

# **APPENDIX B**

The Honorable Charles W. Dent, Chairman  
The Honorable Linda T. Sánchez, Ranking Member  
U.S. House of Representatives Committee on Ethics  
1015 Longworth House Office Building  
Washington, DC 20515

**Re: Review No. 15-6333**

Dear Chairman Dent and Ranking Member Sánchez:

On behalf of Representative Jared Polis, we respectfully request that the House Committee on Ethics (“the Committee”) dismiss the above-referenced referral. The referral arises from commonplace representational activities that did not result in any personal benefit for Representative Polis. The record clearly demonstrates that the Congressman acted in good faith and did not violate any standard of conduct. Having previously established a Committee-approved blind trust and having frequently requested Committee guidance on a wide array of issues, Representative Polis reaffirms his commitment to the standards of conduct, and to cooperating with the Committee to resolve this matter.

On a rare, narrowly divided 4-2 vote, the Board of the Office of Congressional Ethics referred a claim that the Congressman impermissibly engaged in commercial endorsements: first, by granting an interview to the producer of an online video game, and second, by holding a press availability with a local business. The referral relies on a bizarre and sweeping interpretation of the rules that would curtail how Members routinely interact with constituents, businesses in their districts, and media companies.

Every day, Members and other federal public officials find innovative ways to connect with the public. They appear at sports games and entertainment programs, visit independent bookstores on Small Business Saturday, sample products at factories and distribution centers, pose for photos with employees during site visits, dress in uniforms with logos and work behind counters, express their enthusiasm for musicians and TV shows, and keep mobile district offices in front of branded supermarkets. The logic of OCE’s referral would throw all of these perfectly legitimate activities into legal doubt, and practically every Member of Congress would be in violation of these rules, often unknowingly, in numerous appropriate interactions that regularly occur with constituent businesses and other private entities.

An example of the appropriate activities that innumerable Members regularly perform in their official capacity was the recent filming of distinguished Members of both parties in their House offices reading the lines of Kevin Spacey’s character, Frank Underwood, from the popular program “House of Cards” against the show’s iconic score and introductory theme.<sup>1</sup> One Member said, against a cut-away shot of Underwood’s chief of staff, Doug Stamper, “that’s how

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<sup>1</sup> NBC News, *Now This News presents “House of Cards” with actual members of Congress reading lines from Kevin Spacey’s character, Frank Underwood*, Feb. 13, 2014, <http://www.nbcnews.com/watch/now-this-news/members-of-congress-act-out-house-of-cards-150775875847>.

you devour a whale, Doug, one bite at a time.” The Member activity was not unlike a host of common and legitimate constituency outreach and press functions, such as tweeting about Taylor Swift, posting about owning an AR-15,<sup>2</sup> congratulating a NASCAR driver in a video appearing on a speedway’s website, retweeting a photo from an official meeting with the retailer Home Depot,<sup>3</sup> or telling the NHL Network in an interview that their network is a “godsend.” The standard advanced in OCE’s referral would diminish the forms and means of communication that Members can use to connect with their constituents and place Members at a greater distance from the interests of their constituents.

The Committee has consistently shown great caution in distinguishing between these types of permissible activity, which is meant to bring the Congress closer to the public, and the sort of hard commercial appeals which the rules really restrict. Like the examples listed above, Representative Polis accepted the invitation of a media corporation to talk about his official duties in an appropriate new media context: in his case, with millions of people who play an online game, including many thousands in his district. It was nothing more than a constituent communication commonly understood to adhere to both the spirit and letter of the standards of conduct. And like countless Members of the House, who are filmed and photographed while visiting local businesses, Representative Polis teamed up with a small startup clothing company located in his district to be photographed at a press availability in a local park, so that he could lampoon his status as the so-called “worst-dressed Member of Congress.” Representative Polis did not ask anyone to buy anything, had no financial interest at stake, did not receive any remuneration, and acted for no reason except as an ordinary part of his official role and to communicate with the public as a Member of Congress.

The Committee on Ethics should reject the sweeping, thinly supported interpretation which OCE has now advanced. It should affirm that Members may continue to engage in the types of creative outreach and communications which are so common in the House, and which are vital to bringing the Congress closer to the lives of everyday people given the fragmentation of the media landscape and the importance of new media outlets. The Committee should quickly dismiss the referral in order to prevent the significant chilling effect it would otherwise have, and take no further action.

## FACTUAL BACKGROUND

At issue in this matter are two media requests to which Representative Polis and his office responded in 2014 and 2015. The first was a request by the producers of a free online game, League of Legends, to be interviewed for a “human interest piece” about the Congressman, who was a longtime player of the free game, and who had previously discussed legislative issues with its millions of players in an online forum. The second was an offer by a small clothing company in the district, Ninox, to participate in a media availability in response to a widely publicized story that the Congressman was the “worst dressed Member of Congress.” In both cases, the Congressman complied with the standards of conduct.

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<sup>2</sup> See <https://twitter.com/RepKenBuck/status/588725017342451713/photo/1>.

<sup>3</sup> See <https://twitter.com/JasonHD1508/status/641696060734369792>.

### A. *League of Legends Video*

On April 27, 2015, Representative Polis appeared in a web-based video produced by Riot Games, an entertainment company that produces the popular video game League of Legends.<sup>4</sup> According to Riot Games, over 67 million individuals play League of Legends every month.<sup>5</sup> Representative Polis has played League of Legends for many years and is well-known among his fellow players.<sup>6</sup> He is simply, a “gamer.” Because Representative Polis maintains most of his investments in a blind trust, he has no private economic interest in Riot Games that could have affected his interactions with the company.

League of Legends is a “fast-paced, competitive online game” in which two teams of players battle in an online arena.<sup>7</sup> It is downloaded and played for free. Players assume the role of an unseen “summoner” that controls a “champion” and competes to destroy the opposing team’s “nexus,” a structure protected by defensive elements.<sup>8</sup> Since it was launched in the fall of 2009,<sup>9</sup> the game has become incredibly popular; by 2012, it was the most-played computer game in the world, having logged almost 1.3 billion hours of play in a single year.<sup>10</sup> More than 27 million people play the game each day.<sup>11</sup>

As with the National Football League or Major League Baseball, an ardent community of enthusiasts has sprung up around League of Legends. A Championship Series consisting of ten professional teams competes annually and culminates in a World Championship, which attracted 32 million online viewers and sold out the Staples Center in Los Angeles in 2013.<sup>12</sup> Hundreds of thousands of players post and review messages on the League of Legends message boards, and the online community hosts leagues, viewing parties, and meet-ups.<sup>13</sup>

Given the enthusiasm of the League of Legends community and Representative Polis’ personal interest in the game, the Congressman has found participation in that community to be an effective way to interact with his constituents, many of whom play the game. For example,

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<sup>4</sup> See *Jared Polis: Community Congressman*, YouTube, <https://www.youtube.com/watch?v=WTQmAY4wd9s>; Riot Games, *About*, <http://www.riotgames.com/riot-manifesto>.

