HOLTZMANVOGELJOSEFIAKTORCHINSKY PLLC
Attorneys at Law
45 North Hill Drive • Suite 100 • Warrenton, VA 20186

June 13, 2018

Chair Caroline C. Hunter
Vice Chair Ellen L. Weintraub
Commissioner Matthew S. Petersen
Commissioner Steven T. Walther
Federal Election Commission
1050 First Street, NE
Washington, DC 20002

Re: Response of Aristotle International, Inc. to General Counsel's Brief Recommending Probable Cause Finding in MUR 6334

HEARING REQUESTED

Dear Commissioners,

This response to the General Counsel's Brief in MUR 6334, dated February 28, 2018, is submitted by the undersigned counsel on behalf of Aristotle International, Inc. The General Counsel recommends that the Commissioners find probable cause to believe that the Respondent violated 52 U.S.C. § 30111(a)(4) after declaring that Aristotle's Relationship Viewer is a commercial "solicitation tool" that incorporates FEC-sourced "contribution history." This position is based on a deep misunderstanding of the nature and functionality of the Relationship Viewer, and a factual misrepresentation of its capabilities, coupled with an application of the underlying law that departs substantially from Commission and judicial precedent. Furthermore, this matter is materially indistinguishable from the case considered and dismissed in MUR 5625, and the result should be no different.

For the reasons set forth below, the Commissioners should reject the General Counsel's analysis, find no probable cause, and close the file in this matter. We request that the Commission hold a probable cause hearing on this matter so that we may address any other outstanding factual or legal questions.

I. Aristotle's Relationship Viewer

This case represents a second bite at the apple for the Complainant, NGP Software, Inc., which is a competitor of Aristotle that has been abusing the Commission's processes for commercial gain since 2004.[1] This case also appears to be a second bite at the apple for the General Counsel, who advances the same arguments and expansive view of the law that were rejected when the Commission dismissed NGP's last complaint (MUR 5625). The Relationship Viewer that is the subject of this matter may be more robust than the feature at issue in MUR 5625, but the basic functionality remains the same. Three Commissioners described the feature at issue in MUR 5625 as follows:

> Aristotle's Campaign Manager 5 software program has more than 400 features, and the compliance/vetting feature at issue is one of more than 50 new features Aristotle offered as a part of a free upgrade to its existing customers in the spring of 2004. It is the only feature of the more than 400 total features that provides access to any FEC data. And that access is limited to a restricted, non-downloadable subset of limited data that can only be accessed with respect to individuals whose names and addresses are already part of the end-user's pre-existing database. In other words, at issue is a small part of a free upgrade that allows for additional legal compliance that can only be used with a pre-existing list.[2]

The same basic description applies to the Relationship Viewer.

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[1] NGP has used the Commission's enforcement process twice now, along with the advisory opinion process, for the sole purpose of harming a business competitor. Through the Commission, NGP continues to engage in anti-competitive practices.

[2] MUR 5625, Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn ("Controlling SOR") at 2.

A. Aristotle Relationship Viewer – How Does It Work?

Aristotle sells a powerful and full-featured accounting, reporting, compliance, fundraising and data management software package, to political committees throughout the country. The Relationship Viewer is one feature of the larger Aristotle software package.

The Relationship Viewer allows a customer to see "relationships" that exist between individuals *who are already a part of the customer's existing database*. The Relationship Viewer does not obtain any names or contact information from FEC files; rather, it finds and displays links or connections between persons already present in the user's database. For example, "relationships" that may be displayed are based on geographic criteria (shared zip codes or neighborhoods, for instance), consumer data, employment information, political affiliations, or contribution history. This information may be useful, for example, in the context of voter persuasion efforts – residential, employment, and other shared interest links tend to show voters who may be persuaded by other linked voters, or who may respond to similar types of appeals. (Commissioners may recognize this practice of grouping individuals according to shared characteristics as a component of "microtargeting.") Aristotle's software is *not* used only by fundraisers and FEC compliance professionals. The Commission recently acknowledged that contribution information is useful beyond the fundraising context. In Advisory Opinion 2014-07, the requestors explained:

> By supporting candidates that share their policy preferences and personal interests – and by screening out those who do not – *campaign contributors generate large amounts of information* on where candidates stand on a specified set of issues. Crowdpac's model is able to make inferences about issue positions of both candidates and donors by analyzing the patterns of which donors support which candidates.[3]

[3] Advisory Opinion Request 2014-07 at 2 (emphasis added). Vice Chair Ravel noted that "the information [Crowdpac is] providing . . . has value in and of itself." Open Session consideration of Advisory Opinion Request 2014-07, August 14, 2014, https://www.fec.gov/resources/audio/2014/2014081402.mp3 (remarks of Vice Chair Ravel)..

The specific feature at issue in this matter allows the user to: (1) look up an individual name in the user's existing database; (2) see the "first degree" relationships generated from other information already in the user's database; and then (3) click on one of the displayed names to see contribution history information for that individual. This contribution history information is the *only* information drawn from FEC reports, and it is *not* saved or otherwise integrated into the user's database; it is simply viewed by the user as a one-time event.[4] "Relationship Viewer searches are in fact stand-alone results that cannot be exported or downloaded and, therefore, cannot be integrated or sorted by the user for such impermissible uses."[5] The Relationship Viewer does not permit a user to export or download the user's own list with the Commission's contribution history information appended.[6] The Relationship Viewer does not download or export lists of individuals, and it is not a list-making device.

In other words, by hovering over or clicking on an individual's name, the Relationship Viewer displays the same information that the user could see by opening a new browser window on his or her computer and performing an individual contributor search on the Commission's website or on one of the many other websites that make this information readily available. Donor contribution history information is readily available at sites such as the Center for Responsive Politics' free "Donor Lookup" webpage.[7] In addition, Aristotle gives away – for free

[4] MUR 6334, Response of Aristotle International, Inc. (Sept. 13, 2010) at 3 ("the FEC data cannot be used to download or export a list of individuals for targeting solicitations"); *id.* at 17 ("[v]iewer results cannot be exported or downloaded" and "[t]he FEC data is not integrated or matched into the client's database").

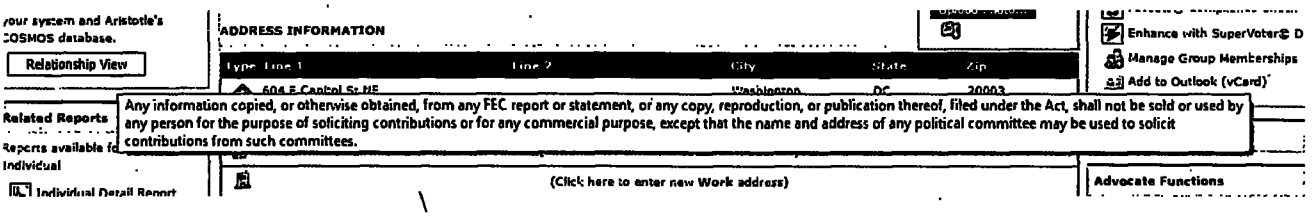
[5] *Id.* at 23.

[6] *See id.* at 14 ("the Relationship Viewer results cannot be exported or downloaded"); Response at 22 ("the software as ultimately implemented does not and never did export or allow downloading of any data, including FEC data, from the Viewer"); *id.* at 17 ("FEC data is not integrated or matched into the client's database").

[7] *See* https://www.opensecrets.org/donor-lookup.

– the exact same contribution history information that is used in the Relationship Viewer at its "Contributor Data Lookup" webpage.[8] The Relationship Viewer is simply a convenience feature that does not increase the cost of a subscription to Aristotle's software.

Warnings about the permissible uses of FEC data appear throughout Aristotle's software, including when the Relationship Viewer is used. An example of the warning used appears below.



According to the Complainant and the General Counsel, the sole conceivable use for the Relationship Viewer is to solicit contributions. This argument ignores a rather important fact – that any political committee that uses the Relationship Viewer can *already* solicit any name that appears in the Relationship Viewer because those names are in the user's existing database.[9] To the extent that any "list" is at issue, it is the user's own list, and, as noted, the Relationship Viewer does not supplement any user's list with any new names from the Commission's database.[10] The very idea that the Relationship Viewer "is designed as a solicitation tool" is misguided. The Relationship Viewer does not display any contact information,[11] it cannot

[8] *See* http://aristotle.com/fec-lookup/.

[9] *See* MUR 6334, Response of Aristotle International, Inc. at 14 ("[T]he 360 Relationship Viewer only searches the FEC files for contribution information for individuals already in the committee's database; i.e., the 360 Relationship Viewer does not extract the names of individuals from the FEC files.").

[10] *See id.* at 21 ("searches cannot be initiated unless the identity of an individual is already in the committee's database, and the search results never provide the identity of individuals from the FEC file").

[11] *See* Letter of Stephen E. Hershkowitz to William Powers, June 20, 2014, at 2 ("the Relationship Viewer display does not contain contact information").

generate new prospect lists, and there is absolutely no list selling, list brokering, or even list enhancing that occurs within the Relationship Viewer.

B. As in MUR 5625, Aristotle's Advertising Materials Are Not Relevant to The Underlying Legal Question

The General Counsel places heavy emphasis on Aristotle's advertising materials, just as it did in MUR 5625.[12] FECA does not purport to regulate commercial advertising, and Aristotle's advertising is irrelevant to the Commission's consideration of this matter. The sole issue is whether the Relationship Viewer – in terms of its actual capabilities and uses – violates Section 30111(a)(4). If the Commission focuses on how the Relationship Viewer works and what it does, it will find that the Relationship Viewer is permissible under the long-held understanding of the Act that is reflected in both judicial and Commission precedent.

As explained in Aristotle's initial Response, advertising for Aristotle's software "does not attempt to provide a full description, and that is not the purpose of the advertising. The purpose is to pique the interest of political committees and have them ask to talk to one of Aristotle's highly trained sales representatives."[13] By way of comparison, a recent television advertisement emphasized the new Jeep Grand Cherokee's "advanced headlights" and "Napa leather-trimmed seats." Neither feature is integral to the performance of an automobile – they are simply distinguishing selling points. Similarly, "Aristotle's advertising of [its] advanced features does not alter the heart of the Aristotle 360 software, which is accurate accounting, report generation and overall data management."[14]

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[12] *See* MUR 6334, General Counsel's Brief at 4-8; MUR 5625, General Counsel's Brief at 7-11.

[13] MUR 6334, Response of Aristotle International, Inc. at 10.

[14] *Id.* at 10.

