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Ana Rivas
Treasurer, Coalition for Progress
231 Tenth Avenue, Apt. 7B, c/o Barri Mattes
New York, NY 10011

Dear Ms. Rivas:

We are citizens of Jersey City and supporters of its pay-to-play laws. These laws protect Jersey City taxpayers, by barring contractors and redevelopers from making political contributions to curry favor with Jersey City officeholders. Your organization, Coalition for Progress, was established to support Mayor Steve Fulop's candidacy. Yet in defiance of Jersey City's pay-to-play laws, your organization has accepted hundreds of thousands of dollars from contractors and developers that do business with the City. The Jersey Journal reported that "[o]f the 58 donations that top \$10,000, at least 27 – for a total of \$1.46 million – are contributions from businesses with contracts with Jersey City or its autonomous agencies, developers who have received long-term tax breaks from the city, firms with lawyers who appear regularly before city boards and agencies and more."¹ Your organization even accepted a \$1 million contribution from the founder of a for-profit hospital chain that sought and received Mayor Fulop's backing for the city's ambulance contract. Your organization then tried to hide this by disclosing a shell corporation, rather than the hospital chain founder, as the donor.²

In 2015, Mayor Fulop's taxpayer-paid Corporation Counsel crafted a legal opinion concluding that your organization is somehow exempt from Jersey City's pay-to-play laws, notwithstanding the fact that it was established to support Mayor Fulop's candidacy.³ It is our understanding that contractors and developers have relied on this opinion to make contributions to your organization. We have reviewed the Corporation Counsel's opinion in great detail and have concluded that its legal analysis is incorrect. The City's pay-to-play laws are sufficiently broad to cover contributions to organizations that make independent expenditures in support of officeholders, like Mayor Fulop, who remain candidates for Jersey City office or that make expenditures to support local referenda. The Corporation Counsel's reliance on *Citizens United* is misguided. *Citizens United* did not address pay-to-play laws and, as a result, federal Super PACs still forswear contributions from government contractors. Meanwhile, the one state with a pay-to-play law comparable to New Jersey's in scope, Connecticut, has expressly held that its pay-to-play law is unaffected by *Citizens United*. Super PACs in Connecticut are barred from taking contributions from government contractors.⁴

1 Terrence T. McDonald, Donors to PAC with ties to Fulop are a 'who's who' of Jersey City, The Jersey Journal, Feb. 1, 2016, http://www.nj.com/hudson/index.ssf/2016/02/pac_with_ties_to_fulop_rakes_in_32m_donors_a_whos.html

2 Paul Blumenthal, Donor Behind \$1 Million Dark Money Super PAC Contribution Revealed, The Huffington Post, July 15, 2016, http://www.huffingtonpost.com/entry/super-pac-llc-contribution_us_57896d7ae4b03fc3ee51058b

3 See John Heinis, *Scarinci: Fulop will have the money and political support to be the next governor*, Hudson County View, Jan. 25, 2016) ("[n]ow no one can say that Steve Fulop will not have the money to win! The Democratic primary for Governor is over before it begins!"), <http://hudsoncountyview.com/scarinci-fulop-will-have-the-money-and-political-support-to-be-the-next-governor/>.

The Mayor's spokesperson, Jennifer Morrill has said "that any PAC or any super PAC that receives donations from Jersey City vendors should not be involved in any Jersey City election, as per our pay to play laws," Morrill said. We agree. Accordingly, because it has accepted contributions from Jersey City contractors and redevelopers, Coalition for Progress is barred from making any expenditures (including independent expenditures) to aid Mayor Fulop while he remains a candidate for Jersey City office. Coalition for Progress is also prohibited from making any expenditures in support of local referenda, due to its acceptance of contractor and redeveloper money.

If Coalition for Progress violates this ban, we reserve our right under Section 8 of City Ordinance 08-128 to bring a legal action in court seeking the invalidation of contracts affected by your organization's actions. As a courtesy, we are providing a copy of this letter to your organization's donors, so that they can review these issues prior to Coalition for Progress engaging in any spending on behalf of Mayor Fulop.

THE TWO PAY-TO-PLAY ORDINANCES

Jersey City has two pay-to-play laws: one covering the procurement of services (the "Procurement Ordinance") and one covering redevelopment (the "Redevelopment Ordinance").

