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Office of the General Counsel
Attn: Lisa J. Stevenson, Esq.
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Revised Great America PAC Advisory Opinion Request Concerning the Former Employee Coordination Regulation, 11 C.F.R § 109.21(d)(5)

Dear Ms. Stevenson:

Pursuant to 52 U.S.C. § 30108, Great America PAC ("GAP") seeks an advisory opinion from the Commission concerning the applicability of the commission's regulations concerning the circumstances under which expenditures involving a former employee of a candidate or political party will be treated as coordinated with such candidate or party. *See* 11 C.F.R. § 109.21(d)(5). Due to the pendency of the upcoming general election, GAP requests expedited consideration by the Commission.

GAP previously submitted a request for an advisory opinion on this issue on September 8, 2016. In a letter dated September 14, 2016, Associate General Counsel Adav Noti rejected the request, refusing to address the questions presented on the grounds the request did "not include a description of all facts relevant to the specific activity or transaction at issue." In particular, he alleged the letter "does not provide sufficient facts to determine whether any of the activities mentioned in the request—such as 'door-to-door' visits—would constitute "'public communications'" under the applicable federal statutes and regulations.

As explained below, GAP wishes to hire phone bank personnel and door-to-door canvassers to contact members of the public "in support of Donald Trump's candidacy for President in the November 2016 election." These individuals will provide members of the public with information about the candidate (in this case, Trump), his candidacy, and policies; answer questions about the candidate and his policies to the extent reasonably possible; and urge eligible voters to vote for the candidate. Phone bank personnel and door-to-door canvassers will be given scripts, lists of talking points or bullet points, "frequently asked question" sheets, and/or other aides or types of training to provide them with the information necessary to engage in these communications. All of the information GAP or its contractors use in preparing these materials or conducting training for canvassers and phone bank personnel will originate from publicly available sources; none will be obtained from Trump, his campaign, or a political party.

Thus GAP wishes to hire phone bank personnel and door-to-door canvassers (directly, or through contractors) to engage in political communications satisfying the "content standards" of 11 C.F.R. § 109.21(c)(3), (c)(4)(ii), and/or (c)(5). The phone bank personnel and door-to-door canvassers will engage in "public communication[s]" because they will be communicating with members of the general public. 52 U.S.C. § 30102(22); *accord* 11 C.F.R. § 100.26. The

communications will "expressly advocate" the election of a clearly identified candidate, Donald J. Trump, and reasonably may expressly advocate the defeat of a clearly identified candidate, Hillary Clinton. 11 C.F.R. § 109.21(c)(3); *see also id*. § 109.21(c)(4)(ii) (encompassing "public communication[s]" that "refer[] to a clearly identified Presidential . . . candidate" made between his or her nomination and the general election); *id*. § 109.21(c)(5) (encompassing public communication[s]" that include the "functional equivalent of express advocacy"). Moreover, GAP and its contractors, through phone bank personnel, will make more than 500 calls "of an identical or substantially similar nature within [a] 30-day period." 52 U.S.C. § 30101(24) (setting forth requirements of a "phone bank"); *accord* 11 C.F.R. § 100.28.

Mr. Noti also incorrectly alleges that GAP "asks the Commission to find that its regulation, as a matter of law, is 'overbroad in several respects.'" This erroneous accusation appears to arise from a misunderstanding of GAP's advisory opinion request. None of the Questions Presented set forth in GAP's request ask the Commission to address the "general question" of law of whether the regulation is unconstitutionally overbroad. *Cf*. 11 C.F.R. § 112.1(b). Rather, GAP demonstrated that 11 C.F.R. § 109.21(d)(5) is overbroad in the course of presenting its argument as to why the Commission should construe the regulation narrowly, so as not to apply to the activities in which GAP wishes to engage.

In light of these clarifications about both GAP's factual situation and the nature of its request, GAP respectfully re-submits its request and asks the Commission address these important issues. Moreover, to the extent any further uncertainty somehow remains about the nature of GAP's intended conduct, GAP would be pleased to provide further information to the Commission, rather than incurring the delay entailed by having this request rejected.

I. FACTUAL BACKGROUND

Great America PAC is a non-connected, unauthorized hybrid political committee. It has made, and will continue to make, substantial independent expenditures in many forms in support of Donald J. Trump's candidacy for President in the November 2016 election. GAP intends to directly hire and pay individual agents, as well as third-party service providers, to make personal contact with potential voters in various states. Voters will be contacted through door-to-door visits ("canvassing") and live phone calls ("phone banking"), advocating the election of Donald Trump.

