June 23, 2023

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

Re: Interim Final Rule Amending 11 C.F.R. § 110.4(b)(1)(iii)

Dear Ms. Stevenson:

Campaign Legal Center ("CLC") respectfully submits this comment on the Federal Election Commission's (the "Commission") Interim Final Rule Amending 11 C.F.R. § 110.4(b)(1)(iii), which would repeal a regulation that prohibits knowingly helping or assisting any person in making a contribution in the name of another (the "help or assist" regulation).[1] The Commission's interim final rule states that the putative basis for this repeal is a decision by the U.S. District Court for the District of Utah in *FEC v. Swallow*, in which the Commission sought to enforce the regulation against a defendant who allegedly assisted a co-defendant in making about 20 straw donor contributions to a federal candidate.[2] The district court found the "help or assist" regulation to be invalid and granted the defendant's motion to dismiss the Commission's claim against him.[3] The district court's order further enjoined the Commission from enforcing the rule and "ordered [the regulation] stricken from the Code of Federal Regulations."[4]

As we noted in our previous comment,[5] although the Commission did not appeal the *Swallow* decision and is currently declining to enforce the help or assist regulation, its hands are not tied; the Commission can still enforce the help or assist regulation in future cases brought against other parties in other jurisdictions — but only if the regulation remains on the books. In light of the help or assist regulation's important

1 11 C.F.R. § 110.4(b)(1)(iii); *see* 52 U.S.C. § 30122.

2 *See FEC v. Swallow*, 304 F. Supp. 3d 1113, 1114 (D. Utah 2018).

3 *Swallow*, 304 F. Supp. 3d at 1118.

4 *Id.* at 1119.

5 Campaign Legal Center ("CLC") Comment on REG 2018-06 (May 17, 2023), https://sers.fec.gov/fosers/showpdf.htm?docid=422999.

role and purpose, we urge the Commission not to repeal this important bulwark against blatantly corrupt conduct.

A single district or appellate court's decision invaliding a federal regulation does not require an agency to stop enforcing the regulation altogether, as the Commission knows from past experience. Federal courts have long recognized that an agency can enforce its regulations everywhere except where a court has ruled that it cannot do so. Indeed, the Supreme Court made clear decades ago that doing so is particularly critical to the development of the law and to the functioning of executive agencies: In *United States v. Mendoza*, the Supreme Court held that the government is not "collaterally estopped" by a prior adverse court decision from raising an argument or legal claim against a different party in another jurisdiction, even when the government elected not to appeal that adverse decision.[6]

Noting both the "the geographic breadth of government litigation" and the fact that "[g]overnment litigation frequently involves legal questions of substantial public importance," the court explained that preventing the government from litigating the same legal issues against a different party would "thwart the development of important questions of law by freezing the first final decision" on such questions.[7] The court also acknowledged that because the government's decision not to appeal a particular case involves a variety of policy considerations — *e.g.*, resource allocation, prioritization of cases — and that the government's policy goals may change depending on agency leadership, a prior decision not to appeal does not preclude the government from raising the same legal claims against a different party.[8]

The Commission followed *Mendoza* in denying a petition for rulemaking that asked the agency to remove 11 C.F.R. § 100.22(b)'s definition of "express advocacy" from the regulations based on a Fourth Circuit decision holding the regulation invalid:

> [T]he rule of *stare decisis* requires only that a decision by a circuit court of appeals be followed within the circuit in which it is issued. Since government agencies typically operate nationwide, it is not unusual for an agency to find that different courts have interpreted its statutes or rules in different ways.
>
> The Supreme Court has recognized that, when confronted with this situation, an agency is free to adhere to its preferred interpretation in all circuits that have not rejected that interpretation. It is collaterally estopped only from raising the same claim against the same party in

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[6] *United States v. Mendoza*, 464 U.S. 154, 162 (1984).

[7] *Id.* at 160. The court also noted that such a practice would force it to reevaluate its practice of "waiting for a conflict to develop" before granting *certiorari*, in addition to forcing the Solicitor General to appeal adverse rulings without consideration of prudential factors such as resource allocation. *Id.* at 160–61.

[8] *Id.* at 161.

