FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 22, 2017

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson LJS
Acting General Counsel

Lorenzo Holloway
Assistant General Counsel
Compliance Advice

Jennifer G. Waldman JW
Attorney

SUBJECT: Request for Consideration of a Legal Question Submitted by Friends of Mike Lee (LRA #1044)

I. REQUEST FOR CONSIDERATION OF A LEGAL QUESTION: MAY THE COMMITTEE RETAIN CONTRIBUTIONS THAT WERE DESIGNATED FOR A PRIMARY ELECTION THAT DID NOT OCCUR

On April 24, 2017, the Commission received a Request for Consideration of a Legal Question ("Request") from counsel on behalf of Friends of Mike Lee (the "Committee"), the principal campaign committee of United States Senator Mike Lee from the State of Utah ("Candidate").[1] *See* Attachment 1.

The Request addresses a determination by the Reports Analysis Division, based on informal guidance provided by the Office of General Counsel, that the Committee must refund certain contributions designated for the primary election that it accepted and spent before it was determined that there would not be a primary election.

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[1] At least two Commissioners agreed to consider this Request pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission. 81 Fed. Reg. 29861 (May 13, 2016).

As of 2016, a candidate seeking to appear on the primary ballot in Utah has two methods to obtain primary ballot access under Utah law. *See* Senate Bill 54 (2014): Frequently Asked Questions, Prepared by the Office of the Lieutenant Governor (Oct. 19, 2015); UT Code § 20A-9-403; 406 (2016). First, the candidate may be nominated at his or her party's convention. UT Code § 20A-9-406 (2016). In addition, Utah law permits candidates to use a petition process to bypass the convention and advance to a primary election. UT Code § 20A-9-403(3)(a) (2016). If a candidate gathers a sufficient number of signatures on his or her petition by a certain date, the candidate's name will be placed on the ballot for a primary election to be held after the convention. UT Code § 20A-9-403(3)(b), (4)(a)(ii), and (5)(c) (2016). If a candidate is nominated at the party convention and no other candidates gain access to the primary election ballot, the party-nominated candidate becomes that party's candidate for the general election without participating in a primary election. UT Code § 20A-9-403-5(c) (2016).

The Candidate used both methods to gain access to the primary ballot. The Committee's disclosure reports show that the Committee received two types of designated contributions: contributions designated for the convention and contributions designated for the primary election.

On April 23, 2016, the Candidate became the Republican Party's nominee for the United States Senate at the conclusion of the Utah Republican Party convention. The Candidate also gained enough signatures on his petition to appear on the primary election ballot. The Candidate learned five days before the nominating convention that he was the only candidate to qualify for the primary ballot through the petition method. Attachment 2 at 4. Once the Candidate became the party nominee at the party convention and no other candidates qualified for the ballot via the petitioning process, Utah determined there was no need for a Republican primary election. As a result, Utah cancelled the Republican primary election. UT Code § 20A-9-403-5(c) (2016).

Since Utah cancelled the primary election, the Reports Analysis Division requested that the Committee refund or redesignate the contributions that contributors had designated for the primary election. The Committee refunded all of the primary contributions received after April 23, 2016, the date of the convention, but it retained the $453,583.78 in primary election contributions that it received before the convention. [2]

The Committee contends that to gain primary election ballot access, it was forced to spend money on the nominating convention as well as on the gathering of signatures to appear on the primary ballot. Attachment 3 at 4. The Committee claims that it spent over $200,000 to gather signatures. [3] *Id.* The Committee argues that it was required to proceed along both tracks because the signatures were not certified until April 18, 2016 and had the Committee not

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[2] The Committee had $254,492 cash on hand as of March 31, 2017.

[3] While the Committee claims that it spent $200,000 to gather the signatures, the Committee does not state in its written response to RAD whether it actually spent its primary election contributions on the petition effort. *See* Attachment 3. Since the Committee cites this as its reason for declining to refund the primary election contributions it accepted before the convention, however, we are assuming solely for the purpose of this analysis that it spent the primary election contributions on this effort.

collected the mandatory number of valid signatures, it would have been too late to attempt to gain ballot access via the nominating convention. *See* Attachment 1. Due to uncertainty surrounding the new law allowing for two paths for a candidate to appear on the primary election ballot, the Lieutenant Governor (the chief election officer in Utah) issued guidance recommending that all candidates seek both the nomination at their party convention and the petitioning process. Voter and Candidate Clarification Issued by State of Utah (Jan. 19, 2016). The Committee asserts that because it spent the money on gaining access to the primary election, which at the time it did not know would not occur, the Committee was following the recommendations of the Lieutenant Governor.