Personnel operating "phone banks" will use contact information provided by GAP or its vendors to call potential voters selected by GAP or its vendors. Door-to-door canvassers will physically travel to the homes of potential voters GAP or its vendors have targeted to attempt to speak with the voters in person. Phone bank personnel and canvassers may be asked to record the results of each contact attempt, including whether or not contact was made, its date and time, the name of the person who spoke with them, the person's expressed likelihood of voting for Trump in the upcoming election, and other feedback or noteworthy comments.

GAP or its vendors will choose the potential voters who its phone bank personnel and door-to-door canvassers will attempt to contact by analyzing various publicly available records and sources. GAP will also provide each of these workers with one or more scripts to use when

contacting potential voters, either by phone or in person. Each script may take the form of a complete transcript to be read verbatim, or bullet points of the main ideas which employees must attempt to convey. The scripts also may include outlined responses to possible questions voters may ask.

The agents GAP wishes to hire, and the third-party vendors with which GAP seeks to contract, will "expressly advocate the election" of Donald Trump, a candidate who will be "clearly identified" in the underlying communications. 52 U.S.C. § 30101(17)(A). Thus, the funds GAP will spend on such communications qualify as "independent expenditures" under federal law, so long as those expenditures are "not made in concert or cooperation with[,] or at the request or suggestion of[,]" Trump, his authorized committee, his agents, or a political party committee or its agents. *Id*. § 30101(17)(B). In other words, GAP's anticipated expenditures will be deemed "independent," and therefore not subject to limit, so long as they are not considered "coordinated" with either Trump or a political party.

Due in part to heavy competition during election season for people who have experience with voter outreach, many of the people GAP and its likely vendors wish to hire have, within the previous 120 days, performed similar paid front-line, ground-level voter outreach work for the Trump campaign, a state political party, or the Republican National Committee ("RNC"), as either employees or independent contractors.[1] People who are hired as front-line voter outreach personnel typically are not involved in a campaign's or party's strategic decisions, and generally are not responsible for determining either the voters or geographic areas to be targeted or the messages to be conveyed. They often receive training, however, in ways to communicate with potential voters to advance the campaign's or party's interests or strategic plan, and the topics on which to focus. Moreover, it is reasonably possible one or more people who previously performed voter outreach work (through a phone bank or door-to-door soliciting) for the Trump campaign, a state party, or the RNC, and are subsequently hired by GAP may—without solicitation and contrary to GAP's strict instructions—either:

(i) mention or discuss aspects of their previous employment that are material to their new job, such as the geographic locations of voters to whom they engaged in outreach efforts, training they received from their former employers, the contents of the scripts they used while interacting with voters in their previous jobs, or comments or responses voters made in response to those previous outreach efforts, or

(ii) unilaterally decide to use training or portions of scripts used in their previous jobs, which cannot be "unlearned" and are unlikely to be forgotten, including but not limited to suggested responses to particular questions or comments from voters.

II. QUESTIONS PRESENTED

[1] This memorandum will collectively refer to both employees and independent contractors as "employees," since campaign finance law does not establish any legally pertinent distinctions between those categories of personnel.

1. Does 11 C.F.R. § 109.21(d)(5) apply to front-line field employees engaged in voter outreach efforts, such as phone-banking or door-to-door canvassing?

2. When a person hires someone who, within the previous 120 days, performed front-line, ground-level voter outreach efforts for a candidate or political party (a "former employee"), does 11 C.F.R § 109.21(d)(5) require some or all of that person's subsequent communications to be treated as coordinated expenditures, when:

    a. that person himself has no interaction with any candidate, campaign, or political party concerning either his communications or the former employee;

    b. that person himself strictly prohibits such former employees from using or conveying information they acquired in their previous positions, but a former employee nevertheless unilaterally decides to do so anyway;

    c. that person himself did not wish or intend to make a coordinated expenditure, and took reasonable precautions against doing so;

    d. the person has no reason to believe the former employee was ordered or encouraged to quit his previous job by the candidate, campaign, or political party for which he used to work, for the purpose of taking a new position in order to coordinate communications or expenditures;

    e. the person has no reason to believe the former employee is continuing to act as an agent, or otherwise at the direction of, the candidate, campaign, or political party for which he used to work; and

    f. the person has no reason to believe the candidate, campaign, or political party for whom the former employee used to work is using the former employee as a conduit through which to pass information to his new employer.

3. Is information concerning the geographic areas in which a former employee of a candidate or political party who previously engaged in voter outreach efforts, either in person or by phone:

    a. "material" to a new employer's communications, if the former employee conveys information to one or more persons who have input in determining the geographic areas in which the new employer will conduct its own voter outreach efforts;

    b. "available from a publicly available source," on the grounds the voters who the previous employer contacted are members of the public.