> any location, or from continuing to pursue the issue against any party in a circuit that has already rejected the agency's interpretation.[9]

In view of this principle, the Commission maintained its position that the "express advocacy" definition was constitutional and continued to enforce section 100.22(b) in other courts.[10]

In fact, the Fourth Circuit decision on which the rulemaking petition to strike section 100.22(b) was based — *Virginia Society for Human Life, Inc. v. FEC* ("VSHL")[11] — itself concluded that a nationwide injunction preventing any future enforcement of the regulation would have conflicted with the principle that circuit court decisions are only binding within the circuit.[12] Citing *Mendoza*, the court noted that it was wary of stymying the development of the relevant legal questions, and said the FEC "must" be allowed to "press its position" in courts that had not yet ruled on the constitutionality of the regulation.[13] The Fourth Circuit's acknowledgement that a circuit court's decision "is only binding within its circuit" — which the Commission explicitly echoed in declining to open a rulemaking to strike section 100.22(b) — plainly undermines the notion that a single district court's judgment can render a federal regulation unenforceable and invalid in all future matters across every federal district and circuit.

Indeed, in a concurring opinion joined by Justices Thomas and Barrett issued today in *United States v. Texas*, Justice Gorsuch outlined some of the fundamental problems raised when a federal district court vacates or enjoins agency action across the nation — echoing some of the concerns previously articulated in *Mendoza*:

> The temptations a single district judge may face when invited to vacate agency rules are obvious. Often, plaintiffs argue that everyone deserves to benefit from their effort to litigate the case and the court's effort to decide it. Judges may think efficiency and uniformity favor the broadest possible relief. But there are serious countervailing considerations. . . . [V]acatur can stymie the orderly review of important questions, lead to forum shopping, render meaningless rules about joinder and class actions, and facilitate efforts to evade the APA's normal rulemaking processes. . . . [U]niversal relief, whether by way of injunction or vacatur, strains our separation of powers. It exaggerates the role of the Judiciary in our constitutional order,

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[9] Definition of "Express Advocacy," 63 Fed. Reg. 8363, 8363–8364 (Feb. 19, 1998) (citing *Mendoza*, 464 U.S. at 154).

[10] *See id.* at 8364. The Commission further stated that "declining to follow one Circuit Court's decision nationwide" is "the norm." *Id.*

[11] 263 F.3d 379 (4th Cir. 2001).

[12] *Id.* at 392. The court also concluded that a nationwide injunction would "not provide any additional relief to VSHL." *Id.* at 393.

[13] *Id.* at 393–94 (citing *Mendoza,* 464 U.S. at 160).

> allowing individual judges to act more like a legislature by decreeing the rights and duties of people nationwide.[14]

The Commission's suggestion here, that the *Swallow* decision *requires* it to strike the "help or assist" regulation — five years after that decision was issued — is inconsistent with these judicial precedents and its own prior statements. Indeed, in the interim final rule, the Commission acknowledges that "agencies are permitted in certain circumstances to maintain the invalidated interpretation of the statute or regulation in later matters that will come before courts in other jurisdictions,"[15] but claims that those "circumstances" are not present here because it chose not to appeal the *Swallow* decision and is not currently seeking to relitigate its holding elsewhere.

That argument misstates the law and fails to account for the fact that the agency is legally permitted to make a different policy choice regarding future enforcement of the help or assist regulation in other jurisdictions. As the Supreme Court recognized in *Mendoza*, and as the Commission acknowledged in rejecting the rulemaking petition to strike section 100.22(b), although the federal government may have discretionary reasons for declining to appeal a particular adverse court ruling, it remains free to defend the same position in a *future* case involving a different opposing party.[16]

Accordingly, absent repeal, the Commission — and the Department of Justice — would remain free to enforce the "help or assist" regulation in the future, in all other jurisdictions.[17] The proposed repeal of the help or assist regulation would, by contrast, foreclose any future enforcement of the help or assist regulation, which would be a particularly poor decision because of the important role that this regulation has served, and should continue to serve, in upholding the Commission's mission of preventing corruption and enhancing transparency.

