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**VIA EMAIL**

Saurav Ghosh  
Federal Election Commission  
Office of the General Counsel  
1050 First Street, NE  
Washington, DC 20463  
sghosh@fec.gov

**Re: MUR 7271**

Dear Mr. Ghosh:

We write as counsel to the Democratic National Committee and Virginia McGregor in her official capacity as treasurer (together, “Respondent” or the “DNC”), in response to the General Counsel’s Brief in the above referenced matter. Because the General Counsel’s Brief presents insufficient factual and legal basis to find probable cause that Respondent violated the Federal Election Campaign Act of 1971, as amended (“Act”), the Federal Election Commission (the “Commission”) should immediately dismiss this matter and close the file.

The DNC wholeheartedly agrees with the statement from Senator Bentsen cited by the Office of General Counsel (“OGC”): “contributions by foreign nationals are wrong, and they have no place in the American political system.”<sup>1</sup> After being the victim of a Russian-sponsored cyber intrusion in 2016, the DNC knows better than most about the perils of foreign interference in our elections. Indeed, the underlying facts of this matter arise from the DNC’s concern over the deep ties between Paul Manafort, Donald Trump’s campaign manager in 2016, and the interests of Russian President Vladimir Putin. It is not surprising, therefore, that after OGC’s long investigation into this matter, they have not found any indication that the DNC received a foreign national contribution.

OGC’s own conclusions actually show that the Commission was wrong in its finding “reason to believe” that a violation occurred in this matter. The Commission originally authorized an investigation because “the available information indicates that the Ukrainian Embassy provided opposition research on the Trump campaign and campaign chairman Paul Manafort to [Alexandra] Chalupa at no charge, and that Ms. Chalupa passed on this research to DNC

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<sup>1</sup> General Counsel’s Brief at fn 81, MUR 7271 (Democratic National Committee) (Jan. 13, 2021) (hereinafter, “General Counsel’s Brief”), citing 120 Cong. Rec. 8782 (Mar. 28 1974).

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officials.”<sup>2</sup> OGC’s investigation concluded that this did not occur. Indeed, the more time that OGC has spent on this matter, the clearer it has become that nothing much at all actually happened. Neither the DNC nor Ms. Chalupa ever requested or received opposition research from the Ukrainian Embassy or Ukrainian foreign nationals and staff of the Ukrainian Embassy did not take action of any kind to support the DNC in any way. The only thing that did occur is that Ms. Chalupa sent a single email to a staff person at the Ukrainian Embassy to alert them that they might get a press question about Paul Manafort given his previous work in their country. But even this never came to pass. The President of Ukraine never discussed Manafort’s role with the Trump campaign at a press conference. However, instead of now recommending that the Commission close this matter, as one would expect, OGC has invented facts and a radical new legal theory with no precedent in the Commission’s jurisprudence.

OGC first misconstrues the sole communication at issue to claim that it is a solicitation for the purposes of influencing a federal election on behalf of the DNC when it is plainly not. Moreover, OGC then posits that talking to a reporter (which again, they found did not even happen here) is something of value - a contribution or expenditure that should be listed on every campaign’s and political committee’s reports filed with the Commission. This is simply not the law, and any attempt to interpret the Act in this way for the first time in an enforcement matter would plainly encroach on due process and First Amendment rights.

An individual, principally acting on their own non-electoral motivations, alerted another individual that they may receive a question from a reporter, which then never occurred. This is not a solicitation. It does not involve a contribution or “anything of value.” There is no basis for the Commission to continue with this matter.

