



February 10, 2022

The Honorable Edward A. Buchanan
Wyoming Secretary of State
122 W 25th Street
Cheyenne, WY 82002

Dear Secretary Buchanan,

Campaign Legal Center (“CLC”) respectfully submits these comments to the Wyoming Secretary of State (“Secretary”) regarding the revised Notice of Intent to Adopt Rules defining “direct coordination” for purposes of Wyo. Stat. Ann. § 22-25-102(a), as amended by 2020 Senate Act No. 36.¹

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American’s right to transparency and accountability in the electoral process.

CLC previously submitted written comments to the Secretary’s office, in July 2020 and in October 2021, concerning the two prior rulemaking proposals regarding the meaning of “direct coordination” under state law, which is aimed at ensuring that Wyoming’s corporate contribution ban for candidates is not circumvented by also barring political action committees (“PACs”) and political parties that “directly coordinate” with candidates from accepting corporate contributions. CLC’s prior comments both explained the importance and constitutionality of coordination rules and provided recommendations for expanding the definition of “direct coordination.”² CLC provides further comment here on one aspect of the revised proposed rule.

¹ See ARR21-111 (filed Dec. 28, 2021), <https://wyoleg.gov/arules/2012/rules/ARR21-111P.PDF>.

² For the Secretary’s reference, copies of our prior comments are attached. See Attachment A, Campaign Legal Ctr. Comments to Wyo. Sec’y of State (filed Oct. 21, 2021); Attachment B, Campaign Legal Ctr. Comments to Wyo. Sec’y of State (filed July 24, 2020).

Specifically, CLC urges the Secretary to restore to the final rule the inclusion of the simultaneous sharing of officers between a candidate and a PAC or party under the meaning of “direct coordination.” The prior version of the proposed rule defined “direct coordination” to include “[a]ny officer of a political action committee or political party simultaneously serving as an officer of a candidate’s campaign committee, or actively seeking office as a candidate”³ In our most recent comments, CLC offered suggestions for strengthening this provision, such as by ensuring the rule additionally accounted for both members of a candidate’s family and the use of common vendors.⁴ Unfortunately, the current rule has moved in the opposite direction by eliminating this provision entirely and, as a result, significantly undermines the efficacy of these coordination rules.

Undoubtedly, the sharing of “officers” between a candidate and a PAC or political party presents a ripe avenue for coordination between them. Although “officer” is undefined, the Secretary’s existing rules provide such persons with responsibility for the obligations of political committees,⁵ and such persons are also liable, along with the candidate or political committee, under Wyoming law for the failure to file required reports.⁶ By the nature of their position, committee officers very likely are directly involved in matters of campaign strategy and spending—or at least privy to such information—and the same is even more true for a candidate themselves who may be serving as an officer for a PAC or political party.

To be sure, a shared officer would still be obligated under the proposed rule to not undertake the specific actions identified to avoid direct coordination, such as not sharing non-public information from the candidate with the PAC or political party.⁷ But because the proposed rule depends upon a “communication” between the two entities in defining those coordinated activities, the sharing of officers invites circumvention. For example, if a person serves as an officer on both a candidate’s committee and a political party committee, the party could potentially delegate all decisions about spending related to that candidate to that officer. The officer seemingly could

³ ARR 21-082 § 3(c) (filed Aug. 26, 2021),
<https://wyoleg.gov/arules/2012/rules/ARR21-082P.pdf>.

⁴ See Attachment A at 2-4.

⁵ See, e.g., Wyo. Admin. Code 002.0005.21 § 4(f) (defining “responsible party” for campaign finance regulations as “a candidate, *committee officer*, chairman, treasurer, or other person” required to file reports (emphasis added)), § 5(h) (referencing “the responsible party’s statutory obligation to file campaign finance reports”).

⁶ See Wyo. Stat. § 22-25-108(a).

⁷ Proposed Rule § 3(b)(iv).

then make decisions about the party's spending based on their information about the candidate's campaign without communicating with anyone at the party about that information.

Accordingly, CLC strongly recommends that the final rule at least ensure that the simultaneous sharing of officers between candidates and PACs or political parties is included as direct coordination. Moreover, CLC continues to recommend strengthening that provision to include other close connections between those groups, such as candidate family members and the use of common vendors.⁸

CLC thanks the Secretary for considering our comments on this important rulemaking. We would be happy to provide additional information or answer questions to assist the Secretary in promulgating the final rule.

Respectfully,

/s/ Patrick Llewellyn
Patrick Llewellyn
Director, State Campaign Finance

⁸ See Attachment A at 2-4. Should the Secretary restore both the former provision and the former safe harbor exception, see ARR 21-082 § 4, CLC continues to recommend strengthening that exception to require a firewall meeting specific criteria, see Attachment A at 5-6, Attachment B at 10-11.

ATTACHMENT A



October 21, 2021

Submitted electronically to elections@wyo.gov

The Honorable Edward A. Buchanan
Wyoming Secretary of State
122 W 25th Street
Cheyenne, WY 82002

Dear Secretary Buchanan,

Campaign Legal Center (“CLC”) respectfully submits these comments to the Wyoming Secretary of State (“Secretary”) regarding the revised Notice of Intent to Adopt Rules defining “direct coordination” for purposes of Wyo. Stat. Ann. § 22-25-102(a), as amended by 2020 Senate Act No. 36.¹

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American’s right to transparency and accountability in the democratic process.

