Advisory Opinion Request
For Candidates and Committees

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NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
P.O. Box 185, Trenton, NJ 08625-0185
(609) 292-8700 or Toll Free Within NJ 1-888-313-ELEC (3532)
Website: www.elec.state.nj.us

PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

   Full name of Person, Committee, or Entity:
   Fund for Jobs and Growth

Mailing Address:	*Day Telephone Number:
700 13th St. Suite 600	(202) 654-6200
Washington D.C. 20005-3960	*Evening Telephone Number:

2. Indicate if the above named person, committee, or entity currently files reports with the Commission:

   ☐ Yes ☑ No

   a. If yes, indicate in what capacity it is filing:

Candidate committee	☐	Recall committee	☐
Joint candidates committee	☐	Recall defense committee	☐
Political committee	☐	Personal financial disclosure statement	☐
Continuing political committee	☐	Other (please describe):	☐
Political party committee	☐		
Legislative leadership committee	☐		

   b. If no, indicate if the above named person, committee, or entity has in the past filed reports with the Commission, giving elections (i.e., 2005 general election) or calendar years, and identify filing capacity:
   No.

   c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).
   Whether an organization that makes only independent expenditures, and does not make contributions to or coordinated expenditures on behalf of New Jersey candidates (or to committees that contribute to candidates), may solicit and accept contributions in excess of $7,200 per election, even if qualifies as a "political committee" under New Jersey law.

*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee, or entity requesting the opinion, and that the person, committee, or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. Attach additional sheets if necessary.

Statement of Facts:

See attached letter from Marc E. Elias, counsel to the Fund for Jobs and Growth, which describes the requester's contemplated activities to influence New Jersey elections.

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result:

See attached letter from Marc E. Elias, counsel to the Fund for Jobs and Growth. In summary, the Fund for Jobs and Growth seeks a ruling that it may solicit and accept funds in excess of $7,200 to fund its independent expenditure program, even if it qualifies as a "political committee" under state law.

6. Person who is submitting this advisory opinion request on behalf of the committee or entity listed in Question #1:

Full Name:
Marc E. Elias

Mailing Address:
Perkins Coie LLP
700 13th St. Suite 600
Washington D.C. 20005-3960

*Day Telephone Number:
(202) 434-1609

*Evening Telephone Number:

Fax Number:
(202) 654-9126

a. Official Capacity of Person Requesting Opinion:

- Candidate ☐
- Treasurer ☐
- Organizational Treasurer ☐
- New Jersey Attorney representing requesting person, committee, or entity ☐
- Other (please describe): ☑
  Out-of-state counsel.

7. I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request.

(CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

February 14, 2013
Dated:

Signature:

*Leave this field blank if your telephone number is unlisted. Pursuant to N.J.S.A. 47:1A-1.1, an unlisted telephone number is not a public record and must not be provided on this form.

Perkins Coie

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February 14, 2013

Jeffrey M. Brindle
Executive Director
New Jersey Election Law Enforcement Commission
28 West State Street, 13th Floor
Trenton, New Jersey 08608

Re: Advisory Opinion Request

Dear Mr. Brindle:

We seek an advisory opinion on behalf of the Fund for Jobs and Growth (the "Fund"), an organization that is being established to support Democratic candidates in legislative races across the country. In accordance with recent court decisions, such as *Citizens United v. FEC* and *Speechnow.org v. FEC*, the Fund seeks to solicit and accept contributions in excess of $7,200 per election and spend these funds to make independent expenditures in support of Democratic state legislative candidates in New Jersey in 2013. We ask for confirmation that the Fund's plan is permissible under New Jersey law and New Jersey Election Law Enforcement Commission ("ELEC") regulations and precedent; and for guidance as to whether the Fund will incur filing obligations as a political committee.

FACTUAL BACKGROUND

The Fund is incorporated in the District of Columbia and intends to influence state legislative elections nationwide. Because New Jersey is one of only two states holding regular legislative elections this year, the Fund anticipates that more than half of its spending in 2013 will be in support of its independent expenditure program in New Jersey. Over the four-year nationwide election cycle (ending with the 2016 election), however, the Fund anticipates that less than half of its spending will be in connection with New Jersey elections. The Fund plans to accept general purpose donations to be used at the discretion of the Fund in any state it chooses. The Fund also intends to accept donations earmarked for use in particular states, such as New Jersey.

