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STATE OF HAWAI'I
CAMPAIGN SPENDING COMMISSION
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August 10, 2016

Mr. Marc E. Elias, Esq.
Mr. Jonathan S. Berkon, Esq.
Ms. Rachel L. Jacobs, Esq.
Perkins Coie
700 13th Street, NW
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Washington, DC 20005-3960

Re: Advisory Opinion No. 16-02

Dear Counsels:

This is in response to your request for an advisory opinion from the Campaign Spending Commission ("Commission") dated March 4, 2016.[1] Your request sought guidance on the topic of coordinated expenditures and raised three different potential fact patterns.[2]

Fact Pattern 1 (Hybrid PAC or Affiliated PACs /Firewall)

Requestor[3] would like to engage in two programs that collaborates with candidates. The first program is the retention of personnel to recruit and train candidates to run in select races in Hawaii. These personnel would meet with candidates or ask candidates to complete questionnaires. These personnel would also provide training to these candidates and their staff on how to run a campaign. The trainings would not focus on any specific campaign but give general information that could be used by any campaign in Hawaii. The second collaborative program involves Requestor's retention of personnel ("coordinated-side personnel") to work directly with candidates throughout the campaign to help the candidates develop specific messages and campaign plans. The coordinated-side personnel would work closely with the candidates in matters involving messaging, communication strategies, fundraising plans, field programs, and budgeting.

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[1] Attachment "A" is a copy of your request.
[2] A draft advisory opinion was placed on the Commission's agenda for its May 11, 2016 meeting. On May 10th, Requestor's attorney asked Commission staff for a postponement of the Commission's consideration of the draft advisory opinion so Requestor could respond to the draft. The 90-day requirement in HRS § 11-315 was waived. At the May 11th meeting, Requestor's attorney formally requested a continuance to the Commission's August 10, 2016 meeting. In a letter dated July 8, 2016, Requestor provided comments to the draft advisory opinion. A copy of this letter is attached as Attachment "B".
[3] Requestor's true identity was not disclosed to the Commission. Requestor's attorney did inform staff that Requestor is an entity other than a political party.

The activities of these collaborative programs would be reported by Requestor's noncandidate committee ("traditional PAC"). This includes the reporting of any in-kind contributions made to supported candidates during the course of these programs' activities. The traditional PAC will register with the Commission, accept contributions subject to the limits and source restrictions contained in Hawaii Revised Statutes ("HRS") Chapter 11, and file disclosure reports in accordance with HRS Chapter 11.

In addition to the two collaborative programs, Requestor would retain separate personnel to create and disseminate independent expenditure communications. These independent expenditures would support the same candidates that are also receiving the benefit of Requestor's support through Requestor's two collaborative programs. Requestor referred to the personnel that would work on Requestor's independent expenditure program as "independent-side personnel." Requestor would register a second noncandidate committee with the Commission to pay for its independent expenditures (the "Super PAC"). The Super PAC would file disclosure reports with the Commission in accordance with HRS Chapter 11.

To keep the coordinated-side personnel separated from the independent-side personnel, Requestor will implement a written firewall policy as described in Federal Election Commission ("FEC") regulation, specifically 11 C.F.R. § 109.21(h). In order to take advantage of the regulation's safe harbor, the written policy will:

- Prohibit overlap of personnel between coordinated-side personnel and independent-side personnel.
- Prohibit communication (written and oral) between coordinated-side personnel and independent-side personnel regarding the independent expenditure program.
- Prohibit coordinated-side personnel from conveying any information about the candidates' nonpublic plans, projects, activities, or needs to independent-side personnel.
- Coordinated-side personnel will not have access to the files of independent-side personnel and vice versa.

Question 1: If the firewall policy described above is followed, would the communications created, produced, and disseminated by Requestor's independent-side personnel be treated as "independent expenditures" under Hawaii law?

No, the mere existence of a firewall would not allow Commission to treat Requestor's independent-side expenditures as truly independent expenditures since Requestor, through its coordinated-side personnel, also makes in-kind contributions to candidates. Thus, although Requestor may make independent expenditures through its independent-side program, those

expenditures will be subject to the applicable limits contained in HRS § 11-357 and aggregated with the expenditures of its coordinated-side program.

Under HRS § 11-358, contributions to noncandidate committees are limited to $1,000 in an election. In Yamada v. Kuramoto, 744 F.Supp.2d 1075, 1083-84 (D. Haw. 2012), the district court entered an injunction of this provision as follows:

> The court GRANTS Plaintiffs' Amended Motion for Preliminary Injunction in part (the as applied challenge to § [11–358]) and DENIES the Motion in part (the facial challenge to § [11–358]). The contribution limit in § [11–358] is unconstitutional as applied to Yamada's and Stewart's proposed contributions to AFA–PAC (an entity that engages in solely independent expenditures) in excess of the statutory limit. Defendants are enjoined from enforcing § [11–358] monetary contribution limit as to Yamada's and Stewart's proposed campaign donations to AFA–PAC.

The Commission cannot ignore Yamada.[4] The Yamada injunction only applied to, and thus may only be extended to, committees that make **only independent expenditures**. Noncandidate committees outside the scope of the injunction are subject to the contribution limits of Hawaii law, including HRS §§ 11-357 and 11-358. Under the set of facts presented, expenditures made by Requestor's independent-side personnel, would be considered in-kind contributions to, and expenditures by, the supported candidate. Even if a firewall policy was adopted by Requestor, the communications created, produced, and disseminated by Requestor's independent-side personnel would be subject to the contribution limits in HRS § 11-357. To the extent that Requestor is asking the Commission to find Hawaii law unconstitutional because it does not permit a hybrid PAC or two affiliated PACs to make unlimited independent expenditures, even where a proper firewall exists, the Commission lacks the power to do so. HOH Corp. v. Motor Vehicle Indus. Licensing Bd., Dept. of Commerce & Consumer Affairs, 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987).

The Commission notes that even the federal safe harbor for the establishment of a firewall, relied upon by Requestor, does not provide absolute protection for political committees at the federal level. 11 C.F.R. § 109.21(h) provides in pertinent part:

> This safe harbor provision does not apply if specific information indicates that, despite the firewall, information about the candidate's or political party committee's campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.

That is to say, an expenditure will be considered independent only if, factually, the expenditure is truly independent, notwithstanding the presence of a firewall. Thus, if Requestor intended to

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[4] The state did not appeal the contribution-limit issue discussed above. Plaintiffs appealed the rest of the issues, which the district court decided in favor of the state. The Ninth Circuit affirmed the district court in Yamada v. Snipes, No. 12-15913 (May 20, 2015).

make only independent expenditures in Hawaii, which by the facts presented, it does not, the existence of a firewall between Requestor's employees and candidates is certainly relevant to the inquiry of whether Requestor's expenditures are truly independent, but not dispositive in the presence of evidence of coordination.

Also, in Vermont Right to Life Committee, Inc. v. Sorrell, 758 F.3d 118 (2nd Cir. 2014), Vermont Right to Life Committee, Inc. ("VRLC"), a 501(c)(4) non-profit corporation established two state political committees, the Vermont Right to Life Committee-Fund for Independent Political Expenditures ("VRLC-FIPE") and Vermont Right to Life Committee, Inc., Political Committee ("VRLC-PC"). VRLC-FIPE made only independent expenditures while VRLC-PC made direct contributions to candidates. VRLC and VRLC-FIPE sued various officials of Vermont, contending, among other things, that the state's contribution limit applicable to political committees did not apply to VRLC-FIPE since it was an independent expenditures only group. The district court ruled in favor of the state, that is, the contribution limits for political committees applied to VRLC-FIPE. The Second Circuit affirmed the district court's ruling. The appellate court found that having separate bank accounts for VRLC-FIPE and VRLC-PC and organizational documents that stated that VRLC-FIPE is an independent expenditure only committee was not enough to show that VRLC-FIPE was, in fact, an independent expenditure only committee. 758 F.3d at 141. The court noted:

> [W]hether a group is functionally distinct from a non-independent–only entity may depend on factors such as the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities.