C. The Relationship Viewer is Not a "Solicitation Tool"

The General Counsel refers to the Relationship Viewer as a "solicitation tool" – the same term the General Counsel adopted late in the proceedings in MUR 5625.[15] Much like the General Counsel's fixation on Aristotle's advertising, this term is also a distraction from the actual issue. The term "solicitation tool" does not appear in the Commission's many advisory opinions issued on Section 30111(a)(4). As far as we have found, the term was used only once in enforcement matters prior to MUR 5625, in a factually inapposite matter, to describe a list of names and addresses taken from a committee's FEC report.[16] The judicial decisions cited here and in the General Counsel's Brief do not use the term. "Solicitation tool" is not a legal term of art and appears to have been utilized here by the General Counsel precisely because it is a loaded term that reflects a *legal* conclusion.

The General Counsel does *not* claim, however, that the Relationship Viewer is a "solicitation tool" in the sense that it somehow produces lists of contributor name and contact information from FEC data, or even directly aids or facilitates solicitation. Instead, the General Counsel theorizes: "Though a given person's relationships might, in the abstract, have other uses to a political committee besides solicitation, *the prominent display of contribution histories embedded on the visualization map couches the meaningfulness of the relationship in terms of*

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[15] The term "solicitation tool" first appears in General Counsel's Report #3 in MUR 5625, and was also used in the General Counsel's Brief in that matter. The term does not appear to have been used during the oral probable cause hearing.

[16] The General Counsel's Report in MUR 2140, at page 3, refers to "the source and number of *lists or names obtained from the disclosure reports* for use as a solicitation tool" (emphasis added). In MUR 2140, the Respondent was caught soliciting a committee's pseudonyms (salt names) after sending fundraising letters to the pseudonyms. The General Counsel very clearly used the phrase "solicitation tool" to refer to an *actual list of names* believed to have been taken from an FEC report. There is no indication whatsoever that the phrase was used to describe any device other than a list of names and addresses.

the target's giving potential."[17] The General Counsel does not argue that this "visualization map" is a list that is being been sold (it is, of course, derived from the user's existing list and displays no contact information), but rather, the "visualization map" displays information in a way that allegedly causes the user to think of "the target's giving potential." This description of what constitutes a "solicitation tool" is so open-ended and subjective – and entirely dependent on the viewer's presumed reaction to the displayed information – that it is just another way of saying that no commercial product may ever use any FEC-derived information in any way. Where Section 30111(a)(4) once prevented "the copying and use of names and addresses of individual contributors,"[18] today the General Counsel claims the provision prohibits displaying publicly-available information in a way that "couches the meaningfulness of the relationship in terms of the target's giving potential," even though that information "might, in the abstract, have other uses to a political committee besides solicitation."

The General Counsel is proposing to prohibit a software feature that requires a new term of art to describe it and that is described in terms that have obviously been concocted to fit the needs of this particular case. This overbroad and ambiguous term – "solicitation tool" – does not appear in the Commission's cases, statutes, regulations, or Advisory Opinions – the definition the General Counsel has given it cannot possibly pass for an acceptable legal standard. The Commission has never before told the public that it is prohibited from producing devices, such as "visualization maps," that use contribution history information to "couch the meaningfulness of relationships in terms of a person's giving potential." As the Supreme Court explained:

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which

[17] *Id.* at 9 (emphasis added).

[18] Advisory Opinion 1981-38.

either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou* v. *Jacksonville*, 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'" (quoting *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939) (alteration in original)). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States* v. *Williams*, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). It requires the invalidation of laws that are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid.* As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See *id.*, at 306.

Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.

FCC v. Fox TV Stations, Inc., 567 U.S. 239, 253-254 (2012).

The Relationship Viewer is *not* a "solicitation tool" – it is a single feature found within a larger accounting, reporting, voter contact, data management, fundraising and compliance software package. How the Relationship Viewer "couches the meaningfulness" of relationships between existing data points in a user's database is not a matter that is in any way addressed by Section 30111(a)(4). What is legally relevant is the fact that the Relationship Viewer has no list making, list brokering, or list enhancing capabilities. Provided the Commission does not create and apply a new standard in this matter, the Relationship Viewer does not violate any known definitions, standards or precedent. The General Counsel's framing of this case acknowledges this, and the General Counsel resorts to the term "solicitation tool" precisely *because* the

"Relationship Viewer does not replicate traditional list brokering."[19] Furthermore, the General Counsel fails to adequately explain why it does not follow the Commission's dismissal of MUR 5625 eight years ago (discussed in more detail below) when that matter is directly on point.

D. Aristotle's Use of Contributor Information Is Not Unique

Aristotle is only one of many companies that incorporate limited contributor information into a commercial product that provides customers with information. As discussed in more detail below, the Commission recently approved such use in Advisory Opinion 2014-07 (Crowdpac). WealthEngine aggregates data from dozens of sources, including FEC reports,[20] "to help fundraising, marketing and business development professionals create strategies to extend their reach and build their prospect pipeline."[21] The company "work[s] with nonprofits, hospitals, institutions of higher education, political campaigns and advocacy groups of all sizes as well as luxury organizations and financial services firms to help them effectively identify individuals with the net worth, income, lifestyle and affinity to become their next top donor or customer."[22]

iWave provides access to FEC contributor information through its fundraising platform to provide "context for your research efforts."[23] According to iWave, "[f]inding your prospective donor has contributed politically suggests he/she is *more likely to be charitable.*" iWave further

[19] MUR 6334, General Counsel's Brief at 17.

[20] WealthEngine, US Data Sources, http://wealthengine.force.com/pkb/servlet/fileField?id=0BE0d000000bt1X. ("This data source provides information on political campaign/committee contributions. The data is taken from financial disclosure reports filed by House, Senate, and Presidential campaigns, parties, and PACs from 1993 to the present.")

[21] WealthEngine, About, https://www.wealthengine.com/about.

[22] *Id.*

[23] iWave, *Finding New Donors with Political Contributions*, https://www.iwave.com/2017/09/14/prospecting-with-politics/.

explains that "[p]olitical giving records can help round out a prospect's profile by indicating both capacity to give and affinity to certain causes."[24] iWave includes the following disclaimer regarding customer use of FEC data:

> According to Federal Election Commission (FEC) privacy regulations, US political giving data found within Prospect Research Online (PRO) cannot be used for any commercial purposes -*including the solicitation of political or charitable donations.*
>
> iWave offers third-party political giving data at no charge to provide context for our clients' fundraising efforts, but not for their direct use in soliciting contributions of any kind. To learn more about this restriction, please visit the FEC's page on Sale and Use of Campaign Information.[25]

L2 provides access to both consumer data and Commission contribution history data and advises customers that "[t]he primary difference is that it is legal to reach out directly to the privately obtained donor data vs. the publicly available Federal Election Commission Data."[26] Other examples include Donor Search,[27] and Blackbaud.[28] APRA, which is a trade association for professional fundraisers, provides the following advice on the use of Commission data while engaging in "prospect research":

> Using FEC data in our sector is this: we are restricted from soliciting contributions from people FOUND via the FEC data. So the data cannot be used to generate prospects. If the person's name is already on file/in an organization's database, then, yes, the data from FEC can be used.[29]

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[24] iWave, *Political Contributions*, https://www.iwave.com/products/prospect-research-online/pro-data/political-contributions/.

[25] *Id.*

[26] L2, *L2 email, phone and address matched donor data*, http://www.l2political.com/blog/2017/09/05/l2-email-phone-and-address-matched-donor-data/.

[27] Donor Search, https://www.donorsearch.net/wealth-screening-definitive-guide/.

[28] Blackbaud, *Fundraisers' Guide to Data Sources*, https://www.blackbaud.com/files/resources/downloads/Whitepaper_TA_FundraisersGuideToDataSources.pdf.

[29] APRA, *Ethics Toolkit* (rev. June 8, 2017), www.aprahome.org/d/do/4885.

The widespread use of Commission contributor information for informational purposes within commercial products demonstrates that the state of the law is generally understood as Chairman Goodman explained in 2014, when he stated that using FEC data to inform the public is permissible, and is not "what is contemplated to be prohibited under the Act, which is actually soliciting the people who show up on the reports or selling the [FEC] information as a commercial product in and of itself."[30]

And while Aristotle does not, and does not propose to, sell Commission contributor data, other entities quite literally download FEC information and sell it to customers. For example, the Center for Responsive Politics provides "customized research" for "a modest fee." The Center for Responsive Politics advertises on its website, OpenSecrets.org, a "Custom Data Request" service, and explains: "We have data on federal campaign finance going all the way back to 1979; lobbying since 1998 and personal financial disclosure data since 2004. We can provide you with the information you need in the form of standard reports, raw data or specialized research."[31] Directly below this language are buttons to "make a request" and "make a payment," and below these buttons is a disclaimer that advises, "Federal law prohibits the use of contributor information for the purpose of soliciting contributions or for any commercial purpose."[32]

[30] Open Session consideration of Advisory Opinion Request 2014-07, August 14, 2014, https://www.fec.gov/resources/audio/2014/2014081402.mp3 (remarks of Chairman Goodman).

[31] Center for Responsive Politics, *OpenSecrets Custom Data Request*, https://www.opensecrets.org/contracts/.

[32] *Id.*

II. The Commission Resolved This Case In 2010 When It Dismissed MUR 5625

In 2010, the Commission dismissed a matter that considered a predecessor to the Relationship Viewer. The General Counsel claims the present case is distinguishable from MUR 5625.[33] The General Counsel is incorrect. The FEC report information that the C/V Feature and the Relationship Viewer utilize are exactly the same, and the manner in which the two functions display that information is materially indistinguishable. A different result in these two cases would introduce an inexplicable inconsistency into the Commission's enforcement precedent.

A. The Relationship Viewer is Materially Indistinguishable from the C/V Feature

The General Counsel's contention that the Relationship Viewer is distinguishable from the C/V Feature rests on two claims. First, the General Counsel claims the Relationship Viewer serves no "legitimate" compliance or vetting purposes. Second, the General Counsel claims the "relationship-mapping functionality," in and of itself, requires a different outcome. Both claims are addressed below.

1. Like the C/V Feature, the Relationship Viewer Has Legitimate Compliance, Vetting, and Informational Purposes

The General Counsel claims that "[t]here do not appear to be any legitimate compliance or vetting purposes for displaying the contribution histories of a given person's relationships."[34] This claim directly contradicts the controlling Statement of Reasons in MUR 5625, in which three Commissioners found that "there are legitimate compliance reasons why it is beneficial for a committee to have limited access to the sort of data Aristotle is providing."[35] The controlling

[33] *See* MUR 6334, General Counsel's Brief at 9 ("Relationship Viewer is thus distinguishable from the feature in MUR 5625").

