

# UTRECHT, KLEINFELD, FIORI, PARTNERS

---

ATTORNEYS AT LAW

1776 Eye Street NW, Tenth Floor, Washington, DC 20006

Main (202) 778-4000

[www.up-law.com](http://www.up-law.com)

July 24, 2020

Jeff S. Jordan  
 Assistant General Counsel  
 Federal Election Commission  
 Office of Complaints Examination & Legal Administration  
 Attn: Christal Dennis, Paralegal  
 1050 First Street, NE  
 Washington, DC 20463

*Via email, [cela@FEC.gov](mailto:cela@FEC.gov)*

***Re: MUR 7735, Big Tent Project Fund and Jonathan Kott***

Dear Mr. Jordan:

In regard to the complaint filed in MUR 7735 (“Complaint”) by the Campaign Legal Center (“Complainant”), this response is submitted as counsel on behalf of Big Tent Project Fund and Jonathan Kott in his capacity as director (“Respondents”).

## INTRODUCTION

The Complaint concerns expenditures and reporting by Big Tent Project Fund (“Big Tent” or “BTPF”) and presents three basic allegations: (1) Respondents should have registered and filed regular reports with the Federal Election Commission (“FEC” or “Commission”) as a political committee; (2) even if not required to register as political committee, Respondents should have disclosed donors who earmarked contributions to fund independent expenditures; and (3) Respondents failed to report independent expenditures in certain states.

In short, and as more fully established below, because BTPF did not meet the requirements for political committee status, and because the donations received by BTPF were not earmarked for the purpose of influencing a federal election, the allegations of the Complaint are without merit.<sup>1</sup> Accordingly, we respectfully request that the Commission find there is no reason to believe the Respondents violated the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA") or any Commission regulations.

**I. Big Tent Project Fund Does Not Meet the Requirements for Political Committee Status Under Either the Act or FEC Regulations.**

Under the Act and Commission regulations, as well as both FEC and Court interpretations, two necessary elements must be satisfied to trigger political committee status and therefore registration and reporting under the Act. First, the Act and Commission regulations prescribe a monetary threshold, defining 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."<sup>2</sup> Second, in addition to triggering this monetary threshold, Court decisions have added a "major purpose" test to political committee status under FECA, requiring that only those groups or organizations that have the nomination or election of one or more federal candidates as their "major purpose" will be subject to registration and reporting under the Act.

The "major purpose" test stems from a long line of court cases that set forth the limits of permissible regulation of political speech under the First Amendment, beginning with *Buckley v.*

---

<sup>1</sup> The only question is one minor reporting omission from the April quarterly report, which was discovered in preparation of this response. This matter should be handled through the administrative fine process and not the MUR process. The quarterly report will be amended to rectify this omission. None of the expenditures involved were required to be disclosed on 24 Hour reports. In addition, the Complaint alleges activity by Big Tent under the name "United We Succeed." Big Tent did not make these expenditures.

<sup>2</sup> 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a).

*Valeo.*<sup>3</sup> In *Buckley*, the Supreme Court held that defining political committee status "only in terms of the annual amount of 'contributions' and 'expenditures'" could lead to constitutional overbreadth issues by reaching "groups engaged purely in issue discussion."<sup>4</sup> To cure that constitutional infirmity and avoid finding registration and reporting requirements for political committees unconstitutional, the Buckley Court added an additional element to the definition of political committee. This additional requirement narrowed the reach of FECA by holding that the term "political committee" would "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.*"<sup>5</sup> Under the statute as thus construed, an organization (other than one controlled by a candidate) must register as a political committee only if it (1) meets the \$1,000 threshold *and* (2) has as its "major purpose" the nomination or election of one or more federal candidates. By so construing the term "political committee," the Buckley Court limited the scope of political committee status, and specifically, the type and number of entities within the regulatory reach of the Commission. Moreover, to insure the reach of this definition would not be impermissibly broad in subjecting numerous organizations to reporting requirements, the Court stated that for political committee reporting status, the term "expenditure" is construed to mean spending for express advocacy communications:

...[W]e 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.<sup>6</sup>

---

<sup>3</sup> 424 U.S. 1 (1976).

