

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITY08 <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	No.1:07-cv-00053 (RWR)
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	

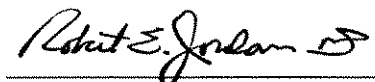
MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and Local Rule 7, Plaintiffs respectfully move this Court for summary judgment against Defendant Federal Election Commission (“FEC”).

For the reasons stated in Plaintiffs’ Complaint, and the accompanying Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment, summary judgment is appropriate in favor of Plaintiffs because there are no material facts in dispute, and as a matter of law, the FEC’s interpretation of the Federal Election Commission Act, and the imposition of its restrictions on Plaintiffs, were unlawful.

Plaintiffs request that this Court enter an Order declaring that Unity08’s activities prior to candidate selection do not subject it to regulation as a political committee, and enjoin the FEC from initiating enforcement actions relating to those activities.

Respectfully submitted,



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March 21, 2007

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**MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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I. SUMMARY OF THE CASE

This case involves a challenge to a ruling of the Federal Election Commission (“FEC” or the “Commission”). Because of the threat of enforcement action based on the ruling, Unity08, a new, centrist political movement, is severely hampered in its efforts to obtain access to the ballot in fifty states and the District of Columbia in time for the 2008 Presidential Election. The two major political parties already have automatic access to the ballot in all fifty-one of these jurisdictions. They are also free to solicit contributions from donors for their organizing efforts and political activities with a limit more than five times greater than the \$5,000 limit that the FEC seeks to apply to Unity08.¹

Unity08 wishes to solicit loans in excess of the \$5,000 limit in order to finance Unity08’s efforts to obtain access to state ballots as an organization. Unity08 needs to accept such loans, if it is to achieve its goals. The FEC has ruled, in effect, that Unity08 may not receive from any individual donations or loans beyond \$5,000 per year to pay for ballot access. This ruling – from a body composed of representatives of the two established parties – threatens to choke this incipient and innovative political movement at its birth. Unless overturned by this Court, the ruling will prevent Unity08 from obtaining sufficient ballot access to become a meaningful participant in the 2008 Presidential Election.

Plaintiffs thus seek declaratory and injunctive relief from the threat of prosecution raised by the FEC’s ruling. Because Unity08 does not now have a candidate, and will not have a

¹ In Advisory Opinion 2006-20, the FEC indicated that Unity08 had to comply with the restrictions imposed by the Federal Election Campaign Act of 1971, but did not specifically indicate that it considered Unity08 a non-connected political committee, which would subject it to the \$5,000 annual limitation. Since Unity08 does not have a candidate and, consequently, could not be a candidate committee, we have assumed that the non-connected committee limitation would apply. The FEC’s rationale that Unity08 is a “placeholder” for a candidate could be interpreted, however, to limit Unity08 to the \$2,300 contribution applicable to a candidate committee.

candidate until after it completes its on-line convention in the summer of 2008, the FEC's determination conflicts with the constitutionally-mandated construction of the Federal Election Campaign Act of 1971, as amended (the "FECA" or the "Act")², laid down by the Supreme Court in the landmark case of Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), and confirmed by decisions in this Circuit, and this Court. As interpreted by the Commission, the Act would limit the Plaintiffs' ability to join together to raise and expend money on core political speech, and would thereby infringe on Plaintiffs' speech and associational rights under the First Amendment to the United States Constitution.

II. STATEMENT OF FACTS

A. Unity08 Is A New Form Of Political Organization

Plaintiff Unity08 is a political organization created by voters who believe that the major political parties have focused too much attention on "wedge" issues that appeal primarily to each parties' "base" of voters. See Declaration of Douglas L. Bailey ("Bailey Decl.") ¶ 8, attached hereto as Ex. 1 (all Exhibits referenced in Plaintiffs' Memorandum of Law and in Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue In Dispute are true and correct copies attached hereto as Exhibits 1-20.)

In their view, political discussion in recent times has largely ignored the truly critical issues that face our country. Id. The individual Plaintiffs, who organized Unity08 and now direct its operations, are registered voters with various party affiliations. See, e.g., Bailey Decl. ¶¶ 2-3; Declaration of Roger M. Craver ("Craver Decl.") ¶ 2 (Ex. 2). They have been involved for many years in political campaigns and governance at the state and national levels. See Bailey Decl. ¶ 5; Craver Decl. ¶¶ 3-4; Pls.' Statement of Material Facts As To Which There Is No

² 2 U.S.C. §§ 431 et seq. (2000) & Supp. IV (2004).

Genuine Issue In Dispute ¶¶ 61-64 (“Pls. Statement of Facts”). They formed Unity08 in an attempt to jolt the two major parties out of the current partisan political deadlock that stands in the way of meaningful change in the governance of our country. Bailey Decl. ¶ 8. Unity08 does not plan to become a permanent political party, but success in the 2008 election and the reaction of the two major parties to that event might change this. Id. ¶ 12.

Unity08’s ultimate goal is to facilitate the creation of a unified ticket composed of one Republican and one Democrat on the ballot for President and Vice President of the United States in the 2008 election, and have that ticket on the ballot in all 50 states and the District of Columbia. Id. ¶ 10. To achieve this ultimate goal, Unity08 plans to pursue ballot access activities to get access as an organization in those 37 states and the District of Columbia that permit that to be done in the absence of actual candidates. Id. ¶ 20. To select candidates, Unity08 plans to hold a convention, via the Internet, in the summer of 2008 at which any registered voter can be registered as a delegate and vote. Id. ¶¶ 38-39. Every individual who steps forward as a candidate, and who meets the constitutional requirements to be President, will be entitled to compete for the Unity08 on-line nomination. Id. ¶ 40. Unity08 does not now have candidates for the 2008 Presidential Election and will not have candidates until they are selected by the delegates at the on-line convention. Id. ¶ 42.

The political architecture of Unity08 differs significantly from that of the two major parties. Id. ¶ 34. It is designed to take advantage of the Internet as a modern organizational tool. Id. The Internet allows interaction between large numbers of people at relatively little cost. As Unity08 intends to show, it has the potential to revolutionize political dialogue in this country. Id. Unity08 intends to create the technology that will permit the voters of this country to create an alternative Unity ticket for the 2008 elections at far less cost than the candidate selection

process of the two major parties. Unity08 has received extensive favorable media coverage not only for its efforts to create a Unity ticket, but also for its innovative proposals to use the Internet to provide an opportunity for greater access for ordinary voters in the political process. Id. ¶ 36 and Ex. 3.

Phase One, the effort to qualify for the ballot in 37 jurisdictions that allow this to be done without having a specific candidate, has begun in only a limited fashion.³ See Bailey Decl. ¶ 32. Qualifying in the states is labor-intensive and will require substantial resources to succeed in having hundreds of thousands of voters sign petitions. See id. ¶¶ 22-28. Once Unity08 qualifies for ballot access in a state, the candidates for President and Vice-President that it chooses at the on-line convention will have access to the ballot in that state. If Unity08 succeeds in this effort, its candidates in these 37 states will stand in these states on an equal footing – at least with respect to ballot access – with the candidates of the two major parties, whose candidates have automatic ballot access in all 51 jurisdictions without having to go through this laborious process. At the present time, Unity08 has not qualified to appear on the ballot for the 2008 presidential election in any state.⁴ Id. ¶ 33.

