FEDERAL ELECTION COMMISSION
Washington, DC

TO: The Commission

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SUBJECT: MURs 7968, 7969 (Donald J. Trump, *et al.*)
Supplemental Circulation to the Commission

This supplemental memorandum in the above-referenced matters provides additional information and analysis regarding the Commission's historical approach to the analysis of candidacy status under 52 U.S.C. § 30101(2)(A),[1] and what funds, raised or spent, count toward the $5,000 threshold for contributions or expenditures after which the Commission will deem an individual to have become a candidate.[2]

[1] Under the Act, "[t]he term 'candidate' means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election — . . . if such individual has received contributions aggregating in excess of $5,000, or has made expenditures aggregating in excess of $5,000." 52 U.S.C. § 30101(2)(A).

[2] A contribution is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or . . . the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." *Id.* § 30101(8)(A). An expenditure is "any purchase, payment, distribution, loan, advance, deposit, or gift of anything of value, made by any person for the purpose of influencing any election for Federal office; and . . . a written contract, promise or agreement to make an expenditure." *Id.* § 30101(9)(A).

I. THE COMMISSION'S WELL-ESTABLISHED CANDIDACY STATUS ANALYSIS DEMONSTRATES THAT TRUMP BECAME A CANDIDATE LONG BEFORE HIS NOVEMBER 2022 FORMAL ANNOUNCEMENT

The Commission has historically evaluated candidacy status by first addressing the individual's intent to run, then turning to their subsequent contributions and expenditures to determine whether and when the $5,000 threshold is met. In MUR 5908 (Duncan Hunter, *et al.*), for example, the Commission structured its analysis to first answer whether the individual had determined to run, before turning next to whether he had crossed the statutory threshold:

> Based on statements made in October and December 2006, it appears that Hunter may have already decided to become a candidate prior to filing his Statement of Candidacy on January 23, 2007. . . . Having apparently already made the decision to run for President and advertising that decision to the general public, the only remaining question is when did he raise or spend $5,000 in support of his campaign.[3]

Subsequently, in MUR 6775 (Hillary Clinton, *et al.*), the Commission did not address whether Clinton may have crossed the $5,000 statutory threshold because the initial issue of whether she had made a private determination to run indicated that she had not, rendering further analysis unnecessary. The Commission explained:

> Thus, even assuming that Clinton authorized Ready for Hillary PAC to receive and spend funds exceeding $5,000 on her behalf as the Complaint alleges, she would not become a candidate as a result of those activities so long as they were related only to testing the waters. . . . [I]t appears that the actions of both Clinton and Ready for Hillary PAC are aimed at evaluating the feasibility of her candidacy and do not signify that Clinton has decided to become a candidate. Because neither Clinton nor Ready for Hillary PAC appear to have received contributions or made expenditures in excess of $5,000 in connection with seeking her nomination or election to federal office, Clinton would not have triggered candidate status under the Act even if she had consented to the activities of Ready for Hillary PAC.[4]

Also relevant is the Commission's Factual and Legal Analysis in MUR 6533 (Perry Haney, *et al.*), in which the Commission explained that an individual's determination to run for office is what makes the funds she receives or spends in advancing that goal "contributions" and "expenditures" in satisfaction of the section 30101(2)(A) threshold: "Once an individual begins

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[3] Factual & Legal Analysis ("F&LA") at 5 (Duncan Hunter, *et al.*), MUR 5908; *see* First Gen. Counsel's Rpt. ("FGCR") at 23, 27, 33 n.139, 42 n.183 (discussing MUR 5908 (Duncan Hunter, *et al.*)).

[4] F&LA at 8-10 (Hillary Clinton, *et al.*), MUR 6775; *see* FGCR at 38 n.163 (discussing MUR 6775 (Hillary Clinton, *et al.*)).

to campaign or decides to become a candidate, funds that were raised or spent to 'test the waters' apply to the $5,000 threshold for qualifying as a candidate, and the candidate must register with the Commission."[5]

Here, though Trump explicitly disclaims that he was ever testing the waters,[6] the overwhelming information available in the record indicates that Trump had made the private determination to run by June 2021, over a year before his formal announcement in November 2022. In accordance with the foregoing precedents, because Trump had made the private determination to run for federal office, the next question is when he raised or spent $5,000 in support of his campaign.[7]

