UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

READY FOR RON 66 W. Flagler Street Suite 900, #6781 Miami, FL 33130, *Plaintiff*, v. FEDERAL ELECTION COMMISSION 1050 First Street, NE Washington, DC 20463, *Defendant*.	Judge Randolph D. Moss No. 1:22-cv-3282-RDM

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF READY FOR RON'S MOTION FOR PRELIMINARY INJUNCTION

Dan Backer, Esq. (D.C. Bar No. 996641)
Chalmers & Adams LLC
441 N. Lee Street, Suite 300
Alexandria, VA 22314
(202) 210-5431
dbacker@ChalmersAdams.com

Lilian Rodriguez-Baz, Esq.*
Chief Legal Counsel, Ready for Ron
66 W Flagler Street, Suite 900
Miami, FL 33130
(561) 291-9897
Lilian@ReadyForRon.com

*Motion for pro hac vice admission forthcoming
Attorneys for Plaintiff

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

FEC Advisory Opinions

Statutes and Regulations

Other Sources and Authorities

INTRODUCTION

As of this writing, more than 100,000 people have signed a petition declaring themselves "Ready for Ron"—that is, seeking to draft Florida Governor Ron DeSantis to run for President in 2024. Plaintiff Ready for Ron ("RFR"), a federal political committee, has run advertisements encouraging people to virtually "sign" the petition by submitting their names and contact information through a website and telephone hotline RFR created for that purpose. Ignoring the Constitution, the plain language and legislative history of the Federal Election Campaign Act ("FECA"), binding D.C. circuit precedent, and its own treatment of nearly $1.5 billion in political activity each election cycle, the Federal Election Commission ("FEC" or "Commission") has decided to prohibit both RFR and the petition's signatories from engaging in this fundamental act of political speech and association.

The Commission has issued an advisory opinion refusing to allow RFR to provide its signed petition with signatories' voluntarily provided contact information to Governor DeSantis. *See Ready for Ron*, FEC A.O. 2022-12 (Sept. 28, 2012), *attached as* Compl. Exh. 11. Declaring the petition to be a "thing of value" which might be "useful" to Governor DeSantis, the Commission has concluded providing the petition to Governor DeSantis either while he is "testing the waters" for a potential candidacy, or after he becomes a candidate, would violate the Federal Election Campaign Act's ("FECA") contribution limits. *Id*. at 1. The Commission also deadlocked on the issue of whether RFR may provide its petition to Governor DeSantis before he begins testing the waters, despite the complete absence of any statutory or regulatory basis for such a prohibition, *id*., thereby depriving RFR of a "safe harbor" against enforcement actions and civil and criminal penalties for engaging in such conduct. 52 U.S.C. § 30108(c)(1)(A), (c)(2); *Unity08 v. FEC*, 596

F.3d 861, 867-68 (D.C. Cir. 2010). The Commission's advisory opinion creates a reasonable apprehension of civil and criminal penalties for RFR.

The Commission's refusal to acknowledge RFR's right to provide a signed petition identifying its signatories to a public figure to encourage him to run for our nation's highest office is beyond the pale. It blatantly violates the rights of both RFR and the petition's signatories to engage in pure political speech and expressive association. The Commission's treatment of a signed political petition to someone as a "contribution," particularly before they have even become a "candidate" under the FECA, not only misinterprets that statute and flies in the face of binding circuit precedent, *see Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 382 (D.C. Cir. 1981), but casts a chilling pall over one of our nation's most important, longstanding forms of collective political action.

STATEMENT OF FACTS

A. *Ready for Ron*

RFR is a draft committee formed for the purpose of drafting Governor DeSantis as a candidate for the Republican nomination for President in the 2024 election. Declaration of Gabriel Llanes ¶ 4, *attached as* Motion for Preliminary Injunction, Exh. 1 (hereinafter, "Llanes Decl."). RFR is not affiliated with Governor DeSantis in any way and has not coordinated with him or his staff with regard to the petition. *Id*. ¶ 5.

RFR has two bank accounts. *Id*. ¶ 6. First, it has a traditional hard money account, which may be used to make political contributions. *Id*. Contributions which RFR receives for this account are subject to the Federal Election Campaign Act's ("FECA") contribution limits. *Id*. Second, RFR also has a separate, segregated "non-contribution" account pursuant to the U.S. District Court for the District of Columbia's ruling in *Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2002). *Id*. RFR

may accept unlimited contributions to this "*Carey* account" and use funds from it to pay for its communications, advertisements, and other expenses. *Id*. RFR may not use funds from this account, however, to make political contributions. *Id*.

B. *Ready for Ron's Petition to Governor DeSantis*

RFR has created a petition to attempt to persuade Governor DeSantis to become and remain a candidate for the Republican nomination for President in the 2024 election. *Id*. ¶ 7. RFR has invited members of the general public who share that political belief to associate together to convey this political message by approving the addition of their virtual signatures to its petition through either RFR's website or a dedicated phone line RFR established. *Id*. ¶ 8. RFR has publicized its petition through various advertisements funded in part or whole from RFR's non-contribution *Carey* account. *Id*. ¶ 9.

RFR's website, http://www.ReadyforRon.com, displays the text of the petition. *Id*. ¶ 10. It provides users with an opportunity to electronically submit their name, phone number, e-mail address, and zip code (collectively, "Signatory Information") to be added to the petition. *Id*. ¶ 13. To virtually sign the petition, a person must provide at least their name and e-mail address. *Id*. The page on which people enter their Signatory Information contains a message stating, in relevant part, "I am Ready for Ron! Let Ron know I'm behind him and want to join his team!" *Id*. ¶ 14. A notice at the bottom of the screen informs users by virtually signing the petition and providing their information, they are requesting to have RFR provide it to Governor DeSantis. *Id*.

RFR has also established telephone numbers for people to call to virtually sign the petition by having their names and contact information added to it. *Id*. ¶ 15. When a person calls the number, a recorded message invites them to join the petition if they wish to "Let Ron know, 'I am Ready for Ron!'" and that they are "behind him and want to join his team!'" *Id*. It further notifies

callers by signing the petition, they are requesting to have their names and contact information provided to Governor DeSantis. *Id*. In addition, RFR conducts "robocalls" in which it dials people's phone numbers and plays them a pre-recorded message about the petition, inviting them to sign it. *Id*. ¶ 16. A person may press "1" to request to have their name and contact information added to the petition and provided to Governor DeSantis. *Id*. Finally, RFR also gathers petition signatures in person on select occasions. Id. ¶ 28. It uses a preprinted form to invite people to provide their signature and contact information to join the petition to draft Governor DeSantis. *Id*.

A person's name and contact information will be added to the petition only if they ask to sign the petition through RFR's website(s), phone number(s), or forms designated for that purpose. *Id*. ¶ 17. RFR has not and will not add anyone to the petition without their request and consent. *Id*. RFR is currently spending between $100,000-$200,000 per month on advertisements through various mediums to notify people about its petition and invite them to sign it. *Id*. ¶¶ 25-26. It pays for these advertisements through both its traditional hard-money account and non-contribution *Carey* accounts. *Id*. ¶ 25.

RFR's petition has so far attracted approximately 100,000 signatures. *Id*. ¶ 18. If the signatories' contact information were treated as if it were contained within an ordinary mailing or contributor list, then $0.05 per line-item would be a reasonable approximation of the minimum fair-market value for such information. Id. ¶ 27. At that rate, the fair-market value of the signed petition with signatories' contact information would exceed $2,900, the limit on contributions from a non-multicandidate political committee to a candidate per election. *Id*.

RFR wishes to present the signed petition, including the names and contact information provided by its signatories, to Governor DeSantis, regardless of whether the Commission determines he is testing the waters or has become a candidate. *Id*. ¶ 19; *see also id*. ¶ 28 (specifying

reasons). After it does so, RFR wishes to periodically demonstrate continued public support for Governor DeSantis' nomination or candidacy by providing supplements or updates to the petition with the names and contact information of people who subsequently join the petition. *Id*. Were it not for the FEC's response to RFR's advisory opinion request and resulting substantial likelihood of enforcement actions, RFR would provide its petition, as well as with updates and supplements, to Governor DeSantis before he begins testing the waters for a potential presidential run, while he is "testing the waters" under 11 C.F.R. § 100.72, and also after he has become a "candidate" under 52 U.S.C. § 30101(2); *accord* 11 C.F.R. § 100.3(a). Llames Decl. ¶ 20.

C. *The FEC's Advisory Opinion Declining to Allow Ready for Ron to Deliver Its Signed Petition to Governor DeSantis*

On June 28, 2022, RFR submitted an advisory opinion request to the FEC to obtain an advisory opinion confirming the legality of its actions and providing RFR with "safe harbor" protection against any administrative proceedings, civil penalties, and prosecution for its actions pursuant to 52 U.S.C. § 30108(c). Llames Decl., ¶ 21. The FEC issued an opinion refusing to confirm the legality of RFR's ongoing and concretely impending future conduct. The FEC:

- deadlocked and failed to reach a conclusion on whether RFR may provide its signed petition, including signatories' contact information, to Governor DeSantis before he begins testing the waters under 11 C.F.R. § 100.72;
- concluded RFR may not provide its signed petition with signatories' contact information to Governor DeSantis once he begins testing the waters under 11 C.F.R. § 100.72 because it would constitute an illegal excessive contribution in violation of that regulation;
- concluded RFR may not provide its signed petition with signatories' contact information to Governor DeSantis once he becomes a candidate under 52 U.S.C. § 30101(2) and

11 C.F.R. § 100.3(a) because it would constitute an illegal excessive contribution in violation of 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1); and

- concluded RFR may not spent funds from its non-contribution *Carey* account on advertising or other expenses relating to its petition, if it provides the signed petition to Governor DeSantis while he is testing the waters or becomes a candidate, because such expenditures would transmute into an illegal excessive contribution in violation of 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1).

