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JUNE 20, 2023

VIA E-MAIL

Wanda Brown, Acting Assistant General Counsel
Kathryn Ross, Paralegal
Federal Election Commission
Office of Complaints Examination and Legal Administration
1050 First Street, NE
Washington, DC 20463
Email: CELA@fec.gov

Re: Matter Under Review 8132 (Fetterman for PA, Senator John Karl Fetterman, Warnock for Georgia, and Senator Raphael Warnock)

Dear Ms. Brown:

We write on behalf of Fetterman for PA, Senator John Karl Fetterman, Warnock for Georgia, and Senator Raphael Warnock (“*Respondents*”) in response to the Complaint filed by the Committee to Defeat the President (“*Complainant*”) in Matter Under Review 8132. Respondents have agreed to submit a joint response to the Complaint.

The Complaint alleges that Fetterman for PA and Warnock for Georgia (the “*Campaigns*”), along with two Democratic presidential campaigns, violated 52 U.S.C. § 30104(b)(2)(D), (b)(3)(B) and 11 C.F.R. § 10(a)(3)(iv), (a)(4)(ii) by accepting excessive, unreported in-kind contributions from ActBlue consisting of donor contact information.

However, the Complaint deliberately omits a key fact: **the Campaigns each paid ActBlue millions of dollars in fees in exchange for its donor processing services over the course of the 2022 election cycle.** It is only by ignoring this fact that Complainant could possibly conclude that a violation of federal law has occurred – the Complaint alleges that the Campaigns received donor contact information “without charge” when in fact the Campaigns paid ActBlue millions of dollars for their services. There is no reason to believe a violation of federal law or Federal Election Commission (“*FEC*” or “*Commission*”) regulations has occurred, because the Campaigns paid the fair market value for the services ActBlue provided.

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I. Factual and Legal Background

Fetterman for PA and Warnock for Georgia are the principal campaign committees of Senator John Fetterman and Senator Raphael Warnock.¹ ActBlue is a federal hybrid PAC that serves as a conduit or intermediary for contributions to Democratic campaigns and political committees.²

Like virtually all federal Democratic campaigns, the Campaigns created ActBlue accounts to allow them to accept contributions via ActBlue's online platform. When donors make contributions via ActBlue, ActBlue collects those contributions and transmits them to the Campaigns on a weekly basis (or more frequently as requested), either by check or by wire transfer. Commission regulations require the Campaigns to report contributions received via ActBlue as "conduit" contributions on their regular Form 3 filings.³ Commission regulations require the Campaigns to report the identity of the conduit (in this case, ActBlue) as well as the identity of the original contributor, including the contributor's name, mailing address, and, if the contributor has contributed over \$200 in the election cycle, the contributor's occupation and employer.⁴

The obligation to collect and report the required contributor information rests with both ActBlue, as the conduit, and the Campaigns, as the ultimate recipients of the contributions. When donors make contributions through ActBlue's platform, they are required to provide their name, mailing address, occupation, and employer. In addition to the name, mailing address, occupation, and employer, ActBlue includes a mandatory field for donors to enter an email address and an optional field for donors to enter their phone number.⁵

When it transmits contributions to the Campaigns, ActBlue is required to transmit the name, mailing address, occupation, and employer for each contributor.⁶ When it transmits the legally required information, ActBlue also transmits the email address and phone numbers collected via the online form. This additional contact information permits the Campaigns to satisfy their legal obligations to use their "best efforts" to contact contributors who did not submit the required contributor information and to confirm the legality of questionable contributions, such as by inquiring as to a contributor's citizenship status.⁷

¹ FEC Form 1, Fetterman for PA, <https://docquery.fec.gov/pdf/815/202303159579259815/202303159579259815.pdf>; FEC Form 1, Warnock for Georgia, <https://docquery.fec.gov/pdf/815/202303159579259815/202303159579259815.pdf>.

² ActBlue, About, <https://secure.actblue.com/about>; FEC Form 1, ActBlue, <https://docquery.fec.gov/cgi-bin/forms/C00401224/1491267/>.

³ See 11 C.F.R. §§ 110.6(c)(2), 102.8(c).

⁴ *Id.*

⁵ ActBlue, Privacy Policy, <https://secure.actblue.com/privacy> ("We require your email address when you donate so that we can email you a receipt.")

⁶ See 11 C.F.R. §§ 110.6(c)(1)(iv), 102.8(a)-(b).