<sup>5</sup> Riot Games, *About*, <http://www.riotgames.com/riot-manifesto>.

<sup>6</sup> Report and Findings ¶ 21.

<sup>7</sup> League of Legends, *What is League of Legends?*, <http://gameinfo.na.leagueoflegends.com/en/game-info/get-started/what-is-lol/>.

<sup>8</sup> League of Legends, *New Player Guide*, <http://na.leagueoflegends.com/en/site/guide/index.html>.

<sup>9</sup> Riot Games, *League of Legends Launches Fall 2009*, <http://www.riotgames.com/articles/20090602/240/league-legends-launches-fall-2009>.

<sup>10</sup> John Gaudiosi, *Riot Games’ League Of Legends Officially Becomes Most Played PC Game In The World*, Forbes, July 11, 2012, <http://www.forbes.com/sites/johngaudiosi/2012/07/11/riot-games-league-of-legends-officially-becomes-most-played-pc-game-in-the-world/>.

<sup>11</sup> Ian Sherr, *Player Tally for ‘League of Legends’ Surges*, Wall Street Journal, Jan. 27, 2014, <http://blogs.wsj.com/digits/2014/01/27/player-tally-for-league-of-legends-surges/>.

<sup>12</sup> Eddie Makuch, *32 million people watched League of Legends Season 3 World Championships*, GameSpot, Nov. 19, 2013, <http://www.gamespot.com/articles/32-million-people-watched-league-of-legends-season-3-world-championships/1100-6416259/>.

<sup>13</sup> League of Legends, *Community Programs*, <http://na.leagueoflegends.com/en/community/>. A “meetup” is when people sharing a common interest use the Internet to arrange a place to gather in person about that common enthusiasm. See, e.g., FEC Adv. Op. 2004-06 (Meetup).

when Congress considered H.R. 3261 in the 112th Congress, the “Stop Online Privacy Act,” the Congressman discussed the legislation on the League of Legends online forum.<sup>14</sup>

Committee members can watch the video for themselves at <https://www.youtube.com/watch?v=WTQmAY4wd9s>. It focuses on Representative Polis’ background and official duties as a Member of Congress. The video contains no direct commercial appeal for the game, which users download and play for free, nor is there any promotion of the products Riot Games sells in connection with the game. Representative Polis discusses his biography, why he decided to run for office, how he serves as a Member of Congress, and his role in opposing the Stop Online Piracy Act. For instance, on his experience in Congress, Representative Polis said that “all of a sudden [upon being elected] you’re yielding to people on the floor, you’re introducing bills and you have the same authority as somebody that has been there for 20 or 30 years, the same vote.” With respect to H.R. 3261, the Congressman described the legislation as “kind of an internet censorship type law,” and the video features footage of him speaking against the bill. The vast majority of the video is devoted to Representative Polis’ background, policy priorities, and how the game’s online community can affect the legislative process.

In the video, Representative Polis also discusses his longstanding passion for gaming and his previous interactions with the League of Legends community in the context of his legislative role. Representative Polis states that “it was actually a computer game that first got me interested in politics,” that he’s “been a gamer pretty much as long as [he] can remember.” He says “I [] hope to be somebody that the community of League of Legend players across the country and the world can turn to as a person in Congress who understands an experience and wants to protect it and is very much a part of that community.” At no point does Representative Polis encourage individuals to play League of Legends; indeed, the record shows the video was directed to people who already avidly play the game. Instead, he encourages members of the League of Legends community to engage in the legislative process, stating it “should not give up just by defeating SOPA and PIPA.” Less than 1:16 of the 4:21 video talks about League of Legends, and even then, the bulk of that footage places the game in relation to Representative Polis’ duties in Congress.

The video itself, which focused on civic participation, contained no “sales pitch.” The extensive record built by OCE showed there was no intent by the sponsor or the Congressman to sell products. A Riot Games employee told the OCE that “[t]here was no economic goal for the project.”<sup>15</sup> Similarly, Riot Games reported that it rejected the notion that the goal of the product would be to “move product.”<sup>16</sup> The initial request to Representative Polis’s office expressed the company’s interest in “producing and featuring a human interest piece on congressman [sic] Polis.”<sup>17</sup>

The record shows that Representative Polis and his staff, who cooperated completely with OCE at all times, saw the request in the same way. Representative Polis’ chief of staff saw the video

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<sup>14</sup> Report and Findings ¶ 24.

<sup>15</sup> Report and Findings ¶ 35.

<sup>16</sup> *Id.* ¶ 43.

<sup>17</sup> *Id.* ¶ 50.

“purely as a documentary - [] Jared had been asked to do a number of documentaries since we’d been in office.”<sup>18</sup> Representative Polis’ scheduler also understood the request to be related to producing “a human interest piece documentary about the congressman and his life and why he played League of Legends and to talk a little bit about the advocacy around how he worked during the SOPA-PIPA debates.”<sup>19</sup> The scheduler’s memo to Representative Polis, headlined “PRESS CALL,” identified the interaction as a press-related documentary “about your career.”<sup>20</sup> The office’s communications director said the video did not raise any red flags, as “it was heavily focused on [Representative Polis’] legislative work.”<sup>21</sup> The Congressman’s staff views discussions with the community as a way of “engaging with constituents that don’t read the newspaper every day.”<sup>22</sup>

Representative Polis viewed the video as “[e]ssentially a documentary that would talk about my life, gaming as part of my life.”<sup>23</sup> He never viewed the documentary as “anything to do with promoting a product,”<sup>24</sup> but rather as “journalistic content” for the League of Legends community.<sup>25</sup> Further, Representative Polis noted that he could not endorse a product, stating “if I were to go and be part of a commercial, or to tell people to play a particular game, or buy a particular game, that would be an inappropriate use.”<sup>26</sup>

No direct outlay of official funds was made to support the interview. The official resources used were minimal and indirect: staff time to schedule and support the Congressman; office space and supplies used in the normal course of official duties; House computers and electrical power; and telephone service.