The Committee relies on Advisory Opinion 2004-20 (Farrell) to support its arguments. In Farrell, the Commission considered contributions in connection with Connecticut elections, which, similarly to Utah, offered two paths for a potential congressional candidate to gain access to the ballot – through the party's nominating convention or through a signature-gathering petition process. Advisory Opinion 2004-20. The Farrell for Congress committee inquired as to whether the committee could continue to accept undesignated primary election contributions *after* the candidate was nominated during a party convention and the primary election was cancelled. *Id*. The Commission concluded that Farrell for Congress could not accept undesignated primary contributions following the date of the party convention. *Id*.

In reaching this conclusion, the Commission recognized Connecticut's nominating convention and the primary election were two different elections for the purpose of applying the contribution limits. Advisory Opinion 2004-20. Because Ms. Farrell, however, did not participate in the primary election, and the nominating convention was the only election she participated in during the primary process, the Commission concluded that the committee must treat the undesignated contributions received after the convention as contributions for the general election. *See* Advisory Opinion 2004-20 (Farrell).

The Committee argues that, similar to Connecticut, the Utah nominating convention and the primary election are two separate elections with separate contribution limits, and as a result, the Committee may raise and spend contributions for the nominating convention and for gathering signatures for the primary election. Attachment 2, at 3.

As a general legal matter, we agree that Utah's nominating convention and its primary election are two separate elections, but we conclude that the Committee cannot retain the contributions that the contributors designated for the primary election because the primary election was cancelled.

II. THE COMMITTEE CANNOT RETAIN PRIMARY ELECTION CONTRIBUTIONS BECAUSE THE PRIMARY ELECTION WAS CANCELLED

The Federal Election Campaign Act of 1971 (the "Act") places limitations on the aggregate amount of contributions that any person or multicandidate political committee may make to a candidate with respect to any election for federal office. 52 U.S.C. § 30116(a)(1) and (2). These limitations apply separately with respect to each election. 52 U.S.C. § 30116(a)(6);

11 C.F.R. §§ 110.1(j) and 110.2(i). Here, because the convention had the authority to nominate a candidate, it qualified as an election separate from the anticipated primary election. *See* 52 U.S.C. § 30101(1)(A) and (B); 11 C.F.R. § 100.2(e) (defining "election" in pertinent part to include a convention or caucus with the authority to nominate a candidate.). *See also* Advisory Opinion 1992-25 (Owens) (concluding that Utah convention is a separate election)[4]; UT Code § 20A-9-403(1)(b)(2016).

The issue here is that Utah cancelled the anticipated primary election. In Advisory Opinion 1980-68 (Miller), the Commission recognized that accepting contributions for an election at a time before the necessity of such an election is determined -- in this case, a primary run-off election -- is "analogous to accepting general contributions before the primary election." AO 1980-68, p 2; *see also* AO 2009-15 (Bill White for Texas). Thus, given that the convention and the primary election would constitute separate elections, the Committee here was permitted under these authorities to accept contributions for both elections before the date of the convention. At the same time, however, contributions designated for an election that does not occur, or in which a person is not a candidate, must be refunded, redesignated for another election in which the candidate has participated or is participating, or reattributed to another contributor. 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(5) and (k)(3); *see* AOs 1980-68; 1982-49 (Weicker); 2009-15. A candidate may not be accorded a separate contribution limit for an election in which he or she does not participate. AOs 2009-15; 1986-17 (Green).

In this case, the Committee and the Candidate chose to pursue both routes to the primary ballot available to them under Utah law – seeking the nomination from the party convention and circulating and gathering signatures to petition their way onto the ballot. The Committee contends that it spent over $200,000 on its signature gathering effort and the Office of the Lieutenant Governor certified the petition, qualifying the Candidate to appear on the primary ballot. Attachment 3 at 3. As noted above, however, the Candidate became the nominee designated by the convention at its conclusion on April 23, 2016, thus obviating the need to hold a subsequent primary election, which was then cancelled.

We do not agree with the Committee's argument that its advance spending of the primary election funds immunized it from the requirement to refund, reattribute or redesignate those contributions once it was determined that the primary election would not be held. *See* Attachment 3. If a candidate does not participate in an election, he or she is not entitled to a separate contribution limit for that election and the spending of contributions collected in advance does not change this determination. *See* AO 1986-17 (Green). The Commission's regulations provide that a primary election which is not held because a candidate was nominated by a caucus or convention with authority to nominate is not considered a separate election for the

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[4] The petition process was added in 2016 and thus was not considered by the Commission in rendering its conclusion in Advisory Opinion 1992-25 (Owens). The petition process does not undermine that conclusion, however, because the Commission has concluded that the "authority to nominate" requirement is satisfied even when there is a possibility that the convention decision might be upset under relevant state law. *See* Advisory Opinion 1976-58 (Peterson)(concluding that the possibility of post-convention primary election if candidate gained at least 20 percent of vote did not compromise the state convention's character as separate election). While it is possible that a post-convention primary election featuring multiple candidates on the ballot could be held, the Utah state party convention still has the authority to nominate under Utah law.

purpose of applying the contribution limits. 11 C.F.R. § 110.1(j)(4); *see also* AOs 2009-15 (White)(addressing only scheduled elections in which candidates are unopposed or that are not held because the candidate is unopposed or received the majority of votes in a previous election); 1986-12 (Ferraro)(concluding that contributions to a candidate with respect to an election in which she does not participate as a candidate must be refunded to the contributors).