<sup>4</sup> *Id.* at 79.

<sup>5</sup> *Id.* (emphasis added).

<sup>6</sup> *Id.* At 80.

After *Buckley* established the major purpose test, subsequent cases provided further guidance as to the proper approach to determine an organization's major purpose.<sup>7</sup> In *Massachusetts Citizens for Life V. FEC* ("MCFL"), the Supreme Court identified an organization's independent spending as a relevant factor in determining an organization's major purpose.<sup>8</sup> Based on these court rulings, the Commission adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates.<sup>9</sup> The Commission observed that "the major purpose doctrine requires a fact-intensive analysis of a group's campaign activities compared to its activities unrelated to [federal] campaigns."<sup>10</sup> To determine an entity's "major purpose," the Commission explained that it considers a group's "overall conduct," including organizational documents, government filings (e.g., IRS notices), the proportion of spending related to "Federal campaign activity (i.e., the nomination or election of a Federal candidate)," public statements about its mission, and the extent to which fundraising solicitations indicate funds raised will be used to support or oppose specific candidates.<sup>11</sup> <sup>12</sup> Here, an examination of these factors establishes that the major purpose doctrine is not satisfied.

**A. Under the Commission's Case-By-Case Approach, Big Tent Project Fund Does Not Have the Major Purpose of Nominating or Electing Federal Candidates.**

*1. Big Tent's Primary Organizational Purpose Relates to Issues*

---

<sup>7</sup> See, e.g.. *Real Truth About Abortion, Inc. v. FEC* (formerly *Real Truth About Obama v. EEC*), 681 F.3d 544, 556 (4th Cir. 2012), cert. denied, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) ("RTAA")

<sup>8</sup> 479 U.S. 238,249, 262-263 (1986).

<sup>9</sup> Political Committee Status, 72 Fed. Reg. 5,595 (Feb. 7, 2007) (Supplemental Explanation and Justification) ("Supplemental E&J").

<sup>10</sup> *Id.* at 5,601.

<sup>11</sup> *Id.* at 5,597; 5,605.

<sup>12</sup> The Commission stated in the Supplemental Explanation & Justification that it compares how much of an organization's spending is for "*federal campaign activity*" relative to "activities that [a]re not campaign related."<sup>13</sup> Supplemental E&J at 5,601, 5,605 (emphasis added).

Big Tent made independent expenditures aggregating in excess of \$1,000, satisfying the first prong of the political committee test. Thus, the Commission must next analyze Big Tent's major purpose.

Though an organization's tax status is not dispositive when conducting a political committee analysis, it is a strong and relevant consideration.<sup>13</sup> The Commission has previously quoted Senator John McCain, one of the principal sponsors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), who stated that "under existing tax laws, Section 501(c) groups . . . cannot have a major purpose to influence federal elections, and therefore are not required to register as federal political committees, as long as they comply with their tax law requirements."<sup>14</sup> Even groups that traditionally lobby for greater regulation of political speech have noted that "a legitimate 501(c) organization should not have to fear that it will become a political committee simply by engaging in issue-related criticisms of public officials."<sup>15</sup> While not establishing an

---

<sup>13</sup> Statement of Reasons of Comm'r's. Hunter & Petersen at 10, MUR 6596 (Crossroads GPS).

<sup>14</sup> *Id.* See also Comments of John McCain and Russell D. Feingold on Reg. 2003-07 (Political Committee Status) (Apr. 2, 2004), attached statement of Senator John McCain, Senate Rules Committee, March 10, 2004 at 2. *See* 26 U.S.C. §501(c)(4)(A) (providing an exemption from taxation for "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare").

