April 25, 2022

BY ELECTRONIC MAIL

Mark Allen, Esq.
Laura Conley, Esq.
Office of General Counsel
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Re: MUR 7310

Dear Mr. Allen and Ms. Conley:

On behalf of Respondents Mark Takai for Congress, Dylan Beesley in his official capacity as treasurer, Lanakila Strategies LLC and Dylan Beesley, in his personal capacity (collectively, "Respondents"), with this letter please find Respondents' Probable Cause Brief in the above-referenced matter.

Respondents request an oral hearing before the Commission.[1] Respondents request the hearing because the recommendation is unprecedented on the facts of this matter, presents clear violations of the boundaries governing Commission action, and, if adopted, would be seen by the regulated community as a significant, unforeseen change outside the rulemaking process in the rules governing candidates' discretion over the use of their funds, the terms on which they may pay commercial vendors, and the winddown of their campaigns.

[1] *See* Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64,919 (Nov. 19, 2007); Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55,443 (Oct. 28, 2009).

We look forward to the Commission's consideration of our response.

Sincerely,

//s//

Brian G. Svoboda
Counsel for Mark Takai for Congress

//s//

William Pittard
Counsel for Dylan Beesley and Lanakila Strategies LLC

cc: Chair Dickerson
Vice Chair Walther
Commissioner Broussard
Commissioner Cooksey
Commissioner Trainor
Commissioner Weintraub
Lisa J. Stevenson, Esq., Acting General Counsel
Charles Kitcher, Esq., Associate General Counsel, Enforcement

BEFORE THE FEDERAL ELECTION COMMISSION

MARK TAKAI FOR CONGRESS, AND DYLAN BEESLEY, IN HIS OFFICIAL CAPACITY AS TREASURER, LANAKILA STRATEGIES, LLC, AND DYLAN BEESLEY, IN HIS PERSONAL CAPACITY.	IN RE: MUR 7310 ORAL HEARING REQUESTED

RESPONDENTS' PROBABLE CAUSE BRIEF

INTRODUCTION

For nearly fifty years, the Federal Election Commission has warned campaigns not to underpay their vendors, lest they receive prohibited or excessive contributions. For apparently the first time, the Office of General Counsel asks the Commission to find a prohibited personal use of campaign funds, because the campaign allegedly *overpaid* a vendor who was not part of the candidate's family.

At issue is whether ten months of continued flat fee payments, under a contract to wind down the campaign—a contract negotiated and signed by the candidate himself—fulfilled an obligation that would not have "exist[ed] irrespective of the candidate's election campaign."[1] Engaged under the contract to oversee the campaign during its wind down, the vendor received the payments prescribed by the contract, and not a penny more, while waiting for the late candidate's family to set up the charity that would receive its surplus funds before termination.

There is no prohibited personal use here. The payments occurred under a contractual obligation that arose *directly from*—not "irrespective of"—the candidate's campaign. The

[1] 52 U.S.C. § 30114(b)(2).

General Counsel's Brief offers no case in which the Commission has ever found personal use from overpaying a vendor outside of the candidate's family. Instead, the brief resorts to a "greatest hits" of discredited enforcement theories. It ignores the plain text of the controlling statutes, uses an advisory opinion as a sword instead of a shield to establish a non-existent rule for winding down campaigns, and retroactively enforces rules that the complainant has asked the Commission to adopt, but that the Commission has not adopted.

Finding probable cause would disrupt how campaigns pay their vendors, to the detriment of the anti-corruption purposes of the Federal Election Campaign Act of 1971, as amended ("the Act"). It would strip campaigns of the "wide discretion" that the Commission has repeatedly and emphatically affirmed that they have.[2] Such a finding would change the compliance calculus for campaigns: while they must continue to worry about *underpaying* vendors to avoid receiving in-kind contributions, now they would also have to worry about *overpaying* vendors to avoid personal use. The General Counsel's recommendation takes rules written to avoid corruption, misapplies them, and creates incentives that instead would promote corruption.

An adverse finding would also be unjust to the vendor's principal, Dylan Beesley, whose good faith is repeatedly demonstrated by the General Counsel's Brief. The brief identifies no payments except those made under the contract, because there were no such payments. It makes clear that Beesley was not responsible for the delay in setting up the charity, and thus in the campaign's wind down. It presents repeated instances of his good-faith compliance. When Beesley voluntarily agreed to reduce Lanakila's monthly pay after the Takai family formed the charity, and when the pendency of this matter did not permit the campaign immediately to

[2] *See, e.g.*, Contribution and Expenditure Limitations and Prohibitions; Personal Use of Campaign Funds; Final Rule, 60 Fed. Reg. 7,862, 7,867 (1995).

terminate, the General Counsel's Brief uses that against him, seizing on the new, going-forward amount to "prove" that the old one somehow represented personal use.

Unsupported by law, flawed in its reasoning, heedless of the practical consequences for the regulated community, and deeply unfair to the Respondents, the General Counsel's recommendation should be withdrawn or rejected.

