Attachment: REG_2015_04_Klein_Stephen_10_26_2015_11_21_53_CommentText.txt

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The attached comments relate to part of REG 2015-04 / Notice 2015-09. Although these comments recommend the Commission not undertake a rulemaking at this time, if the Commission elects to do so I would appreciate the opportunity to testify before the Commission, in person, at a public hearing relating to this rulemaking.

Comments provided by :
Klein, Stephen

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October 26, 2015

Via Electronic Submission System

Federal Election Commission
ATTN: Amy L. Rothstein, Assistant General Counsel
999 E Street NW
Washington, DC 20463

Re: Comments on "Rulemaking Petition: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United)" (REG 2015-04) (Notice 2015-09)

Dear Ms. Rothstein,

The Pillar of Law Institute is a nonprofit, nonpartisan institution organized under § 501(c)(3) of the Internal Revenue Code and dedicated to defending political free speech and association. It is a program of the Wyoming Liberty Group. Pillar represents citizens nationwide who are threatened by laws that abridge political First Amendment rights. Pillar also from time to time provides comments to administrative agencies including the Federal Election Commission with the aim of informing administrative decisions in order to prevent the abridgement of free speech.

I. Introduction

These comments only address the fourth and final provision of REG 2015-04, a rulemaking petition that asks the Commission to "[e]nsure that the expenditures made by super PACs [independent expenditure-only political committees] and other outside spending groups are truly independent of federal candidates as required by *Citizens United* and its progeny."[1] More specifically, the petition suggests that

> the Commission should adopt rules that prohibit candidates from attending super PAC fundraising events. The Commission should also adopt rules that deem all spending by outside groups that effectively operate as "the alter ego of a candidate" as coordinated spending. Finally, the Commission should look to the states for innovative solutions to ensure that spending by outside groups looking to influence elections is truly independent.[2]

In short, this part of the petition asks the Commission to revisit and revise the coordination regulations in 11 CFR §§ 109.20–109.37 and related provisions. Despite constant news coverage replete with commentary from campaign reform advocates decrying this supposed fracture in campaign finance law, in practice the current regulations—though imperfect[3]—provide important space for super PACs and political organizations of all affiliations and sizes to effectively engage in American politics without fear of investigation, prosecution, and penalties.

[1] *See* 80 Fed. Reg. 45,116 (Jul. 29, 2015).
[2] Petition for Rulemaking Regarding the *Citizens United* Decision at 8, *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=337864 (citations omitted).
[3] *See infra* part IV.

As is often the case in campaign finance law, advocates for reform confuse existing law with what they would like it to be.[4] Even accurate statements about coordination—such as "campaign coordination is illegal"—become wholly inaccurate when one defines terms of art using the dictionary instead of existing regulation and precedent.[5] Yet this is, unfortunately, a refrain in discussions of coordination: "[M]any supposedly independent expenditures . . . actually are not independent of candidates or parties according to any common-sense meaning of the word."[6] Although law should be written plainly enough to be understood by persons of ordinary intelligence,[7] campaign finance law occupies a complex realm where every law and regulation must answer to a bold constitutional amendment that, by the common-sense meaning of its words, questions the very existence of many campaign finance regulations.[8] At the very least, campaign finance regulation must be drawn with sharp precision to avoid constitutional calamities by respecting free speech and association.

The cynicism beneath the apparent disruption occurring under the current coordination regulations can be easily—and justifiably—matched with cynicism against so-called reform. In an era of unlimited independent expenditures, contributions remain limited, and constitutionally so.[9] Thus, *of course* reformers urge the Commission to adopt regulations that would convert numerous expenditures into contributions and to otherwise hobble the fundraising of super PACs and other independent groups. As a result, speakers could once again be limited or silenced altogether.[10] This result is not hypothetical: poorly constructed and overbroad coordination regulations and enforcement practices have already threatened free speech. Thankfully, these efforts have been rebuked in court.

Although there is not significant enforcement history or case law relating to coordination, even this limited history shows that constitutional concerns are as apparent in coordination regulation as in the censorship overturned in *Citizens United*.[11] Considering this precedent, the Commission should decline to revisit the coordination regulations at this time, particularly based on the suggestions within the petition.