## LEGAL ANALYSIS

### I. The Office of General Counsel’s Investigation

This matter originated with a complaint alleging that Ms. Chalupa, while acting as an agent of the DNC, solicited, accepted, or received foreign national contributions in the form of opposition research created by Ukrainian nationals. Despite the DNC’s representations that this was not correct, the Commission found reason to believe that a violation occurred. As stated above, the decision was based on the conclusion that “the record before the Commission indicates that by seeking and obtaining the Ukrainian Embassy’s research, which is a thing of value, to assist her and the DNC, at no cost, Ms. Chalupa solicited and received prohibited foreign national contributions.”<sup>3</sup> The only evidence before the Commission at the reason to believe stage was a debunked *Politico* article.<sup>4</sup> Fortunately, OGC now has had an opportunity to perform a thorough

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<sup>2</sup> Factual and Legal Analysis at 1, MUR 7271 (Democratic National Committee) (Aug. 1, 2019).

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.*

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investigation, conducting multiple depositions and interviews and reviewing voluminous documents. All of this fact finding has shown that the Commission's assumptions at the reason to believe stage were simply wrong. The DNC did not request any Ukrainian Embassy opposition research. Alexandra Chalupa did not request any Ukrainian Embassy opposition research. The Ukrainian Embassy did not provide the DNC any opposition research. There was no such Ukrainian Embassy opposition research. There are no facts or claims in OGC's brief to the contrary. Documents from the Commission's investigation show both Ms. Chalupa and Oksana Shulyar, the Ukrainian Embassy official from whom Ms. Chalupa allegedly sought the research, confirmed that such research was never requested or provided.<sup>5</sup> The Ukrainian Embassy opposition research that Ms. Chalupa supposedly obtained and provided to the DNC was actually just a list of links to public news articles that Ms. Chalupa compiled herself.<sup>6</sup>

However, OGC refuses to admit that they got it wrong. It is not until footnote 80 on page 17 of the General Counsel's Brief that they even reference the "opposition research" theory which was the entire basis of the Commission's reason to believe finding. Instead, while no longer alleging that the DNC received anything of value from a foreign national, OGC claims that the DNC may still have solicited something (albeit not opposition research). This new theory is based on a single press advisory that Ms. Chalupa sent to the Ukrainian Embassy for her own purposes. There are no other communications that OGC identifies as potentially constituting solicitations, and there are no facts to suggest that the DNC actually received anything at all. This one email is the entire basis of OGC's recommendation that the Commission find probable cause that there was a violation of the Act. The General Counsel's Brief distorts the facts and engages in pure conjecture at several instances, so it is important to actually read Ms. Chalupa's email in its entirety:

Important Press Opportunity

From: Alexandra Chalupa

To: oshulyar[redacted]

Cc:

Date: Wednesday, March 30, 2016, 3:19 PM EDT

Hi Oksana -

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<sup>5</sup> See Chalupa Aff. at 7-8, 13-14 (Nov. 5, 2019) ("I never asked the Embassy of Ukraine or any foreign government for research or documents related to Paul Manafort, Donald J. Trump, or anything having to do with a U.S. Election."); Chalupa Dep. at 320:4-15, 411:9-22 (Nov. 25, 2019); Shulyar Written Statement at 4 (June 9, 2020) (hereinafter, "Shulyar Written Statement") ("To my knowledge, digging up new information and/or providing assistance to any U.S. political campaign with opposition research was neither requested from the Embassy, nor considered by the Embassy. Furthermore, I have no knowledge that any such actions or coordination had ever taken place.")

<sup>6</sup> See General Counsel's Brief at 5; Chalupa Dep., Ex 6; see also Chalupa Dep. at 200:19 - 201:2 ("And this was -- this is already what I had known. He didn't ask me to research anything. This is what I already knew in the articles. And I included that I remember reading public information as well that backed up that I had known about.").

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I know you are very busy but if there is opportunity to get this message to the Ambassador and President Poroshenko's Communication's Director, please do so.

There is a very good chance that President Poroshenko may receive a question from the press during his visit about the recent New York Times article saying that Donald Trump hired Paul Manafort as an advisor to his campaign and whether President Poroshenko is concerned about this considering Trump is the likely Republican nominee and given Paul Manafort's meddling in Ukraine over the past couple of decades. In essence, this means that Putin and Trump now share the same advisor in addition to Trump's many business projects being backed by Russian money.