#### B. *Ninox “Worst-Dressed” Park Event*

The second request at issue in this matter, which OCE did not disclose to Representative Polis as the subject of any allegation until well after the review was underway, came from Ninox, a small men’s clothing startup located in Representative Polis’s district. A story published by GQ Magazine in February 2014 gained widespread attention when it named Representative Polis the worst-dressed Member of Congress.<sup>27</sup> A Ninox employee emailed Representative Polis’ communications director, suggesting that trying on some of their clothes as a follow up to the

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<sup>18</sup> *Id.* ¶ 53. In fact, the League of Legends video is very similar in tone and content to an interview Representative Polis gave previously to ReasonTV. See YouTube, ReasonTV, *A Gamer in Congress: Q&A with Rep. Jared Polis (D-Colo.)*, <https://www.youtube.com/watch?v=5nk5C7vADj0>. The similarity of the interviews, both of which focused on his official duties, helps explain why he and his staff saw nothing unusual about the League of Legends interview. See also “An Interview With Rep. Jared Polis: Why We Need To Stop SOPA” Forbes Magazine, Jan. 18, 2012 (including the question: “You were an internet entrepreneur and you are a gamer. Is there a problem that needs to be addressed with piracy? Games especially seem to get hit by piracy, and organizations like the ESA have stated they support SOPA. Why should gamers not support the bill?”).

<sup>19</sup> *Id.* ¶ 58.

<sup>20</sup> *Id.* ¶ 60.

<sup>21</sup> *Id.* ¶ 67.

<sup>22</sup> *Id.* ¶ 99.

<sup>23</sup> *Id.* ¶ 61.

<sup>24</sup> *Id.* ¶ 69.

<sup>25</sup> *Id.* ¶ 62-63.

<sup>26</sup> *Id.* ¶ 69.

<sup>27</sup> Dennis Tang, *Worst Congressional Style Ever? Yeah, Probably*, GQ, Feb. 25, 2014.

GQ story “may be a fun way to get some press.”<sup>28</sup> The record shows that the Congressman’s press staff saw the event solely as a fun, self-deprecating way of playing off the GQ story.<sup>29</sup> It shows no discussion of the possibility of any advertising by Ninox, nor any appeal by the Congressman to shop there or buy its products.

Representative Polis’ communications director facilitated the event with Ninox and invited local and national press to observe the makeover session, which was held in a local park and was open to the press.<sup>30</sup> Articles covering the event were published in the *Boulder Daily Camera*, the *Denver Post*, the *Washington Post*, and *GQ Magazine*. After the makeover, Representative Polis’ official Twitter account sent the following tweet: “BREAKING: @GQMagazine rescinds worst dressed title. I owe it all to @NINOXdesign.”<sup>31</sup> Representative Polis also re-tweeted a message from the @NINOXdesign Twitter account and posted a photo of the event on his official Instagram account.<sup>32</sup> Again, because Representative Polis maintains most of his assets in a blind trust, he has no interest in the company that could have affected his interactions with it.

The record shows that the interactions between Ninox and Representative Polis were limited solely to the press availability and that Ninox sought no clearance from Representative Polis to use his image in any advertising and none was provided. However, without Representative Polis’ consent and knowledge, Ninox later posted a number of images from the makeover event on its social media pages, including on Facebook, Twitter, and Instagram that did not simply describe the event but advertised discrete products.<sup>33</sup> One of the Facebook posts advertised a particular product as the “\$89 Polis Special.”<sup>34</sup> The Congressman learned of the advertisements for the first time when OCE interviewed him. He said that he was “not happy that they’re using my name . . . we will immediately contact them and tell them they shouldn’t be calling this the Polis Special.”<sup>35</sup> The Congressman’s communications director also did not know of this use of Representative Polis’ likeness.<sup>36</sup>

To avoid receiving a prohibited gift while participating in the press availability, prior to the event it was agreed that Representative Polis would purchase the clothes he wore at full price with personal funds.<sup>37</sup> As with the League of Legends activity, Representative Polis made no direct outlay of official funds to support the event with Ninox. Again, only minimal and indirect use of official resources were provided to support the event, such as staff time, House computers, phones, and House power. The engagement between Representative Polis and Ninox was the first time the Congressman had interacted with the company. The Congressman received no compensation for his activities.

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<sup>28</sup> Report and Findings ¶ 113.

<sup>29</sup> *Id.* ¶¶ 116, 124.

<sup>30</sup> *Id.* ¶¶ 116, 123-124.

<sup>31</sup> *Id.* ¶ 131.

<sup>32</sup> *Id.* ¶¶ 132, 133.

<sup>33</sup> *Id.* ¶¶ 136, 137.

<sup>34</sup> *Id.* ¶ 138.

<sup>35</sup> *Id.* ¶ 140.

<sup>36</sup> *Id.* ¶ 146, 147.

<sup>37</sup> *Id.* ¶ 148.

## DISCUSSION

### I. Representative Polis Complied With the Standards of Conduct, Engaging in Core Representational Activities

#### A. *The Standards of Conduct Give Members Discretion to Perform Their Representational Duties and Permitted the Congressman's Participation in These Events*

The U.S. Constitution assigns Members of the House of Representatives the duty of representing their constituents in exercising their weighty responsibility of “mak[ing] all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”<sup>38</sup> Multiple features of the Constitution’s structure were designed to foster proximity and familiarity between House Members and their constituents. Unlike any other federal institution, Representatives have always been directly elected by their constituents.<sup>39</sup> And, the Constitution’s assignment of two-year terms and the ratio of Members to constituents encourages Representatives to be aware of and respond to the needs of their districts.<sup>40</sup>

The Framers’ discussion of the House of Representatives shows that Representatives were expected to closely represent their constituents, and that the Constitution was designed to guarantee proximity between constituents and Members of the House of Representatives. In Federalist No. 52, James Madison said “as it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people.”<sup>41</sup> And, in Federalist No. 58, discussing the proper number of Members of the House, he stated “[i]t is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents.” Further, Madison contrasted the House with the Parliament of Great Britain, which as a result of its small size, featured representatives “who do not reside among their constituents, are very faintly connected with them, and have very little particular knowledge of their affairs.”<sup>42</sup> The House of Representatives, in other words, was custom-made to ensure that Members’ intimate awareness of the needs of their constituents would render the chamber “a safe and competent guardian of the interests which will be confided to it.”<sup>43</sup>

Courts have accordingly recognized the broad nature of a Member’s representational duties. Though these judicial cases have arisen in diverse circumstances, their reasoning on the scope of a Representative’s official duties has much in common. The Supreme Court has stated that “Members of the Congress engage in many activities other than the purely legislative activities,”

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<sup>38</sup> U.S. Const., art. I, § 8.

<sup>39</sup> *Id.* § 2 (“members chosen every second year by the people”); *cf. id.* § 3 (Senators “chosen by the legislature thereof, for six years”).

<sup>40</sup> *Id.* § 2 (“shall not exceed one for every thirty thousand”);

<sup>41</sup> The Federalist No. 52.

<sup>42</sup> The Federalist No. 58.

