

June 19, 2006

By Electronic Mail

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Re: Comments on Advisory Opinion Request 2006-20 (Unity 08)

Dear Mr. Norton:

These comments are filed on behalf of the Campaign Legal Center and Democracy 21 in regard to AOR 2006-20, an advisory opinion request submitted by Unity 08.

Unity 08 states that its "Goal One" is "to elect a Unity Ticket for President and Vice President of the United States in 2008...." AOR at 2. It intends "to qualify for ballot positions in certain key states for the offices of President and Vice President of the United States through petitions, and if required, litigation...." *Id.* at 3. It intends "to select, using a 'virtual' convention over the Internet, candidates for the office of President and Vice-President of the United States to run in those ballot positions." *Id.* at 4.

In short, Unity 08 intends to hold a convention in order to nominate candidates for President and Vice President, and then intends to elect those candidates to the White House by running them on ballot positions it has qualified for.

These are the activities of a nascent political party engaged in influencing federal elections, and for that reason, these activities fall under the federal campaign finance laws.

We recognize that Unity 08 has indicated that it intends to be a largely grassroots effort, and has adopted policies that will diminish its reliance on non-Federal funds to conduct its political activities. These policies include, *e.g.*, not accepting donations from sources prohibited by FECA, and an intent to solicit "many" of its donations over the Internet. AOR at 3.

Nonetheless, the basic question posed by the AOR is whether Unity 08 is a "political committee" within the meaning of 2 U.S.C. § 431(4), and therefore must abide by the contribution limits, source prohibitions and reporting requirements applicable to political committees. For the reasons set forth below, the Commission should advise Unity 08 that it meets the definition of "political committee" and should register as such.

Political Committee Status

Section 431(4) of Title 2 defines the term "political committee" to mean "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); *see also* 11 C.F.R. § 100.5(a). A "contribution," in turn, is defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office...." 2 U.S.C. § 431(8)(A). And an "expenditure" is defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office...." 2 U.S.C. § 431(9)(A).

In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court construed the term "political committee" 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). In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Court again invoked the "major purpose" test and noted that if a group's independent spending activities "become so extensive that *the organization's major purpose may be regarded as campaign activity*, the corporation would be classified as a political committee." 479 U.S. at 262 (emphasis added). In that instance, the Court said the group would become subject to the "obligations and restrictions applicable to those groups *whose primary objective is to influence political campaigns.*" *Id.* (emphasis added). The Court in *McConnell v. FEC*, 540 U.S. 93 (2003) restated the "major purpose" test for political committee status as iterated in *Buckley*. 540 U.S. at 170 n.64.

Thus, Unity 08 is a "political committee" if it meets both parts of a two-prong test for political committee status: (1) it has a "major purpose" to influence elections and (2) it receives \$1,000 in "contributions" or makes \$1,000 in "expenditures."

1. Unity 08 meets the threshold "major purpose" test. Unity 08 makes clear that its "major purpose" is to nominate and elect candidates for President and Vice President in the 2008 election. Given its statement that election of federal candidates is its "Goal One," AOR at 2, it can hardly be contested that Unity 08 is a group "the major purpose of which is the nomination or election of a candidate," as set forth by the Court in *Buckley*.

There is no basis for the Commission to conclude other than that the "major purpose" of Unity 08 is to nominate and elect federal candidates.

This conclusion is buttressed by the fact that Unity 08 has registered with the Internal Revenue Service under section 527 of the Internal Revenue Code as a "political organization" that is operated "primarily" for the purpose of "accepting contributions or making expenditures" under 26 U.S.C. § 527. AOR at 1.

Section 527 of the IRC provides tax exempt treatment for "exempt function" income received by any "political organization." The statute defines "political organization" to mean a "party, committee, association, fund, or other organization (whether or not incorporated) *organized and operated primarily for the purpose of directly or indirectly accepting*

contributions or making expenditures, or both, for an exempt function." 26 U.S.C. § 527(e)(1) (emphasis added). An "exempt function" is defined to mean the "function of *influencing or attempting to influence the selection, nomination, election, or appointment of any individual* to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors...." 26 U.S.C. § 527(e)(2) (emphasis added).

The Supreme Court in *McConnell* recognized that section 527 groups are primarily engaged in influencing elections. It stated, "Section 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity." 540 U.S. at 174 n.67. The Court noted that 527 groups "by definition engage in partisan political activity." *Id.* at 177.