The Commission recently reaffirmed the general principle that candidates are required to refund contributions for elections in which the candidate does not subsequently participate. In a Request for Consideration of a Legal Question submitted by the Cantor for Congress committee, the Cantor for Congress committee argued that it was not required to return general election contributions that had been spent in anticipation of participating in the general election, after the candidate lost the primary election. Memorandum from Lisa J. Stevenson to Commission, Request for Consideration of a Legal Question by the Commission by Cantor for Congress (LRA #980) (Jan. 27, 2015). The Commission concluded that the Cantor for Congress committee was required to refund all contributions designated for the general election, even those spent in anticipation of participating in the general election. Vote Certification, Cantor for Congress (LRA #980) (Mar. 18, 2015). Similarly, in another Request for Consideration of a Legal Question by the David Vitter for U.S. Senate Committee, the Commission agreed that "while candidates may choose to spend some or all of the general election contributions they collect before the primary election takes place, they do so at the risk that if they do not participate in the general election, they will be required to refund the general election contributions." Memorandum from Lisa J. Stevenson, to Commission, Request for Consideration of a Legal Question by the Commission by David Vitter for U.S. Senate (LRA #1027) (Sept. 29, 2016), Vote Certification, David Vitter for U.S. Senate (LRA #1027) (Oct. 27, 2016). *See also* Memorandum from Christopher Hughey, to Commission, Request for Consideration of a Legal Question by the Commission by Michael Williams for U.S. Senate (LRA #872) (Mar. 19, 2012), Certification of Commission in matter of Michael Williams for U.S. Senate (LRA #872) (Apr. 10, 2012) (candidate is required to refund or redesignate contributions designated for special election that does not occur).

Under these same principles, the Committee cannot retain the contributions designated for the primary election that it spent in its effort to gain access to the ballot, for an election that was not held. The Committee permissibly solicited designated contributions for the convention and the primary election in advance of the convention. However, once it was known that the primary election would not be held, the Committee was required to return or receive permission to re-designate all contributions designated for that primary election. 11 C.F.R. § 110.1(b)(5) and (k)(3); see AOs 1980-68; 1980-22; 1982-49; 2009-15.

III. RECOMMENDATION

For the reasons noted above, we recommend that the Commission conclude that the Committee cannot retain any contributions that were designated for the primary election.

Attachments –

1. Request for Legal Consideration from Friends of Mike Lee, dated April 24, 2017.

2. Supplement to Request for Legal Consideration from Friends of Mike Lee, dated May 8, 2017.

3. Response to Request for Additional Information, dated December 2, 2016.

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April 24, 2017

Via electronic mail: LegalRequestProgram@fec.gov

Federal Election Commission
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ATTN: Secretary to the Commission

Re: Friends of Mike Lee, C00473827, Request for Legal Determination

To the Commissioners of the Federal Election Commission:

The undersigned serves as counsel to Friends of Mike Lee, the principal authorized campaign committee of Mike Lee, United States Senator from Utah, FEC ID #C00473827 ("the Committee").

The Committee received a Request for Additional Information ("RFAI") from the Reports Analysis Division ("RAD") on October 11, 2016, with regard to the Committee's July 2016 Quarterly Report. RAD directed the Committee to return all contributions received by the Committee designated for the Utah primary in June 2016. The Committee provided a response to RAD on December 2, 2016, in which the Committee pointed out that the 2016 Utah primary election and the 2016 Utah GOP nominating convention were separate elections under Utah state law and, pursuant to the Commission's regulations and prior legal precedent, the Committee was permitted to raise and spend funds for both the primary election and the state party nominating convention, up to the time when the convention was concluded and Sen. Lee was officially nominated as the Republican candidate for the United States Senate to appear on the November 2016 General Election ballot in Utah.

RAD advised the Committee on April 20, 2017 that it had been informally advised by the Office of General Counsel to reject the Committee's submission. No information regarding the basis on which the OGC rendered such advise has been provided to the Committee.

The request from RAD to refund all primary contributions received by the Committee is contrary to and otherwise inconsistent with prior Commission matters and advisory opinions dealing with the same issue.

Please consider this a request for legal determination by the Commission with regard to the question of whether funds raised for both a primary election and a state nominating convention are separate elections, allowing the Committee to solicit funds for both. This request for legal determination is warranted under the Commission's Legal Request Program. See Federal Election Commission Notice 2016-02, 81 Fed. Reg. No. 93 39861, Friday, May 13, 2016.