The Procurement Ordinance bars those performing professional services, banking services, insurance services, consulting services, extraordinary unspecified services, media services public relations services, lobbying services, parking garage management services, and other management services for Jersey City – along with associated individuals and entities – from making more than \$500 in contributions per year to "PACs."⁵

The Redevelopment Ordinance bars those retained for redevelopment and rehabilitation work by Jersey City – along with associated individuals and entities, including those performing services for the redevelopers – from making any contribution to "PACs" during the period beginning when the redeveloper applies for the project and ending when the redevelopment agreement terminates.⁶

For purposes of both ordinances, the term "PAC" includes "any political action committee that regularly engages in the support of Jersey City municipal or Hudson County elections and/or Jersey City municipal or Hudson County candidates, candidate committees, joint candidate committees, political committees, political parties, or political party committees."⁷

COALITION FOR PROGRESS IS COVERED ONCE IT BEGINS MAKING EXPENDITURES IN SUPPORT OF MAYOR FULOP

PACs that make expenditures in support of Jersey City candidates are covered by the contribution restrictions in the Procurement Ordinance and the Redevelopment Ordinance. Accordingly, if Coalition for Progress makes expenditures to support Mayor Fulop while he remains a candidate for mayor, it will cause its donors covered by either ordinance to void their contracts. There are several reasons for this.

First, any spending by your organization in connection with Jersey City elections would satisfy the "regularly engages" standard and trigger the ban. Even the Corporation Counsel's opinion concedes that "if a business entity [covered by the ban] does give to a PAC, that PAC is precluded from making contributions to a candidate for or holder of local office in Jersey City"⁸ Notwithstanding the Corporation Counsel's focus on contributions, nothing in the ordinance itself distinguishes contributions from independent expenditures. An

4 Connecticut State Elections Enforcement Commission, Declaratory Ruling 2013-02: *Contributions to Political Committees, Independent Expenditures and State Contractor Contribution Limitations*, available at http://www.ct.gov/seec/lib/seec/laws_and_regulations/seec_declaratory_ruling_2013-02_final.pdf

5 Jersey City Ordinance 08-128 (hereinafter, the "Procurement Ordinance"), § 1.

6 Jersey City Ordinance 09-096 (hereinafter, the "Redevelopment Ordinance"), § 1.

7 Procurement Ordinance, § 1(e); Redevelopment Ordinance, § 1(a).

8 Memorandum to Office of the Mayor from City of New Jersey Law Department (Oct. 15, 2015).

organization qualifies as a “PAC” by engaging in “support” of Jersey City candidates and/or officeholders, or local referenda. That support can come in the form of direct contributions or independent expenditures. As noted above, Mayor Fulop’s spokesperson has confirmed “that any PAC or any super PAC that receives donations from Jersey City vendors should not be involved in any Jersey City election, as per our pay to play laws.”⁹

Second, the Corporation Counsel’s suggestion that *Citizens United* exempts Super PACs like Coalition for Progress from the pay-to-play ordinances is mistaken. Like Jersey City, federal law bans contributions from government contractors.¹⁰ While the *Citizens United* decision invalidated the federal ban on expenditures by corporations, the case did not challenge – let alone overturn – the prohibition on expenditures by government contractors. Recently, the D.C. Circuit upheld the contractor ban as applied to contributions to federal candidates.¹¹

Notably, at the federal level, it remains the general practice of Super PACs to reject contributions from federal contractors. In 2012, pro-Romney Super PAC initially accepted such contributions and then reversed itself after realizing the federal contractor ban remained in place:

Since that 2010 ruling, the ban has not yet been ruled on by the courts.

But there's some evidence that courts are inclined to uphold the rule. In April, a federal district court judge in Washington, D.C., shot down a challenge to a related part of the ban that prohibits contractors from making campaign contributions to candidates and political parties. The suit was filed by three federal contractors who argued that the prohibition violates their 1st Amendment rights.

U.S. District Judge James Boasberg denied their request for a preliminary injunction, saying they were unlikely to succeed in overturning the ban. In his ruling, he wrote that there was a reasonable basis to ban such donations, saying "the suggestion that those seeking federal contracts might 'pay to play' is hardly novel or implausible."

And because the ban still is on the books, most major super PACs explicitly warn donors on their websites that federal contractors cannot give.¹²

Recently, when the pro-Clinton Super PAC inadvertently accepted \$200,000 from a government contractor, it quickly refunded the money.¹³ Media accounts across the political spectrum reiterated that federal contractors are banned from contributing to federal Super PACs.¹⁴

Connecticut’s handling of this issue is instructive as well. Connecticut is the one state with a pay-to-play law as strict as New Jersey’s. When presented with the question of whether its contractor ban could be applied to

9 Terrence T. McDonald, *More trouble for super PAC aligned with Fulop*, Jersey Journal, Feb. 25, 2016, http://www.nj.com/hudson/index.ssf/2016/02/more_trouble_for_super_pac_aligned_with_fulop.html

10 52 U.S.C. § 30119.

11 *Wagner v. Federal Election Commission*, 793 F.3d 1 (D.C. Cir. 2015).