4. Is information derived from the contents of scripts, talking points, or responses to potential voter questions a former employee of a candidate or political party previously used in voter outreach efforts, either in person or by phone, on behalf of that candidate or party:

a. "material" to a new employer's communications, if the former employee conveys such information to one or more persons who have input into developing the scripts which the new employer will require its employees to use in conducting voter outreach;

b. "material" to a new employer's communications, if the former employee unilaterally decides—in violation of the new employer's strict instructions—to quote excerpts from those scripts, talking points, or responses while speaking with voters on behalf of the new employer;

c. "use[d]" by the former employee, if the former employee unilaterally decides—in violation of the new employer's strict instructions—to quote excerpts from those scripts, talking points, or responses while speaking with voters on behalf of the new employer;

d. "material" to a new employer's communications, if the former employee unilaterally decides—in violation of the new employer's strict instructions—to convey such information to one or more of the new employer's other front-line personnel responsible for engaging in voter outreach efforts, who use such information while speaking with voters;

e. "available from a publicly available source," on the grounds the contents of the scripts were effectively made public when they were used in the course of the previous employer's voter outreach efforts.

5. If a former employee of a candidate or political party violates 11 C.F.R. § 109.21(d)(5), may his current employer continue to treat his expenditures as independent if he terminates the former employee immediately upon learning of the violation?

III. CONSTITUTIONAL ANALYSIS

A. Statutory and Regulatory Background

Under federal law, expenditures coordinated with a candidate are treated as "contributions" to that candidate and subject to contribution limits. 52 U.S.C. § 30116(a)(7)(B); *cf. id*. § 30101(17)(B) (defining "independent expenditure" as excluding coordinated expenditures). An expenditure qualifies as coordinated if it is made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate." *Id*. § 30116(a)(7)(B)(i); *see also id*. § 30101(17)(B). Expenditures for the "dissemination, distribution, or republication" of a candidate's broadcasts or campaign materials also are treated as coordinated. *Id*. § 30116(a)(7)(B)(iii).

The Bipartisan Campaign Reform Act ("BCRA") repealed the FEC's then-existing definition of "coordination" and directed the agency to "promulgate new regulations on coordinated communications." Pub. L. No. 107-155, § 214(b)-(c), 116 Stat. 81, 94-95 (Mar. 27,

2002). BCRA specifies the new regulations "shall not require agreement or formal collaboration to establish coordination." *Id*. § 214(c), 116 Stat. at 95. It further directs the regulations "shall address," among other things, "payments for communications directed or made by persons who previously served as an employee of a candidate or a political party." *Id*. Although this provision requires the FEC to "address" this issue, it "provid[es] no guidance as to how the FEC should [do so]." *Shays v. FEC*, 414 F.3d 76, 98 (D.C. Cir. 2005) (quotation marks omitted).

The FEC responded to BCRA by promulgating a new coordination regulation in 2003. *See* FEC, Final Rule, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421 (Jan. 3, 2003). The agency concluded Congress intended for it to enact regulations "encompass[ing] situations in which former employees, who by virtue of their former employment have been in a position to acquire material information about the plans, projects, activities, or needs of the candidate or political party committee, . . . subsequently use that information or convey it to a person paying for a communication." FEC, Notice of Proposed Rulemaking, *Coordinated and Independent Expenditures*, 67 Fed. Reg. 60,042, 60,051 (Sept. 24, 2002); *accord* 68 Fed. Reg. at 438; *see also* 67 Fed. Reg. at 60,052 (concluding Congress' "primary concern" was "a situation in which a former employee of a candidate goes to work for a third party that pays for a communication that promotes or supports the former employer/candidate or attacks or opposes the former employer/candidate's opponent").

Under the current version of the coordination regulation, a communication must satisfy three requirements to be deemed coordinated with a candidate or political party. 11 C.F.R. § 109.21(a). First, it must be paid for by "a person other than th[e] candidate, authorized committee, or political party committee." *Id*. § 109.21(a)(1). Second, the communication must fall within certain content-related categories. *Id*. § 109.21(a)(2), (c). Finally, it must satisfy a "conduct standard," such as the "[f]ormer employee or independent contractor" regulation. *Id*. § 109.21(a)(3), (d)(5).