The facts of this matter are not disputed and are described more specifically in the Committee's submission to RAD. See Attached Exhibit, December 2, 2016 Letter to RAD from the Committee.

Prior to the GOP Nominating Convention, the Committee raised and spent substantial funds both for the Nominating Convention as well as gathering signatures to qualify for the 2016 Utah Primary ballot, which followed the advice rendered by the Utah Lieutenant Governor's office to all prospective candidates in January 2016. The Committee treated the Nominating Convention and the primary election signature gathering as two separate elections which, under Utah state law, they were. The Committee was not certain until April 23, 2016, at the conclusion of the GOP Nominating Convention, whether there was or was not going to be a contested primary election. After that date, the Committee accepted no further contributions designated for the 2016 primary.

The scenario that unfolded in Utah in 2016 is identical to the situation in Connecticut described in FEC Advisory Opinion 2004-20.

The Committee returned any / all contributions for the Utah 2016 primary received *after* the GOP Nominating Convention. However, it is contrary to law and Commission precedent to require the Committee to return primary contributions received before the convention during the time when a primary election was still a real possibility. Only after the GOP Nominating convention did it become clear that the primary election would not take place with regard to nominating the GOP candidate for the United States Senate.

The Committee requests that any legal analysis provided to RAD and to the Commission in this matter be disclosed to the Committee with the opportunity for our formal response prior to the Commission's consideration of this matter. We have no idea what legal authority can possibly exist for RAD's directive that the Committee refund primary contributions received before the date when a primary election was still scheduled to occur.

Accordingly, the Committee requests the Commission issue its legal decision directing RAD to withdraw its prior notice to the Committee requiring the return of primary contributions received prior to the 2016 GOP nominating convention.

Please contact me at (202) 431-1950 or cmitchell@foley.com should the Commission need additional information.

Thank you for your consideration of this Request for Legal Determination.

Sincerely,

/c/ Cleta Mitchell

Cleta Mitchell, Esq., Counsel
Friends of Mike Lee

Attachment – December 2, 2016 Committee Submission to RAD

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May 8, 2017

Via electronic mail: LegalRequestProgram@fec.gov

Federal Election Commission
999 E Street NW
Washington, DC 20463
ATTN: Secretary to the Commission

Re: Friends of Mike Lee, C00473827, Supplement to Request for Legal Determination

To the Commissioners of the Federal Election Commission:

Please consider this a supplement to the April 24, 2017 Request for Legal Determination submitted by Friends of Mike Lee ("the Committee").

I spoke last week with Jennifer Waldman from the Office of General Counsel in an effort to come to some agreement about this matter. During the course of the conversation, it became clear that the attorneys in OGC are basing their conclusions on advisory opinions that are not exactly on point with regard to the current situation.

As I indicated in my submission, prior to 2014, the only way a candidate could become the nominee of his/her party on the general election ballot was through the state party nominating conventions. The Utah legislature in 2014 changed the path to the general election, by creating a separate route to securing the nomination. The legislation, SB 54, created an additional or alternative manner for appearing on the state's primary ballot, which was through a petition / signature gathering process. The new law was challenged in court in January 2016 by the Utah Republican party and there was a great deal of uncertainty surrounding the status of the law and its application to candidates in the 2016 election cycle.

The Utah chief elections officer is the Lieutenant Governor. To address the many questions from candidates in January 2016, Lt. Gov. Spencer J. Cox issued a public advisory to all candidates and would-be candidates, in which he responded to a number of the inquiries that were being asked of his office. The question below is applicable to the present situation involving Sen. Lee's route to the nomination in 2016:

"Question #6: In light of the uncertainty surrounding potential litigation, do you have a recommendation on which path a candidate should take to ensure access to the ballot?

> **"**This is the question I receive most often from candidates. The decision and calculation on which path to choose will be different and personal for each campaign. While there are many different reasons to choose one path over another, I can only speak to ballot access. While I am attempting to provide as much information and clarity as possible to help candidates make an informed decision, I recognize that additional litigation makes a final outcome difficult to predict. Although judges are historically averse to removing candidates from the ballot, it is impossible to know with 100% certainty whether a judge could invalidate the signature path or remove the party's QPP status, thus eliminating the caucus/convention path. In short, while I can ensure ballot access for either ballot paths, a judge could alter that determination. As such, it appears that the only way to completely guarantee ballot access, regardless of any judicial outcome, would be for candidates to choose BOTH routes (gathering signatures AND participating in the caucus/convention)…" (emphasis added)

In other words, because of the changes in the statute, coupled with pending litigation involving aspects of the new law, the chief elections officer of the state advised all candidates to seek the nomination of their party using *both* the petitioning process and the party nominating conventions. Two separate elections, each having the potential to select the party's nominee.