758 F.3d at 142. The court made clear that the question of whether two entities are separate and distinct depends on the particular circumstances. The court went on to conclude:

> We have held that the state may impose contribution limits on some groups--groups such as VRLC-PC that directly contribute or coordinate expenditures with campaigns. **Where VRLC-FIPE is functionally indistinguishable from VRLC-PC, the same limits may constitutionally apply to it.** The Supreme Court has upheld limitations on contributions to entities whose relationships with candidates are sufficiently close to justify concerns about corruption or the appearance thereof. [Citations omitted.] It is the requirement of independence--the absence of prearrangement and coordination--that alleviates the danger that expenditures will be spent as *quid pro quo* for improper commitments from the candidate. [Emphasis added.]

758 F.3d at 145.

Requestor's question requires a fact-intensive inquiry. Thus, even if this Commission was not bound by Yamada, the Commission doubts that it could resolve such a factual inquiry by way of an advisory opinion, where there is no opportunity for the Commission to make findings

of fact and conclusions of law as to those facts.[5] If the facts on the ground showed a lack of coordination, then the expenditures would be deemed independent.

Requestor's reliance on Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996), for the proposition that it may register and maintain both an independent expenditures only committee and a committee that directly supports candidates through in-kind contributions, is misplaced. That case involved a challenge to the expenditure limit on political party expenditures. The party argued that the expenditure limits could not be applied to its independent expenditures. The government argued that all party expenditures, given the nature of political parties, should be considered coordinated as a matter of law. The court ruled that the government could not presume that the party's expenditures were coordinated and based upon the record, the party's expenditures were factually independent. 518 U.S. at 619. That case did not directly address the issue that is raised by Requestor here. More importantly, even if the case did directly address the issue, Requestor is not a political party, and thus, the Court's rationale would not necessarily apply to the hybrid PAC or two affiliated PACs situation being contemplated by Requestor. Also, as discussed above, the Commission is bound to follow Yamada.

In sum, based upon Yamada and HRS § 11-357, and as illustrated by Requestor's fact pattern, Hawaii law would not allow the hybrid PAC or two affiliated PACs situation described in the request. Requestor may make independent expenditures through its independent-side program, however, because of its activities through its coordinated-side programs, those independent expenditures will be subject to Hawaii's limits on contributions and aggregated with the expenditures of its coordinated-side program.

Question 2. May independent-side personnel engage in Requestor's recruitment and training activities? Would Requestor have to wait an

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[5] For example, Requestor did not indicate how the coordinated-side operation and the independent-side operation would be funded, nor whether there would be separate bank accounts for each side. Requestor also did not disclose whether the same person would manage or control the spending of the traditional PAC and the Super PAC. Of course, if the coordinated-side operation and the independent-side operation had the same source of funding or the same person controlling the spending of each entity, these facts would strengthen the Commission's belief that the Super PAC is enmeshed financially and organizationally with the traditional PAC such that the contribution limits to candidates as applied to the traditional PAC will also apply to the Super PAC. Vermont Right to Life Committee, Inc., 758 F.3d at 141. In other words, that all of Requestor's "independent" expenditures supporting or opposing candidates would be deemed contributions subject to the limits in HRS § 11-357 and aggregated with the spending of its coordinated-side operations. See, HRS § 11-361(a) ("All contributions and expenditures of a person whose contributions or expenditures are financed, maintained, or controlled by any corporation, labor organization, association, party, or any other person, including any parent, subsidiary, branch, division, department, or local unit of the corporation, labor organization, association, party, political committees established and maintained by a national political party, or by any group of those persons shall be considered to be made by a single person.")

interval of time after engaging in these recruitment and training activities prior to the first airing of an independent expenditure?

In accordance with the discussion above, the overlap of staff between the independent-side program and the coordinated-side program would be evidence that the two programs are not truly separate. Vermont Right to Life Committee, Inc., 758 F.3d at 142 ("As discussed below, whether a group is functionally distinct from a non-independent-expenditure-only entity may depend on factors such as the overlap of staff and resources, the lack of financial independence, the coordination of activities, and the flow of information between the entities.")

Fact Pattern 2 (Republication of Campaign Material)

Requestor proposes that it would participate in the following activities:

1. In printed communications (e.g., mailers and walking pieces) supporting candidates, Requestor would incorporate into its communications certain photographs that had been posted on publicly accessible websites by candidates. These photographs would not include campaign logos, slogans, or other written campaign messages. These photographs would not comprise more than 50 percent of the surface area of the communication.

2. In television or digital communications supporting candidates, Requestor would incorporate into its communications certain photographs and b-roll footage that had been posted on publicly accessible websites by candidates. These material would not include campaign logos, slogans, or other written campaign messages. These materials would not be on screen for more than 50 percent of the duration of the communication.

3. Requestor's independent-side personnel--the personnel working on creating, producing, or disseminating the communications--would not have any discussions with candidates or their campaigns regarding the posting of photographs or b-roll footage.

4. The content, timing, and targeted audience of the communications--including the decision whether and how to integrate publicly available campaign photographs or b-roll footage--would be developed by Requestor's independent-side personnel, without any input from candidates, their campaigns, or Requestor's coordinated-side personnel.

Question 3. Would the limited use of a candidate's publicly available photographs and footage, as described above, result in Requestor's independent communications being deemed "coordinated" under Hawaii Law?

HRS §11-363(a) provides in pertinent part:

> The financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written or other campaign materials prepared by the candidate, candidate committee, or agents shall be considered to be a contribution to the candidate.

As mentioned by Requestor, the Commission's decision in In Re Sierra Club Hawaii PAC, Docket No. 15-13 (November 19, 2014), directly addresses this question. In that case, an independent-expenditures-only noncandidate committee took a photograph of a candidate and his family from the candidate's campaign website and used the photograph in independent mailers in support of the candidate. The photograph used, in addition to being on the candidate's campaign website, was also used by the candidate in his own campaign mailers. The Commission determined that the photograph was campaign material, and thus, the payment for the independent expenditure (i.e., the payment for the republication of campaign material) was a contribution to the candidate under HRS §11-363(a).

Requestor correctly points out that the FEC has an analogous rule, 11 C.F.R. 109.23. Requestor informs the Commission that:

> Nonetheless, at the federal level, it is standard practice for independent groups to pull down b-roll footage and/or photographs from candidates' publicly available websites and integrate these materials into their own communications. To date, the FEC has yet to find that this practice violates the federal republication ban.

In asking the Commission to reverse its position expressed in Docket No. 15-13, Requestor cites to several "Statement of Reasons" from individual FEC commissioners that Requestor believes indicates that four of the current six commissioners would allow campaign photographs to be used by independent groups and three of the six commissioners would allow independent groups to use campaign b-roll footage. However, the public statements made by individual commissioners are required in a complaint-generated case (Matter Under Review or "MUR") where the FEC's General Counsel is recommending a probable cause finding and an individual commissioner declines to vote for enforcement of the regulation. These statements are by no means a ruling or advisory opinion of the FEC.

The sentiment expressed in the statements of individual commissioners cited by Requestor was earlier rejected by the FEC when it promulgated or recodified 11 C.F.R. 109.23 on January 3, 2003. In discussing possible exceptions to the rule, the FEC noted:

> The same commenter also proposed additional exceptions for paragraph (b) to cover republication and distribution of original campaign material that already exists in the public domain, such as presentations made by candidates, biographies, positions on issues or voting records. **The Commission declines to promulgate a "public domain" exception because such an exemption could "swallow the rule," given that virtually all campaign material that could be republished could be considered to be "in the public domain."**

68 C.F.R. 442, Rules and Regulations, January 3, 2003 (emphasis added).

If Requestor intends to republish, and therefore reinforce, the same positive image of the candidate's family that the candidate himself has advanced by putting the photograph on his campaign website and using the picture in his own political mailer, it is certainly fair to consider Requestor's expenditure on the communication to be an in-kind contribution to the candidate under HRS §11-363(a). Therefore, any payment for a communication that results in the republication of a candidate's campaign material,[6] or a portion thereof, will be considered a contribution from Requestor to the candidate.