Under the FEC's "former employee or independent contractor" standard, an election-related communication qualifies as coordinated—regardless of whether "there is agreement or formal collaboration" between the person funding the communication and a candidate or party—if two requirements are met. *Id*. § 109.21(d). ***First***, the communication must be paid for by the employer of someone who, within the previous 120 days,[2] was an employee or independent contractor of a political party committee, a candidate clearly identified in the communication, or that candidate's opponent. *Id*. § 109.21(d)(5)(i).

Second, the former employee or independent contractor must use, or convey to the person paying for the communication, information that:

- is ***either*** "about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee," ***or***

[2] As originally enacted, the regulation applied to people who had worked for the candidate, the candidate's opponent, or a political party within the same election cycle. *See* FEC, Final Rule, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 454 (Jan. 3, 2003).

was "used by the former employee or independent contractor in providing services" in his former position;

- is "material to the creation, production, or distribution of the communication;" ***and***

- was not "obtained from a publicly available source."

Id. § 109.21(d)(5)(i)-(ii); *cf.* FEC, Final Rule, *Coordinated Communications*, 75 Fed. Reg. 55,947, 55,957 (Sept. 15, 2010); FEC, Notice of Proposed Rulemaking, *Coordinated Communications*, 70 Fed. Reg. 73,946, 73,954 (Dec. 14, 2005). Employers can attempt to prevent their expenditures from being deemed coordinated by forcing their new employees to work behind a firewall, segregated off from the personnel responsible for making those expenditures. *See* 11 C.F.R. § 109.21(h). Even when employers use a firewall, however, their expenditures will nevertheless be deemed coordinated if, despite the firewall, material non-public information from a former employee's previous job is used in making, producing, or distributing a communication. *Id*.

The FEC has explained this regulation is "intended to encompass both situations in which the former employee assumes the role of a conduit of information and situations in which the former employee makes use of the information but does not share it with the person who is paying for the communication." 67 Fed. Reg. at 60,052; *accord* 68 Fed. Reg. at 438. The rule applies even when the former employee or contractor is not "act[ing] under the continuing direction or control of, at the behest of, or on behalf of, his or her former employer." 67 Fed. Reg. at 60,052. It is likewise applicable even when there is no "mutual understanding or meeting of the minds" between the person funding the communication and a candidate or political party "as to all, or even most, of the material aspects of [the] communication." *Id*. at 60,052.

B. Coordinated Expenditures May Be Treated as Contributions

The Supreme Court has held the Government may choose to treat expenditures which are coordinated with a candidate as in-kind contributions to that candidate, to prevent people from "circumvent[ing]" contribution limits through spending that is, in effect, a "disguised contribution[]." *Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976) (per curiam); *see also McConnell v. FEC*, 540 U.S. 93, 202-03 (2003) (Stevens, J.) (reiterating coordinated expenditures are "indirect contributions"); *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 442, 446, 464 (2001) ("*Colorado II*") (holding a coordinated expenditure can be "virtually indistinguishable from [a] simple contribution[]" and is a "potential alter ego[] for [a] contribution[]"). Because coordinated expenditures involve candidates' input, they "might well have virtually the same value to the candidate as a contribution and would pose similar dangers of abuse." *Buckley*, 424 U.S. at 46; *see also Colorado II*, 533 U.S. at 446 (recognizing coordinated expenditures can be "as useful to the candidate as cash").

Coordinated expenditures therefore differ sharply from independent expenditures, which are made without any input from a candidate. "[T]he absence of prearrangement and coordination of an expenditure with the candidate . . . not only undermines the value of the

expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Buckley*, 424 U.S. at 47; *see also Colorado II*, 533 U.S. at 442, 446. Because independent expenditures are categorically less valuable to a candidate than coordinated expenditures and, by definition, do not afford the candidate an opportunity to negotiate a *quid pro quo* arrangement, the Government may not limit the amount of a person's independent expenditures. *Buckley*, 424 U.S. at 51; *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) ("*NCPAC*"); *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 613-14 (1996) ("*Colorado I*"); *see also Citizens United v. FEC*, 558 U.S. 310 (2010).

C. The Government May Not Simply Designate an Expenditure as Coordinated in the Absence of Some Actual Interaction Concerning the Expenditure Between the Source of the Funds and the Candidate or Party Who Benefits from It.

"Coordinated expenditure" is a constitutionally restricted category—it delineates a limited universe of expenditures that, under the First Amendment, the Government may treat as contributions and thereby limit. *See supra* Section I.B; *see also FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 90 (D.D.C. 1999) ("[B]ecause 'coordination' marks the constitutional dividing line between . . . contributions . . . and . . . expenditures, that line ultimately is drawn by reference to the First Amendment, not [federal statutes]."). Consequently, neither Congress nor the FEC is free to simply designate certain expenditures as "coordinated" when, in reality, they were made independently of any candidate or party. Rather, an expenditure may be treated as coordinated only when it arises from some interaction between the source of the funds and the candidate or party (even if that interaction does not rise to the level of a formal agreement).