This is a huge opportunity to alleviate political pressure on Poroshenko's administration by directing attention to Putin/Manafort. Making it well known that the same man who helped Yanukovich's puppet government come to power and advised him throughout the Ukraine crisis is now advising a top candidate for U.S. President while also drawing attention to the fact that many are not aware of - that Manafort is back in Kyiv.

A Manafort presence in Kyiv is essentially a political invasion of Ukraine - Putin's green men invaded Crimea, his opposition militia invaded Eastern Ukraine and his top political advisor - Paul Manafort - has penetrated Kyiv and continues to create problems.

This is something that could be big and get international media attention in addition to national coverage given that is tied to Trump (the press will be all over it and get Ukraine back in the spotlight).

The Ukrainian diaspora, regardless of political party affiliation is very concerned about Trump and now especially given his connection to Manafort. This will give them an opportunity to help Poroshenko's administration by finding a common enemy for all to focus on - Manafort/Putin. We have a team in New Britain, Connecticut (Manafort's hometown) ready to do a press event end of April calling for the Manafort Street name to be changed. We have Marcy Kaptur's office interested in exploring the idea of a Congressional investigation into Manafort.

It is important to note that the role Manafort was given on the Trump campaign is much bigger than being reported. They timed his campaign manager's scandal that broke yesterday less than 24 hours after Manafort's hire was announced (even though the campaign manager's scandal happened two weeks earlier). Manafort will now be the top advisor and likely new CEO of the Republican Convention if and when Trump secures the nomination, where he will refresh his network before heading back overseas to create more problems.

It is important President Poroshenko is prepared to address this question should it come up. In a manner that exposes Paul Manafort for the problems he continues to cause Ukraine - past and present.

If President Poroshenko does, we will deliver a united Ukrainian diaspora, as well as the Polish Americans, Turks, Hungarians and others who will be ready to amplify this message. I will get the Democratic Presidential candidates aware and engaged and the Republicans.

If you are able to get this information to the Ambassador to pass along to President Poroshenko's communications team, it is important. At the very least for them to be aware of the opportunity.

I am copying \_\_\_\_\_ in the event he is able to flag for you at tonight's event.

Hope to see you soon.

Ali Chalupa  
Sent from my iPhone<sup>7</sup>

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<sup>7</sup> See Email from Chalupa to Shulyar (Mar. 30, 2016, 3:19 PM), Chalupa Dep., Ex. 7.

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Ms. Chalupa informed the Ukrainian Embassy that the President of the Ukraine may get a question about Paul Manafort at an upcoming press appearance and explained how discussing the matter could be an opportunity for Ukrainians to serve the Ukrainian administration's own internal politics. Poroshenko never in fact fielded this question or apparently ever publicly discussed Paul Manafort's role with the Trump campaign.<sup>8</sup> What is clear from the email itself, is that it is not a request for a Ukrainian national to contribute to the DNC, in-kind or otherwise.

## **II. Ms. Chalupa's Email Was Not a Solicitation for the Purpose of Influencing a Federal Election**

From the plain text of Ms. Chalupa's email to the Ukrainian Embassy, it is clear that she is not "soliciting" for the DNC. To "solicit" means to "ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value."<sup>9</sup> Facing the facts that neither the DNC nor Ms. Chalupa requested or received "opposition research" from foreign nationals, OGC's new theory is that there was a request the Ukrainians "prepare and convey this negative messaging about Trump's campaign advisor, which would help the DNC in the 2016 election."<sup>10</sup> Yet, Ms. Chalupa's email simply contains no such ask.