I. STATEMENT OF FACTS

This matter involves ten months of payments to a company called Lanakila Strategies LLC, a firm associated with Dylan Beesley who was the top aide to Congressman Mark Takai's campaign.[3] Beesley was a trusted aide to the Congressman. Hired as a fundraiser in 2015, he performed well enough that the campaign quickly raised his pay.[4] As the 2016 election approached, while the Congressman remained healthy and looked forward to re-election and extended service in Congress, he increased Beesley's responsibilities, extending his portfolio into campaign strategy.[5] The General Counsel's Brief shows that Beesley worked hard, and offers no instance in which he cut corners, shirked duties, or engaged in any sort of self-dealing.[6]

When illness abruptly cut Congressman Takai's political career short, he turned to Beesley to steward the campaign through its winding down process, but while setting the terms himself.[7] The Congressman entered into a revised contract with Lanakila on behalf of the campaign, setting Lanakila's campaign-related duties and rate of pay.[8] The record shows that the Congressman sought to maintain Lanakila's then-existing rate of pay, which was reasonable, given that Beesley had only recently ascended to what otherwise would have been a secure,

[3] *See* General Counsel's Brief at 1, 3 (Mark Takai for Congress).
[4] *See id.* 3-4.
[5] *See id.* at 4-5.
[6] *See, e.g.*, *id.*
[7] *See id.* at *5.*
[8] *See id.*

senior role with a long-serving Member of Congress.[9] The Congressman also provided for no termination date in the contract, which was also reasonable, since the date on which the campaign would be able to terminate could not then be known.[10] Serving the campaign in a wind down capacity was a much less attractive role for Beesley and Lanakila. There would be no service in a top strategic role for a rising Member of Congress who had declared his commitment to build seniority through a long tenure of serving Hawaii's First District in the U.S. House of Representatives. Rather, there would be the drudgery of unwinding a campaign that the Congressman and Beesley had labored to build ahead of the Congressman's first re-election, with a surge of work and then a gradual lessening of that same work. And yet Beesley, largely out of loyalty, agreed that Lanakila would undertake that work at the same cost, despite the less attractive nature of the work and its diminished future possibilities.[11]

The General Counsel's Brief offers nothing to suggest that the agreement was anything other than an arm's length agreement, or that its terms were driven by anything other than the candidate's desire to provide for the campaign's efficient administration and wind down. Indeed, it was Beesley who suggested to the Congressman that the campaign engage outside counsel at Perkins Coie LLP regarding the campaign's wind down plan.

The brief further shows that Beesley proceeded diligently in winding down the campaign and identifies no act or omission on his part that extended the wind down or delayed the campaign's termination. [12] It shows that Beesley moved quickly to terminate or renegotiate leases and to handle other wind down tasks while remaining attentive to the campaign's legal

[9] *See id.* at 5-6.
[10] *See id. Cf.* 60 Fed. Reg. at 7,873 (noting that the process of winding down a federal office "often takes longer than anticipated").
[11] First Amendment to Consulting Agreement dated June 14, 2016.
[12] *See* General Counsel's Brief at 6-11 (Mark Takai for Congress).

compliance, correctly evaluating particular proposed uses of campaign funds.[13] The brief presents no instance in which Beesley contemplated any violation of Commission rules.

Additionally, the General Counsel's Brief shows that Beesley dealt transparently with others interested in the campaign—particularly the Takai family—writing frequent memos and emails on the status of the wind down and seeking and holding meetings on these same matters.[14] When the Congressman passed away, and when the prior treasurer stepped down, the Congressman's wife asked him to serve as treasurer, and Beesley agreed, with no change in pay, despite the increase in legal responsibilities.[15] Beesley continued to proceed diligently with the wind down process.[16] The brief shows that he continued to involve the Congressman's family in matters of committee administration and that they were involved in financial decisions.[17] Indeed, the brief acknowledges that "Sami Takai"—not Beesley and not Lanakila—"was responsible for . . . authorizing payment on invoices from vendors, including Lanakila."[18]

While the General Counsel's Brief claims that "Beesley's duties for the Committee appear to be minimal" after a March 15, 2017 meeting with Congressman Takai's wife,[19] it

[13] *See id.* at 6-7. The General Counsel's Brief uses these evaluations to suggest "that Beesley was aware that certain uses of campaign funds were prohibited," yet does not allege any knowing and willful violation. Nor does the brief present any evidence to show that Beesley was aware of a specific date by which the campaign must terminate, or Lanakila must voluntarily renounce its right to compensation under the terms of the contract. Of course, there is no such date.
[14] *See id.* at 7 (memo and proposed meeting with Congressman Takai), 8 n.42 (email with Congressman's spouse), 8-9 (involving the Congresswoman's spouse in the disbursement process), 9 (meeting with Congressman's spouse), 10-11 (email with Congressman's spouse), 11 (email and meeting with Congressman's spouse), 12 (email with Congressman's spouse).
[15] *See id.* at 7. *See also* 52 U.S.C. § 30102(a), 11 C.F.R. §§ 102.7, 102.9, 104.14 (providing for treasurer's legal responsibilities).
[16] *See* General Counsel's Brief at 8-14 (Mark Takai for Congress).
[17] *See id.*
[18] *Id.* at 8-9.
[19] *Id.* at 12.

makes clear that Beesley and Lanakila continued to perform bona fide services after that date.[20] He supervised the campaign's compliance vendor, issued checks, reviewed campaign finance reports, corresponded with the Congressman's wife about wind down matters, and handled various other tasks.[21] While a third-party compliance vendor prepared and filed the campaign's reports, there was no one besides Beesley and Lanakila who was contractually or legally responsible for the totality of its operations.

The sole, practical hurdle to the campaign's termination was the Takai family's establishment of a charitable foundation to receive its surplus funds.[22] The General Counsel's Brief is clear that neither Beesley nor Lanakila was involved in that process.[23] The brief consistently presents Beesley as encouraging the process—not delaying it. In December 2016, he raised the question with the Congressman's wife of transferring the campaign's funds to charity.[24] He raised the same subject again in January 2017, while noting the amounts owed to Lanakila under the contract.[25] He advised the family in May 2017 about the process of depositing funds into the as-yet uncreated entity.[26] The record does not say why forming the foundation took the time that it did; the General Counsel's Brief quotes Beesley as telling the compliance vendor that the Congressman's wife "doesn't seem to be in a hurry," and offers nothing to contradict that.[27] But the reason seems obvious: a wife and two children had just

[20] *See id.* at 12-14.
[21] *See id* at 12.
[22] *See* 52 U.S.C. § 30114(a)(3).
[23] *See, e.g.*, General Counsel's Brief at 10 (Mark Takai for Congress) (quoting notes saying, "501(c)(3) -- GK setting up"); *id.* at 11 ("Sami hasn't set up the foundation yet"); *id.* at 13 (citing meeting notes "stating that Gary Kai was setting up the organization").
[24] *See id.* at 9.
[25] *See id.* at 10
[26] *See id* at 13-14.
[27] *See id.* at 11.

unexpectedly lost their husband and father at age 49 to pancreatic cancer, and the wind down of his federal campaign, for which there was no fixed deadline, could only have been a lesser priority relative to other burdens and demands.