Coordination is a "functional," rather than "formal" designation. *Colorado II*, 533 U.S. at 443. *McConnell* held an agreement between a speaker and a candidate is not required for an expenditure to be deemed coordinated. *McConnell*, 518 U.S. at 221 (Stevens, J.) ("We are not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that truly are independent."). The Court nevertheless reiterated that, to qualify as coordinated, an expenditure must be made at "a candidate's request or suggestion." *Id*. at 222. In short, "'coordination' in this context implie[s] some measure of collaboration" between the speaker and candidate. *Clifton v. FEC*, 114 F.3d 1309, 1311 (1st Cir. 1997); *see, e.g.*, *Republican Nat'l Comm. v. FEC*, 619 F.3d 410, 434-35 (5th Cir. 2010) (en banc) (holding a communication was coordinated because the candidate was aware of its content and its timing was arranged with the candidate); *cf.* S. Rep. No. 93-689, at 18 (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 5604 (explaining an expenditure must be made "in cooperation with" a candidate—typically meaning "at the request or suggestion of the candidate"—to be deemed coordinated).

Federal courts have consistently invalidated attempts to simply deem an expenditure to be coordinated in the absence of any interaction concerning that expenditure between the source of the funds and a candidate or party. Most notably, *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) (plurality op.) ("*Colorado I*"), flatly refused to allow the Government to automatically treat all expenditures by political parties concerning a candidate

as being coordinated with that candidate. The Court held that "the First Amendment prohibits the application" of such a categorical presumption to an expenditure that, in reality, was "made independently, without coordination with any candidate." *Id*.

In *Colorado I*, a federal statute limited the amount a state political party committee could spend in connection with a federal election. *Id*. at 611-12 (citing 2 U.S.C. § 441a(d)). The FEC had enacted an implementing regulation that effectively deemed all party expenditures relating to a candidate's campaign as being coordinated with that candidate, and therefore subject to contribution limits. *See id*. at 619 (citing 11 C.F.R. § 110.7(b)(4)).

The Court began its analysis by recognizing an independent expenditure by a political party "is 'core' First Amendment activity no less than . . . the independent expression of individuals, candidates, and political committees." *Id*. at 616. It went on to declare, "***[S]imply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one***. . . . The government cannot foreclose the exercise of [First Amendment] rights by mere labels." *Id*. at 621-22 (quotation marks omitted) (emphasis added); *see also Republican Nat'l Comm. v. FEC*, 619 F.3d 410, 443 (5th Cir. 2010) (en banc) (Jones, C.J., dissenting) ("This court is not bound by the government's simply labeling the speech 'coordinated.'"). The Court noted the state party had not "consulted with any candidate in the making or planning of the advertising campaign in question." *Id*. Thus, its expenditure could not be treated as coordinated, and therefore was not subject to any limit. *Id*.

"The fact that the presumption was conclusive . . . played the critical role in [*Colorado I*]: it eliminated the need for a finding that the expenditures were in fact coordinated and foreclosed the possibility of a defense." *Landell v. Sorrell*, 382 F.3d 91, 146 (2d Cir. 2002), *rev'd on other grounds sub nom. Randall v. Sorrell*, 548 U.S. 230 (2006); *see, e.g.*, *Democratic Governors Ass'n v. Brandi*, No. 3:14-CV-544 (JCH), 2014 U.S. Dist. LEXIS 78672, at *27 n.8 (D. Conn. June 10, 2014) ("[I]t would likely be unconstitutional . . . to treat associational activities . . . as conclusively presumptive coordination."); *Republican Party of Minn. v. Pauly*, 63 F. Supp. 2d 1008, 1015, 1017 (D. Minn. 1999) (holding that, for the government to be able to limit certain expenditures, it "must produce evidence of actual coordination," and may not "merely 'presume' coordination").

Lower courts consistently have applied this principle to invalidate attempts to limit expenditures by presuming to be, or designating them as, "coordinated," when in reality they were made independently of a candidate or political party. For example, in *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963 (8th Cir. 1999), an Iowa law required an organization to notify a candidate when it makes an independent expenditure advocating his or her election. The candidate was then required to "either disparage the independent expenditure through a statement of disavowal and corrective action, or have the independent expenditure presumed to be their own—i.e. coordinated." *Id*. at 967. Under this statute, if the candidate did not act, the organization's "entirely independent expenditure is automatically presumed to be a coordinated expenditure, eliminating its independent nature." *Id*.