Fact Pattern 3 (Acquisition and Use of Candidate Information from Vendor)

In 2010, the Republican Governors Association ("RGA") made independent expenditures in support of gubernatorial candidate Duke Aiona, after the RGA received polling data from a vendor working for Aiona's campaign. The Aiona campaign had authorized the Tarrance Group to provide that data to the RGA. The Democratic Party of Hawaii ("DPH") filed an administrative complaint with the Commission against the RGA alleging, inter alia, improper coordination based upon the RGA's acquisition and use of the data to inform its communication program.[7] The Commission summarily dismissed the complaint.

Question 4. May Requestor's independent-side personnel acquire and use the type of information that RGA did from candidates' vendors to inform their independent expenditure program?

The Commission suggests that Requestor be cautious in its reliance upon the Commission's summary dismissal of the complaint in Docket No. 10-06 when planning its future independent expenditures program for Hawaii candidates. In summarily dismissing the complaint, the Commission did not enter separate findings of fact and conclusions of law as it does when it makes a Preliminary Determination of Probable Cause pursuant to HRS § 11-405(a) at a HRS Chapter 92 agency meeting, or makes a decision on a contested case pursuant to HAR § 3-161-44 in a HRS Chapter 91 proceeding. Whether Requestor's future independent expenditure program will result in a finding of coordinated expenditures will heavily depend upon the facts underlying the expenditures.[8] However, the mere sharing of polling data does not establish or disprove a coordinated expenditure. A person alleging a coordinated expense must show a nexus between the alleged coordinated activity and the expenditure of funds.

The Commission provides this Advisory Opinion as a means of stating its current interpretation of the Hawaii campaign finance law in §11-301, *et seq.*, HRS, and the

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[6] Campaign material includes b-roll footage, logos and any other material a candidate uses to promote the candidate's campaign.

[7] Democratic Party of Hawaii v. Republican Governors Ass'n, et al., Docket No. 10-06 (June 8, 2011).

[8] None of the current Commissioners were involved in the Commission's consideration and disposition of the DPH's complaint in Docket No. 10-06.

Commission's rules in chapter 3-160, HAR. The Commission may adopt, revise, or revoke this Advisory Opinion if provisions of the campaign finance law or administrative rules are amended or repealed.

CAMPAIGN SPENDING COMMISSION

By: BRYAN LUKE
Its Chair

ATTACHMENT A

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Re: Advisory Opinion Request

Dear Mr. Kam:

Pursuant to Haw. Rev. Stat. § 11-315, we seek an advisory opinion from the Hawaii Campaign Spending Commission (the "Commission or CSC") on behalf of Requestor.

The Supreme Court's 2010 decision in *Citizens United v. FEC*, and the Ninth Circuit's subsequent decision in *Yamada v. Weaver*, prompted the State of Hawaii to rewrite its campaign finance laws. Organizations that wish to sponsor independent expenditures may now accept contributions without limit to finance such expenditures, and organizations that wish to support other entities' independent expenditure programs may also do so without limit.

In the 2010, 2012, and 2014 election cycles, organizations across the political spectrum competed with each other to influence the outcome of Hawaii elections under these new rules. Many of these organizations imported practices that had been used regularly by political organizations in federal races and other state races. These included (i) setting up a firewall within the organization to ensure that the organization's independent expenditure program was conducted separately from any programs undertaken in coordination with candidates; (ii) integrating photographs and b-roll footage found on candidates' websites in an organization's independent communications; and (iii) obtaining polling data from the candidates' consultants to inform their own independent expenditure program.

In the absence of clear guidance in Hawaii's statute and regulations, the CSC has been flooded with complaints alleging that these practices, and others like them, violate the law. Addressing these issues for the first time in the enforcement context has placed undue burden on the CSC, which has limited resources, and the regulated community, which needs clear guidelines on which activities comply with Hawaii law and which do not. It is important that organizations be able to engage in constitutionally protected speech without fear of legal sanction. It is equally important that organizations competing with each other to influence the outcome of Hawaii elections are subject to the same rules and receive the same treatment under the law. Our hope is

that this request provides the CSC with an opportunity to address these issues in a comprehensive way, ahead of the 2016 elections.

Accordingly, Requestor asks the CSC whether engaging in the following activities would comply with Hawaii law:

- Requestor proposes to have one set of its personnel interact directly with candidates and have a separate set of personnel create, produce, and disseminate independent expenditure communications in support of these candidates. Requestor would establish a strict firewall policy to ensure the independence of these communications.

- Requestor proposes to download photographs and b-roll footage posted on candidates' publicly available websites and use these materials in Requestor's independent expenditure communications. The use of these materials would be strictly limited as described in Section B below.

- Requestor proposes to obtain from candidates' vendors the following nonpublic information: polling, research, and data from the campaigns' phone banking and canvass operations. Requestor would not interact directly with campaigns to request this information, nor would Requestor share any information about its independent expenditure program with campaigns or their consultants. Requestor understands that the Republican Governors Association engaged in a practice like this in 2010 and that the CSC dismissed a complaint alleging that it violated the law.

We provide more details about the proposed activities below.

A. Use of a Firewall to Ensure Independence of Communications

Requestor would like to engage in two distinct programs in collaboration with candidates:

- Requestor would retain personnel to identify and recruit candidates to run in select races in Hawaii elections. To do so, such personnel would meet with potential candidates and/or ask potential candidates to complete questionnaires. These personnel would also conduct general trainings for candidates and their staffs. The trainings would be provided in a conference style format, with multiple candidates and/or their staffs present. They would focus on how to (i) develop a campaign budget, (ii) craft a campaign message, (iii) conduct research, (iv) cultivate earned media, (v) build a communications plan, (vi) run a field program and engage in direct voter contact, and (vii) fundraise. These trainings would not focus on any specific campaign but would instead provide general information and skills that could be utilized by any campaign in Hawaii.

- Separate from this first program, Requestor would retain personnel (to whom we will refer to as "coordinated-side personnel") to work directly with candidates on a regular basis throughout the campaign to help them develop their specific messages and campaign plans. These coordinated-side personnel would be closely involved with their candidates' messaging, communications strategies, fundraising plans, field programs, and budgeting.

To the extent that Requestor made any in-kind contributions to candidates during the course of these activities, the expenses would be paid by the Requestor's non-candidate committee (the "traditional PAC") and reported as in-kind contributions subject to any applicable limits. The traditional PAC would register with the CSC; accept contributions subject to the limits and source restrictions of Hawaii law; and file disclosure reports in accordance with Hawaii law.

In addition to these activities, Requestor would retain personnel to create, produce, and disseminate independent expenditure communications – including communications in support of the same candidates who were recruited, trained, and/or coached by Requestor's personnel as described above. This independent activity would include the retention of pollsters and research firms to assist with the development of messages and targeting, along with firms to create, produce, and disseminate the communications. It would also include personnel to oversee these consultants. Collectively, we will refer to personnel who work on the Requestor's independent expenditure program as "independent-side personnel." Independent-side personnel would not communicate with candidates or their campaigns during the period when they are creating, producing or disseminating any of Requestor's independent expenditure communications.