Section 30122's prohibition of contributions in the name of another supports FECA's disclosure regime, which maintains vital electoral transparency, and prevents the circumvention of federal contribution limits and prohibitions, including provisions that prohibit contributions by corporations, federal contractors, and foreign nationals. Put simply, FECA requires every contribution to be made and disclosed in the name of the true contributor providing the funds. The help or assist regulation advances that crucial goal by making it unlawful for someone to knowingly organize, execute, or facilitate an illegal straw donor scheme — *i.e.*, proscribing the conduct that helps effectuate or accomplish such a scheme. As such, the help or assist regulation reasonably implements Section 30122 because, as the Commission argued

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[14] *United States v. Texas*, 599 U.S. ___ (2023) (Gorsuch, J., concurring) (slip op., at 17–18), https://www.supremecourt.gov/opinions/22pdf/22-58_i425.pdf.

[15] Interim Final Rule at 3 n.1.

[16] *See Mendoza*, 464 U.S. at 160–62.

[17] Other federal district courts may, of course, decide to defer to the *Swallow* decision or adopt its reasoning in holding the help or assist regulation unenforceable, *e.g.*, *FEC v. Rivera*, Case No. 17-22643, 2018 WL 11426428 (S.D. Fla. Sept. 27, 2018), but that possibility obviously does not prevent the Commission from enforcing the rule.

in the *Swallow* litigation, it is "substantially related and closely drawn to the disclosure and anti-circumvention interests" that animate Section 30122.[18]

Prior matters illustrate why the help or assist regulation plays a crucial role in preventing contributions in the name of another. For instance, in MUR 6920, the American Conservative Union ("ACU"), Now or Never PAC, and James C. Thomas III acknowledged violating Section 30122 based on an elaborate conduit contribution scheme in which Thomas, Now or Never PAC's treasurer, played a key role in effectuating the contribution in the name of another.[19] While Thomas was neither the source nor recipient of the funds contributed in the name of another, and did not act as a conduit, his involvement was integral to accomplishing the unlawful scheme.[20] Absent the help or assist regulation, however, Thomas would likely have faced no accountability, despite his active participation in and furtherance of the scheme, for violating Section 30122.

As this case illustrates, repealing the help or assist regulation would undermine the enforcement of FECA, and could lead to absurd and unjust outcomes. The Commission itself appears to recognize the dire need for the help or assist regulation, or at least a legal prohibition consistent with it: for years, the Commission has asked Congress to amend FECA to include, under Section 30122, language that would "prohibit directing, helping or assisting the making" of a contribution in the name of another.[21] The Commission clearly understands that those "who initiate or instigate or have some significant participation in a plan or scheme to make a contribution in the name of another"[22] are engaged in wrongful, culpable conduct that undermines our elections, and it should not scrap the best tool it currently has to combat such conduct.

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[18] *FEC v. Jeremy Johnson*, FEC's Memorandum in Opposition to Motion to Dismiss at 8.

[19] Conciliation Agreement ¶ VI, MUR 6920 (American Conservative Union, *et al.*), (Oct. 31, 2017), https://www.fec.gov/files/legal/murs/6920/17044434756.pdf.

[20] *See* Gen. Counsel's Brief, MUR 6920 (Thomas) at 8–11, https://www.fec.gov/files/legal/murs/6920/17044435545.pdf ("[Thomas] wired the funds from [Government Integrity, LLC] to ACU, served as a point of contact among the Respondents regarding the transactions, accepted the funds on behalf of Now or Never PAC, and finally reported ACU as the source of the funds.").

[21] *E.g.*, FEC Legislative Recommendations for 2022 at 13 (Dec. 15, 2022), https://www.fec.gov/resources/cms-content/documents/legrec2022.pdf.

[22] Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,105 (Aug. 17, 1989), https://www.fec.gov/resources/cms-content/documents/notice1989-13-081789.pdf#page=8.

In sum, the Commission is not legally required to repeal the help or assist regulation, and doing so would be an exceedingly poor exercise of its discretion, undermining the enforcement of FECA's prohibition of contributions in the name of another, which plays a crucial role in preventing corruption, upholding transparency, and protecting voters. We therefore respectfully urge the Commission not to repeal 11 C.F.R § 110.4(b)(1)(iii).

Respectfully submitted,

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