See generally Compl., Exh. 11, at 1.

The FEC's advisory opinion, its refusal to grant RFR a statutory "safe harbor," and the reasonable likelihood of administrative proceedings, civil penalties, and prosecution under the FECA have chilled RFR from exercising its rights by deterring it from providing the signed petition with signatories' contact information to Governor DeSantis at any point, unless and until this Court enters an injunction and/or declaratory judgment in its favor. Llanes Decl. ¶ 23.

ARGUMENT

I. READY FOR RON HAS A FIRST AMENDMENT RIGHT TO SOLICIT AND GATHER SIGNATURES FOR ITS PETITION, AND PRESENT THE SIGNED PETITION TO GOVERNOR DESANTIS AT A TIME OF ITS CHOOSING

RFR's fundamental First Amendment rights of speech and political association allow it to provide its signed petition with the signatories' contact information to Governor DeSantis at any time, and to fund its petition-related activities through its non-contribution *Carey* account. The FECA's contribution limits are unconstitutional as applied to pure political speech like a signed petition. Contribution limits are generally subject only to intermediate scrutiny and constitutionally permissible because they typically "entail[] only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley v. Valeo*, 424 U.S. 1, 20, 25 (1976) (per curiam).

Buckley explained, "A contribution serves as a general expression of support for the candidate and his views, but does not communicate the basis for the underlying support. . . . [T]he expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate." *Id.* at 21. The Court further emphasized contribution limits "involve[] little direct restraint on . . . political communication" because they do "not in any way infringe the contributor's freedom to discuss candidates and issues." *Id.*

This reasoning is patently inapplicable when the supposed contribution is, itself, political speech, such as a signed political petition. The Supreme Court has never allowed contribution limits to be applied to prohibit pure political speech by American citizens. Treating RFR's signed petition as a contribution would impose much more than "a marginal restriction upon the contributor's ability to engage in free communication." *Id.* at 20–21. Petitioning Governor DeSantis is not an "undifferentiated, symbolic act," but rather direct, express political speech that lies at the heart of the First Amendment. *Id*. at 21. The petition expressly "communicat[es] the underlying basis for [signatories'] support" of Governor DeSantis and proudly displays the identities and contact information of those who have chosen to join it. *Id*. Accordingly, the FEC's sweeping conception of in-kind contributions imposes a "direct restraint" on both RFR's and the petition signatories' "freedom to discuss candidates and issues." *Id*. at 21.

Joining together in a petition is also a fundamental, time-honored form of political association. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence . . . were early examples of this phenomena . . . ." *Citizens Against Rent Cont./Coalition for Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981). As the Court elaborated,

"[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id.*; *see also NAACP v. Alabama*, 357 U.S. 449, 460 (1958) ("Effective advocacy of both public and private points of view . . . is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."). Indeed, *Buckley* itself recognized the right to freedom of association "is diluted if it does not include the right to pool money through contributions." *Buckley*, 424 U.S. at 65-66. Here, Governor DeSantis' supporters are not seeking to "pool money," but rather join together in a petition, amplifying their voices through collective action in a way that would be impossible if acting individually. By barring RFR from presenting a signed political petition to Governor DeSantis, the Commission is severely hindering expressive political association.

If an individual directly e-mailed Governor DeSantis to encourage him to run for President and provide their contact information, it would be pure political speech beyond the Commission's constitutional ability to regulate. If that person instead urged people to sign a petition to Governor DeSantis to persuade him to run, both that person's speech as well as the underlying petition would be likewise protected. Such pure political speech does not lose constitutional protection or become subject to governmental restriction simply because gathering the petition costs money. *See Buckley*, 424 U.S. at 16 (rejecting the notion "the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element"). Nor does a signatory lose their right to convey their political support for Governor DeSantis' candidacy simply because they wish to join with others to convey it. *See Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224-25 (1989) (holding the state violated the First Amendment right to freedom of association by allowing individual members of political parties' state and county central

committees to endorse candidates, but not the committees themselves). Accordingly, prohibiting RFR from submitting its signed petition to Governor DeSantis "heavily burdens core First Amendment expression." *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 614 (1996) ("*Colorado I*") (plurality op.).

Finally, RFR cannot constitutionally be required to anonymize its petition or alter or dilute its message by stripping the signatories' contact information from it. The decision about whether or not to engage in political communications anonymously is itself protected by the First Amendment. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."). Moreover, signatories affixing their names and contact information to the petition is an important form of expressive political association. *Meyer v. Grant*, 486 U.S. 414, 421 (1988) ("[C]irculation of a petition involves . . . interactive communication concerning political change . . . ."); *see also Doe v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) ("[S]igning a referendum petition amounts to political association protected by the First Amendment."). Providing signatories' contact information also helps establish the authenticity of the signatures and allows Governor DeSantis to confirm they are not fraudulent.

In short, RFR's signed petition with signatories' contact information involves pure political speech and expressive association in a manner absent from other types of monetary and in-kind contributions. *Cf. Buckley*, 424 U.S. at 20-21. Accordingly, the FECA's contribution limits should be subject to strict scrutiny insofar as they apply to RFR's petition, and held unconstitutional as applied.

II. THE FEDERAL ELECTION CAMPAIGN ACT DOES NOT PROHIBIT READY FOR RON FROM PROVIDING ITS SIGNED PETITION TO GOVERNOR DESANTIS

The FECA does not prohibit RFR from providing its signed petition, including contact information for its signatories—as well as any future updates or supplements to the petition—to Governor DeSantis. Section A explains the FECA is completely inapplicable to a signed political petition, meaning RFR may provide the signed petition and any supplements to Governor DeSantis at any time, regardless of whether he is "testing the waters" or has become a federal candidate. Section B demonstrates, in the alternative, the FECA allows RFR to provide its signed petition to Governor DeSantis before he becomes a candidate—regardless of whether the Commission decides he is "testing the waters." This Section demonstrates the FECA neither empowers the Commission to regulate efforts to "draft" federal candidates, nor otherwise regulates contributions to individuals who have not yet become candidates. Indeed, Congress has repeatedly refused to grant the Commission's repeated requests for such authority. Finally, Section C shows, at the very least, RFR may provide its signed petition, including signatory contact information, to Governor DeSantis before he begins testing the waters.

A. *Ready for Ron May Provide Its Signed Petition to Governor DeSantis at Any Time*

The FECA does not prohibit RFR from providing a signed petition, including contact information for its signatories (as well as any updates or supplements) to Governor DeSantis at any time, even if he is testing the waters or has become a candidate. Under a plain-meaning interpretation of the FECA, a signed political petition does not qualify as a "contribution." Alternatively, even if the information contained within a petition is deemed a "contribution," the source of any contribution in this case is not RFR, but rather the people who have chosen to join together to sign the petition to encourage Governor DeSantis to run for office and asked RFR to

convey their signatures and contact information to him on their behalf. At most, RFR is a conduit, *see* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a), not a contributor. The FECA's limits therefore do not bar RFR from providing its signed petition to Governor DeSantis.

1. A signed petition does not qualify as a "contribution" under FECA

Contribution limits do not bar RFR from providing its signed petition to Governor DeSantis because the petition does not fall within the statutory definition of "contribution." The FECA defines "contribution" as "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." 52 U.S.C. § 30101(8)(A)(i) (emphasis added); 11 C.F.R. § 100.52(a). The signed petition does not qualify as a "contribution" under a plain-meaning interpretation of this definition because it is neither a "gift" nor a "thing of value" for purposes of this definition.

a. *A signed petition is not a "gift"*

The first reason RFR's signed petition does not constitute a "contribution," and therefore is not subject to the FECA's contribution limits, is because the petition is not a "gift." 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). An undefined statutory term such as "gift" must be given its "ordinary, contemporary, common meaning." *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997); *see Nat'l Grain & Feed Ass'n v. Occupational Safety & Health Admin., U.S. Dep't of Labor*, 845 F.2d 345, 346 (D.C. Cir. 1988) (defining statutory term based on its "plain meaning" and "ordinary usage"); *see also Ass'n of Private Sector Colleges & Univs. v. Duncan*, 681 F.3d 427, 443 (D.C. Cir. 2012). Customary usage of language determines whether something constitutes a "gift" under § 30101(8)(A)(i). *See* In re *McDonald for Congress*, FEC A.O. 1976-86, at *1 (Oct. 6, 1976) (determining whether an act constitutes a "gift" primarily based on the industry's customary practice). Pure political speech which lies at the heart of the First

Amendment, such as a signed petition urging a person to become or remain a candidate, is not ordinarily characterized as a "gift" and therefore does not constitute a "contribution." *See, e.g.*, *Brunswick Corp.*, FEC A.O. 1984-43, at *2 (Sept. 14, 1984) ("[T]he endorsement of a candidate by a corporation does not by itself constitute a prohibited contribution . . . ."); *cf. Watson v. United States*, 552 U.S. 74, 79 (2007) ("The Government may say that a person 'uses' a firearm simply by receiving it in a barter transaction, but no one else would.").