Thus, by definition, any entity that registers with the Secretary as a "political organization" under section 527 is "organized and operated primarily" for the purpose of "influencing or attempting to influence the selection, nomination, election or appointment of" an individual to public office. The Commission has frequently cited the section 527 standard as identical to the "major purpose" prong of the test for "political committee" status. See e.g. Ad. Ops. 1996-13, 1996-3, 1995-11. Accordingly, any group that chooses to register as a "political organization" under section 527 – including Unity 08 – is *by definition* an entity "the major purpose of which is the nomination or election of a candidate...."¹ Under the "major purpose" standard set forth in *Buckley*, this is sufficient to meet the first prong of the "political committee" test.²

2. Unity 08 meets the \$1,000 expenditure test. An "expenditure" is defined as any disbursement "made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9).

With regard to the question of whether Unity 08 has made (or soon will make) \$1,000 in "expenditures," there are two relevant issues: first, whether the definition of "expenditure" in the case of Unity 08 is limited by the "express advocacy" test, and second, whether Unity 08's proposed spending prior to nominating a specific candidate constitutes "expenditures."

a. The "express advocacy test does not apply to Unity 08. The test of whether a group has made \$1,000 in "expenditures" is not limited by the "express advocacy" standard when applied to a "major purpose" group, including a section 527 "political organization," such as Unity 08. Rather, the test for "expenditure" is the statutory standard of whether disbursements are made "for the purpose of influencing" any federal election, regardless of whether the disbursements are for an "express advocacy" communication.

¹ This would be true in all instances other than a 527 organization which is devoted to influencing the selection of individuals to appointive office such as, e.g., a judicial appointment. But this exception does not apply to Unity 08.

² Of course, if the 527 group is involved only in influencing State and local candidate elections, it would not be a federal political committee because it would not meet the second prong of the test, *i.e.*, it would not be receiving federal "contributions" or making federal "expenditures." In this case, however, Unity 08 indicates that *all* of its electoral activity will be directed to federal elections. AOR at 4.

The Supreme Court made clear in *Buckley* that the “express advocacy” limitation does not apply to an entity which has a “major purpose” to influence candidate elections. “Political committees” – construed in *Buckley* to “only encompass organizations....the major purpose of which is the nomination or election of a candidate” – are not vulnerable to concerns of vagueness in drawing a line between issue discussion and electioneering activities because their activities, according to the Court, “can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” 424 U.S. at 79.

By contrast, the Court developed and applied the “express advocacy” test only to spenders *other than* “major purpose” groups:

But when the maker of the expenditure is not within these categories – when it is an individual other than a candidate or a group other than a “political committee” – the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of [the disclosure provision] is not impermissibly broad, we construe “expenditure” for purposes of that section in the same way we construed the terms of [the spending limit] – to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.

Id. at 79–80 (emphasis added).

Thus, the Court in *Buckley* made a crucial distinction: when the spender is an organization with a “major purpose” to influence candidate elections, the statutory definition of “expenditure” as spending “for the purpose of influencing” a federal election is sufficiently clear to be facially constitutional, because such organizations “are, by definition, campaign related” and their spending “can be assumed” to fall within the area properly regulated by Congress. Therefore, there is no need for an “express advocacy” limitation on the definition of “expenditure” in order to save the term from vagueness.

By contrast, when the spender is any other kind of organization – any organization which does *not* have a “major purpose” to influence elections – then a narrowing construction of “expenditure” limited to “express advocacy” is required in order to avoid constitutional problems of vagueness.³

The Court affirmed its reliance on this distinction in *McConnell*, where it rejected a vagueness challenge to the “promote, support, attack or oppose” standard in BCRA as applied to political party committees. 540 U.S. at 170 n.64. The Court’s analysis here clearly stands for the proposition that an “express advocacy” test is not required for political party committees, and for political committees generally, because their actions “are presumed to be in connection with

³ The Court’s analysis in *Buckley* makes clear that the “major purpose” determination is made *prior* to a determination of whether the “express advocacy” test applies to the definition of “expenditure.” The Court applied the “express advocacy” construction only to organizations which were not “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. Thus, it is logically necessary first to determine if an organization has a “major purpose” to nominate or elect a candidate; if so, the “express advocacy” construction of “expenditure” does not apply.

election campaigns.” *Id.* In support, the Court here cited and quoted the language from *Buckley* defining “political committees” to include groups which have the “major purpose” to nominate and elect candidates. *Id.* quoting 424 U.S. at 79. A PASO standard, and not the narrower “express advocacy” test, accordingly, can be applied to such “major purpose” groups.

For this reason, the “express advocacy” test, which the Supreme Court in *McConnell* deemed to be “functionally meaningless,” 540 U.S. at 218, is not relevant to the question of whether a “major purpose” group, including a section 527 organization, is spending money to influence the election of federal candidates, and whether it is, accordingly, making “expenditures.”