[34] MUR 6334, General Counsel's Brief at 9.

[35] MUR 5625, Controlling SOR at 8.

block explained that the feature at issue in MUR 5625 "lets the user know how much a person has already contributed, and thus avoids the situation of inadvertently soliciting and/or accepting a contribution that would exceed the limitations of the Act, and could lead to an excessive contribution."[36] The same is true of the Relationship Viewer, and demonstrates a "legitimate compliance and vetting" purpose, to the extent one is even required to be demonstrated. The controlling Commissioners also explained that even if one were to use the information to "know precisely how much it could legally solicit from a contributor," "this is not its sole function, and does not convert what is otherwise a compliance function into a 'sale' or 'use.'"[37] In other words, the compliance and vetting purposes of which the General Counsel cannot conceive have been supplied by the Respondent and were previously acknowledged and accepted by three Commissioners whose views were set forth in the controlling Statement of Reasons. Furthermore, neither the Act nor the Commission's regulations *require* any person to provide the Commission with a "legitimate compliance and vetting" explanation for an activity that does not otherwise violate Section 30111(a)(4), and the perceived absence (at least in the view of the General Counsel) of such an explanation cannot create a violation. While the General Counsel's claim that the Relationship Viewer has no "legitimate compliance and vetting" purpose is factually incorrect and ignores the controlling Statement of Reasons, it is also legally irrelevant because it reverses the burden of proof by forcing the Respondent to explain itself and prove its innocence.

[36] *Id.* at 5-6. Compliance with the individual biennial aggregate contribution limits is no longer an issue.

[37] *Id.* at 6 n.22.

Assume for the sake of argument, however, that the General Counsel is correct and there is no "legitimate compliance or vetting purposes for displaying the contribution histories of a given person's relationships."[38] It does not follow that the Relationship Viewer can only constitute illegal list brokering. Regardless of whether the General Counsel can imagine "legitimate compliance or vetting purposes" for the Relationship Viewer, the fact remains that the Relationship Viewer *does not* copy names and addresses from FEC reports, *does not* generate lists of prospects, and *does not* enhance existing lists by appending FEC report information. Or, as the General Counsel notes, the "Relationship Viewer does not replicate traditional list brokering."[39]

The General Counsel argues that the "Relationship Viewer is designed for the purpose of identifying 'those who may likely be positively disposed to contributing to the user's organization.'"[40] The Relationship Viewer highlights individuals who are already in the user's database and whom the user may already solicit; it can be safely presumed that these individuals "may likely be positively disposed to contributing," and the user already knew this without benefit of the Relationship Viewer. The General Counsel also claims that the Relationship Viewer "presents data in a manner that is designed to assist clients with solicitation and displays their contact information."[41] The second portion of this claim is critical to the General Counsel's case and is factually incorrect – contact information is *not* displayed within the Relationship Viewer. Displaying the contribution history of those in the user's own existing database, only in a viewable form that cannot be exported or otherwise saved or preserved within the software,

[38] MUR 6334, General Counsel's Brief at 9.

[39] *Id.* at 17.

[40] *Id.* at 10.

[41] *Id.* at 12.

does not expand the universe of individuals that may be solicited by the user and does not "assist clients with solicitation."

The Relationship Viewer does not make use of FEC contributor information in a way that the Commission has previously found impermissible. No matter how the General Counsel chooses to describe the function at issue, it is *not* list-brokering or list-selling, it has no list-enhancing capabilities, and Section 30111(a)(4) does not prohibit it unless the Commission decides to change the longstanding meaning of the sale or use restriction in this enforcement matter. Such an interpretation would overturn long-established Commission precedent and infringe on the First Amendment rights of the universe of those who publish or otherwise make FEC data available.

2. Any Factual Differences Between the Relationship Viewer and the C/V Feature are Immaterial

The General Counsel also seeks to distinguish the Relationship Viewer from the C/V Feature by noting an entirely trivial and immaterial factual distinction. According to the General Counsel, "the feature in MUR 5625 . . . returned the contribution history of only one person at a time with no relationship-mapping functionality," whereas the Relationship Viewer "return[s] the contribution history of only one person at a time," but with relationship-mapping functionality.[42] If this distinction actually warrants a different legal outcome, then the General Counsel's position must be that contribution history information may be used, just not in conjunction with this particular relationship-mapping function. The General Counsel does not explain the basis for this conclusion, which makes no sense on its face and fails to acknowledge the underlying legal analysis in the controlling Statement of Reasons.

[42] *Id.* at 9.

B. The General Counsel Dismisses the Legal Analysis of the Controlling Opinion in MUR 5625

The General Counsel's discussion of MUR 5625 is incomplete and dismissive of the views and conclusions of the controlling block of Commissioners. The General Counsel asserts that "the Commission split 3-3 at the probable cause to believe stage, in part, over whether the feature was a solicitation tool or a bona fide compliance and vetting feature."[43] The Commissioners did not, in fact, split on the issue of whether the C/V feature was a "solicitation tool." The controlling Statement of Reasons does *not* use that term except in a footnote that quotes the General Counsel only for the purpose of disputing an allegation made by the General Counsel.[44] Instead, the controlling Statement of Reasons focused on *how* Commission data could be accessed within the C/V feature, without resort to the General Counsel's misleading terminology, and assessed whether that use of data was a prohibited "sale or use" under the Act. The controlling Statement did not adopt the term "solicitation tool" or in any way agree that the Act or Commission regulations address "solicitation tools." In any case, the General Counsel focuses on what was, at best, a relatively inconsequential side argument. The legal rationale in the controlling Statement of Reasons is substantially more complex than the General Counsel suggests, and the disagreement among the Commissioners was not reducible to differing views of the facts of the case.

The controlling Statement of Reasons begins by noting that "the complainant [in MUR 5625] based its complaint solely upon one prior Commission advisory opinion (AO 2004-24) that the complainant itself sought and which was materially distinguishable from the facts at

[43] *Id.* at 10 n.34.

[44] *See* MUR 5625, Controlling SOR at 13 n.63 ("OGC erroneously alleges a 'separate and distinct violation' 'when Aristotle touted the CM5 upgrade's use as a solicitation tool . . . .").

issue here."[45] Three Commissioners recognized that there was no precedent for finding a violation other than a single advisory opinion that the complainant had manufactured to "use[] as a sword" against a business competitor. This has not changed, and in the interim, MUR 5625 was dismissed.

Next, the controlling block explained that "OGC's probable cause recommendation was based upon the notion that virtually any sale of any FEC data constitutes a *per se* commercial use, thus violating the Act."[46] Three Commissioners rejected this view because "reading the Act this way is at odds with the legislative history, court cases, and prior Commission matters."[47] The General Counsel makes no effort to address the controlling block's legal analysis, and instead reiterates the same view of the law that failed to garner a majority vote in 2010.

The controlling Statement explains three Commissioners' legal rationale succinctly:

> The statute, the regulation, and the legislative history show that not all uses of FEC data are banned. Instead, Congressional concern centered on two specific problematic uses of disclosed information: (1) that list brokers would simply copy names and contributors directly from the reports and then sell those names to third parties for solicitation purposes; and (2) that commercial businesses would solicit political contributors to a degree that could constitute harassment. Thus, as Aristotle correctly observes, "Congress intended the term 'for commercial purposes' to apply to the sale of lists of *names* by list brokers for purposes of prospecting and targeted soliciting." Aristotle is not copying names and addresses from FEC reports and selling them to its customers. The compliance/vetting feature only provides the contribution history of those already in a customer's *existing* data base. And since Aristotle is not selling new names and contact information, there is no threat of "all kinds of harassment" that was of concern when this amendment was adopted.[48]

[45] MUR 5625, Controlling SOR at 1-2; *see also id.* at 5 n.21.

[46] *Id.* at 2.

[47] *Id.*; *see also id.* at 6.

[48] *Id.* at 8 (footnotes omitted) (emphasis in original).

The controlling block then noted that "[t]here is no evidence that the data was used in a manner inconsistent with the purpose of the sale or use prohibition, and there are legitimate compliance reasons why it is beneficial for a committee to have limited access to the sort of data Aristotle is providing."[49] These observations are as true today as they were in 2010.

III. The General Counsel's Position Departs From Applicable Precedent in an Effort to Expand the Scope and Meaning of the Sale and Use Restriction

The General Counsel's legal position departs substantially from applicable precedent and rests on three mistaken conclusions.

- *First*, the General Counsel claims that the sale or use restriction applies to all "contribution data" equally, without recognizing that contributor names and addresses have long been treated differently than contribution history and other information.
- *Second*, the General Counsel advances a broad interpretation of Section 30111(a)(4) that extends far beyond list brokering to include any "conduct [that] implicates the animating purpose of the sale and use restriction."
- *Third*, the General Counsel takes the position that all non-media commercial uses of report information are prohibited and that the inclusion of any FEC data into any product that is sold for legal purposes is prohibited in virtually all cases.

A. The General Counsel Fails to Acknowledge That the Sale and Use Restriction Targets Names and Addresses

The Relationship Viewer does not extract any names or addresses from the Commission's report database, and only displays contribution history information from that database, one contributor at a time. In order to avoid problematic precedent, the General Counsel claims that

[49] *Id.*

"the source of names used by the Relationship Viewer is not dispositive to the sale and use analysis which instead turns on the impermissible use of contribution histories obtained from the Commission's database."[50] This uncited assertion has no basis whatsoever, and a review of both Commission and judicial precedent makes this perfectly clear.

1. Commission Advisory Opinions Focus on the Use of Individual Contributor Names and Addresses

For decades, the Commission's focus has been on the sale and use of *names and addresses* in list brokering scenarios, and, contrary to the General Counsel's assertions, the Commission has long permitted the commercial use of contribution amount and other financial information. In Advisory Opinion 2014-07 (Crowdpac), a unanimous Commission noted the "long line of advisory opinions in which the Commission has approved proposals to sell or use information from reports filed with the Commission where that information did not include *the names and addresses of individual contributors*."[51]

Advisory Opinion 2014-07 approved a use of FEC contributor data that is strikingly similar to the manner in which Aristotle's Relationship Viewer uses contributor data. Crowdpac's "proprietary algorithm" analyzes "the contribution histories of individuals who have contributed to particular candidates, including any other candidates to whom those contributors have given."[52] The Commission approved this use, as well as a request to "display on its website the names, cities, and states of individual contributors from Commission reports for the purpose of explaining the functionality of its algorithm," meaning the proposal specifically sought to identify individuals who contributed to the same candidates. This is exactly the same "link"

[50] MUR 6334, General Counsel's Brief at 3 n.8.