Since the term "gift" appears in a statutory list, this Court can also apply the *noscitur a sociis* canon to confirm its meaning. The *noscitur* canon "dictates 'words grouped in a list should be given related meaning.'" *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 114-15 (1989)); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (explaining the *noscitur* canon means that a term in a legal provision "is known by the company it keeps"). The maxim, "while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki*, 367 U.S. at 307.

The Supreme Court frequently invokes *noscitur a sociis* to develop a more "precise" and accurate definition for a potentially broad term in a statutory list to make it correspond better with the other terms in the list. *United States v. Williams*, 553 U.S. 285, 294 (2008). In *Yates v. United States*, 574 U.S. 528, 544 (2015) (quoting 18 U.S.C. § 1519), for example, the term "tangible object" appeared "last in a list of [statutory] terms that beg[an] 'any record [or] document.'" Applying the *noscitur a sociis* canon, the Court concluded that, despite its apparent facial breadth, "tangible object" referred solely to "objects used to record or preserve information." *Id.*; *see also Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (construing the term "communication" in a federal securities statute to include only "public communication[s]," because the other items listed

in that provision "refer[] to documents of wide dissemination"); *Dole*, 494 U.S. at 36 (concluding the phrase "reporting and recordkeeping requirements" in a statutory definition referred only to "rules requiring information to be sent or made available to a federal agency," based on the other elements included in that definition).

In this case, the term "contribution" is defined as including a "gift," as well as any "subscription, loan, advance, or deposit." 52 U.S.C. § 30101(8)(A)(i); *accord* 11 C.F.R. § 100.52(a). Read in that context, it becomes apparent the term "gift" includes transfers with a financial aspect, and does not extend to signed political petitions with their signatories' contact information. *See McDonnell v. United States*, 136 S. Ct. 2355, 2368–69 (2016) (holding the term "any question" within the federal bribery statute's definition of "official act" had to be construed narrowly and in context). Since RFR's petition is not a gift, it does not fall within the statutory or regulatory definition of "contribution," and therefore the FECA's contribution limits do not prohibit RFR from providing it to Governor DeSantis at any time.

b. *A signed petition is not a "thing of value" for purposes of the definition of "contribution"*

RFR's petition also fails to satisfy another statutory element of the definition of "contribution": the petition is not a "thing of value" for purposes of 52 U.S.C. § 30101(8)(A)(i) and 11 C.F.R. § 100.52(a). Even though constitutionally protected acts of political expression may have value to a candidate, they do not constitute "things of value" for purposes of these provisions. *See Assoc. Buildings & Contractors*, FEC A.O. 1984-23, at 2 (June 22, 1984) (ruling, before *Citizens United* recognized the constitutional right of corporations to engage in political speech, that a corporation or labor union may "endorse a candidate and may publicly announce its endorsement and state the reason or reasons for it," regardless of whether the endorsement is a thing of value, because such endorsement does not constitute a "contribution").

The Commission's regulations concerning the meaning of the phrase "thing of value" explain, "[T]he 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 is a contribution." *Id*. § 100.52(d)(1) (emphasis added). A signed political petition with the signatories' contact information, however, is neither a "good" nor a "service" within the ordinary understanding of those terms. Moreover, under 11 C.F.R. § 100.52(d)'s plain terms, a good or service must carry a "usual and normal charge" to constitute "anything of value" and qualify as a contribution. 11 C.F.R. § 100.52(d); *see, e.g.*, *Preston v. Leake*, 743 F. Supp. 2d 501, 511 (E.D.N.C. 2010) (stating, in construing a comparable state campaign finance provision, "[p]roviding a service to a candidate for free ***when one usually charges for it*** is an in-kind contribution"), *aff'd*, 660 F.3d 726 (4th Cir. 2011). Signed petitions seeking to encourage a public figure to take some action or are customarily provided to their addressees free of charge; they are not regarded as "goods" or "services" for which the recipient must typically pay. Thus, because RFR's signed petition is not a "good," and the addressee of a political petition does not pay any "usual and ordinary charge" for it, the petition is not "anything of value" under 11 C.F.R. § 100.52(a), (d), and therefore does not qualify as a "contribution" under 52 U.S.C. § 30101(8)(A)(i) and 11 C.F.R. § 100.52(a); *cf*. Statement of Reasons of Vice Chair Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III, In re *Donald J. Trump for President, Inc.*, MURs 7265 & 7266, at 2 & n.8 (May 10, 2021) (expressing reticence to adopt the FEC Office of General Counsel's "tenuous legal theory of what constitutes a 'thing of value'" and doubting whether the term includes the provision of "general information that is helpful to a campaign").

c. *The Commission's reasons for treating RFR's signed petition as a "contribution" are erroneous*

The FEC deadlocked on whether RFR may provide its signed petition to Governor DeSantis before he begins testing the waters, and affirmatively concluded it may not do so once Governor DeSantis begins testing the waters or becomes a candidate. Compl. Exh. 11 at 1. The Commission ruled RFR's provision of its signed petition with its signatories' contact information to Governor DeSantis is a "contribution" because the Commission has historically treated "membership lists," "mailing lists," and "contributor lists" as contributions. *Id*. at 5 ("The Commission's regulation specifically identifies 'membership lists' and 'mailing lists' as examples of goods that are in-kind contributions when provided to a candidate . . . without charge . . . ." (citing 11 C.F.R. § 100.52(d)(1)); *see also id*. at 8-9 ("[T]he Commission has previously concluded that political committee mailing lists and membership lists have value and that the provision of such lists to a candidate . . . at no charge . . . is a contribution."). The Commission added, "The contact information in [RFR's] petition would be of significant value to Governor DeSantis" because of its "expensive development costs" and inclusion of "persons who are advocating in favor of Governor DeSantis running for President." *Id*. at 7. Neither of the judicial precedents the Commission relied upon dealt with signed political petitions, however. *See FEC v. Int'l Funding Institute*, 969 F.2d 1110, 1118 (D.C. Cir. 1992) (en banc), *cited by* Compl. Exh. 11 at 5 (holding the Commission may bar a private entity from reselling contributor information it obtains from disclosure reports that political committees file with the FEC); *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 77, 96 (D.D.C. 1999) (holding the FEC could pursue penalties against a political committee for providing a candidate with a list of likely delegates to the 1994 Virginia Republican convention who "were highly likely to share [the committee's] views on a number of issues").

The Commission erred by mechanistically treating a signed political petition as if it were a commercially purchased or sold contributor, mailing, membership, or distribution list. ***First***,

RFR's signed political petition involves a constitutionally protected communication to Governor DeSantis attempting to persuade him to run for President. *Cf. Meyer v. Grant*, 486 U.S. 414, 421 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"). Contributor, mailing, and distribution lists, in contrast, are simple amalgamations of data that do not involve, convey, or communicate any political message. It is much more appropriate to treat them as a "good" than a political petition. As RFR emphasized at the September 15 Commission hearing, it does not enrich or otherwise supplement any of the data provided by signatories into the petition, as it would with a commercially mailing or distribution list or other data for RFR's own internal use. Video of Sept. 15, 2022 FEC Hearing at 23:03 to 23:26, https://www.youtube.com/watch?v=BWfuTD46wwM.

Second, the petition reflects the voluntary, affirmative political and expressive association of Governor DeSantis' supporters. "[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. . . . [I]n the political process it can focus on a candidate . . . ." *Citizens Against Rent Control / Coal. For Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981). The Court explained, "[B]y collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Id*. at 295; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) ("An individual's freedom to speak . . . could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.").

The petition is a voluntary association of Governor DeSantis's supporters who have joined together to urge him to become a candidate. People's names and contact information can wind up on many mailing or distribution lists, in contrast, without their knowledge or consent; their

inclusion does not constitute joint association to further political goals or the willful expression of any political idea. Allowing people to individually encourage Governor DeSantis to run for President and provide him with their contact information, while prohibiting them from joining together to do so in the context of a petition, seriously burdens associational rights in a way that is completely absent from restrictions on mailing, contribution, or distribution lists. *See Eu v. San Francisco Democratic Cent. Comm.*, 489 U.S. 214, 224-25 (1989) ("[I]mposing limitations 'on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association.'" (quoting *Citizens Against Rent Cont.*, 454 U.S. at 296)). While a third party's compilation of data might be deemed a "good," a list of voluntary signatories choosing to associate together cannot be.

Finally, RFR's petition implicates Governor DeSantis' fundamental First Amendment right to receive information. *See Va. State Bd. of Pharmacy v. Va. Citizens Cons. Council*, 425 U.S. 748, 757 (1976) (acknowledging the "First Amendment right to receive information and ideas" (quotation marks omitted)); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); *see also Martin v. Struthers*, 319 U.S. 141, 143, 148-49 (1943) (discussing the "right to receive" information). The FEC's Advisory Opinion infringes Governor DeSantis' right to receive political communications and learn the identities of supporters who affirmatively wish to encourage him to run for President.

Thus, the Commission erred in both overlooking the fundamental distinguishing characteristics of RFR's petition and shoehorning it into the regulation declaring "membership lists[] and mailing lists" to be things of value and therefore contributions. 11 C.F.R. § 100.52(d)(1). Unlike such barren aggregations of information, a signed political petition: (i) conveys an

intentional political message implicating the fundamental First Amendment expression rights of each individual who signs it; (ii) arises from the knowing, voluntary consent of the petition's supporters to join together in expressive political association; and (iii) implicates the First Amendment right of the petition's intended recipient to receive the political communication involved. Thus, the signed petition containing its signatories' individually provided contact information does not constitute an in-kind "contribution" under the FECA and therefore cannot run afoul of contribution limits.