II. Constitutional Precedent

The rulemaking petition asserts that the *Citizens United* decision and its progeny alter the current coordination landscape and require the Commission to act. This assertion is drawn from scant discussion in the majority opinion in *Citizens United*, none of which actually suggests a need for change.[12]

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[4] *Cf. I'm Just a Bill (Schoolhouse Rock!)*, YOUTUBE, https://www.youtube.com/watch?v=tyeJ55o3El0, *with* Stop Super PAC-Candidate Coordination Act, S. 1838, 114th Cong. (2015), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/1838/text.

[5] *See generally coordination*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/coordination (defining "coordination" as "the process of organizing people or groups so that they work together properly and well").

[6] Ian Vandewalker & Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform*, BRENNAN CENTER FOR JUSTICE, Sept. 2015, at 23, *available at* https://www.brennancenter.org/publication/stronger-parties-stronger-democracy-rethinking-reforming.

[7] *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

[8] *See* U.S. CONST. amend. I ("Congress shall make no law . . . .")

[9] *See* McCutcheon v. Fed. Elec. Com'n ("FEC"), 134 S.Ct. 1434, 1444–45 (2014).

[10] *See* 11 CFR § 109.22 ("Any person who is otherwise prohibited from making contributions . . . under any part of the Act or Commission regulations is prohibited from paying for a coordinated communication.")

[11] *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

[12] *See id.* 360 ("*By definition*, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." (emphasis added)). The current regulations were promulgated nine months after the *Citizens United* ruling. *See* 75 Fed. Reg. 55,961 (Sept. 15, 2010), *available at* http://www.gpo.gov/fdsys/pkg/FR-2010-09-15/pdf/2010-22649.pdf.

Furthermore, the current regulations resulted from a nearly decade-long saga of rulemaking and litigation under the Administrative Procedure Act from 2002 until 2010.[13] *Citizens United* provides no guidance, and the *Shays* cases—along with *McConnell v. FEC*, were entirely theoretical.[14] The Commission, however, is not without guidance from instances in which coordination regulations were actually applied, and cases before and after *Shays* and *McConnell* reflect the constitutional pitfalls of enacting and enforcing overbroad coordination provisions.

A. *FEC v. Christian Coalition*

FEC v. Christian Coalition is the most comprehensive as-applied challenge ever brought against a federal coordination prosecution.[15] Despite the case's vintage, the candor and caution within the ruling is refreshing.[16] The case challenged the application of FEC regulations long past.[17] Nevertheless, its application of the First Amendment endures for any coordination discussion.

Importantly, the *Christian Coalition* opinion draws some very stark conclusions. The court ruled that the narrowing construction of "expenditures" in *Buckley v. Valeo* (to only constitute express advocacy) was not to be universally applied throughout the Federal Election Campaign Act.[18] This is a particularly tenuous conclusion today, as "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day."[19] While acknowledging the chilling effect of costly and lengthy investigations (the ruling, in 1999, was based on activity leading up to the 1992 presidential election), the court stated that fact-intensive inquiries into coordination are "inevitable."[20] More recent cases, particularly at the state level, show that overbroad investigations should be considered harmful independent of an overbroad law, though the two often intertwine.[21] Even with these reservations, the court ruled the FEC's legal theory was overbroad and that the majority of the Christian Coalition's conduct with candidates and campaigns did not constitute coordination. The court's guidance is instructive.

The court ruled that the FEC's approach to coordination at the time, an "'insider trading' or conspiracy approach . . . sweeps in all attempts by corporations and unions to discuss policy matters with the candidate while these groups are contemporaneously funding communications directed at the same policy matters."[22] Addressing "expressive" expenditures,[23] the court narrowed coordination as follows:

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[13] *See, e.g.*, Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008).
[14] *See* 540 U.S. 93, 219–23 (2003) (rejecting a facial challenge to coordination amendments in the Bipartisan Campaign Reform Act).
[15] 52 F.Supp.2d 45, 86 (D.D.C. 1999) ("[T]he question presented is whether the First Amendment requires a limiting construction of the [Federal Election Campaign] Act that would protect the Coalition's expenditures in this case.").
[16] *Id.* at 86 ("Regrettably, neither parties nor *amici* appear willing to confront the real difficulties posed by this case.").
[17] *See id.* at 89 n.54; 11 CFR § 109.1(b)(4) (1999).
[18] *Christian Coalition*, 52 F.Supp.2d at 87 n.50, *citing* Buckley v. Valeo, 424 U.S. 1, 46–47 (1976).
[19] *Citizens United*, 558 U.S. at 324. One might call this a blatant disregard of common sense definitions. *See supra* note 6 and accompanying text.
[20] *Christian Coalition*, 52 F.Supp.2d at 89.
[21] *See infra* part II(B).
[22] *Christian Coalition*, 52 F.Supp.2d at 90.
[23] Importantly, the court's definition of "expressive coordinated expenditure" was broad, but distinguished speech based on content and conduct.

> As used in this Opinion, an "expressive coordinated expenditure" is one for a communication *made for the purpose of influencing a federal election* in which the spender is responsible for

> In the absence of [1] a request or suggestion from the campaign, an expressive expenditure becomes "coordinated;" [2] 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.[24]

This ruling—requiring either specific conduct (a request or suggestion from the campaign for a certain communication) or *very* specific conduct (substantial discussion) over content and strategy—foreshadows what is now 11 CFR § 109.21. The current regulations are more specific than this ruling, and serve to merge the court's reasoning by requiring certain conduct *and* content in a communication in order for it to be coordinated. New standards reaching conduct beyond the current regulations or the court's reasoning would encounter the same constitutional difficulties.

The *Christian Coalition* court's application of its narrowing construction of coordination led to the dismissal of most of the Commission's claims. The court ruled that having access to private opinion polls conducted by a campaign and using that information for targeted speech does not translate to coordination absent a request from the campaign or material discussion.[25] Working for a campaign at the same time one works for an organization like Christian Coalition would not satisfy coordination, either, absent conduct and content.[26] Most tellingly, a candidate may raise money for an outside organization, even when he or she knows that the money raised will be used for a purpose benefiting his or her campaign.[27]

There are many ways one might try to brush off the *Christian Coalition* decision, but these do not undermine its lessons. The Commission did not appeal the decision from the district court.[28] Affirmation from the D.C. Circuit or even the Supreme Court would make the ruling more influential, but district court opinions are still precedent, and constitutional principles endure. The Bipartisan Campaign Reform Act, passed after the *Christian Coalition* decision, reset the Commission's coordination regulations, and the Supreme Court upheld a facial vagueness and overbreadth challenge to provisions requiring the

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> a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign. A mere expenditure to increase the volume of the candidate's speech by funding additional purchases of *campaign materials*—posters, buttons, leaflets, etc,—does not raise the same type of First Amendment concerns that are at issue here.

Id. at 85 n.45 (emphasis added).

[24] *Id.* at 92. The court made a similar narrowing for get-out-the-vote telephone efforts. *Id.* at 93.

[25] *Id.* at 95.

[26] *Id.* ("Though Russell was privy to various campaign strategies, the FEC does not link that knowledge to any discussion or negotiation of the Coalition's expenditures on voter guides."); *id.* at 96–97 ("While Grabinski was the person primarily responsible for deciding which churches would receive voter guides, he did not make his decisions based on any discussions or negotiations with the Hayworth campaign.").

[27] *Id.* at 94. ("Even if the evidence incontrovertibly established that Bush's Road to Victory appearance was to fund the Coalition's voter guides, that by itself does not turn the corporation's subsequent expenditures into illegal campaign contributions.").

[28] *See* Statement of Chairman Scott E. Thomas and Commissioner Danny Lee McDonald, Dec. 1999, *available at* http://www.fec.gov/members/former_members/thomas/thomasstatement04.htm.

Commission to create regulations that "shall not require agreement or formal collaboration to establish coordination."[29] The Court, of course, rejected other facial challenges in *McConnell* against laws with unconstitutional maladies that became apparent in application.[30] The Commission should not pass regulations that beg another revelation at the Supreme Court. *Christian Coalition* provides boundaries to coordination that are similarly confined like the Commission's current regulations.[31] To revise the regulations in a way that tests the case's reasoning—as the petition urges—is to simply invite the next *Citizens United*.