CLC previously submitted comments to the Secretary, in July 2020, concerning the original proposal to define “direct coordination” pursuant to Wyo. Stat. Ann. § 22-25-102(a). CLC’s prior comments explained the importance and constitutionality of coordination rules, and also provided recommendations for expanding the proposed rule’s definition of “direct coordination” to better protect against circumvention of Wyoming’s prohibition on corporate contributions to candidates.² We commend the Secretary’s decision to revise the proposed rule to more comprehensively define “direct coordination” by including a political action committee (“PAC”) or political party making

¹ See ARR21-082P (filed Aug. 26, 2021), <https://wyoleg.gov/arules/2012/rules/ARR21-082P.pdf>.

² A copy of our prior comments is attached for reference. See Attachment A, Campaign Legal Ctr. Comments to Wyo. Sec’y of State (filed July 23, 2020).

contributions to a candidate, certain communications between candidates and PACs or parties to aid the candidate’s election, and the simultaneous sharing of officers by a PAC or party and a candidate’s campaign committee.

The following recommendations are intended to further strengthen the Secretary’s final rule for “direct coordination” by proposing the inclusion of additional types of conduct that candidates and outside groups routinely engage in to circumvent contribution limits. Our recommendations would help ensure that Wyoming’s corporate contribution prohibition is effective and not easily evaded.

Recommendations for Final Rule

I. *Define “direct coordination” to include when a candidate or candidate’s family member had a role in creating or managing a PAC or political party.*

We recommend that Wyoming’s final rule for “direct coordination” also include when a candidate or candidate’s family member has recently established, maintained, controlled, or principally funded a PAC or political party that makes expenditures in support of that candidate.

The proposed rule would regulate as “direct coordination” circumstances where an officer of a PAC or party either is “simultaneously serving” as an officer of the candidate’s campaign committee or is “actively seeking office as a candidate.”³ However, it would not apply when a candidate has *previously* served as an officer or in another leadership role with a PAC or party within a recent timeframe (e.g., within the previous two years or within the same election cycle). Likewise, the proposed rule would not cover instances where a candidate’s immediate family member—such as a spouse, parent, sibling, or child—either is a current officer of a PAC or party or has previously served as such an officer within a recent timeframe.

Contemporary federal elections illustrate how excluding these circumstances from coordination rules makes it easy for candidates to evade contribution limits. For example, some federal candidates, prior to formally declaring their candidacies, have created and raised substantial amounts of money for super PACs that, once the candidates have announced they are running for office, proceed to operate as single-candidate PACs in support of their campaigns.⁴

³ Proposed Rule § 3(c) (emphasis added).

⁴ See PAUL S. RYAN, COMMON CAUSE, “TESTING THE WATERS” OR DIVING RIGHT IN? (Jan. 2019), <https://www.commoncause.org/wp-content/uploads/2019/01/TestingtheWatersv3.pdf>; see also Alex Isenstadt, *Jeb Bush’s \$100M May*, POLITICO (May 8, 2015), <https://www.politico.com/story/2015/05/jeb->

Likewise, family members of federal candidates have created and funded super PACs that actively support the candidates' campaigns with helpful expenditures.⁵ These foundational ties between candidates and PACs that are currently or recently affiliated with them or their family members bely the independence of these PACs from the candidates they support, and effectively allow candidates to indirectly control super PACs that are not subject to contribution limits under the law, thus undermining those limits and precipitating concerns about quid pro quo corruption.

To protect against the evasion of state law's corporate contribution ban through this type of coordinated activity in Wyoming elections, we recommend that the Secretary's final rule define "direct coordination" to include situations where a candidate or candidate's immediate family member plays or has played a role in creating or managing a PAC or political party that makes expenditures to support the candidate.⁶

II. Define "direct coordination" to include the employment of former campaign staff and use of common vendors.

Similarly, we recommend that the final rule also define "direct coordination" to cover a PAC or party hiring a candidate's recent former high-level campaign staff or sharing common vendors with a candidate.

While the proposed rule defines "direct coordination" to include the simultaneous sharing of "officers" between a candidate and a PAC or party, the proposed rule does not include the employment of *former* campaign staff by a PAC or party or the use of common vendors.⁷ However, both former campaign staffers and common vendors, like committee officers, can easily facilitate the exchange of nonpublic, strategic information between a candidate and outside groups that seek to aid the campaign. At the federal level, super PACs regularly hire former staffers of a candidate shortly after they leave the campaign and employ the same vendors as candidates to ensure that "independent expenditures" made by those PACs most effectively complement

bush-right-to-rise-super-pac-campaign-117753; Alexandra Jaffe & Kailani Koenig, *Fiorina Super PAC Tests Legal Limits of Campaign Coordination*, NBC News (Sept. 17, 2015), <https://www.nbcnews.com/meet-the-press/fiorina-super-pac-tests-legal-limits-campaign-coordination-n428056>.

⁵ See Fredreka Schouten & Christopher Schnaars, *Some candidates' super PACs are a family affair*, USA TODAY (July 18, 2014), <https://www.usatoday.com/story/news/nation/2014/07/18/relatives-fund-candidate-super-pacs-rothblatt/12824361/>.

⁶ For suggested rule text regarding a candidate or candidate's family member establishing or controlling a PAC or political party, see Attachment A at 9.

⁷ See Proposed Rule §§ 3(c), 4(b).

the official campaign strategy—and contravene any commonsense understanding of independence.⁸ Thus, Wyoming should include both a PAC’s or political party’s hiring of recent former executive or managerial campaign staff and its use of common vendors with a candidate as additional types of conduct that constitute “direct coordination” in the final rule.⁹

III. Provide that republication of a candidate’s campaign material to support the candidate constitutes de facto coordination.