2. Ready for Ron is not the source of any contribution to Governor DeSantis, but instead is merely acting as a conduit, providing the petition and signatories' contact information on the signatories' behalf

Even if the signatory information contained within RFR's petition is properly deemed to be a "contribution" to Governor DeSantis, the source of that contribution is the signatories themselves, rather than RFR. RFR is merely a conduit passing along a message and contact information from each signatory, at the signatory's request, to Governor DeSantis. *See* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a).

The FECA provides, "[A]ll contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." 52 U.S.C. § 30116(a)(8); *accord* 11 C.F.R. § 110.6(a). Here, the "thing of value" the FEC concluded constitutes a contribution is the name, zip code, e-mail address, and/or phone number of each signatory.[1] RFR included messages on its

[1] The funds RFR spent on advertising and maintaining its website and hotline, in contrast, are not contributions to Governor DeSantis. To the contrary, such funds are likely independent expenditures since RFR's communications expressly advocated the defeat of a clearly identified federal candidate, President Joe Biden; the funds were not spent "in concert or cooperation with

petition webpage and telephone recordings stating, by virtually signing the petition and providing their contact information, a signatory is requesting to have R4R provide the information they submit to Governor DeSantis. RFR's website, for example, invites people to sign the petition if they wish to express, "I am Ready for Ron! Let Ron know I'm behind him and want to join his team!" Llames Decl. ¶ 14. A notice at the bottom of the screen informs users, by virtually signing the petition and providing their contact information, they are requesting to have RFR provide it to Governor DeSantis. *Id*. Likewise, when a person calls RFR's petition hotline or receives a robocall from RFR, a prerecorded message invites them to "press 1" to sign the petition and provide their contact information, and have RFR provide it to Governor DeSantis. *Id*. ¶ 15.

RFR includes a person's name or contact information on its petition only at that person's express request and direction. *Id*. ¶ 17. Each signatory makes the decision for him- or herself to add their name and contact information to the petition for transmission to Governor DeSantis. Thus, the true contributor is the individual providing their contact information; R4R appends the signatory's name and contact information to the petition and passes it along to Governor DeSantis on the individual's behalf.[2] In other words, RFRs acts as a conduit through which contact

---

or at the request or suggestion of" Governor DeSantis; and Governor DeSantis never had possession, custody or control of such funds. *See* 52 U.S.C. § 30101(17).

[2] Given the *de minimis* value of each individual signatory's contact information, it should not count against the signatory's contribution limit. Contact information an individual provides directly to a candidate through a web portal or otherwise is not regarded as a "contribution" which counts against that person's contribution limit to the candidate due to the *de minimus* value of that information. *Cf. Hon. Cecil Heftel*, FEC A.O. 1977-51, at 2 (Nov. 16, 1977) (concluding a Member of Congress' "receipt of macadamia nuts from corporations, trade associations, [or] individuals" does not constitute a "contribution," in part because they "appear to be of minimal value"). Likewise, an individual's submission of their contact information through the website of a third-party intermediary such as R4R to send to a potential candidate on their behalf should be subject to the *de minimus* exception to "contributions," as well.

Moreover, although a political committee is typically required to itemize each conduit contribution it facilitates in its disclosure reports, *see* 11 C.F.R. § 110.6(c)(1), RFR should not be

information for the petition's signatories is transmitted from those signatories to the petition's recipient. *See* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6(a).

If individuals provided checks to RFR to transmit to Governor DeSantis—even at RFR's behest or as a result of RFR's solicitations and advertisements—it is undisputed that, under 52 U.S.C. § 30116(a)(8), those individuals would be the source of any donation or contribution, Governor DeSantis would be the recipient, and RFR would be merely the conduit responsible for transmitting the checks to him. *See ActBlue*, FEC A.O. 2006-30, at 6 (Nov. 9, 2006) ("[T]he earmarked contributions would be contributions from the original contributor to the Prospective Candidate . . . ."); *see also WE LEAD*, FEC A.O. 2003-23, at 4 (Nov. 7, 2003) ("[C]ontributors may earmark contributions to the primary committee of the presumptive nominee through [an intermediary committee]. . . .").

Likewise, if each petition signatory individually sent their contact information directly to Governor DeSantis—even at RFR's behest or as a result of RFR's solicitations or advertisements—each such person would properly be regarded as the source of that information. The FECA does not prohibit them from instead choosing to join together to transmit their signatures and contact information to Governor DeSantis through a conduit, RFR. And the identity

---

required to individually report to the FEC each individual who signs its petition and provides contact information through RFR's portal for Governor DeSantis. Mandating such disclosure would require RFR to list potentially hundreds of thousands of individual transactions with a nominal value of approximately $0.05 each. Disclosing such voluminous granular data would not help the public decide which candidates to support, prevent corruption, or impede circumvention of contribution limits. *Cf. Buckley*, 424 U.S. at 66-68 (identifying constitutionally permissible grounds for disclosure requirements concerning campaign finance funds). Moreover, the FEC has recognized *de minimis* exceptions to other requirements, *see, e.g.*, 11 C.F.R. §§ 100.24(c)(7), 113.1(g)(1)(i)(C), 114.4(c)(6), 9008.9(c). Imposing such a substantial burden would be an unreasonable, unconstitutional application of the FECA. Both the Constitution and principles of statutory interpretation exempt R4R from having to report a separate conduit contribution to reflect the contact information of each individual signatory it passes along to Governor DeSantis on the signatory's behalf.

of the contributor does not change simply because RFR is waiting to amass a substantial number of signatures with contact information before delivering its petition to Governor DeSantis to ensure the petition has maximum effect, rather than forwarding each signature to Governor DeSantis immediately upon its submission. If an individual provides a thing of value—their contact information—to RFR with the express request the information be transmitted to Governor DeSantis, that individual should be deemed the source of the transaction, Governor DeSantis the recipient, and RFR the conduit.

Indeed, the FEC's refusal to approve RFR's conduit activities is particularly objectionable given its advisory opinions protecting ActBlue, a non-connected political committee which solicits and processes over one billions dollars' worth of online political contributions for Democratic candidates each cycle through its website, http://secure.ActBlue.com.[3] Federal regulations generally require a conduit committee to forward an earmarked contribution, along with the name and address of the contributor, to the designated recipient candidate within ten days of receipt. 52 U.S.C. § 30102(b)(1)-(2); 11 C.F.R. § 102.8(a)-(b); *see, e.g.*, *ActBlue*, A.O. 2006-30, at 6-7 (Nov. 9, 2006) (discussing ActBlue's legal obligation to forward the names and addresses of each person who made a contribution through ActBlue to the recipient candidate).

When ActBlue transmits a contribution to the designated recipient candidate, however, it provides not only the legally required identifying information about the contributor, but also the contributor's phone number and e-mail address—which the FECA does not require ActBlue to

[3] For example, in the 2020 election cycle, ActBlue processed 15,672,773 contributions totaling $647,286,951 to Joe Biden alone; it provided Biden not only with the funds, but the identifying information and contact information for each contributor. *See Vendor/Recipient Profile: BIDEN FOR PRESIDENT*, OPEN SECRETS (last referenced Oct. 23, 2022), https://www.opensecrets.org/campaign-expenditures/vendor?cycle=2020&vendor=BIDEN+FOR+PRESIDENT

provide and the recipient candidate is not required to report to the FEC. *See Does ActBlue Share My Personal Information, Including Email Address and Phone Number?*, ACTBLUE (last referenced Sept. 26, 2022) (explaining, in addition to information "[r]equired by federal law," it ***also*** "pass[es] along [a contributor's] email address, as well as your phone number if you choose to provide it, to the group [the contributor] gave to . . . so they can stay in touch"), https://support.actblue.com/donors/about-actblue/does-actblue-share-my-personal-information-including-email-address-and-phone-number/.

This Commission has repeatedly upheld such arrangements. FEC A.O. 2006-30, at 6-7; *see also Skimmerhat*, FEC A.O. 2012-22, at 3, 5 (Aug. 2, 2012) (approving a website which allowed a user to make contributions to the candidates she designates, where the website's operator would "forward all contributions within ten days of receipt along with certain identifying information" about the contributors to those candidates); *cf. ActBlue*, FEC A.O. 2007-27, at 7 (Dec. 17, 2007) (approving ActBlue's use of password-protected sites to solicit conduit contributions from the restricted classes of corporations' and unions' separate segregated funds to those funds).

