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October 3, 2006

Federal Election Commission
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Re: Response to the Draft Advisory Opinion 2006-20, dated September 29, 2006

Dear Commissioners:

The Office of the General Counsel (the "OGC") has failed to consider in its new Draft Advisory Opinion (hereinafter referred to as the "Draft AO") any of the additional information Unity08 provided in its supplemental filings on August 16, 2006 and September 22, 2006. The Draft AO merely reiterates, without any significant additional legal analysis, the same conclusions that the Commission found troubling in its initial open meeting on AO 2006-23. The Draft AO now relies almost exclusively on OGC's expansive interpretation of the term "clearly identified candidate" in Section 100.57 of the Commission's regulations. Moreover, the OGC inexplicably fails to address at all the concerns expressed by the Commission in the July 20, 2006 open meeting about possible constitutional problems with the OGC's proposed interpretations.

The OGC's interpretation of Section 100.57 is not mandated by any statutory language or the plain meaning of any regulatory language. Section 100.57 includes in the definition of contribution money received in response to a solicitation that indicates that "the funds received will be used to support or oppose the election of a *clearly identified Federal candidate*." Unity08 has not made any such solicitation, but the OGC tortures the language of the regulation

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to try to make it fit Unity08.¹ Despite the fact that Unity08 does not have a candidate, and is not on the ballot in a single state, and, therefore, does not even have the potential at the present time to have a candidate in any state, the OGC insists that Unity08's references on its website to possibly running future candidates for President and Vice President constitute solicitations for a "clearly identified" candidate.²

¹ In reaching this extraordinary conclusion the OGC can rely only on Advisory Opinion 2003-23 (WE LEAD) addressing the question of a clearly identified candidate for "earmarking" purposes. Whether specific office, party affiliation, and election cycle are sufficient to identify a candidate to allow earmarking has no relevance to whether a candidate is "clearly identified" for the purpose of 100.57. The issues are in no way comparable. Moreover, whether a candidate is or is not sufficiently identified for earmarking purpose does not implicate any First Amendment issues. In addition, the earmarking AO rests on the well grounded assumption that the party has already qualified for a spot on the ballot for the office for which the funds are earmarked and the party has a history of placing candidates on the ballot for the office in question; this situation does not exist in the case of Unity08.

The OGC again also cites AO 1977-16, which held that it was *permissible* for a local search committee to accept contributions on behalf of an undetermined Federal candidate. As previously noted, this opinion was decided before the court's decision in *Machinists*, which held that such draft organizations were *not* political committees under the Act. *See Machinists, supra*, 655 F.2d at 394. *See also* 11 C.F.R. § 100.72 and 11 C.F.R. § 100.131 (exempting payments from the definitions of contributions and expenditures monies used to determine whether an individual would like to run for office); 11 C.F.R. § 110.2(l) (making certain contributions by a multicandidate committee to pre-candidate committees in-kind contributions under certain circumstances).

Moreover, as noted in Unity08's August submission, the OGC's Section 100.17 does not support its application of such a broad interpretation of "clearly identified" in this instance. The Act's definition, which Section 100.17 was based upon, clearly contemplates an actual candidate. Section 431(18) defines "clearly identified" as (1) "the name of the candidate involved;" (2) "a photograph or drawing of the candidate;" or (3) "the identity of the candidate is apparent *by unambiguous reference.*" 2 U.S.C. § 431(18) (emphasis added). The wording of the regulations and the examples cited in the Explanation and Justification for Section 100.17 make clear that the focus is on *actual candidates* for Federal office -- not hypothetical or potential candidates, as the OGC contends.

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In *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995), the Court stated that:

Only if the solicitation makes plain that the contributions will be used to advocate the defeat or success of a clearly identified candidate at the polls are they obliged to [comply with the disclosure requirements]. (Emphasis added).

Here, the converse is true. Unity08 has taken steps to make clear that contributions will not be used to support or oppose any candidate. Promptly after the first Commission open meeting on July 20th, Unity08 added a disclaimer to its website indicating that Unity08 would not use any monies it received in response to its solicitation to support or oppose future candidates. The OGC contends that the disclaimer is inadequate to remove Unity08 from the scope of Section 100.57, but its argument ignores the court's language in *Survival*. In *Survival* the court stated that "only if the solicitation makes plain that the contributions will be used" to make independent expenditures is the organization required to comply with the disclosure requirements. *Id.* at 295. Here the solicitation does not make it plain; to the contrary, it expressly states that the money received will not be so used. The OGC selects various phrases from the website out of context, but the language it cites makes it clear that the selection and election of a candidate is the

² The OGC ignores that while the possibility of running Unity08 candidates is featured on the website, the website also strongly promotes itself as a forum for discussion on the issues that most Americans find crucial. For example, the website hosts a blog and "shoutbox" section that provides an "online soapbox to discuss and rate the issues that matter most to you and Unity08" and reprints articles of political importance. On its "Take Action" page, Unity08 list five simple ways to take action, most related to encouraging discussion and only one (the fifth) being a link to contribute. <http://www.unity08.com> (e.g., No. 1 "spread the word about what we're trying to accomplish and why" and No. 4 "[a]dd your voice to the mix by commenting on blogs and voting in polls").