We recommend that the final rule regulate the republication of a candidate’s campaign material by a PAC or party as de facto “direct coordination” when the republished material is used to support the candidate. The proposed rule lists a PAC or party republishing, “in whole or in part, any campaign material or advertisement created or prepared by a candidate” as one type of “discussion or communication” between candidates and PACs and parties that would qualify as “direct coordination.”¹⁰ But republication of a candidate’s campaign material by a PAC or party for the purpose of aiding that candidate’s election can occur without any direct contact with the candidate or the candidate’s campaign committee. Moreover, when an allied PAC or political party republishes a candidate’s campaign material, it is essentially acting in collaboration with the campaign by amplifying the candidate’s own messaging; that activity should therefore be treated as coordination per se, regardless of whether there has been any discussion or communication with the candidate who benefits from republication. Indeed, a number of other states treat the republication of a candidate’s campaign material either as automatic coordination or as an in-kind contribution to the beneficiary candidate.¹¹ We

⁸ See, e.g., Maggie Severns, *Pro-Buttigieg super PAC hired Buttigieg finance staffer amid ad blitz*, POLITICO (Feb. 21, 2020), <https://www.politico.com/news/2020/02/21/pete-buttigieg-super-pac-staffer-116607>; Ashley Balcerzak, *Candidates and their super PACs sharing vendors more than ever*, OPENSECRETS.ORG (Dec. 21, 2016), <https://www.opensecrets.org/news/2016/12/candidates-super-pacs-share-vendors/>. (finding there were 632 instances where super PACs and the candidates they supported had hired the same individual or company during the 2016 federal election cycle).

⁹ For suggested rule text regarding a PAC or party’s employment of former campaign staff and common vendors, see Attachment A at 10.

¹⁰ Proposed Rule § 3(b)(iii).

¹¹ See, e.g., Md. Code, Elec. Law § 13-249(a)(4)(ii) (“Coordinated expenditure’ includes a disbursement for any communication that republishes or disseminates, in whole or in part, a video, a photograph, audio footage, a written graphic, or any other form of campaign material prepared by the candidate or political party that is the beneficiary of the disbursement.”); Wash. Rev. Code § 42.17A.005(15)(a)(iii) (“Contribution’ includes . . . [t]he financing by a person of the dissemination, distribution, or republication, in whole or in part, of broadcast,

recommend that the Secretary's final rule similarly classify republication of campaign material as "direct coordination," unless the republication opposes the candidate's election.¹²

IV. Specify that the safe harbor only applies if a PAC or political party has established a firewall that satisfies specific guidelines.

We recommend that the final rule clarify that the "safe harbor" provision only exempts conduct from the meaning of "direct coordination" when a PAC or party has established a firewall policy in accordance with specific guidelines. While the proposed rule would create a safe harbor exception from the definition of "direct coordination" if a party or PAC "can demonstrate that any of its employees, or vendors it contracts with, who have material, non-public strategic information about a candidate's . . . needs were not involved with any expenditure the party or committee makes in support of the candidate," it provides no further conditions or requirements to make sure that relevant information is not actually passed to the candidate's campaign.¹³

Bolstering the safe harbor provision to clearly require more meaningful separation between any staff or agents of the PAC or party who have "material, non-public strategic information" about a candidate's campaign needs or plans and those staff working on independent expenditures to aid that candidate would better protect against a PAC or political party discreetly coordinating with a candidate. Specifically, Wyoming's final rule should stipulate that, to qualify for the safe harbor, a PAC or party must establish a firewall that: (1) separates specific staff working on expenditures to support a specific candidate from other staff who provide services to that candidate; (2) prevents leadership or managers from simultaneously supervising the work of staff members who are separated by the firewall; (3) prohibits the flow of strategic, non-public information between the staff separated by the firewall and between the candidate and PAC or party; (4) creates physical and technological separations to ensure that non-public information does not in fact flow between

written, graphic, digital, or other form of political advertising or electioneering communication prepared by a candidate, a political or incidental committee, or its authorized agent").

¹² For our suggested rule text regarding republication, see Attachment A at 9 ("For purposes of Wyo. Stat. Ann. § 22-25-102(a), 'direct coordination' means: . . . [a] political party or political action committee making an expenditure for a communication that republishes, disseminates, or distributes, in whole or part, any video, audio, written, graphic, or other form of campaign material, created or prepared by the candidate or candidate's committee, unless the republished material is used for an expenditure to oppose the candidate that created or prepared the material").

¹³ Proposed Rule § 4(b).

the PAC or party and the candidate, or between specific staff separated by the firewall; and (5) is memorialized in writing and distributed to all relevant staff before relevant activities or expenditures are undertaken, and is provided to the Secretary of State upon request.¹⁴

Conclusion

CLC thanks the Secretary for considering our comments on this important rulemaking. We would be happy to provide additional information or answer questions to assist the Secretary in promulgating the final rule.

Respectfully,

/s/ Austin Graham

Austin Graham
Legal Counsel

/s/ Patrick Llewellyn

Patrick Llewellyn
Director, State Campaign Finance

¹⁴ For suggested rule text regarding firewalls, see Attachment A at 10-11.