⁷ *Id.* §§ 104.7(b)(2); 103.3(b); 110.20(a)(7).

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ActBlue charges the Campaigns a 3.95 percent fee for each contribution made via its platform. ActBlue subtracts the 3.95 percent fee from each contribution before transmitting the contribution to the Campaigns. When reporting contributions received through ActBlue, the Campaigns must report the full amount of the contribution from the underlying donor on their FEC reports and report the fee deducted as a disbursement to ActBlue.⁸

ActBlue has collected millions of dollars in fees from the Campaigns in this manner in exchange for processing these transactions. In the 2022 election cycle, Warnock for Georgia's reports show \$6,382,106.02 in disbursements to ActBlue.⁹ Fetterman for PA's reports show \$2,174,047 in disbursements to ActBlue.¹⁰

II. Legal Analysis

a. The Campaigns reasonably believed they were paying fair market value for all ActBlue services.

“[T]he provision of any goods or services without charge or at a charge that is less than the usual and normal charge” is an “in-kind” contribution.¹¹ However, no contribution occurs if the recipient of goods or services pays “the usual and normal charge.” The “usual and normal charge” for services is the “commercially reasonable rate prevailing at the time the services were rendered.”¹² The Campaigns paid ActBlue millions of dollars, which they understood to be the “usual and normal charge” for such services. The Campaigns acted reasonably in making this judgment and the Commission lacks sufficient information to second-guess it.

ActBlue is not a new platform. Since the mid-2000s, thousands of Democratic campaigns and committees have used the ActBlue platform to raise funds. They have paid ActBlue hundreds of millions of dollars in fees. And they have done so in reliance on *four* advisory opinions that ActBlue has obtained from the Commission.¹³ In these opinions – and others – the FEC has set forth requirements for the provision of payment processing services to political committees, finding that no in-kind contribution occurs as long as the service provider “acts as a commercial vendor by (1) rendering services in the ordinary course of business at the usual and normal charge or in exchange for bargained-for consideration; (2) forwarding contributions through a

⁸ See Adv. Op. 2007-04 (Atlatl), <https://www.fec.gov/files/legal/aos/2007-04/2007-04.pdf>.

⁹ FEC.gov, Disbursements, Warnock for Georgia, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00736876&recipient_name=actblue&two_year_transaction_period=2022 (accessed June 10, 2023).

¹⁰ FEC.gov, Disbursements, Fetterman for PA, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00765800&recipient_name=actblue&two_year_transaction_period=2022 (accessed June 10, 2023).

¹¹ 11 C.F.R. § 100.52(d)(1).

¹² *Id.* § 100.52(d).

¹³ Adv. Ops. 2006-30 (ActBlue), <https://www.fec.gov/data/legal/advisory-opinions/2006-30>; 2007-27 (ActBlue), <https://www.fec.gov/data/legal/advisory-opinions/2007-27>; 2014-13, <https://www.fec.gov/data/legal/advisory-opinions/2014-13>; 2014-19 (ActBlue), <https://www.fec.gov/data/legal/advisory-opinions/2014-19>.

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segregated account to candidates and committees; and (3) employing adequate screening procedures to ensure that the service provider does not forward illegal contributions.”¹⁴

Likewise, in one opinion, ActBlue represented to the Commission that its fees would include internal staff time and website costs or, alternatively, ActBlue would treat such expenses as in-kind contributions.¹⁵ The Complaint does not allege facts showing that ActBlue failed to comply with these conditions, and the Campaigns are unaware of any such facts.

To the contrary, the Campaigns have each paid ActBlue millions of dollars for its services. ActBlue’s 3.95 percent fee is similar to the fee charged by most commercial payment processing companies.¹⁶ This fee is also almost identical to (in fact, .01% higher than) the fee charged by the political contribution processing company WinRed, which provides similar contribution processing services – including the transmittal of email addresses – to Republican candidates and campaigns.¹⁷ “The Commission has previously advised that a committee may determine the ‘usual and normal charge’ for goods or services by looking to the ‘fair market value’ of those goods or services, relevant ‘commercial considerations,’ and the fee paid by ‘any similarly situated member of the general public.’”¹⁸ The Commission has historically relied on the vendor – and not the recipient of services – to accurately value the services provided, as the vendor is generally in a better position to assess the value of the service and the price it is likely to command on the market.¹⁹