B. *Two Unnamed Petitioners v. Peterson* (The John Doe Cases)

Wisconsin offers "innovative solutions" about coordination standards.[32] Far from supporting expansive coordination regulations, *Two Unnamed Petitioners v. Peterson* builds off the precedents of *Citizens United* and the Seventh Circuit Court of Appeals to narrow the coordination inquiry even more than *Christian Coalition* and the Commission's current regulations.[33] Better known as Wisconsin's John Doe Cases, *Peterson* halted a prolonged, extensive and secret investigation into the actions of several politically active organizations, campaigns for Wisconsin state office and politically engaged citizens.[34] The prosecutors based their investigation on a coordination theory that encompassed restrictions and prohibitions on coordinated issue advocacy.[35] Although most of the public attention given to the case focused on the alleged methods utilized by prosecutors and police in carrying out the investigation, the Wisconsin Supreme Court unequivocally ruled that the legal theory behind the investigation was unconstitutionally vague and overbroad, no matter the tactics employed.[36]

"The special prosecutor's theories, if adopted as law, would require an individual to surrender his political rights to the government and retain campaign finance attorneys before discussing salient political issues."[37] This was because under the prosecution's theory any organization could become a subcommittee of a campaign committee through coordinated issue advocacy or—alternatively or simultaneously—coordinated issue advocacy could count as an in-kind contribution to committees, requiring adherence to contribution limits. Furthermore, to determine subcommittee status or in-kind

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[29] McConnell v. FEC, 540 U.S. 93, 219–23 (2003).

[30] *Cf. id.* at 203–09 (upholding the ban against corporations and unions funding electioneering communications) *with Citizens United*, 558 U.S. at 329–67 (overturning the ban against corporations and unions funding electioneering communications).

[31] This conclusion is not entirely accurate, as *Christian Coalition* requires "expressive expenditures" while the current regulations allow for coordination charges based on electioneering communications, even if they consist of issue advocacy. *See* 11 CFR § 109.21(c)(1); *see also infra* part IV.

[32] *See supra* note 6 and accompanying text.

[33] *See* Two Unnamed Petitioners v. Peterson, 866 N.W.2d 165 (Wis. 2015).

[34] *Id.* at 180–81.

[35] *Id.* at 181.

> The theory of the case, as put forward by the special prosecutor, is two-fold: (1) that the independent groups and the candidate committee worked "hand in glove" such that the independent groups became mere subcommittees of the candidate's committee, thus triggering reporting and disclosure requirements . . . ; and (2) that the coordinated issue advocacy amounted to an unlawful in-kind contribution to the candidate committee . . . .

Id.

[36] *Id.* at 179, 190–96.

[37] *Id.* at 190, *citing Citizens United*, 558 U.S. at 324.

contributions, investigations would become the norm.[38] To save the statutes in question, the court applied a limiting construction and ruled that coordination only applies to express advocacy or its functional equivalent.[39] This followed a recent decision of the Seventh Circuit Court of Appeals.[40] Applying this construction, the court dismissed both of the theories behind the investigation and halted it in its entirety.[41]

Like *Christian Coalition*, reformers would probably like to ignore *Peterson* in discussions about federal coordination regulation. The prosecutorial power wielded under Wisconsin's John Doe law in the case is thankfully uncommon and the Commission enjoys no such power to keep its investigations as secret. Furthermore, the law in question was so obviously vague and overbroad it is not comparable to the Commission's current regulations. Like *Christian Coalition*, however, the *Peterson* ruling cannot be simply swept aside. It shows that although reformers chastise this agency for not embarking on coordination witch hunts, courts will offer stern rebuke when investigations and prosecutions are undertaken with anything less than exacting constitutional specificity.

III. Applying Precedent to the Proposal

There is very little detail or supporting arguments accompanying the suggestions in the petition for rulemaking. As Commissioner Walther commented when this petition was first considered for publication by the Commission, "I don't think it's a call for the kind of serious rulemaking that I think that we should be doing."[42] This is an apt summary. Nevertheless, since the notice was eventually published, its "sales pitch" should be addressed.[43] *Christian Coalition* and *Peterson* counter the few suggestions actually made in the petition, and broadly caution against expanding the current regulations.