ATTACHMENT B



July 23, 2020

The Honorable Edward A. Buchanan
Wyoming Secretary of State
122 W 25th Street
Cheyenne, WY 82002

Dear Secretary Buchanan,

Campaign Legal Center (“CLC”) respectfully submits these comments to the Wyoming Secretary of State (“Secretary”) regarding the Notice of Intent to Adopt Rules defining “direct coordination” for purposes of the statutory amendments made by Senate File 20.¹

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American’s right to transparency and accountability in the electoral process.

One of the main focuses of CLC’s campaign finance practice is improving the legal standards that define coordination between candidates and outside groups making expenditures to support them. CLC has previously provided guidance and recommendations for addressing coordination issues to both federal and state election authorities,² and the following comments are intended to assist the Secretary in promulgating a final regulation that effectively precludes corporations

¹ Proposed ARR 20-044 (filed May 29, 2020), <https://wyoleg.gov/arules/2012/rules/ARR20-044P.pdf>; 2020 Wyo. Sess. Laws at 309, <https://wyoleg.gov/2020/SessionLaws.pdf>.

² See Comments from Campaign Legal Ctr. & Democracy 21 to Fed. Election Comm’n (Dec. 16, 2015), <https://campaignlegal.org/sites/default/files/Letter%20to%20FEC%20Commissioners%20re%20Agenda%20Doc%2015-54-A%20%28Dec%2016%202015%29.pdf>; Comments from Campaign Legal Ctr. to N.M. Sec’y of State (Aug. 14, 2019), at 3-4, <https://campaignlegal.org/sites/default/files/2019-08/CLC%20Written%20Comments%20on%20Proposed%20Campaign%20Finance%20Rule.pdf>; Comments from Campaign Legal Ctr. & W.V. Citizens for Clean Elections to W.Va. State Election Comm’n (July 10, 2019), at 2-3, <https://campaignlegal.org/sites/default/files/2019-07/CLC%20WV%20CCE%20Comments%20on%20Proposed%20Rulemaking%20for%20CSR%20146-3.pdf>.

from using political parties or political action committees (“PACs”) as conduits for circumventing state law’s prohibition against corporate campaign contributions.³

Part I of the comments gives an overview of the U.S. Supreme Court’s case law concerning coordination restrictions, highlights common ways that candidates and outside groups have coordinated in federal elections, and describes the background of the Wyoming Election Code’s new coordination restriction. Part II then makes recommendations for defining “direct coordination” in accordance with best practices, and Part III sets out draft regulatory language incorporating our recommendations for the Secretary’s final regulation.

I. Constitutionality and Importance of Coordination Rules

Wyoming’s new statutory prohibition against corporations making contributions to political parties or PACs that “directly coordinate” with candidates addresses a critical issue in contemporary elections: ensuring that legal restrictions on campaign contributions are not circumvented through extensive cooperation and collaboration between candidates and outside groups—including political parties, PACs, and other organizations—that spend money to support the election of those candidates.

Beginning with its seminal decision *Buckley v. Valeo*, the U.S. Supreme Court has consistently maintained that third-party expenditures “controlled by or coordinated with a candidate” may be constitutionally limited in the same manner as direct contributions to the candidate’s campaign.⁴ Because coordinated expenditures are essentially indirect contributions to candidates, *Buckley* reasoned that limiting expenditures made in coordination with candidates furthers the same anti-corruption interests served by limits on direct campaign contributions and, critically, “prevent[s] attempts to circumvent the [limits] through prearranged or coordinated expenditures amounting to disguised contributions.”⁵

More recent decisions from the Supreme Court have reiterated that limits on coordinated expenditures are justified because these expenditures “raise[] the risk of corruption (and its appearance) through circumvention of valid contribution limits.”⁶ In *FEC v. Colorado Republican Campaign Committee* (“*Colorado Republican II*”), the Court held that coordinated spending between a political party and candidates of that party “may be restricted to minimize circumvention of contribution limits.”⁷ Importantly, the Court in *Colorado Republican II* rejected the argument that political parties’ close relationship to candidates necessitates greater First Amendment protection for their coordinated expenditures, finding instead that

³ In our comments, we use the term “corporation” to broadly refer to all organizations that are prohibited from making contributions to candidates under Wyo. Stat. Ann. § 22-25-102(a), including unions, partnerships, professional associations, civic or fraternal groups, and other entities.

⁴ 424 U.S. 1, 46-47 (1976).

⁵ *Id.* at 47.

⁶ *FEC v. Colo. Republican Federal Campaign Committee*, 533 U.S. 421, 456 (2001).

⁷ *Id.* at 465.

“parties’ capacity to concentrate power to elect is the very capacity that apparently opens them to exploitation as channels for circumventing contribution and coordinated spending limits binding on other political actors.”⁸

Likewise, in *McConnell v. FEC*, the Court declined to strike down part of the federal Bipartisan Campaign Reform Act extending coordination rules to expenditures made in the absence of “an agreement or formal collaboration” with a candidate.⁹ The *McConnell* Court noted that the existence of a formal agreement did not establish “the dividing line” between coordinated versus independent spending, and explained that “expenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash.’”¹⁰ Thus, the Court made clear in *McConnell* that an agreement or arrangement between an outside group and a candidate is *not* a constitutional precondition to a finding of coordination.¹¹

After the Court struck down bans on corporate independent expenditures in *Citizens United v. FEC*,¹² coordination rules have become especially critical to preserving the efficacy of restrictions on corporations giving money and other assistance to candidates’ campaigns. While the holding in *Citizens United* relied on the assumption that independent expenditures, unlike direct campaign contributions, do not create a risk of “quid pro quo” corruption because they are made without “prearrangement and coordination” with candidates,¹³ many campaign finance laws narrowly define “coordination” and leave ample opportunity for outside groups and candidates to engage in a range of collaborative conduct. This kind of extensive interaction belies any commonsense understanding of “independent,” and undermines legal restrictions on campaign contributions that are key to maintaining accountability and preventing corruption in our democratic process.

