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**FLORIDA DEPARTMENT of STATE**

**CHARLIE CRIST**  
Governor

**KURT S. BROWNING**  
Secretary of State

June 18, 2008

Mr. Bert Gall  
Institute for Justice  
901 N. Glebe Road, Suite 900  
Arlington, Virginia 22203

RE: DE 08-08  
Electioneering Communications  
Organizations; Political Committees  
§§ 106.011(1), (3)(a), (4)(a), (18), & (19),  
106.08(4)(b), 106.143(1)(b), and  
106.1439, Florida Statutes

Dear Mr. Gall:

This letter responds to your request for an advisory opinion regarding actions proposed to be taken by the Institute for Justice, a Virginia-based § 501(c)(3) nonprofit corporation, concerning an issue on the Florida ballot in November 2008. Because you are a member of an organization that is actually involved in the action that is the subject of the request, the Division of Elections has the authority to issue you an opinion pursuant to section 106.23(2), Florida Statutes (2007).

By way of background, you state the Institute for Justice's main activity is the litigation of constitutional issues. The Institute's webpage ([www.ij.org](http://www.ij.org)) describes the organization as the "nation's only libertarian public interest law firm." It further states that the Institute engages in "advocacy both in the courts of law and in the court of public opinion on behalf of individuals whose basic rights are denied by the government." You relate that the Institute funds its activities by donations. You also indicate that the Institute occasionally comments on ballot issues. The Institute would like to publish, both on its website and newsletter (distributed to about 22,000 people, over 1,000 of whom live in Florida) an article, which would include the following paragraph concerning a ballot issue in Florida:

Floridians will vote on two school-choice ballot issues this fall. One of these is Ballot Issue #7, entitled, "Religious Freedom." This ballot issue provides that an individual or entity may not be barred from participating in any public program because of religion. The approval of this ballot issue by voters will be beneficial to Florida's families because, by amending Florida's Blaine Amendment, the

issue removes a legal barrier to the creation of scholarship programs that allow parents, not bureaucrats, to pick the school that is best for their children.

Your request contains a series of questions concerning whether the publication of this paragraph constitutes an electioneering communications, and if so, does the Institute become an electioneering communications organization under Florida's Election Code. Your request also contains several follow-on questions regarding contributions, expenditures, and political committees which are dependent upon how we answer the electioneering communications' questions. We believe the explanation set forth below makes it unnecessary to address all of your specific questions.

Section 106.011(18), Florida Statutes (2007), in relevant part, provides:

(a) "Electioneering communication" means a paid expression in any communications media prescribed in subsection (13) by means other than the spoken word in direct conversation that:

1. Refers to or depicts a clearly identified candidate for office or contains a clear reference indicating that an issue is to be voted on at an election, without expressly advocating the election or defeat of a candidate or the passage or defeat of an issue. . . .
3. For communications containing a clear reference indicating that an issue is to be voted on at an election, is published after the issue is designated a ballot position or 120 days before the date of the election on the issue, whichever occurs first. . . .

Because the proposed paragraph makes a clear reference to the ballot issue, but does not "expressly advocate"<sup>1</sup> the passage of the issue, the communication is an electioneering communication under Florida law. As an electioneering communication, section 106.1439, Florida Statutes (2007), mandates that the communication prominently state: "Paid electioneering communication paid for by (name and address of person [or entity] paying for the communication)."

Section 106.011(19), Florida Statutes (2007), defines "electioneering communications organization" as

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<sup>1</sup> The term "expressly advocate" was meant to incorporate "magic words" of advocacy such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "oppose," and "reject" mentioned in *Buckley v. Valeo*, 424 U.S. 1 (1976). *Division of Elections Opinion 05-06* (September 21, 2005). The clear reference required in § 106.011(1)(a), Fla. Stat., begins in the second sentence. So, in answer to the Institute for Justice's questions, the elimination of the last or next-to-last sentence in the proposed paragraph would have no effect on this opinion. However, the elimination of the last three sentences would exclude the paragraph from being an electioneering communication.

any group, other than a political party, political committee, or committee of continuous existence, whose activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications.

Because the Institute for Justice's election-related activities in Florida would be "limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications," pursuant to section 106.03(1)(b), Florida Statutes (2007), the Institute would be an "electioneering communications organization" under Florida's Election Code and must register as one once it "anticipates receiving contributions or making expenditures." This statute mandates that the registration shall occur within 24 hours after the date which the Institute has information that causes it to anticipate that it will receive contributions or make expenditures for an electioneering communication. As an electioneering communications organization, the Institute must comply with all applicable statutory requirements regulating an electioneering communications organization, to include appointing and maintaining a registered agent, appointing a campaign treasurer and designation of a campaign depository, and filing required reports. You may find more particulars about electioneering communications organizations in the Division's *2008 Electioneering Communications Organization Handbook* (January 2008), located at: <http://election.dos.state.fl.us/publications/index.shtml>.