The email from Ms. Chalupa to Ms. Shulyar, the only communication at issue, states that President Poroshenko could receive a press question about Manafort during his visit to the United States and shares guidance on how he could use that opportunity to his own political advantages. Nowhere in the email does Ms. Chalupa actually ask that the President take the question or request the Ukrainian Embassy or government to prepare a statement regarding Manafort.<sup>11</sup> In conducting its deposition of Ms. Chalupa, even OGC staff recognize that the email does "not specifically ask[] the president to take a question" about Manafort.<sup>12</sup> The plain text of the email falls short of the Commission's definition of a "solicitation" under any objective interpretation.

If there was any doubt about the meaning of the email, in her deposition Ms. Chalupa stated that she intentionally did not ask Poroshenko to take the press question because she was uncomfortable doing so.<sup>13</sup> Instead, Ms. Chalupa stated that her purpose was to inform the

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<sup>8</sup> See General Counsel's Brief at 9 ("There is no record of Poroshenko receiving a question on Manafort at the U.S. Capitol Visitor Center event or otherwise conveying the message about Manafort that Chalupa communicated."); Shulyar Written Statement at 3.

<sup>9</sup> 11 C.F.R. § 110.20(a)(6) (cross-referencing 11 C.F.R. § 300.2(m)).

<sup>10</sup> General Counsel's Brief at 13.

<sup>11</sup> See Email from Chalupa to Shulyar (Mar. 30, 2016, 3:19 PM), Chalupa Dep., Ex. 7.

<sup>12</sup> Chalupa Dep. at 216:15-16.

<sup>13</sup> See *id.* at 216:15-22.

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Embassy that the press question could arise: “[T]his was important to flag, this question could come up, so that they weren’t caught off-guard. But I didn’t ask it in this regard, I just wanted them to know that it could come up”.<sup>14</sup> Ms. Chalupa also stated: “from my own individual perspective, I felt it was important wearing my Ukrainian-American activist hat [...], to basically flag it for them, that it could come up, that they should be prepared.”<sup>15</sup> Ms. Chalupa’s message *informed* Ms. Shulyar that Poroshenko might receive the press question. It did not *solicit* Poroshenko or the Embassy to take any specific action, let alone request or recommend an expenditure of resources, such as conducting research or preparing a file on Manafort.

Moreover, the prospect that Ms. Chalupa was flagging for the Ukrainian Embassy was a way that they could advance their own political goals and draw attention to the Russian influence in Ukraine, not for them to influence the presidential election. While it may be true that Luis Miranda thought drawing attention to Manafort could benefit the DNC, the General Counsel’s Brief must concede that this is not the test: “the question under the Act is whether the thing of value was provided for the purpose of influencing a federal election, not simply whether it provided a benefit to the recipient’s [committee].”<sup>16</sup> While of course nothing was actually provided here, Ms. Chalupa email was not about influencing a federal election, and staff at the Ukrainian Embassy did not interpret it as such. The email did not include a solicitation, and definitely did not include a solicitation to support the DNC.

The General Counsel’s Brief tries to make much of Ms. Chalupa’s use of the word “opportunity” in her email, but the actual “opportunity” she was discussing was the “*opportunity* to alleviate political pressure on Poroshenko’s administration by directing attention to Putin/Manafort” and the “*opportunity* to help Poroshenko’s administration.”<sup>17</sup> While her email refers to the fact that the Manafort issue could receive heightened press attention because of his involvement with Donald Trump, the point was that his role in the U.S. elections could help draw attention to the Ukrainian agenda and that “Manafort [was] back in Kyiv”<sup>18</sup>, not that the Ukrainians should engage in U.S. matters. OGC also repeatedly relies on the line in the email that Ms. Chalupa could “get Democratic presidential candidates aware and engaged”, but conveniently ignores the fact that the same line also refers to engaging “the Republicans.”<sup>19</sup> In deciding whether to contact the Embassy regarding the potential press question, Ms. Chalupa consulted with a personal contact, \_\_\_\_\_, who was not politically aligned with Democratic candidates, and the two agreed that the Manafort issue was a “national security” issue rather than a “political” issue.<sup>20</sup> Ms. Chalupa’s idea was that the Ukrainians could use the U.S. elections, on a bi-partisan basis, to shine the spotlight on Ukrainian matters, not the other way around. That is

<sup>14</sup> *Id.* at 216:21 - 217:4.