Examples from recent federal elections illustrate the many ways in which candidate campaigns and outside groups can coordinate activities. For instance, before officially announcing their candidacies for federal office, prospective candidates have set up and raised money for super PACs that subsequently made independent expenditures to boost those candidates once they launched their campaigns;¹⁴ some

⁸ *Id.* at 455.

⁹ 540 U.S. 93, 220-23 (2003).

¹⁰ *Id.* at 221 (quoting *Colorado Republican II*, 533 U.S. at 442, 446).

¹¹ 540 U.S. at 222.

¹² 558 U.S. 310 (2010).

¹³ 558 U.S. at 357. The Court in *Citizens United* made a point to distinguish the challenge at hand from its precedent upholding prohibitions on corporate contributions to candidates, which, the Court noted, “have been an accepted means to prevent *quid pro quo* corruption.” *Id.* at 359 (emphasis in original).

¹⁴ See Matea Gold, *Why super PACs have moved from sideshow to center stage for presidential hopefuls*, WASH. POST (Mar. 15, 2015), https://www.washingtonpost.com/politics/once-the-sideshow-super-pacs-now-at-the-forefront-of-presidential-runs/2015/03/12/516d371c-c777-11e4-a199-6cb5e63819d2_story.html; Matea Gold, *Now it’s even easier for candidates and their aides to help super PACs*, WASH. POST (Dec. 24, 2015),

federal candidates have fundraised for super PACs and other independent expenditure groups even after formally establishing their campaign committees.¹⁵

Soon after ending their employment with candidates, many former campaign staffers also have gone on to work for super PACs that support those same candidates, bringing valuable, non-public information about the candidates' electoral strategy and needs along with them.¹⁶ Additionally, the frequent use of common vendors by candidates and outside groups has helped to ensure that independent expenditures most effectively complement spending by candidates' campaigns.¹⁷ And federal candidates and outside groups have routinely exploited gaps in the Federal Election Commission ("FEC") regulations' coverage of online communications to exchange campaign-related materials and information on public websites, with the understanding that the materials will be used for supportive electioneering.¹⁸

https://www.washingtonpost.com/politics/now-its-even-easier-for-candidates-and-their-aides-to-help-super-pacs/2015/12/24/d8d1ff4a-a989-11e5-9b92-dea7cd4b1a4d_story.html

¹⁵ See FEC Advisory Op. 2011-12 (concluding that federal candidates and officeholders may solicit annual contributions of up to \$5,000 per donor on behalf of independent expenditure-only political committees); Alexander Burns, *Romney addressing super PAC fundraisers*, POLITICO (July 28, 2011), <https://www.politico.com/story/2011/07/romney-addressing-super-pac-fundraisers-060143>.

¹⁶ See Maggie Severns, *Pro-Buttigieg super PAC hired Buttigieg finance staffer amid ad blitz*, POLITICO (Feb. 21, 2020), <https://www.politico.com/news/2020/02/21/pete-buttingieg-super-pac-staffer-116607>; see also Ashley Balcerzak, *Candidates and their super PACs sharing vendors more than ever*, OPENSECRETS.ORG (Dec. 21, 2016), <https://www.opensecrets.org/news/2016/12/candidates-super-pacs-share-vendors/> (reporting that there were 632 instances where super PACs and the candidates they supported had hired the same individual or company during the 2016 federal election cycle).

¹⁷ Mike Spies, *Documents Point to Illegal Campaign Coordination Between Trump and the NRA*, THE TRACE (Dec. 6, 2018), <https://www.thetrace.org/2018/12/trump-nra-campaign-coordination/> (reporting that "the NRA and the Trump campaign employed the same operation — at times, the exact same people — to craft and execute their advertising strategies for the 2016 presidential election," and noting that the common vendors "executed ad buys for Trump and the NRA that seemed coordinated to enhance each other.").

¹⁸ The FEC has exempted online communications from regulation unless they are "placed for a fee on another person's website." 11 C.F.R. § 100.26. Thus, an outside group's republication of a candidate's campaign materials on the group's own website generally is not considered a "coordinated communication" under the FEC's rules. Fed. Election Comm'n, Internet Final Rules (May 1, 2006), <https://www.fec.gov/updates/internet-final-rules/>. See also Matea Gold, *How a super PAC plans to coordinate directly with Hillary Clinton's campaign*, WASH. POST (May 12, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/05/12/how-a-super-pac-plans-to-coordinate-directly-with-hillary-clintons-campaign/>.