This matter came before the Commission in a completely random and unpredictable way. At the apparent prompting of a political opponent of one of Lanakila's other clients, the *Honolulu Star-Advertiser* published a story about the Takai campaign's continued payments to Lanakila.[28] Shortly thereafter, a *Tampa Bay Times* story discussed the campaign and Beesley in examining the FEC reports of more than a dozen so-called "Zombie campaigns."[29] That, in turn, led to the filing of the instant complaint. By then, the Takai family had registered the K. Mark Takai Foundation with the State of Hawaii.[30]

Lanakila, Beesley, and the campaign took prudent steps to minimize future negative press. Beesley's service as treasurer was augmented by the appointment of Gary Kai as deputy treasurer.[31] After the charity's formation removed what would have been the last barrier to the campaign's termination had the complaint not been filed, Lanakila agreed voluntarily to reduce its pay to $750 per month, not knowing that the Commission's reason-to-believe finding would delay termination further for years to come.[32] The campaign transferred $250,000 to the charity on April 17, 2018, seeing no factual or legal basis for the complaint, and confident that the

[28] *See id.* at 14.
[29] Christopher O'Donnell, Eli Murray, Connie Humburg & Noah Pransky, *Zombie Campaigns*, TAMPA BAY TIMES (Jan. 31. 2018), https://projects.tampabay.com/projects/2018/investigations/zombie-campaigns/spending-millions-after-office/.
[30] *See* General Counsel's Brief at 15 (Mark Takai for Congress). The General Counsel's Brief does not claim that the formation was in response to the news articles, nor that the timing was anything other than a coincidence.
[31] *See id.* at 15.
[32] *See id.*

Commission would dismiss it.[33] But the Commission instead found reason to believe a violation occurred, forcing the campaign to remain open. The Office of General Counsel made requests for documents and other information with which the respondents cooperated completely, producing thousands of documents and draining the campaign of the little resources it had left. Ironically, because of this MUR's pendency, and for no other reason, the campaign remains registered with the Commission and still must file reports almost six years after the candidate died.[34]

II. LEGAL ARGUMENT

A. Neither the Act nor Commission Regulations Prohibited the Committee's Payments to Lanakila

1. Applicable Law

The Act and Commission regulations permit the use of campaign funds for any lawful purpose besides personal use.[35] "Personal use" means:

> any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as a federal officeholder.[36]

The purpose of the personal use ban is to avoid corruption.[37] Its origins lie in Congressional ethics rules. In 1967, the Senate censured Senator Thomas Dodd because he had used "the

---

[33] *See id.* at 16.

[34] Indeed, since April 2018, the campaign—having moved nearly all of its remaining assets to the designated charity—has not even paid Lanakila the reduced $750/month fee to which the campaign and Lanakila agreed in early 2018. Lanakila has now gone more than four years without even the $750/month payment that the General Counsel contends constitutes fair market value once the winddown work diminished in 2018. And yet the General Counsel advances an overpayment theory of liability.

[35] *See* 52 U.S.C. § 30114(a)(6), (b)(1); 11 C.F.R. § 113.2(a), (e).

[36] 11 C.F.R. § 113.1(g).

[37] *See, e.g.*, *Fed. Election Comm'n v. O'Donnell,* 209 F. Supp. 3d 727, 740 (D. Del. 2016) (the ban "reduces corruption and promotes public confidence in the campaign finance and political system.").

influence and power of his office ... to obtain, and use for his personal benefit, funds from the public through political testimonials and a political campaign."[38] Both the Senate and the House later expressly codified the prohibitions on personal use, and the 1979 amendments to the Act extended them to non-incumbent candidates.[39] The ban prevents current and future officeholders from seeking funds that could be used for an entirely unattenuated personal benefit, as opposed to the attenuated personal benefit that results from receiving and spending funds to influence an election.

The Commission has repeatedly affirmed that candidates have "wide discretion over the use of campaign funds. If the candidate can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use."[40] On the specific subject of staff, the Commission has held "that the wide discretion accorded political committees for their expenditures allows the campaign to choose the personnel it wishes to employ."[41]

Commission regulations list certain categories of spending that are treated as *per se* personal use because of their greater potential for personal benefit, and thereby for corruption.[42] For example, the rules place special restrictions on salary payments made "to a member of the

[38] U.S. Senate Select Comm. on Ethics, Senate Ethics Manual 154-55 (2003 ed.) (quoting *Report of the Select Committee on Standards and Conduct, United States Senate, on the Investigation of Senator Thomas J. Dodd of Connecticut, to Accompany S. Res. 112,* S. Rep. No. 193, 90th Cong., 1st Sess. 26–27 (1967)).
[39] *See, e.g.*, Cong. Rec. 37,197 (daily ed. Dec. 20, 1979) (remarks of Rep. Thompson) ("Presently, under House rules Members may not convert such excess campaign funds to their personal use. The Senate amendment would apply that policy to all the Federal candidates …").
[40] 60 Fed. Reg. at 7,867.
[41] Advisory Opinion 1992-04 at 2 (Cortese).
[42] *See* 11 C.F.R. § 113.1(g)(1)(i).