<sup>15</sup> *Id.* at 217:14-19.

<sup>16</sup> General Counsel’s Brief at 21 (internal citations omitted).

<sup>17</sup> *See* Email from Chalupa to Shulyar (Mar. 30, 2016, 3:19 PM), Chalupa Dep., Ex. 7 (emphasis added).

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See* Chalupa Dep. at 214:16 - 215:9.

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why no one at the DNC played any role in crafting the “messaging” that Ms. Chalupa included in the email.

No one from the DNC reviewed the email or told Ms. Chalupa what to write.<sup>21</sup> Ms. Chalupa said the email “was done completely independently” of the DNC and the email was “mostly shaped by [her] conversation with \_\_\_\_\_, which was separate” from her interactions with the DNC.<sup>22</sup> Ms. Chalupa’s email makes no mention of the DNC in any way and was sent from a personal email account.<sup>23</sup> Even in communications outside of the email, Ms. Chalupa did not represent to the Embassy that the DNC was involved at all with the potential press question regarding Manafort.<sup>24</sup> Tellingly, Ms. Shulyar stated: “According to my personal observation and understanding, these were Alexandra Chalupa’s individual initiatives stemming from her personal beliefs, and I do not remember anything indicating they were dictated or encouraged by the DNC.”<sup>25</sup>

As OGC recognizes, Ms. Chalupa is a longtime activist in the Ukrainian-American community and developed an interest in Paul Manafort’s activities in Ukrainian politics as early as 2008.<sup>26</sup> Ms. Chalupa has invested much of her personal and professional time and energy in Ukraine’s affairs. She also has a history of working as a private person to expose Manafort’s role in Ukrainian politics. For example, in 2014 Ms. Chalupa tried to convince a U.S. news publication to write an exposé on “Manafort’s work in Ukraine for Russian-backed politicians.”<sup>27</sup> Ms. Chalupa believed that she was “as clear as much as [she] could have been” that she was acting in her personal capacity in her communications with the Embassy.<sup>28</sup> While a DNC staff person may have been interested in whether Manafort was discussed at a press conference, Ms. Chalupa’s outreach was a continuation of her previous personal work and simply not about doing anything for the DNC or to influence U.S. elections.

Ms. Chalupa provided the Ukrainian Embassy an advisory, but did not actually ask that they do anything in particular, let alone provide something to influence a federal election on behalf of the DNC. She did not intend her email to be read that way, the recipient did not understand it in that way, and the email did not even refer to the DNC. Under any fair review of the facts, Ms. Chalupa’s email does not meet the legal definition of a “solicitation” for the DNC.

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<sup>21</sup> See *id.* at 229:9-14.

<sup>22</sup> *Id.* at 229:14-17.

<sup>23</sup> See Email from Chalupa to Shulyar (Mar. 30, 2016, 3:19 PM), Chalupa Dep., Ex. 7.

<sup>24</sup> See Chalupa Dep. at 219:17 - 221:3.

<sup>25</sup> Shulyar Written Statement at 3; see also Shulyar Additional Points and Elaborations (July 2020) at 1 (“I can reconfirm that based on Alexandra’s communication and presentation, I had got a strong impression that it was her personal initiative and cause.”).

<sup>26</sup> General Counsel’s Brief at 3-4.

<sup>27</sup> Chalupa Aff. at 7; see also Chalupa Dep. 123:10 - 124:8.

<sup>28</sup> See *id.* at 425:11-18; see also *id.* at 217:9-9 (“[A]t the end of the day it was my own capacity.”).