Furthermore, to ensure that Requestor's independent expenditure communications are independent as a matter of law, Requestor would implement a written firewall policy to separate its independent-side personnel and its coordinated-side personnel. The policy (as described below) would be designed and implemented in accordance with Federal Election Commission ("FEC") regulations, specifically 11 C.F.R. § 109.21(h):

- First and foremost, there would be no overlap between coordinated-side personnel and independent-side personnel. Any individual who served as coordinated-side personnel would not serve as independent-side personnel, and vice versa.

- Second, coordinated-side personnel and independent-side personnel would be prohibited from communicating with each other (either in writing or verbally) regarding the independent expenditure program. This would include a prohibition on coordinated-side personnel requesting that independent-side personnel disseminate a particular communication and a ban on coordinated-side personnel being involved in the creation, production, or dissemination of an independent expenditure communication, including "(A) the content of the communication; (B) the intended audience for the communication;

(C) the means or mode of the communication; (D) the specific media outlet used for the communication; (E) the timing or frequency of the communication; or (F) the size or prominence of a printed communication, or duration of a communication by means, including broadcast, cable, or satellite."[1]

- Third, coordinated-side personnel would be barred from conveying any information about the candidates' nonpublic plans, projects, activities, or needs to independent-side personnel.

- Fourth, coordinated-side personnel would not have access to the paper or electronic files of independent-side personnel, and vice versa.

Requestor would register a second non-candidate committee (the "Super PAC") with the Commission to pay for these independent expenditure communications. The Super PAC would disclose its donations and expenditures in accordance with Hawaii law on reports filed with the Commission.

Question 1: If the firewall policy described above is followed, would the communications created, produced, and disseminated by Requestor's independent-side personnel be treated as "independent expenditures" under Hawaii law?

Under Hawaii law, an "independent expenditure" is "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate that is not made in concert or cooperation with or at the request or suggestion of the candidate, the candidate committee, a party, or their agents."[2] Likewise, federal law defines "independent expenditure" as an expenditure "expressly advocating the election or defeat of a clearly identified candidate; and that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."[3]

Two decades ago, the U.S. Supreme Court recognized that organizations whose personnel work directly with candidates on certain matters also have a constitutionally protected right to make independent expenditures in support of those same candidates, *as long as the expenditures themselves are independent*. In that case, the Colorado Republican Party challenged an FEC regulation barring political parties from airing independent expenditures.[4] The party chairman acknowledged that "it was the practice of the Party to 'coordinat[e] with the candidate' [on] 'campaign strategy' and for [the chairman] to be 'as involved as [he] could be' with the

[1] Haw. Code R. § 3-160-8(b)(2).
[2] Haw. Rev. Stat. § 11-302.
[3] 52 U.S.C. § 30101(17).
[4] *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n.*, 518 U.S. 604 (1996).

individuals seeking the Republican nomination by making available to them 'all of the assets of the party.'"[5] But, as the Supreme Court made clear, an entity may collaborate in some respects with candidates without forfeiting its constitutional right to make independent expenditures:

> These latter statements, however, are general descriptions of Party practice. They do not refer to the advertising campaign at issue here or to its preparation. Nor do they conflict with, or cast significant doubt upon, the uncontroverted direct evidence that this advertising campaign was developed by the Colorado Party independently and not pursuant to any general or particular understanding with a candidate....And we therefore treat the expenditure, for constitutional purposes, as an "independent" expenditure, not an indirect campaign contribution.[6]

The FEC did not adopt a formal regulation recognizing firewalls until 2006.[7] But, in a 2004 enforcement action, the FEC acknowledged that an organization that adopts a written firewall policy may have its coordinated-side personnel work directly with candidates, while its independent-side personnel create, produce, and disseminate independent expenditure communications. In that matter, the FEC determined that a PAC's paid communications in support of a congressional candidate, Betty Castor, were "independent expenditures" because "the staff assigned to work directly with the Castor Committee had no discussions with the staff assigned to [the affiliated independent expenditure committee] about the advertisements at issue and imparted no knowledge or information about the Castor campaign to [the affiliated independent expenditure committee] staff."[8]

When it codified the firewall regulation in 2006, the FEC acknowledged that its earlier recognition of firewalls was effectively mandated by the Supreme Court's decision in *Colorado Republican Party*. Given that "the Supreme Court has recognized that political party committees have the right to make unlimited independent expenditures," the FEC wrote, "establishing firewalls and similar screening policies is an effective way to simultaneously protect that right and avoid improper coordination."[9] In implementing the firewall, the key is that employees are "placed on separate teams (or 'silos') within the organization, so that information does not pass between the employees who work on independent expenditures and the employees who work with candidates and their agents."[10] The "use of a firewall can ensure that staff responsible for [a committee's] coordinated [] expenditures do not share or convey information to staff who are

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[5] *Id.* at 614.
[6] *Id.*
[7] *See Coordinated Communications*, 71 Fed. Reg. 33190, 33206 (June 8, 2006).
[8] First General Counsel's Report, Matter Under Review ("MUR") 5506 (EMILY's List) 7 (2005).
[9] *Coordinated Communications*, 71 Fed. Reg. at 33206.
[10] *Id.*

simultaneously exercising the [committee's] constitutional right to make unlimited independent expenditures."[11]

State regulators have followed the same approach. In 2015, the State of Montana passed a campaign finance reform bill to "effectively end the flood of 'dark money'—electoral spending by nonprofit groups that do not disclose their donors—that has plagued recent Montana elections."[12] Montana's contribution limits are among the lowest in the nation and the state even refused to apply *Citizens United* to its own elections until the U.S. Supreme Court specifically ordered that it do so.[13] Montana's Commissioner of Political Practices, Jonathan Motl, previously represented Common Cause, a grassroots organization that supports tough disclosure laws and wants to reverse *Citizens United*,[14] prior to his appointment.[15] In other words, Montana is one of the strictest campaign finance states in the country, with a dedicated reformer serving as its chief regulator. Yet, tellingly, when the Commissioner adopted regulations implementing the new statute, the regulations explicitly recognized that a firewall is probative evidence that coordination has not occurred.[16]

The CSC, too, should recognize that an organization that establishes and implements a firewall in accordance with FEC regulations may have its coordinated-side personnel work directly with candidates and their campaigns, while its independent-side personnel create, produce, and disseminate independent expenditure communications. Such a firewall would ensure that Requestor's independent expenditure communications are not made with the consent of or in cooperation with, or at the request or suggestion of a candidate, his or her candidate committee, a political party, or their agents. The mere fact that Hawaii's statutes and regulations do not refer to firewalls is not a bar to the CSC's recognition that an organization that establishes and implements a firewall has not made a coordinated expenditure. As the FEC recognized, the Supreme Court decision in *Colorado Republican Party* means that organizations enjoy a constitutional right to sponsor independent expenditure communications, even if some of their personnel work directly with candidates. By recognizing that an organization with a proper firewall has not made a prohibited coordinated expenditure, the CSC would provide organizations with the proper incentive to adopt and implement safeguards against coordination.

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[11] *Id.*
[12] Paul Blumenthal, *Montana Republicans & Democrats Unite to Ban Dark Money*, Huffington Post (Apr. 15, 2015), http://www.huffingtonpost.com/2015/04/15/montana-dark-money_n_7074084.html.
[13] *Am. Tradition P'ship, Inc. v. Bullock*, 132 S.Ct. 2490, 2491 (2012).
[14] Money in Politics, Common Cause, http://www.commoncause.org/issues/money-in-politics/?_ga=1.165037563.594206167.1452549264 (last visited Jan. 12, 2016).
[15] Alex Sakariassen, *The Most Important Person in Montana Politics*, Missoula Independent (Oct. 1, 2015), http://missoulanews.bigskypress.com/missoula/the-most-important-person-in-montana-politics/Content?oid=2482959.
[16] Mont. Admin. R. 44.11.602(2)(f).

Question 2: May independent-side personnel engage in Requestor's recruitment and training activities? Would Requestor have to wait an interval of time after engaging in these recruitment and training activities prior to the first airing of an independent expenditure?