Phase Two, Unity08's on-line virtual convention, will take place in the summer of 2008. Id. ¶ 38. At that time, voter-delegates from across the country will select candidates for the office of President and Vice-President for the 2008 election from those constitutionally-qualified candidates who have put themselves forward. Id. ¶¶ 39-40. All persons who have signed up on

³ The remainder of the states would not permit Unity08 to obtain ballot access as an organization; they restrict such access to established parties whose affiliated candidates have achieved a certain percentage of the vote in prior elections, or only permit candidates from major parties to obtain ballot access.

⁴ Unity08 does not intend to promote, attack, support, or oppose candidates for Congress, or State and local elections at any time. See Bailey Decl. ¶ 14.

the Internet with Unity08 as delegates will be eligible to vote during the virtual convention for the candidates they want to constitute the Unity08 ticket. Id. Unity08 thus will not – cannot – have candidates until the convention has concluded, and Unity08 will not provide financial support to its candidates after the convention.⁵ Id. ¶¶ 42-43. Unity08’s candidates will themselves have to form candidate committees under the federal election laws, register with the FEC, and file reports like any other candidate committee. Id. ¶ 43. Unity08 has not to date contracted for any of the technical services necessary to create the on-line convention and related voting mechanism. See id. ¶ 48.

Since its inception in the Spring of 2006, Unity08 has sought to finance its efforts to qualify as an organization for a position on state ballots by soliciting small donations from individuals. Id. ¶ 49. Unity08 has decided to restrict donations from individuals to \$5,000 per year. Id. ¶ 50. Unity08 has used personal requests for donations, telephone solicitations, email solicitations, personal letters and solicitations on its website to raise money. See id. ¶ 56. Unity08 has voluntarily decided not to accept donations from corporations, foreign nationals, or government contractors. Id. ¶ 51. Furthermore, Unity08 chose to register for tax exempt status as a “section 527” organization. Id. ¶ 13. As a consequence, under the Internal Revenue Code, Unity08 must report for public disclosure its donations over \$200 and its expenses over \$500, requirements similar to some of the reporting requirements contain in the FECA.

B. Unity08’s Request For An Advisory Opinion

From the outset, Unity08 realized it was breaking new ground, and sought advice from the FEC.

⁵ Unity08 believes candidates for its nomination will have to register with the FEC and raise money pursuant to the restrictions of the federal election laws. See Bailey Decl. ¶ 43.

On May 30, 2006, Unity08 requested an advisory opinion seeking a determination by the Commission that, inter alia, Unity08 was not subject to the laws and regulations governing political committees until such time as it was supporting or opposing a candidate for federal office. On July 13, 2006, the Office of the General Counsel (“OGC”) issued the first draft of Advisory Opinion 2006-20, which argued that Unity08 was a political committee under the Act., 2 U.S.C. §§ 431 et seq.

On July 20, 2006, the FEC held a public meeting to consider Unity08’s request and the proposed draft opinion. After a discussion of the uniqueness of issues raised by Unity08 in its request and its response to the draft opinion,⁶ the Commissioners requested that Unity08 give it an extension of the mandatory 60 day time limit for responding to advisory opinion request to further consider all of the issues raised. Unity08 agreed to a 30-day extension until August 30, 2006, for the FEC to issue its opinion.

On August 16, 2006, Unity08 supplemented its original request for an advisory opinion in order to rectify some of the misconceptions contained in the initial draft advisory opinion. Unity08 explained that its current activities were centered on establishing an organization and exploring the viability of a third-party alternative ticket in 2008, not supporting a particular candidate. Indeed, Unity08 added a disclaimer to its website and mailings making clear to all donors that any money raised now would not be used to support a candidate, but would be used

⁶ As Commissioner Mason stated during the July 20, 2006 hearing on Draft Advisory Opinion 2006-20, the FECA and the regulations promulgated thereunder were designed to address the major parties, party organizations that were candidate-driven, or parties built from the local level up, so that the organizations were clearly either functioning in support of an actual candidate or were established political parties by the time they participated in federal elections. *See* http://www.fec.gov/audio/2006/20060720_02.mp3 (audio recording of meeting on FEC’s website). Unity08, however, is an organization seeking first to form at the national level and with ballot access as a party in the maximum possible number of states before it will have candidates for President or Vice President.

solely for party-building activities. Unity08 also clarified that it did not seek to qualify any candidates for ballot access after they had been identified through the nomination process, but sought only to gain ballot access as an organization in those states that allow it to do so

Upon further request by the FEC, Unity08 agreed to another extension until October 10, 2006 for the FEC to issue its opinion.

On September 29, 2006, the OGC reissued Draft Advisory Opinion 2006-20 with very minor changes. At a public meeting on October 4, 2006, the FEC rejected its General Counsel's argument that Unity08 was receiving "contributions" under 11 CFR § 100.57 (2006), finding that the organization's reference to a Unity Ticket was not sufficient to meet the definition of a "clearly identified candidate." Yet, in complete contradiction to this conclusion and with no supporting analysis, the Commissioners (with the exception of Commissioner von Spakovsky, who dissented), voted to adopt the remainder of Draft Advisory Opinion 2006-20, determining that Unity08 must register as a political committee because: "Monies spent by Unity08 to obtain ballot access through petition drives will be expenditures. An 'expenditure' is a 'purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.'" Advisory Opinion 2006-20 at 3 (emphasis added) (Ex. 4). The Commission conceded that "Unity08 plans to qualify for ballot access for itself as an organization, but not yet for any named candidates," yet argued that "Unity08 is, in effect, using its name as a placeholder for its candidates' names on the ballot." Id. at 4 (emphasis added). In addition, the Commission held: "Moreover, unlike organizations that secure ballot access for themselves in order to field a slate of Federal and non-Federal candidates, Unity08 has announced that it will field only candidates for the offices of President and Vice President — in the 2008 election only. Thus, in promoting itself through petition drives

to obtain ballot access, Unity08 is promoting its presidential and vice-presidential candidates, and any payments by Unity08 for these activities will constitute expenditures.” Id. (emphasis added). The Commission cited no support for this proposition.

In addition, the Commission found that because “Unity08’s self-proclaimed major purpose is the nomination and the election of a presidential candidate and a vice-presidential candidate,” the party’s “major purpose” is campaign activity, meaning Unity08 is a political committee covered by the FECA. Id.

C. Unity08 Needs To Obtain Loans From Individuals Greater Than \$5,000 To “Kick Start” Its Ballot Access And Convention Planning Efforts

As noted, since its inception in 2006, Unity08 has limited its fundraising to \$5,000 per year from individuals. Unity08 has now recognized that to meet its ballot access goals it must raise several million dollars on a rapid timetable, in part because a number of states are moving up the date of presidential primaries. Bailey Decl. ¶¶ 52-53; Craver Decl. ¶¶ 10-12. It proposes to do so through loans from individuals, which loans would be paid back through subsequent small donations. See id. Faced with this need, Unity08 seeks declaratory and injunctive relief from the threat of prosecution by the FEC. If it cannot pursue such loans, the chances that Unity08 will not succeed in pursuing its objectives are greatly increased. See Bailey Decl. ¶¶ 19, 52-55; Craver Decl. ¶ 10.

III. ARGUMENT

Plaintiffs are entitled to summary judgment because Unity08 does not fit the definition of political committee as that definition has been constrained for First Amendment reasons by the courts. In short, the FECA cannot be constitutionally applied to Unity08’s actions at this time. Unity08 filed its request for an advisory opinion to confirm its conclusion that the federal election laws would not apply to it until it had selected its candidates in the on-line convention.

FEC Advisory Opinion 2006-20 makes clear that, in the FEC's view, Unity08 can take no action to advance its innovative political ideas, including seeking ballot access as an organization, without complying with the restrictions of the federal election laws, restrictions that should apply only after Unity08 has selected its candidates.