That is what Sen. Lee did. He followed the advice of the Lieutenant Governor's office and expended resources for both the party nominating convention *and* the primary ballot access petitioning process.

Only after the nominating convention was concluded did Sen. Lee know for certain that he was the GOP nominee and that no candidate would be challenging him on the primary ballot. That is because no other Republican candidate gathered and submitted sufficient signatures to appear on the primary ballot.

Sen. Lee did what *he* was instructed to do. Through no actions of his own, the Lieutenant Governor's office decided not to incur the expense of conducting a primary election for the Republican nomination, because that had been determined on April 23, 2016 and no other candidate had secured the signatures to force a primary election for the Republican nomination.

That was not within the power of Sen. Lee to change. He qualified for the primary ballot and then he won the state party's nomination at the convention. He had no control whatsoever over the decision of the state elections officer to decide, after the conclusion of the party nominating convention, that holding a primary for this nominee was not necessary. That was purely within the province of the Lieutenant Governor as the election official of the state of Utah.

The advisory opinions on which the Office of General Counsel is relying are inapplicable to these facts and this situation.

First, the OGC mistakenly relies upon the Request for Legal Determination LRA980 involving the expenditure of general election funds by a candidate who lost a primary election. Clearly, that situation is wholly inapposite to the facts here. There, the candidate knew in advance of the primary election that he might not move to the next election, but nonetheless chose to expend general election funds prior to the date of the primary, on an assumption that he would be the party nominee in November. He was not.

That is not the situation here. The facts of this situation are that there were two elections scheduled, either of which had the legal authority under state law to nominate the general election candidate. The Commission has historically advised that whether or not an election is a 'separate election', for which a separate contribution limit is allowable, is a matter of *state* law. See Advisory Opinions 1984-16, 1981-19, 1976-58 and 1978-30. In each of these cases, the Commission's decision turned on whether the law of the state established procedures whereby party nominees were legally determined by a convention, as well as a primary. Where each process can independently nominate the candidate to appear on the general election ballot, then each is a separate election, with separate contribution limits.

That is precisely what happened in Utah in 2016. The chief elections officer of the state advised all candidates to seek their party nomination through both the convention and the primary to be held in June, *both* of which procedures had legal authority to nominate the candidates. Sen. Lee heeded that advice, then raised and spent funds for two elections, in both of which he qualified to participate. On April 18, 2016, Sen. Lee was declared eligible to appear on the primary ballot, based on the signatures gathered and submitted on the nominating petitions. Then, following the party nominating convention on April 23, 2016, the state elections office determined that a primary was not going to be held but that decision was beyond Sen. Lee's control and certainly was not Sen. Lee's decision. Had the primary election been held, Sen. Lee would have been on the ballot because he had gathered the requisite number of signatures and had previously been declared eligible to appear on the primary ballot.

The Commission would be acting in a manner contrary to its historic precedent applying *state* law to the determination of whether a convention and a primary are separate elections. Where, as here, a candidate follows the dictates of state law, where both a primary and a convention have power to nominate the general election candidate, the Commission has recognized separate limits for each. In addition, in this case, Sen. Lee followed the directive of the chief state elections official in seeking parallel routes to the ballot, and Sen. Lee was declared eligible for the primary ballot prior to his nomination at the state party convention. Those were two separate elections under Utah law, as evidenced by the public advisory from the Lieutenant Governor's office. And, in fact, the Democratic nominee for the United States Senate failed to receive 70% of the Democratic Party vote at the state Democratic Party convention and was forced to appear on the primary ballot in order to secure the nomination for the General Election. Sen. Lee, who qualified for the Republican primary ballot, won the nomination by receiving over 70% of the party's votes at the state party convention in April – and no other candidate for the Republican nomination filed sufficient signatures to force a primary election for the GOP nomination. That fact was not known until April 18, 2016, when the Lieutenant Governor issued the list of candidates who had qualified for the respective primary ballots.

With respect, the Commission would be departing from longstanding authority and historic precedent to now determine that the State of Utah's primary election wasn't a separate election. The Lieutenant Governor's decision to recognize the outcome of the nominating convention and to dispense with the Republican primary election after only one candidate – Sen. Lee – qualified for the primary by submitting the required signatures within the allotted time frame, is no different from the situation with many incumbents who face no primary opposition, but who are nonetheless allowed to raise and spend funds in connection with a primary election.

The facts of this matter most closely align with the Commission's decision in AO 2004-20. The statutory route to the nomination in Connecticut is closely parallel to that adopted by the Utah legislature in 2014. Where the parties formerly had sole authority to nominate candidates, state laws were changed to allow for an alternative route to the nomination, namely, petitioning to appear on the primary ballot, held some months after the nominating convention. In that case, the Commission determined that the primary and the convention were two separate elections, to-wit:

> "The Commission concludes that, despite the change in Connecticut's law, party conventions in Connecticut continue to be separate elections under the Act. However, because Ms. Farrell is not on the ballot for the August 10, 2004, primary, and because the convention is the only election in which Ms. Farrell is participating during the primary process, Farrell for Congress may not accept undesignated primary contributions after May 10, 2004, the date of the Democratic district convention."