12 Matea Gold, ‘Super PAC’ supporting Romney rethinks donations from federal contractors, The Los Angeles Times, May 5, 2012, <http://articles.latimes.com/2012/may/05/nation/la-na-federal-contractor-ban-20120505>

13 Dave Levinthal, *Pro-Hillary Clinton super PAC returns government contractor’s contribution*, The Center for Public Integrity, July 5, 2016, <https://www.publicintegrity.org/2016/07/05/19872/pro-hillary-clinton-super-pac-returns-government-contractors-contribution>

14 Marisa Schultz, *Pro-Hillary super PAC took \$200K in illegal donations*, N.Y. Post, June 30, 2016, <http://nypost.com/2016/06/30/pro-hillary-super-pac-took-200k-in-illegal-donations/>; Harper Neidig and Jonathan Swan, *EXCLUSIVE: Pro-Hillary group takes \$200K in banned donations*, The Hill, June 29, 2016, <http://thehill.com/homenews/campaign/285269-exclusive-pro-hillary-group-takes-200k-in-banned-donations>; Press Release, The Campaign Legal Center, *Hillary Clinton Super PAC Accepted \$200,000 in Illegal Contributions from Government Contractor* (July 6, 2016), available at <http://www.campaignlegalcenter.org/news/press-releases/hillary-clinton-super-pac-accepted-200000-illegal-contributions-government>.

Super PACs in light of *Citizens United*, Connecticut's campaign finance regulator answered in the affirmative.¹⁵ Accordingly, state contractors in Connecticut are banned from contributing to Super PACs in the state. That ruling has not been challenged.

The Jersey City Corporation Counsel appears to misunderstand the holding in *Citizens United*, which did not concern pay-to-play laws. It is astounding that a legal opinion about pay-to-play laws and Super PACs failed to cite to the D.C. Circuit Court decision in *Wagner* upholding the federal contractor ban; the practice of Super PACs at the federal level to refuse contributions from government contractors; or the determination by Connecticut's regulator to enforce its contractor ban against Super PACs. Such an incomplete legal analysis is unlikely to withstand scrutiny in court.

Third, as long as Mayor Fulop remains a candidate for Jersey City mayor, Super PACs (like Coalition for Progress) that have accepted contractor and developer money may not expend funds in support of him. That is certainly the case now that Fulop has confirmed that he is a candidate for mayor.¹⁶ Communications during this period that promote or support Mayor Fulop, or attack or oppose his opponents, are clearly in support of his mayoral candidacy, not a gubernatorial candidacy. New Jersey law takes an objective approach to determining whether a communication is connected to a particular election, focusing on whether the "audience [is] substantially comprised of persons eligible to vote for the candidate on whose behalf the communication was made."¹⁷ Accordingly, any communication that reaches Jersey City voters is necessarily in connection with the mayoral race under this standard.

Communications that reach outside Jersey City may also be in connection with the mayoral race. Mayor Fulop is currently using his mayoral committee to communicate with voters outside Jersey City. His hometown Democratic committee is hosting events outside Jersey City.¹⁸ Mayor Fulop and his allies insist that these expenditures have nothing to do with his gubernatorial ambitions and are aimed at expanding his network of support for his mayoral reelection. Mayor Fulop cannot have it both ways. If the mayoral committee's activities targeted outside Jersey City are in connection with his mayoral candidacy, then why wouldn't communications by your organization? The same analysis applies to local referenda. The ordinances cover organizations that regularly engage in support of Jersey City candidates or Jersey City elections. If Coalition for Progress engaged in support for local referenda, it would qualify as a PAC under the pay-to-play ordinances.

We are hereby putting Coalition for Progress on notice. As Mayor Fulop's spokesperson said: "any PAC or any super PAC that receives donations from Jersey City vendors should not be involved in any Jersey City election, as per our pay to play laws." Coalition for Progress has received donations from Jersey City contractors and redevelopers. If it makes expenditures to promote or support Mayor Fulop, or attack or oppose his opponents, Coalition for Progress is causing some of its donors to violate Jersey City's pay-to-play ordinances. We reserve all of our rights under the law to enforce the ordinances, including our right under the Procurement Ordinance to bring a lawsuit seeking invalidation of contracts affected by your organization's actions.

Very truly yours,

Esther Wintner

¹⁵ Connecticut State Elections Enforcement Commission, Declaratory Ruling 2013-02.

¹⁶ Matt Friedman, Politico, *Murphy files ELEC complaint against Fulop*, Sept. 1, 2016, <http://www.politico.com/states/new-jersey/story/2016/09/murphy-files-elec-complaint-against-fulop-105124> and Terrence T. McDonald, Jersey Journal, *Murphy calls for probe of Fulop campaign; mayor's team calls it 'frivolous'*, Sept. 1, 2016, http://www.nj.com/hudson/index.ssf/2016/09/fulop_phil_murphy_ethics_complaint_1.html

¹⁷ NJAC 19:25-10.10(b)(2).

¹⁸ Terrence T. McDonald, Jersey Journal, *Fulop out-of-town party plans have critics grumbling*, Sept. 6, 2016, http://www.nj.com/hudson/index.ssf/2016/09/fulop_bbq_in_paramus_has_critics_grumbling.html