candidate's family."[43] The individual must provide bona fide services to the campaign, and the salary payments may not exceed fair market value.[44] In all other cases, the regulations evaluate salary payments according to the general "irrespective test," asking simply whether campaign funds are being used "to fulfill a commitment, obligation or expense…that would exist irrespective of the candidate's campaign or duties as a Federal officeholder."[45]

In the same way, Commission regulations prescribe a fixed time period for winding down a federal office, such as a Congressional office.[46] Interpreting the Act's provision that campaign funds may be used to defray any ordinary and necessary expenses incurred in connection with a candidate's duties as a holder of Federal office, and holding that "the costs of winding down the office of a former Federal officeholder are ordinary and necessary expenses," the Commission authorized the use of campaign funds to wind down a former officeholder's federal office for a period of six months after leaving office.[47] At the same time, the Commission recognized that "this process often takes longer than anticipated," expressed its intention to "provide former officeholders with some leeway," and made clear that "this provision acts as a safe harbor" instead of a bright line.[48] If "a former officeholder … can demonstrate that he or she has incurred ordinary or necessary winding down expenses more than six months after leaving office," then the use of campaign funds is still permissible, because the plain text of the rule provides only a minimum winding down period, not a maximum.[49]

[43] *Id.* § 113.1(g)(1)(i)(H). Separate, complex rules apply when the campaign proposes to pay a challenger or open seat candidate. *See id.* § 113.1(g)(1)(i)(I).
[44] *Id.* § 113.1(g)(1)(i)(H).
[45] *Id.* § 113.1(g).
[46] *See* 11 C.F.R. § 113.2(a)(2).
[47] *See id.*
[48] 60 Fed. Reg. at 7,873.
[49] *Id.*

This regulation refers solely to the costs of winding down the *federal* office.[50] The Commission wrote the rule to interpret the Act's provision allowing "ordinary and necessary expenses incurred in connection with duties … as a holder of federal office."[51] There is no regulation prescribing a particular timeframe for winding down a *campaign*. These expenses are evaluated under the general "irrespective test," as any other expense would be in the absence of an express statutory provision.[52] Thus, for example, in Advisory Opinion 2013-05, Representative Elton Gallegly sought Commission permission to use campaign funds beyond the six-month period to store both officeholder and campaign materials.[53] The Commission held that the storage represented "an ordinary and necessary winding-down expense of a federal officeholder with your extensive tenure."[54] But the Commission held also that the use of campaign funds to pay these expenses "is otherwise lawful and does not constitute personal use."[55] The Gallegly opinion does not stand for the proposition that the use of campaign funds to wind down the campaign is subject to the same six-month "safe harbor" as the wind down of the federal office, which would be inconsistent with the plain language of both the statute and the rule. Rather, the opinion affirms that the wind down of the campaign is evaluated under the "irrespective test."[56]

---

[50] *See* 11 C.F.R. § 113.2(a)(2).
[51] 52 U.S.C. § 30114(a)(2); 60 Fed. Reg. at 7,873.
[52] *See* 11 C.F.R. § 113.1(g).
[53] *See* Advisory Opinion 2013-05 (Gallegly).
[54] *Id.* at 3.
[55] *Id* n.3.
[56] *See id.* There are some MURs in which the Commission has dismissed complaints of personal use by the former officeholders—not the vendors—while noting that the disputed expenses occurred during § 113.2(a)(2)'s six-month timeframe. *See, e.g.*, Factual and Legal Analysis, MUR 7336, at 6 (Mulvaney); Factual and Legal Analysis, MUR 7293, at 15 (Zinke). However, in each case, the Commission made clear that the general "irrespective test" controlled. *See* Factual and Legal Analysis, MUR 7336, at 5; Factual and Legal Analysis, MUR 7293, at 12-13. Moreover, in the Zinke MUR, the Commission did not dispute legal and compliance fees

Applying the "irrespective test," the Commission has repeatedly refused to find personal use on the grounds that a vendor was being paid too much. For example, in MUR 6275 (Massa), the complaint alleged that a former Congressman engaged in prohibited personal use when his campaign paid a $40,000 "campaign management fee" to his former Congressional chief of staff.[57] The complaint and respondent could agree only that the chief of staff "conducted work on behalf of the Committee related to campaign activities for which he was entitled to some compensation …"[58] There was no written contract.[59] Still, the Commission held: "Committees and candidates have wide latitude to retain services and compensate staff within commercially reasonable bounds, and the available evidence found that at least some portion of the payment was legitimate compensation for" the chief of staff's work.[60] The Commission accordingly dismissed the matter.

Even in cases involving the candidate's family, when (unlike here) the "irrespective test" is supplemented by specific requirements that the family member provide bona fide services, and that the payments not exceed fair market value,[61] the Commission has still declined to find a violation. For example, in MUR 6864 (Ruiz), the complaint alleged that the candidate's wife was "grossly overpaid for managing a virtually nonexistent campaign."[62] It contended that she was "the single largest recipient of campaign funds from" the campaign, which "paid more for

incurred outside § 113.2(a)(2)'s six-month timeframe, because they "do not appear to have been personal expenses and would not have violated the Act." Factual and Legal Analysis, MUR 7293, at 16.

[57] Factual and Legal Analysis, MUR 6275, at 1 (Massa).

[58] *Id.* at 1-2.

[59] *See id.* at 2.

[60] *Id.* at 3.

[61] *See* 11 C.F.R. § 113.1(g)(1)(i)(H).