<sup>43</sup> *Id.*

including “legitimate errands performed by constituents” and “speeches delivered outside the Congress,” activities that have “grown over the years . . . in part because they have come to be expected by constituents.”<sup>44</sup> The D.C. Circuit Court of Appeals noted as well that “the House has not attempted to define a Member’s ‘official and representative duties,’ and has in large measure vested Members with ‘discretion to fix the terms and conditions of employment’ of staff members.”<sup>45</sup> The appeals court stated that “House Rules certainly contemplate a line between the ‘official’ and the ‘personal’ but “do little to indicate where that boundary lies.”<sup>46</sup> And, it remarked that “[f]or the ‘ordinary person,’ unlike a legislator, the distinction between work and life may be relatively clear . . . [but] [f]or a Congressman, it is not so clear; service in the United States Congress is not a job like any other, it is a constitutional role to be played upon a constitutional stage.”<sup>47</sup>

In its current guidance to Members, the Committee on Ethics cites *Brewster* and *McCormick* for the principle that Members possess discretion in their exercise of official and representational duties.<sup>48</sup> It says “[t]here is no conclusive listing of a Member’s ‘official and representational duties.’”<sup>49</sup> The Committee has acknowledged that “it is sometimes difficult to define comprehensively what is and is not an official activity.”<sup>50</sup> For example, the Committee dismissed an allegation that a Member impermissibly sent soliciting letters on official House stationery on behalf of an employee of a substantial campaign contributor, because “[t]he Committee is particularly sensitive when its actions might be viewed as limiting a Member’s ability to speak publicly on issues,” citing *Brewster*.<sup>51</sup>

Far from presenting a “bright line,” the House Ethics Manual instead urges Members to act prudently when working with businesses or referring to them in official communications. While it distinguishes normal representational duties from endorsements by the government, the Manual leaves much to the discretion of the Member. Thus, the Manual recognizes that “it is usually appropriate publicly to congratulate a local business for achieving an award or celebrating a significant anniversary,” but says also that “Members should refrain from overtly commercial promotions.”<sup>52</sup> And, it states that “an outside entity should never be permitted to use congressional stationery to promote a commercial or other unofficial endeavor” and communications should be drafted “so that they do not lend themselves to misinterpretation as an

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<sup>44</sup> *United States v. Brewster*, 408 U.S. 501, 512 (1972); see also *McCormick v. United States*, 500 U.S. 257, 272 (1991) (“serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator”).

<sup>45</sup> *United States v. Rostenkowski*, 59 F.3d 1291, 1309 (D.C. Cir. 1995) (citing Members’ Handbook at 2.3, 2.14)

<sup>46</sup> *Id.* (quoting P.L. 101-520; Member’s Handbook § 2.I.A).

<sup>47</sup> *Id.* at 1312; see also *United States v. Kolter*, 71 F.3d 425, 432 (D.C. Cir. 1995).

<sup>48</sup> House Ethics Manual at 279.

<sup>49</sup> *Id.* The Members’ Handbook also recognizes the flexible and hard-to-characterize scope of official duties, stating that a “Member must determine the primary purpose” of expenses and that the Members’ Representational Allowance (“MRA”) may be used for “reasonable expenditures in support of official and representational duties.” Handbook at 1.

<sup>50</sup> Statement of the Committee on Standards of Official Conduct Regarding Complaints Against Rep. Newt Gingrich, at 62 (Comm. Print Mar. 8, 1990).

<sup>51</sup> *Id.* at 63.

<sup>52</sup> House Ethics Manual at 326.

official endorsement from the Congress.”<sup>53</sup> By contrast, the rules on outside employment, which do not apply to this referral, are not cautionary, but prohibitive. The Manual states that Members may not “undertake any outside employment that would involve the Member personally in the selling or endorsement of any goods or services.”<sup>54</sup> Implicit here is the recognition that Members perform no representational duties through outside employment.

The Committee offers no express guidance on how to distinguish between permissible representational activities and prohibited endorsements. The Manual recognizes that outside organizations may appear at House events and that Members may appear at events sponsored by outside organizations, while cautioning that Members “must avoid becoming too closely affiliated with any commercial entity, in order to avoid any appearance that they are accruing benefits by virtue of improper influence.”<sup>55</sup> The Manual also recognizes the tension between a Member’s interest in supporting their constituents and the importance of avoiding an implication that Congress endorses an outside organization. It says that Members may insert “an Extension of Remarks in the *Congressional Record*, noting the accomplishments of a district business,” but cautions Members to avoid “overtly commercial promotions.”<sup>56</sup>

*B. Representative Polis Exercised His Discretion to Perform His Representational Duties*

At the heart of this matter are two events in which Representative Polis participated to show “a common interest with the people” and an “acquaint[ance] with the interests and circumstances of his constituents.”<sup>57</sup> Both the League of Legends appearance and the Ninox press availability arose directly from his role as a Member. Neither involved any personal profit for Representative Polis, nor any favorable treatment for any campaign contributor. Neither involved any direct appeal by the Congressman for any business transaction. In each case, Representative Polis was reaching out to his constituents where they are, in the ordinary circumstances of their day-to-day lives in a manner that is customary among Members of Congress.

Representative Polis has identified the community of enthusiasts that play League of Legends as an important constituency in terms of his congressional district and his legislative agenda. Over 67 million individuals play League of Legends every month,<sup>58</sup> including thousands that live in his district.<sup>59</sup> His Communications Director described talking to the League of Legends community as a means of “engaging with constituents that don’t read the newspaper every

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<sup>53</sup> *Id.* at 350.

<sup>54</sup> *Id.* at 188.

<sup>55</sup> *Id.* at 350.

<sup>56</sup> *Id.* at 326. While not binding on the House, the Office of Government Ethics (OGE) offers additional guidance on separating permissible activities from prohibited promotion. It says that “[t]he determination as to whether a particular reference to an employee’s title, position, agency, or government affiliation could reasonably be construed as implying government sanction or endorsement is necessarily fact-specific” and must be evaluated based on the “totality of the circumstances.” See Office of Government Ethics, Advisory Op. LA-14-08 (Nov. 19, 2014).

<sup>57</sup> The Federalist Nos. 52, 58.

<sup>58</sup> Riot Games, *About*, <http://www.riotgames.com/riot-manifesto>.