[51] Advisory Opinion 2014-07 (Crowdpac).

[52] *Id.* at 9.

between contributors that the Relationship Viewer displays, although in the case of the Relationship Viewer, the links are not displayed on a public website and are limited to individuals already in the user's database.

According to the requestor, the Crowdpac "algorithm is able to make inferences about issue positions of both candidates and contributors by analyzing the patterns of which contributors support which candidates."[53] Similarly, the Relationship Viewer "analyzes patterns" found among contributors, albeit only within a user's existing database. In Advisory Opinion 2014-07, the Commission specifically approved Crowdpac's proposed "analysis of Commission data without public identification of contact information for individual contributors."[54] Again, this is exactly what the Relationship Viewer does – it performs an analysis of information, including Commission contribution history information, "without public identification of contact information for individual contributors."

The General Counsel's position in this matter ignores the Commission's conclusions in Advisory Opinion 2014-07 (Crowdpac), which unanimously approved the use of Commission-sourced contributor data, in connection with a contribution platform, where the use of that data served informational purposes and did not "entail disclosing individual contributors' contact information."[55] In other words, *after* deciding MUR 5625, the Commission unanimously approved an undeniably commercial use of contributor data within a platform designed to generate contributions to candidates. The Vice Chair noted that Crowdpac's proposal served the "salutary purposes" of providing more information to the public which "fulfills what this

[53] *Id.* at 2

[54] *Id.* at 10.

[55] *Id.*

Commission is all about."[56] Chairman Goodman agreed, and also explained that he relied on the legal distinction between "commercial use in order to generate solicitations versus selling a service which is an informational service to individual voters and citizens that empowers them."[57] Commissioner Goodman explained that the proposal, notwithstanding the fact that Crowdpac, which is largely a contribution platform, "helps citizens make some sense of the data on the FEC website."[58] Finally, Commissioner Goodman stated that the request did not implicate the sale or use prohibition, which is directed to two practices: "actually soliciting the people who show up on the reports or selling the information as a commercial product in and of itself."[59] No Commissioner objected to this summary of the law.

In Advisory Opinion 2014-07, the Commission explained that:

> Crowdpac may display on its website the names, cities, and states of individual contributors drawn from Commission reports . . . [b]ecause this limited use of contributor data is simply meant "to promote . . . the transparency of political information" provided by Crowdpac, and because Crowdpac will not reveal contact information, such as phone numbers, street addresses, or email addresses.[60]

Discussion of this aspect of Advisory Opinion 2014-07 is conspicuously absent from the General Counsel's Brief, which misrepresents the opinion as a decision that merely "permitted the sale and use of contribution data when displayed in a non-individualized, aggregate form in a product unrelated to solicitation."[61] Like Crowdpac, the Relationship

[56] Open Session consideration of Advisory Opinion Request 2014-07, August 14, 2014, https://www.fec.gov/resources/audio/2014/2014081402.mp3 (remarks of Vice Chair Ravel).

[57] *Id.* (remarks of Chairman Goodman).

[58] *Id.*

[59] *Id.*

[60] Advisory Opinion 2014-07 (Crowdpac) at 11.

[61] MUR 6334, General Counsel's Brief at 13 n.49.

Viewer utilizes contributor information in a way that provides more information to the public. The General Counsel's conclusions and recommendations are inconsistent with the Commission's unanimous decision in Advisory Opinion 2014-07.

Advisory Opinion 2014-07 did not depart from earlier Commission precedent, although it certainly cast doubt on the approach taken by the General Counsel in MUR 5625. Decades earlier, the Commission explained, "[t]he prevention of list brokering, *not the suppression of financial information*, is the purpose of 2 U.S.C. § 438(a)(4) and 11 CFR 104.15."[62] In a 1981 advisory opinion, the Commission wrote:

> Specifically, it appears from the legislative history of the 1979 Amendments to the Act, that a commercial vendor may compile information from FEC reports for the purpose of selling that information but that the prohibition on the copying and use of names and addresses of individual contributors is crucial and so was maintained.[63]

In a series of advisory opinions issued from 1986 – 1998, the Commission used the following language almost verbatim: "The Commission has previously stated that the principal, if not sole, purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their *names* sold or used for commercial purposes."[64]

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[62] Advisory Opinion 1980-78 (Richardson) (emphasis added).

[63] Advisory Opinion 1981-38 (CAMPAC Publications); *see also* Advisory Opinion 1980-101 (Weinberger) (same); Advisory Opinion 1983-44 (Cass Communications) (same).

[64] *See* Advisory Opinion 1986-25 (Public Data Access, Inc.) (emphasis added); *see also* Advisory Opinion 1989-19 (Johnson) ("Based on the legislative history of the Act, the Commission has previously explained that the principal purpose of this restriction is the protection of individuals who make contributions to political committees from having their *names* used for commercial purposes, not the suppression of financial information.") (emphasis added); Advisory Opinion 1991-16 (Feigenbaum) ("The Commission has previously stated that the principal purpose of restricting the sale or use of information copied from reports is the protection of individuals who have contributed to political committees from having their *names* sold or used for commercial purposes.) (emphasis added); Advisory Opinion 1995-05 (14th District TRIM Committee) ("Based on the legislative history of the Act, the Commission has previously stated that the principal purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their *names* sold or used for commercial purposes.") (emphasis added); Advisory Opinion 1995-09 (NewtWatch PAC) ("Based on the legislative history of the Act, the Commission has previously stated that the principal purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their *names* sold or used for commercial purposes.") (emphasis added); Advisory Opinion 1998-04 (White Oak Technologies, Inc.) ("Based on the legislative history of the Act, the

In Advisory Opinion 1980-101 (Weinberger), the Commission approved a request from an individual who sought to use FEC report data to increase the value of a commercial list. The Commission approved a request to "publish and sell a directory of comprehensive information concerning Political Action Committees" that "would facilitate coordination among PACs and help candidates better target their funding requests.[65] The directory would not, however, identify individuals who made contributions to the listed PACs."[66] The requestor asked "what, if any information that PACs supply in reports to the Commission which is then published in FEC documents may be commercially republished and under what conditions."[67] In response, "the Commission conclude[d] that, *except for information identifying individual contributors*, any of the information found in FEC documents or documents filed with the Commission may be used in the subject publication."[68]

In 1981-38 (CAMPAC), a commercial publisher of a newsletter proposed to use information derived from FEC reports "to provide leads for news articles ... and *for solicitation of* both information and *subscriptions*."[69] The Commission noted that the request sought to use mainly information from Schedule B for solicitation purposes. The Commission approved the

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Commission has previously stated that the principal purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their *names* sold or used for commercial purposes.") (emphasis added).

[65] Advisory Opinion 1980-101 (Weinberger).

[66] *Id.*

[67] *Id.*

[68] *Id.* (emphasis added).

[69] Advisory Opinion 1981-38 (CAMPAC).

request because it did not seek to use "the *names and addresses* of any contributors to any campaigns."[70]

In Advisory Opinion 1989-19 (Johnson), the Commission wrote: "You have stated that you will only market copies of report pages that do not contain the names of individual contributors. The Commission concludes that nothing in the Act or Commission regulations prohibits your proposed activity."[71] The Commission appears to have allowed the requestor to sell copies of FEC report pages consisting of the exact same contribution information that the Relationship Viewer allows a user to access.

Advisory Opinions 1980-101, 1981-38, and 1989-19 are not dead letter law, and, as noted above, the Commission approvingly cited them in Advisory Opinion 2014-07.[72] Since the Commission's earliest days, the agency has consistently applied Section 30111(a)(4) to restrict the sale and use of the "names and addresses" of individual contributors. In MUR 5625, three Commissioners concluded that "the application of 2 U.S.C. § 438(a)(4) has consistently been limited to the sale and use of *contributor names and contact information* to prevent list brokering."[73]

[70] *Id.* (emphasis added). In 1983, the Commission described the holding in Advisory Opinion 1981-38 as follows: "In this opinion, a publisher was permitted to use information contained in candidate filings with the FEC, *excluding the names and addresses of individual contributors*, to provide leads for news articles and other information for use in a newsletter and to solicit subscriptions." Advisory Opinion 1983-44 (Cass Communications) (emphasis added).

[71] Advisory Opinion 1989-19 (Johnson).

[72] The Commission has issued two advisory opinions applying Section 30111(a)(4) since 2014. Both approved the use of aggregated data drawn from FEC reports. In Advisory Opinion 2015-12 (Ethiq, Inc.), the Commission explained that "[a]ggregated data and data that does not contain individual contributors' contact information does not implicate the privacy concerns at the heart of section 30111(a)(4)." Similarly, in Advisory Opinion 2017-08 (Point Bridge Capital, LLC), the Commission noted that the "[s]ale and use of Commission data that does not contain 'sufficient information to generate solicitations' to individual contributors is therefore permissible," and "PBC's use of contribution data to generate the ETF will not result in the disclosure of any individual contributor information that could be used to solicit contributions." With respect to the Relationship Viewer, the only FEC data used by the Relationship Viewer is contribution history information, which cannot be used on its own to solicit any contributions. The information required to make a solicitation is *already* in the possession of the user.

[73] MUR 5625, Controlling SOR at 12.

The Commission's approach is consistent with judicial precedent. In the second Legi-Tech case, the District Court noted that "[t]hrough the CCTS, Legi-Tech provided the campaign contributor information to its customers *in whole* and in a form that facilitated use of that information for solicitation purposes."[74] Legi-Tech's "Campaign Contribution Tracking System" (CCTS) included:

> [I]nformation regarding contributors and their contributions, including the contributors' telephone numbers and street addresses . . . . Except for the contributors' telephone numbers, which were obtained from an outside vendor, the information was copied directly from the disclosure reports on file with the Commission, entered into the CCTS database and sold to Legi-Tech's CCTS customers . . . .[75]

The court concluded that "Legi-Tech's CCTS is nothing more than a computerized list of campaign contribution information copied from FEC files."[76] As three Commissioners later explained, "Legi-Tech was intentionally selling contributor names, addresses and even phone numbers for prospecting and solicitation purposes."[77]

2. The Commission Has Departed From the "Names and Addresses" View in Two Instances in Response to Self-Professed List Brokers

The General Counsel seeks to analogize two prior instances in which the Commission "has prohibited the use of individual contribution histories where, as here, the purpose was to enhance pre-existing names by determining who is a known political contributor."[78] Both cases

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[74] *FEC v. Legi-Tech, Inc.*, 967 F. Supp. 523, 533 (D.D.C. 1997) (*Legi-Tech II*).