As stated above, Requestor warrants that none of its independent-side personnel will work directly with candidates to help them develop their specific messages and campaign plans (e.g., the activities in which coordinated-side personnel will engage). If permitted, however, some of Requestor's independent-side personnel would assist with Requestor's recruiting and training efforts. These activities would occur before these independent-side personnel commenced work on creating, producing, or disseminating communications. Moreover, Requestor's independent-side personnel would take care not to obtain from candidates any information about their campaign's nonpublic plans, projects, activities, or needs, or to discuss with them any aspect of the independent expenditure program.

While federal law generally restricts individuals from serving on both the "coordinated side" and the "independent side," it recognizes that an independent expenditure is compromised only where "information about the campaign plans, projects, activities, or needs" is used by the individual in creating the independent communication or when it is conveyed to those who create the communication.[17] Here, Requestor's independent-side personnel would not be privy to such information as a result of the recruiting or training programs, and would be firewalled off from the candidates immediately afterward. Federal law also recognizes that an individual who works with a candidate (and *does* learn such strategic information) may subsequently participate in independent expenditures supporting that candidate *if* she or he undertakes a "cooling-off" period.[18]

Accordingly, Requestor asks whether its independent-side personnel may participate in recruiting and training programs that take place prior to their commencing work on the independent expenditure program and, if so, whether there must be a specified interval of time, or a "cooling-off" period, between such programs.

B. Use of Publicly Available Campaign Photographs and Footage in Independent Expenditure Communication

Under Hawaii law, "coordinated activity" includes "[t]he payment by any person for the production, dissemination, distribution, or republication of any written, graphic, or other form of campaign material, in whole or in part, prepared by a candidate, candidate committee, or noncandidate committee, or an agent of a candidate, candidate committee, or noncandidate committee."[19] Federal law includes a similar restriction: "[t]he financing of the dissemination,

[17] 11 C.F.R. § 109.21(d)(4)(iii).
[18] *Id.* § 109.21(d)(4), (5).
[19] Haw. Rev. Stat. § 11-363(b)(2).

distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be considered a contribution."[20]

Nonetheless, at the federal level, it is standard practice for independent groups to pull down b-roll footage and/or photographs from candidates' publicly available websites and integrate these materials into their own communications.[21] To date, the FEC has yet to find that this practice violates the federal republication ban. At least four of the six current FEC commissioners have approved of the practice with respect to photographs, reasoning that

> [t]o treat an incidental republication of a photograph, which is part of an otherwise permissible independent expenditure, as an 'in-kind contribution' makes no intuitive sense. Rather, where a standard photograph from a website is reproduced, but only as an incidental portion of the document being disseminated, we do not think a finding that the entire document is a republication of campaign materials is warranted.[22]

Likewise, at least three of the six commissioners have approved of the practice with respect to b-roll footage, concluding that the "republication provision is designed to capture situations where third parties, in essence, subsidize a candidate's campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate" and not where third parties merely "creat[e] and pay[] for advertisements that incorporate as background footage brief segments of video footage posted on publicly accessible websites by authorized committees of federal candidates."[23]

Requestor proposes to do the following:

- In printed communications (e.g., mail and walk pieces) supporting candidates, Requestor would incorporate into its communications certain photographs that had been posted on publicly accessible websites by candidates. These photographs would not include

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[20] 11 C.F.R. § 109.23(a).
[21] *See e.g.*, *What's With this Video of McConnell Doing Stuff?*, NPR (Mar. 29, 2014), http://www.npr.org/sections/itsallpolitics/2014/03/29/295927924/whats-with-this-video-of-mcconnell-doing-stuff; Shane Goldmacher, *The Actual Intention Behind That Awkward Mitch McConnell Video*, Nat'l J. (Mar. 12, 2014), http://www.nationaljournal.com/politics/2014/03/12/actual-intention-behind-that-awkward-mitch-mcconnell-video.
[22] Statement of Reasons of Commissioners Hans A. von Spakovsky & Ellen L. Weintraub, MUR 5743 (EMILY's List) 4 (2007). Commissioner Weintraub has voted against allowing independent groups to use publicly available b-roll footage from candidates in their ads, even though she voted to allow the same groups to use publicly available photographs from candidates in their ads.
[23] Statement of Reasons of Vice Chairman Matthew S. Petersen & Commissioners Caroline C. Hunter & Lee E. Goodman, MUR 6603 (Ben Chandler for Congress), MUR 6777 (Kirkpatrick for Arizona), MUR 6801 (Senate Majority PAC), MUR 6870 (American Crossroads), MUR 6902 (Al Franken for Senate 2014) 2 (2015).

campaign logos, slogans, or other written campaign messages. These photographs would not comprise more than 50 percent of the surface area of the communication.

- In television or digital communications supporting candidates, Requestor would incorporate into its communications certain photographs and b-roll footage that had been posted on publicly accessible websites by candidates. These materials would not include campaign logos, slogans, or other written campaign messages. These materials would not be on screen for more than 50 percent of the duration of the communication.

- Requestor's independent-side personnel—the personnel working on creating, producing, or disseminating the communications—would not have any discussions with candidates or their campaigns regarding the posting of photographs or b-roll footage.

- The content, timing, and targeted audience of the communications—including the decision whether and how to integrate publicly available campaign photographs or b-roll footage—would be developed by Requestor's independent-side personnel, without any input from candidates, their campaigns, or Requestor's coordinated-side personnel.

Question 3: Would the limited use of a candidate's publicly available photographs and footage, as described above, result in Requestor's independent communications being deemed "coordinated" under Hawaii law?

Based on the FEC's actions to date, it is clear that Requestor's proposed activities would not result in a finding that federal campaign finance laws had been violated.

Nonetheless, the CSC appears to have taken a much broader view of the republication ban. In 2014, the Sierra Club Hawaii PAC, an independent expenditure committee, used a photograph of a candidate and his family, obtained from the candidate's public website, in the Sierra Club Hawaii PAC's independent expenditure communication supporting the candidate. Notwithstanding the string of FEC matters that did not result in a finding of a violation for similar conduct, the Commission determined that the PAC had made an impermissible in-kind contribution to the candidate based on the use of the photograph.[24]

We urge the CSC to reconsider that position here and approve of the Requestor's proposed activities. The Requestor is not proposing to copy or republish the candidates' communications; it instead seeks to make limited use of these visual materials to more effectively communicate its own message. The purpose of the republication rule is to "distinguish[] between independent expressions of an individual's views and the use of an individual's resources to aid a candidate in

[24] Haw. Campaign Spending Comm'n, , In re Sierra Club Hawaii PAC, No. 15-13, Minutes for Nov. 19, 2014 Meeting, http://ags.hawaii.gov/campaign/minutes/minutes-for-november-19-2014/.

a manner indistinguishable in substance from the direct payment of cash to a candidate."[25] The latter is clearly impermissible. For example, an independent expenditure-only political action committee (or "a Super PAC") supporting Mitt Romney's 2012 candidacy recently paid a $50,000 fine to the FEC for republishing a substantial portion of a television ad that Romney's campaign had run during his 2008 candidacy.[26] But as far back as the 1980s, the FEC has made clear that not every third party use of candidate campaign materials is "republication" under federal law.[27] Although the "wholesale copying of candidate materials" —what the pro-Romney Super PAC did—constitutes republication, the "partial use of such materials in connection with one's own protected speech is not legally problematic."[28] That is precisely what Requestor proposes to do here.