The Fund seeks to raise contributions in excess of the amounts normally permitted to political committees under N.J. Stat. Ann. § 19:44A-11.5 and to spend these funds to make "independent

expenditures" (as that term is defined by N.J. Admin. Code § 19:25-12.7) in support of Democratic state legislative candidates in New Jersey in 2013. The Fund may make its independent expenditures directly or it may collaborate with other entities or organizations (except for candidates or persons or committees acting on behalf of candidates) to more effectively communicate with the public. The Fund will not make contributions to, or coordinated expenditures on behalf of, New Jersey candidates, party committees, or continuing political committees, but it may pool resources with other entities or organizations, including political committees that expressly limit their New Jersey electoral activity to independent expenditures.

The Fund will be organized exclusively as a political organization within the meaning of section 527 of the Internal Revenue Code. If ELEC determines that the Fund will incur filing obligations as a political committee, the Fund will appoint a treasurer and open a depository on the same day it receives its first $2,400 in contributions,[1] and will then register with ELEC within 10 days.[2] As a political committee, the Fund would disclose its contributions and expenditures on election-cycle reports.[3] It would also file 48-hour reports of contributions received and independent expenditures made in excess of $1,400 in the last 13 days before an election.[4] On the other hand, if ELEC determines that the Fund is *not* a political committee, the Fund will instead disclose its contributions and expenditures to the Internal Revenue Service ("IRS") on Form 8872, which the IRS makes available for public viewing on its website.[5] As an unregistered association or group making independent expenditures in New Jersey, the Fund would also comply with the reporting requirements set forth at N.J. Admin. Code §§ 19:25-12.8, -12.8A. The Fund will also register and report in states where its activities trigger such obligations.

QUESTIONS PRESENTED

New Jersey law limits the amount of money that political committees may accept from most sources.[6] Specifically, it bars a political committee from accepting more than $7,200 from each

[1] N.J. Admin. Code § 19:25-4.4(a).

[2] *Id.* § 19:25-4.4(b).

[3] *Id.* § 19:25-8.8.

[4] *Id.* §§ 19:25-8.9, -8.10.

[5] *See* http://www.irs.gov/Charities-&-Non-Profits/Political-Organizations/Political-Organization-Filing-and-Disclosure.

[6] N.J. Stat. Ann. § 19:44A-11.5.

individual, union, or corporation per election. However, ELEC has determined that an association or group that makes independent expenditures in New Jersey and that does not have the "major purpose" of aiding or promoting New Jersey candidates or committees is not a political committee. As a result, it is not subject to the $7,200 per election limit on incoming contributions.[7] To date, ELEC has yet to decide whether a political committee that makes only independent expenditures and that does not make contributions to or coordinated expenditures on behalf of New Jersey candidates or committees is subject to these strict limits.[8]

Against that background, the Fund seeks guidance on two issues:

First, the Fund seeks confirmation that it may raise unlimited contributions from individuals, unions, and corporations to make independent expenditures.

Second, the Fund asks whether it would be considered a political committee under New Jersey law or whether it would instead be treated as an unregistered association or group.

LEGAL DISCUSSION

A. Organizations that make only independent expenditures enjoy a First Amendment right to accept unlimited contributions from individuals, unions, and corporations

Organizations that make only independent expenditures and that refrain from making contributions or coordinated expenditures ("independent expenditure-only organizations") enjoy a First Amendment right to accept unlimited contributions from individuals, unions, and corporations. In 2010, the U.S. Supreme Court issued its decision in *Citizens United v. FEC*, striking down a federal law banning independent electoral and issue advocacy sponsored by corporations.[9] The Court reasoned that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption" and, accordingly, the government lacked a compelling basis to bar particular speakers (such as corporations or unions) from sponsoring them.[10] Two months later, the D.C. Circuit concluded in a unanimous en banc decision that, in light of *Citizens United*, "the government can have no anti-corruption interest in

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[7] *See* ELEC Adv. Op. 01-2012 (NAR Fund) (June 26, 2012); ELEC Adv. Op. 01-2011 (Better Education) (April 27, 2011); ELEC Adv. Op. No. 02-2003 (Continental Airlines) (Feb. 24, 2003); ELEC Adv. Op. No. 06-2001 (Democratic Governors Association) (July 13, 2001).

[8] ELEC Adv. Op. 01-2011, at 6 ("The Commission does not believe that the recent federal case law compels the Commission to apply a different analysis other than the one followed above in answering your questions.").

[9] *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010).