In recent Wyoming elections, coordination has also become an issue. Shortly before the 2016 general election, the Wyoming Republican Party filed several complaints with the Secretary of State alleging that various Democratic candidates for the state legislature had used a political consulting firm, ELLA WY, Inc., to coordinate with nonprofit organizations that made independent expenditures to benefit those candidates at the upcoming election.¹⁹ The Wyoming Attorney General’s office ultimately dismissed the Republican Party’s complaints on the technical grounds that state law, at the time, only permitted “qualified electors” to file complaints regarding election code violations.²⁰

Following the 2016 cycle, Wyoming officials began to review potential election code changes to clarify legal restrictions on coordination, among other election reforms.²¹ In 2019, the Secretary of State’s office formulated the new restriction on “direct coordination” and other amendments to the election code as part of a draft legislative proposal, which was presented by the Secretary’s Election Division staff at an interim meeting of the Joint Committee on Corporations, Elections and Political Subdivisions last September. That committee subsequently voted to sponsor a bill, introduced as Senate File 20, containing the Secretary’s recommended statutory revisions during the 2020 legislative session.²²

(“The FEC rules specifically permit some activity—in particular, activity on an organization’s website, in email, and on social media—to be legally coordinated with candidates and political parties”); Andrew Gripp, *How Super PACs and Candidates Legally (And Illegally) Coordinate Their Efforts*, INDEPENDENT VOTERS NEWS (Oct. 26, 2016), <https://ivn.us/2016/10/26/super-pacs-evaded-rules-coordinating-campaigns>.

¹⁹ Nick Learned, *GOP Files Third Complaint of Campaign Finance Violations in Albany County, First Two Referred to Wyoming Attorney General*, KOWB (Nov. 2, 2016), <https://kowb1290.com/gop-files-third-complaint-of-campaign-violations-in-albany-county-first-two-referred-to-wyoming-attorney-general/>; Press Release, Wyo. Republican Party, WY GOP Files Second Complaint Alleging More Democrat Campaign Finance Violations (Oct. 26, 2016), https://www.wyoming.gop/second_campaign_lawViolation.

²⁰ Laura Hancock, *AG will not consider Wyoming GOP complaint against liberal groups*, CASPER STAR TRIBUNE (updated Jan. 20, 2020), https://trib.com/news/state-and-regional/govt-and-politics/ag-will-not-consider-wyoming-gop-complaint-against-liberal-groups/article_7e5dfc96-c813-5e2a-abb8-042aef59ae18.html; see also 2018 Wyo. Sess. Laws at 63 (replacing “Any qualified elector” with “any person” in Wyo. Stat. Ann. § 22-26-121 for purpose of specifying who may file complaints of election code violations with the Secretary).

²¹ Joel Funk, *Wyoming election law proposals grow from 2016 controversies*, CASPER STAR TRIBUNE (Sept. 25, 2017), https://trib.com/news/state-and-regional/wyoming-election-law-proposals-grow-from-2016-controversies/article_62e716e0-bedb-5d84-acb5-ff1d830fc1ab.html.

²² See Summary of Proceedings, Meeting of Joint Corporations, Elections & Political Subdivisions Interim Comm. (Sept. 16-17, 2019), at 3, <https://wyoleg.gov/InterimCommittee/2019/07-20190916MeetingMinutes.pdf>.

With respect to the new statutory prohibition against corporations making contributions to political parties or PACs that “directly coordinate” with candidates, a spokesperson for the Secretary’s office explained, “These changes explicitly seek to close a loophole for parties and PACs to no longer be able to function as a conduit for corporations to funnel money directly to a candidate or candidate’s campaign committee.”²³ Importantly, the Wyoming Election Code, as amended by Senate File 20, now more clearly proscribes the kind of activity that gave rise to the Republican Party’s 2016 complaints, and the Secretary’s office is expressly directed to flesh out the meaning of “direct coordination” by regulation.²⁴

II. Recommendations for Defining “Direct Coordination”

To prevent the circumvention of Wyoming’s ban on corporate contributions to state candidates, the Secretary’s final regulation should clearly delineate the meaning and scope of “direct coordination.” As a threshold matter, it is critical that the Secretary’s regulation make clear that “direct coordination” includes a political party or PAC making contributions to a candidate or candidate’s committee; this regulatory clarification would definitively close the statutory loophole that has enabled parties and PACs to funnel corporate funds to candidates despite the prohibition in Wyo. Stat. Ann. § 22-25-102(a).²⁵ If the final regulation does not cover a political party or PAC making contributions to a candidate, the new restriction on “direct coordination” will do little to disrupt the status quo, as parties and PACs could easily sidestep the restriction by avoiding activities that constitute “direct coordination” while continuing to pass along funds originally provided by corporate entities to candidates.²⁶

Moreover, by clarifying that “direct coordination” includes making contributions to a candidate, the final rule would augment other statutory restrictions, including the

²³ Nick Reynolds, *Wyoming is looking to close a campaign finance loophole. But it may not matter*, CASPER STAR TRIBUNE (Sept. 21, 2019), https://trib.com/news/state-and-regional/govt-and-politics/wyoming-is-looking-to-close-a-campaign-finance-loophole-but-it-may-not-matter/article_64e48eb9-f998-5bb7-a171-7c20ae292ec6.html.

²⁴ See Wyo. Stat. Ann. § 22-25-102(a) (“The secretary of state shall promulgate rules to define direct coordination as prohibited by this section.”).

²⁵ See Nick Reynolds, *Wyoming is looking to close a campaign finance loophole. But it may not matter*, CASPER STAR TRIBUNE (Sept. 21, 2019), https://trib.com/news/state-and-regional/govt-and-politics/wyoming-is-looking-to-close-a-campaign-finance-loophole-but-it-may-not-matter/article_64e48eb9-f998-5bb7-a171-7c20ae292ec6.html.