The Plaintiffs' position is quite simple, and we contend, quite solidly founded. There is no question that Unity08 is seeking through its processes to produce candidates for President and Vice President. Under a succession of court decisions, starting with the landmark case of Buckley, 424 U.S. 1, and followed by decisions in this Circuit and this District, it has been determined that the First Amendment does not permit federal regulation of those election-related activities that do not involve corruption, the risk of corruption, or the appearance of corruption. Since corruption, actual or potential, has been deemed to be related to the existence of actual candidates who have declared themselves as running for elected office, regulation of donations or expenditures is not constitutionally permissible in the absence of such actual candidates. Unity08 has no such candidates, and indeed cannot have until its on-line convention is complete in the summer of 2008. Hence it is not subject to regulation at this time.

State laws provide the major parties with guaranteed ballot access for their candidates for President and Vice President. State laws require new political organizations, on the other hand, to navigate a quagmire of regulations and to demonstrate sufficient support, via petition signatures, to justify its appearance on the ballot.

Neither Congress nor the FEC has identified any potential for corruption or the appearance of corruption where an organization seeks ballot access in its own name without supporting a specific candidate. Without some nexus to corruption or the appearance of

corruption, neither Congress nor the FEC can limit Unity08's ability to obtain the loans it intends to seek from individual citizens of the United States.

Since Advisory Opinion 2006-20 considers all funds raised or expended by Unity08 to be subject to the restrictions of the FECA, funds to be raised by Unity08 to obtain ballot access and develop and operate its innovative on-line virtual convention would be subject to the limitations of the federal election laws. Again, these expenses would be incurred before the identification of a candidate, and would not be made to a candidate or to those supporting a particular candidate, or made in support of any specific candidate. See Bailey Decl. ¶¶ 57-62. Consequently, no corruption or the appearance of corruption would be present.

A. Unity08 Does Not Meet The Definition Of Political Committee Because It Has No Candidate

Because of the potential unconstitutional overreach of the FECA, the Supreme Court and the D.C. Circuit have required that there be a candidate seeking federal election before limitations can be imposed on that candidate, or the candidate's party. The concern that contributions to the candidate could result in quid pro quo corruption or its appearance is what justifies the impingement on protected speech. Without a candidate, there is no prospect for corruption, thus no adequate justification for impairing First Amendment rights. That is exactly the situation in this case. Unity08 has no candidate, therefore the FEC cannot treat it as a "political committee" and impose limitations. There is no corruption rationale or other justification for impairing the free speech and associational rights of Plaintiffs – and the FEC did not assert any in its Advisory Opinion. As Unity is not supporting or opposing a candidate, it is not engaging in activities which threaten corruption and thus might justify regulation.

The Act and Commission regulations, with certain exceptions, define a "political committee" as "any committee, club, association, or other group of persons which receives

contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year. . . .” 2 U.S.C. § 431(4)(A); 11 CFR § 100.5(a) (2006). An ““expenditure”” is a “purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office. . . .” 2 U.S.C. § 431(9)(A)(i). Likewise, a ““contribution”” is made “for the purpose of influencing any election. . . .” 2 U.S.C. § 431(8)(A)(i). In order for an expenditure or contribution to be made for the purpose of “influencing” any election, the Supreme Court has required that it be made in support or opposition to a specific candidate. Buckley, 424 U.S. at 79-80 (holding Act only encompasses expenditures by organizations under “control of a candidate or the major purpose of which is the nomination or election of a candidate” or funds used to “expressly advocate the election or defeat of a clearly identified candidate”) (footnote omitted); McConnell v. FEC, 540 U.S. 93, 190-92 (2003).

In a later case, the Supreme Court summarized the key holding in Buckley: “Buckley identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a candidate. . . .” Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 296-97 (1981) (italics in original; emphasis added).

Because Unity08 has no candidate, it cannot be making “expenditures” and therefore cannot be a “political committee” under the Act and Commission regulations. Similarly, donations to Unity08 are not “contributions” because Unity08 is not a political committee.⁷

⁷ This is particularly relevant because Buckley applied “exacting” scrutiny, which has been regarded as a somewhat lesser level of constitutional scrutiny than strict scrutiny to “contributions.” Contributions presupposes a political committee, which presupposes support or

Further, monies spent on ballot access are not expenditures, as they are not in support of or in opposition to a specific candidate. Nor are expenses for creating and operating an online convention up to the point where the ultimate candidates are selected. Unity08 simply is not a “political committee” under the definition.

1. FEC regulation as a “political committee” requires that there be a specific candidate

Contribution and expenditure limits by their nature impair core political discourse protected by the First Amendment. That is why the Supreme Court, beginning with Buckley, has been reluctant to approve, in the face of First Amendment challenges, congressional efforts to regulate those forms of political speech. The Supreme Court, this Circuit, and this District have made clear that limitations on core political speech are only justifiable: (1) in response to evidenced corruption or the appearance of corruption in the electoral process, or (2) where the limitation relates to support for a specific candidate. Neither of these elements is present in this case, and therefore the FEC’s Advisory Opinion cannot be sustained. Further, without a specific candidate, the question of what is a “contribution” and what is a “donation” and what the limit is on either, is entirely irrelevant. Without a specific candidate in the mix, those terms and the FECA’s restrictions are simply not applicable. In short, without a candidate – an actual, individual, person – anywhere to be seen as Unity’s candidate, the FEC cannot lawfully regulate Unity as a political committee.

opposition for a federal candidate – a context in which Congress found the possibility of corruption, and in which First Amendment rights could therefore be regulated. Where “contributions” are not involved, but rather donations to a political organization not yet a political committee, limitations on core First Amendment freedoms of speech and association should be measured against a strict scrutiny standard for expressive association. See, e.g., Boy Scouts of Am. v. Dale, 530 U.S. 640, 657-59 (2000); Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984).

The Supreme Court first prescribed the analytical framework applicable here in Buckley. There, the Supreme Court identified concerns with corruption and the appearance of corruption as the constitutional justification for regulation of political speech. 424 U.S. at 28 (“The Act’s \$1,000 contribution limitation focuses precisely on the problem of large campaign contributions -- the narrow aspect of political association where the actuality and potential for corruption have been identified. . . .”). To avoid the vagueness and potential overbreadth of the statutory definitions, Buckley adopted a narrowing construction of the Act’s definition of “political committee” and “expenditure.” The Court said:

To fulfill the purposes of the Act [political committees] 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. Expenditures of candidates and of “political committees” so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79-80. Congress defined “candidate” in the Act as “an individual who seeks nomination or election to a federal office. . . .” 2 U.S.C. § 431(2) (including in definition of “candidate” an individual who “has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual”). The Court’s use of the term here carries a similar meaning. Because Unity08 does not have as its purpose the nomination or election of any specific individual it is not a “political committee” as Buckley has defined that term.

Furthermore, the Buckley Court stated that:

When the maker of the expenditure is . . . an individual other than a candidate or a group other than a “political committee” . . . we construe “expenditure” . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

424 U.S. at 80.

Subsequently, in McConnell v. FEC, the Supreme Court dealt with a later round of congressional efforts to regulate campaign activities, in the context of limiting “soft money” support for candidates, but continued the limitations of Buckley on federal regulation of core First Amendment activity relating to elections. 540 U.S. at 126.