<sup>15</sup> Comment of Public Citizen on Reg. 2003-07 (Political Committee Status) at 10 (Apr. 5, 2004). Public Citizen further noted that "[e]ntities that do not have as their major purpose the election or defeat of federal candidates, such as 501(c) advocacy groups, but which may well be substantially engaged in political activity, should remain subject to regulation for only the narrow class of activities - express advocacy and electioneering communications - explicitly established by current federal election law, as amended by [McCain-Feingold]." *Id.* at 2; *see also* Comments of 324 Nonprofit Organizations on FEC Draft Advisory Opinion 2003-37 at 2 (Feb. 4, 2004) ("[T]he organizations represented here have criticized Congress' and the Administration's policies and actions concerning such issues as tax cuts ... Medicare ... and numerous other issues. There is little doubt, we fear, that these communications would be perceived ... as 'opposing', or even 'attacking,' President Bush and other federal officeholders .... Making it unlawful to criticize [these] policies and actions ... except under the auspices of a registered political committee is one of the most fundamental attacks on the freedom of speech and freedom of association of American citizens ever contemplated by a governmental agency."); Democracy 21, Campaign Legal Center, Center for Responsive Politics, Comments on Draft Advisory Opinion 2003-37 at 2, 6 (Feb. 4, 2004) (arguing the Commission could regulate 527 organizations as political committees under a P ASO standard since, "unlike 501(c) groups, [527s are] organized for the express purpose of engaging in partisan political activity"); Comments of Public Citizen, Inc., on FEC Draft Advisory Opinion 2003-37 (Feb. 4, 2004) (criticizing the draft advisory opinion because "any organization that spends at least \$1,000 on communications with some significant amount of activity that criticizes (or praises) a federal candidate would turn itself into a 'political committee' ... and all of its issue advocacy could therefore become subject to FECA's requirements") (emphasis added); Comments of the Brennan Center for Justice at NYU School of Law and Common Cause on FEC Draft Advisory Opinion 2003- 37 (Feb. 17, 2004) (criticizing the draft advisory opinion because "interest group fundraising and spending that was plainly left outside the scope of BCRA, because it was for neither

absolute shield per se, the history is clear that tax status is at minimum a rebuttable presumption of non-political committee status.

Big Tent is organized and operated exclusively for social welfare purposes under Section 501(c)(4) of the Internal Revenue Code (“the Code”) with a primary purpose of educating the public on current events and policy issues such as healthcare, tax, energy, education. Although, as a nascent organization, Big Tent has not yet been required to file an exempt return with the IRS, the organization timely filed Notice 8976 with the IRS, noticing the organization’s intent to operate as a social welfare organization, and has at all relevant times operated in conformity with the requirements of Section 501(c)(4) of the Code.

The Complaint merely surmises that Big Tent has not made sufficient primary purpose social welfare expenditures but offers no facts to support that assertion. Records of the organization show that to date it has made approximately \$3.75 million in primary purpose expenditures. Consistent with existing organizational plans, Big Tent will continue to make primary purpose expenditures, including issue advocacy and educational communications, primary purpose grants to other organizations, and other expenditures consistent with the requirements of the Code. Big Tent’s primary purpose and organizational activities weigh against finding that its major purpose was the nomination or election of federal candidates.<sup>16</sup> <sup>17</sup> Accordingly, because Big Tent was formed and has consistently operated as a bona fide 501(c)(4) and has plans to continue to build upon this operation, the major purposes doctrine should be inapplicable in this instance.

*2. Jonathan Kott’s Public Statements Do Not Dictate that Big Tent’s Major Purpose was the Nomination or Election of Federal Candidates.*

---

express advocacy nor electioneering communications, would be swept within the purview of campaign finance law under the approach taken by the Jan. 29 Draft.”).

<sup>16</sup> *Supra note 12*

<sup>17</sup> Additionally, while Big Tent did report expenditures detailed in the Complaint to the FEC as independent expenditures containing express advocacy, the organization may have overreported certain expenditures that did not contain express advocacy, which therefore were not in furtherance of an electoral major purpose.

While the Commission has noted that it may consider statements made by an organization in its analysis of an organization's major purpose, it has also noted that such statements are not necessarily dispositive.<sup>18</sup> <sup>19</sup> According to the 2007 Supplemental E&J, "the Commission must evaluate organizational statements in a fact-intensive inquiry, giving due weight to the form and nature of the statements, as well as the speaker' s position within the organization."<sup>20</sup> Statements must be evaluated in their totality, and a stray quote or a paraphrase, in the face of all the other evidence, should not transform a group into a political committee.

