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Mr. P. Christopher Hughey, Acting General Counsel
Ms. Shawn Woodhead Werth, Secretary and Clerk
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: **Advisory Opinion Request—"Colbert Super PAC"**

Dear Mr. Hughey and Ms. Werth:

This letter is an Advisory Opinion Request filed on behalf of Mr. Stephen Colbert. Mr. Colbert seeks the Commission's guidance on the formation and operation of "Colbert Super PAC," a proposed independent expenditure-only committee that will endeavor to "mak[e] a better tomorrow, tomorrow."

This letter also constitutes notice to the Office of the Commission Secretary that Mr. Colbert plans to appear before the Commission to answer questions regarding his Advisory Opinion Request.

I. BACKGROUND

Since 2005, Mr. Colbert has hosted *The Colbert Report*, a half-hour television program that is owned, distributed, and produced by U.S. subsidiaries of Viacom, Inc. (collectively, "Viacom"), a media company that is not owned or controlled by any political party, committee, or candidate. *The Colbert Report* is distributed on cable television and through associated Internet sites.

The Colbert Report discusses political actors, issues, and news through on-air monologues and guest interviews, as well as other less conventional methods. The show has addressed campaign finance rules and controversies within this format on a regular basis.¹ While *The Colbert Report* generally focuses on matters that do not involve Mr. Colbert personally, Mr. Colbert has placed himself in positions where his personal political actions and experiences can serve as material for the show. For instance, during the 2008 election cycle, Mr. Colbert's "Hail to the Cheese Stephen Colbert Nacho Cheese Doritos 2008 Presidential Campaign" provided an

¹ See, e.g., *The Colbert Report*, *Citizens United v. Federal Election Commission* (Sept. 15, 2009), available at <http://www.colbertnation.com/the-colbert-report-videos/249057/september-15-2009/citizens-united-v--federal-election-commission---jeffrey-toobin>; *The Colbert Report*, *The Word - Invisible Inc.* (Oct. 26, 2010), available at <http://www.colbertnation.com/the-colbert-report-videos/363236/october-26-2010/the-word---invisible-inc->.

occasion to engage *The Colbert Report's* audience on the topic of campaign-related rules and paperwork.² When Mr. Colbert and Jon Stewart co-hosted the widely attended "Rally to Restore Sanity and/or Fear" on the National Mall in October 2010, *The Colbert Report* repeatedly mentioned the event, invited audience members to attend, and used the opportunity to discuss the state of political dialogue during the election.³

Consistent with this pattern, Mr. Colbert recently raised with *The Colbert Report's* audience the idea of creating his own PAC, initially in the context of offering comment on Governor Tim Pawlenty's leadership PAC activities. The idea of a "Colbert Super PAC" has to date been only a vehicle for discussing campaign-finance rules and new developments in politics, such as *Citizens United* and independent expenditure-only committees.⁴

Mr. Colbert now plans to form an actual federal independent expenditure-only committee named "Colbert Super PAC." Colbert Super PAC will make only independent expenditures, advertisements that expressly advocate the election or defeat of a clearly identified candidate and that are not coordinated with any candidate or political party. Colbert Super PAC will also pay usual and normal administrative expenses, including but not limited to, luxury hotel stays, private jet travel, and PAC mementos from Saks Fifth Avenue and Neiman Marcus. It plans to maintain a website, on which it will discuss political events, solicit contributions, and offer opinions on political matters. Colbert Super PAC will not make any contributions to, or coordinate its expenditures with, any candidate or any other political committee. Colbert Super PAC intends to solicit and accept unlimited corporate contributions, unlimited individual contributions, unlimited political-committee contributions, and unlimited labor contributions. Colbert Super PAC will report contributions, expenditures (including independent expenditures), receipts, and disbursements as required by Commission rules.

Colbert Super PAC will register as a non-connected committee with the Commission. Viacom will not pay for Colbert Super PAC's establishment and administrative costs under 11 C.F.R. §§ 100.81, 100.141 (exemption from "contribution" and "expenditure" for corporate-connected a "separate segregated fund"). Furthermore, neither Viacom nor its corporate management will control or direct Colbert Super PAC's activities. Viacom will merely continue to perform its regular review process applicable to the content of any Viacom show, including *The Colbert Report*.