II. THE $5,000 THRESHOLD WAS MET IN THESE MATTERS MONTHS BEFORE TRUMP FILED HIS NOVEMBER 2022 STATEMENT OF CANDIDACY

Turning to the question of what funds are considered contributions or expenditures sufficient to cross the $5,000 statutory threshold, the Commission has in prior matters straightforwardly applied the regulatory text in identifying "payments made for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign."[8] Neither the Commission nor federal courts have

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[5] F&LA at 3 (Perry Haney, *et al.*), MUR 6553 (citing 11 C.F.R. §§ 100.72(a), 100.131(a)); *see also* F&LA at 5 (Jon Bruning, et al.), MUR 6449 ("Once an individual begins to campaign or decides to become a candidate, funds that were raised or spent to 'test the waters' apply to the $5,000 threshold for qualifying as a candidate."). Much of the Commission's relevant precedent concerning questions of candidacy arises in the context of the testing-the-waters exemption. *See* F&LA at 4 (Paul Aronsohn), MUR 5693 (noting that the candidate's authorized committee had raised $5,000 by April 19, 2005, but determining that he did not become a candidate until he decided to run for office as evidenced by statements in an October 27, 2005 solicitation letter; having established that he had determined to run, the Commission then held that the funds he had raised while testing the waters satisfied the $5,000 threshold); Statement of Reasons ("SOR"), Vice Chairman Petersen & Comm'rs Hunter, McGahn & Weintraub at 1, MUR 5934 (Fred D. Thompson, *et al.*) (writing, without addressing how or whether the candidate had crossed the $5,000 threshold, "[b]ecause we do not believe Senator Thompson's public statements establish that he had definitively decided to become a federal candidate before he filed his Statement of Candidacy on September 6, 2007, we voted against finding reason to believe that a violation occurred"); SOR, Vice Chairman Petersen & Comm'rs Hunter, McGahn & Weintraub at 1, MUR 5930 (writing, without addressing how or whether the candidate had crossed the $5,000 threshold, "[b]ecause Mr. Schilling's public statements failed to establish that he had definitively decided to become a federal candidate before he filed his Statement of Candidacy on October 12, 2007, we voted to dismiss the complaint in this case"); F&LA at 7-9 (Alfred C. Sharpton), MUR 5363 (finding reason to believe, on the basis of Sharpton's statements in his October 2002 book, despite later equivocal statements, that he had become a candidate and had crossed the $5,000 threshold via raising more than $5,000 in contributions by August 2002).

[6] Resp. of Donald J. Trump, *et al.*, at 2, MUR 7968 ("[N]either Donald J. Trump nor any other Respondent has . . . raised any money for testing[-]the[-]waters activities . . . ."); Resp. of Donald J. Trump, *et al.*, at 3, MUR 7969 (same); *see* FGCR at 21.

[7] *See* Advisory Opinion 2015-09 at 5 (Senate Majority PAC & House Majority PAC) ("[A]n individual who has raised or spent more than $5000 on 'testing-the-waters' activities would become a candidate when he or she makes a private determination that he or she will run for federal office.").

[8] 11 C.F.R. § 100.131(b).

ever before limited the scope of relevant "payments made" to express advocacy in connection with contributions or expenditures that satisfy this threshold.

Recently, in its May 2023 decision in *Ready for Ron v. FEC*,[9] a District Court for the District of Columbia determined that, if (then-undeclared) Florida governor Ron DeSantis were to accept a list of contacts gathered by an independent political committee, Ready for Ron ("RFR"), in the process of gathering signatures and data for a petition to encourage him to run for president, DeSantis would receive an "in-kind contribution" in excess of $5,000, the acceptance of which would render him "a candidate for federal office or . . . testing the waters."[10] At the time of the decision, dated May 17, 2023, DeSantis had not yet declared his presidential candidacy.[11]

The district court determined that the petition and contact list were created to influence an election for Federal office, and it described the list of contacts at issue as a "uniquely effective, tangible tool designed to assist [DeSantis] in purs[u]ing the presidency."[12] The court further held that the contact list was both a gift and a thing of value, rendering its provision by RFR to DeSantis a contribution (which would be excessive due to its value in excess of the applicable contribution limit).[13] Specifically, the court wrote that RFR "seeks to give Governor DeSantis a valuable contact list, and its purpose in doing so is to influence the 2024 election by inducing Governor DeSantis to become a candidate in that election and supporting him in his candidacy. Such a conveyance is a contribution under 52 U.S.C. § 30101(8)(A)(i)."[14] It went on to explain that:

> One of the things that makes RFR's contact list so valuable is that, at substantial expense, RFR has identified those voters most likely to support Governor DeSantis'[s] candidacy. These are the individuals who, if contacted, will presumably be most likely to make contributions to his campaign, to volunteer, and to show up at the polls. If any contact lists should be treated as in-kind

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[9] *Ready for Ron v. FEC*, No. 22-3282 (RDM), 2023 WL 3539633, Mem. Op. & Order (D.D.C. May 17, 2023) [hereinafter *Ready for Ron v. FEC*]. This opinion was issued after the circulation of the FGCR and prior supplement in these matters.

[10] *Ready for Ron v. FEC* at 2 ("As explained below, the Court agrees with the Commission that what RFR calls a petition is, in fact, a contact list and, more importantly, an in-kind contribution."); *id*. at 40 ("Based on its *de novo* review, the Court concludes that, if Governor DeSantis were to accept RFR's contact list, he would become a candidate for federal office or would at least be testing the waters. Either way, providing the contact list to Governor DeSantis for free would constitute an excessive and thus unlawful contribution.").

[11] *See* Ron DeSantis, Original Statement of Candidacy (May 24, 2023), https://docquery.fec.gov/pdf/806/202305249581677806/202305249581677806.pdf.

[12] *Ready for Ron v. FEC* at 17.

[13] *Id.* at 17-19. At the time of the Commission's advisory opinion to RFR, which plaintiffs brought this suit to challenge, the applicable limit was $2,900. *See* Advisory Opinion 2022-12 at 5 (Ready for Ron) ("The Act prohibits a political committee, other than a multicandidate political committee, from contributing more than $2[,]900 to any candidate with respect to any election for federal office.").

[14] *Ready for Ron v. FEC* at 19.

> contributions, surely those that are crafted to provide the most benefit to their recipients should be.[15]

The court held that accepting the contact list from Ready for Ron would render DeSantis a candidate, or indicate that he was testing the waters as of the time of acceptance:

> For instance, the Act "deem[s]" anyone who receives "contributions aggregating in excess of $5,000" to be a "candidate," makes it unlawful for any "candidate" to "receive . . . funds for any Federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of th[e] Act," and prohibits the "accept[ance] [] or recei[pt]" of a "contribution or donation" from a foreign national. RFR's "affirmative acts" test appears nowhere in the statutory text or governing regulations and, if adopted, would open the floodgates to circumvention of the statutory requirements. The Court thus has no difficulty concluding that Governor DeSantis would become a candidate or at least begin testing the waters were he to accept RFR's contact list.[16]

In these matters, the Facebook advertisements asking whether viewers would "Vote for Trump a 3rd Time" in connection with statements that "President Trump was the greatest President of all time" were both solicitations and information-gathering efforts directly tied to a third Trump presidential candidacy.[17] As discussed in the First General Counsel's Report, users interacting with the ad were directed to a page requiring the user to sign up for text messages "from President Trump" in order to answer the question posed by the poll; submitting a response then redirected the user to the WinRed contribution page for the Save America Joint Fundraising Committee.[18] Because the advertisements and associated poll "identif[y] those voters most likely to support [Trump's] candidacy,"[19] in just the same way as the court found in *Ready for Ron*, the Facebook advertisements at issue here likewise represent a "uniquely effective, tangible tool designed to assist [Trump] in purs[u]ing the presidency."[20]

The Commission has never applied a standard requiring express advocacy when interpreting the candidacy threshold, though it has at times noted that money spent on communications that included express advocacy was evidence that such spending counted toward the $5,000 threshold, and to indicate that a candidate had made a determination to run for office and was no longer testing the waters. Critically, the Commission has previously found the

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15 *Id.* at 26.

16 *Id.* at 42 (internal citations omitted, alterations in original).

17 These advertisements were first disseminated on April 11, 2022, and surpassed $5,000 in total cost between May 5 and May 11, 2022. *See* Export of Meta Ad Library Data

18 FGCR at 13-14.

19 *Ready for Ron v. FEC* at 26.