As a self-identified “political organization” formed “primarily” for the purpose of “making expenditures,” 26 U.S.C. § 527(e)(1), Unity 08 is – like other “major purpose” entities – subject to the statutory definition of “expenditure,” without the limiting “express advocacy” gloss developed by the Court in *Buckley* for non-“major purpose” groups. The Commission should advise Unity 08 that it is mistaken in requesting that the “express advocacy” test be applied to judging whether its spending constitutes “expenditures.” AOR at 4-5.

Thus, Unity 08 meets the \$1,000 expenditure prong of “political committee” status if it spends \$1,000 “for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(9).⁴

b. Unity 08 is making “expenditures” even prior to nominating a candidate. Unity 08 relies on the “Draft Kennedy” cases, *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (*Machinists*); *see also FEC v. Florida for Kennedy Committee*, 681 F.2d 1281 (11th Cir. 1982), to argue that the definition of “expenditure” is further limited by a requirement that its spending be relative to a specific, named, “clearly identified” federal candidate. Because it has not yet identified any such specific candidate to support, Unity 08 argues that it will not be making “expenditures” for purposes of the “political committee” test until it nominates actual candidates for President and Vice President. AOR at 5-8.

The “Draft Kennedy” cases are not applicable here. In those cases, the groups at issue were engaged in “attempts to convince the voters – or Mr. Kennedy himself – that he would make a good ‘candidate,’ or should become a ‘candidate.’” *Machinists*, 655 F.2d at 396. There

⁴ Alternatively, Unity 08 meets the second prong of the “political committee” test because it has received, or soon will receive, \$1,000 in “contributions.” A new regulation, 11 C.F.R. § 100.57, makes clear that an “express advocacy” test does not apply to *any* group, whether a “major purpose” group or not, in determining whether the group is soliciting and receiving “contributions,” *i.e.*, money “for the purpose of influencing” federal elections. Rather, any gift made “in response to any communication” is a “contribution” if “the communication indicates that any portion of the funds received will be used *to support or oppose* the election of a clearly identified Federal candidate.” (emphasis added). (For reasons set forth below, Unity 08’s activities meet the “clearly identified Federal candidate” test. *See infra* at 5-7). This regulation makes clear that a “support or oppose” standard – not express advocacy – applies to Unity 08’s solicitation activities, and thus Unity 08 satisfies the second prong of the “political committee” test if it receives \$1,000 in response to solicitations indicating that the money will be used to “support” a Unity 08 candidate for President.

was no certainty, or even likelihood, that Kennedy would ever become a candidate within the meaning of FECA. Thus, the "draft" committees might in the end never support a "candidate" for federal office.

Here, by contrast, Unity 08 has announced that its "Goal One" is to nominate and then support specific candidates for President and Vice President. Unlike the facts of the "Draft Kennedy" cases, Unity 08's goal is not to attempt to convince some individual to run for office, who might or might not do so, but rather to nominate (and then elect) its own candidates for federal office, a goal which is entirely within its own control. In the "Draft Kennedy" cases there was no way to know whether a federal candidacy would ever occur. Here, by contrast, there is no reason to doubt that the efforts of Unity 08 will result in active support and promotion of "candidates" for federal office.⁵

The mostly closely analogous precedent is Ad. Op. 2003-23 (WE LEAD). Although the Unity 08 AOR dismisses out of hand the relevance of this advisory opinion, it deals squarely with a key question here: whether a specific candidate must be "identified" – i.e., nominated – in order for FECA rules to apply.⁶

The Commission's answer was no, when the activity relates to a "presumptive nominee" for a specific federal office in a specific federal election:

The Commission has interpreted this regulation to allow contributions to be earmarked for an *undetermined Federal candidate* in certain circumstances. In Advisory Opinion 1982-23, the Commission concluded that it was permissible for a local committee to earmark \$1,000 through a local party committee to *the as-yet unknown Republican nominee* for New York's 24th Congressional District. In Advisory Opinion 1977-16, the Commission concluded that it was permissible for a local committee to accept contributions and make expenditures on behalf of an *undetermined Federal candidate*. In both instances, the Commission concluded that it was permissible to earmark contributions to undetermined Federal candidates because *the candidates were identifiable as to specific office, party affiliation, and election cycle, although the names of the eventual nominees were not known*.