ActBlue, FEC A.O. 2008-10 (Jan. 15, 2015), is even more closely on point. ActBlue wished to establish various "draft fund[s]" where "users would make contributions earmarked for specific women who are potential candidates for President in 2016 but who have not yet formed authorized presidential campaign committees." *Id*. at 2. ActBlue would forward any contributions earmarked for an individual to that person if she formed a presidential candidate committee by a specified deadline. *Id*. The Commission concluded ActBlue could accept contributions from users on behalf of individuals who are not yet federal candidates, to forward to those individuals once they become candidates. *Id*. at 4; *see also id*. at 5 ("ActBlue may act as a conduit or intermediary for

contributions earmarked for prospective candidates . . . ."); *see also* A.O. 2006-30, at 3 ("ActBlue may solicit and receive contributions from individuals earmarked for Prospective Candidates" and "forward the earmarked contributions to the candidates . . . ."). "Contributions that ActBlue transfers . . . to the designated candidate . . . would be attributed to the persons who contributed [those funds], and not to ActBlue." A.O. 2008-10, at 4; *see also* A.O. 2006-30, at 6; *Pro-Life Democratic Candidate PAC*, FEC A.O. 2019-11, at 2, 6 (July 25, 2019) (allowing a draft fund to accept conduit contributions to provide to a pro-life Democratic presidential candidate who met certain "experience and endorsement criteria" if one were drafted).

The Commission's advisory opinion in this case establishes a perverse pay-to-play system where an intermediary may gather contact information about a potential candidate's supporters only if those supporters make monetary conduit contributions to the candidate. If RFR required people to provide contributions through its website to Governor DeSantis as a condition for signing its petition then, like ActBlue, it could collect contributors' contact information to provide to him. It is absurd and constitutionally erroneous for monetary contributions to receive greater protection than pure political speech. *See Buckley*, 424 U.S. at 44-45 (subjecting restrictions on expenditures to strict scrutiny, but contribution limits only to intermediate scrutiny because "expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations"). RFR should be permitted to provide its signed petition to Governor DeSantis without having to charge signatories for the privilege of signing. *Cf.* A.O. 2006-30, at 6-7; A.O. A.O. 2008-10, at 5. The FECA's conduit provision, 52 U.S.C. § 30116(a)(8); *accord* 11 C.F.R. § 110.6(a), allows RFR to provide an opportunity for people to join together in collective political expression to attempt to draft the presidential candidate of their choice without having to provide a monetary contribution.

In short, RFR's signed petition is not a large in-kind contribution from RFR to Governor DeSantis simply because it contains signatories' personally provided contact information. Rather, at most, RFR is facilitating a series of miniscule in-kind contributions, each of negligible value, from DeSantis supporters who have signed its petition. Accordingly, contribution limits do not bar RFR from providing the signed petition with signatories' contact information, as well as any future updates or supplements, to Governor DeSantis.

B. *In the Alternative, Ready for Ron May Provide Its Signed Petition to Governor DeSantis Before He Becomes a Candidate, Regardless of Whether He Is "Testing the Waters"*

Contribution limits do not prohibit RFR from providing its signed petition to Governor DeSantis unless and until he becomes a "candidate" for federal office. Accordingly, RFR may provide the signed petition to him at any point before he becomes a candidate, regardless of whether the Commission concludes he is "testing the waters."

The FECA limits the amount a political committee such as R4R may contribute to a "candidate" for federal office (or a candidate's "authorized political committee[]"). *See* 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).[4] The FECA defines the term "candidate" as someone who "seeks nomination for election, or election, to Federal office," as evidenced by the fact he or she has received, spent, or authorized the receipt or expenditure of more than $5,000 to seek a federal office. 52 U.S.C. § 30101(2); *accord* 11 C.F.R. § 100.3(a). A person who has not satisfied those requirements is not a "candidate" for purposes of the FECA. By its plain terms, the FECA's contribution limit does not apply to donations, transfers, or other such interactions with a person who has not qualified as a "candidate."

[4] Since R4R is not a multicandidate PAC, it falls within FECA's definition of "person" for purposes of contribution limits. *See* 52 U.S.C. § 30101(11); *accord* 11 C.F.R. § 100.10.

Governor DeSantis is not presently a candidate for President or any other federal office in the 2024 election or any other election. He has not declared his candidacy for any federal office. According to the FEC's online database, *see* https://www.fec.gov/data/candidates/?q=desantis, he has neither created nor authorized any federal candidate committees for the purpose of raising funds in connection with any future elections. The FEC has identified no evidence he has raised or spent any funds, much less $5,000, in connection with the 2024 presidential election. Accordingly, since Governor DeSantis does not presently qualify as a "candidate" for purposes of federal campaign finance law, the FECA's contribution limits do not apply to any donations or transfers to him, 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1).

As this Section explains, the D.C. Circuit has repeatedly held the FECA does not allow the Commission to regulate efforts to "draft" potential candidates, precisely because such efforts (by definition) are aimed at people who are not yet candidates under the FECA. Moreover, the Commission has repeatedly implored Congress to extend the statutory definitions of "contribution" and "expenditure" to include payments and donations made in connection with efforts to persuade someone to become a federal candidate. Congress has repeatedly rejected such proposals. The FECA's "testing the waters" regulation, which purports to expand the reach of the FECA's contribution limits to regulate efforts to "draft" non-candidates by persuading them to run for office, is invalid. And in any event the regulation is inapplicable to this case because, by its plain terms, it limits only the provision of "funds" to people who are testing the waters, and not in-kind contributions of other things of value to them. Thus, RFR may provide its signed petition with contact information for its signatories, along with any future updates or supplements, to Governor DeSantis at any time before Governor DeSantis becomes a federal candidate under the FECA.

1. Binding D.C. Circuit precedent precludes the FEC from regulating disbursements made in an

effort to "draft" someone to become a candidate

Binding D.C. Circuit precedent holds the FECA does not regulate efforts to "draft" candidates for federal office. "[A]t the time [the FECA] was written and amended in 1971, 1974, and 1976,'draft' groups were either unheard of, or else not considered as a factor of sufficient importance in the political process to warrant concern by Congress." *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 382 (D.C. Cir. 1981) [hereinafter, "*Machinists*"]. Noting the FECA "nowhere mentions 'draft' groups," the D.C. Circuit has refused to read the statute to "imply coverage for such groups." *Id*. at 394; *see also id*. (declining to "stretch the statutory language, or read into it oblique references of Congressional intent to include 'draft' groups"). Federal regulations do not discuss "draft" efforts, either. The only reference to "draft[ing] an individual . . . to encourage him or her to become a candidate" in the Commission's regulations is to exempt draft committees from the restrictions that typically apply to the use of candidates' names by unauthorized committees. 11 C.F.R. § 102.14(b)(2).

In *Machinists*, 655 F.2d at 382, the Machinists Non-Partisan Political League ("the League") was an unauthorized multicandidate political committee. It "encourage[ed] and assist[ed] the formation of 'draft-Kennedy' groups in several states" for the 1980 election. *Id*. at 382-83. Between May and November 1979, when Senator Ted Kennedy formally announced his candidacy for President, the League spent approximately $30,000 in connection with those draft groups. *Id*. at 382-83. The Carter campaign filed an administrative complaint, alleging the draft groups should have registered as political committees and the League's disbursements to them violated contribution limits. *Id*. at 383, 390. The Commission opened an investigation into the groups and subpoenaed the League for information. *Id*. at 384.

The D.C. Circuit held the FEC lacked jurisdiction to issue the subpoena because draft committees were neither "political committees" under the FECA nor subject to FECA's contribution or expenditure restrictions. *Id*. at 397. The *Machinists* Court began by declaring the FEC's "investigation into 'draft Kennedy' groups represents an unprecedented assertion of subject matter jurisdiction for the FEC." *Id*. at 386. The Commission was investigating "political activity and association" which had "never before [been] subject to bureaucratic scrutiny." *Id*. It was targeting "the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding." *Id*. at 388; *see also id*. at 390 (holding draft committees' activities involve "centrally important first amendment associational and advocacy interests").

Machinists went on to hold draft committees do not "fall within the Court's limited definition of political committees." *Id*. at 392. "Draft groups . . . aim to produce some day a candidate acceptable to them, but they have not yet succeeded. Therefore none is promoting a 'candidate' for office, as Congress uses that term in FECA." *Id*. Moreover, because a draft committee's activities "are not related in any way to a person who has decided to become a candidate," it has no "potential for corruption" that has been "specifically identified by Congress." *Id*.; *see also id*. at 394 (noting a draft committee's "contributions and expenditures do not relate to an identifiable 'candidate'"). *Machinists* concluded, "In this delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique references of Congressional intent to include 'draft' groups. . . . [W]e must decline to extend [FECA] to cover such groups." *Id*.; *accord FEC v. Citizens for Democratic Alternatives in 1980*, 655 F.2d 397, 398 (D.C. Cir. 1981); *see also FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982) ("[U]nauthorized groups electioneering on behalf of someone who is not yet a candidate for

federal office cannot be covered by the Act."). The D.C. Circuit went on to reaffirm and apply *Machinists* as late as 2010. *See Unity08 v. FEC*, 596 F.3d 861, 867-68 (D.C. Cir. 2010).

Machinists establishes RFR's right to provide its signed petition to "draft" Governor DeSantis at anytime before he becomes a candidate; the FEC's advisory opinion to the contrary flatly violates this precedent (which the Commission did not even bother mentioning). ***First***, *Machinists* requires the Commission to be cautious in regulating private efforts to draft potential federal candidates, since such efforts not only involve the exercise of core First Amendment rights, *Machinists*, 655 F.2d at 388, but generally lie beyond FECA's bounds, *id*. at 394. ***Second***, the Court repeatedly emphasized the difference between "activities [to] support an existing 'candidate'" and "attempts to convince the voters or [the individual himself] that he would make a good 'candidate' or should become a 'candidate.'" *Id*. at 396. Since a person who has not yet qualified as a candidate—including a person who may be "testing the waters"—is (by definition) not a candidate, disbursements made in the course of attempting to convince him "that he would make a good 'candidate' or should become a 'candidate'" cannot qualify as "contributions" under FECA and are not subject to regulation. *Id*.; *see also id*. at 392 (emphasizing the target of a draft campaign is not a "candidate . . . as Congress uses that term in FECA").