20 *Id.* at 17.

following categories of disbursements and in-kind receipts to constitute expenditures and contributions that satisfy the section 30101(2)(A) threshold: ballot access fees;[21] travel;[22] lodging;[23] post office box rental;[24] meet-and-greet lunches;[25] postage;[26] fundraising consulting and solicitations;[27] donor management software;[28] campaign staff and contractor salary;[29] film

[21] F&LA at 5 (Alvin M. Greene), MUR 6315 ("Therefore, once Mr. Greene paid the South Carolina Democratic Party $10,440 in ballot access fees on March 16, 2010, the same day he filed his Notice of Candidacy with the party, he exceeded the expenditure threshold for candidacy, and triggered the registration and reporting requirements for himself and his authorized committee.").

[22] F&LA at 7 n.36 (Amanda Adkins for Congress, *et al.*), MURs 7689, 7794 (noting that permissible testing-the-waters expenses that were properly reported and that would have counted toward the $5,000 threshold had Adkins made the determination to run included "travel"); F&LA at 19 (John R. Kasich, *et al.*), MURs 6955, 6983 (referencing "nearly two dozen trips out of Ohio on non-state business between January and July 2015 to meet with potential donors, participate in forums, and speak at various events"); F&LA at 10 (Scott Walker, *et al.*), MURs 6917, 6929 (finding payments by a third party organization for "travel for events at which Walker gave speeches indicating that he was considering a presidential candidacy" were in-kind contributions for testing-the-waters activities); F&LA at 5-6 (Carly Fiorina), MUR 6224 (noting permissible testing-the-waters expenditures that did not count toward the $5,000 threshold solely because Fiorina had not yet made a determination to run included "$54,935 for media/travel [and] $37,072 for polling/travel"); *see* FGCR at 31 n.128, 37 n.158 (discussing MURs 7689, 7794 (Amanda Adkins for Congress, *et al.*)); *id.* at 23 n.92, 26 n.107, 27, 30, 31 (discussing MURs 6955, 6983 (John R. Kasich, *et al.*)); *id*.at 29-30 & n.122 (discussing MURs 6917, 6929 (Scott Walker, *et al.*)); *id.* at 31 n.128 (discussing MUR 6224 (Carly Fiorina)).

[23] F&LA at 10 (Scott Walker, *et al.*), MURs 6917, 6929 (finding payments for "lodging on dates and in states that are consistent with Walker's attendance at events at which he made statements regarding a potential candidacy" were in-kind contributions for testing-the-waters activities).

[24] F&LA at 7 n.36 (Amanda Adkins for Congress, *et al.*), MURs 7689, 7794 (noting that expenses that would have counted toward the $5,000 threshold included "a post office box rental").

[25] *Id.* (noting that expenses that would have counted toward the $5,000 threshold included "a meet and greet lunch").

[26] *Id.* (noting that expenses that would have counted toward the $5,000 threshold included "postage").

[27] *Id.* (noting that expenses that would have counted toward the $5,000 threshold included "fundraising consulting"); F&LA at 3 (David Larsen*, et al.*), MUR 6999 (finding that expenditures that exceeded the $5,000 threshold included those for fundraising solicitations); *see* FGCR at 29 n.118 (discussing MUR 6999 (David Larsen, *et al.*)). While the solicitations in MUR 6999 involved express advocacy in that the logo, website, and campaign names associated with the solicitations were all variations on "Larsen for Congress," the Commission evaluated the presence of express advocacy to indicate that the candidate had determined to run for office. F&LA at 3 (David Larsen*, et al.*), MUR 6999.

[28] F&LA at 7 n.36 (Amanda Adkins for Congress, *et al.*), MURs 7689, 7794 (noting that expenses that would have counted toward the $5,000 threshold included "donor management software").