[10] *Citizens United*, 130 S. Ct. at 909.

limiting contributions to independent expenditure-only organizations."[11] As a result, "the limits on contributions to [such organizations] cannot stand."[12] Other federal circuits have followed suit.[13]

The Federal Election Commission ("FEC") reacted swiftly to the *Citizens United* and *Speechnow.org* decisions, recognizing that it could no longer impose limits on the contributions received by independent expenditure-only organizations:

> Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations such as the Committee that make only independent expenditures.[14]

Many state regulators subsequently announced that they would no longer enforce state contribution limits against independent expenditure-only organizations. Wisconsin's Government Accountability Board, which administers one of the most restrictive campaign finance laws in the country, enacted an emergency rule allowing independent expenditure-only organizations to raise unlimited contributions from individuals, unions, and corporations.[15] In Massachusetts, the Office of Campaign and Political Finance issued new regulations allowing "independent expenditure PACs" – defined as "PACs that only receive[] donations to make independent expenditures, and only make[] independent expenditures" – to "receive donations from individuals without limit, and from corporations and other entities that are otherwise prohibited from contributing to PACs."[16] Reflecting the broad consensus among state regulators,

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[11] *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc).

[12] *Id.*

[13] *See Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *N.C. Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008).

[14] FEC Adv. Op. 2010-11, at 3 (Commonsense Ten) (emphasis added) (footnote omitted). *See also* FEC Adv. Op. 2010-09 (Club for Growth).

[15] Wis. Admin. Code § GAB 1.91. *See* Press Release, Wis. Gov't Accountability Bd., G.A.B. Announces Emergency Rule on Independent Political Ads (May 20, 2010), *available at* http://gab.wi.gov/sites/default/files/news/nr_gab_emergency_rule_05_20_10_pdf_34804.pdf.

[16] 970 Mass. Code Regs. 2.17(3).

the Kentucky Registry of Election Finance concluded last year that "the First Amendment prevents the government from applying contribution limits to a political committee that makes independent expenditures only."[17]

A handful of state regulators initially refused to abide by *Citizens United* and *Speechnow.org*. In May 2010, Michigan's Secretary of State issued a declaratory ruling barring independent expenditure-only organizations from receiving unlimited contributions from corporations.[18] But a federal district court quickly enjoined the Secretary from enforcing this ruling, finding that "if the State of Michigan has no constitutional authority to restrict the proposed independent expenditures when done or funded by one entity or person alone, it does not somehow magically acquire authority to restrict those expenditures merely because the spender joins together with other entities which also have the right to make or fund such expenditures."[19] The Secretary was forced to rescind the ruling. Many courts in other jurisdictions have also struck down contribution limits and source restrictions as applied to independent-expenditure committees, citing *Citizens United*, *Speechnow.org*, and their progeny.[20] To date, no court has upheld a restriction on contributions to independent expenditure-only organizations since *Citizens United*.

B. ELEC may classify the Fund either as a political committee or as an unregistered association

So long as it may raise contributions in unlimited amounts to support its independent expenditure activities, the Fund is willing to register as a political committee with ELEC. ELEC's regulations define a "political committee" as "any group of two or more persons acting jointly, or any corporation, partnership or any other incorporated or unincorporated association, which is organized to or does aid or promote the nomination, election or defeat of any candidate or candidates for public office . . . if the persons, corporation, partnership, or incorporated or unincorporated association raises or expends $2,400 or more to so aid or promote the

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[17] Ky. Registry of Election Fin. Adv. Op. 2012-005, at 2 (Kentucky Family Values) (Aug. 17, 2012), *available at* http://www.kref.ky.gov/NR/rdonlyres/592D425E-7601-4DD0-8F43-A4EA90D156A2/0/AdvisoryOpinion2012005.pdf.

[18] *See* Letter from Secretary of State Terri Lynn Land to Robert S. LaBrant, Senior Vice President Michigan Chamber of Commerce (May 21, 2010), *available at* http://www.michigan.gov/documents/sos/Labrant_Final_Response_5-21-2010_322021_7.pdf.

[19] *Mich. Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 693 (W.D. Mich. 2010).

[20] *See, e.g.*, *Stay the Course W. Va. v. Tennant*, No. 1:12-cv-01658, 2012 WL 3263623 (S.D. W. Va. Aug. 9, 2012); *Lair v. Murry*, 871 F. Supp. 2d 1058 (D. Mont. 2012); *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012);*Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012); *Republican Party of N.M. v. King*, 850 F. Supp. 2d 1206 (D.N.M. 2012).

nomination, election or defeat of a candidate or candidate."[21] The Fund intends to raise and spend more than $2,400 to promote the election (and defeat) of candidates. Accordingly, ELEC may require the Fund to register as a political committee.