A. Suggestion: "Prohibit candidates from attending super PAC fundraising events"

Outside of the coordination restrictions, law and regulations already limit federal candidates to soliciting up to $5,000 per individual contributor for super PACs, an interpretation affirmed in an advisory opinion from the Commission with a unanimous 6-0 vote.[44] In the same advisory opinion, the Commission affirmed its regulation (codified around the same time as the most recent coordination

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[38] *Peterson*, 866 N.W.2d at 192 ("In essence, under his theory, every candidate, in every campaign in which an issue advocacy group participates, would get their own John Doe proceeding and their own special prosecutor to determine the extent of any coordination. This is not, and cannot, be the law in a democracy.").

[39] *Id.* at 190–91.

> To be clear, the reason that the definition of "political purposes" . . . is unconstitutional is because the phrase "influencing [an] election" is so broad that it sweeps in protected speech, as well as speech that can be subject to regulation. "Influencing [an] election" obviously includes express advocacy, but without a limiting construction it could just as easily include issue advocacy aired during the closing days of an election cycle. This is precisely the kind of overbroad language that the Supreme Court has repeatedly rejected. "*Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election*."

Id. at 193, *citing FEC v. Wisconsin Right to Life*, 551 U.S. 449, 474 (2007).

[40] *See Peterson*, 866 N.W.2d at 193, *citing Wisconsin Right to Life v. Barland*, 751 F.3d 804 (7th Cir. 2014).

[41] *Peterson*, 866 N.W.2d at 195–96.

[42] Open Meeting, Part III at 1:21:35, June 18, 2015, *available at* http://www.fec.gov/audio/2015/2015061803 mp3.

[43] *Id.*

[44] 52 U.S.C. § 30125(e)(1); 11 CFR § 300.61; AO 2011-12, *available at* http://saos fec.gov/aodocs/AO%202011-12.pdf. Furthermore, federal candidates may not solicit funds for super PACs from sources that are prohibited from making direct contributions to their own campaigns, such as corporations. 52 U.S.C. § 30125(e)(1)(B)(ii).

regulations) that "a Federal candidate or officeholder may '[a]ttend, speak at, or be a featured guest' at . . . a fundraising event" so long as any solicitations comply with the law's limitations.[45] Meanwhile, the super PAC itself can raise unlimited contributions from most sources.[46] The rulemaking petition suggests new regulations "[p]rohibit[ing] candidates from attending super PAC fundraising events" altogether. The overbreadth of such a prohibition is rebuked by the *Christian Coalition* case.

The *Christian Coalition* court addressed the appearance of President George H.W. Bush at a Coalition fundraising event before the 1992 election, and ruled that it could not be considered coordination even under circumstances far beyond merely attendance:

> More troubling is the evidence indicating that the campaign was advised that $500,000 was needed to meet the costs of voter guide production *and that President Bush's fundraising appearance at the 1992 Road to Victory conference was intended by the Coalition and the campaign to raise that amount for that purpose*. However, the evidence is too thin to support a holding that the sharing of information about the cost of producing 40 million voter guides was coordination. Even if the evidence incontrovertibly established that Bush's Road to Victory appearance was to fund the Coalition's voter guides, that by itself does not turn the corporation's subsequent expenditures into illegal campaign contributions.[47]

The First Amendment rights of any super PAC or organization are no different from the Christian Coalition's. Although voter guides and the "expressive coordinated expenditures" discussed in the case are distinguishable from today's independent expenditures, public communications and electioneering communications (all of which may be made by super PACs),[48] it takes far more than simply the presence of a candidate at an event to trigger plausible concerns about coordination. Even a super PAC established for the purpose of the candidate who is attending has the right to publicly or privately engage that candidate, associate with that candidate (outside of the narrow and carefully tailored confines of the current coordination regulations) and—if the candidate is already an officeholder—petition the candidate.[49] Events provide some of the best opportunities for these activities, a fact that is not diminished because the event includes fundraising.

These First Amendment rights of outside groups and, furthermore, candidates cannot be overcome with plausible concerns about corruption or its appearance. Even if that were so, broad prohibition could not even survive rational basis review. Candidates may attend super PAC fundraising events for any number of reasons outside of fundraising—for speeches and discussions of policy, to meet fellow candidates and politicos, or even to hear speeches from other candidates and pundits. Blanket prohibition on attendance forecloses all of these activities, breaking the narrow tailoring in the existing regulations.