<sup>59</sup> Report and Findings, Exhibit 3 at 10.

day.”<sup>60</sup> Representative Polis sees the League of Legends community as a part of the coalition of groups that should be aware of one of his legislative priorities, protecting online privacy.<sup>61</sup>

Representative Polis’ participation in Riot Games’ video thus was an effort to reach his constituents, speak to them about public issues that matter to them, and interact with them on terms and in a forum they frequent. In the current media landscape, where a Member of Congress cannot reach his or her constituents simply by speaking with the editorial board of the local newspaper or local television network, Members must be creative and proactive about how they communicate with their constituencies and encourage them to engage in public issues. Where a Member of Congress appears in a video issued by an outside organization to speak about his biography and official responsibilities and not to sell products or otherwise endorse a commercial product or service, he acts in support of his representational duties, whether the video be produced by a local sports franchise, advocacy organization, or specialty media organization as here. As the Committee has previously stated, it must be “particularly sensitive when its actions might be viewed as limiting a Member’s ability to speak publicly on issues.”<sup>62</sup>

Representative Polis likewise was engaging in representational duties when he convened a light-hearted press event in his district in response to being called the worst-dressed Member of Congress by a national press outlet. The event served the purpose of making Representative Polis available to his constituents and local press, as it was held in a public park and local reporters were invited to participate. It also provided an opportunity for Representative Polis to become familiar with a business located in his congressional district. In this sense, the event was no different than any local site visit, which is a routine activity commonly featured on Members’ schedules, during which photographs are routinely taken by company representatives and others.

Finally, Representative Polis’ activities comply with the more detailed analysis OGE uses in the Executive branch to distinguish permitted interactions with private businesses from prohibited government endorsement by examining the “totality of the circumstances.” Neither League of Legends nor Ninox had a strong nexus to the government. He had no position with either entity, except to play League of Legends in his free time. League of Legends did not use his name to promote any product, and Ninox did so without his knowledge and consent. Both appearances referenced his official role, but only toward legitimate official ends: encouraging good citizenship and awareness of his legislative work among the League of Legends community, and lampooning his Member persona in the Ninox press availability while gaining familiarity with a local small business.

Ninox’s later unauthorized use of Representative Polis’ image to sell sunglasses does not affect the evaluation of his conduct. First, Representative Polis has and retains publicity rights under common law that he would have had to waive in order for the company to exploit his image for commercial gain. Second, the record shows that no such use was proposed or contemplated when the event was planned. Third, any Member making any site visit would have faced the same risk, whether he was eating a hot dog at a restaurant or driving a car at an auto factory.

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<sup>60</sup> Report and Findings ¶ 99.

<sup>61</sup> *Id.* ¶ 24.

<sup>62</sup> Statement of the Committee on Standards of Official Conduct Regarding Complaints Against Rep. Newt Gingrich, at 63 (Comm, Print Mar. 8, 1990).

Members cannot be expected in the ordinary course to obtain releases from constituent businesses before making a visit to confirm that the Representative does not consent to the commercial use of their likeness.

C. *The OCE Board Misapplied the Law While Identifying No Express Prohibition With Which Representative Polis Failed to Comply*

As discussed above, the House Ethics Committee has been sensitive to the appearance of limiting how Members may speak on issues or communicate with their constituents. In contrast, OCE advanced a sweeping view of the standard that is unsupported by any express authority. The Board justified its findings based on three authorities (1) the purpose statute, 31 U.S.C. § 1301(a), and related authority, including the House Ethics Manual; (2) language in the House Ethics Manual regarding commercial endorsement; and (3) the House Office Building Commission Rules and Regulations.<sup>63</sup> None of these provisions has been applied to find activities like Representative Polis' to violate these rules, and none provided a basis for referral.

1. Purpose Statute

The "purpose statute," 31 U.S.C. § 1301(a) provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made." The House Committee on Administration rules accordingly provide that the Members' Representational Allowance (MRA) may be utilized "to support the conduct of [] official representational duties."<sup>64</sup> The Handbook provides that "[o]rdinary and necessary expenses incurred by the Member . . . in support of [] official and representational duties" means "reasonable expenditures in support of official and representational duties."<sup>65</sup> Consistent with these authorities is the GAO's authoritative Principles of Federal Appropriations Law, which states that:

31 U.S.C. § 1301(a) does not require, nor would it be reasonably possible, that every item of expenditure be specified in the appropriation act. While the statute is strict, it is applied with reason. The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation. This concept, known as the 'necessary expense doctrine,' has been around almost as long as the statute itself.<sup>66</sup>

The Handbook provides nineteen rules governing MRA funds, including prohibitions on the use of funds for events that are primarily social in nature, personal expenses, campaign expenses, the

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<sup>63</sup> OCE also cited House Rule 23, cl. 1-2, which requires Members to behave "in a manner that shall reflect creditably on the House" and to "adhere to the spirit and letter of the Rules of the House." Report and Findings at 5. Compliance with these standards of conduct hinges on the underlying substantive standards. Further, OCE discussed the Joint Committee on Printing's prohibition on commercial advertising in government publications, which does not apply to the present review because the communications at issue were not government publications and did not include any material showing that the government endorses or favors any specific commercial product.

<sup>64</sup> Members' Congressional Handbook at 1; *see* House Ethics Manual at 125 (explaining relationship between Handbook and purpose statute).

<sup>65</sup> *Id.*

<sup>66</sup> Principles of Appropriations Law, at 4-20 (emphasis added).

use of personal funds to send franked mail, and the use of funds that may directly benefit Members, relatives of Members, or persons with whom the Member has a professional or legal relationship.<sup>67</sup> The Handbook also describes a host of categories for which MRA funds can be spent, including “[o]rdinary and necessary expenses related to conducting official meetings,”<sup>68</sup> “[o]rdinary and necessary expenses . . . to solicit input/information from constituents related to official business,”<sup>69</sup> and “[o]rdinary and necessary expenses related to audio and video recording and materials, including but not limited to . . . [f]ilming related to the appearance of a Member [] at an official event.”<sup>70</sup>

To our knowledge, until OCE’s referral, no authority has ever recognized the type of representational activities at issue in this review as a violation of the purpose statute. The referral ignores the “necessary expense” doctrine, disregarding Member discretion, and citing no precedent to support its contention that Representative Polis may have misused official resources.<sup>71</sup>

## 2. House Ethics Manual on Commercial Endorsements

Representative Polis’ appearance in the League of Legends video and at the Ninox “worst-dressed” press availability were consistent with the Committee’s precedent and guidance: first, with its broad sensitivity toward limits on how Members may communicate and its acknowledgement that Members may refer to or even congratulate local businesses; and second with its admonitions against participating in “overtly commercial promotions,” allowing entities to use House stationery to promote unofficial endeavors, and to giving the appearance of enjoying improper benefits. OCE did not discuss the Committee’s reluctance to interfere with what Members say on official business, and it gave short shrift to the language in the Manual that expressly permits Members to recognize and praise businesses in official communications in many circumstances.

While not applicable to the conduct in this matter, House Rule XXIII, Clause 11 is the most explicit prohibition on lending official resources to private entities. Yet even regarding this unambiguous Rule, the Ethics Manual makes clear that “Clause 11 of House Rule 23 is not intended to restrict a Member’s official communications . . . ”<sup>72</sup> Finally, in analyzing how the House approaches promotional activity, OCE failed to consider that Members are explicitly permitted to promote home state products in their offices. House Rule XXV, Clause 5(a)(3)(V) permits Members to accept “[d]onations of products from the district or State that the Member, Delegate, or Resident Commissioner represents that are intended primarily for promotional purposes, such as display or free distribution, and are of minimal value to any single recipient.”