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### III. Ms. Chalupa's Email Does Not Concern a Contribution or Thing of Value

Although Ms. Chalupa's email did not actually solicit the Ukrainian Embassy to take any specific action, nothing contemplated in this fact pattern would have amounted to a "contribution" to the DNC even if it did occur. Taking a single question from a reporter is not "anything of value" for which there is a "usual and normal charge" under the Act and Commission regulations, and despite OGC's inventive reading of the facts, no other type of DNC support is even suggested in this case. Speech itself is not limited by the Act.

The Act defines "contribution" as "any gift ... of money or anything of value made by any person for the purpose of influencing any election for Federal office."<sup>29</sup> "Anything of value" encompasses "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services."<sup>30</sup> The Commission's regulations provide a demonstrative list of goods and services that constitute something of electoral value to the campaign: securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists.<sup>31</sup> Taking a question from a reporter does not meet this regulatory standard.

Under previous FEC authority, it is clear that the activities even potentially contemplated in this matter could not amount to "anything of value" as a matter of law. For example, in Advisory Opinion 2007-22 (Hurysz), the Commission specifically approved a candidate's plans to consult with Canadian citizens to learn about their election activities without providing payment.<sup>32</sup> The Commission ruled the campaign could "travel to Canada to consult with Canadian citizens who have managed successful third party campaigns, and to observe third party campaign operations."<sup>33</sup> On the other hand, the Commission found that the candidate could not accept free "printed materials" from Canadian citizens. These materials would have included "flyers, advertisements, door hangers, tri-folds, signs, and other printed material."<sup>34</sup> The Commission determined the provision of these items at no charge would have resulted in an impermissible in-kind contribution because the "provision of these items without charge would relieve [the] campaign of the expense that it would otherwise incur to obtain such materials."<sup>35</sup> The distinction was that a foreign national answering questions was perfectly appropriate as there is no "usual and normal" charge for this type of activity; it is simply not a "good or service" for which political committees pay. Had Poroshenko actually been asked about Manafort by the press and provided an answer, it would still not have been a contribution because there is no "usual and normal charge" for responding to a reporter. Any finding to the contrary would come

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<sup>29</sup> 52 U.S.C. § 30101(8)(A)(i).

<sup>30</sup> 11 C.F.R. § 100.52(d)(2).

<sup>31</sup> *Id.* § 100.52(d)(1).

<sup>32</sup> Advisory Opinion 2007-22 (Hurysz).

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.*



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as shocking news to the thousands of individuals every election who both talk to campaigns or their staff and also address questions from members of the press. The Commission's ruling in Advisory Opinion 2007-22 is clear: speech itself, answering a question, a verbal communication without an accompanying disbursement of funds to distribute the message, is not a reportable item of value under the Act, whether it arises from a foreign national or not.

The General Counsel's Brief also compiles a list of items that the Commission has previously deemed to be items of value under the Act in previous advisory opinions and enforcement matters. Commissioner Weintraub recently engaged in a similarly exhaustive exercise.<sup>36</sup> None of this authority suggests that something like taking a reporter's question could constitute a "thing of value" for purposes of campaign finance law. For example, the General Counsel's Brief cites Advisory Opinion 1990-12 for the conclusion that "if a campaign volunteer shared the results of a poll he had previously commissioned, or even used his knowledge of the poll results to provide the campaign with strategic advice, the value of the poll results would be an in-kind contribution."<sup>37</sup> Yet, there is no poll or other paid research at issue in this case. Similarly, the General Counsel's Brief refers to the Commission's finding in MUR 5409 that a "corporation made prohibited in-kind contributions by providing a campaign with its nonpublic lists of organizations and individuals with similar political views, which the corporation 'utilized its resources to obtain and compile,' and which 'contain[ed] information that may be of value in connection with' a federal election."<sup>38</sup> This too is inapposite. The Commission regulations specifically contemplate that "membership lists" and "mailing lists" are things of value,<sup>39</sup> but there are no "membership lists" or "mailing lists" at issue here. The General Counsel's Brief then cites to the Commission's decision in MUR 5409 regarding the provision of nonpublic information as an in-kind contribution.<sup>40</sup> But again, there was no potential transfer of non-public information in this case. As Ms. Shulyar states in her written statement provided to the Commission, any activity contemplated in Ms. Chalupa's outreach was "limited to the field of stirring a publicly open discussion by amplifying information that had been already publicly available."<sup>41</sup> OGC's authority simply does not support its conclusions. The General Counsel's Brief cites precedent concerning contact lists and commissioned polls, all things with