The Commission did not, therefore, write on a clean slate when it decided to apply the Act to Unity08. The Commission’s conclusions that Unity08 is a “political committee” and that the expenses Unity08 incurs to obtain ballot access as an organization are “expenditures” extend the Act beyond the scope found acceptable in Buckley and its progeny. Based on these findings, the Commission went on to impose upon Unity08 the strict statutory contribution limits approved in Buckley for presidential campaigns even though it admitted that Unity08 did not presently have a specific candidate. In doing so, it extended those strict limits to a situation in which it did not and could not identify any potential for corruption, and it conceded that there was no candidate to corrupt.

The Commission’s conclusions plainly conflict with Buckley and thirty years of cases applying Buckley. The Commission provides no explanation or justification for its decision. That decision deviates not only from Buckley and its progeny limiting the scope of the Act, but also from the Commission’s prior administrative determinations applying the Act.

Congress cannot, consistent with the First Amendment, regulate the amount of money individuals can give to a new political organization’s efforts to obtain a position on the ballot for an as-yet-unidentified candidate. Such regulation of core political speech – i.e., petitioning, voter interaction, dissemination of political dialogue, expenditures of money to broadcast ideas into the political forum – is subject to exacting or strict scrutiny, and no justification for such

regulation exists. The corruption rationale that supports limitations on contributions to identified candidates does not support the limitations on donations where no candidate has been chosen.

Moreover, the Commission's application of the Act to Unity08, which seeks to provide a ballot alternative to the candidates of the two major parties, should be evaluated with due consideration to the composition of the Congress that passed the Act and the composition of the Commission created by it. The Congress that passed the Act consisted entirely of members from the two major parties, and the Commission it established to interpret the Act consists of three Republicans and three Democrats. The Commission's decisions concerning regulations that impact all parties, including the Republican and Democratic parties, fall into a different category than decisions that impact only a potential competitor to the major parties. The Commission's decision to impose restrictions on Unity08's ability to raise and spend money to qualify for state ballot positions has the practical economic effect here of preventing a challenge to the two major parties that automatically, without spending a dime, have access to ballots in all fifty states without qualification expenses. Thus Unity08 and its supporters find themselves the chickens in a chicken coop controlled by "red" foxes and "blue" foxes.

Buckley and McConnell limit regulation, with the result that a donation is not a "contribution" unless it is used in support or opposition of a specific candidate. When it does so, because the money going to the candidate poses a threat of corruption (as found by Congress), some limitations on First Amendment freedoms may be justified. However, in each and every case, a candidate – a person running for office – is required; otherwise, the countervailing government interest would not be substantial enough or well-supported enough to permit infringing on core First Amendment speech and associational rights.

This Circuit has applied the limitations of Buckley in a case whose facts are particularly pertinent to this matter. In FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 394 (D.C. Cir. 1981), the FEC claimed that payments made by the Machinists Union's separate segregated fund to various groups that had as their announced goal persuading Senator Ted Kennedy to run for President were "contributions" in excess of the amounts allowed under the Act. Id. at 390. The Court rejected the FEC position, holding that monies given to such groups were not "contributions" or "expenditures" because the groups' activities were "not related in any way to a person who has decided to become a candidate. . . ." Id. at 392 (emphasis added). The court reasoned, "[d]raft groups . . . have one thing in common . . . they aim to produce some day a candidate acceptable to them, but they have not yet succeeded. Therefore, none are promoting a 'candidate' for office, as Congress uses that term in the FECA." Id.

Machinists is controlling precedent in this Circuit, and the FEC position here cannot stand up to examination in light of it. If Machinists governs, a fortiori Unity08's current contributions and expenditures cannot be regulated, because they are even further removed from support of an identifiable candidate than were those of the Machinists group. Until such time as specific candidates have been linked to the Unity08 party, donations received and the expenses incurred in the pursuit of Unity08's goals do not constitute "contributions" or "expenditures" under the Act.⁸

Cases in this Court, too, have recognized that a "clearly identified candidate" must mean a particular, individualized, identifiable, living, breathing "person" – a "person who has decided to become a candidate' for federal office" – not a party "placeholder." See FEC v. Malenick,

⁸ Because ballot qualification is a prerequisite to the possibility of candidacy, the Commission has not, to our knowledge, ever considered money spent by a political party to qualify for ballot access as an organization, including money spent for litigation to get on the ballot, to be an "expenditure" under the Act.

310 F. Supp. 2d 230, 234-35 (D.D.C. 2004) (citation omitted) (discussing Machinists, 655 F.2d at 392).

Malenick relied in part on another case in this Court that stressed the importance of clear limitations on regulation in instances where there is no demonstrable candidate. In FEC v. GOPAC, Inc., 917 F. Supp. 851, 859 (D.D.C. 1996), this Court held that the “major purpose test” requires as a prerequisite an actual candidate. GOPAC’s stated mission was: “to create and disseminate the doctrine which defines a caring, humanitarian, reform Republican Party in such a way as to elect candidates, capture the U.S. House of Representatives and become a governing majority at every level of government.” Id. at 854 (citations omitted). Although GOPAC’s sole purpose was to advocate the election of Republicans as a class of candidates, the court held that the definition of “political committee” was limited by Buckley to groups whose major purpose was the election of a particular federal candidate or candidates. The Court concluded, id. at 859, 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 . . . to support a ‘person who has decided to become a candidate’ for federal office.” Id. The Court rejected the Commission’s attempt to broaden the definition of political committee to include all organizations engaged in “‘partisan politics’” or “‘electoral activity’.” See id. The GOPAC court noted that, where First Amendment values are at stake, it is important to establish a “‘bright-line’” rule. Id. at 861. The rule laid down in GOPAC drew a distinction “between an organization whose major purpose was to support a particular federal candidate” and an organization “whose major purpose did not involve support for any particular federal candidate, either because there was no candidate running at the time or because the support was not directed to the election of any particular candidate but was more in the nature of general

party support.” Id. at 862 (emphasis added, citations omitted) (citing Machinists, 655 F.2d at 392).

Nothing has changed since the “bright-line” test for a “political committee” was laid down in GOPAC. In a more recent decision this Court stated that, while an “organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates,” “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.” FEC v. Malenick, 310 F. Supp. 2d at 234-35 (alterations in original) (quoting GOPAC, 917 F. Supp. at 859, and discussing Machinists, 655 F.2d at 392) (emphasis added).⁹

Reading all these cases together makes it clear that the courts have made great efforts to avoid permitting regulation to be imposed in situations involving merely hypothetical or potential candidates because to do so would unconstitutionally limit political speech of the group or party.

In reaching its conclusion that Unity08’s ballot access expenses were “expenditures,” the Commission inexplicably relied on two of its own prior Advisory Opinions (1994-05 and 1984-11) (Exs. 5 and 6), both of which involved actual candidates seeking ballot access as “independent” candidates. The Commission’s conclusions that the expenses in those cases for

⁹ In Malenick the court found that Triad, a GOP political consulting and fundraising firm, was a political committee because it funneled money directly to individual candidates, sent fax alerts advocating the election of named candidates, and had no other purpose other than to support such candidates (e.g., no plan to engage in principled issue debate or increase public participation). 310 F. Supp. 2d at 235-37. Unity08 has none of these features.

ballot access constituted “expenditures” were unexplained, but appeared to rest on the idea that monies spent on ballot access by a candidate are expenditures or “qualified campaign expenses” because of the attendant publicity. Unity08 disagrees that expenses incurred by candidates to obtain ballot access for themselves as independent candidates constitute an “expenditure,” but the point is that neither of these prior Advisory Opinions support the Commission’s conclusion that Unity08’s expenses are expenditures – because there is no candidate identified with Unity08.

