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June 5, 2023

Federal Election Commission  
1050 First St. NE  
Washington, DC 20463

**Re: REG 2019-03 (Mailing List Exchange)**

Dear Commissioners:

Independent-expenditure-only political committees — commonly known as “super PACs” — play an increasingly pervasive role in our elections. Despite the legal requirement that they remain wholly independent of candidates, super PACs have been documented providing operational support and voter data to candidates, which is particularly valuable early in an election cycle when candidates’ campaigns are just getting off the ground.<sup>1</sup> This trend appears poised to continue in the 2024 presidential election: reports indicate that the super PAC “Never Back Down” intends to provide substantial operational support for presidential candidate Ron DeSantis, including by engaging in a “list swap” with DeSantis’s authorized campaign committee.<sup>2</sup> At present, the FEC does not apply disclosure requirements

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<sup>1</sup> *E.g.*, Alex Isenstadt, *A mole hunt, a secret website and Peter Thiel’s big risk: How J.D. Vance won his primary*, POLITICO (May 3, 2022), <https://www.politico.com/news/2022/05/03/jd-vance-win-ohio-primary-00029881> (“[U.S. Senate candidate J.D.] Vance was a first-time candidate, and he lacked a donor base able to keep up on the fundraising front with his rivals. . . . As the primary got underway, the super PAC took on the responsibilities typically overseen by campaigns: It built out an extensive data operation, sent text messages to supporters encouraging them to attend Vance’s events, and hosted tele-town hall events the candidate participated in.”); First Gen. Counsel’s Rpt., MUR 6932 (Clinton) at 6, 23 (describing how a super PAC and the just-announced Hillary Clinton presidential campaign swapped email lists of 4 million supporters in 2015).

<sup>2</sup> Michael Scherer, Isaac Stanley-Becker & Ashley Parker, *DeSantis Group Plans Field Program, Showing the Expanding Role of Super PACs*, Wash. Post (Apr. 19, 2023), <https://www.washingtonpost.com/politics/2023/04/19/desantis-super-pac-campaign/> (“At a recent Iowa event for Never Back Down . . . volunteers collected the names and contact information of about 48 attendees. . . . While the super PAC and a campaign cannot pool such data, they are allowed to engage in equal-value list swaps to take advantage of each other’s efforts, campaign finance attorneys say.”).

to exchanges of voter lists of purportedly equal value, undermining transparency.<sup>3</sup> And this reported transaction between DeSantis’s campaign and the super PAC dedicated to supporting his candidacy may only be the first of many such list swaps between federal candidates and their sponsor super PACs during the 2024 election.

Against this troubling backdrop, Campaign Legal Center (“CLC”) respectfully urges the Commission to make REG 2019-03 (Mailing List Exchange) a top priority. CLC filed a petition for rulemaking on the topic of equal-value list swaps nearly *four years* ago. The petition requested that the Commission promulgate a rule requiring political committees to report the receipt and disbursement of any mailing/email list or other valuable information, regardless of whether the list was received or disbursed as part of a purported equal-value swap.<sup>4</sup> The petition noted that the Federal Election Campaign Act mandates the reporting of *all* receipts and disbursements, and that advisory opinions exempting equal-value list swaps from the reporting requirements misinterpret the law — with serious detrimental effects for transparency and voters’ right to know who is spending to influence elections.<sup>5</sup>

This important matter appears to have stalled. The Commission published a notice of availability and solicited comments on the rulemaking petition through October 2019, but has taken no further action.<sup>6</sup> Although the Commission lacked a quorum for part of the interim time, the agency has now consistently maintained a full quorum for the past two-and-a-half years and still has failed to act on this matter. CLC thus renews its request, as it did almost exactly three years ago,<sup>7</sup> to address this specific gap in the Commission’s approach to ensuring that candidate campaigns and other political committees are fully disclosing all their financial transactions, as the Federal Election Campaign Act requires.

It is more vital than ever that the Commission promulgate a regulation clarifying that purported equal-value list swaps must be disclosed. Under the FEC’s current approach, Never Back Down and DeSantis’s campaign committee could avoid disclosing the value of a list exchange, as long as they claim the exchanged lists were of equal value, and there would be no way for regulators, watchdog groups, or the public to assess whether the exchanged lists were truly of equal value or if the super PAC actually made a prohibited contribution by providing the DeSantis campaign with a more valuable list than it received in return.

Further, this is just one potential list swap out of many that may happen during the 2024 election. Without regulatory reform, there is no way for the public or the Commission to effectively police whether any of these transactions are resulting in

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<sup>3</sup> Advisory Op. 2002-14 (Libertarian National Committee) at 5; Advisory Op. 1981-46 (Dellums) at 2.

<sup>4</sup> CLC, Petition for Rulemaking to Amend 11 C.F.R. § 104.3 to Clarify that Political Committees Must Disclose Receipts and Disbursements of Exchanged Lists (June 28, 2019).

<sup>5</sup> *Id.*

<sup>6</sup> Rulemaking Petition: Requiring Reporting of Exchanges of Email Lists, 84 Fed. Reg. 45,116 (Aug. 28, 2019).

<sup>7</sup> CLC Letter at 6–7 (June 16, 2020).

excessive or unlawful in-kind contributions, or even to know which super PACs are engaging in these significant transactions with the candidates from whom they are theoretically independent.

To provide the transparency required by statute, and to avoid the need for judicial intervention, the Commission should address this issue of purportedly equal-value list exchanges before the 2024 election gets farther underway.

Respectfully submitted,

          /s/ Saurav Ghosh          

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