[75] *Id.* at 525.

[76] *Id.* at 530.

[77] MUR 5625, Controlling SOR at 10 (emphasis added); *see also* MUR 5155, General Counsel's Report #3 at 9 ("Legi-Tech sold subscribers lists of donors from FEC data specifically so that Legi-Tech's customers could solicit those donors."). Legi-Tech's CCTS was developed as a challenge to Section 30111(a)(4) and the company was intentionally engaging in commercial list brokering that was prohibited by the Act. *See Legi-Tech II* at 525.

[78] MUR 6334, General Counsel's Brief at 14.

are easily distinguished. First, both involved self-professed list brokers. Second, the General Counsel ignores the obvious distinction between downloading data in bulk to increase the value of a list and displaying additional information about an individual, on a name-by-name basis, in a format that does not allow the creation of enhancement of any list.

The first of these cases is Advisory Opinion 1985-16 (Weiss). While the General Counsel acknowledges in a footnote that "[t]he requestor in AO 1985-16 was the purveyor of a commercial list,"[79] the General Counsel contends that this critical fact is not material. According to the General Counsel, "the requestor asked to compare a pre-existing list of names with the Commission's database in order to identify who made a past contribution."[80] As explained by the General Counsel, "[t]he operative fact is that a person, whether it be the vendor or the end user, sought to enhance the solicitation value of pre-existing names by comparing them to the Commission's database" and Aristotle's Relationship Viewer "mirror[s] the exact conduct prohibited in AO 1985-16" and "go[es] even one step further . . . by enabling the user to analyze the contribution histories of a given person's network of relationships."[81] However, the Commission's description of the request emphasized rather different "operative facts":

> You state that you own a list of potential contributors to Federal election campaigns which you could market 'for commercial and/or solicitation purposes.' You indicate that you desire to increase the market value of the list. You propose to search reports filed by political committees with the Commission to compare the names on your list with those individuals who have actually contributed to Federal election campaigns. You state that no new names or other information would be added to your list from Commission records.[82]

[79] *Id.* at 14 n.52 ("[t]he requestor in AO 1985-16 was the purveyor of a commercial list").

[80] *Id.* at 14.

[81] *Id.* at 14 n.52, 14.

[82] Advisory Opinion 1985-16 (Weiss) (emphasis added).

In other words, the Commission denied the request of a self-professed list broker who sought to use Commission reports "to purge the non-contributors from your list or to otherwise identify the contributors on your list" for no purpose other than to "to increase the commercial value of your list."[83] What the requestor proposed in Advisory Opinion 1985-16 fell squarely within Senator Bellmon's stated area of concern: protecting "public-spirited citizens" from "selling lists and list brokering." What the Commission rejected in Advisory Opinion 1985-16 – a commercial list broker asking to use FEC information to create a more valuable list to sell – is a far cry from the Relationship Viewer, which has no list-making capabilities.

The second case identified by the General Counsel is Advisory Opinion 2004-24 (NGP), which three Commissioners previously determined "was materially distinguishable from the facts at issue" in MUR 5625, while noting that "what NGP presented appears to be a garden-variety sale of a list of FEC data."[84] The questionable purposes behind NGP's request in Advisory Opinion 2004-24 were thoroughly discussed in MUR 5625.[85] In short, the requestor sought an opinion that reached a certain outcome and secured the opinion with representations that dictated that outcome. For example, NGP told the Commission in its request that "the product could be used for solicitation and prospecting purposes" and that it did not seek to place any restrictions on the end-user.[86] As was the case in Advisory Opinion 1985-16, the Commission was responding to a requestor that not only presented itself as a list broker, but also

[83] *Id.*

[84] MUR 5625, Controlling SOR at 5, 1-2.

[85] In hindsight, Advisory Opinion 2004-24 should have been treated as an improper request that concerned hypothetical activity conducted by third parties who were not requestors. A few months after the Commission issued Advisory Opinion 2004-24, the requestor filed a complaint that referenced the opinion and alleged, "Another campaign software firm, Aristotle International, Inc. . . . offers and advertises this prohibited service." MUR 5625, Complaint of NGP Software, Inc. at 1.

[86] MUR 5625, Controlling SOR at 5.

indicated that the Commission data incorporated into its lists could be used for any purpose, including commercial solicitation.

B. The Sale or Use Restriction Is Narrow and Serves to Prohibit List Brokering

The sale or use restriction was proposed as a floor amendment (amendment No. 381) by Senator Bellmon on August 4, 1971. The provision's legislative history, set forth below in full, makes clear why the provision has long been understood as a prohibition against list brokering:

> Mr. BELLMON. Mr. President, the purpose of this amendment is to protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party. **We all know how much of a business the matter of selling lists and list brokering has become.** These names would certainly be prime prospects for all kinds of solicitations, and I am of the opinion that unless this amendment is adopted, we will open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment, and in that way tend to discourage them from helping out as we need to have them do.
>
> I believe the amendment is acceptable to the Senator from Nevada, and I yield back the remainder of my time.
>
> Mr. CANNON. Mr. President, this is certainly a laudable objective. I do not know how we are going to prevent it from being done. I think as long as we are going to make the lists available, some people are going to use them to make solicitations. But as far as it can be made effective, I am willing to accept the amendment, and I yield back the remainder of my time.
>
> The PRESIDING OFFICER. The question is on agreeing to the amendment (No. 381) of the Senator from Oklahoma.'
>
> Mr. NELSON. Mr. President, will the Senator yield?
>
> Mr. BELLMON. I yield.
>
> Mr. NELSON. I could not hear the Senator from Oklahoma, and I did not understand exactly what he is doing with the list under the amendment.
>
> Mr. BELLMON. Mr. President, the amendment is self-explanatory. I shall read it again. It provides that "any information copied from such reports and statements shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose."

> **In the State of Oklahoma, our own tax division sells the names of new car buyers to list brokers, for example, and I am sure similar practices are widespread elsewhere.** This amendment is intended to protect, at least to some degree, the men and women who make contributions to candidates or political parties from being victimized by that practice.
>
> Mr. NELSON. Do I understand that the only purpose is to prohibit the lists from being used for commercial purposes?
>
> Mr. BELLMON. That is correct.
>
> Mr. NELSON. The list is a public document, however.
>
> Mr. BELLMON. That is correct.
>
> Mr. NELSON. And newspapers may, if they wish, run lists of contributors and amounts.
>
> Mr. BELLMON. That is right; but **the list brokers, under this agreement, would be prohibited from selling the list or using it for commercial solicitation.**[87]

After this brief exchange, "[t]he amendment was agreed to."[88]

In the first advisory opinion issued on the subject, the Commission explained that "[t]he express legislative intent behind [52 U.S.C. § 30111(a)(4)] is to protect the persons who make contributions . . . from victimization by the practice of list brokering or selling."[89] Other early advisory opinions on the subject similarly reflect the "list selling" and "list brokering" emphasis of the applicable legislative history. For example, in 1979, the Commission explained that the sale and use restriction "prohibit[s] the use of any list to solicit contributions which is copied or otherwise obtained from disclosure reports filed under the Act."[90] This view has carried forward

[87] 117 Cong. Rec. 30,057-30,058 (daily ed. Aug. 5, 1971) (emphasis added).

[88] *Id.* at 30,058.

[89] Advisory Opinion 1977-66 (TIPAC).

[90] Advisory Opinion 1979-03 (CSFC).

to more recent opinions as well.[91] In 2009, the Commission relied, once again, on this legislative history-based view and noted that "in his response to a question from Senator Nelson, Senator Bellmon confirmed that the '*only purpose*' of the prohibition is to 'prohibit the lists [of contributor names and addresses] from being used for commercial purposes.'"[92]

The courts have taken the same view. The D.C. Circuit noted that "the brief history of the 'commercial purposes' floor amendment reveals that it was intended to protect campaign contributors from the barrage of solicitations they would receive if 'list brokers' were allowed to sell donor lists on file at the FEC."[93] The District Court for the District of Columbia wrote: "[w]hat the agency proscribes is list-making."[94]

Following this long line of Commission precedent, the controlling Statement of Reasons in MUR 5625 explained that "the application of 2 U.S.C. § 438(a)(4) has consistently been limited to the sale and use of *contributor names and contact information* to prevent list brokering," and noted that "in advisory opinions prior to 2004-24, the Commission consistently stated that the purpose of 2 U.S.C. § 438(a)(4) is the 'prevention of list brokering,' and 'to protect individual contributors from having their names sold or used for commercial purposes."[95]

[91] *See, e.g.*, Advisory Opinion 1985-16 (Weiss) ("The Commission has declared that the purpose of this restriction is to protect individuals who make contributions to campaigns from being victimized by list-brokering."); Advisory Opinion 1988-02 (Chicago Board Options Exchange, Inc.) ("The Commission has declared that the purpose of this restriction is to protect individuals who make contributions to campaigns from being victimized by list-brokering."); Advisory Opinion 1995-05 (14th District TRIM Committee) ("Based on the legislative history of the Act, the Commission has previously stated that the principal purpose of restricting the sale or use of information copied from reports is to protect individual contributors from having their names sold or used for commercial purposes.").

[92] Advisory Opinion 2009-19 (Club for Growth PAC) (emphasis added; bracketed language in original).

[93] *Nat'l Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 192 (D.C. Cir. 1986) (*Legi-Tech I*).

[94] *Legi-Tech II*, 967 F. Supp. at 531.

[95] MUR 5625, Controlling SOR at 12 (emphasis added), 4 n.15.

The General Counsel takes a very different view in this matter. Here, the General Counsel acknowledges that the "Relationship Viewer does not replicate traditional list brokering," but does not view this as a barrier to enforcement.[96] According to the General Counsel, the sale and use restriction applies not only to list brokering, but to *any* "solicitation tool" that in any way utilizes contributor information.[97] The General Counsel asserts that the "Relationship Viewer is designed as a solicitation tool and that Aristotle's conduct directly *implicates the animating purpose* of the sale and use restriction, which is to prevent individual contributors from being solicited because their names appear on a disclosure report filed with the Commission."[98] By casting aside the traditional "list brokering" limitation in favor of a standard that captures any "conduct [that] directly implicates the animating purpose of the sale and use restriction,"[99] the General Counsel urges a change in the law that overturns decades of precedent reflecting a once-accepted understanding that the provision is a narrow exception intended to prevent list brokering.