[29] *Id.* (noting that expenses that would have counted toward the $5,000 threshold included "contractor pay"); F&LA at 7-8 (Rand Paul), MUR 7191 (finding that Paul's leadership PAC had made excessive contributions in the form of funding "pre-candidacy efforts . . . that Paul received . . . in his capacity as a potential candidate" in the form of paying the salary of campaign office staff); *see* FGCR at 32 n.135 (discussing MUR 7191 (Rand Paul)).

footage of the candidate later used in campaign advertisements;[30] polling and survey research;[31] legal, compliance, and finance consulting;[32] and web services.[33] If communications associated with these expenditures contained or even related to express advocacy, the Commission did not mention it in its Factual and Legal Analyses.[34]

Even when the communications at issue in a matter have included express advocacy, the Commission has not framed the express advocacy as what brings the disbursement within the meaning of expenditure as applied to the candidacy threshold. Instead, express advocacy in a solicitation indicated that the candidate had concluded that he would run, and was not testing the waters:

> Finally, in a November 30, 2010, solicitation e-mail, Bruning stated, "Please help me defeat Ben Nelson in 2012 by making a contribution today. Together we can take back this country and bring true Nebraska values to Washington." That November 30, 2010, solicitation demonstrates that Bruning had by that time concluded he would run. By soliciting funds to be used to campaign against a specifically named opponent, Bruning made or authorized a statement that refers to himself as a candidate for a particular office, and thus certainly by this point he was no longer merely evaluating the viability of his candidacy but had decided to campaign for office.[35]

The Commission's determination that Bruning had crossed the $5,000 threshold did not relate to the express advocacy in the solicitation above, but rather to when Bruning transferred $448,349.52 from an account he had previously established in 2007 "as a testing[-]the[-]waters

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[30] F&LA at 19 (John R. Kasich, *et al.*), MURs 6955, 6983 (finding that contributions that crossed the $5,000 threshold included "an in-kind contribution" in the form of filming footage of Kasich used in a Kasich campaign ad).

[31] F&LA at 7-8 (Rand Paul), MUR 7191 (noting that "survey research" conducted for the benefit of pre-candidacy efforts, received as a potential candidate, would constitute testing-the-waters activity counting toward the $5,000 threshold); F&LA at 5-6 (Carly Fiorina), MUR 6224 (noting testing-the-waters expenditures that did not count toward the $5,000 threshold solely because Fiorina had not yet made a determination to run included "$37,072 for polling/travel").

[32] F&LA at 5-6 (Carly Fiorina), MUR 6224 (noting expenditures that would count toward the $5,000 threshold if Fiorina had determined to run included "$32,176.75 for legal and compliance consulting; $31,036 for finance consulting/travel").

[33] *Id.* (noting expenditures that would count toward the $5,000 threshold if Fiorina had determined to run included "$21,906 for web services").

[34] One exception is MUR 6999 (David Larsen*, et al.*), in which the Commission did mention express advocacy. *See supra* note 27.

[35] F&LA at 8 (Jon Bruning, *et al.*), MUR 6449 (internal citations omitted); *see* FGCR at 22, 31 n.128, 38 n.162 (discussing MUR 6449 (Jon Bruning, *et al.*)).

account, authorized by Mr. Bruning for the purpose of exploring a possible future federal candidacy" to his 2012 campaign.[36]

The plain meaning of the Commission's regulations is also instructive: under the exceptions to expenditures outlined for testing-the-waters activity in 11 C.F.R. § 100.131, the Commission chose to exempt certain kinds of activity from the definition of expenditures for individuals evaluating a prospective run for office. The activities explicitly listed in this section include "conducting a poll, telephone calls, and travel," so long as those activities are conducted "to determine whether an individual should become a candidate."[37] By including "payments made" for these activities in the *exception* to the definition of expenditures, and noting that the exemption is "not applicable to individuals who have decided to become candidates,"[38] the Commission's regulation indicates that these payments would otherwise constitute expenditures under the definition of that term at 52 U.S.C. § 30101(9)(A). None of "conducting a poll, telephone calls, and travel" inherently includes an express advocacy component.

In short, Save America's spending on Facebook advertisements asking whether individuals would "vote for Trump" were either expenditures or in-kind contributions because they were made by an entity under Trump's control to promote a candidacy Trump had already decided many months earlier to pursue. They thereby satisfy the $5,000 statutory threshold beyond which the Commission shall deem an individual to be a candidate. Accordingly, there is reason to believe that Donald J. Trump failed to timely file a statement of candidacy and designate an authorized committee.

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36 F&LA at 11 (Jon Bruning, *et al.*), MUR 6449.

37 11 C.F.R. § 100.131(a).

38 *Id.* § 100.131(b); *see* Advisory Opinion 2015-09 at 5, *supra* note 7.