⁵ For much the same reason, *FEC v. GOPAC*, 917 F.Supp. 851 (D.D.C. 1996), the other case principally relied on by Unity 08, is also plainly distinguishable. There, the group in question was supporting *state and local* candidates for the purpose of building a "farm team," *id.* at 854, with the "ultimate major purpose" of electing Republicans to the House. *Id.* at 858 (emphasis in original). The district court stressed that GOPAC "avoided *directly* supporting federal candidates," *id.* at 857 (emphasis in original), and "did not make any direct contribution to any particular federal candidates." *Id.* at 858. Here, by contrast, Unity 08 has stated that its principal goal is to nominate and support federal candidates in the 2008 election cycle, and that it does *not* intend to influence state and local elections. AOR at 4.

⁶ In Ad. Op. 2003-23, the question related to the application of the earmarking rules that relate to contributions to, or expenditures on behalf of, a "clearly identified candidate." 11 C.F.R. § 110.6(b)(1).

Under WE LEAD's proposal, *because the presumptive nominee is identifiable as to specific office (President of the United States), party affiliation (Democratic Party), and election cycle (2004)*, the Commission concludes that contributors may earmark contributions to the presumptive nominee through WE LEAD....

Ad. Op. 2002-23 (emphasis added).

The same is true here. Unity 08's activities relate not to an individual who may or may not become a federal candidate, but to an "as-yet unknown" party nominee who, by definition, will be a candidate. But although "as-yet unknown," this "presumptive nominee" of the Unity 08 committee "is identifiable as to specific office" (President of the United States) as well as to "party affiliation" (the Unity 08 committee, once it endorses) and "election cycle" (2008). Just as these identifying attributes were sufficient in Ad. Op. 2003-23 to constitute a "clearly identified candidate" for purposes of the earmarking rules, so too they are sufficient here for purposes of determining whether spending relating to this "presumptive nominee" satisfies the definition of "expenditure."⁷

Accordingly, if Unity 08 makes disbursements "for the purpose of influencing" the election of its "presumptive nominee" for the 2008 presidential election, that spending constitutes "expenditures" for purposes of FECA. If that spending exceeds \$1,000, Unity 08 meets the second prong of the test for "political committee" status.⁸

Conclusion

Because Unity 08 makes clear that its principal purpose is to influence the 2008 presidential election, and also because it is a section 527 group, Unity 08 meets the threshold "major purpose" prong of the test for "political committee" status.

As a "major purpose" entity, the definition of "expenditure" applicable to Unity 08 is not limited to express advocacy. Because Unity 08 is planning to spend funds plainly "for the purpose of influencing" the 2008 presidential election, and that spending relates to a definite, although "as-yet unknown" candidate who will be the "presumptive nominee" of the group,

⁷ In the AOR, Unity 08 dismisses the relevance of Ad. Op. 2003-23 because it did not relate to whether the group at issue was a political committee. AOR at 7 n.2. Although true, that distinction misses the point. The reasoning of the advisory opinion was that a party's "presumptive nominee" for a specific federal office in a specific federal election is sufficiently specific and identified to meet the "clearly identified candidate" test. Unity 08 argues that it is not making "expenditures" because it as yet lacks "a particular *identified* candidate," AOR at 7 (emphasis in original). Thus, the question decided by Ad. Op. 2003-23 as to whether and when a "presumptive nominee" meets the "clearly identified candidate" test is directly relevant here.

⁸ As noted above, Unity 08 also meets the second prong of the test if it receives \$1,000 in "contributions" – defined as funds received in response to solicitations that indicate that the money will be used to "support or oppose" a "clearly identified" Federal candidate. 11 C.F.R. § 100.57. For the reasons set forth in Ad. Op. 2002-23 and discussed in text, solicitations for funds to support a "presumptive nominee" for the 2008 presidential election meet the "clearly identified" test.

Unity 08 is making "expenditures," which (when they aggregate to \$1,000) will meet the statutory prong of the test for "political committee" status. Alternatively, because Unity 08 is planning to solicit funds by indicating that the money it receives will be used to "support" a presumptive nominee for the 2008 presidential election, it is receiving "contributions," 11 C.F.R. § 100.57, which (when they aggregate to \$1,000) will also meet the statutory prong of the test for "political committee" status.

The Commission should advise Unity 08 that its activities as a nascent political party relating to the 2008 presidential election require it to register as a "political committee" and to comply with the contribution limits, source prohibitions and reporting requirements of the law.⁹

Respectfully,

/s/ Fred Wertheimer

/s/ J. Gerald Hebert

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⁹ Unity 08 also seeks advice on whether it may incorporate for liability purposes. AOR at 8-9. Such incorporation is expressly permitted under 11 C.F.R. § 114.12(a).