Allowing for the incidental use of publicly available photographs in a group's independent speech would bring the Commission in line with even some of the country's strictest regulators. For example, the City of Philadelphia's Board of Ethics recently promulgated a regulation barring the republication of campaign material.[29] This new regulation was supported by campaign finance report groups as a model for reform.[30] But even this strict regulation permits independent groups to incorporate into their communications any "photograph obtained from a public source," including a candidate's website.[31] Going beyond the City of Philadelphia's strict rule and prohibiting *any* use of publicly available campaign photographs would be inconsistent with basic First Amendment principles and unnecessary to effectuate the purpose underlying the republication ban. The Commission should follow suit here—at least with respect to the use of photographs (in line with the City of Philadelphia's rule) and hopefully with respect to the use of b-roll footage as well (in line with the federal practice).

C. Acquisition and Use of Candidate Information from Vendor

In 2010, the Republican Governors Association (the "RGA") made independent expenditures in support of gubernatorial candidate, Duke Aiona, after having received polling data from a vendor

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[25] H.R. Rep. No. 94-1057 at 59 (1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.A.N. 946, 974.
[26] Conciliation Agreement, MUR 6535 (Restore Our Future) 2-3 (2015).
[27] *See e.g.* Statement of Reasons of Comm'r. Thomas J. Josefiak, MUR 2272 (American Medical Association) 6-9 (1987) (rejecting allegations of republication); General Counsel's Report, MUR 2766 (Auto Dealers and Drivers for Free Trade Political Committee) 24-27 (1989) (finding the same).
[28] Statement of Reasons of Chair Caroline C. Hunter & Comm'rs. Donald F. McGahn & Matthew S. Petersen, MUR 5879 (DCCC) 5 (2012).
[29] Phila. Bd. of Ethics, Reg. No. 1, § 1.40.
[30] *See* Testimony of Megan P. McAllen, Associate Counsel, Campaign Legal Ct., before the Phila. Bd. of Ethics (Sept. 17, 2014), http://www.campaignlegalcenter.org/sites/default/files/2014-09-17_Philadelphia_Ethics_Board_testimony_final.pdf; Testimony of Daniel I. Weiner, Counsel, Brennan Ctr. for Justice at N.Y. Univ. School of Law, submitted to the Phila. Bd. of Ethics (Sept. 17, 2014), https://www.brennancenter.org/analysis/brennan-center-urges-adoption-enhanced-coordination-rules-philadelphia.
[31] Phila. Bd. of Ethics, Reg. No. 1, § 1.40.

working for Aiona's campaign.[32] The Aiona campaign had authorized the Tarrance Group to provide the data to the RGA.[33] The Democratic Party of Hawaii filed a complaint against the RGA alleging improper coordination based on the RGA's acquisition and use of the data to inform its communication program.[34] The CSC voted unanimously to dismiss the complaint.[35]

Question 4: May Requestor's independent-side personnel acquire and use the type of information that RGA did from candidates' vendors to inform their independent expenditure program?

Requestor seeks confirmation that it may do what the RGA did in 2010. Requestor proposes that its independent-side personnel obtain information – including polling data, research, and IDs from the candidates' phone banking and canvass operations – from the candidates' consultants to inform its independent expenditure program. Requestor's independent-side personnel would not interact directly with the campaign to request this information, nor would Requestor share any information about its independent expenditure program with the campaign or the campaign's consultants.

Requestor simply wants to be subject to the same rules as other groups sponsoring independent expenditures. Requestor asks that the Commission confirm that it may permissibly engage in this proposed activity or, alternatively, make clear in its response that the activity in which the RGA engaged in 2010 will not be permitted on a prospective basis. Requestor is entitled to be on the same footing as others participating in the political process.

We respectfully request that the Commission issue an advisory opinion to Requestors as promptly as possible.

Very truly yours,

Marc E. Elias
Jonathan S. Berkon
Rachel L. Jacobs
Counsel for Requestor

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[32] Derrick Depledge, *Complaint Against Aiona Campaign Dismissed*, Honolulu Star Advertiser (June 8, 2011), https://www.staradvertiser.com/breaking-news/complaint-against-aiona-campaign-dismissed/.
[33] *Id.*
[34] Haw. Campaign Spending Comm'n, Democratic Party of Haw. v. Republican Governors Ass'n & Friends of Duke Aiona, No. 10-06, Minutes for June 8, 2011, http://ags.hawaii.gov/campaign/minutes/minutes-for-june-8-2011.
[35] *Id.*

ATTACHMENT B

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Re: Requestor's Response Regarding Draft Advisory Opinion 16-02

Dear Mr. Kam:

We submit this response on behalf of Requestor in response to Hawaii Campaign Spending Commission (the "***Commission***") Draft Advisory Opinion 16-02 (the "***Draft Response***").

The U.S. Supreme Court has said that all organizations enjoy a constitutional right to make independent expenditures. In its request, Requestor asks the Commission how it can structure its personnel and activities to exercise that constitutional right. But instead of answering Requestor's question of *how* it may exercise its right, the Draft Response effectively answers that it *cannot* do so at all. Requestor also asks whether it may engage in the same activity that a similarly situated entity undertook in 2010 and that the Commission did not penalize. The Draft Response does not provide an answer to this question, suggesting instead that Requestor would have to wait until the enforcement process to know whether its activities are legally permissible.

Respectfully, Requestor does not believe that the Draft Response answers the questions that it poses. The Commission is a government agency that regulates speech. As the U.S. Supreme Court has made clear, "[w]hen speech is involved," agencies must demonstrate "rigorous adherence" to two related principles: that "regulated parties should know what is required of them so they may act accordingly" and that "precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[1] To comply with this constitutional directive, Hawaii law offers the Commission a choice. It "may render written advisory opinions upon the request of any [person] as to whether the facts and circumstances of a particular case constitute or will constitute a violation" or "[i]f no advisory opinion is rendered within ninety days ... it shall be deemed that an advisory opinion was rendered and that the facts and circumstances of that particular case do not constitute a violation."[2] The Draft Response

[1] *Fed. Communications Comm'n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012); *see also Yamada v. Snipes*, 786 F.3d 1182, 1187-88 (2015) (citing *Fox Television*).
[2] Haw. Rev. Stat. § 11-315.

does not answer the Requestor's questions; the final opinion issued by the Commission should do so.

We would be happy to set up a tele-conference with all interested parties to discuss any questions raised by the request or this response.

I. Questions 1 and 2

The firewall protocols that Requestor proposes are rigorous and adhere to the firewall safe harbor provision found in the regulations of the Federal Election Commission ("***FEC***"). To summarize:

- There would be no overlap between Requestor's coordinated-side personnel and independent-side personnel. Any individual who served as coordinated-side personnel would not serve as independent-side personnel, and vice versa.

- Coordinated-side personnel and independent-side personnel would be prohibited from communicating with each other (either in writing or verbally) regarding the independent expenditure program.

- Coordinated-side personnel would be barred from conveying any information about a candidates' nonpublic plans, projects, activities, or needs to independent-side personnel.

- Coordinated-side personnel would not have access to the paper or electronic files of independent-side personnel, and vice versa.

- Two separate noncandidate committees, with separate bank accounts, would be established. One committee (the "***traditional PAC***") would be used to make contributions and pay the coordinated-side personnel. A second committee (the "***Super PAC***") would be used to make independent expenditures and pay the independent-side personnel. There would be no transfer or intermingling of funds between the two committees.

In Question 1, Requestor asks whether these protocols suffice to ensure that the *expenditures* of the Super PAC are "independent" within the meaning of Hawaii law. Assuming the answer to Question 1 is "yes," Question 2 asks whether the *expenditures* will remain independent if Super PAC personnel engage in certain recruitment and training activities prior to the commencement of the independent expenditure program. It also asks whether a certain interval of time should pass between these recruitment and training activities, and the commencement of the independent expenditure program.

The Draft Response answers an altogether different question: whether the Super PAC may accept unlimited *contributions* under the *Yamada v. Kuramoto* decision. As we explain below, Requestor does not seek to establish a single "hybrid PAC." It instead seeks to establish two distinct noncandidate committees: a traditional PAC and a Super PAC. Requestor does not ask the Commission to issue an opinion on whether the Super PAC may accept unlimited contributions. Requestor considers that to be a settled question of law, for the reasons set forth below. Instead, Requestor asks that the Commission respond to the questions posted in Question 1 and 2.