In addition, the OGC also states that "[a]lthough Unity08 did not initially place a limit on the amount of donations it solicits or accepts, it recently imposed a \$5,000 limitation on donations from individuals." Draft AO, p. 3. In fact, while Unity08 did not mention the limitation previously, it has always imposed such a limitation.

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“ultimate goal.” Nothing in these statements of Unity08’s ultimate purpose contradicts the disclaimer.

Moreover, Unity08 has made commitments in its submissions to the Commission that it would not use the monies raised now to influence the election of any candidates it might have in the future.³ The OGC ignores, without explanation, Unity08’s commitment not to use the money to influence the election of any future candidates. Unity08 can not explain its purpose without mentioning its future goals, but the explanation of its future goals does not transform its present activity into something it is not, and it has told the Commission it will not do.

The OGC’s proposed Advisory Opinion does not apply settled law to Unity08’s factual situation. The OGC is asking the Commission to reach out to bring within the ambit of the Federal Election Campaign Act of 1971, as amended (the “Act”), activity that previously had been considered too preliminary to be included. And, it is asking the Commission to make this extensive expansion of the scope of the Act based on a dubious interpretation of a single regulation. The OGC ignores completely the limited rationale that, according to the *Buckley*

³ Unity08 made clear in its August 16th supplementary submission that its activities would fall into four stages: Phase I (centered on establishing an organization and exploring the viability of a third alternative ticket in 2008); Phase II (qualification as an organization in those jurisdictions that allow it to qualify without a candidate); Phase III (the holding of an online convention); and Phase IV (the general election campaign, during which Unity08 may help the nominated candidate gain ballot access in those states that require a candidate). See Unity08’s Supplemental filing dated August 16, 2006, pp. 2-4. Unity08 also made it clear that it was seeking an Advisory Opinion only in connection with the initial stages and would seek other Advisory Opinions as necessary for future stages. As Unity08 also made clear in its September 22nd letter to the OGC, monies received during the present stage are being used and would continue to be spend to only for organizational administration (e.g. office rent, development of corporate document), issues discussion, and Unity08’s efforts to get on the ballot as a party in the states that permit ballot access without a candidate.

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Court, justified the limitations on contributions -- the appearance of impropriety that could come from large contributions to candidates for federal elective office.⁴ *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). Contributions to Unity08 at this time do not raise that concern. Unity08 does not have a candidate; it does not yet even have a ballot position in any state.

Court's have repeatedly held that the government's right to limit the ability of citizens to join together in an organization to raise and spend money in order to advance political ideas is narrow. *See id.* at 28; *McConnell v. FEC*, 540 U.S. 93, 291 (2003). In permitting some limitations on the extent to which the government can place restrictions on the ability of citizens to raise and expend money for political purposes, courts have recognize that "organizational speech is a vital means of amplifying the citizen's voice in a democracy" and that contributions to a like-minded organization are one way for an individual to make his/her voice louder. *Survival Education Fund, Inc.*, *supra*, 65 F.3d at 292 (quoting *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 261 (1986) ("individuals contribution to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction")). Accordingly, courts have continually construed restrictions on raising and expending funds for political purposes narrowly to avoid imposing undue restrictions. As the court in *Survival* stated, "[l]est any movement dealing with national policy be subjected to the onerous requirements devised to police political campaigns, a result we refused to belief Congress intended, we interpret[] [the language used to define contributions] narrowly." *Id.* at 294.

The Draft AO would stifle Unity08's ability to promote itself and its ideas. The major parties have guaranteed ballot access, whereas the cost for qualifying as a new party in every

⁴ The *Buckley* Court stated that the Act's "primary purpose" was "to limit the actuality and appearance of corruption resulting from large individual financial contributions." 424 U.S. at 26-27 (also stating "[t]o the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined").

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state could be 3-4 million dollars or more. Additional expenses may result from the need to challenge a state's refusal to qualify a political organization for the ballot or to defend a challenge to a ballot qualification. Sufficient money to defray these expenses would be nearly impossible to raise under the limitations applicable to a non-connected political committee (\$5,000) or to a candidate committee (\$2100). The Act allows the national committee of the major parties to accept contributions of \$26,700 per year from individuals. Adoption of the OGC's expansive interpretation of Section 100.57 would make the development of new challengers to the existing parties nearly impossible.