Once Colbert Super PAC is established, it will continue to provide an on-air premise for discussing campaign-finance rules and other aspects of American politics. As with similar instances in the past, Mr. Colbert intends to use the PAC's activities as a source of on-air

² See, e.g., *The Colbert Report, Hail to the Cheese – Campaign Coverage Finance* (Oct. 8, 2007), available at <http://www.colbertnation.com/the-colbert-report-videos/118650/october-18-2007/hail-to-the-cheese---campaign-coverage-finance>.

³ See, e.g., *The Colbert Report, President Obama Endorse Rally to Restore Sanity* (Sept. 30, 2010), <http://www.colbertnation.com/the-colbert-report-videos/360638/september-30-2010/president-obama-endorses-the-rally-to-restore-sanity>.

⁴ See, e.g., *The Colbert Report, Colbert Super PAC – Trevor Potter* (Apr. 25, 2011), available at <http://www.colbertnation.com/the-colbert-report-videos/382014/april-14-2011/colbert-super-pac---trevor-potter>.

material for *The Colbert Report*.⁵ For instance, he plans to reference Colbert Super PAC's website, describe its operations, and mention audience participation opportunities. In so doing, Mr. Colbert may show examples of independent expenditure ads created by the PAC. *The Colbert Report*'s distribution, production, and unique format will not be altered because of Colbert Super PAC content.

Mr. Colbert now submits this Advisory Opinion Request to receive clarification and guidance from the Commission concerning Colbert Super PAC's operation, particularly the proper categorization and reporting of airtime and associated costs.

II. QUESTIONS PRESENTED AND ASSOCIATED DISCUSSION

A. **May Mr. Colbert Form an Independent Expenditure-Only Committee that Accepts Unlimited Corporate Contributions, Unlimited Individual Contributions, Unlimited Political-Committee Contributions, and Unlimited Labor Contributions?**

Mr. Colbert requests confirmation that he may establish Colbert Super PAC, an independent expenditure-only committee. In 2010, the U.S. Supreme Court ruled that corporations could make unlimited independent expenditures using corporate treasury funds⁶ and the D.C. Circuit Court held that individuals could make unlimited contributions to independent expenditure-only groups.⁷ After these court rulings, the Commission advised Commonsense Ten, a group that intended only to make independent expenditures, that it could register with the Commission and permissibly "solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations."⁸ Colbert Super PAC will, in all material respects, be identical to Commonsense Ten because the PAC intends only to make independent expenditures and will not offer any monetary or in-kind contribution to any other political committee. Mr. Colbert therefore believes that his establishment of Colbert Super PAC is permitted. Mr. Colbert asks the Commission to verify this conclusion.

⁵ Mr. Colbert anticipates that other media outlets will also discuss Colbert Super PAC's activities. See e.g., Dan Eggen, *Colbert Announces Super PAC*, WashingtonPost.com (Apr. 15, 2011), available at http://www.washingtonpost.com/blogs/44/post/colbert-announces-a-super-pac/2011/04/15/AFZCByjD_blog.html.

⁶ *Citizens United v. FEC*, 130 S.Ct. 876, 913 (2010).

⁷ See *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) ("the contribution limits of 2 U.S.C. 441a(a)(1)(C) and 441a(a)(3) are unconstitutional as applied to individuals' contributions to SpeechNow"); see also *EMILY's List v. FEC*, 581 F.3d 1, 10 (D.C. Cir. 2009) ("... individual citizens may spend money without limit (apart from the limit on their own contributions to candidate or parties) in support of the election of particular candidates").

⁸ Fed. Election Comm'n Adv. Op. 2010-11 at 3.

B. If Colbert Super PAC is Discussed on *The Colbert Report*, Should Airtime and Related Costs Be Reported as a Lawful In-kind Contribution or Will the Costs Be Exempt from Reporting Requirements under the “Press Exemption”?

Mr. Colbert asks for guidance on Colbert Super PAC’s reporting obligation for airtime and related production and personnel costs.

Political committees, including independent expenditure-only committees, must disclose all contributions received. Commission regulations define “contribution” to include “anything of value” for the purpose of influencing a federal election.⁹ However, Commission regulations also exempt from that definition “any cost[s] incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer) ... unless the facility is owned or controlled by any political party, political party committee, or candidate.”¹⁰

If Colbert Super PAC is discussed on *The Colbert Report*, will the value of airtime and related costs be reported as a lawful in-kind contribution from Viacom or will the costs be exempt from reporting requirements under the “press exemption”?