²⁶ Wyoming’s 2020 Campaign Guide, published by the Secretary’s Election Division, aligns with this reading of state law as amended by Senate File 20. The guide explains that “organizations [] prohibited from making contributions directly to candidates and candidate committees” may only expend funds to “1) Make independent expenditures for speech expressly advocating the election or defeat of a candidate (W.S. 22-25-102(k)(i)); 2) Make electioneering communications pursuant to W.S. 22-25-101(c); 3) Bear any portion of a PAC’s or political party’s

prohibition against any person “solicit[ing] or receiv[ing] a payment or contribution from an organization prohibited from making a contribution under [Wyo. Stat. Ann. § 22-25-102(a)].”²⁷ Similarly, to guard against some of the most common coordination abuses seen at the federal level, the regulatory definition of “direct coordination” should cover a political party or PAC’s republication of campaign materials originally prepared by a candidate, regardless of whether there has been other collaboration between the party or PAC and the candidate.

Along with including direct contributions and republication of a candidate’s campaign materials within the scope of the regulation, the Secretary’s definition of “direct coordination” should set forth the specific types of conduct that qualify as “consultation, cooperation, or communication” between a candidate and a political party or PAC. For example, the Montana Commissioner of Political Practices (“COPP”), whose office administers campaign finance laws in that state, has promulgated a comprehensive regulation defining “coordination.”²⁸ Montana’s regulation lists various types of conduct that COPP will consider relevant in determining if a communication or other expenditure is “coordinated” with a candidate, including whether the communication or expenditure was made based on information provided by the candidate or candidate’s agent, whether the person making the communication or expenditure has paid for the services of another person who has also received compensation from the candidate, and whether the candidate or candidate’s agent participated in any decision regarding “the content, timing, location, media, intended audience, volume of distribution, or frequency of placement” of the communication or expenditure.²⁹ In addition to Montana, other states around the country have adopted statutes or regulations that specify particular kinds of conduct that qualify as coordination.³⁰

Based on CLC’s experiences helping to develop coordination rules in federal and state elections, we have identified a range of cooperative conduct that should be covered as part of an effective “direct coordination” regulation in Montana,³¹ including:

administrative costs or costs of soliciting contributions (W.S. 22-25-102(k)(ii)).” Wyo. Election Division, *2020 Campaign Guide* 9,
https://sos.wyo.gov/Elections/Docs/2020/2020_Campaign_Guide.pdf.

²⁷ Wyo. Stat. Ann. § 22-25-102(a); *see also id.* § 22-25-102(b) (“No person shall solicit or receive a political payment or contribution from any source other than a natural person, political party, political action committee or candidate’s campaign committee organized under W.S. 22-25-101.”).

²⁸ Mont. Admin. R. 44.11.602,

<http://www.mtrules.org/gateway/RuleNo.asp?RN=44.11.602>.

²⁹ *Id.*

³⁰ See, e.g., Alaska Admin. Code tit. 2, § 50.405(5)(B); Ariz. Rev. Stat. Ann. § 16-922(C); Cal. Code Regs. tit. 2, § 18225.7(c), (d); Conn. Gen. Stat. § 9-601c(b); Fla. Stat. Ann. § 106.011(12)(b); 970 Mass. Code Regs. 2.21(5), (6); N.Y. Elec. Law § 14-107(1)(d); R.I. Gen. Laws § 17-25-23; W. Va. Code Ann. § 3-8-9a.

³¹ The types of coordinated conduct included in CLC’s recommendations overlap in substantial part with those in Montana’s coordination regulation. *See supra* note 28.

- *General coordination with a candidate:* If a political party's or PAC's expenditure is "not made totally independently" of a candidate, it should be treated as coordinated. This would include an expenditure made by the party or PAC pursuant to an express or implied agreement, a general or particular understanding, or a request by or communication with a candidate.
- *Candidate or candidate's family member had a role in creating or running the political party or PAC:* If during the two years preceding when a party or PAC makes an expenditure to support a candidate, the candidate or the candidate's immediate family member established, maintained, controlled, or principally funded the party or PAC, then expenditures supporting the candidate made by the party or PAC in the same two-year period should qualify as coordinated.
- *Candidate has fundraised for the political party or PAC:* If during the two years preceding when a party or PAC makes an expenditure to support a candidate, the candidate has solicited funds for, provided non-public fundraising information to, appeared as a speaker or featured guest at a fundraiser for, or gave permission to be featured in fundraising efforts of the party or PAC, then subsequent expenditures by the party or PAC in support of the candidate should be considered coordinated.
- *Expenditures based on non-public information about the campaign's needs:* If an expenditure is based on non-public information about a candidate's campaign needs that the candidate has provided directly or indirectly to the party or PAC, then the party or PAC's subsequent expenditure to support the candidate should be treated as coordinated.
- *Former employee or common agent or vendor:* If a political party or PAC employs or retains the services of a person who has been a managerial-level employee, key fundraiser, or vendor for a candidate within the previous two years, then expenditures by the party or PAC in support of the candidate should be deemed coordinated. Covered persons should include those who, at any point during the previous two years: (i) had executive or managerial authority for the candidate; (ii) were authorized to raise or expend funds for the candidate and had received non-public information from the candidate about the campaign's plans or needs; or (iii) provided the candidate with professional services (other than accounting or legal services) related to campaign or fundraising strategy.
- *Safe harbor if the political party or PAC has established a firewall:* In recognition of the fact that it may be difficult for a party or PAC to find Montana-based staff or vendors who have not previously worked with candidates in the state, the regulation may exclude from coverage any expenditures involving former employees or common vendors of a candidate if the party or PAC has implemented a firewall policy that satisfies certain criteria meant to ensure there is no flow of strategic, non-public campaign

information from the former employee or common vendor to other staff of the party or PAC who are working directly with the beneficiary candidate.