It would be a bizarre twist if Members were permitted to explicitly promote their home state products by displaying or even distributing them in their office, but they were not permitted to

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<sup>67</sup> Members’ Congressional Handbook at 1-2.

<sup>68</sup> *Id.* at 16.

<sup>69</sup> *Id.* at 18.

<sup>70</sup> *Id.* at 19.

<sup>71</sup> See Report and Findings ¶¶ 1, 3, 23.

<sup>72</sup> House Ethics Manual at 347.

tweet about those companies, or to appear publicly with the companies that produce those products when they might be photographed.

### 3. House Office Building Commission

Finally, OCE relied on the Rules and Regulations Governing the House Office Buildings, which cover “the use and occupancy of rooms and space, including terraces, entrances, lobbies, foyers, corridors, cafeterias, restaurants and areas appurtenant thereto, in the Cannon, Longworth, and Rayburn House Office Buildings.”<sup>73</sup> The Rules provide that “photographing, filming (including news filming), television, recording or broadcasting in buildings under the jurisdiction of the Commission is prohibited.”<sup>74</sup> In addition, the rules prohibit “soliciting [] alms and contributions, commercial soliciting for products or services, [] vending of all kinds, [and] the display or distribution of commercial advertising,” among other activities, “in any of the areas covered by these regulations.”<sup>75</sup>

On their face, these particular regulations apply only to the “use and occupancy of rooms . . . in the Cannon, Longworth, and Rayburn House Office Buildings,” and do not apply to an event in Boulder, Colorado. With respect to the League of Legends video, the rule does not apply because Representative Polis was not engaging in “commercial soliciting for products or services,” but rather discussing his personal background, legislative priorities, and the relationship between his official duties and a community of video game enthusiasts. As discussed above, the video featuring Representative Polis contained no “sales pitch” and there was no “economic goal for the project.”<sup>76</sup>

The alleged violations in the Board’s report and findings lack two significant characteristics common to House Ethics Committee actions finding a violation of a standard of conduct: (1) the existence of precedent that recognizes analogous conduct as a violation; and (2) clear language in the House Ethics Manual or Members’ Handbook that prohibits the conduct at issue. For example, when the Committee has found violations of the purpose statute and accompanying authority, Members had violated particular prohibitions on the use of official funds identified in the House Rules, Members’ Handbook, or House Ethics Manual. Specifically, violations of the purpose use statute have entailed at least one of the following three circumstances: (1) the use of official resources for campaign or political purposes; (2) conflicts of interest or self-dealing; or (3) other particular actions expressly prohibited. Thus, in multiple ethics proceedings, the Committee has reprimanded Members or taken other adverse action for using House resources for campaign work.<sup>77</sup> This activity is expressly prohibited in the Members’ Handbook and

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<sup>73</sup> House Office Building Commission Regulations, Dec. 1995.

<sup>74</sup> *Id.* § 2.

<sup>75</sup> *Id.* § 4.

<sup>76</sup> Report and Findings ¶ 35; *see also id.* ¶¶ 43, 50.

<sup>77</sup> *See, e.g., In the Matter of Allegations Relating to Representative Laura Richardson*, H. Rep. 112-642 (2012); Statement of Chairman Doc Hastings and Ranking Minority Member Howard L. Berman Regarding Representative Conyers (Dec. 29, 2006); *Statement of Alleged Violation in the Matter of Representative Barbara Rose-Collins*, H. Rep. 104-886 (1997); *In the Matter of Representative E.G. “Bud” Shuster*, H. Rep. 106-979 (Oct. 16, 2000).

House Ethics Manual.<sup>78</sup> A number of Ethics Committee reports have also criticized Members for using official resources for their own personal benefit.<sup>79</sup> Again, the Members' Handbook and House Ethics Manual clearly proscribe conduct of this nature.<sup>80</sup> Lastly, a number of Ethics Committee actions have addressed other "official use" allegations clearly proscribed in the regulations, such as improper use of the frank,<sup>81</sup> or improper use of congressional stationery.<sup>82</sup> In contrast, the violations found by the OCE are not grounded in House Ethics Committee precedent or clear provisions in the House Ethics Manual.

*D. The OCE Board implies a duty of inquiry and duty of prevention that does not currently exist and may not be imposed on Members by the OCE*

While the multitude of vague statements about commercial endorsements is discussed above, there is no clear legal standard for Members to follow. As described above, whatever standard the Committee may fairly imply, it is certainly far short of the broad prohibition the OCE suggests by finding the possibility of a violation in this matter. In addition, as there is no evidence of any knowledge by Representative Polis or his staff of the sunglasses sale by Ninox, OCE's findings suggest that Members have some previously unknown duty to proactively inquire of every private entity they interact with about the details of how the entity will use any photographs or recordings of their interaction. The breadth of interactions that would implicate such duties shows any attempt to impose them to be impractical and likely to chill the many free-flowing interactions Members regularly have with their constituents and other private citizens or entities. If the Committee were to endorse the implied duties that the OCE's logic would require, Members would be forced to prohibit photography or recording of any kind, or at least the public release of any photographs, before they agreed to any meetings or site visits with any private entities. This result would dramatically curtail Congress' interactions with the private sector and would actually reduce the transparency of whatever interactions remain.

## **II. Unless the Committee Corrects OCE's Misreading of the Rules, Common and Widespread Representational Activities Would Be Chilled and a Significant Increase in Complaints Would Result**

OCE's referral in this matter is an unprecedented application of the rules that, unless corrected, will chill the exercise of representational duties throughout the House. By OCE's logic, whenever a Member is filmed by a for-profit company; whenever the company uses the video in connection with its business; whenever the company spends substantially to produce the video;

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<sup>78</sup> Members' Handbook at 2; House Ethics Manual at 123 ("official resources of the House must, as a general rule, be used for the performance of official business of the House, and hence those resources may not be used for campaign or political purposes").

<sup>79</sup> See, e.g., *In the Matter of Representative Austin J. Murphy*, H. Rep. 100-485 (Dec. 16, 1987); *In the Matter of Allegations Relating to Representative Phil Gingrey*, Comm. Report (Dec. 11, 2014); *In the Matter of Representative Charles B. Rangel*, H. Rep. 111-661 (Nov. 29, 2010).

<sup>80</sup> Members' Handbook at 2 (No Member may benefit from expenditure of MRA funds); House Ethics Manual at 71 (gifts), 187 (outside employment).

<sup>81</sup> Compare *In the Matter of Representative Newt Gingrich*, H. Rep. 101-995, with Members' Handbook at 20 (prohibiting unofficial use of frank).