Alternatively, ELEC could find that the Fund lacks a "major purpose" of aiding or promoting New Jersey candidates or committees, because it anticipates that less than 50 percent of its spending over a four-year cycle will be in connection with New Jersey elections, even though it does intend to solicit funds specifically for New Jersey activity. An organization lacking the "major purpose" of aiding or promoting New Jersey candidates or committees is not a political committee, under ELEC's precedents.[22]

C. If it classifies the Fund as a political committee, ELEC should not subject the Fund to the contribution limits imposed by N.J. Stat. Ann. § 19:44A-11.5

While ELEC may compel the Fund to register as a political committee and comply with the reporting requirements that apply to such committees, it may not require the Fund to comply with the $7,200 per source per election limit imposed by N.J. Stat. Ann. § 19:44A-11.5. Because the Fund is an independent expenditure-only organization, it must be permitted to accept contributions in excess of the $7,200 per election limit from individuals, unions, and corporations.

The "Supreme Court has recognized only one interest sufficiently important to outweigh the First Amendment interests implicated by contributions for political speech: preventing corruption or the appearance of corruption."[23] But as a matter of law, "independent expenditures . . . do not give rise to corruption or the appearance of corruption."[24] Therefore, ELEC "has no anti-corruption interest in limiting contributions to an independent expenditure group," such as the

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[21] N.J. Admin. Code § 19:25-1.7.

[22] *See* ELEC Adv. Op. 01-2012; ELEC Adv. Op. 01-2011; ELEC Adv. Op. No. 02-2003; ELEC Adv. Op. No. 06-2001. As stated above, the Fund intends to solicit funds specifically for New Jersey activity. The absence of such solicitations has been one factor that ELEC considered in its previous "major purpose" opinions. However, in a 2012 opinion, ELEC found that an organization lacked a "major purpose" of influencing New Jersey elections, even though it solicited funds from affiliated entities in New Jersey for the specific purpose of making independent expenditures in the state. *See* ELEC Adv. Op. 01-2012, at 3. Moreover, other states, like Virginia, draw a distinction between committees that spend less than 50 percent of their budgets on elections in that state – as the Fund would in New Jersey over a four-year election cycle – and committees that spend 50 percent or more of their budget on in-state elections. *See* Va. Code. Ann. § 24.2-945.1(A).

[23] *Speechnow.org*, 599 F.3d at 692.

[24] *Citizens United*, 130 S. Ct. at 909.

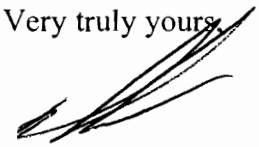
Fund.[25] And without a sufficient anti-corruption interest to justify the contribution limits set forth at N.J. Stat. Ann. § 19:44A-11.5, they would be plainly unconstitutional as applied to the Fund.

Moreover, ELEC already permits federal PACs and other national political organizations to accept unlimited contributions to pay for independent expenditures supporting New Jersey candidates. Denying that same right to political committees would violate the core First Amendment principle that the "Government may not suppress political speech on the basis of the speaker's . . . identity."[26] Treating political committees less favorably than unregistered associations would also be bad policy. If ELEC enforced N.J. Stat. Ann. § 19:44A-11.5 against independent expenditure-only political committees, but not unregistered associations, it would simply encourage organizations to avoid registering as political committees. These unregistered organizations would be able to run negative attack ads and, depending on the type of organization, voters might not know who was funding the ads. Encouraging the proliferation of these "dark money" organizations would run counter to the principles that ELEC works to uphold.

CONCLUSION

ELEC should confirm that independent expenditure-only organizations, like the Fund, may raise contributions in excess of $7,200 per election, even if their activities require them to register as a political committee. The First Amendment, as interpreted by the Supreme Court, compels this outcome. Moreover, doing so will promote transparency in the electoral process by encouraging these organizations to register with ELEC and disclose their donors.

Very truly yours,



Marc E. Elias
Ezra W. Reese
Counsel for Fund for Jobs and Growth

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[25] *Speechnow.org*, 599 F.3d at 695.

[26] *Citizens United*, 130 S. Ct. at 913.