A. Hybrid PACs and *Yamada*

In *Carey v. FEC*, a nonprofit organization sued the FEC so that it could legally establish a "hybrid PAC."[3] A hybrid PAC is a *single political committee* with two segregated accounts: one to make contributions to candidates and one to make independent expenditures. The first account is subject to limits and source restrictions on incoming contributions; the second account is not. In the *Carey* litigation, the FEC conceded that it could not stop the nonprofit organization from establishing *two separate political committees* to accomplish the same purpose – one to make contributions (with funds subject to federal limits and source restrictions) and one to make independent expenditures (with unlimited funds). The FEC simply asked that the nonprofit organization take the formal step of establishing those two committees, so that its activities could be more easily disclosed to the public.[4] The court sided with the nonprofit organization, holding that that FEC was legally barred from even requiring the establishment of two separate committees.[5]

Requestor does *not* seek to establish a hybrid PAC. As described above, the Requestor would establish two distinct noncandidate committees. The traditional PAC would raise funds in compliance with Hawaii limits and source restrictions, and would make contributions to candidates. The Super PAC would raise funds in unlimited amounts, and would make only independent expenditures. Each committee would pay its own associated overhead expenses. Per Hawaii law, each committee would have its own segregated bank account and there would be no transfer or intermingling of funds between the committees.[6] Requestor's proposal is precisely what the FEC conceded in the *Carey* litigation as being beyond the reach of permissible state regulation in light of *Citizens United* and *SpeechNow*.

Further, Requestor does not ask the Commission to render an opinion on whether the Super PAC may accept unlimited contributions. Requestor considers that a settled question. In *Yamada*, a

[3] *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121, 136 (D.D.C. 2011).
[4] Defendant's Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction at 36-37, *Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121 (D.D.C. 2011) (No. 11-259).
[5] *Carey*, 791 F. Supp. 2d at 136.
[6] *See* Haw Rev. Stat. § 11-351(a).

federal court held that the Commission may not impose contribution limits on a noncandidate committee that limits its activities to independent expenditures. The Super PAC enjoys the same legal right as the noncandidate committee in *Yamada*. Like the noncanddiate committee in *Yamada*, the Super PAC does not use its funds to make contributions to, or coordinated expenditures with, candidates or party committees. Like the noncandidate committee in *Yamada*, the Super PAC uses its funds solely to make independent expenditures.

The Draft Response suggests that the Super PAC is in a materially different position than the noncandidate committee in *Yamada* because the Super PAC's sponsor, the Requestor, also seeks to maintain a traditional PAC. For this proposition, the Draft Response cites to a Second Circuit decision, *Vermont Right to Life Committee v. Sorrell* ("*VRTL*") – a decision that has no binding effect in the Ninth Circuit – in which the court assessed whether a Vermont statute imposing contribution limits was unconstitutional as applied to an organization claiming to be an independent expenditure-only PAC.[7] The Draft Response suggests that *VRTL* established a broad principle that a single entity may not maintain both a Super PAC and a traditional PAC.

That is a misreading of the Second Circuit's holding. The court, in fact, said the fact that two organizations were committees of the same umbrella organization, "by itself, would not show coordination."[8] The court recognized that "whether a group is functionally distinct from a non-independent-expenditure-only entity may depend on factors such as the overlap of staff and resources, the lack of financial independence, the coordination of activity, and the flow of information between the entities."[9] "[T]o assure that expenditures are in fact uncoordinated," the Second Circuit said that "[s]ome actual separation between the groups must exist."[10] Based on the "total overlap of staff and resources, the fluidity of funds, and the lack of any informational barrier between the entities," the Second Circuit found that Vermont Right to Life Committee - Fund for Independent Political Expenditures ("***VRLC-FIPE***") was "indistinguishable from [Vermont Right to Life Committee, Inc. - Political Committee ("***VRLC-PC***")], a non-independent-expenditure-only group," and thus, "the same limits may constitutionally apply to" VRLC-FIPE.[11]

The situation here is not comparable to what the court found in *VRTL*. Although VLRC-FIPE had a separate bank account from VRLC-PC, VRLC-PC transferred funds to VLRC-FIPE to fund its activities.[12] Here, there would be no transfer of funds between the separate bank accounts of the traditional PAC and the Super PAC. In *VRTL*, the two entities had significant

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[7] *Vermont Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 118, 139 (2nd Cir. 2014).
[8] *Id.* at 143.
[9] *Id.* at 142.
[10] *Id.* at 141.
[11] *Id.* at 145.
[12] *Id.* at 143.

overlap of advisers and membership.[13] Here, Requestor's coordinated-side personnel and independent-side personnel would not overlap at all. Any individual who served as coordinated-side personnel would not serve as independent-side personnel, and vice versa. In *VRTL*, the two entities conducted activity in concert with one another, including co-sponsoring voter guides.[14] In contrast, Requestor would prohibit its coordinated-side personnel and its independent-side personnel from communicating regarding the independent expenditure program.[15] Both personnel would also be prohibited from accessing each other's files and coordinated-side personnel would be banned from conveying certain information to the independent-side personnel.

As we have indicated, the Commission need not address this issue to respond to Requestor's request. But we wish to point out these differences, in order to underscore that *VRTL* is inapposite to this request.

B. The Questions Presented

The cases described above – *Carey*, *Yamada*, and *VRTL* – address the ability of the state to limit *contributions* to political committees that make independent expenditures in the wake of the Supreme Court's 2010 decision in *Citizens United*. But the question presented by Requestor – what steps must be taken by an organization to ensure the independence of its *expenditures* – pre-dates *Citizens United*. Even prior to *Citizens United*, it was common for organizations to make both contributions and independent expenditures, as long as sufficient barriers were in place to ensure that the expenditures were truly independent as a matter of law.

It is an axiomatic principle of campaign finance law that "individuals, candidates, and ordinary political committees [have] the right to make unlimited independent expenditures."[16] In determining whether an expenditure is independent, "the constitutionally significant fact ... is the lack of coordination between the candidate and the source of the expenditure."[17] The U.S. Supreme Court has made clear that the government may not conclusively presume that *all* of a group's expenditures are "coordinated" merely because that group engages in some coordinated

[13] *Id.* at 143-44.
[14] *Id.* at 144.
[15] This restriction would include a prohibition on coordinated-side personnel requesting that independent-side personnel disseminate a particular communication and a ban on coordinated-side personnel being involved in the creation, production, or dissemination of an independent expenditure communication, including "(A) the content of the communication; (B) the intended audience for the communication; (C) the means or mode of the communication; (D) the specific media outlet used for the communication; (E) the timing or frequency of the communication; or (F) the size or prominence of a printed communication, or duration of a communication by means, including broadcast, cable, or satellite.
[16] *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 614 (1996).
[17] *Id.* at 617.

activity with a candidate.[18] At the time, the FEC took the position that "all party expenditures should be treated as if they had been coordinated *as a matter of law*."[19] This was based on the FEC's "empirical judgment that party officials will as a matter of course consult with the party's candidates before funding communications intended to influence the outcome of a federal election."[20] But the Supreme Court expressly rejected the FEC's position, noting that "[a]n agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one" and holding that the expenditures at issue in this case were "independent" because the "advertising campaign was developed by the [party] independently and not pursuant to any general or particular understanding with a candidate."[21] The fact that the party making the independent expenditures, the Colorado Republican Party, also made contributions to and coordinated expenditures with its candidates did not taint the independent nature of the advertising program at issue in the case.[22]

The Draft Response adopts the same constitutionally infirm position that the FEC held prior to the Supreme Court decision in *Colorado Republican Federal Campaign Committee v. FEC*. The Draft Response concludes that the activities of the traditional PAC conclusively mean that "[e]xpenditures made by Requestor's independent-side personnel, would be considered in-kind contributions to, and expenditures by, the supported candidate."[23] The Draft Response goes on to say that "[e]ven if a firewall policy was adopted by Requestor, the communications created, produced, and disseminated by Requestor's independent-side personnel would not be treated as 'independent expenditures' under Hawaii law."[24] In other words, according to the Draft Response, all expenditures made by the Super PAC are conclusively deemed to be "coordinated" (and therefore illegal) even if there is a firewall in place to ensure that candidates, political parties, and their agents had no involvement in the creation, production, or dissemination of the expenditure.