[62] Factual and Legal Analysis, MUR 6864, at 1 (Ruiz).

her salary than it did for campaign advertising."[63] However, the Commission acknowledged that she provided bona fide services, and that "even if true" that the campaign was functionally non-existent, the campaign would still "require continued compliance services in advance of termination."[64] The Commission found no reason to believe a violation occurred.[65]

Similarly, in MUR 5701 (Filner), the Commission found no reason to believe that the candidate and campaign engaged in prohibited personal use through fundraising consulting payments made to the candidate's spouse.[66] "Despite the patchy record on both sides," the Commission found no information to suggest that the spouse's firm failed to provide bona fide services or received more than fair market value.[67]

2. Application to the Facts

There is no legal basis to find personal use in this case. First, the plain text of the regulation thwarts any adverse finding. The Act expressly authorizes the use of campaign funds "for otherwise authorized expenditures in connection with the campaign" or "for any other lawful purpose" besides personal use.[68] It defines "personal use" to mean the use of campaign funds "to fulfill any … obligation … of a person that would exist irrespective of the candidate's election campaign or individual's duties as a holder of Federal office …"[69] The campaign had an enforceable legal obligation to pay Lanakila a monthly fee of $5,500 plus tax.[70] The contract was signed by the candidate himself, extending the campaign's previous agreements with

[63] *Id.* at 2.
[64] *Id.* at 5.
[65] *Id.*
[66] *See* Notification to Bob Filner for Congress, MUR 5701; First General Counsel's Report, MUR 5701.
[67] First General Counsel's Report, MUR 5701, at 5.
[68] 52 U.S.C. § 30114(a)(1), (6).
[69] 52 U.S.C. § 30114(b)(2).
[70] *See* General Counsel's Brief (Mark Takai for Congress) at 5.

Lanakila, and it was entered into for the express purpose of winding down the campaign.[71] Every single one of the payments disputed by the General Counsel's Brief was made to fulfill this obligation, which plainly and indisputably would not have existed irrespective of Representative Takai's candidacy. The General Counsel's Brief does not dispute the existence of this obligation, nor its enforceability, nor that it arose in an arm's length transaction. The General Counsel's Brief identifies no instance in which the campaign made any payment to Lanakila or Beesley except under this obligation. The allegation of personal use thus crashes into the rock of the statute itself. That alone should have ended this matter years ago—without Respondents having to endure years of additional financial burden, distraction, and emotional drain.

Moreover, when Congressman Takai entered into the contract with Lanakila on behalf of the campaign, he had "wide discretion over the use of campaign funds."[72] He had "latitude to retain services and compensate staff within commercially reasonable bounds …"[73] Because he was not hiring Lanakila to wind down the Congressional office, but rather the campaign, the agreement set no fixed termination date.[74] Even if there had been, the Commission would still have recognized that "this process often takes longer than anticipated,"[75] and even the General Counsel would have allowed the campaign to terminate after more than six months.[76] Neither Congressman Takai nor Lanakila nor Beesley nor the General Counsel could have pointed to any

[71] *See id.* at 3, 5.
[72] 60 Fed. Reg. at 7,867.
[73] Factual and Legal Analysis, MUR 6275 (Massa), at 3.
[74] *See* 11 C.F.R. § 113.2(a)(2) (establishing six-month safe harbor for "winding down the office of a former Federal officeholder").
[75] 60 Fed. Reg. at 7,873.
[76] *See* General Counsel's Brief at 21-22 (fixing March 2017 as the date to complete the winddown—ten months after the Congressman's withdrawal).

Commission authority that would tell them when the payments to Lanakila were required to end, when they were required to be adjusted downward, or to what amount they would have to be adjusted. The record shows that Congressman Takai exercised the discretion that Commission rules expressly gave him, and that the payments were made solely according to that discretion.

The personal use rules placed no condition on the payments to Lanakila, except for the general "irrespective test." Neither Dylan Beesley nor anyone else associated with Lanakila had a family relationship with Representative Takai, and so the special requirements applying to salaries paid to family members—that the services be bona fide, and that the payments not exceed fair market value—did not apply.[77] Even if Beesley *had* been a member of the candidate's family, previous Commissions still would not have found personal use. His services were bona fide and provided at fair market value. "Even a virtually nonexistent campaign would require continued compliance services in advance of termination."[78] The same was no less true of Lanakila's management services. While a third-party vendor was filing the campaign's reports, there was no one else holding the broad responsibilities reserved to the treasurer for the campaign's compliance with the Act.[79]

The General Counsel's Brief cites the diminished tempo of the wind down activities as support for the proposition that the campaign paid Lanakila more than fair market value after March 2017, but it fails to account for Beesley's voluntary ascension into the treasurer position

[77] *See* 11 C.F.R. § 113.1(g)(1)(i)(H).
[78] Factual and Legal Analysis, MUR 6864, at 5 (Ruiz) (internal quotations omitted).
[79] *See* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (2005) ("The Act designates treasurers to play a unique role in a political committee; indeed, a treasurer is the only office a political committee is required to fill … Without a treasurer, committees cannot undertake the host of activities necessary to carry out their mission, including receiving and disbursing funds and publicly disclosing their finances in periodic reports filed with the Commission.").

in September 2016, with no increase in pay.[80] The performance of the treasurer's obligations, by itself, might well have been sufficient to justify the $5,500 monthly fee.

More basically, the General Counsel's Brief is an assault on the use by a campaign of a flat-rate contract. The parties all knew at the negotiation of the contract that the work under that contract would not be even throughout its life. Indeed, they anticipated to a near certainty exactly what happened—that the work would be particularly heavy initially and then would decrease. In light of that anticipated reality, the parties negotiated a flat, monthly fee, as do many campaigns and vendors, including where, as here, both sides know that the work will be uneven. Such arrangements are common on campaigns, where work is typically performed over a two or even six-year horizon, and in the past such contracts have been left to the wide discretion of the candidates. Never before has the Commission seen fit to swoop in and find personal use on the basis of a flat-fee contract, by focusing on the months with lighter work—and, absent a previously unannounced ban on all flat-fee contracts, neither does the Commission suggest any basis by which it would conduct such an analysis going forward.