1. The “Press Exemption” Applies to Viacom

The Commission conducts a two-step analysis to determine whether the “press exemption” applies. First, the Commission asks whether the entity engaging in the activity is a press entity under Commission rules.¹¹ Second, in determining the exemption’s scope, the Commission considers: (1) whether the press entity is owned or controlled by a political party, committee, or candidate; and, if not, (2) whether the press entity is acting as a press entity in conducting the activity at issue (i.e. whether the entity is acting in its “legitimate press function”).¹² If the press entity is not owned or controlled by any political party, political committee, or candidate, and if it is acting as a press entity with respect to the conduct in question, the Commission lacks subject matter jurisdiction over the conduct.¹³

Here, Viacom’s activities make clear that it is a press entity. In fact, the Commission has specifically held on a prior occasion that Viacom is a press entity.¹⁴ Moreover, Mr. Colbert believes that Colbert Super PAC discussion on *The Colbert Report* is fully within the press exemption because Viacom is not owned or controlled by a political party, committee, or candidate and because Viacom will act in its legitimate press function by distributing *The Colbert Report*.

⁹ 11 C.F.R. § 100.52.

¹⁰ 11 C.F.R. § 100.73.

¹¹ See, e.g., Fed. Election Comm’n Adv. Op. 2005-16 at 4.

¹² See *Reader’s Digest Association v. FEC*, 509 F.Supp. 1210, 1215 (S.D.N.Y. 1981).

¹³ *FEC v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1313 (D.D.C. 1981).

¹⁴ Fed. Election Comm’n Adv. Op. 2003-34 at 3.

a. VIACOM IS NOT OWNED OR CONTROLLED BY A
POLITICAL PARTY, COMMITTEE, OR CANDIDATE

Viacom is not owned or controlled by a political party, committee, or candidate. Notably, "Commission decisions ... have never found that a [host] 'owned or controlled' the entity for purposes of the press exemption on the basis that the [host] had a role in determining program content," even when the host exercised total control over a non-scripted live program's content.¹⁵ Viacom is therefore not owned or controlled by Colbert Super PAC regardless of the extent to which Mr. Colbert, a PAC representative, helps formulate and deliver content on *The Colbert Report*.

b. VIACOM WILL ACT IN ITS LEGITIMATE PRESS FUNCTION
BY DISTRIBUTING *THE COLBERT REPORT* AFTER
COLBERT SUPER PAC'S FORMATION

Viacom will act in its core legitimate press function in producing and broadcasting *The Colbert Report* after Colbert Super PAC is formed. The Commission considers two main factors in determining whether an entity acts in its legitimate press function.

First, the Commission ascertains whether the programming is available to the general public.¹⁶ Here, this element is easily met, as *The Colbert Report*, including future segments mentioning Colbert Super PAC, will be available to the general public through cable television and on the Internet.

Second, the Commission decides whether the programming is comparable in form to that ordinarily issued by the press entity.¹⁷ This portion of the "press exemption" test has been frequently analyzed. A press entity could conceivably fall outside the exemption where it utilizes an unconnected medium or undertakes extraordinary efforts that go beyond its normal press activities to aid a federal candidate or committee.¹⁸ However, given the First Amendment concerns implicated by regulation of the press, as well as the editorial and creative discretion recognized by the "press exemption," the Commission has generally given wide berth to the media and treated with deference any content variations that occur within a program's normal

¹⁵ Fed. Election Comm'n MUR 6242, First General Counsel's Report at 6 (Hayworth) (Commission ratified Office of General Counsel's report, 6-0). See also Fed. Election Comm'n MURs 5555 (Ross) and 4689 (Dornan).

¹⁶ Fed. Election Comm'n Adv. Op. 2008-14 at 5.

¹⁷ Fed. Election Comm'n Adv. Op. 2000-13.