C. The Act Does Not Prohibit All Commercial Uses of FEC Data, and the Incorporation of FEC Data into a Commercial Product Is Not A *Per Se* Violation

The General Counsel seeks to untether the phrase "or for commercial purposes" from its connection to list brokering and list selling in order to create a new type of violation that, if adopted, would allow the Commission to pursue activity that "does not replicate traditional list

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[96] MUR 6334, General Counsel's Brief at 17.

[97] *See* MUR 6334, General Counsel's Brief at 10 ("the statute prohibits the sale and use of individual contribution data obtained from the Commission's database in connection with a solicitation tool"). This is the same argument the General Counsel advanced in MUR 5625, which the Commission dismissed.

[98] MUR 6334, General Counsel's Brief at 1 (emphasis added).

[99] *Id.*

brokering."[100] This position, however, disregards a clear decision of the Second Circuit, which "determined that the purpose of the commercial exception contained in § [30111](a)(4) was to protect political contributors from unwanted entreaties from vendors of merchandise such as 'cars, credit cards, magazine subscriptions and cheap vacations.'"[101] There is no suggestion that Aristotle's software somehow produces prospect lists for these types of vendors. The General Counsel seeks an expansion of the Commission's enforcement authority, but this view is not consistent with binding precedent.

Both the D.C. Circuit and the Second Circuit concluded that not all commercial uses of FEC report information are prohibited, and the phrase "or for commercial purposes" does not create a blanket prohibition. The D.C. Circuit explained that only "commercial activities . . . actively [sic] akin to that of a list broker" are subject to the sale or use restriction.[102] The Second Circuit similarly "read the prohibition to cover list making and list brokering."[103]

In the first of these cases, the D.C. Circuit explained:

> [T]he legislative history of the "commercial purposes" proviso unequivocally indicates that Congress intended a narrower proscription. In particular, the brief history of the "commercial purposes" floor amendment reveals that it was intended to protect campaign contributors from the barrage of solicitations they would receive if "list brokers" were allowed to sell donor lists on file at the FEC.[104]

Thus, the court concluded, "we understand Congress to have 'left a gap for the [FEC] to fill' in determining what commercial activities fall within the proviso's prohibition (actively [sic] akin

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[100] *Id.* at 17.

[101] *FEC v. Political Contributions Data*, 995 F.2d 383, 385 (2d Cir. 1993).

[102] *Legi-Tech I*, 795 F.2d at 193.

[103] MUR 5625, SOR at 9.

[104] *Legi-Tech I*, 795 F.2d at 192.

to that of a list broker) and what commercial activity is not proscribed (activity akin to that of a newspaper)."[105]

Subsequently, in *FEC v. Political Contributions Data, Inc.* ("*PCD*"), the Commission advanced the same broad reading that the D.C. Circuit rejected in *Legi-Tech I*: "The FEC contends that PCD's activities fall squarely within the sweep of the 'commercial purposes' prohibition, since PCD sold information compiled from FEC reports for a profit."[106] The Second Circuit also rejected this argument, although the Commission has never fully abandoned it, even after PCD was awarded attorney's fees after the Second Circuit determined that "the Commission's position [was] unreasonable in light of the plain language and legislative history of the statute."[107] The Second Circuit agreed that the statute's "commercial purposes" prohibition cannot be given "a literal interpretation" for the same reasons identified by the D.C. Circuit, and because "the plain language of the statute is insufficient . . . we must move outside the four corners of the statute to 'established canons of construction' in order to construe it."[108]

PCD did not portray itself as a media entity, and the Second Circuit's description of PCD's business made clear that it was not a traditional media outlet: PCD "was formed in order to assemble and disseminate FEC data at a profit."[109] The Second Circuit explained:

> PCD marketed two standard reports. One, a "corporate affiliation contributor report," analyzed the contributions made by officers and upper-level employees of the 700 largest United States corporations. The other, a "congressional district report," listed the name of each major ($500.00 and up) contributor located within each of the country's 435 congressional districts, the contributor's occupation,

[105] *Id.* at 193.

[106] *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190, 194 (2d Cir. 1991).

[107] *FEC v. Political Contributions Data, Inc.*, 995 F.2d 383, 386 (2d Cir. 1993).

[108] *Political Contributions Data, Inc.*, 943 F.2d at 194-195.

[109] *Id.* at 193.

> and the amount of each donation. In addition, PCD occasionally compiled and sold the results of special computer searches, consisting of a short list of names and contributions.
>
> None of PCD's reports contained the mailing addresses or phone numbers of contributors.[110]

The Second Circuit rejected the Commission's conclusions in Advisory Opinion 1986-25, and instead found that PCD's reports did not violate the sale and use restriction. According to the court:

> There is little, if any, risk that PCD's lists will result in solicitation or harassment of contributors. The absence from PCD's reports of mailing addresses and phone numbers, as well as the caveat on each page against solicitation and commercial use, make it virtually certain that these reports will be used for informative purposes (similar to newspapers, magazines, and books ...), not for commercial purposes (similar to soliciting contributions or selling cars).[111]

The Second Circuit ultimately "conclude[d] that PCD used the information obtained from the FEC in a communication 'similar' to a newspaper, magazine, or book. PCD's lists, although not 'traditional media, are much closer to 'commercial purveyors of news,' . . . than they are to a list of sales prospects. They are designed in a manner that will further first-amendment values and not infringe contributor privacy by abetting solicitors."[112] The Second Circuit upheld PCD's sale of compilations of contributor names, occupations, and contribution amounts not because PCD was a media entity, but because its commercial use of FEC data was "informative" in the

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[110] *Id.*

[111] *Id.* at 196-197; *see also FEC v. Political Contributions Data*, 995 F.2d 383, 386-387 ("the lists, compiled without addresses or phone numbers and bearing a warning against commercial use, posed no danger to the privacy interests which § 438(a)(4) was designed to protect"); Advisory Opinion 2009-19 (Club for Growth PAC) at 4 (noting that the Second Circuit held "that the sale of contributor lists that did not include addresses or phone numbers and that explicitly stated that the lists could not be used for the purpose of solicitation or any commercial use did not violate the prohibition at 2 U.S.C. § 438(a)(4)").

[112] *Id.* at 196.

same sense as a newspaper's use of that information would be "informative." The Second Circuit also noted:

> Today, we are faced with the FEC's attempt to limit the FECA's broad disclosure requirements through the "commercial purposes" restriction contained in 2 U.S.C. § 438(a)(4). Specifically, we must decide whether the defendant, a corporation which produces campaign contribution reports to sell to the public, "sold or used" information culled from the FEC in violation of § 438(a)(4). Since we answer that question in the negative by reading the statute in a manner that avoids the first amendment problems that the FEC's interpretation would engender, we not only further the intent of congress, but also **need not reach the "important and troubling First Amendment implications raised by any construction of the statute that bars the use of the information at issue in this case by organizations such as" the defendant.**[113]

The Second Circuit closed with an important point that the General Counsel altogether ignores. After determining that PCD may lawfully market lists of individual contributor names, along with contribution amounts and occupation information, all sourced from FEC reports, the court noted that:

> The "use" of the information "for the purpose of soliciting contributions or for commercial purposes" is still prohibited by the terms of the statute. The "salting" provision . . . helps to ensure that anyone who uses the information for any sort of solicitation – whether for contributions or for other forms of commerce – will be caught. The [Section 30111(a)(4)] prohibition is only violated by a use of FEC data which could subject the "public spirited" citizens who contribute to political campaigns to "all kinds of solicitations." PCD's publications plainly are not designed in that manner.[114]

The Second Circuit held that the fact that someone *could* use one of PCD's publications for solicitation purposes did not mean that PCD was in violation of the law. This view focuses on what PCD's publications actually are and how they are designed, rather than how a user might view them. In the present matter, the General Counsel focuses on how a user of the Relationship Viewer may interpret "the meaningfulness of the relationships" displayed "in terms

[113] *Id.* at 191-192.(emphasis added)

[114] *Id.* at 197-198.

of the target's giving potential," while claiming that it is somehow irrelevant that the "Relationship Viewer does not replicate traditional list brokering."[115] As was the case with PCD's publications, the "design" of the Relationship Viewer makes clear that it is *not* a list making, selling, or brokering device – it does not add names to a user's list, it does not display contact information, and it does not export any lists at all.[116] The Relationship Viewer is altogether unsuited for list brokering, and, in fact, does not include such functionality. The speculative approach advocated by the General Counsel was rejected in *PCD*.

The Second Circuit held that Section 30111(a)(4) only restricts uses of FEC report information that commercialize lists of individual names with contact information (*i.e.*, "lists of sales prospects"[117]). Without both names and contact information, the FEC-sourced contribution history information cannot be used for solicitation purposes because that information is insufficient to create a list of solicitation prospects. As three Commissioners noted:

> [T]he Second Circuit read the prohibition to cover list making and list brokering. As explained above, Aristotle's compliance/vetting feature cannot be used for that purpose, because it does not allow committees to search, copy or download the names and addresses of contributors who are not already in their existing data base to create prospecting lists. **The feature only permits a committee to view how much someone already in its data base has given to other campaigns and committees.**[118]

The same is true of the Relationship Viewer today.

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[115] MUR 6334, General Counsel's Brief at 9, 17.

[116] *See* MUR 5625, Controlling SOR at 8-9 ("The court analyzed the purpose and design of PCD's publication and determined that the 'principal purpose' of PCD's reports was something other than a 'commercial purpose,' because the absence of any contact information in the reports, such as the contributors' addresses and phone numbers made it 'virtually certain' the reports would be used for informational purposes and not for commercial purposes.").

[117] *FEC v. Political Contributions Data, Inc.*, 943 F.2d at 196.

[118] MUR 5625, Controlling SOR at 9 (emphasis added).

The General Counsel attempts to distinguish the Second Circuit's decision by claiming that "[b]ased on a review of the Commission's entire body of administrative matters involving the restriction, . . . the Commission has never permitted the sale or use of FEC data where the purpose [sic] related to solicitation and has taken care to ensure that a challenged or requested sale or use of FEC data does not directly or indirectly involve such a purpose."[119] This claim is inaccurate. For instance, the requestor in Advisory Opinion 1980-101 proposed to sell a directory whose purpose was to "facilitate coordination among PACs and help candidates better target their funding requests."[120] This Commission-approved directory was very obviously a list, and its purpose was very obviously "related to solicitation."