The Eighth Circuit held *Colorado I* prohibited such presumptions of coordination. *Id*. at 967-68. It explained, "[S]imply calling an independent expenditure a 'coordinated expenditure,'

or presuming such, cannot make it so." *Id*. at 968. To be treated as coordinated, an expenditure must involve "prearrangement or coordination" with a candidate. *Id*. The court concluded the plaintiffs were likely to succeed in demonstrating the provision was unconstitutional. *Id*.; *see also Pauly*, 63 F. Supp. 2d at 1019 (invalidating a state law presuming all expenditures a political party made about a candidate following that candidate's nomination were made in coordination with her, because such a "presumption of coordination" was "unsupported").

Likewise, in *Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997), the FEC treated voter guides as being "coordinated" with a candidate if the entity preparing them made a "simple oral inquiry" to a candidate about her position on an issue. The First Circuit rejected this approach, declaring the FEC "cannot rewrite the dictionary and classify a simple inquiry as a contribution." *Id*.; *see also id*. at 1316 (holding the FEC's decision to treat certain communications as "coordinated" simply because the speaker sought an "explanation" from the candidate concerning her stance on certain issues raises "constitutional concern[s]").

The Tenth Circuit applied the same principle in *Elam Construction v. Regional Transportation District*, 129 F.3d 1343, 1344 (10th Cir. 1997) (per curiam). In that case, the board of a regional transportation district proposed a referendum to increase the sales tax rate to fund new construction. The Tenth Circuit held expenditures by groups supporting the referendum could not categorically be treated as being coordinated with the Board, and therefore limited on the grounds they are equivalent to contributions to the Board. *Id*. at 1347. The court reasoned that, in the absence of any true coordination between outside groups and the Board, money spent by groups supporting the referendum "are better analogized to 'independent' expenditures on behalf of [the Board], which cannot be limited . . . ." *Id*.

In *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), the U.S. District Court for the District of Columbia rejected the FEC's sweepingly broad approach to coordination. It held:

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's:
>
> (1) contents;
> (2) timing;
> (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or
> (4) "volume" (e.g., number of copies of printed materials or frequency of media spots).
>
> Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners.

Id. at 92. In short, the First Amendment allows an expenditure to be deemed coordinated only if the candidate "has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants." *Id*.

D. The FEC's Former Employment Regulation Is Overbroad and Impermissibly Categorizes Certain Truly Independent Expenditures as Coordinated

The FEC's "former employee" regulation, 11 C.F.R. § 109.21(d)(5), impermissibly allows expenditures to be deemed coordinated in the absence of the type of interaction between the person providing the funds and a candidate or political party the First Amendment demands. The provision is overbroad in several respects.

1. The regulation deems expenditures to be coordinated in the absence of any interaction between the speaker and a candidate or political party—The regulation violates the First Amendment because it deems an expenditure to be coordinated despite the absence of any interaction between the source of the funds and a candidate or political party. It simply presumes such coordination if a former employee shares or uses material information he learned in his previous employment. 11 C.F.R § 109.21(d)(5). Such circumstances, however, do not amount to the type of interaction between the person making an expenditure and candidate *Colorado I* and its progeny demand. *See supra* Section I.C.

To be sure, one can imagine circumstances in which a candidate directs or encourages a person to quit her campaign and join a PAC or SuperPAC for the purpose of bringing internal campaign information with her. Or there may be situations where a purported former employee continues to act as an agent for a candidate or party, even after supposedly moving to a new employer. Or a campaign may feed information to a PAC or SuperPAC through a former employee. A candidate may even encourage a PAC or SuperPAC to ask a former employee it recently hired about certain issues, or urge it to follow that employee's lead on certain matters. But § 109.21(d)(5) sweeps far beyond any such instances of actual prohibited interaction between the new employer and a candidate or political party.

The FEC itself acknowledged § 109.21(d)(5) is aimed at what the FEC believed to be Congress' "primary concern," which is that "a former employee of a candidate goes to work for a third party that pays for a communication that promotes or supports the former employer/candidate or attacks or opposes the former employer/candidate's opponent." 68 Fed. Reg. at 438. It elsewhere admitted it construed Congress' intent as "encompass[ing] situations in which former employees, who by virtue of their former employment have been in a position to acquire information about the plans, projects, activities, or needs of the candidate's campaign or the political party committee, may subsequently use that information or convey it to a person paying for a communication." *Id*.; *see also id*. ("[T]he final rule focuses only on the use or conveyance of information that is material to a subsequent communication . . . .").