The Commission also ruled that Unity08 is a political committee because it satisfies the so-called “major purpose test.” Advisory Opinion at 4-5. That test limits the reach of political committee status under the FECA to organizations whose major purpose is the support or opposition of a candidate. That additional constraint on political committee status has received a limiting construction pursuant to Buckley: it has been construed to apply where there is an “identified candidate.” See, e.g., GOPAC, 917 F. Supp. at 859. The definition of “political committee” – an organization that makes expenditures or receives contributions in excess of \$1,000 in a year¹⁰ – is the same definition that Buckley construed as vague and overbroad and, accordingly, limited 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. The Buckley “major purpose test” was reaffirmed, and expanded, by the Supreme Court in FEC v. Massachusetts Citizens for Life, 479 U.S. 238, 263 (1986). In that case, a non-profit advocacy corporation whose “central organizational purpose” was issue advocacy had, nevertheless, paid a substantial amount of money for the preparation and public distribution of a newsletter that advocated the election or defeat of particular candidates for federal offices. Id. at 253. The

¹⁰ See 11 C.F.R. § 100.5 (2006). The regulation also states that the term includes separate segregated funds established by political committees, certain local committees of a political party, and individual campaign committees. There is no dispute that none of these categories are applicable to Unity08.

Supreme Court held that the organization did not meet the definition of a political committee, notwithstanding that it was not engaged “solely” in issue advocacy – because its “major purpose” was not the nomination or election of specific candidates. *Id.* at 252-53 & n.6. Thus, the Court found that expenditures that helped some particular candidates were not enough to make a “political committee” out of an organization, as long as advocacy of a particular candidate was not its major purpose. Thus, it is not simply enough even to be supporting or opposing a specific candidate – there is the added requirement that such support or opposition must emanate from an organization whose major purpose is the election of a particular candidate for federal office. At this time, given the activities that Unity08 is undertaking – voter petitioning, dissemination of its message, organization of its online convention and voting process, and promotion of an issue agenda focusing on critical issues – and given that Unity has no candidates, it is manifest that Unity’s major purpose is not the election of a particular candidate for federal office.

The efforts of the FEC to extend the scope of activities that trigger political committee status have simply been out of step with controlling judicial decisions.

In an apparent effort to avoid the clear thrust of the “specific candidate” requirement, the FEC claims Unity08’s major purpose is “campaign activity” because the party is promoting itself as a “placeholder” for candidates yet to appear on the scene, and is thus a “political committee.”¹¹ Advisory Opinion at 4-5. But the question is, “placeholder for whom?” Here

¹¹ The FEC cited Malenick in Advisory Opinion 2006-20, but its description of the case is not entirely accurate. The Commission’s parenthetical states “(finding the organization evidenced its ‘major purpose’ through its own materials which stated the organization’s goal of electing Republican Party candidates for Federal office and through efforts to get prospective donors to considering supporting Federal candidates).” Advisory Opinion at 5. The Malenick court did not make its finding based on the vaguely-stated goal of electing Republican candidates, but instead pointed directly to specifics such as payment of money directly to individual candidates, and solicitation and promotion of named, individual candidates for specific offices. 310 F. Supp. 2d at 235-37.

there is no “whom”; in Buckley the Supreme Court stated that the major purpose must be the nomination or election of a candidate, and only an individual person can be nominated or elected. Until the summer of 2008, there will be no person for whom the major purpose of Unity08 is that person’s election. The Commission’s reasoning puts the cart before the horse. Until the summer of 2008 no amount of “placeholder” rationale by the Commission can convert Unity08’s ballot access efforts into support for an actual individual candidate, and until that time the FEC cannot constitutionally, under governing judicial “narrowing” interpretations of the Act, regulate its expenditures and contributions.

A key point in Buckley is that the Supreme Court noted it was narrowing the FECA’s definition of “political committee” specifically to prevent issue advocacy groups from being deemed political committees, an interpretation that would have made the provision unconstitutional. See Buckley, 424 U.S. at 79. In a similar vein, this Circuit has held that the “‘major purpose’ test” was constitutionally required because “[i]ndependent expenditures are the most protected form of political speech. . . .” See Akins v. FEC, 101 F.3d 731, 741 (D.C. Cir. 1996) (en banc) (emphasis added) (citing Buckley, 424 U.S. at 19-23), vacated on other grounds, 524 U.S. 11 (1998)). Against this background of judicial interpretations keeping the FECA within constitutional limits by protecting First Amendment speech to the fullest extent from misguided and excessively expansive application of the FECA, the Commission was simply wrong in cavalierly branding Unity08 as political committee.

2. The Administrative Order is inconsistent with the Commission’s prior support for the “candidate” limitation on regulation

The Commission has not always been so insensitive to First Amendment values and has previously given support to the judicial interpretations noted above. Since 1996, the Commission has concluded, consistently with the holding in GOPAC, that the definition of

political committee requires finding efforts to support or oppose an actual candidate. See Advisory Opinion 2003-1 (Ex. 7). For example, in Matter Under Review (“MUR”) 395, a commission enforcement action, the Commission declined to continue proceedings against the College Republican National Committee for failure to register as a political committee. In so doing, Commissioners Mason, Smith and Wold stated that “we think GOPAC is correct in holding that general expressions of support for candidates of a party do not, absent direct contributions to federal candidates or the presence of ‘express advocacy,’ qualify as ‘expenditures’ under the Act.” Statement of Reasons for Pre-MUR 395 at 3-4 (2002) (Ex. 8). Indeed, the Commission found that “[t]he idea that a group can be considered a political committee solely because its major purpose is campaign activity has no basis in law.” Id. at 4; see also Statement of Reasons by Chairman Smith and Commissioners Mason and Toner for MUR 5024 (2004) (failing to find reason to believe that Council for Responsible Government was a political committee because its brochures referencing candidate Tom Kean, Jr. did not constitute express advocacy and, therefore, were not expenditures under Act) (Ex. 9).

In 2004, the Commission again declined to expand the scope of the definition of “political committee.” After a proposed Bipartisan Campaign Reform Act rulemaking (involving receipt or expenditure of so-called “soft money” for political purposes by groups not controlled by a candidate) – in which it received over 100,000 comments and, after holding hearings – the Commission decided against revising the definition of political committee along the lines recommended by its General Counsel and reaffirmed its application of the major purpose test, stating:

The “major purpose” test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status. The Commission has been applying this construct for many

years without additional regulatory definitions, and it will continue to do so in the future.

69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004). As noted by a commentator during the hearings, “[t]he major purpose gloss that the Supreme Court imposed or clarified, which neither Congress nor the Commission has ever encoded in the statute [or] in [the] regulations is an effort to limit the reach of the statute, not to expand it.” Tr. of Public Hearing at T82:3-7 (Apr. 14, 2004) (comments by Mr. Gold of the AFL-CIO) (excerpt at Ex. 10). Thus, the Commission’s advisory opinion with regard to Unity08 is inconsistent even with its own prior precedents.

The bottom line is that Buckley, Machinists, and GOPAC limit the scope of the Act to the receipt and expenditure of monies for the purpose of influencing the election or defeat of a specific candidate and therefore that the Commission’s application of the Act to Unity08’s efforts to finance its qualification as an organization for access to the ballot in various states and organization of a convention is inconsistent with the constitutionally-mandated interpretation laid down in those cases.