<sup>82</sup> Compare *In the Matter of Representative Dick Armey*, H. Rep. 104-886, with Members' Handbook at 20 (prohibiting private use of House stationery) and House Ethics Manual at 347, 350 (same).

or whenever any part of the video is filmed in a Member's office, the Member can be perceived as impermissibly promoting a commercial endeavor.<sup>83</sup> Similarly, whenever a Member "engage[s] in and publiciz[es]" an official event with a for-profit company, the Member likewise can be perceived as impermissibly endorsing a company's product.<sup>84</sup> Yet these conditions can be easily met whenever a Member is filmed by a media corporation; or whenever a Member makes a site visit or holds and publicizes a constituent meeting at a particular restaurant or grocery store. The thin support which OCE provides for these sweeping propositions, and the actual day-to-day conduct of Members, show powerfully that the true standard is much different, and that OCE erred.

Countless press releases, social media communications, and descriptions of appearances by Members of the House of Representatives show that Representative Polis' engagement with the League of Legends community and meeting with Ninox rest comfortably within the common practice of House Members and their understanding of the standards of conduct. A few examples highlight why the standard advanced by OCE against Representative Polis could be applied to almost any Member of Congress. In no way does this mean that any of these Members violated any standard of conduct. Rather, these examples show that a proper application of the rules allows Members to connect with the public in diverse ways, as their representational duties require.

#### *A. National Sports Franchises*

Many Members of the House have announced their support for local sports franchises on social media, in broadcast interviews, and even on the floor of the House, despite the fact that these franchises are for-profit corporations that spend substantially on promotional activities. For instance, one congressman recently sang the New York Mets' fight song, *Meet the Mets*, on the House floor. Several tweeted about the Los Angeles Dodgers and Kansas City Royals from their official accounts. Another Member of Congress spoke about his "ownership" share in the Green Bay Packers in a recorded interview. Yet another expressed his support for the Chicago Blackhawks and the NHL Network in an interview filmed by the NHL Network.

Multiple Members have posted on their social media pages about NFL franchises, including announcing the opening of Eagles training camp, the record of the Denver Broncos, a Monday Night Football game between the Arizona Cardinals and the Baltimore Ravens, and the score of a Patriots game. Although local sports franchises are undoubtedly key and beloved local institutions, they are still for-profit entities that engage in promotional activity. Lastly, another Member of Congress paid tribute to NASCAR driver Jeff Gordon in a video posted on the Charlotte Motor Speedway's website, featuring the speedway's 1-800 number and a banner imploring fans to "BUY TICKETS."

#### *B. TV Shows/Bands*

Members of the House just as frequently express their allegiance to particular television shows and bands. As with sports franchises, these bands and television programs are profit-seeking

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<sup>83</sup> Report and Findings ¶¶ 106-107.

<sup>84</sup> *Id.* ¶ 149.

ventures that engage in extensive promotional activity. For instance, one Member of Congress said at a *National Review* event that he enjoys Taylor Swift. Many Members of Congress have discussed their enjoyment of “House of Cards” on HBO, putting out press releases about the show and bragging that they binge-watch the program. As described above, a half-dozen Members of Congress were even filmed in their House offices reading lines from the show. Another Member of Congress tweeted the news that Kiwi-based duo Flight of the Conchords would be releasing a film. For a historic example, a former House Speaker appeared in an episode of “Cheers” during its first season.

### C. *Miscellaneous*

In addition to the examples above, Members of the House have posted about owning an AR-15, visiting a local coffee roasting company, appearing on a Wheaties Box, purchasing books written by David Brooks (as well as the book store from which it was purchased) and about Justice Ginsburg, appearing at the Sugar Sands Inn to promote the tourism industry, the biscuit and pies at a Fort Worth coffee shop, a PGA Golf Championship event in the district, a visit to a Home Depot, and a chocolate shop that made a product named after the Member. A number of House Members and automobile companies have also posted on their social media about Member test-drives of automobiles. Unless and until the Committee corrects the interpretation that OCE only narrowly advanced, a prudent Member will have no alternative but to stand down from a wide range of permissible representational activities in which Members now commonly engage. The result, ironically, would be a Congress that is less responsive and thereby accountable to the public and “less acquainted with the interests and circumstances of [its] constituents.”<sup>85</sup>

### III. **At All Times Representative Polis Acted in Good Faith, and He Has Cooperated Fully and Forthrightly With OCE**

Representative Polis is fully committed to complying with all standards of ethical conduct. As a matter of policy, he has not hesitated to seek Committee advice, stating “[w]e use the Committee on Ethics regularly . . . [w]e would typically use it around anything that could relate to any possible impropriety before it happens.”<sup>86</sup> There is nothing whatsoever in the record to suggest that he or his staff purposely departed from this general practice. Precisely because Members so frequently interact with for-profit enterprises in media events, and precisely because Representative Polis endorsed no product, made no commercial appeal, and did not stand to benefit financially from the companies’ activities, neither he nor his staff saw any “red flags” indicating that these requests somehow raised ethics concerns. According to the Congressman, the League of Legends request “did not trigger any alarm bells because it was not for any type of personal gain . . . [w]e also didn’t feel that it had anything to do with promoting a product.”<sup>87</sup> That sentiment was apparently shared by the Congressman’s staff.<sup>88</sup> The request from Ninox

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<sup>85</sup> The Federalist No. 58. Should the Committee require documentation of the examples of permissible representational activity described above, we would be happy to provide it.

<sup>86</sup> Report and Findings, Exhibit 3 at 13.

<sup>87</sup> Report and Findings ¶ 69.

<sup>88</sup> *Id.* ¶¶ 53 (Chief of Staff), 58 (Scheduler), 65-67 (Communications Director).

also did not suggest a possible ethics violation, because Representative Polis did not view the event as something that he would gain from, or that would involve a personal endorsement.<sup>89</sup>

In several respects, Representative Polis has taken remedial action to ensure compliance with his ethical obligations. Upon learning that Ninox had used Representative Polis' likeness in commercial advertising without his knowledge and consent, the Congressman told his communications director to contact Ninox and direct them to remove posts using his image for the purpose of advertising.<sup>90</sup> In addition, Representative Polis also took appropriate remedial action by having his office "delete any tweets from the official Twitter account that 'tagged' a specific company."<sup>91</sup> Lastly, his office has "gone back and forth with Ethics, just to clarify [some] of the rules regarding social media," and his communications director noted that "going forward, I make sure that we don't tag companies."<sup>92</sup> This is despite the fact that the Committee on House Administration has given conflicting advice, and clearly this absolute prohibition on using the handles of private entities is not understood by the vast majority of Members of Congress. The widespread practice of House Members mirrors common usage of social media platforms, where users frequently "tag" companies and other entities.