Third, *Machinists* rejected the notion efforts to draft a candidate carry a "potential for corruption." *Id*. The Supreme Court has expressly emphasized preventing actual or apparent corruption are the only constitutionally permissible justifications for contribution limits. *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality op.) ("Congress may regulate campaign contributions to protect against corruption or the appearance of corruption."); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far

identified for restricting campaign finances."). Given the D.C. Circuit's binding conclusions concerning the absence of corruption in efforts to draft a potential federal candidate, the First Amendment bars the Commission from applying contribution limits to prevent RFR from providing its signed petition to Governor DeSantis. Under *Machinists*'s interpretation of the FECA, RFR may provide its signed draft petition with signatories' contact information, along with any updates or supplements, to Governor DeSantis before he becomes a candidate.

2. Congress has repeatedly declined the FEC's requests to amend FECA's definition of "contribution" to include disbursements made to influence someone to run for federal office

This Court should not construe the term "contribution" to include donations or transfers to a person who has not yet become a candidate because Congress considered and rejected amendments to the FECA to that effect. The Supreme Court has consistently cautioned against interpreting statutes in ways which reflect proposals or amendments Congress failed to adopt. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) ("Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program."); *City of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1472 (2020) ("Congress did not accept these requests for general EPA authority over groundwater."); *Fourth Estate Pub. Ben Corp. v. Wall-street.com LLC*, 139 S. Ct. 881, 891 (2019) ("Despite proposals to repeal § 411(a)'s registration requirement entirely, however, Congress maintained the requirement for domestic works." (citations omitted)); *see also Kimble v. Marvel Entm't LLC*, 576 U.S. 446, 458 n.4 (2015) ("Congress declined to enact bills that would have modified . . . tying doctrine . . . .").

Throughout the 1970s, the Commission itself repeatedly complained draft committees are not covered by FECA, and disbursements made for the purpose of inducing someone to run for federal office could not be considered "contributions" because the recipient was not yet a

"candidate." For example, in 1976, the Commission stated, "Congress may wish to consider amending the Act to bring draft movements within the reporting provisions and contribution limits." FEC, *Annual Report 1976*, at 74 (quoted in *Machinists*, 655 F.3d at 395), https://www.fec.gov/resources/cms-content/documents/ar76.pdf. It explained, "[P]ersons or committees supporting a draft movement on behalf of an individual who is not a candidate within the meaning of the Act may not have any reporting requirements." *Id*. The Commission further recognized FECA's limits on contributions to candidates were inapplicable during the "draft" stage before a person satisfied the statutory definition of "candidate." It recommended Congress change the law to specify someone who contributes to a draft committee knowing a "substantial portion" of the contribution "will be expended on behalf of a clearly identified individual . . . be considered to have made a contribution to a 'candidate.'" *Id*. at 75; *see also* FEC, *Annual Report* 1975, at 77 ("Thought should be given to amending the law to make the contribution limitations applicable to draft movements. Under the present law, an individual is not a candidate unless he [satisfies the statutory requirements].") (quoted in *Machinists*, 655 F.2d at 395), https://www.fec.gov/resources/cms-content/documents/ar75.pdf.

In 1979, Congress followed only part of the Commission's advice. It amended the FECA's reporting provisions to require draft committees to disclose their receipts and disbursements. *Machinists*, 655 F.3d at 395. The House committee report accompanying the amendments to the reporting provisions declared, "The change was made to ensure that organizations set up to 'draft' individuals who are not actually candidates will be required to report." *Id*. (quoting H. Rpt. No. 96-422, at 15 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2860, 2874). The D.C. Circuit observed, "[T]here is no indication from the 1979 Amendments or the legislative history that such 'draft'

groups were to be bound by the contribution limitations. . . . Congress has never acted expressly to bring 'draft' groups within the coverage of contribution limitations." *Id*.

In 1987, the Commission asked Congress to expand the definition of "contribution" to include funds provided in the course of attempting to influence a person to run for federal office. *See* FEC, *Legislative Recommendations*—1987, *reprinted in* House Subcomm. on Elections, Comm. on House Admin., *Hearings on Campaign Finance*, 100th Cong., 1st Sess., at 869 (May 21, June 2, June 16, June 30, and July 14, 1987) (suggesting Congress amend the definitions of "contribution" and "expenditure" to include "funds contributed by persons 'for the purpose of influencing a clearly identified individual to seek nomination for election or election to federal office'"). The Commission warned these changes were necessary because "a nonauthorized group organized to support someone who has not yet become a candidate may operate completely outside the strictures of the Federal Election Campaign Act." *Id*.

Throughout the early 1990s, Congress repeatedly considered legislation to redefine the terms "contribution" and "expenditure" in FECA to include payments or disbursements "for the purpose of expressly advocating that a clearly identified individual become a candidate for Federal office." H.R. 708, 103rd Cong., § 8(a)(3) (Feb. 2, 1993); S.7, 103rd Cong., § 422(a) (Jan. 21, 1993); H.R. 4934, 102nd Cong., § 504(a) (Apr. 9, 1992); S.6, 102nd Cong., § 622(a) (Apr. 11, 1991); S.143, 102nd Cong., § 422(a) (Jan. 14, 1991); S.2595, 101st Cong., § 422(a) (May 12, 1990); *see also* S. Comm. on Rules & Admin., *Hearings on Proposed Amendments to the Federal Election Campaign Act of 1971*, S. Hrg. 99-709, at 122, 303, App. 1F at 272 (Nov. 5, 1985; Jan. 22 & Mar. 27, 1986) (reprinting S. 1891, 99th Cong., § 3(a), 3(d) (Dec. 3, 1985) (containing proposed potential amendment to 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i) to redefine "contribution" and

"expenditure" to include payments or disbursements "for the purpose of expressly advocating that a clearly identified individual become a candidate for Federal office")).

In the course of drafting the Bipartisan Campaign Reform Act ("BCRA"), Pub. L. No. 107-155 (Mar. 27, 2002), Congress expressly considered and rejected the possibility of limiting disbursements to a person for the purpose of influencing them to become a federal candidate. In 1999, Representative Steny Hoyer, who is presently Majority Leader of the U.S. House of Representatives, introduced H.R. 1818, 106th Cong., 1st Sess. (May 14, 1999), as part of Congress' effort to amend the FECA. Section 106 of his bill would have amended the definitions of "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any clearly identified individual ***to seek nomination or election to Federal office***." *Id.* § 106(a)(1) (emphasis added). It similarly would have amended the definition of "expenditure" to include any "purchase, payment, distribution, loan, advance, deposit, or gift" made for that purpose. *Id*. § 106(a)(2).

RFR's proposed petition to Governor DeSantis—who presently is not a federal candidate—to attempt to "draft" him to run for President falls squarely within the legislative proposals for which the FEC repeatedly advocated, that Congress considered and repeatedly declined to adopt. The Commission's advisory opinion inappropriately subjects RFR's proposed conduct to contribution limits as if these legislative changes had been adopted.

3. <u>There is no legal authority for the FEC's "testing the waters" regulation</u>

Despite the D.C. Circuit's binding ruling, the FECA's unambiguous text, and the statute's legislative history confirming it neither regulates draft activities nor limits donations to people before they qualify as candidates, the FEC has promulgated a regulation purporting to establish such limits. 11 C.F.R. § 100.72, the FEC's "testing the waters" regulation, applies to donations or

transfers to an individual who is not a candidate which are made "for the purpose of determining whether [they] should become a candidate." *See also Askew*, FEC A.O. 1981-32, at 4 (Oct. 2, 1981) (noting the testing the waters regulation applies to "activities designed to determine whether to run"). Examples of "testing the waters" activities include "conducting a poll, telephone calls, and travel." 11 C.F.R. § 100.72(a). The regulation acknowledges such donations and transfers "are not contributions," but nevertheless goes on to nullify that disclaimer by declaring, "Only funds permissible under the Act may be used for such [testing-the-waters] activities." *Id*.

The Commission has construed that provision to mean the FECA's contribution limits apply to both monetary and in-kind donations to recipients who are testing the waters at the time such donations are made, even before the recipient has decided whether to become a candidate, *see, e.g.*, *Washington State Federal Comm.*, FEC A.O. 1998-18, at *3 (Oct. 9, 1998) ("Commission regulations provide for adherence to the Act's limits and prohibitions at the time of the activity, in anticipation of the eventual candidacy."); *Congressman Vic Fazio*, FEC A.O. 1985-38, at 3 (Jan. 17, 1986) ("[T]his regulation applies the prohibitions and limitations of the Act to the 'funds received' and 'Payments made' for the purpose of determining whether an individual should become a candidate under the Act."). The Commission explained people must be prohibited from making unlimited donations or transfers to individuals who are testing the waters to prevent "circumvention" of the FECA's contribution limits. FEC, *Payments Received for Testing the Waters Activities; Transmittal to Congress*, 50 Fed. Reg. 9992, 9993-94 (Mar. 13, 1985); FEC, *Effective Date: "Testing the Waters" Regulations*, 50 Fed. Reg. 25,698, 25,698-99 (June 21, 1985). Applying this principle, the Commission's advisory opinion in this case bars RFR from providing its signed petition to Governor DeSantis once he is deemed to be "testing the waters." Compl. Exh. 11 at 8.