B. Unity08’s Ballot Access Activities And Convention Planning Activities Cannot Be Lawfully Regulated Because They Are Core Political Speech And There Has Been No Finding of Corruption

There is overwhelming authority, cited above, barring activities not associated with support for specific candidates from being subject to regulation on the theory that the sponsor is a “political committee.” It therefore seems unnecessary to develop in detail the large body of First Amendment law about the permissible government regulation of core political speech. It is useful to note, however, that at this stage of its activities, and until the nomination of actual candidates is achieved, Unity08 activities are more akin to those activities having to do with ballot initiatives and other activities in which there are substantial efforts to communicate directly with members of the public on matters relating to governance and political philosophy

than they are to political campaigning. The difference, of course, is that unlike some of these other activities (recalls, referenda, initiatives), Unity08 does hope at the very end of its process to produce two candidates, one for President and one for Vice President – but at that point, when campaigning takes over, Unity08 is out of the picture.

First Amendment law outside the campaign setting – relating to initiatives, referenda, recalls and the like – is consistent with the First Amendment concerns that drove Buckley to its limitations on the federal election law. Among the leading cases are Buckley v. American Constitutional Law Foundation, 525 U.S. 182, 199-200 (1999), which found that restrictions on petition circulation severely burdens speech, and Meyer v. Grant, 486 U.S. 414, 422-23 (1988), holding that prohibitions on paid petition circulators restricts political speech. As the Supreme Court held in Meyer, petition circulation “of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.” 486 U.S. at 421. Regulation of the sort imposed here burdens Unity08’s ability to organize and compete in the political arena and should therefore be subject to strict scrutiny as it burdens core rights beyond contribution limits, without in any way preventing corruption. The courts look for some compelling government interest that would override a restriction on speech or association in the political arena. Prevention of actual or potential corruption, or the appearance of corruption is the primary focus, but as noted, there is no evidence that either Congress or the Commission has found that the kinds of activities Unity08 wishes to pursue are in any way connected with corruption. See Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 297 (1981) (explaining “Buckley does not support limitations on contributions to committees formed to favor or oppose ballot measures”; finding limitation violated speech and associational rights because no fear of undue influence when contributions made to ballot questions and not a

particular person). Here, there is simply no case for government regulation that would justify thwarting Unity08's unique effort to bring reform to the American political process at the presidential level.

IV. CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs' motion for summary judgment, enter an Order declaring that Unity08's activities prior to candidate selection do not subject it to regulation as a political committee, and enjoin the FEC from initiating enforcement actions relating to those activities.

Respectfully submitted,



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Counsel for Plaintiffs

March 21, 2007

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITY08 <u>et al.</u> ,)	
)	
Plaintiffs,)	
)	
v.)	No.1:07-cv-00053 (RWR)
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	

**PLAINTIFFS’ STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE IN DISPUTE**

In support of their Motion for Summary Judgment and pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and Local Rule 7(h), Plaintiffs submit the following Statement of Material Facts As To Which There Is No Genuine Issue In Dispute.

1. Unity08 is a nascent political movement of voters who believe that the major political parties have focused too much attention on “wedge” issues – like abortion and gay marriage – that appeal primarily to their “base” of voters to the detriment of the “crucial” issues – like energy independence and health care reform – that face our country today. See Bailey Decl. ¶ 8 (Ex. 1). (All Exhibits referenced herein are true and correct copies attached to Plaintiffs’ Memorandum of Law as Exhibits 1-20.)

2. Unity08 seeks to: (1) ensure that an alternative ticket for President and Vice-President is available to the American voters on the November 2008 ballot, which ticket offers a choice to independent voters and those in the middle in both of the major parties; and (2) select candidates for that ticket in June 2008 in an on-line convention that will be open to every

registered voter who also properly registers as a delegate to the convention. See Deposition of Douglas Bailey (“Bailey Dep.”) at 10, line 21-p. 11, line 22 (excerpts at Ex. 11).

3. Unity08 seeks to jolt the two major parties out of the current partisan political deadlock that stands in the way of meaningful change in our country’s governance. See Bailey Decl. ¶ 8.

4. Unity08 requested an advisory opinion from the Federal Election Commission (“FEC” or “Commission”) on May 30, 2006 seeking a determination that Unity08 was not a political committee at the present time and would not become a political committee until such time as it was supporting or opposing a candidate for federal office. See Request by Unity08 for an Advisory Opinion (May 30, 2006) (Ex. 12).

5. The Office of the General Counsel released on July 13, 2006, a draft of Advisory Opinion 2006-20, which concluded that Unity08 was a political committee under the Federal Election Campaign Act of 1971, *as amended*, 2 U.S.C. §§ 431 *et seq.* See Draft Advisory Opinion (July 13, 2006) (Ex. 13).

6. On July 20, 2006, the FEC held a public meeting to consider the proposed draft opinion. See Minutes of July 20, 2006 Open Meeting (Ex. 14). After a discussion of the uniqueness of issues raised by Unity08 in its request and in its response to the draft opinion, the Commissioners requested Unity08 to grant the Commission an extension of the mandatory 60 day time period for a response to an Advisory Opinion Request to enable the Commissioners to further consider all of the issues raised. See http://www.fec.gov/audio/2006/20060720_02.mp3 (audio recording of meeting on FEC’s website).

7. Unity08 granted the FEC a 30-day extension until August 30, 2006, to issue its advisory opinion. See Request for Extension (July 31, 2006) (Ex. 15).

8. On August 16, 2006, Unity08 supplemented its request for an advisory opinion. Unity08 explained in the supplement that its current activities were centered on establishing an organization and exploring the viability of a third-party alternative ticket in 2008, not supporting a particular candidate. See Supplement to Advisory Opinion Request 2006-20 (Aug. 16, 2006) (Ex. 16). Unity08 explained that it had added a disclaimer to its website and mailings making clear to all donors that any money raised will not be used to support a candidate, but would be used solely for organizational activities, including ballot access. See id. Unity08 stated that it did not seek to qualify any candidates for ballot access, but sought only to gain ballot access as an organization in those states that allow it to do so. See id. Unity08 further supplemented its request on September 21, 2006. See Supplement to Advisory Opinion Request 2006-20 (Sept. 21, 2006) (Ex. 17).

9. Unity08 agreed to a request by the FEC for another extension until October 10, 2006. See Request for Extension (Aug. 22, 2006) (Ex 18).

10. The Office of General Counsel issued its second draft advisory opinion (Ex. 19) on September 29, 2006, again concluding the Unity08 was a political committee.

11. The Commission held a public meeting on October 4, 2006, to consider the second draft opinion. The Commission rejected its General Counsel's conclusion that Unity08 was receiving "contributions" under 11 CFR § 100.57, finding that the organization's reference to a Unity Ticket was not sufficient to meet the definition of a "clearly identified candidate." See http://www.fec.gov/audio/2006/20061004_02.mp3.

12. The Commissioners (with the exception of Commissioner von Spakovsky, who dissented) voted to adopt the remainder of Draft Advisory Opinion 2006-20.

13. The Commission concluded in Advisory Opinion 2006-20 that Unity08 must register as a political committee, because the “[m]onies spent by Unity08 to obtain ballot access through petition drives will be expenditures. An ‘expenditure’ is a ‘purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.’” Advisory Opinion 2006-20 at 3 (Ex. 4). The Commission stated that “Unity08 is, in effect, using its name as a placeholder for its candidates’ names on the ballot and that in promoting itself through petition drives to obtain ballot access, Unity08 is promoting its presidential and vice-presidential candidates, and any payments by Unity08 for these activities will constitute expenditures.” Id. at 4.

14. The Commission also stated that because “Unity08’s self-proclaimed major purpose is the nomination and the election of a presidential candidate and a vice-presidential candidate,” the party’s “major purpose” is campaign activity, and consequently Unity08 is a political committee covered by the FECA. Id. at 4-5.