The OGC's arguments that money spent to place Unity08 as party on the ballot constitutes an expenditure has no merit whatsoever. The OGC cannot cite a single authority to support its assertion. The OGC relies again on Advisory Opinions concluding that monies spent on ballot access *by a candidate* are expenditures or "qualified campaign expenses" because of the attendant publicity. See AO 1994-05 (The individual had actually filed a Statement of Candidacy and declared his intent to run for U.S. Senate). The OGC's argument that Unity08's decision to field only candidates for President and Vice-President in 2008 transforms its efforts to qualify as a party into "promotional activities" for these as yet unnamed candidates is likewise without merit. This argument also misunderstands the rules in states for ballot access. Unity08's access as a party will usually permit it to field candidates in other races. Its decision not to do so constitutes the sort of strategic decision into which the First Amendment prohibits the OGC from involving itself.⁵ Petitions for Unity08's access to the ballot as a party need not mention the races in which it intends to field candidates. Consequently, Unity08's efforts to get ballot access as a party will not differ from the efforts of other parties.

⁵ In *McLaughlin v. North Carolina Board of Elections*, 65 F.3d 1215 (4th Cir. 1995), the court described North Carolina's law as follows: "If the BOE determines that the petitions contain the requisite number of valid signatures, it certifies the party as a 'new' party under N.C. Gen. Stat. § 163-96(a)(2) & -96(b) (1994), thereby entitling the party to nominate as much as one candidate per office to appear on the general election ballot." *Cert. denied*, 517 U.S. 1104 (1996).

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Moreover, election of a candidate is not the only purpose of ballot access. As Justice Rehnquist stated in *McConnell*, “national parties are exemplars of political speech at all levels of government, in addition to effective fundraisers for federal candidates For sure, national political committees exist in large part to elect federal candidates, but ...they also promote coordinated political messages and participate in public policy debates unrelated to federal elections ... and increase public participation in the electoral process. ... *Indeed, some national political parties exist primarily for the purpose of expressing ideas and generating debates.*” *Supra*, 540 U.S. at 352 (Rehnquist, J., dissenting).

Finally, the OGC’s argument that Unity08 satisfies the major purpose prong of the definition of political committee ignores that the courts have repeatedly construed the test to apply only to actual candidates, and have repeatedly rejected the OGC’s proposed construction that would extend the reach of the trigger for political committee status to an organization, like Unity08, that merely expresses a goal of running candidates, who are as yet unknown, in a far-off future election. *See FEC v. GOPAC*, 917 F. Supp. 851, 862 (D.D.C. 1996) (“even if the organization’s major purpose is the election of a federal candidate, 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”); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392-94 (Ct. App. D.C. 1981. As outlined in Unity08’s previous submissions, the OGC’s proposed application of the broad construction of the “major purpose” test to a political organization such as Unity08 is particularly inappropriate for both legal and policy reasons. As the Commission itself has noted, this broad expansion of the major purpose test would “affect[] hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA.” 69 Fed. Reg. 225, 68065 (Nov. 23, 2004). *See also* Unity08’s Supplemental Filing dated August 16, 2006, at pp. 17-22.

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By organizing as a 527 organization, Unity08 has insured that information on its donors and expenses will be available to the public. As a 527 organization, Unity08 is required to file disclosure reports with the IRS. See 26 U.S.C. § 527(j)(3)(A) (527 organizations must file a report disclosing all expenditures that aggregate to more than \$500 per person per calendar year and contributions that aggregate to more than \$200 per person per calendar year); cf. 11 C.F.R. § 104.7 (requiring political committees to provide similar disclosure for its "best efforts" requirement). See also 26 U.S.C. § 527(k) (527 organizations must make all their filings available for public inspection).

Thus, we again urge the Commission, for the reasons given herein and in Unity08's previous filings, to reject the OGC's Draft Advisory Opinion. The General Counsel points only to a single regulation, specifically Section 100.57, to support its conclusion that Unity08 is a political committee, and for the reasons we have set forth above, that the plain language of the regulation, and the holding of the case upon which it is based, do not support the OGC's analysis. The Commission should conclude, therefore, that nothing in the Act or regulations prohibit Unity08 from funding its organizational development and ballot access as a party without registering as a political committee and without limiting the contributions it receives. As Unity08 has indicated, monies received from its present solicitations will be limited to the uses described in its submissions to the Commission, and set forth *supra*, and additional Advisory Opinions will be sought with respect to other phases of its efforts.

Sincerely,

John J. Duffy

cc: Lawrence Norton, Esq.