The breadth of this proposal, as bare as it is, goes well beyond campaign finance precedent and touches upon First Amendment cases from more chilling governmental efforts. "A law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes

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[45] AO 2011-12 at 5, *citing* 11 CFR 300.64(b)(1). This interpretation survived a challenge in the *Shays* litigation. Shays v. FEC, 337 F.Supp.2d 28, 88–92 (D.D.C. 2004).

[46] Notable exceptions include prohibitions on contributions from federal contractors and foreign nationals. *See* 52 U.S.C. §§ 30119(a)(1), 30121(a)(1)(A).

[47] *Christian Coalition*, 52 F.Supp.2d at 94 (emphasis added).

[48] *See* 11 CFR §§ 100.22, 100.26, 100.29.

[49] *See generally* U.S. CONST. amend. I.

unnecessarily on protected freedoms. *It rests on the doctrine of 'guilt by association' which has no place here*."[50] But even limiting itself to existing campaign finance precedent the Commission should decline to consider this unconstitutional proposal.

B. Suggestions: "Deem all spending by outside groups that effectively operate as 'the alter ego of a candidate' as coordinated spending" / "Ensure that spending by outside groups looking to influence elections is truly independent"

The second and third proposals in the coordination portion of the petition are interconnected because they both largely call for transforming the current coordination regulations into open-ended, fact-intensive inquiries that would join the Commission's more colorful regulations. These other regulations require reading numerous cases, enforcement matters and advisory opinions to begin to understand them.[51] But the Commission's most confounding, vague and overbroad regulations largely relate to disclosure. Although disclosure is a burden that has been far too readily accepted by courts without proper scrutiny following *Citizens United*, the threat of vague and overbroad coordination regulations are undoubtedly greater. That is, while it is hard to determine which groups must comply with PAC burdens in order to engage in political speech (and then, hard to comply with said PAC burdens), coordination regulation has the potential to once again outlaw speech entirely by converting it into limited or prohibited contributions.[52] The *Peterson* decision rebukes the tactics—overbroad inquiry—that would attend a regulation so broad as to prohibit an outside group from "effectively operat[ing] as 'the alter ego of a candidate'" or require "[true] independen[ce]."[53]

The Wisconsin Supreme Court was very critical of the breadth of the inquiry made in the John Doe cases:

> The breadth of the documents gathered pursuant to subpoenas and seized pursuant to search warrants is amazing. Millions of documents, both in digital and paper copy, were subpoenaed and/or seized. Deputies seized business papers, computer equipment, phones, and other devices . . . . The special prosecutor obtained virtually every document possessed by the Unnamed Movants relating to every aspect of their lives, both personal and professional, over a five-year span (from 2009 to 2013). Such documents were subpoenaed and/or seized without regard to content or relevance to the alleged violations . . . . As part of this dragnet, the special prosecutor also had seized wholly irrelevant information, such as retirement income statements, personal financial account information, personal letters, and family photos.[54]

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[50] Elfbrandt v. Russell, 384 U.S. 11, 19 (1966) (emphasis added).; *see supra* note 6 and accompanying text.
[51] *See, e.g.*, 11 CFR § 100.22(b) (defining "express advocacy").
[52] *See* 11 CFR § 109.22.
[53] The quotation in this suggestion comes from a law review article by Columbia Law professor Richard Briffault. *See generally* Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88 (2013), *available at* http://columbialawreview.org/coordination-reconsidered_briffault/. These comments will not address Briffault's suggestions in detail, but he deserves credit for being far more specific in his proposals. *See id.* at 97–99. Nevertheless, his suggestions suffer the same overbreadth discussed throughout this section. *See, e.g., id.* at 98 (finding an "alter ego" simply on the basis that a candidate "signals support for [an] organization's campaign work").
[54] *Peterson*, 866 N.W.2d at 183.

