals with specific earmarking rules that are wholly unrelated to the issues in the present case. WE LEAD, an organization that was already registered

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<sup>5</sup> 2 U.S.C. §431(16) (defining “political party”); 11 C.F.R. §100.15 (same); AO 2004-9; AO 1980-3.

as a political committee, collected earmarked contributions and forwarded them to the presumptive Democratic nominee or to the Democratic National Committee if the presumptive nominee was not named by a particular time. At issue was whether contributors to WE LEAD were allowed under earmarking rules to make those contributions to WE LEAD, *not* whether WE LEAD was a “political committee.”<sup>6</sup>

**D. Unity08’s Activities Create No Risk Of Corruption Or Its Appearance**

The FEC’s overblown rhetoric is divorced from logic, common sense, and the facts about Unity08. Allowing a group like Unity08 to collect contributions exceeding the \$5,000 limit that applies to political committees certainly will not “create an opportunity for massive corruption.” FBR-42. A donor to a true political party or PAC knows that his or her donation will be used directly to campaign for the nomination and/or election of some particular person—who will then be beholden to the donor. A donor to Unity08, by contrast, knows that his or her donation would be used solely to create an open source platform for greater participation but specifically *would not* be used to campaign in any way for the actual election of whatever person ultimately took advantage of that platform. To

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<sup>6</sup> The FEC’s *amici* also argue (FBR-13-14) that Unity08’s registration under 26 U.S.C. §527 means it is a political committee, but the FEC itself has specifically declined to treat 527 status as a proxy for determining political committee status. *See* 72 Fed. Reg. 5595 (Feb. 7, 2007).

the extent the Unity08 nominee would be indebted to Unity08's contributors in some abstract sense, the same could be said for a group that devotes itself to securing changes in ballot access laws that would make any independent candidacy easier to run. Certainly independent candidates would be grateful for such abstract and impersonal support, but it is a far cry from the kinds of corruption-inducing linkages that the Supreme Court has found to be constitutionally sufficient to justify FECA's harsh contribution limits.

The FEC says that corruption of the political *process* exists where contributions are not directly connected to a candidate of the contributor's choosing, and that this type of corruption is a compelling reason to justify constitutional restrictions on Unity08. FBR-45-48 (citing *Cal. Med. Ass'n v. FEC*, 453 U.S. 182 (1981)). But unlike Unity08, the group in *California Medical* was already a political committee that supported specific, actual candidates. The Supreme Court's observation that contributions earmarked for administrative expenses could effectively be redirected into direct candidate support (FBR-46) must be understood in that context. If a donor offers to pay all the administrative expenses of the Democratic Party, obviously that would enable the party to shift other funds into direct campaign expenditures. There are no such "fungible money" concerns with Unity08, because the organization had no plans to participate in campaigning *at all*.

Moreover, the FEC fails to take into account more recent Supreme Court precedent explicitly rejecting *California Medical's* reasoning that equalization of the political voices is a compelling interest. 453 U.S. at 198 n.19. For example, in *Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008), the Court recognized that “the interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections’” is insubstantial because “‘the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.’” (citation omitted); *see also id.* (“rejecting as ‘antithetical to the First Amendment’ ‘the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections’”) (citation omitted). On June 29, 2009, the Supreme Court also requested rehearing and briefing in *Citizens United v. FEC*, No. 08-205, because it is specifically considering whether to overrule *Austin* and the parts of *McConnell v. FEC* based on the same reasoning the FEC argues here, regarding the equalizing of voices in the political process. Supreme Court Order in Pending Case (June 29, 2009).

The other two cited cases are inapposite. *United States v. Goland*, 959 F.2d 1449, 1453 (9th Cir. 1992) (FBR-48-49), held that a contributor could not evade prosecution for making excessive contributions *directly to an actual candidate* merely because the candidate did not know the contributor’s identity. And in *FEC*

*v. Ted Haley Congressional Committee*, 852 F.2d 1111, 1116 (9th Cir. 1988) (FBR-48), the court held that a post-election contribution to a person who was no longer a “live” candidate but needed to retire campaign debt could be regulated because otherwise a candidate could “run[] their campaigns at a deficit and then collect[] contributions after the election.” (Citation omitted.) Those post-campaign contributions raised a definite potential for a corrupt, *quid pro quo* pre-arrangement. Here, Unity08 planned to be involved only at the pre-campaign stage and would never be affiliated with any candidate with whom there could have been any arrangement creating a risk of the appearance of corruption.

**E. Unity08’s Disbursements For Activities Related To Acquiring Ballot Access Were Not “Expenditures”**

Spending to achieve ballot access is not a FECA “expenditure” under the First Amendment unless done in support of an identified candidate. UBR-35-37. The FEC claims that ballot access activities are not constitutionally protected and cites as support two of its prior advisory opinions, which it claims did not involve actual, specific candidates. FBR-31-32. But the notion that Unity08’s spending for ballot access was merely non-communicative administrative work unworthy of First Amendment protection (FBR-34) contravenes controlling authority. The Supreme Court has held that this type of work, which included petitioning for ballot access, is constitutionally protected. *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) (“The circulation of an initiative petition of necessity involves both the

expression of a desire for political change and a discussion of the merits of the proposed change ... [and] involves the type of *interactive communication concerning political change that is appropriately described as ‘core political speech.’*) (emphasis added); *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (“[T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars.”); UBR-38-40.

The requestors in the FEC’s two prior advisory opinions were named individuals. The FEC asserts that they were not “candidates” because the one in AO 1994-05 had not yet spent enough money, and the one in AO 1984-11 was asking when he would become eligible for certain matching funds available to presidential candidates. FBR-31-32. So what? In each case, the groups were already affiliated with an actual person who would be a candidate during the ballot access process, raising a risk of corruption or its appearance. Unity08’s spending for ballot access was unrelated to a particular person and therefore raised no such risks. *See FEC v. Nat’l Conservative PAC*, 470 U.S. 480, 497 (1985) (“The absence of prearrangement and coordination of an expenditure with the candidate ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”) (citation omitted); *accord Machinists*, 655 F.2d at 392.

**CONCLUSION**

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

DATED: July 20, 2009

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**CERTIFICATE OF COMPLIANCE**

In accordance with Circuit Rule 32(a) and Federal Rules of Appellate Procedure 28.1 and 32(a)(7), the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the brief is proportionally spaced and contains 6,990 words exclusive of the certificates required by Federal Rule of Appellate Procedure 28(a)(1) and Circuit Rule 28(a)(1), table of contents, table of authorities, glossary, signature lines, and certificates of service and compliance. The undersigned used Microsoft Word to compute the count.

DATED: July 20, 2009

Respectfully submitted,

/s/ J. Scott Ballenger  
J. Scott Ballenger

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of July, 2009, I filed eight (8) paper copies of the foregoing Reply Brief of Appellant and also electronically filed the foregoing with the Clerk of the Court using the Court's CM/ECF system, which will send notification of the filing, and pursuant to Federal Rule of Appellate Procedure 25(c)(1)(D) a copy will be served via electronic mail to the following:

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