You also question how to treat contributions received and expenditures made by the Institute if the Institute is an electioneering communications organization. Section 106.011(3)(a), Florida Statutes (2007), states:

"Contribution" means:

A gift, subscription, conveyance, deposit, loan, payment, or distribution of money or anything of value, including contributions in kind having an attributable monetary value in any form, made for the purpose of influencing the results of an election or making an electioneering communication. [Emphasis supplied.]

The definition of "expenditure" also includes "a purchase, payment . . . or anything of value made for the purpose of influencing the results of an election of making an electioneering communication." Section 106.011(4)(a), Florida Statutes (2007). If an organization satisfies the statutory definition of an electioneering communication organization, it must report all contributions received and expenditures made. We do not believe that an electioneering communication organization may "pigeonhole" its contributions and expenditures to segregate those that are made for the purpose of making electioneering communications and those that are not. If an organization, like the Institute for Justice, has diverse purposes and does not desire to report all its contributions and expenditures upon becoming an electioneering communication organization in Florida, it may create a separate organization for the sole purpose of being an electioneering communications organization. The distinct and separate electioneering communications organization would accept and report the electioneering communications organization's contributions and expenditures. It would not report all the Institute's donations

and disbursements, but only those received or made to it as the separate electioneering communications organization. The separate organization, not the Institute itself, would be the organization that must comply with Florida's laws governing electioneering communication organizations, to include the following restriction in section 106.08(4)(b), Florida Statutes (2008):

Any contribution received by an electioneering communications organization on the day of an election or less than 5 days prior to the day of that election may not be obligated or expended by the organization until after the date of the election and may not be expended to pay for any obligation arising prior to the election.

If a separate electioneering communications organization is not formed, then the Institute itself becomes subject to all the requirements of Chapter 106, Florida Statutes.

In one of your questions, you ask whether the Institute would become a political committee if it added a sentence to the proposed paragraph that says, "Floridians should vote for Ballot Issue #7." Because the Institute would then be expressly advocating for the passage of the issue, the communication is no longer an electioneering communication. Section 106.011(1), Florida Statutes (2007), in relevant part, provides:

(a) "Political committee" means:

1. A combination of two or more individuals, or a person other than an individual, that, in an aggregate amount in excess of \$500 during a single calendar year:

a. Accepts contributions for the purpose of making contributions to any candidate, political committee, committee of continuous existence, or political party;

b. Accepts contributions for the purpose of expressly advocating the election or defeat of a candidate or the passage or defeat of an issue;

c. Makes expenditures that expressly advocate the election or defeat of a candidate or the passage or defeat of an issue; or . . .

(b) Notwithstanding paragraph (a), the following entities are not considered political committees for purposes of this chapter:

. . . Corporations regulated by chapter 607 or chapter 617 or other business entities formed for purposes other than to support or oppose issues or candidates, if their political activities are limited to contributions to candidates, political parties, or political committees or expenditures in support of or opposition to an issue from corporate or business funds and if no contributions are received by such corporations or business entities. . . .

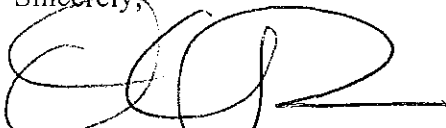
So, if the Institute accepts contributions or makes expenditures in excess of \$500 in a calendar year for the purpose of expressly advocating the passage of Florida's Ballot Issue #7, it would have to organize and register as a political committee in accordance with section 106.03, Florida Statutes (2007) and file the reports required by section 106.03, Florida Statutes (2007), even if the Institute is not otherwise engaged in political activity within the state. In this situation, the article that includes the proposed paragraph must comply with the marking requirements in section 106.143(1)(b), Florida Statutes (2007), regarding "paid political advertisement" or "pd. pol. adv." with the name and address of the Institute being indicated. A political committee must have its own campaign account and, pursuant to section 106.11(1)(b), Florida Statutes (2007), the account must be designated "Campaign Account of (name of political committee)." Therefore, if the Institute, as an already existing multi-purpose organization, desires to become involved in express advocacy regarding Florida's Ballot Issue #7, it must create a separate organization to comply with the political committee requirements found in Chapter 106, Florida Statutes.

#### SUMMARY

When a paid expression makes a clear reference to a ballot issue in the communication media as specified in statute, but does not "expressly advocate" the passage of the issue, the communication is an electioneering communication.

Electioneering communications organizations and political committees must comply with all statutory requirements for those entities found in Chapter 106, Florida Statutes. If an existing organization that is not an electioneering communications organization desires to engage in the activities of an electioneering communications organization, it may create a separate organization so that the separately formed organization, not the previously existing organization, must comply with Chapter 106, Florida Statutes. However, if an existing organization desires to engage in activities which would make it become a political committee, it must separately form a political committee, which then must comply with the requirements of Chapter 106, Florida Statutes.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Palmer', with a horizontal line extending to the right.

Donald L. Palmer  
Director, Division of Elections

Prepared by:  
Gary J. Holland  
Assistant General Counsel