It would be unreasonable to demand that the Campaigns make an independent assessment of the value of ActBlue’s services when thousands of similarly-situated committees – *of both political parties* – had been charged a similar rate for similar services. Nor is the Commission in possession of sufficient information to second-guess the Campaigns’ judgment; in fact, “[t]he Commission has previously exercised its prosecutorial discretion and dismissed matters that presented similar difficulties in assessing fair market prices.”²⁰

¹⁴ Adv. Op. 2021-10 (RBI), <https://www.fec.gov/files/legal/aos/2021-10/2021-10.pdf>. See also Adv. Op. 2022-03 (Democracy Engine), <https://www.fec.gov/files/legal/aos/2022-03/2022-03.pdf>; Adv. Op. 2007-04 (Atlatl), <https://www.fec.gov/files/legal/aos/2007-04/2007-04.pdf>.

¹⁵ Adv. Op. 2007-27 (ActBlue), <https://www.fec.gov/files/legal/aos/2007-27/2007-27.pdf> (“ActBlue must treat any costs it incurs for its activities under Program 2, including a portion of staff salaries and expenses for website development and maintenance, as in-kind contributions to the recipient SSFs.”)

¹⁶ Stripe, Pricing, <https://support.winred.com/en/articles/3097721-pricing> (charging 2.9% plus a 30c per-transaction fee); Square, Pricing, <https://squareup.com/us/en/pricing> (charging 2.9% plus a 30c per transaction fee for online transactions).

¹⁷ WinRed, Pricing, <https://support.winred.com/en/articles/3097721-pricing> (charging a 3.94% transaction fee on contributions to campaign committees).

¹⁸ Statement of Reasons of Chairman Allen Dickerson and Comm’rs Sean J. Cooksey and James E. “Trey” Trainor, III, MURs 7575,7580,7592 & 7626 (Brand New Congress) at 4, https://www.fec.gov/files/legal/murs/7626/7626_12.pdf.

¹⁹ Statement of Reasons of Chair Dara Lindbaum, Vice Chair Sean J. Cooksey, and Comm’rs Allen J. Dickerson and James E. “Trey” Trainor, III (Patriots of America PAC) 4, https://www.fec.gov/files/legal/murs/7874/7874_15.pdf.

²⁰ Statement of Reasons of Chairman Allen Dickerson and Comm’rs Sean J. Cooksey and James E. “Trey” Trainor, III, MURs 7575,7580,7592 & 7626 (Brand New Congress) at 4, https://www.fec.gov/files/legal/murs/7626/7626_12.pdf.

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b. Obtaining donor email addresses and phone numbers facilitates compliance with the Act.

The phone numbers and email addresses obtained from ActBlue facilitate the Campaigns' compliance with their legal obligations under the Act. The Campaigns must collect and report accurate information about all contributions they receive.²¹ This information includes the name and mailing address of all donors, as well as the occupation and employer of any donor who contributes more than \$200 in a calendar year.²² As a conduit committee, ActBlue has a separate legal obligation to collect this information and transmit it to the Campaigns along with any contributions it collects and forwards.²³ If a contributor fails to provide this information at the time the contribution is made, the Campaigns must demonstrate that they have made their best efforts to obtain, maintain, and report the information.²⁴ As part of the "best efforts" requirement, committees must make at least one attempt to contact a contributor to obtain the missing information no later than 30 days after the receipt of the contribution.²⁵

Committees also have an obligation to confirm the legality of any contribution they receive that appears to be from a prohibited source – such as a contribution that appears to be from a corporation or an individual who is not a U.S. citizen or permanent resident.²⁶ In order to confirm the legality of the contribution, a committee must obtain a written statement from the contributor or an oral explanation by telephone. These inquiries must be made within 30 days of the deposit of the contribution.²⁷

The Commission has authorized committees to use email addresses to meet their obligation to use best efforts to obtain required contributor information.²⁸ Contacting contributors by email is often faster and more reliable than traditional mail and has thus become a common way for committees to meet their compliance obligations.²⁹ As a result, it has also become a common practice for campaigns to ask for email address and phone number information alongside other required donor information when soliciting contributions. Facilitating the collection of this contact information is therefore an integral part of ActBlue's contribution processing service.

²¹ 52 U.S.C. 30102(c).

²² *Id.*

²³ 11 C.F.R. §§ 110.6(c)(1)(iv), 102.8(a)-(b).

²⁴ *Id.* § 104.7(a).