Thus, the regulation does not target instances of actual interaction between a speaker and a candidate or political party. Instead, it categorically deems expenditures to be coordinated simply because they are based in part on information—information that may be up to four

months outdated—that originated from a candidate's campaign or political party. Such communications still qualify as independent expenditures under *Buckley*, however, because the absence of any actual interaction between the speaker and the candidate or political party concerning the communication "alleviates the danger that [the] expenditure[] will be given as a quid pro quo for improper commitments from the candidate." 424 U.S. at 47. And *McCutcheon* reaffirmed contributions may be limited only to combat actual or apparent *quid pro quo* corruption. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). The former employee regulation limits expenditures in numerous situations where "[t]he separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which [the Court's] case law is concerned"—even if those expenditures are based in part on (somewhat outdated) information from a campaign or political party. *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 752 (2011). For these reasons, § 109.21(d)(5) is overbroad and unconstitutional as applied to a substantial fraction of instances to which it applies, in which there is no actual interaction between a speaker and a candidate or party concerning either the former employee or the expenditure/communication at issue.

2. A person's expenditures may be deemed coordinated, without that person's knowledge or permission, because a former campaign or party employee he hires unilaterally decides to "use" information from her prior position—The Supreme Court has held the ability to make independent expenditures concerning elections lies at the very "core" of the First Amendment right to freedom of speech. *Buckley*, 424 U.S. at 44-55; *NCPAC*, 470 U.S. at 493. The Court has consistently struck down laws resulting in limitations on a person's ability to make political expenditures based on the conduct of third parties. *See Bennett*, 564 U.S. at 738 (invalidating a state public financing scheme under which the amount of a candidate's expenditures was added to the amount of independent expenditures supporting him made by outside groups to determine whether the candidate's opponent would receive public funding); *McConnell*, 540 U.S. at 218 (invaliding BCRA provision that allowed a national political party's expenditures to be deemed "coordinated" based on conduct or decisions made by affiliated state or local parties).

Here, § 109.21(d)(5) allows a person's independent expenditures to be converted to coordinated expenditures, and therefore limited, despite the complete absence of any interaction between that person and a candidate or political party. Indeed, when a person hires a former employee of a candidate or political party, § 109.21(d)(5) allows the Government to limit that person's expenditures based solely on the unilateral decisions of that former employee to use information from his previous position. The regulation applies even when the person attempting to fund the independent expenditure strictly prohibits the former employee from using or conveying information from his previous position. Not even following the FEC's firewall regulation prevents a person's speech from being deemed a coordinated expenditure if, despite taking all specified precautions, a former campaign employee nevertheless unilaterally chooses to use information he received at his prior job. 11 C.F.R. § 109.21(h). Thus, the former employee regulation unconstitutionally permits a person's speech to be deemed a coordinated expenditure and limited, not only in the absence of any interaction between that person and a candidate or political party concerning the communication, but based on the unilateral decision of a former employee of a candidate or political party against that person's strict orders.

3. A person may be completely disqualified from making independent expenditures concerning an election based on internal comments made by a former campaign or party employee he hires—The former employee regulation also has the pernicious effect of prohibiting a person from making independent expenditures based on unsolicited—and even strictly prohibited—informal comments one of his employees may make, if that person previously worked for a candidate or political party. Section 109.21(d)(5) designates a person's expenditures as "coordinated" if he hires a former employee of a candidate or party who "conveys" information about that previous employer's "campaign plans, projects, activities, or needs" that is material to the underlying communications. Even an offhand comment by an employee who previously worked for a candidate that the candidate had planned or considered something similar to the communication, or that the communication wouldn't undermine the candidate's campaign plans, can be enough to cause the communication to be deemed a coordinated expenditure. Such a redesignation typically would preclude the speaker from making the communication, since its costs generally would exceed the applicable contribution limit.

The regulation also makes it extremely burdensome for people attempting to craft political communications to have frank, robust, uninhibited discussions with their employees concerning political speech, due to the perpetual danger material campaign information might inadvertently spill over into the conversation. Many committees seeking to fund independent expenditures respond by simply refusing to hire former employees of candidates or parties. FEC, *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,204 (June 8, 2006) (recognizing the former employee regulation "operate[s] in practice as a 'period of disqualification,'" in which a former employee "may not work on any particular matter for particular clients merely because [he previously] worked with a candidate or political party"). Thus, § 109.21(d)(5) not only unconstitutionally limits the ability of speakers to engage in expenditures that, from a First Amendment perspective, must be regarded as independent, but also substantially chills internal political discussions involving former employees of candidates and political parties, substantially burdening their associational rights.