Jonathan Kott responding to specific news media inquiries and interview questions that were, given their timing, about election related activities, is not dispositive as to the major purpose of Big Tent. Kott's remarks as quoted in the Complaint did not, and were not intended to, address the full spectrum of organizational activities. It should also be noted that news media characterizations of Big Tent's activities and purpose, as referenced in the Complaint, are not publications or statements of the organization and have no effect on a major purpose analysis.

**II. Respondent BTPF Did Not Receive Any Donations for the Purpose of Influencing an Election Under the Definition of "Contribution" in 52 U.S.C. §§ 30101(13) and 30104 (c)(1), (c)(2)(C)).**

Big Tent did not receive donations for the purpose of influencing an election under the definition of "contribution" set forth in 52 U.S.C. §§ 30101(13) and 30104 (c)(1), (c)(2)(C)) because none of the donations received were earmarked for the purpose of influencing federal elections. The Commission established interim guidelines which apply to the reporting of

---

<sup>18</sup> See *Real Truth About Obama v. FEC*, No. 3:08-cv-00483, 2008 WL 4416282, at \*14 (E.D. Va. Sept. 24, 2008) ("A declaration by the organization that they are not incorporated for an electioneering purpose is not dispositive.") (emphasis in original), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom. Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311).

<sup>19</sup> 310 F.Supp.2d at 235.

<sup>20</sup> 72 Fed. Reg. at 5,601.

donations used to finance independent expenditures expressly advocating the election or defeat of a federal candidates.<sup>21</sup> In its guidance, the Commission clarifies that “[s]ubsection (c)(1) applies to ‘all contributions received by such’ reporting not-political committee, 52 U.S.C. § 30104(c)(1) (emphasis added), and . . . requires disclosure of donors of over \$200 annually making contributions ‘earmarked for political purposes.’<sup>22</sup> The Commission’s guidance further clarified that the reporting of contributors over \$200 is mandated if those contributions were given for the purpose of furthering any independent expenditures regarding a federal candidate and the nonprofit used the contributions for such independent expenditures.<sup>23</sup>

Such reporting guidelines would apply only where donations are made pursuant to a written proposal or some other specific indication that a donor earmarked a donation or otherwise made a donation to further an independent expenditure, and none were so earmarked as stated above. The Guidance clarifies that because 11 C.F.R. §109.10(e)(1)(vi) had been invalidated, there is no longer any requirement for nonprofit organizations and other non-political committee entities to report contributors on 48-hour and 24-hour Form 5 reports. Regarding quarterly and year-end reports, the Guidance states that non-political committee entities must report on Form 5-A the identification of each contributor (other than a political committee) giving over \$200 during the reporting period and use memo entry to indicate which contributors gave for the purpose of furthering any independent expenditure.<sup>24</sup>

---

<sup>21</sup> Judith Ingram, *FEC provides guidance following U.S. District Court decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) FEC.gov (2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/> (last visited Jun 8, 2020). (FEC Guidance).

<sup>22</sup> *CREW v. FEC*, 316 F. Supp. 3d 349, 389 (D.D.C. 2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 80-96 (1976) (which contributions are ‘intended to influence elections); see *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986); see also 52 U.S.C. § 30101(8)(A)(i) (defining a ‘contribution’ 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’).

<sup>24</sup> FEC Guidance at 2.

### III. Prayer for Relief

In short, and as more fully established above, because BTPF did not meet the requirements for political committee status, and because the donations received by BTPF were not earmarked for the purpose of influencing a federal election, the allegations of the Complaint are without merit.<sup>25</sup> For these reasons Respondents respectfully request that the Commission find no reason to believe that a violation of the Act or Commission regulations occurred and close this MUR as it pertains to these Respondents as expeditiously as possible.

Respectfully submitted,

The image shows two handwritten signatures side-by-side. The signature on the left is for Lyn Utrecht and the signature on the right is for Adam Clark.

Lyn Utrecht  
Adam Clark  
Utrecht, Kleinfeld, Fiori Partners  
Counsel for Respondents

---

<sup>25</sup> Supra note 1