Since the petition calls for "true independence," there is no reason to doubt FEC dragnets similar to Wisconsin would go hand-in-hand with broad regulation. Given the petition's emphasis on guilt-by-association—even citing to arguments for preventing a candidate's former employees from joining a supportive super PAC for great lengths of time[55]—such investigations could extend into the private lives and associations of campaign staff and super PAC staff alike. The stakes would remain very high, including both civil and potentially criminal penalties.[56]

Fact-intensive inquiries remain a truism in law enforcement; law must be applied to the facts of a case. But overbroad regulation would hurt political speech by allowing facts to redefine law on a case-by-case basis. This may reach a level of regulation so expansive that political candidates and engaged citizens would have to curtail personal associations entirely outside of politics simply to avoid coordination inquiries. Donning the cynicism toward campaign finance reform that reformers bring to existing law and political speech, one cannot help but think over-caution and complete disassociation are objectives rather than unintended consequence of reform. Far from cleaning up politics, the *Peterson* case drives home a danger of coordination best recognized by the D.C. District Court in *McConnell*: "[I]n the absence of a clear and narrow definition of coordination, an organization's ideological opponents need only assert that it is engaged in such activity to initiate a crippling litigation process that could prevent the organization from participating, legally, in protected lobbying or speech activities."[57]

The current coordination regulations ensure the "true independence" of super PACs and political campaigns.[58] There is no need to revise the rules at this time, but if this must occur a rulemaking must begin with constitutional basis far removed from suggestions made in the petition.

IV. Conclusion

Given the freedom currently enjoyed by super PACs and other political organizations under the current coordination regulations—with prohibition only on actual, objective control of an outside organization's communications by a candidate or campaign—there is no need for a coordination rulemaking at this time. However, this does not mean that the current coordination rules are unquestionably constitutional. Indeed, the *Peterson* case contradicts the *Christian Coalition* case by narrowing coordination inquiries to communications containing express advocacy or its functional equivalent.[59] If the reasoning behind the *Peterson* decision were followed at the federal level, it could result in overturning or narrowing parts of the Commission's existing coordination regulations, including 11 CFR § 109.21(c)(1), which regulates coordination of electioneering communications regardless of whether or not they include express advocacy or its functional equivalent. Revising this provision would be a far better use of the Commission's time than anything suggested in the petition. However, given the prolonged litigation that resulted in the last series of coordination rulemakings and the fact that a bill to

[55] *See* Briffault, *supra* note 53, at 97–99.
[56] *See* 52 U.S.C. § 30109.
[57] McConnell v. FEC, 251 F.Supp.2d 176, 382 (D.D.C. 2003).
[58] *See, e.g.*, Nicholas Confessore, *Demise of Scott Walker's 2016 Bid Shows Limits of 'Super PACs'*, N.Y. TIMES, Sept. 22, 2015, *available at* http://www.nytimes.com/2015/09/23/us/politics/scott-walkers-demise-shows-limits-of-super-pac-money-model html; Kenneth P. Vogel, *Scott Walker, Rick Perry show limits of super PACs*, POLITICO, Sept. 22, 2015, http://www.politico.com/story/2015/09/scott-walker-rick-perry-super-pacs-limits-213916.
[59] *Cf. Peterson*, 866 N.W.2d at 193, *with Christian Coalition*, 52 F.Supp.2d at 86–89.

revise the coordination regulations was recently introduced in Congress,[60] it would best suit the Commission to consider this after the 2016 election cycle.

"There exists 'no right more basic in our democracy than the right to participate in electing our political leaders.'"[61] *Citizens United* changed a lot of things in campaign finance law, but not everything. As it pertains to coordination, the rulemaking petition suggests nothing more than broad platitudes that are unconstitutional under precedent older and far more specific to coordination than *Citizens United*. It would behoove this agency to decline a coordination rulemaking at this time.

I appreciate the opportunity to comment on this proposed rulemaking. Although these comments oppose a coordination rulemaking, if the Commission elects to proceed I would appreciate the opportunity to testify before the Commission, in person, at a public hearing relating to this rulemaking.

Respectfully submitted,

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[60] *See* Stop Super PAC-Candidate Coordination Act, S. 1838, 114th Cong. (2015), *available at* https://www.congress.gov/bill/114th-congress/senate-bill/1838/text.
[61] *Peterson*, 866 N.W.2d at 187, *citing McCutcheon*, 134 S.Ct. at 1440–41.