This position is untenable. *Colorado Republican* is explicit that the government may not conclusively deem *all* of a group's expenditures to be "coordinated" simply because the group engages in some coordinated activity. The government must provide some clear mechanism by which a group may exercise its constitutional right to make independent expenditures, while ensuring that those expenditures are not improperly coordinated. Or, put another way, when asked *how* an organization may structure itself to preserve the independence of its communication the program, the answer must be something other than "you cannot." The FEC has recognized that "establishing firewalls and similar screening policies is an effective way to

[18] *Id.* at 614.
[19] *Id.* at 618 (emphasis in original).
[20] *Id.* at 620 (internal quotation marks omitted).
[21] *Id.* at 614, 621.
[22] *Id.* at 614.
[23] Draft Response at 3.
[24] *Id.*

simultaneously protect that right and avoid improper coordination."[25] Requestor's proposal included the establishment and implementation of a firewall that goes beyond what the FEC requires under its own regulations.

The Draft Response counters that the Commission is not bound by *Colorado Republican* because "Requestor is not a political party."[26] But under the Supreme Court's campaign finance jurisprudence, nonparty organizations like Requestor enjoy as much or *more* protection to make independent expenditures than political parties.[27] The Draft Response also suggests that a firewall "does not provide absolute protection for political committees at the federal level," citing the FEC's admonition that a group cannot claim the protection of its firewall if it disregards its strictures.[28] That is true, of course. But the converse is also true: a group *does* enjoy absolute protection if it follows the strictures of its firewall policy.[29] Requestor simply asks the Commission to confirm that the firewall protocols set forth in the request – if they are followed by Requestor – are sufficient to preserve the independence of the Super PAC's contributions. The question of what the Commission would do if the Requestor disregarded the firewall protocols is not presented in the request and need not be addressed.

To summarize: Question 1 asks whether the firewall protocols set forth by Requestor – if they are followed in practice by Requestor – are sufficient to ensure that Super PAC's expenditures are deemed independent under Hawaii law. If they are not, the Commission should explain why they are not, so that Requestor may adopt other protocols to ensure the independence of the Super PAC's expenditures. Question 2 asks whether the Super PAC's personnel may engage in certain recruitment and training activities, or whether those activities would taint the independence of the Super PAC's subsequent expenditures.

II. Question 3

Requestor seeks clarification on several points with respect to Question 3:

- The Draft Response suggests that it is the inclusion of a photograph in a campaign's mailer – as opposed to the mere posting of the photograph on a campaign website – that makes its subsequent use by a Super PAC to be an in-kind contribution.[30] At any point in time, there may be numerous photographs and videos of a candidate publicly available on the Internet and those photographs and videos may not necessarily be used in campaign

[25] Coordinated Communications, 71 Fed. Reg. 33190, 33206 (June 8, 2006).
[26] Draft Response at 4.
[27] *See Carey v. Fed. Election Comm'n*, 791 F. Supp. 2d 121, 131 (D.D.C. 2011); *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 618 (1996).
[28] Draft Response at 3.
[29] 11 C.F.R. § 109.21(h).
[30] Draft Response at 6.

advertisements. Requestor seeks confirmation that a contribution occurs only where the Super PAC uses a photograph that has first appeared in a paid campaign ad (such as a mailer or paid digital ad) and not where the photograph has merely appeared on a campaign's website or social media page.

- The Draft Response does not discuss the use of b-roll footage. Requestor would like to use both b-roll footage and photographs in its communications. Requestor respectfully requests that the Commission address the use of b-roll footage as well as photographs in its final response.

Furthermore, Requestor seeks to clarify federal law on this topic. *First*, although there has been dispute between the FEC commissioners on the question of whether b-roll footage may be incorporated into independent expenditures, at least four of the six current FEC commissioners have opined that the use of publicly available photographs in an otherwise independent communication does not amount to "republication" under federal law.[31] The clarity on that point of law is probably why the issue has not been presented in the form of a rulemaking or advisory opinion. *Second*, Requestor is not asking for a broad "public domain exception" whereby it could use any campaign materials found in the public domain without exception. That exception clearly would swallow the rule. Requestor is simply asking that it be able to use publicly available photographs and b-roll video footage of a candidate that lack a communicative element (such as a campaign slogan or logo) so that it can communicate its own message about a candidate or his or her campaign. These photographs or footage would never comprise more than 50 percent of the Super PAC's independent expenditure communication.

Finally, the position taken in the Draft Response will have an unintended and undesirable effect on Hawaii elections. If Requestor is unable to use photographs or b-roll video footage to support a candidate with Requestor's own independent speech without making a prohibited contribution to the candidate being supported, then Requestor, and others in Requestor's position, will be forced to use photographs or b-roll video footage of candidates it opposes in negative attack ads against those candidates. This will result in an increasingly negative tone in Hawaii elections. Although likely not the intended consequence of the Draft Response, this outcome will surely be the actual result.

[31] See Statement of Reasons of Commissioners Hans A. von Spakovsky & Ellen L. Weintraub, Matter Under Review ("MUR") 5743 (EMILY's List) 4 (2007); *see also* Statement of Reasons of Chair Caroline C. Hunter and Comm'rs. Donald F. McGahn and Matthew S. Petersen, MUR 5879 (DCCC) at 5 (2012) ("[W]holesale copying of candidate materials constitutes republication, but partial use of such materials in connection with one's own protected speech is not legally problematic.").

III. Question 4

In Question 4, Requestor asks whether the Super PAC may request from a candidate's consultant a copy of the campaign's polling data without compromising the independence of its expenditure program. Requestor's independent-side personnel would not interact directly with the campaign to request this information, nor would Requestor share any information about its independent expenditure program with the campaign or the campaign's consultants. This is the protocol that RGA followed in 2010 and that the Commission did not penalize.

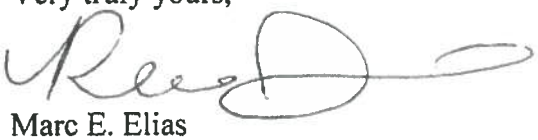
The Draft Response advises Requestor to "be cautious in its reliance upon the Commission's summary dismissal of the complaint in Docket No. 10-06 when planning its future independent expenditure program for Hawaii candidates."[32] Respectfully, that response does not answer Requestor's question as to whether the underlying conduct is legally permissible. It puts Requestor in the unfair position of having to either refrain from engaging in activity that other PACs are doing or to risk adverse enforcement .

Requestor asks that the Commission confirm that it may permissibly engage in this proposed activity or, alternatively, make clear in its response that the activity in which the RGA engaged in 2010 will not be permitted on a prospective basis. If the Commission does not issue a response to the question, then by law, it "shall be deemed that an advisory opinion was rendered and that the facts and circumstances [presented by the question] do not constitute a violation" of Hawaii law.[33]

Again, we would be happy to set up a tele-conference with all interested parties to discuss any questions raised by the request or this response.

Thank you for your consideration.

Very truly yours,



Marc E. Elias
Jonathan S. Berkon
Rachel L. Jacobs

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[32] Draft Advisory Opinion 16-02 at 7.
[33] Haw. Rev. Stat. § 11-315.