In other matters, the Commission has sought to blunt the impact of the Second Circuit's decision with the suggestion that a subsequent District Court decision reached different conclusions. Setting aside questions of whether the Commission may pick and choose the judicial precedent it will follow,[121] any differences between *PCD* and *Legi-Tech II* are not material to the outcome of this matter. Both of these cases compel the same legal outcome here.

As noted above, *Legi-Tech II* involved the Campaign Contribution Tracking System ("CCTS"), which was materially dissimilar in nature to PCD's lists and to the Relationship Viewer, because the CCTS also included mailing addresses and phone numbers. By copying names and addresses from FEC reports, and also appending phone numbers, Legi-Tech "provided the campaign contributor information to its customers in whole." This activity

[119] MUR 6334, General Counsel's Brief at 13.

[120] Advisory Opinion 1980-101 (Weinberger).

[121] The Office of General Counsel's disregard for *PCD* appears to be a longstanding position. The Office of General Counsel presented Advisory Opinion 1986-25 as "good law" in *Legi-Tech II*, even though the Second Circuit rejected it in *PCD*. *See Legi-Tech II*, 967 F. Supp. at 529.

amounted to straightforward list selling, and satisfied the Second Circuit's names-and-contact-information standard (a point the *Legi-Tech II* court appears to have overlooked).[122] Furthermore, "Legi-Tech's sale of contributor information through the CCTS was not only the primary focus of its activity, but, as the FEC points out, it was the CCTS's only purpose."[123] The use of contribution history information in one feature of a complex software package is hardly Aristotle's "primary purpose," and one cannot reasonably conclude that the Relationship Viewer violates Section 30111(a)(4) under either *PCD* or *Legi-Tech II*.

D. Privacy Protection Is A Rationale for Disallowing List Brokering, Not an Independent Basis for Creating an Unprecedented Enforcement Theory

The General Counsel urges the Commission to reinterpret the legislative history's references to privacy protection not as Senator Bellmon's rationale for prohibiting list brokering, but as an independent basis for enforcing the sale and use restriction.

According to the General Counsel, the Commission should reject Aristotle's argument "that the legislative history of the sale and use restriction (regarding the privacy interest) supports a narrow reading of the statute that prevents only 'list brokering,' i.e., the wholesale copying of names and addresses."[124] Yet Aristotle's position is well-founded and based on a fair and accurate reading of the law and precedent. The General Counsel reasons that "there is no indication that Senator Bellmon intended his single example to be an exhaustive list of the ways in which the sale and use restriction could be violated."[125] The Commission very clearly held otherwise in 2009.

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[122] *Legi-Tech II*, 967 F. Supp. 532; *id.* at 530 ("Legi-Tech's CCTS is nothing more than a computerized list of campaign contribution information copied from the FEC files.")

[123] *Id.* at 530.

[124] MUR 6334, General Counsel's Brief at 16-17.

[125] *Id.* at 17.

In Advisory Opinion 2009-19,[126] the Commission described the scope of Section 30111(a)(4) in terms of its legislative history and made clear that *actual* list brokering is its target:

> Thus, in addition to requiring the disclosure of contributor information, Congress provided limitations to ensure that such information was not misused. Congress was concerned that the Act's reporting requirements "open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment . . . ." 117 Cong. Rec. 30057 (daily ed. Aug. 5, 1971) (statement of Sen. Bellmon). Specifically, Senator Bellmon, sponsor of the prohibition on the use of individual contributors' names and addresses, stated that the purpose of the prohibition was to "protect the privacy of the generally very public-spirited citizens who may make a contribution to a political campaign or a political party." *Id.* In his remarks on the Senate floor, however, Senator Bellmon acknowledged the limitations of the prohibition. *See id.* at 30058 (the prohibition "is intended to protect, at least to some degree, the men and women who make contributions to candidates or political parties from being victimized" by having their names sold to list brokers). **Indeed, in his response to a question from Senator Nelson, Senator Bellmon confirmed that the "only purpose" of the prohibition is to "prohibit the lists [of contributor names and addresses] from being used for commercial purposes."** 117 Cong. Rec. 30058 (daily ed. Aug. 5, 1971) (statements of Sen. Nelson and Sen. Bellmon).[127]

The General Counsel's attempt at reading Senator Bellmon's mind misrepresents the legislative history and directly contradicts the Commission's conclusion that the legislative history "confirm[s] that the '*only purpose*'" of the sale and use restriction is to prohibit the "lists [of contributor names and addresses] from being used for commercial purposes."[128]

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[126] In Advisory Opinion 2009-19, the Commission allowed the requestor to do what it had rejected in Advisory Opinion 2003-24 (NCTFK). The Commission did not overrule Advisory Opinion 2003-24 but distinguished it on the grounds that it rejected only "the requestor's broad 'open-ended interaction' [that] presented the 'possibility of repetitive and intrusive communications to contributors.'" Advisory Opinion 2009-19 at 4 n.2. The requestor in Advisory Opinion 2009-19, by contrast, only wanted to use FEC lists to send one letter. The Commission's open session discussion of Advisory 2009-19 on August 27, 2009 made clear that the Commission understood it was "walking back" Advisory Opinion 2003-24.

[127] Advisory Opinion 2009-19 (Club for Growth PAC) (emphasis added; bracketed language in original).

[128] *Id.*

The General Counsel next suggests the introduction of modern computing must somehow change the meaning of the referenced legislative history.[129] While the General Counsel may believe that a re-imagining of the legislative history is in order, three Commissioners drew the opposite conclusion in MUR 5625, and explained that:

> It is difficult to imagine that the sale of data that is already publicly available and that is presented in such a way that it cannot lead to contributor harassment, is the sort of "commercial purpose" contemplated by Congress. Indeed, when this amendment was adopted in 1971, no one could have anticipated the technological advances that would evolve over the next 40 years, including, most notably, the impact of the Internet.[130]

Finally, the General Counsel's attempt to elevate the "privacy interest" as the "animating purpose of the sale and use restriction" contravenes the Second Circuit's decision in *PCD*. The Second Circuit held that the "privacy" interest is secondary to the Act's overall emphasis on "openness and disclosure." In the context of considering and rejecting the Commission's approach in Advisory Opinion 1986-25, the Court held that the Commission's interpretation:

> [D]oes not serve the congressional purposes of furthering the openness and disclosure purposes of the FECA, while avoiding – *to the extent possible* – the invasions of contributor privacy that would be occasioned by all kinds of solicitations.[131]

By promoting the underlying "privacy interest" above the congressional purposes of furthering the openness and disclosure purposes of the Act, the General Counsel argues that Section 30111(a)(4) not only covers "traditional list brokering," but also any practice that "still implicates the same threat to privacy" as list brokering, including *anything* whatsoever that the

[129] MUR 6334, General Counsel's Brief at 17 ("After all, in 1971, modern computing was still decades away (for many years, the only way to access FEC data was through printout and magnetic tape records.")."

[130] MUR 5625, Controlling Statement at 8 n.33.

[131] PCD at 196 (emphasis added).

General Counsel dubs a "solicitation tool."[132] The General Counsel declines to treat the long-held understanding of the sale and use restriction – which was affirmed in 2009 – as a limitation on the Commission's enforcement authority, and instead views this understanding as an inconvenience that can be worked around without even acknowledging recent, contrary Commission precedent. The Commission did not adopt this view in 2009, or in MUR 5625, and it should not do so here.

IV. The General Counsel's View of the Statute and Proposed Application to Aristotle Raises Constitutional Issues That Can Be Avoided by Adhering to Precedent

In 1992, the D.C. Circuit upheld the constitutionality of the sale or use restriction in *FEC v. International Funding Inst., Inc.*[133] *IFI* is factually distinct from the instant matter, but, more significantly, recent decisions of the Supreme Court cast doubt on *IFI*'s continuing validity. Under these decisions, Section 30111(a)(4) and the FEC's implementing regulations create an impermissible distinction between media corporations and all other corporations, burden Aristotle's right to speak, and constitute a content-based speech restriction. The provision could be invalidated under any or all of these rationales. At the very least, these decisions caution against an aggressively innovative application of Section 30111(a)(4) that departs from established precedent, as such an application could expose the provision and the Commission's implementing regulation to renewed First Amendment scrutiny.

A. *Citizens United v. FEC*

Under Section 30111(a)(4), the New York Times (a for-profit entity) may copy a list of contributor names, addresses, and other information from FEC reports, publish that information

[132] MUR 6334, General Counsel's Brief at 17.

[133] In *IFI*, the defendant expressly sought to use FEC lists to solicit contributions. The court held that the use restriction in Section 438(a)(4) is subject to, at most, an intermediate level of scrutiny for consistency with the First Amendment, and that it serves an important governmental interest and is no broader than necessary to serve that interest. *See FEC v. International Funding Inst., Inc.*, 969 F.2d 1110, 1118 (1992).

in list form as "news," and sell access to that information to subscribers or newsstand purchasers, or place that information behind a digital paywall. Aristotle – which is also a for-profit corporation and a publisher of information – cannot do the same thing because, regardless of Aristotle's actual purpose, the Commission or its General Counsel will contend that it is selling lists or otherwise using FEC information for impermissible "commercial purposes." The statute and Commission regulations create one set of rules for "newspapers, magazines, books or other similar communications," even when owned by for-profit corporations, and another set of rules for everyone else that does not fit within the General Counsel's narrow and subjective view of what constitutes a "similar communication."

In *Citizens United*, however, the Supreme Court explained that "[t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not."[134] Citing Justice Scalia's dissent in *Austin*, the majority observed: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[135] "The law's exception for media corporations" results in "differential treatment [that] cannot be squared with the First Amendment."[136]

This "differential treatment" is on display in this matter. If an Aristotle customer wishes to view contribution history information for an individual who is already within the customer's database, the Relationship Viewer allows the customer to see that information by taking the additional step of hovering over or clicking on the individual's name. The General Counsel

[134] *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).

[135] *Id. citing Austin*, 494 U.S. 652, 691 (Scalia, J., dissenting).