Finally, the allegations in this matter are utterly unlike any which the Commission has pursued on a theory of personal use. This is not the case of a candidate using campaign funds four years after leaving office to attend retreats, pay club dues, and travel to Florida.[81] Nor is it even like some of the high-profile cases the Commission has recently dismissed, where former Members of Congress were alleged to have incurred club and food expenses after leaving office.[82] Those cases involved categories of expenses that the Commission flags for special

[80] *See* General Counsel's Brief at 7.
[81] *See* Conciliation Agreement, MUR 7292 ¶¶ 7-9 (Stearns).
[82] *See* Factual and Legal Analysis, MUR 7336, at 2 (Mulvaney); Factual and Legal Analysis, MUR 7293, at 15 (Zinke).

scrutiny in the personal use rules.[83] This case does not: it solely involves payments made to a political consulting firm for bona fide services rendered under a written contract negotiated at arm's length. The General Counsel's Brief can point to no previous case like this one, in which the Commission has second-guessed the wide discretion given to a candidate to arrange for his campaign's administration, substituting its judgment for his on the level of compensation—and, indeed, there is none.

B. By Repeatedly Disregarding Basic Principles of FEC Interpretation and Enforcement, the General Counsel's Recommendation Is Arbitrary, Capricious, and Contrary to Law

The Commission's enforcement decisions are bounded by the principles of reasoned decision-making: they cannot be arbitrary, capricious, or contrary to law.[84] And yet the General Counsel's Brief reads like a list of "greatest hits" of discredited enforcement theories, long ago rejected by the agency.

First, the recommended finding of personal use represents irrational and impermissible interpretations of the statute. It overlooks the plain text of 52 U.S.C. § 30114(b)(2) and 11 C.F.R. § 113.1(g), which define "personal use" as the "use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign …"[85] Each disputed payment was made to fulfill a contractual obligation into which the candidate himself entered expressly to provide for the wind down of the campaign.[86] It overlooks the plain text of 11 C.F.R. § 113.1(g)(1)(1)(H), which treats compensation to *family members* as personal use, when the family members do not

[83] *See, e.g.*, 11 C.F.R. § 113.1(g)(1)(ii)(B) (flagging meal expenses for evaluation on a case-by-case basis).
[84] 5 U.S.C. § 706(2).
[85] 11 C.F.R. § 113.1(g).
[86] General Counsel's Brief at 5-6 (Mark Takai for Congress).

provide bona fide services, and when the payments exceed fair market value.[87] By erroneously applying these same criteria to payments made to non-family members, the General Counsel's Brief would render this language superfluous, when it was meant to limit the wide discretion candidates otherwise have to pay their employees and consultants.[88] Finally, the General Counsel's Brief overlooks the plain text of 11 C.F.R. § 113.2(a)(2), which interprets 52 U.S.C. § 30114(a)(2)'s provision for ordinary and necessary expenses incurred in connection with federal officeholder duties to provide a six-month "safe harbor" for winding down a Congressional office, but makes no such provision for campaigns generally.[89] Such statutory "interpretations" are neither reasonable nor permissible.

Second, the General Counsel's Brief uses an advisory opinion as a sword, not a shield, seizing on the Elton Gallegly opinion as the sole basis for a six-month campaign wind down period. For twenty-five years, it has been axiomatic that "the Commission may not use advisory opinions as a substitute for rulemaking."[90] "Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method."[91] Thus, the Commission refused to use two advisory opinions (approving particular types of advertisements) as a yardstick to determine that other conduct (the use of other types of advertisements) should be treated as a contribution or expenditure.[92]

[87] 11 C.F.R. § 113.1(g)(1)(1)(H).
[88] *See* 60 Fed. Reg. at 7,866, 7,867.
[89] *See id.* at 7,873; 11 C.F.R. § 113.2(a)(2).
[90] Statement of Reasons of Vice Chairman Darryl R. Wold and Commissioners Lee Ann Elliott, David M. Mason and Karl J. Sandstrom on the Audits of Dole for President Committee, Inc., *et al.,* at 3 (June 24, 1999).
[91] *Id.*
[92] *See id.*

The abuse of the Gallegly opinion here is a clear instance of this phenomenon. Elton Gallegly was a 26-year Member of Congress from California who retired in 2013.[93] He had hundreds of boxes of both official and campaign documents, and campaign funds to pay for their storage, and so he sought an advisory opinion to obtain permission to use the funds. The Commission noted that 11 C.F.R. § 113.2(a)(2) provided six months to use campaign funds to wind down the office of a former federal officeholder, but it noted also that this six-month period was a "safe harbor" and not a hard-and-fast deadline.[94] Because a Member of Congress could still demonstrate that he would incur ordinary and necessary winding down expenses outside the six month period, and because Gallegly had made this demonstration, the Commission allowed him to use campaign funds to store the papers—both the official papers, and the campaign papers.[95]

Had Gallegly asked only about the storage of the campaign papers, 11 C.F.R. § 113.2(a)(2) would not have come into play at all. Indeed, the Commission indicated that the use of campaign funds to store the campaign papers would have been permitted independently under the "irrespective test": "Because your use of campaign funds to pay these storage expenses is otherwise lawful and does not constitute personal use, it is also permissible under 2 U.S.C. § 439a(a)(6) and 11 C.F.R. § 113.2(e)."[96]

From this, however—an advisory opinion with the sole function of protecting Congressman Gallegly against future Commission enforcement—the General Counsel conjures a general rule that campaign wind down expenses are inherently suspect after six months have

[93] Advisory Opinion 2013-05.
[94] *See id.*
[95] *See id.*
[96] *See id.* n.3.