¹⁸ *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (finding that a special edition newsletter was not subject to the press exemption because it "was not published through the facilities of the regular newsletter, ... was not distributed to the newsletter's regular audience," and no "characteristic of the [special edition] associated it in any way with the normal MCFL publication."). See also Fed. Election Comm'n MUR 4689, Statement of Reasons by Commissioners Wold, Elliott, Mason, and Sandstrom at 3 ("Because it does not appear that Mr. Dornan was invited to serve as a guest host because of any possible candidacy, the Commission's analysis in three advisory opinions relied on by the General Counsel's Report, Advisory Opinions 1996-16, 1906-41, and 1996-48, in which the Commission reviewed proposed formats in determining whether particular program featuring candidates fall within the press exemption, is not applicable to this matter.")

format. This is true even where, unlike here, the person hosting a show becomes a candidate.¹⁹ For example, the Commission last year unanimously found that the “press exemption” applied to Phoenix radio station KFYI’s broadcasts of *The J.D. Hayworth Show*.²⁰ The show’s host, a soon-to-be U.S. Senate candidate, spent at least 10 percent of programming time discussing his upcoming candidacy and KFYI posted online content mentioning the host as a candidate.²¹ The Commission ultimately found that KFYI fell within the “press exemption” because the broadcasts were “comparable in form to those broadcasts of the Show ordinarily issued by the entity, which broadcasts maintained a ‘newstalk’ format consisting of ‘news, commentary, and editorial’ material on a variety of topics.”²² Similarly, the Commission applied the “press exemption” to three radio stations when a guest host, who was a federal candidate during at least one of the appearances,²³ repeatedly promoted his candidacy and criticized his opponent over the airwaves by claiming, among other things, that she had won a previous election by voter fraud, lied in her campaign “attacks” on him, committed a felony, broken her campaign promises, and voted for “infantioide.”²⁴ Despite these unusual statements, the Commission found that the radio stations acted in their legitimate press functions.²⁵

Consequently, the Commission’s previous decisions strongly support the conclusion that *The Colbert Report* is comparable in form to programming ordinarily produced and distributed by Viacom. To the extent program content is relevant to the Commission, the addition of segments that discuss Colbert Super PAC after its formation will fall well within the traditional editorial framework of the show. *The Colbert Report* has since 2005 discussed campaign finance and other political issues, at times doing so in the context of Mr. Colbert’s personal activities. Colbert Super PAC discussion on *The Colbert Report* will therefore be consistent with prior programs. Most importantly, *The Colbert Report*’s distribution, production, and unique format will not be altered because of Colbert Super PAC content. Viacom will therefore act in its legitimate press function by producing and distributing in its normal course *The Colbert Report*, including segments that discuss Colbert Super PAC.

¹⁹ Indeed, some past Commissioners have expressed the view that Commission inquiry into a message’s content is prohibited for purposes of a “press exemption” analysis. See, e.g., Fed. Election Comm’n MUR 5555, Statement of Reasons for Commissioners Toner, Mason, and von Spakovsky at 3 (Ross) (“The content of a news story, commentary, or editorial is irrelevant”); Fed. Election Comm’n MUR 4689, Statement of Reasons by Commissioner Mason at 2 (admonishing against “any inquiry into the content of the broadcasts at issue”).

²⁰ Fed. Election Comm’n MUR 6242 (Hayworth).

²¹ Fed. Election Comm’n MUR 6242, Response from Clear Channel Communications, Inc. at 9 (Hayworth).

²² Fed. Election Comm’n MUR 6242, First General Counsel’s Report at 6 (Hayworth).

²³ The host had an open campaign committee that had raised hundreds of thousands of dollars. He had formally declared his candidacy before at least one of the radio appearances. Fed. Election Comm’n MUR 4689, First General Counsel’s Report at 7-9 (Dornan).

²⁴ Fed. Election Comm’n MUR 4689, First General Counsel’s Report at 16 (Dornan) (vote 4-2 to reject General Counsel’s recommendations). See also Fed. Election Comm’n MUR 5555 (Ross) (Commission voted unanimously to apply the “press exemption” when

²⁵ See Fed. Election Comm’n MUR 4689, Statement of Reasons by Commissioners Wald, Elliott, Mason, and Sandstrom at 2 (Dornan).