4. The regulation is overbroad in that it applies even to low-level former employees such as phone bank operators and door-to-door solicitors—Finally, § 109.21(d)(5) is overbroad because it applies to all former campaign and party employees, including low-level, front-line staffers solely responsible for knocking on people's doors and operating phone banks. Campaigns and political parties typically provide door-knockers, phone-bank operators, and other front-line, public outreach personnel with scripts setting forth the key bullet points they should convey, as well as answers to many of the questions they are most likely to encounter. Even if a PAC or SuperPAC provides such personnel with a different script that focuses on different issues, it will be virtually impossible to ensure no former employee makes use in any way of any of the strategies, talking points, or prepared responses they learned in their previous jobs. Due to this unavoidable potential for leakage, the former employee regulation "operate[s] in practice as a 'period of disqualification'" in which a person "may not work on any particular matter for particular clients merely because that . . . employee once worked with a candidate or political party" within the preceding four months. FEC, *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,204 (June 8, 2006). The regulation thus "has a

'chilling effect'" on the hiring of low-level employees "because organizations want to avoid the speculative allegations of improper coordination." *Id*.

IV. ANALYSIS

The FEC should not apply 11 C.F.R. § 109.21(d)(5) to low-level, front-line personnel engaged in voter contact efforts through phone banks or door-to-door solicitation. The regulation has deterred people and entities seeking to engage in independent expenditures from hiring people who provided such services to a campaign or political party within the previous four months.

Should the FEC nevertheless choose to unnecessarily burden core First Amendment activities by applying § 109.21(d)(5) to such employees, it should not deem a person's expenditure to be coordinated based on information conveyed or used by such employees unless one or more of the following requirements are met:

- the person funding the expenditure interacted directly about that expenditure with the candidate or political party for whom the former employee previously worked;
- the person failed to strictly prohibit employees from using or conveying information they received in their previous positions;
- the person intended to make a coordinated expenditure;
- the person knows or has reason to believe the former employee was encouraged or ordered to quit his previous job by the candidate or party for whom he previously worked, for the purpose of taking a new position and facilitating coordinated expenditures;
- the person knows or has reason to believe the former employee is still acting as an agent of his previous employer for the purpose of facilitating coordinated expenditures; or
- the person knows or has reason to believe the candidate or political party for whom the former employee previously worked is using that employee as a conduit through which to pass information.

In the alternative, the Commission should construe the text of the regulation narrowly, to avoid raising serious constitutional concerns, in the following manner:

- information concerning places where employees of a candidate or political party engaged in voter outreach efforts through phone banking or door-to-door solicitation is not "material" to future voter outreach efforts on behalf of subsequent employers;
- information concerning geographic areas where employees of a candidate or political party engaged in voter outreach efforts through phone banking or door-to-door

solicitation is considered "available from a publicly available source," since members of the public (*i.e.*, voters) in those areas know that they have been contacted by a campaign;

- information concerning a previous employer's scripts, talking points, or responses to potential questions from voters is not "material" to voter outreach efforts on behalf of subsequent employers, if the former employee conveys that information to someone who has input into developing the scripts to be used in that new employer's voter outreach efforts, or to other front-line personnel directly engaged in voter outreach efforts;

- information concerning a previous employer's scripts, talking points, or responses to potential questions from voters is not "material" to voter outreach efforts on behalf of subsequent employers, if the former employee unilaterally chooses to quote from or paraphrase such information while communicating with voters on behalf of a new employer;

- a former employee does not "use" information from his previous position if he quotes or paraphrases an excerpt from a previous employer's script, talking points, or responses to potential questions from voters while engaging in voter outreach efforts on behalf of a subsequent employer; and

- information concerning a previous employer's scripts, talking points, or responses to potential questions from voters is "available from a publicly available source," since members of the public (i.e., voters) know what was said to them in the course of the previous employer's voter outreach efforts.

Finally, if a former employee of a candidate or party who has been hired by a new employer engages in conduct—against that employer's strict orders, and without that employer's advance knowledge—that would cause the employer's expenditures to be deemed "coordinated," there must be some ameliorative steps the employer can take to avoid being held liable for a violation of campaign finance law.

Sincerely,

/s/ Michael T. Morley
Michael T. Morley
(860) 778-3883 Direct
michaelmorleyesq@hotmail.com

Dan Backer
(202) 210-5431 Direct
dbacker@dpcapitolstrategies.com