lapsed.[97] Instead of examining the particular obligation for which campaign funds were used and asking whether that obligation would have existed irrespective of candidacy, as the statute commands, the General Counsel's Brief looks first instead to whether six months had passed after Representative Takai's death.[98] The General Counsel's Brief cannot even identify the particular date on which the expenses became suspect. It says simply that "after mid-March 2017," Lanakila and Beesley "had largely completed their responsibilities," without asking whether the campaign had a continuing obligation to pay under a contract that would not have existed irrespective of candidacy—which is the only question that matters under the statute—and without considering that a gradual decrease in the quantity of work performed (i.e., a slower period at the tail of the contract) was exactly what the parties anticipated when they originally negotiated the flat-fee arrangement.[99]

Finally, the General Counsel's Brief purports to enforce rules that the Commission has yet to adopt. The generation of this matter coincided with a controversy over so-called "Zombie campaigns"—a colloquial term that refers to principal campaign committees that remain registered and continue to make disbursements long after the candidate has stopped seeking office. Because Commission regulations indeed provide no fixed period by which a principal campaign committee must terminate, both reform proponents and the Commission itself took steps to respond to this controversy—but none of which changed the law.

Less than three weeks after filing the Complaint in this matter, the complainant himself filed a "Petition for Rulemaking to Revise and Amend Regulations Relating to Former

[97] *See* General Counsel's Brief at 18 (Mark Takai for Congress).
[98] *See id.*
[99] *Id.* at 20.

Candidates' Personal Use of Campaign Funds."[100] The petition acknowledged that "the Commission's personal use regulations are not sufficiently clear with respect to former officeholders."[101] It asked the Commission to "provide clear guidance on permissible and impermissible uses of campaign funds for former officeholders" and invited the Commission "to include a non-exhaustive set of [permissible] activities—such as winding-down expenses—in its regulations."[102] In a further indication that 11 C.F.R. § 113.2(a)(2)'s six-month timeline for winding down the Congressional office is not generally understood to apply to winding down the campaign, the petition concluded: "The Commission could consider establishing a time period beyond which campaign committee spending by a committee with no outstanding net debts whose candidate is no longer in office or running for office is presumptively personal use."[103]

The Commission opened a Notice of Availability on the petition but has neither published nor adopted rules in response.[104] Instead, the Commission announced a new policy, to be implemented through the Reports Analysis Division, by which it would "examine the use of campaign funds by dormant committees as part of its review of campaign finance disclosure reports, to ensure the activity meets the regulatory standards for permissible use."[105] The Commission indicated no substantive change in the personal use rules: "Payments for expenses

[100] Campaign Legal Center, Petition for Rulemaking to Revise and Amend Regulations Relating to Former Candidates' Personal Use of Campaign Funds (Feb. 5, 2018), https://campaignlegal.org/sites/default/files/02-05-18%20CLC%20Former%20Member%20Personal%20Use%20petition.pdf.
[101] *Id.* at 4.
[102] *Id.* at 5.
[103] *Id.* at 8.
[104] Rulemaking Petition; Notification of Availability: Former Candidates' Personal Use, 83 Fed. Reg. 12283 (March 21, 2018).
[105] FEC Record, Compliance, Commission will review dormant committees' use of campaign funds (April 26, 2018), https://www.fec.gov/updates/commission-will-review-dormant-committees-use-campaign-funds/.

are generally permissible as long as such expenses would not exist irrespective of the candidate's campaign or duties as a federal officeholder."[106] It made clear that section 113.2(a)(2)'s six-month safe harbor applied only to winding down the federal office, stating "funds in a campaign account may be used to cover the costs of winding down the campaign, *including winding down the office of a former federal officeholder for a period of six months after s/he leaves office.*"[107] Finally, for House campaigns, the policy only applied to those "who did not campaign or hold office during the previous two years," belying the notion of a six-month deadline, and failing even to cover the conduct in this MUR.[108] The Commission's policy on dormant campaigns undercuts the theory of a violation, and yet the General Counsel would fly past the terms of that policy to seek an adverse finding on a theory the Commission could not bring itself to adopt.

If, going forward, Congress or the Commission wishes to further modify the law, rules, or policies governing the winding down of a campaign, then one or the other should do so. Arbitrarily imposing any such unadopted, hypothetical new law, rules, or policies on Respondents for conduct from a half-decade ago, however, would be absurd, and unlawful.

C. A Finding of Probable Cause Would Completely Disrupt How Campaigns Pay Their Vendors

The effect of an adverse finding in this matter on the regulated community cannot be exaggerated. It solely involves the level of compensation paid to a vendor under an arm's length agreement. The finding rests solely on the proposition that the level of compensation was too high, or at least too high in certain months. The presumption is that Representative Takai and Lanakila erred when they set the flat fee in 2016 and did not provide for a termination date in the

[106] *Id.*
[107] *Id.* (emphasis added).
[108] *See id.*

contract, or that Commission regulations required Beesley and Lanakila, at some indeterminate point in time, voluntarily to renounce or reduce the payments to which the contract entitled them.

Until now, when a candidate like Representative Takai negotiated with a vendor like Lanakila, his task would have been straightforward. Lacking any familial relationship with the vendor, and hence no explicit obligation to ensure that the services were bona fide and that the price did not exceed fair market value,[109] he would have exercised "the wide discretion" accorded to "the campaign to choose the personnel it wishes to employ."[110] His primary task would have been to avoid receiving a prohibited contribution, making sure that the campaign paid the vendor no less than the usual and normal charge for the services provided in the marketplace.[111]

The General Counsel's recommendation alters these considerations, in ways that could adversely affect the compliance of campaigns across the board. By requiring that vendor services generally may not exceed fair market value, and not just in the case of family members, the General Counsel's Brief creates an incentive for campaigns to *lower* vendor compensation (to an unknown amount, in accordance with some unknown, unpublished, nonexistent schedule of acceptable payments, all to be determined after the fact by the Commission), thus courting the receipt of excessive and prohibited contributions.