2. Viacom's Expenses Associated with the Discussion of Colbert Super PAC Should Fall within the Scope of the "Press Exemption"

a. VALUE OF TIME SPENT DISCUSSING COLBERT SUPER PAC

Mr. Colbert seeks confirmation that none of Viacom's normal expenses associated with creating, producing, and distributing *The Colbert Report* will be a reportable in-kind contribution to Colbert Super PAC if Mr. Colbert talks about the PAC on his show. This type of discussion falls well within the traditional subject matter of *The Colbert Report* and should be afforded, at the very least, the same application of the "press exemption" the Commission has provided to discussions of election-related subjects by talk show hosts who become candidates.

b. VALUE OF TIME SPENT EXPRESSLY ADVOCATING THE ELECTION OR DEFEAT OF CANDIDATES

It is possible that during *The Colbert Report*, Mr. Colbert will discuss a candidate the PAC will support or oppose through independent expenditures. This type of discussion will be similar to press editorials or commentaries endorsing candidates or urging support of political committees other media outlets regularly undertake under the "press exemption." Therefore, Mr. Colbert asks the Commission to confirm that the inclusion of this type of discussion will be considered exempt from the definition of contribution under the "press exemption" and will not be reportable by Colbert Super PAC as an in-kind contribution from Viacom.

c. COSTS RELATED TO ADS SHOWN ON *THE COLBERT REPORT*

In talking about Colbert Super PAC, Mr. Colbert may show on *The Colbert Report* independent expenditure ads produced for the PAC. Viacom staff normally involved in writing and creating material for *The Colbert Report* may participate in creating the ads featured as part of their work. These independent expenditure ads will be used as content for *The Colbert Report*. Some, but not all, ads would be shown only on *The Colbert Report* in the context of discussion of politics and Colbert Super PAC, and neither Mr. Colbert nor the PAC would buy airtime to show those ads on other shows or networks. Other ads would be shown on *The Colbert Report* during discussion of politics and Colbert Super PAC, but would also air as paid advertisements on other shows and networks before or after being featured on *The Colbert Report*. Mr. Colbert asks the Commission to verify that in both of these contexts, Viacom employees' time in creating an ad, the use of Viacom's production resources in producing the ad, and the value of *The Colbert Report* airtime used to show the ad would be exempt from the definition of contribution under the "press exemption" and would not be reportable by Colbert Super PAC as an in-kind contribution from Viacom.

d. OTHER COSTS NECESSARY TO SUSTAIN COLBERT
SUPER PAC

The idea for Colbert Super PAC arose from a discussion on *The Colbert Report* by Mr. Colbert about politics and campaign finance issues. Once Mr. Colbert creates Colbert Super PAC, certain activities (including the filing of reports, and the design and production of a website) will be necessary for the PAC to remain operational and visible so that it can continue to provide material for *The Colbert Report*. Potentially, staff of the show may undertake these tasks as part of their work for *The Colbert Report*, using Viacom's resources (e.g. office equipment). Mr. Colbert asks the Commission to confirm that this staff time and resource use, except any costs for PAC solicitations, would be exempt from the definition of contribution under the "press exemption" and would therefore not be reportable by Colbert Super PAC as an in-kind contribution from Viacom.

C. If Colbert Super PAC Receives In-Kind Contributions from Viacom, May It Solicit and Accept Contributions from the General Public?

Mr. Colbert seeks confirmation that Colbert Super PAC may solicit and accept contributions from the general public, even if any of the support it receives from Viacom is treated as an in-kind contribution. The Commission previously advised that Club for Growth's independent expenditure-only committee could "solicit and accept contributions from the general public" when the committee was managed by Club for Growth's president and the committee's establishment, administration, and solicitation costs were entirely defrayed by Club for Growth, a corporation.²⁶ The relationship between Colbert Super PAC and Viacom is even less formal and extensive than the arrangement previously reviewed by the Commission. Therefore, Mr. Colbert believes that Colbert Super PAC's acceptance of in-kind contributions from Viacom should not limit the PAC's ability to solicit and accept contributions from the general public. He asks the Commission to confirm this conclusion.

III. CONCLUSION

Mr. Colbert respectfully requests the Commission's timely consideration of this Advisory Opinion Request and guidance on this important venture.

Sincerely,


Trevor Potter
Joseph M. Birkenstock
Matthew T. Sanderson
Caplin & Drysdale, Chtd.

²⁶ Fed. Election Comm'n Adv. Op. 2010-09 at 3.