15. Unity08 did not support or oppose candidates in the 2006 elections. See Bailey Decl. ¶ 14.

16. Unity08 does not intend to support or oppose candidates in any congressional, State, or local election at any time. See Bailey Decl. ¶ 14; see also Bailey Dep. at 12, lines 6-8.

17. Unity08 has no candidates for the office of President and Vice President at this time, and will not until after its June 2008 convention. See Bailey Decl. ¶ 15, 42.

18. None of the money now being raised will support the election or defeat of any candidate. See Bailey Decl. ¶ 58.

19. No donations to Unity08 have been nor will be used to support or oppose any identified candidate for federal office. See Bailey Decl. ¶ 59.

20. No contributions will be made by Unity08 to any identified candidate for federal office. See Bailey Decl. ¶ 60.

21. Unity08 will not provide financial support to its candidates after the convention. See Bailey Decl. ¶ 43; see also Bailey Dep. at 62, lines 12-14.

22. Unity08 does not plan to transfer any of its funds to the Unity08 nominees for use in their campaign after the nomination process. See Bailey Decl. ¶ 44; see also Bailey Dep. at 132, lines 2-7.

23. To the extent the Unity08 nominees wish to solicit money from Unity08 delegates, Unity08 will not become involved in that process. Unity08 may, however, consider renting or selling its delegate list to the nominees so that they may solicit the funds themselves from Unity08 delegates if that would be permitted under the federal election laws. See Bailey Decl. ¶ 45; see also Bailey Dep. at 113, line 21-p. 114, line 8.

24. Unity08 must act very quickly to obtain ballot access as an organization in order to present potential candidates with a realistic opportunity to compete nationwide. See Craver Decl. ¶¶ 6, 7, 8 (Ex. 2).

25. Unity08 must raise money quickly and commence its ballot qualification efforts promptly because qualifying requires a substantial amount of time and money, and Unity08 needs to qualify in these states quickly to establish the credibility of its proposed Unity ticket. See Bailey Decl. ¶ 18; Craver Decl. ¶ 24.

26. Since the issuance of the Advisory Opinion 2006-20 on October 10, 2006, Unity08 has had to alter its plans to scale back and delay its ballot access effort. See Bailey Decl. ¶ 32; See also Bailey Dep. at 43, lines 19-20; 118, lines 1-2.

27. Unity08 believes that it can more rapidly raise the \$10-12 million estimated to be needed to fund its American Agenda, Ballot Access Program, and Convention Hall Project by obtaining loans of greater than \$5,000 from individuals, which loans would be paid back through subsequent donations of \$5,000 or less. See Bailey Decl. ¶¶ 52-53.

28. The contribution limitations applicable to a “political committee” have prevented Unity08 from raising loans in large amounts from individuals because such loans would be considered excess contributions under the Act as interpreted by the FEC in Advisory Opinion 2006-20. See Bailey Decl. ¶ 55.

29. Unity08’s efforts have had to be reduced, and unless money can be raised now from individuals in larger sums than would be permitted to a political committee under the Act, the achievement of its goals is seriously threatened. See Bailey Decl. ¶¶ 32, 48, 52.

30. Unity08 needs to qualify on the ballot quickly to gain credibility. If it cannot qualify in many states quickly, qualified candidates may be deterred from seeking the nomination of the Unity08 convention. See Bailey Decl. ¶ 24; Craver Decl. ¶ 7.

31. Prior to the convention, Unity08 intends to qualify as a party in the approximately 37 states that will allow it to qualify as an organization that does not have a candidate. See Bailey Decl. ¶ 20; Craver Decl. ¶ 5.

32. Qualification for a ballot position as an organization will enable Unity08 to nominate candidates who will appear on the ballot in a state as the Presidential and Vice Presidential candidates of Unity08. See Bailey Decl. ¶ 21.

33. Qualifying in the states requires intensive labor and substantial resources to petition hundreds of thousands of voters, educate them on Unity08’s issue positions, and secure

their signatures so that it may offer to the voters a party meeting state requirements that can ultimately offer candidates. See Bailey Decl. ¶¶ 21-22, 26-28; Craver Decl. ¶¶ 5, 7, 8.

34. At the present time, Unity08 has not qualified to appear on the ballot for the 2008 presidential election in any state. See Bailey Decl. ¶ 33.

35. The requirements for ballot access as an organization vary from state to state. In a few states the process is simple, but in most states it is complex. Generally, to qualify for ballot access as an organization, Unity08 must present petitions containing the signatures of a substantial number of registered voters who support its place on the ballot. Unity08 must start this process immediately if it hopes to complete the process prior to the 2008 election. See Bailey Decl. ¶¶ 22-23.

36. The major parties have guaranteed ballot access, whereas Unity08's most recent estimate of the cost for qualifying as a new party in every state is approximately \$7 million. See Bailey Decl. ¶¶ 28-29.

37. Unity08 has been prevented from pursuing a number of essential activities, including web development and delegate recruitment because the \$5,000 limitation has resulted in limited funds. See Bailey Dep. at 44, lines 6-20.

38. Organizing for ballot access has been slowed due to lack of access to more funding resulting from the FEC limitations. See Bailey Decl. ¶ 32; see also Bailey Dep. at 44, lines 15-20; 119, lines 8-19.

39. The \$5,000 limitation has lessened Unity08's ability to get its message out. See Craver Decl. ¶ 6; see also Bailey Dep. at 45, line 17-p. 46, line 5.

40. Unity08 has made progress toward its goals, with the exception of ballot access which it has begun but only to a limited degree, and cannot ramp up without adequate funding. See Bailey Dep. at 119, line 20-p. 120, line 5.

41. At this time, because of the contribution limitation directly resulting from the FEC's ruling, Unity08 has delayed and scaled back its ballot access initiative due to inadequate funding. More specifically, Unity08 has been severely hampered in its effort to finalize and distribute its ballot access materials, and its efforts to train and deploy volunteers to the states where it needs petition signatures to get on the ballot. For the same reasons, Unity08 has also delayed hiring state ballot access directors and regional coordinators. See Bailey Decl. ¶ 32.

42. Limited funding has hampered Unity's plan to deploy volunteers in the states to petition face-to-face. See Bailey Dep. at 107, lines 11-16.

43. The funds requirements for Unity08, particularly in relation to ballot access, are significant. See Bailey Decl. ¶ 28; see also Bailey Dep. at 41, lines 1-5. One significant cost involves defending against legal challenges anticipated from both parties. See Bailey Dep. at 41, lines 6-12. Challenges would also impede efforts at ballot access. See Bailey Dep. at 42, line 19-p. 43, line 2.

44. Another significant factor and expense in ballot qualification is the fact that ballot access is determined by differing laws in each jurisdiction. See Bailey Dep. at 41, line 1-p. 42, line 2.

45. Another significant factor and expense in ballot qualification is that a number of states have moved up or are planning to move up their primaries to February or March 2008, which in some states such as California, will move up the date by which signatures must be

obtained. See Bailey Decl. at ¶ 25; Bailey Dep. at 41, line 13-p. 42 line 1; 130, line 22-p. 132, line 1; Craver Decl. ¶ 7.

46. Unity08 must hire paid ballot access directors in each state, hire seven to ten paid regional ballot access coordinators, retain and employ counsel to fend off legal challenges to our ballot access by the major parties, and build a sophisticated and extensive citizen effort on a fast-moving mobilization schedule if Unity08 is to be competitive in 2008 with the established political parties. See Bailey Decl. at ¶ 26.