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<sup>36</sup> See The Law of a 'Thing of Value,' Ellen L. Weintraub (October 2019), <https://www.fec.gov/resources/cms-content/documents/2019-10-ELW-the-law-of-a-thing-of-value.pdf> (summarizing Commission rulings on what constitutes a thing of value, and providing the following examples: opposition research; an activist's contact list; an email list; staff time; a business name or logo; a severance payment; the production elements for an event; election materials; a rent-stabilized apartment; office space; a boat; stocks and commodities; barter credit units and cryptocurrency mining awards; a gold coin; poll results; and more generally, securities, facilities, equipment, supplies, personnel, advertising services, membership lists, mailing lists). Answering a press question bears no resemblance to anything the Commission has previously determined to be a thing of value.

<sup>37</sup> General Counsel's Brief at 17.

<sup>38</sup> *Id.*

<sup>39</sup> 11 C.F.R. § 100.52(d)(1).

<sup>40</sup> General Counsel's Brief at 21.

<sup>41</sup> Shulyar Written Statement at 4.

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ascertainable value separate from pure speech. These are good example of conduct that is appropriate to regulate, but are also radically different than the facts here.

Given that there is no authority from the Commission suggesting that there is a “usual and normal charge” for taking a question from a reporter, OGC has had to reinvent the facts before it. OGC alleges the DNC sought “the use of the Ukrainian government’s official resources — including, *e.g.*, the personnel and supplies needed to research and draft the Manafort statement, as well as to prepare Poroshenko to deliver it — to confer a potential electoral benefit on the DNC’s efforts in the 2016 presidential election.”<sup>42</sup> But there is simply no request in Ms. Chalupa’s email, or anywhere else in the record, for the Ukrainian Embassy to do anything of the kind. OGC is engaged in pure speculation and conjecture, which is one thing at the “reason to believe” stage, but is wholly inappropriate after you actually have all the facts. The General Counsel’s Brief emphasizes that “personnel and supplies [would be] needed to research and draft the Manafort statement”<sup>43</sup> - the key thing “of value” that the DNC has apparently solicited. And yet, Ms. Chalupa did not even ask the Ukrainian Embassy to issue a statement, let alone conduct new research or use unidentified “supplies” to prepare one. Similarly, there is no basis to conclude that resources would necessarily have to be expended to “prepare” Poroshenko to speak to the press. While Ms. Chalupa’s email suggests that Poroshenko should be “prepared” to address a question on Manafort, at no point does her message indicate that she means anything other than alerting him that the question could be asked. OGC relies on words that “indicate” that taking a reporter’s question “would likely” involve “potentially limited” resources, but nowhere does Ms. Chalupa actually request that a foreign national actually perform “services” or use “supplies” for the DNC.<sup>44</sup> OGC is imagining what kind of resources could theoretically be expended for a press statement that didn’t happen and which Ms. Chalupa didn’t actually request. This is not the kind of record that can support a probable cause finding.