The Commission lacks any statutory basis for prohibiting RFR from providing its signed petition with signatories' contact information to Governor DeSantis, along with any supplements or updates, while the Commission deems him to be "testing the waters." The FECA's contribution limits apply only to donations or transfers to individuals who are "candidates." 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). The statute goes on to define the term "candidate" as a person who is seeking nomination or election to federal office and has exceeded $5,000 in "contributions" or "expenditures." 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a). A person who is merely "testing the waters," by definition, is not a candidate and therefore is not subject to the FECA's contribution limits.

There is no statutory ambiguity for the FEC to exploit to expand its reach to bar donations or transfers to non-candidates, regardless of whether they are "testing the waters." *Cf. Chevron, U.S.A., Inc. v. Nat'l Resources Def. Council*, 467 U.S. 837, 843 (1984) (holding if Congress has "directly addressed the precise question at issue," the agency and court must "give effect to the unambiguously expressed intent of Congress"). Contribution limits are already a prophylactic protection against the possibility of corruption, since "few if any contributions to candidates will involve *quid pro quo* corruption." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). Limiting contributions—particularly a signed petition—to a person who is not a candidate, in order to prevent the possibility of an impermissible *quid pro quo* in the event the person decides to become a candidate, and then goes on to win the election, is exactly the sort of impermissible "prophylaxis-upon-prophylaxis approach" the Court has repeatedly condemned. *McCutcheon v. FEC*, 572 U.S. 185, 221 (2014) (quoting *FEC v. Wis. Right to Life Inc.*, 551 U.S. 449 (2007) (opinion of Roberts, C.J.)); *accord FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1653 (2022). Accordingly, 11 C.F.R. § 100.72(a) is arbitrary, capricious, contrary to law, invalid, and unenforceable to the extent it

purports to regulate donations to someone who is not a candidate at the time those donations are made. RFR is free to provide its signed petition to Governor DeSantis, regardless of whether he is testing the waters, and the FEC's Advisory Opinion is invalid insofar as it concludes otherwise.

The applicability of the "testing the waters" regulation is a particularly important issue due to the uncertainty expressed by half the Commissioners about whether Governor DeSantis may already be subject to it. As explained above, a person is "testing the waters" under the regulation if that person is "determining whether [he or she] should become a candidate." 11 C.F.R. § 100.72(a). Under this ill-defined and highly subjective standard, it is impossible for the Commission to determine whether public figures who have repeatedly affirmed an intent to run for President in 2024, such as the incumbent President Joseph Biden, are "testing the waters."[5] In the context of this case, several Commissioners emphasized during the Commission's September 15, 2022 hearing the difficulty of applying this vague standard to assess whether Governor DeSantis may be "testing the waters."

FEC Chair Dickerson, for example, suggested it is "unknown" and "speculative" whether Governor DeSantis was already "testing the waters," even before receiving RFR's signed petition, because the Commissioner has not "read every possible press report." *See* Video of Sept. 15, 2022

[5] *See, e.g.*, Brett Samuels, *Biden Says He Intends to Run in 2024, Has Not Made a "Firm Decision,"* THE HILL (7:49 P.M. ET, Sept. 18, 2022) (quoting President Biden as saying, "Look, my intention as I said to begin with is that I would run again. But it's just an intention. But is it a firm decision that I run again? That remains to be seen."), https://thehill.com/homenews/administration/3649720-biden-says-he-intends-to-run-in-2024-has-not-made-a-firm-decision/; Sebastian Smith, *Biden Warns China and Russia, Hedges on Seeking Reelection*, BARRON'S (Sept. 18, 2022) (explaining Biden "surprised many by hedging on whether he'll seek reelection"), https://www.barrons.com/news/biden-hedges-on-seeking-reelection-01663552807; *see also* Carol E. Lee, et al., *Biden Aides are Quietly Assembling a 2024 Campaign as They Await a Final Decision on His Political Future*, FOX NEWS (Sept. 16, 2022), https://www.nbcnews.com/politics/joe-biden/biden-aides-are-quietly-assembling-2024-campaign-await-final-decision-rcna48005.

FEC Hearing at 35:35 to 35:55, https://www.youtube.com/watch?v=BWfuTD46wwM. Of course, it is absurd to suggest a person must "read every possible press report" to determine whether they may submit a signed political petition to a public figure. Commissioner Weintraub later confirmed "you don't know whether [Governor DeSantis] is testing the waters or not." *Id*. at 52:44 to 53:56—a fact the Commission seemingly needs to know to be able to perform its regulatory functions. And – perhaps most shockingly – Commissioner Broussard declared that, merely by accepting the signed petition, Governor DeSantis would be deemed to be "testing the waters." *Id*. at 46:53 to 47:02. Particularly as construed by these Commissioners, the "testing the waters" regulation fails to give adequate warning to a reasonable person as to whether Governor DeSantis is deemed to be "testing the waters" for a potential candidacy at any particular point in time, enhancing the chill to RFR's First Amendment activities.

4. The "testing the waters" regulation does not apply to in-kind contributions

Even if the "testing the waters" regulation is valid, by its plain terms it is inapplicable to this case. On its face, the regulation applies only to "funds" received by a person "for the purpose of determining whether [he or she] should become a candidate." 11 C.F.R. § 100.72(a). The regulation is far narrower than the statutory and regulatory definition of "contribution," which expressly includes gifts of either "money" or "anything of value." 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). There is no language in the testing-the-waters regulation purporting to regulate the provision of anything other than "funds." This Court must enforce the critical distinction in language between §§ 100.52(a) and 110.1(b), which together limit the provision of both "money" and "anything of value" to "candidates," and 11 C.F.R. § 100.72(a), which prohibits the provision only of "[f]unds" to a person who is "testing the waters." *See Henson v. Santander Cons. USA, Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[U]sually at least, when we're engaged in the business of

interpreting statutes we presume differences in language like this convey differences in meaning." (citing *Loughrin v. United States*, 134 S. Ct. 2384 (2014))). Accordingly, the testing-the-waters regulation does not empower the Commission to limit non-monetary, in-kind donations to non-candidates who are merely testing the waters.

Unapologetically ignoring the plain text of its own regulation, the Commission has opined that the term "funds" should be understood as including in-kind goods and services, as well. *See* In re *Reubin Askew*, FEC A.O. 1981-32, at *5 (Oct. 2, 1981) ("The fact that the quoted regulation refers specifically to 'funds received' was not intended . . . to deny the applicability of the exemption to 'in kind' donations for testing the water activity."); *see also Republican Majority Fund*, FEC A.O. 1985-40, at 3 (Jan. 24, 1985) (concluding, under the testing-the-waters regulation, "'funds received' and 'payments made' include in-kind gifts of anything of value"). Reiterating these conclusions, the FEC's advisory opinion in this case concludes RFR may not provide its signed petition to Governor DeSantis if he is "testing the waters." Compl. Exh. 11 at 8 ("[I]f Governor DeSantis were to begin testing the waters for a potential federal candidacy . . . RFR would not be able to provide [the petition] to [him] without charge."). To the contrary, since the FEC's testing-the-waters regulation governs the provision only of "funds," it does not limit RFR's ability to provide its signed petition, along with any supplements and updates, to Governor DeSantis regardless of whether he is testing the waters.

C. *The Canons of Statutory Interpretation Counsel in Favor of Allowing RFR to Provide Its Signed Petition to Governor DeSantis*

To the extent any ambiguity exists over whether the FECA permits RFR to provide its signed petition to Governor DeSantis, regardless of whether he is "testing the waters" or has

become a "candidate," numerous canons of statutory interpretation counsel in favor of construing the FECA narrowly, to permit RFR's political expression and association. ***First***, the constitutional avoidance canon requires this Court to construe statutory and regulatory terms narrowly in order to avoid unnecessarily raising serious First Amendment concerns. *See Nat'l Labor Rel. Bd. v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) ("[I]n the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."); *see also Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (noting the presumption "Congress did not intend" to authorize the issuance of regulations raising "'grave and doubtful constitutional questions'" (quoting *United States* ex rel. *Attorney Gen. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909))). This canon suggests this Court should interpret terms such as "gift" and "anything of value" within the statutory definition of "contribution" narrowly, *see* 52 U.S.C. § 30101(8)(A)(i), to exclude political communications and signed draft petitions. It would likewise lead this Court to narrowly construe the term "funds" in the Commission's testing-the-waters regulation, 11 C.F.R. § 100.72(a), as referring solely to monetary donations, so the regulation does not impede RFR's ability to engage in political expression by providing its signed petition to Governor DeSantis.

Second, the major questions doctrine allows this Court to reject the Commission's attempt to expand campaign finance law to prohibit pure political speech by American citizens to encourage someone to become or remain a federal candidate. *W. Va. v. EPA*, 142 S. Ct. 2587, 2614 (2022). "[J]udges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions." *Id.* (quoting W. Eskridge, Interpreting Law: A Primer on

How to Read Statutes and the Constitution 288 (2016)). It is "'highly unlikely that Congress would leave' to '[the Commission's] discretion' the decision" of whether a group may provide a political petition to a public figure. *Id*. at 2613 (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218 (1994)). Prohibiting political petitions is exactly the type of unusual, sweeping power for which this Court must "'hesitate before concluding that Congress' meant to confer such authority." *Id*. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000)).