That is precisely the procedure followed by Sen. Lee and Friends of Mike Lee. Before the nominating convention, there were two separate elections in Utah in 2016. Sen. Lee qualified for both. After he won his party's nomination at the state convention, he returned any primary contributions received after that date.

The directive from the Reports Analysis Division completely disregards the prior decisions of the Commission that should be applied here.

Friends of Mike Lee respectfully requests that the Commission determine that the contributions received by the Committee prior to the state nominating convention in 2016 were received lawfully for an election separate from the state convention and that no refunds should be required.

Please contact me at (202) 431-1950 if you have additional questions. Thank you.

Sincerely,

/s/ Cleta Mitchell

Cleta Mitchell, Esq., Counsel
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December 2, 2016

Ms. Jessica Grainger
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999 E Street NW
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Re: Friends of Mike Lee – C00473827 – Request for Additional Information – July 2016 Quarterly Report

Dear Ms. Grainger:

The undersigned serves as counsel to Friends of Mike Lee, C00473827 ("the Committee"). Your letter dated October 11, 20161 requesting additional information from the Committee has been forwarded to me in order that I can respond to your question #2, in which you have asked / stated as follows:

> "2. Your committee reported receipt of contributions designated for the "2016 Primary" election, in addition to disclosing receipt of contributions designated for the "2016 Convention" election. Since the candidate will not participate in the 2016 Primary election, any contribution received for this election must be returned to the donors or redesignated to another election (see attached)."

The premise of your question is incorrect and is inconsistent with the regulations of the Commission and the Commission's decision in Advisory Opinion 2004-20, which addressed this specific issue.

In AO 2004-20, the Commission was asked whether, under Connecticut law, the party convention and the primary election were two separate elections, for which contributions could be solicited and received prior to the state party convention.

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[1] Apparently, your office mailed, rather than emailed, the October 11, 2016 letter, which was not received by the Committee until after the due date for response.

The Commission determined that yes, the party convention AND the primary were (are) two separate elections, allowing a candidate to solicit and receive contributions for each *prior* to the date of the party convention:

> "The Commission concludes that, despite the change in Connecticut's law, *party conventions in Connecticut continue to be separate elections under the Act.*" (emphasis added)

The Utah statutes were changed in 2014 to provide that candidates for office in Utah could follow multiple routes by which to gain access to the Utah primary ballot: the historical method of securing sufficient votes at the state party convention to appear on the primary ballot (*See* Title 20A Chapter 9 Part 4 Section 407) *or* a new procedure which allowed candidates to collect sufficient verified signatures to appear on the primary ballot, or both. *See* Title 20A Chapter 9 Part 4 Section 408.

The election calendar in Utah in 2016 reflected the two statutory methods for candidates seeking access to the primary ballot:

Caucus and Convention Method:	Opening Date	Closing Date
Declare Candidacy	March 11, 2016	March 17, 2016
State GOP Convention[2]	April 23, 2016	
Signature Gathering Method:		
Declare Intent to Gather Signatures	January 4, 2016	March 17, 2016
Begin Gathering Signatures	January 4, 2016	
Declare Candidacy	March 11, 2016	March 17, 2016
Deadline for Submission of Signatures	March 31, 2016	
Certification for Primary Ballot	April 18, 2016	

[2] Must receive 60% of party convention votes to win nomination; if no candidate receives 60% of party convention votes, then candidates receiving 40% of the convention votes appear on primary ballot.

The primary election is an 'election' pursuant to 11 C.F.R. §100.2(c) for which federal candidates are allowed to solicit contributions. Under SB 54 enacted by the Utah legislature in 2014, an individual may submit petitions to gain access to the primary ballot even if that individual does not succeed in being nominated by his/her party's state nominating convention.

Historically, Utah's primary nominating convention has also been deemed to be a separate election, because the convention has the legal authority to nominate candidates. *See* 11 C.F.R. §100.2(e). The change in the Utah statute allowing a candidate to petition his/her way onto the primary ballot did not change the fact that the convention is an "election" under the FEC regulations, which was confirmed by the Commission in Advisory Opinion 2004-20, which further states:

> "The Act and Commission regulations define an "election" to include "a general, special, primary, or runoff election" and "a convention or caucus of a political party which has authority to nominate a candidate." 2 U.S.C. 431(1)(A) and (B); *see also* 11 CFR 100.2. The Commission has previously stated that the question of whether a particular event – including a convention or caucus, which has authority to nominate a candidate – is an election, is determined by an analysis of relevant state law. *See* Advisory Opinions 1992-25, 1986-17, and 1984-16."