Finally, Representative Polis has demonstrated his commitment to Congress' ethics oversight mechanism by fully and forthrightly cooperating with the Office of Congressional Ethics. He reaffirms that commitment by pledging to the House Ethics Committee to fully cooperate in its review of the Board's findings and recommendations.<sup>93</sup>

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<sup>89</sup> *Id.* ¶ 119-120; *see also id.* ¶ 134 (Communications Director).

<sup>90</sup> *Id.* ¶ 143.

<sup>91</sup> *Id.* ¶ 135.

<sup>92</sup> *Id.*

<sup>93</sup> OCE's review was marred by several procedural deficiencies. First, OCE referred an allegation that was not disclosed to Representative Polis – the claim that Representative Polis misused official resources and impermissibly endorsed a commercial product during his "worst-dressed" media availability with Ninox. Representative Polis had no adequate opportunity to respond to this allegation. *Cf.* H. Res. 5 § 4 (114th Cong.) (barring OCE from taking any action that would deny any person any right or protection under the Constitution). Second, OCE failed to comply with its deadlines under the Resolution, taking nearly four months to complete a process that is supposed to take "at most three months" and pushing the release of its referral into an election year. Report of the Members of the Special Task Force on Ethics Enforcement at 14 (Dec. 2007) (hereinafter "the Capuano Report"). Third, OCE impermissibly identified cooperative witnesses throughout its findings. *See* H. Res. 895, 110th Cong. § 1(c)(2)(C)(i). "Cooperative witnesses, who will not be named by the board within the Findings in order to preserve confidentiality, should be listed within the supporting documents for the Committee's information." Capuano Report at 13. Yet, the findings identify by name the Riot Games Brand Manager, Representative Polis' scheduler, and a staffer in Representative Polis' district office, all of whom cooperated voluntarily with OCE's review. *See* Report and Findings ¶¶ 60, 149, 122 n.156. Fourth, while OCE produced some of the clearly exculpatory excerpts from the Riot Games staff interviews, they failed to produce other exculpatory material, such as the internal Riot Games document labeling the video a "documentary." Report and Findings Exh. 4. It is of course unknown what other exculpatory material OCE may have withheld that is not in the findings. Fifth, OCE included materials as exhibits to findings that should not be disclosed publicly, but should be submitted as "supporting materials" to the Committee for further review and scrutiny. *Compare* H. Res. 895, 110th Cong. § 1(c)(2)(C)(i)(II), *with id.* § 1(c)(2)(C)(i)(III).

## CONCLUSION

OCE's unprecedented, sweeping and narrowly-adopted report requires swift Committee correction for at least three reasons. *First*, because the House and the Committee have stopped short of prohibiting this conduct, the Board has usurped the Committee's and the House's constitutional prerogative provided in the Rulemaking Clause of Article I, which "clearly reserves to each House of the Congress the authority to make its own rules."<sup>94</sup> *Second*, such a novel and aggressive application of general standards would expose Representative Polis and other Members to ethics-related consequences for which they lacked any kind of reasonable notice.<sup>95</sup> *Third*, the Board's proposed expansion of the ethical standards of conduct runs into headfirst conflict with the Framers' vision of the role of the House of Representatives and the way in which Members commonly perform their representational duties. The Committee should promptly dismiss the findings for imposing a novel set of standards of conduct.

It is worth noting that Representative Polis' conduct in both instances involved novel forms of communications.<sup>96</sup> Such cases, especially when new technologies and alternative media are involved, can raise questions and ambiguities that are not clearly established or well-understood.<sup>97</sup> To the extent the rules require adjustment or clarification, the proper forum for such an effort is through the House Ethics Committee's authority to explain and clarify its Rules, and the authority of the House to set its own rules. OCE could have dismissed this review for

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<sup>94</sup> *United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995); *see also* U.S. Const., art. I, § 5 ("each House may determine the rules of its proceedings").

<sup>95</sup> *See generally* *McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed") (Holmes, J.); *see also* *United States v. Kolter*, 71 F.3d 425, 430 (D.C. Cir. 1995) (House Rule so vague that Member "did not have constitutionally adequate notice that his conduct would expose him to criminal liability").

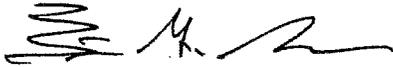
<sup>96</sup> For example, the Federal Election Commission's current interpretation of the "media exemption" under federal campaign finance law would likely treat Riot Games as a media entity for the communications activities at issue in this referral, which is consistent with Representative Polis' office's treatment of the request as a "PRESS CALL." Report and Findings ¶ 60; *see also* FEC Adv. Op. 2005-16 (Fired Up LLC); MUR 5928 (Kos Media LLC); *see also* Statement of Reasons, Commissioners Bradley A. Smith, Michael E. Toner and David M. Mason, MUR 5315 (Wal-Mart Stores, Inc.).

<sup>97</sup> Significantly, during the two weeks between OCE's referral and this response, two federal entities issued guidance on the use of social media. The Senate Rules Committee on November 10, 2015, released new regulations and guidance "designed to accommodate the fact that Members visit locales such as farms and factories as part of their official duties. Accordingly, Members are permitted to use Senate Internet Services to communicate to the public about these visits and even link to a non-Senate website so long as it is not done for commercial or promotional purposes." U.S. Senate Committee on Rules and Administration, *Frequently Asked Questions Regarding Use of Senate Technology* (November 2015). The Dear Colleague letter accompanying the revisions noted that "[g]iven the many advances in technology since the last regulations were adopted [in 2008], an update was required to facilitate the use of modern communication tools . . . [t]he new regulations modernize our rules so Senate offices can utilize new technologies [] to more effectively communicate with constituents." U.S. Senate Committee on Rules and Administration, *Dear Colleague Letter* (Nov. 10, 2015). Similarly, the U.S. Office of Special Counsel on November 12, 2015, updated its guidance to federal employees on the rules governing the use of social media at the workplace. U.S. Office of Special Counsel, Press Release, *OSC Updates Hatch Act Guidance for Social Media* (Nov. 12, 2015) (stating the updated guidance makes "some notable changes" and addresses "new issues"). While neither controls this matter, both show quite clearly that the referral involves an area in which the law is developing.

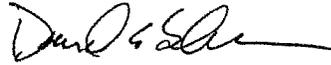
being “de minimis in nature” or because an applicable rule was not in effect at the time.<sup>98</sup> The OCE referral process is the wrong forum to transmit and evaluate novel applications of the rules.

Representative Polis appreciates the Committee’s consideration of his views on this matter. We respectfully request that the Committee dismiss the referral.

Very truly yours,



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<sup>98</sup> Office of Congressional Ethics, *Rules for the Conduct of Investigations*, Rules 1, 7(F). H. Res. 895, 110th Cong. § 1(c)(2)(F)(i)(II).