This would wreak havoc across the administration and enforcement of the Act. First, it throws out the proverbial baby with the bathwater, fighting the illusory potential for corruption in a campaign that is winding down, at the expense of the very real threat of corruption in an active campaign. Second, it turns the Commission and campaign counsel into wage-and-price

[109] *See* 11 C.F.R. § 113.1(g)(1)(1)(H).
[110] *See* Advisory Opinion 1992-04 (Cortese).
[111] *See* 11 C.F.R. § 100.52(d)(2).

boards, inviting them to scrutinize every price term and termination date to ensure that they do not fall below "fair market value," notwithstanding that the fair market already set that value via the arm's length contract.

There is a solution to this problem, and the Act already provides for it: allow campaigns to use their funds for any lawful purpose, except when the obligation would have existed irrespective of the campaign; give them wide discretion over the use of their funds; place additional conditions in spending categories that present elevated risks of personal use; and stand down from enforcement when the campaign can reasonably show that the expense arises from campaign or officeholder activities. But the General Counsel would proceed in the opposite direction. The result would be chaos in the Act's administration and enforcement and a subversion of its anti-corruption purposes.

D. The General Counsel's Brief Disregards the Consistent Evidence of Dylan Beesley's Good Faith

Each enforcement matter involves real people, and Dylan Beesley is at the center of this one. The General Counsel's Brief shows that Beesley was a trusted aide to Representative Takai's campaign.[112] He performed well enough as a fundraiser that the campaign quickly raised his pay.[113] As the 2016 election approached, while Representative Takai remained healthy and looked forward to re-election and extended service in Congress, the Congressman increased Beesley's responsibilities, extending his portfolio beyond fundraising into the strategic direction of the campaign.[114] He raised Beesley's pay, consistent with his expanded role as a

[112] *See* General Counsel's Brief at 3 (Mark Takai for Congress).
[113] *See id.*
[114] *See id.*

trusted advisor.[115] The General Counsel's Brief shows no furtive act whatsoever on Beesley's part.[116]

The General Counsel's Brief shows that Beesley proceeded diligently to wind down the campaign.[117] It identifies no act or omission on Beesley's part that delayed termination and shows that he was attentive to legal compliance, correctly evaluating particular proposed uses of campaign funds.[118] The brief offers no instance in which Beesley recommended, or was privy to, any violation of Commission rules.

Additionally, the General Counsel's Brief shows that Beesley dealt transparently with others interested in the campaign—particularly the Takai family. He wrote frequent memos to the Congressman and his wife on the status of the wind down and sought meetings on related issues.[119] When the Congressman passed away, the Congressman's wife asked him to serve as treasurer when the prior treasurer stepped down, and he agreed, with no increase in pay.[120] He diligently proceeded with the wind down process.[121] The General Counsel's Brief showed that he continued to involve the Congressman's family in matters of committee administration and that they were involved in financial decisions, particularly in reviewing and approving all payments to Lanakila.[122]

The record shows that Beesley tried to encourage the campaign's termination—not delay it. He met with the Congressman's wife toward this end in December 2016, sought her input on

[115] *See id.* at 3-4.
[116] *See id.* at 4.
[117] *See id.* at 6.
[118] *See id.* at 7.
[119] *See* General Counsel's Brief at 6-7 (Mark Takai for Congress).
[120] *See id.*
[121] *See id.* at 8.
[122] *Id.* at 8-9.

wind down matters during the next month, and provided her with detailed updates all along on the Committee's financial activity.[123] The General Counsel's Brief is clear that Beesley had no involvement in or control over the establishment of the family's foundation, other than encouraging the family to hasten that process. It presents no motive for the delay, besides the obvious: that forming and qualifying a section 501(c)(3) charity takes time, and that doing so was but one of many concerns for a grieving family.

Against this strong record of forthright conduct, the General Counsel's Brief makes a few, feeble, unfair attempts to cast Beesley in a bad light. While making no allegation of a knowing and willful violation, the General Counsel tries to turn the evidence of his compliance against him, saying that "Beesley was aware that certain uses of campaign funds were prohibited."[124] The General Counsel's Brief presents no evidence that Beesley was aware of any purported six-month deadline for winding down the campaign, nor of any requirement that Lanakila voluntarily renounce the payments to which the contract entitled it—because there were no such requirements. The only fair inference to be drawn from the brief is that, had such requirements actually existed, and had Beesley known about them, he would have followed them.

Similarly, when Beesley voluntarily agreed to reduce Lanakila's compensation under the contract after the news stories surrounding his engagement, and after the K. Mark Takai Foundation had been established to receive the campaign's funds, the General Counsel tries to turn that against him, too, contending—absurdly and without any evidence—that the reduced $750/month fee represented the fair market value of his services for months *long before* the

[123] *See id.* at 10-11.
[124] General Counsel's Brief at 7 (Mark Takai for Congress).

negotiated decrease.[125] The General Counsel's treatment of Dylan Beesley is no more justified than its reckless misreading of the personal use rules.

CONCLUSION

The General Counsel should withdraw the recommendation that the Commission find probable cause to believe that Respondents violated 52 U.S.C. § 30114(b) by converting campaign funds to personal use, the Commission should otherwise reject the recommendations, MUR 7310 should be closed, and Mark Takai for Congress should be allowed, finally, to terminate.

Dated: April 25, 2022 Respectfully submitted,

Brian G. Svoboda
PERKINS COIE LLP
700 Thirteenth Street, NW
Washington, DC 20005
(202) 628-6600
Attorney for Mark Takai for Congress

William Pittard
KAISER DILLON PLLC
1099 Fourteenth Street, NW
Washington, DC 20005
(202) 683-6150
Attorney for Lanakila Strategies, LLC, and Dylan Beesley

[125] *See id.* at 25.