After the enactment of SB54, there were multiple lawsuits challenging the constitutionality of the new law. Because of the myriad questions surrounding the change in the law, the state's highest election authority, the Lieutenant Governor, issued an advisory in January 2016 advising candidates to consider following *both* routes to the primary ballot: both the convention route *and* gathering signatures to appear on the primary ballot. See attached "SB 54 Clarification, from the Office of the Lieutenant Governor, January 19, 2016".

Sen. Lee followed that advice and proceeded along parallel tracks, seeking the Republican nomination for reelection to the United States Senate through the Utah State Republican convention held on April 23, 2016, as well as circulating and gathering signatures of 28,000 registered voters to qualify for the June 28, 2016 primary ballot in Utah.

Sen. Lee's campaign spent more than $200,000.00 on the signature gathering effort in order to qualify for the June 28, 2016 primary ballot, which signatures were submitted to the Office of Lieutenant Governor on February 26, 2016. The Office of Lieutenant Governor certified on March 16, 2016 that at least 28,000 valid signatures had been submitted, thus qualifying Sen. Lee to appear on the June 28, 2016 primary ballot.

Separately, Sen. Lee spent funds on the caucus and convention nominating process for securing the Republican nomination for the U.S. Senate in 2016. The Commission has recognized that separate resources are required for each path to the nomination:

> "The Commission recognizes that where, as here, state law gives state party conventions the authority to nominate, not just endorse, a candidate, the need for separate contribution limits arises for candidates seeking nomination to Federal office during the convention phase, *and potentially, also during a primary election.* Such an electoral system places more pressure on candidates to put substantial resources into the convention process to secure the nomination, thus increasing the need for separate contribution limits. Where a convention or a caucus has any potential to nominate a candidate, and a candidate has any potential to secure the nomination at such an event, separate contribution limits are needed to supply the necessary resources for the candidates involved." (emphasis added)

Sen. Lee participated in the convention nominating process and, on April 23, 2016, received more than 60% of the delegate votes at the Republican convention to qualify for the primary ballot as the Republican nominee for the US Senate.

Both the convention and the primary were separate elections, just as the procedure outlined in Connecticut in Advisory Opinion 2004-20, and which has historically been recognized by the Commission. Sen. Lee followed both tracks until each was exhausted, but *either* could have been contested and separate funding was required to compete in both.

Sen. Lee solicited and received contributions for both the primary and the convention *until* the Republican convention was concluded. That was the final date on which it was clear that he would not be required to battle for the nomination during the period between the convention and the June 28, 2016 primary election.

Accordingly, after the Republican convention on April 23, 2016, all contributions for the primary were returned, in accordance with Advisory Opinion 2004-20.

But *prior* to the Republican convention on April 23, 2016, Sen. Lee was entitled under FEC regulations and decisions of the Commission, specifically Advisory Opinion 2004-20, to solicit and receive contributions both for the 2016 Utah convention and the 2016 Utah primary election, as those were separate elections under Utah law.

Please contact me if you have further questions regarding this matter.

Sincerely,

Cleta Mitchell

Cleta Mitchell, Esq., Counsel
Friends of Mike Lee

STATE OF UTAH
OFFICE OF THE LIEUTENANT GOVERNOR

SPENCER J. COX
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Voter and Candidate Clarification

SALT LAKE CITY (Jan, 19, 2016) - Lt. Gov. Spencer J. Cox issued the following memo offering clarification to voters and candidates:

The 2016 election cycle is officially underway. This year, voters will once again have the opportunity to vote for many offices, including president, Congress, governor, state legislators and others. As the State's chief election officer, I have the statutory responsibility to enforce Utah's election laws; this includes the interpretation of laws and all initial decisions related to election matters. Additionally, I am required to provide election information to the public.

Recently there has been significant attention given to legislation passed in 2014 that altered Utah election law and the way candidates make their way to the ballot. This change is commonly known as SB54. The passage of SB54 has become controversial and divisive. There has already been one completed lawsuit and another was filed late last week. Consequently, there have been many rumors, media reports and speculation adding confusion and uncertainty to the process. Regardless of my personal feelings on these changes, or the views of others, my office is tasked with implementing and enforcing this legislation. Equally important, I have the duty of ensuring a fair, orderly and smooth election process. In doing so, we rely heavily on the legal guidance and interpretation of Utah's Attorney General and his staff.

On January 4th candidates began filing their declarations to gather signatures. To date, more than 70 candidates have declared their intent to do so. Thousands of signatures have already been gathered and submitted. As such, we are officially in the middle of an election cycle and my job is to move forward and help Utahns navigate this new process.