[136] *Id.* at 352-353.

claims this is an impermissible commercial use of FEC data. However, Aristotle's customer also could access the very same information in other ways. The user could visit the FEC's website and conduct a contributor search, or the Center for Responsive Politics (an incorporated non-profit corporation) website and use the "Donor Lookup" feature, or Aristotle's own "Contributor Data Lookup" website. Or, a user could enter a contributor name in an internet search engine and obtain hits linking to FEC data showing that individual's contributions. In these cases, the user sees the contribution history information for specific individuals. The main functional difference between the Relationship Viewer and the websites and search engines operated by the other corporations referenced is that in many cases the Relationship Viewer actually offers *less* FEC information, and it does so in a form that is unsuitable for list making.

The Commission recently approved of a media entity's use of FEC information on its website that was analogous to Aristotle's Relationship Viewer. In MUR 6053/6065 (Huffington Post), one of the functions at issue was "a mapping feature, which pinpoints and displays a contributor's address and location on a map."[137] The General Counsel noted that "the maps do not provide additional personal or otherwise useful information *that is not available elsewhere.*"[138] The Commission concluded that "HuffingtonPost.com and PoliticalBase.com are similar to newspapers or magazines and their principal purpose in displaying the contributor information appears to be informational."[139] Furthermore, "HuffingtonPost.com does not appear to be using the contributor information for a commercial purpose. . . . Respondent does not charge users a fee to view political contributor information on its website."[140] Despite this,

[137] MUR 6053/6065, First General Counsel's Report at 2.

[138] *Id.* at 6.

[139] *Id.* at 7.

[140] MUR 6053/6065, Factual and Legal Analysis at 4.

Huffington Post is a for-profit commercial entity that is owned by a subsidiary of an even larger for-profit commercial entity, Verizon Communications. Huffington Post obviously makes money by encouraging traffic to its website and by selling display ads for the products of others. A recent visit to the Huffington Post website revealed display ads for CBS television shows, Hertz Rental Cars, and a condominium building (www.huffingtonpost.com, visited April 18, 2018).

Aristotle's Relationship Viewer feature constitutes an incidental, tiny fraction of the software program, and also is offered at no additional cost. There is no per record access charge for FEC contribution data. A list of that data cannot be downloaded, and the cost for the software is the same whether the Relationship Viewer is ever used or not. The price of Aristotle's software remained the same when the feature was introduced. The FEC has not offered any evidence whatsoever that Aristotle's single-record-at-a-time Relationship Viewer feature increases the cost to Aristotle's campaign customers by even a penny. If it was a factor in the Huffington Post's favor in MUR 6053/6065 that there was no charge for the FEC data, it must necessarily be equally relevant here that Aristotle does not charge any additional fee for access to the same data.

Moreover, when HuffingtonPost.com allows users to see that an individual contributed to Hillary Clinton, or to whom their neighbors contributed, that was deemed "informational" and the Commission unanimously voted to dismiss in near record time (five months).[141] However, the General Counsel's position is very different when Aristotle displays the same information in its Relationship Viewer. The contrast, however, is even more striking than may be apparent at

[141] *See* John Aristotle Phillips, *Fundrace: Powering Campaign Transparency*, Huffington Post, Sept. 22, 2010, https://www.huffingtonpost.com/entry/post_906_b_735733.html.

first. The features at issue in MUR 6053/6065 were available at Fundrace.org in 2008. The later version of that site containing substantially the same features – beginning in 2010 – was powered by Aristotle and made publicly available through a partnership with Huffington Post.[142] The inescapable conclusion is that, apparently, Aristotle may display FEC-sourced contributor information through a for-profit commercial media outlet like Huffington Post, but may not do so for no additional charge within its own products. Such a conclusion cannot pass muster as a reasonable interpretation of a restriction on speech under the First and Fourteenth Amendments.

Similarly, in Advisory Opinion 2014-07, the Commission approved the display of the same data that is displayed in the Relationship Viewer in Crowdpac's relationship map format. Thus, a for-profit fundraising entity may use FEC contributor data to enhance the informational value and utility of its fundraising software. The Relationship Viewer does the same thing, yet the General Counsel argues for a different result.

Under *Citizens United*, and under the cases discussed in the following section, such inconsistent and arbitrary applications of restrictions on speech cannot withstand even minimal scrutiny under the First and Fourteenth Amendments.

B. *Sorrell v. IMS Health Inc.*

Section 30111(a)(4) burdens Aristotle's right to speak. The Supreme Court wrote in 2011 that "[a]n individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated."[143] The Court further observed that, in an earlier case, eight Justices "recognized that restrictions on

[142] *See* John Aristotle Phillips, *Fundrace: Powering Campaign Transparency*, Huffington Post, Sept. 22, 2010, https://www.huffingtonpost.com/entry/post_906_b_735733.html.

[143] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011).

the disclosure of government-held information can facilitate or burden the expression of potential recipients and so transgress the First Amendment."[144]

Sorrell considered a challenge to a "Vermont law [that] restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors. Subject to certain exceptions, the information may not be sold, disclosed by pharmacies for marketing purposes, or used for marketing by pharmaceutical manufactures."[145] However, "[t]he information . . . could be sold or given away for purposes other than marketing."[146] "The statute thus disfavors marketing, that is, speech with a particular content."[147]

The parallels between the statute at issue in *Sorrell* and Section 30111(a)(4) are clear. Under *Sorrell*, Aristotle's Relationship Viewer constitutes "the creation and dissemination of information" possessed by the government and is "speech within the meaning of the First Amendment."[148] Section 30111(a)(4) imposes content-based speech restrictions. Even if only "commercial speech" is burdened, the Court made clear that "heightened scrutiny" applies to content-based restrictions on commercial speech.[149] The government still carries the "burden to justify its content-based law," and it "must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."[150] In

[144] *Id.* at 569.

[145] *Id.* at 557.

[146] *Id.* at 554; *see also id.* at 563 ("pharmacies may sell the information to private or academic researchers, . . . but not, for example, to pharmaceutical marketers").

[147] *Id.* at 554.

[148] *Id.* at 570.

[149] *Id.* at 566.

[150] *Id.* at 571-572.

addition, "[t]here must be a 'fit between the legislature's ends and the means chosen to accomplish those ends.'"[151] In *Sorrell*, the Court rejected the state's arguments that the law was "necessary to protect medical privacy, including physician confidentiality, [and] avoidance of harassment."[152] The Court observed that the statute does not preserve privacy because "pharmacies may share prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing."[153]

In closing, the Court rejected a regulation in which "the State gives possessors of the information broad discretion and wide latitude in disclosing the information, while at the same time restricting the information's use by some speakers and for some purposes."[154]

Sorrell casts doubt on the Section 30111(a)(4) prohibition on certain uses of publicly available information for purposes of protecting donor privacy, confidentiality, and the avoidance of harassment. To avoid this Constitutional doubt, the Commission should, at a minimum, avoid expanding its prior interpretation of Section 30111(a)(4) beyond traditional list brokering to encompass non-list publication such as Aristotle's.

C. Reed v. Town of Gilbert

Finally, Section 30111(a)(4) is a content-based speech restriction that is not particularly well-tailored to serve its underlying government interests. Under the provision, anyone may use any information from FEC reports for any purpose, except "for the purpose of soliciting contributions or for commercial purposes." In *Reed v. Town of Gilbert*, the Supreme Court held

[151] *Id.* at 572.

[152] *Id.*

[153] *Id.*

[154] *Id.* at 580.

that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."[155] Both the statute and the Commission's regulation "'on its face' draw[] distinctions based on the message a speaker conveys."[156] The Court noted that "facial distinctions" occur when the government "defin[es] regulated speech by its function or purpose."[157]

Under *Reed*'s formulation, Section 30111(a)(4) is subject to strict scrutiny review, and it seems highly unlikely that it could survive. If the compelling government interest behind the provision is preserving individual donor privacy,[158] the sale or use restriction is obviously a poor fit. Individual contributor privacy is in no way preserved by a restriction limiting sales and uses "for the purpose of soliciting contributions or for commercial purposes," no matter how broadly those terms are interpreted. The Act itself mandates the publication of the names, addresses, and amounts given by contributors, the Commission's own website enables the invasion of privacy by any person at any time, and the Commission has blessed Internet-based search mechanisms that are designed specifically to allow individuals to see their neighbors' contributions.[159] Presidential campaigns and advocacy groups can and do use Commission contributor

[155] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

[156] *Id.*

[157] *Id.*

[158] The "property preservation" interest is an after-the-fact rationale that is not reflected in the legislative history.

[159] *See 2010 Political Donations: HuffPost's FundRace Lists Contributions*, Huffington Post (Sept. 28, 2010), https://www.huffingtonpost.com/entry/2010-political-donations-_n_741723.html ("FundRace makes it easy to search by name or address to see which congressional candidates your friends, family, co-workers, and neighbors are contributing to. Or you can see if your favorite celebrity is putting their money where their mouth is.").

information to contact opponents' donors and to engage in other activities designed to shame them and harm their businesses.[160]

The Commission cannot successfully argue that contributor data that is permitted to be published by countless for-profit commercial websites cannot be published by Aristotle in its software due to a broad privacy interest, where a fundamental purpose of the underlying statute is to mandate publication of exactly the same information.

V. Conclusion

In summary, the Relationship Viewer features at issue in this matter are materially indistinguishable from the features found in prior Aristotle software that the Commission considered in MUR 5625 when it declined to pursue enforcement action. The General Counsel's brief inaccurately describes the Relationship Viewer's purpose, functionality and capabilities. It also incorrectly presents prior Commission precedent, ignores binding case law, and proposes a novel and unsupported "solicitation tool" standard. The General Counsel seeks to expand the scope of prohibited activity beyond traditional list brokering in a way that casts serious doubt on the constitutionality of Section 30111(a)(4) under the First Amendment, as well as under the Fourteenth Amendment as it relates to the General Counsel's attempt to apply the rule arbitrarily and unequally to similarly-situated speakers. For the foregoing reasons, the Commission should decline to find probable cause, dismiss the complaint, and close the file.

Our client respectfully requests that the Commission hold a probable cause hearing on this matter so that we can address any outstanding factual and legal questions for the Commission.

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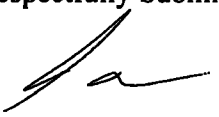
[160] *See Behind the curtain: A brief history of Romney's donors*, KeepingGOPHonest (April 20, 2012), https://web.archive.org/web/20120426044709/http://www.keepinggophonest.com/behind-the-curtain-a-brief-history-of-romneys-donors/ (Obama For America Internet posting identifying three donors to Governor Romney who "benefit from betting against America" and four who are "special-interest donors").

Respectfully Submitted,



Jason Torchinsky
Michael Bayes
Counsel to Aristotle, Inc.