²⁵ *Id.* § 104.7(b)(2).

²⁶ *Id.* § 103.3(b).

²⁷ *Id.*

²⁸ See Fed. Election Comm'n, Campaign Guide for Congressional Candidates and Committees at 88 (Oct. 2021) ("A political committee may also use e-mail to request missing contributor information. AOs 1999-17 (Bush Exploratory Committee) and 1995-09 (NewtWatch).")

²⁹ See MUR 6078, Resp. from Obama for America, <https://www.fec.gov/files/legal/murs/6078/13044323464.pdf> (confirming that Obama for America followed up by telephone and email with contributors in order to confirm citizenship for contributors residing outside of the United States.); see also First General Counsel's Rep., MUR 7974 (Aarika for Congress), https://www.fec.gov/files/legal/murs/7974/7974_04.pdf.

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The FEC should encourage committees to accept and use any contact information available to facilitate compliance with the Act. And conduit committees like ActBlue should similarly be encouraged to provide recipient committees with any information in their possession to facilitate compliance. That is precisely what happened here.

c. The *Ready for Ron* case is easily distinguishable.

The Complaint compares ActBlue’s practice of providing email addresses and phone numbers to the activities proposed by Ready for Ron (“*RFR*”) in a recent Advisory Opinion.³⁰ RFR is a hybrid political committee organized to encourage Governor Ron DeSantis to run for president. In its Advisory Opinion, the Commission advised RFR that its plan to collect names of individuals who planned to support Ron DeSantis’s presidential run, and to provide that list of names with accompanying contact information to Ron DeSantis free of charge, would constitute an in-kind contribution to DeSantis if he became a federal candidate or began testing the waters for president. The proposed petition allowed individuals to “sign” online and required the signer to provide their name and email, with the option to also provide a phone number and zip code.³¹

The FEC correctly found that the provision of the petition (with the names and contact information of the signers) to DeSantis without charge would result in an in-kind contribution, as the contact information in the petition would be of significant value to DeSantis.³² RFR sued the FEC in federal district court, arguing that the First Amendment prohibited the FEC from preventing it from providing this “petition” to DeSantis. The court upheld the FEC’s decision.³³

However, the *Ready for Ron* case is easily distinguishable. *First*, RFR admitted in both its Advisory Opinion request and in its court filings that it spent a significant sum of money – over \$1 million – developing the petition and contact list for the sole purpose of supporting DeSantis’s future presidential campaign.³⁴ In contrast, ActBlue is already required to collect and transmit donor information to comply with the conduit regulations; the marginal cost associated with collecting and transmitting phone numbers and email addresses in addition to the required contact information is likely *de minimis* (if anything). *Second*, RFR sought to provide the list – which it admitted had a significant commercial value – to DeSantis ***without charge***, making that list fall squarely within the definition of “contribution.” In contrast, as explained above, ActBlue provides a service for which it charges a commercially reasonable rate.

³⁰ See FEC Adv. Op. 2022-12 (Ready for Ron), <https://www.fec.gov/files/legal/aos/2022-12/2022-12.pdf>.

³¹ Adv. Op. 2022-12, Request at 2, https://www.fec.gov/files/legal/aos/2022-12/202212R_1.pdf; Adv. Op. 2022-12 at 2, <https://www.fec.gov/files/legal/aos/2022-12/2022-12.pdf>. An individual could also “sign” the petition over the phone.

³² Adv. Op. 2022-12, <https://www.fec.gov/files/legal/aos/2022-12/2022-12.pdf>. The opinion also found that because RFR proposed to use soft money to collect the petitions, the source restrictions would also be violated if it provided the petition to DeSantis. The FEC could not reach a consensus on whether the petition could be provided to DeSantis before he began testing the waters. The D.C. Circuit court, however, held that this would also be impermissible.

³³ *Ready for Ron v. FEC*, Civil Action No. 22-3282 (D.D.C., May 17, 2023).

³⁴ *Id.* at 18.

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For the reasons set forth above, the Commission should find no reason to believe that a violation of the Act or Commission regulation has occurred, and immediately close this matter.

Yours truly,

A handwritten signature in blue ink, appearing to read "Jon S. Berkon", with a long horizontal flourish extending to the right.

Jonathan S. Berkon

Jacquelyn K. Lopez

Elizabeth P. Poston

Counsel to Fetterman for PA and Warnock for Georgia