III. Suggested Regulatory Text

To assist the Secretary in promulgating a “direct coordination” regulation that includes our best-practices recommendations, CLC has prepared the following draft regulatory language containing our suggestions. We urge the Secretary to consider adopting this draft language for the final regulation.

- (a) For purposes of Wyo. Stat. Ann. § 22-25-102(a), “direct coordination” means:
 - i. A political party or political action committee making a contribution of funds or other items of value directly to a candidate or candidate’s campaign committee;
 - ii. A political party or political action committee making an expenditure for a communication that republishes, disseminates, or distributes, in whole or part, any video, audio, written, graphic, or other form of campaign material, created or prepared by the candidate or candidate’s committee, unless the republished material is used for an expenditure to oppose the candidate that created or prepared the material; or
 - iii. A political party or political action committee making an expenditure in cooperation, consultation, or communication with a candidate or candidate’s campaign committee.
- (b) As used in this section, an expenditure is made by a political party or political action committee “in cooperation, consultation, or cooperation with” a candidate or candidate’s campaign committee if:
 - i. The expenditure is not made totally independently of the candidate or candidate’s campaign committee. An expenditure “not made totally independently” includes any expenditure made pursuant to any expressed or implied agreement with, or any general or particular understanding with, or pursuant to any request by or communication with the candidate or candidate’s campaign committee about the expenditure;
 - ii. During the two years preceding the date of the expenditure, the political party or political action committee was directly or indirectly established, maintained, controlled, or principally funded by the candidate, candidate’s campaign committee, or an immediate family member of the candidate. For purposes of the previous sentence, an “immediate family member of the candidate” means a parent, child, sibling, spouse, domestic partner, father-in-law, or mother-in-law;
 - iii. During the two years preceding the date of the expenditure, the candidate solicited funds for the political party or political action committee, provided fundraising information or strategy to the political party or political action committee, appeared as a speaker or featured guest at a fundraiser for the political party or political action committee, or gave permission to be featured in the political party or political action committee’s fundraising efforts;

- iv. The expenditure is based on information about the candidate's campaign needs or plans that the candidate or candidate's campaign committee provided to the political party or political action committee directly or indirectly, such as information about campaign messaging, strategy, fundraising, planned expenditures, or polling data; provided that communications between the candidate and the political party or political action committee solely for the purpose of either engaging in discussions with the candidate regarding the political party or political action committee's position on a policy matter or regarding whether the political party or political action committee will endorse the candidate, and that include no non-public information about the candidate's campaign needs or plans, do not constitute "direction coordination" under this paragraph; or
 - v. During the two years preceding the date of the expenditure, the political party or political action committee employed or retained the services (other than accounting or legal services) of a person who, at any prior point during the same two-year period:
 - 1. Had executive or managerial authority for the candidate or candidate's campaign committee, whether paid or unpaid;
 - 2. Was authorized to raise or expend funds for the candidate or candidate's campaign committee and had received non-public information from the candidate or candidate's campaign committee about the campaign's plans or needs; or
 - 3. Provided the candidate or candidate's campaign committee with professional services (other than accounting or legal services) related to campaign or fundraising strategy.
- (c) Notwithstanding the direct coordination described in subsection (b)(V), an expenditure will not be deemed coordinated if the political party or political action committee creates and implements a firewall policy that meets the criteria in this subsection. A political party or political action committee that relies on a firewall bears the burden of proof that the firewall was in existence and effective at the relevant times. If strategic non-public information passes through a firewall, the resulting expenditures will be deemed direct coordination, regardless of the existence of a firewall, if the criteria for direct coordination in subsection (b)(v) have been met. To satisfy this subsection, a firewall must:
- i. Separate specific staff who provide a service to the political party or political action committee related to its expenditures from distinct, specific staff who have engaged or will engage in any activity defined in subsection (b)(v) with the candidate supported by the expenditures;
 - ii. Forbid each executive, officer, manager, and supervisor within the political party or political action committee to simultaneously oversee the work of staff being separated by a firewall;
 - iii. Prohibit the flow of strategic non-public information between the political party or political action committee and the candidate being supported by the expenditures, and between specific staff being separated by the firewall;
 - iv. Provide for physical and technological separations to ensure that strategic non-public information does not flow between the political

- party or political action committee and the candidate, or between the specific staff who are being separated by the firewall; and
- v. Be memorialized in writing and distributed to all relevant employees and vendors before any relevant work is performed, regarding both the general firewall policy and any specific firewall created pursuant to such a policy, and provided to the Secretary of State upon request.
- (d) For purposes of this section, any reference to a candidate, candidate's campaign committee, political party, or political action committee includes:
- i. An employee or independent contractor, if such employee or contractor has executive or managerial authority for the candidate, candidate's campaign committee, political party, or political action committee at any time during the two years preceding the date of the expenditure; or
 - ii. An agent, whether paid or unpaid, of the candidate, candidate's campaign committee, political party, or political action committee at any time during the two years preceding the date of the expenditure.

Conclusion

To conclude, CLC respectfully urges the Secretary to take full advantage of the rulemaking authority provided in Senate File 20 to issue a regulation for “direct coordination” that comprehensively protects against the circumvention of Wyoming’s prohibition against corporate campaign contributions. We appreciate having the opportunity to participate in this important rulemaking, and CLC would be glad to answer any questions that the Secretary has regarding our comments.

Respectfully submitted,

/s/ Austin Graham
Austin Graham
Legal Counsel