Ultimately, it is telling that the General Counsel’s Brief equates the “value” that the DNC could theoretically have received or that Ms. Chalupa was implicitly requesting to an advertising campaign or “paid electioneering activity.”<sup>45</sup> At most, what Ms. Chalupa was contemplating was for President Poroshenko to engage in a communication. However, the Commission actually has regulations to determine when a communication, like an advertising campaign or paid electioneering activity, potentially constitutes a “contribution.” OGC ignores them completely. Nothing in OGC’s investigatory record suggests that Ms. Chalupa was actually requesting the Ukrainian Embassy to distribute a “paid” “public communication” that would satisfy the three-prong test for “coordinated communications” under 11 C.F.R. § 109.21. Through decades of rulemakings and well thought out decisions, the Commission has already defined what types of speech and communications can constitute contributions. Nothing in this precedent suggests that

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<sup>42</sup> General Counsel’s Brief at 18.

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

<sup>44</sup> *Id.* at 20.

<sup>45</sup> *Id.* at 19.

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a communication like merely talking to a reporter is a “thing of value” subject to the Act’s limits and reporting requirements, even when there is no cost incurred to distribute a message. Indeed, such a theory would fundamentally undermine the working of a free press on political matters and free expression through “Internet communications.”<sup>46</sup> It would be wholly inappropriate, a violation of Respondent’s due process rights, and an undue infringement on the First Amendment for the Commission to so radically change its approach to valuing communications and speech itself without notice through the enforcement process.<sup>47</sup>

After OGC’s investigation, it is clear that this case does not include “opposition research,” “polling,” “advertising services,” or any of the other items that actually do have a “usual and normal charge” and are “things of value” under FEC regulations. Moreover, the claims in the General Counsel’s Brief regarding a request that the Ukrainian Embassy use “services” or “personnel” are simply invented; such requests do not appear in Ms. Chalupa’s email. There is no indication that the Ukrainian Embassy ever expended such resources or thought that they were being asked to do so. Ms. Chalupa’s email does not actually “solicit” anything, but to the extent some action is contemplated, it is merely responding to a reporter’s question if asked. A “communication” like this would never been a “contribution” under the Act or the Commission’s regulations. The DNC simply did not receive or solicit anything amounting to a contribution or item of value from a foreign national.

## CONCLUSION

Foreign nationals should not contribute, or even be asked to contribute to political parties or campaigns. The DNC applauds the Commission’s efforts to keep foreign money out of our elections. At the start of this matter, the Commission may have thought that it had a case on its hands involving such a prohibited contribution based on inaccurate reporting about mythical

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<sup>46</sup> See 11 C.F.R. §§ 100.26, 100.73, 100.94.

<sup>47</sup> See *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) (“[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked.”) (internal quotations omitted); *Fed. Comm’n Comm’n v. Fox Television Stations*, 567 U.S. 239, 253 (2012) (“[T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.”). See also Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, MUR 5724 (Jim Feldkamp for Congress) (Dec. 11, 2009) (stating that the law on familial gifts had become “hopelessly muddled” and that “respect for due process and fundamental fairness demand[ed]” that the Commission not penalize a respondent until it “articulate[d], either by rule or through policy statement, the permissible boundaries” of the law); Statement of Reasons of Chair Ellen L. Weintraub, Vice Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Steven T. Walther in MURs 7263 (Luke Messer) and 7264 (Todd Rokita) (June 20, 2019) (rejecting the Office of the General Counsel’s recommendation to investigate based in part on “lack of explicit guidance” on a specific issue).

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Ukrainian opposition research. Yet OGC's investigation showed that this was actually not the case. Accordingly, the appropriate thing for the Commission to do now is to close this matter. While the Office of General Counsel is inexplicably recommending that Commission find probable cause that the DNC solicited a foreign nation, the facts and the law simply do not support such a holding. There was no DNC solicitation of a "contribution" or thing of "value" "for the purposes of influencing a federal election" and the Commission should find that there is no probable cause to believe a violation has occurred.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'G. Wilson', with a stylized flourish at the end.

Graham M. Wilson

Jordan M. Movinski

*Counsel to Democratic National Committee*