47. Sufficient money to defray these expenses will be impossible to raise on a timely basis under the limitations applicable to a political committee. See Bailey Decl. ¶ 31; Craver Decl. ¶ 10.

48. Loans to be repaid by contributions are essential to raising the needed money. See Bailey Dep. at 42, lines 1-4.

49. Unity08 could raise sufficient money to fund its efforts through loans of more than \$5,000 from individuals, which could then be repaid with contributions of \$5,000 or less. See Bailey Decl. ¶¶ 52-53; Craver Decl. ¶ 12.

50. Contributions are expended for the ballot access project, the technology infrastructure and secure systems to hold the online nominating convention, the web systems needed to implement the New American Agenda to define the crucial issues facing our nation, and for general operating infrastructure to support all programs and the grassroots community of delegates. See Bailey Decl. ¶¶ 17-18.

51. Unity08 does not permit contributions to be earmarked to support any eventual nominee. Such contributions would be returned. See Bailey Decl. ¶ 62.

52. The FEC's ruling that signature-gathering, party-qualifying expenses are "expenditures," and that these "expenditures" make Unity08 a "political committee" subject to the fund raising restrictions of the FECA, means that Unity is substantially inhibited in raising the funds on the schedule required to achieve ballot access in the states that allow it to do so. See Bailey Decl. ¶ 30.

53. Unity08 plans in or around June 2008, to host an on-line nominating convention. See Bailey Decl. ¶38; see also Bailey Dep. at 87, lines 6-8.

54. At the convention, voters who have registered as delegates will select the nominees for a Unity08 presidential ticket from among candidates vying for the nomination. See Bailey Decl. ¶¶ 11, 39; see also Bailey Dep. at 88, line 12-p. 90, line 1.

55. The on-line convention would be held before the conventions of the two major parties, but after the likely nominees of the other parties have been identified however, thus leaving enough time for other potential candidates to survey the field and make a decision as to whether they wish to seek the Unity nomination. See Bailey Dep. at 87, lines 9-18.

56. Unity08 as an organization has no plans to draft any candidate. See Bailey Dep. at 90, lines 2-11.

57. Unity08 will not in any way assist any potential candidates for the Unity08 nomination with raising money prior to the convention. See Bailey Dep. at 94, lines 17-21.

58. Prior to and during the convention, Unity08 intends to provide all candidates an equal opportunity via the website and weblog to communicate to the delegates so as to answer questions that the delegates have specified. See Bailey Dep. at 95, line 4-p. 96, line 14. The candidate can respond and the response will be available on the website. See id. It is also Unity's expectation to provide candidates the opportunity to communicate to delegates for

support by emailing the delegate list in some controlled fashion without giving them the list. See id.

59. Unity08 is a non-profit corporation in the District of Columbia. It has tax exempt status under Section 527 of the Internal Revenue Code. See Bailey Decl. ¶ 13.

60. Unity08 was formed by Roger Craver, Hamilton Jordan, Jerry Rafshoon, and Douglas Bailey. See Bailey Decl. ¶8.

61. Jerry Rafshoon was the director of communications for the Carter presidential campaign in 1976. See Bailey Dep. at 13, line 14-p. 14 line 1. He serves as a volunteer for Unity08, working to support the cause, fund raising, planning, and meeting with the media. See id.

62. Roger Craver was the founder of the Craver Matthews Smith company. See Bailey Dep. at 14, lines 2-14; Craver Decl. ¶¶ 3-5. He is expert in fundraising via direct mail, telephone, on-line and via web operations. See id. He is helping to oversee the effort to recruit delegates via the web site and in other ways, and to convert delegates and other supporters to small dollar contributors. See id.

63. Doug Bailey is Unity08's unpaid chief executive officer and a member of its Board of Directors. See Bailey Decl. ¶ 2. He has been active participant in politics his entire career, since he was a Congressional staffer in the late 1960's, through the Carter years in the 1970's, to his time as founder in 1987 of The Hotline, a business-daily news source for politics. He served as its publisher until to 1999. See Bailey Decl. ¶¶ 4, 5. Most recently, prior to Unity08, he was authoring a book with Freedom's Answer which was a non-profit effort that he founded to engage young people into politics. See Bailey Dep. at 9, lines 6-9.

64. Hamilton Jordan served as White House Chief of Staff from 1979-80 and was a key advisor and strategist for President Carter. See <http://www.unity08.com/founderscouncil>.

65. Unity08 has voluntarily refused to accept contributions from corporations, labor unions, foreign nationals or government contractors. See Bailey Decl. ¶ 51.

66. Unity08 has since shortly after its inception in May 2006 limited individual contributions to \$5,000. See Bailey Decl. ¶ 49-50; see also Bailey Dep. at 40, lines 2-3.

67. Unity08 has almost exclusively raised funds through its Internet site, www.unity08.org, and personal visits. See Bailey Decl. ¶ 56; see also Bailey Dep. at 16, lines 1-7.

68. Fundraising limitations hamper Unity08's ability to utilize traditional, proven fundraising channels other than personal visits and the Internet, such as direct mail and phone solicitation, because it takes money to raise money via those methods (for example, to pay postage costs for mailings and to pay banks of professional third-party telephone solicitors). See Craver Decl. ¶ 11. As a consequence, Unity08's efforts to raise money through direct mail and telephone solicitations have been severely limited. See id.

69. Unity08 has not used print or TV ads to raise funds. See Bailey Dep. at 17, lines 2-8.

70. Fundraising requires seed money, and the most effective method to quickly obtain seed money is to raise it in large increments. See Bailey Decl. ¶ 52.

71. Through January 2007, Unity has raised approximately \$500,000. See Deposition of Daniel Radek at 8, lines 13-16, p. 11, lines 14-19, p. 14, lines 15-20 (excerpt at Ex. 20).

72. Unity08 is soliciting \$5,000 contributions from approximately 200 potential donors to a "bridge fund" to help fund the time period between now and a point where there are

sufficient delegates to then be able to convert a portion of those delegates to small dollar contributors and fund the operation with much smaller contributions. See Bailey Dep. at 23, lines 2-16.

73. Unity08 has not held traditional fundraising events. Unity has held a series of small meetings. See Bailey Dep. at 26, lines 3-11.

74. Unity08 has used an electronic presentation at some of its meetings to list the names of approximately 60 individuals who might become candidates. See Bailey Dep. at 28, line 20-p. 29, line 8; 32, line 1-p.33. line 11.

75. Voters have recommended candidates to Unity08, see Bailey Dep. at 29, lines 2-8, but Unity08 has encouraged anyone to seek its nomination. See Bailey Dep. at 81, lines 20-22.

76. No person who has recommended a candidate to Unity08 has expressed an interest in donating more than \$5,000. See Bailey Dep. at 30, lines 14-17.

77. Unity08 has not asked any Presidential candidate to run, or to consider running, for Unity08's nomination. See Bailey Decl. ¶ 16. Unity08 has briefed many potential Presidential candidates on its process so they can fully and accurately understand Unity08's purpose. See id.

78. The cost of setting up the convention, including the technology infrastructure so that all registered delegates may vote only once, and have that vote authenticated, and to maintain a secure system against attacks, will be several million dollars. See Bailey Dep. at 97, lines 16-12.

79. Successfully establishing the convention infrastructure and attaining ballot access in turn cause candidates to want to seek the Unity08 nomination. See Bailey Dep. at 37, lines 8-22. Potential candidates considering seeking the nomination will look at progress that Unity08 is

making in achieving a significant body of delegates to hold the a convention and progress in achieving ballot access. See *id.*

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