The purpose of this memo is simply to provide clarity and guidance to candidates and voters regarding the law and its implementation. More specifically, this memo answers several questions that have come to my office directly or through media reports. This is not intended to

be a legal brief, nor a comprehensive explanation of law. Furthermore, I do not attempt to outline the disputes and differing interpretations of the law. Please note that this memo is not meant to be adversarial in any way. Instead, I merely set out to explain how the law will be interpreted and implemented by my office. In the interest of brevity, this memo assumes that readers have some previous knowledge of SB54. While many of these questions come from members of the Republican Party, the same issues apply to all candidates and parties equally. I hope this memo will help those participating in the election to make decisions and rely in good faith on an orderly process.

Question #1: Do candidates get to decide which path they take to the ballot?

Yes. After an extensive review of SB54 with the Attorney General's Office, I have determined the clear wording of the statute allows candidates, and not parties, to determine whether to gather signatures, participate in the caucus/convention system or do both. While my office had been working with the Republican Party to get final clarification on this issue from the Utah Courts, we recently received notice that they had changed their mind and decided to file suit in federal court against the state to challenge this and other provisions of the Election Code. That lawsuit was filed on 1/15/16.

Question #2: Will political parties be allowed to remove candidates that gather signatures?

No. Because SB54 specifically allows candidates to choose signature gathering, candidates that rely on the law and meet all other legal requirements will be placed on the primary ballot. Any attempts to remove candidates from the ballot for following the law and gathering signatures will be rejected.

Question #3: Can voters be removed from a party for signing candidate petitions?

No. While there has been much rumor and speculation on this question, the Republican Party has specifically stated that the speculation was unfounded and unintended. Furthermore, there is no basis in law to support such an action. Under SB54 any voter "affiliated" with the party, based upon the voter's party affiliation designation submitted by the voter and entered into the official register, is allowed to sign a petition on behalf of a candidate for that party. As such, any attempt to remove an otherwise qualified and affiliated voter that signs a candidate petition will be rejected.

Question #4: Can the Lt. Governor's Office and county clerks begin verifying signatures immediately?

Yes. There is some confusion regarding a required March 1st declaration from the parties over who will be allowed to participate in their primaries--and thus who would be eligible to sign petitions. This provision existed prior to SB54 and simply has to do with the categories of voters that are allowed to participate in primary elections, as opposed to individual voters. The statute has always contemplated that a party's own affiliated voters would be able to participate in that party's primary election. However, if a party decides to allow voters from another party to participate in their primary, the party must notify my office by March 1st. As this was the primary focus of the previous lawsuit, my office is operating under the assumption that the Republican party will only allow Republican voters to participate in its primary election. As such, my office will only accept signatures from Republican affiliated voters. However, if the Republican Party notifies my office that it has decided to open its primary to other parties or unaffiliated voters by March 1st, my office would then allow signatures from those other party's voters.

Question #5: Is it possible that the Republican Party will lose its Qualified Political Party (QPP) status and that candidates who choose only the caucus/convention path will be removed from the ballot?

No. Because there is nothing in the law that anticipates what happens if a party fails to follow the requirements of a QPP, and because there is no provision to subsequently disqualify a party, this has been subject to different legal interpretations. On August 17, 2015, the Utah Republican Party certified their designation as a QPP and specifically stated their intention to follow all of the statutory QPP provisions and requirements. As such, my intention is to rely on this certification, and allow candidates access to the ballot through the caucus/convention process, unless and until the party officially revokes that certification. While I reject the possibility of removing candidates that rely on the law to get on the ballot by gathering signatures, I also reject the possibility of removing candidates that rely on the law to participate in the caucus/convention system.

Question #6: In light of the uncertainty surrounding potential litigation, do you have a recommendation on which path a candidate should take to ensure access to the ballot?

This is the question I receive most often from candidates. The decision and calculation on which path to choose will be different and personal for each campaign. While there are many different reasons to choose one path over another, I can only speak to ballot access. While I am attempting to provide as much information and clarity as possible to help candidates make an informed decision, I recognize that additional litigation makes a final outcome difficult to predict. Although judges are historically averse to removing candidates from the ballot, it is impossible to know with 100% certainty whether a judge could invalidate the signature path or remove the

party's QPP status, thus eliminating the caucus/convention path. In short, while I can ensure ballot access for either ballot paths, a judge could alter that determination. As such, it appears that the only way to completely guarantee ballot access, regardless of any judicial outcome, would be for candidates to choose BOTH routes (gathering signatures AND participating in the caucus/convention).

I sincerely hope this clarification is helpful and is received in the spirit it is intended. I recognize there are honest and passionate voices on both sides of this debate and that legal cases could potentially impact these determinations. However, I also know how difficult and stressful campaigns can be for all those involved. Accordingly, I ask only that candidates, county clerks, parties and my office work together closely this year to ensure the election moves forward in a collaborative and orderly manner. I wish the very best to all involved this election year.

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