Finally, the rule of lenity requires this Court to resolve any remaining doubts in RFR's favor and interpret ambiguous terms narrowly. The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *DePierre v. United States*, 564 U.S. 70, 88 (2011) (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.)); *see also McNally v. United States*, 483 U.S. 350, 359-60 (2003) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."). The rule applies to FECA provisions that may be enforced either civilly or criminally. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."); *see also United States v. Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality op.).

In *Cleveland v. United States*, 531 U.S. 12, 25 (2000), for example, the Court applied the rule to narrowly construe the term "property" in the federal mail fraud statute, 18 U.S.C. § 1341. It explained, "[T]o the extent that the word 'property' is ambiguous as placed in § 1341, we have instructed that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Cleveland*, 531 U.S. at 25 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The Court concluded the term did not include licenses the defendant was attempting to procure

from the state. *Id.* at 26-27 ("[A] Louisiana video poker license in the state's hands is not 'property' under § 1341."); *see also Yates*, 135 S. Ct. at 1088 (invoking rule of lenity in support of construing the term "tangible object" narrowly). Likewise, here, the rule of lenity counsels strongly in favor of excluding RFR's signed petition from the scope of the terms "gift" and "anything of value" in 52 U.S.C. § 30101(8)(A)(i) (defining "contribution" in relevant part as a "gift" of "money or anything of value"), as well as the term "funds" in 11 C.F.R. § 100.72 (applying federal contribution limits to donations of "funds" to candidates who are "testing the waters").

D. *At the Very Least, Ready for Ron May Provide Its Signed Petition to Governor DeSantis Before He Begins Testing the Waters*

In its zeal to suppress pure political speech and association under the guise of campaign finance regulation, the FEC deadlocked on the question of whether RFR may provide its signed petition to Governor DeSantis before he begins "testing the waters" or becomes a "candidate." *See* Compl. Exh. 11 at 1 ("The Commission could not approve a response by the required four affirmative votes as to whether [RFR] may . . . provide the contact information from its petition to Governor DeSantis when [he] is neither testing the waters nor a federal candidate."). In doing so, the Commission wrongfully deprived RFR of the statutory safe-harbor (*i.e.*, a reliance defense) an advisory opinion would have provided to protect RFR from enforcement actions for engaging in such activities. *See* 52 U.S.C. § 30108(c)(1)(A), (c)(2) ("Any advisory opinion rendered by the Commission . . . may be relied upon by any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered . . . ."). In *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010), the D.C. Circuit recognized the FEC's failure to issue a requested advisory opinion "deprives the plaintiff of a legal right—[§ 30108(c)'s] reliance defense, which [the plaintiff] would enjoy if it had obtained a favorable resolution in the advisory opinion process."

Even if this Court is not persuaded by RFR's other arguments, at the very least the Commission erred in failing to affirm RFR's right to provide its signed petition with signatories' contact information to Governor DeSantis before he starts "testing the waters" or becomes a candidate. The Commission cannot point to any legal authority in either FECA or its own regulations limiting contributions, donations, or transfers to an individual who has not yet even begun testing the waters. Neither federal contribution limits, 52 U.S.C. § 30116(a)(1)(A), nor the Commission's "testing the waters" regulation, 11 C.F.R. § 100.72(a), applies to donations or transfers from a political committee to an individual who is neither testing the waters nor a candidate. Consequently, federal campaign finance law does not bar RFR from providing its petition, including contact information for its signatories, to Governor DeSantis to persuade him to declare his candidacy for the Republican nomination for President. The Commission's refusal to issue an advisory opinion granting RFR a statutory safe harbor for such activity is arbitrary, capricious, and contrary to law.

The only rationale any of the Commissioners offered in support of its deadlock on this issue is that the very act of giving the signed petition to Governor DeSantis—if he accepted it—would automatically trigger "testing the waters" status for him. Video of Sept. 15, 2022 FEC Hearing, at 46:53 to 47:02 (Commissioner Broussard), https://www.youtube.com/watch?v=BWfuTD46wwM. Merely accepting a signed petition, however, does not mean a person has begun the process of determining whether to become a candidate. Officeholders such as President Joe Biden are frequently asked about whether they intend to run for President in an upcoming election, publicly discuss the issue at length, and even admit their intention to run.[6] The Commission does not treat such conversations or declarations as

[6] *See supra* note 5.

sufficient to constitute "testing the waters." Although receiving a signed petition may be an important factor in convincing a person to begin testing the waters, it is not the sort of affirmative act—generally involving the expenditure of funds—sufficient under § 100.72(a) to trigger "testing the waters" status. Accordingly, the Commission lacks any valid basis for barring RFR from providing its petition to Governor DeSantis before he begins testing the waters.[7]

III. THIS COURT SHOULD ISSUE A PRELIMINARY INJUNCTION

This Court should enter a preliminary injunction barring the Commission, at any time, from initiating enforcement proceedings against RFR in connection with either:

- RFR's provision of its signed petition with signatories' contact information to Governor DeSantis while the preliminary injunction remains in effect, regardless of whether he is deemed to be "testing the waters" for a presidential run or has become a candidate for President (or the Republican nomination for President); or
- RFR's expenditure of funds from its non-contribution account in connection with the petition, including for advertisements, robocalls, and maintenance of the petition website and hotline.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief,

[7] To the extent RFR is permitted to provide its signed petition to Governor DeSantis for any of the foregoing reasons at any particular point in time (i.e., before Governor DeSantis begins testing the waters, while he is testing the waters, and/or after he becomes a candidate), RFR is likewise permitted to make expenditures for that purpose from its non-contribution account. *see Carey v. Fed. Election Comm'n*, 864 F. Supp. 2d 57 (D.D.C. 2002) (recognizing the First Amendment right of political committees to establish a separate account for which the committee may accept unlimited contributions, and which may be used to subsidize political speech and other election-related activities except for making contributions to candidates, political parties, or other committees); *see also Speechnow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (en banc) ("[T]he government has no anti-corruption interest in limiting contributions to an independent expenditure group.").

[3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011) (quoting *Winter v. Natural Res. Defense Coun.*, 555 U.S. 7, 20 (2008)). RFR satisfies all four requirements.

First, RFR is likely to succeed on the merits of its claims. As discussed above, RFR has a fundamental First Amendment right to provide its signed petition with signatories' contact information to Governor DeSantis. *See supra* Part I; *see also* Complaint Count I, ¶¶ 93-96. Moreover, as a matter of statutory interpretation, the FECA does not prohibit RFR from providing its petition to Governor DeSantis. RFR may do so at any time because the signed petition is not a "contribution" for purposes of FECA and, *see supra* Subsection II.A.1. Even if the signed petition does constitute a contribution, the source of the contact information which constitutes the purported "thing of value" is each individual signatory who provides their phone number and/or e-mail address for RFR to provide to Governor DeSantis, not RFR itself. RFR is merely a conduit, *see supra* Subsection II.A.2.

Alternatively, RFR is entitled to a preliminary injunction allowing it to provide the signed petition to Governor DeSantis prior to the time he becomes a candidate, regardless of whether he is "testing the waters." Binding D.C. Circuit precedent, the FECA's legislative history, and the plain text of the FECA itself confirm contribution limits do not apply to "draft" efforts to influence someone to run for federal office. *See supra* Subsections II.B.1 to II.B.2. To the extent the FEC's "testing the waters" regulation purports to limit contributions to individuals who are considering whether to run for office, it is without statutory authority and invalid. *See supra* Subsection II.B.3. In any event, the regulation limits the provision only of "funds" to individuals who are testing the waters, and does not apply to in-kind contributions. *See supra* Subsection II.B.4. Any statutory or

regulatory ambiguities must be resolved in RFR's favor under the constitutional avoidance canon, major questions doctrine, and rule of lenity. *See supra* Section II.C.

For these reasons, RFR is likely entitled to an injunction, *see* Complaint Count IV, ¶¶ 109-16, and declaratory judgment, Complaint Count III, ¶¶ 105-08; *id*. Count V, ¶¶ 117-23, confirming its right under the Constitution and/or FECA to provide its signed petition with the signatories' contact information to Governor DeSantis. Moreover, RFR is likely to demonstrate both the FEC's advisory opinion in *Ready for Ron*, Compl. Exh. 11, *see* Complaint Count II, ¶¶ 97-104, and its "testing the waters" regulation," 11 C.F.R. § 100.72; *see* Complaint Count VI, ¶¶ 124-31, are arbitrary, capricious, contrary to law, unconstitutional and invalid.

Second, RFR is likely to suffer irreparable injury in the absence of injunctive relief. In light of the FEC's advisory opinion in this case, RFR faces the serious possibility of both civil and criminal punishment if it provides its signed petition—which already has nearly 100,000 signatures, including signatories' contact information—to Governor DeSantis at any time, including before he starts testing the waters, once he starts testing the waters, and in the event he becomes a candidate. This risk is exacerbated by the fact RFR's signature-gathering efforts were funded at least partly through its non-contribution *Carey* account. This interference with pure political speech and association constitutes *per se* irreparable harm. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time unquestionably constitutes irreparable injury.'" (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.))); *see also Davis v. District of Columbia*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[A] prospective violation of a constitutional right constitutes irreparable injury for these purposes."). Moreover, to the extent the FEC's advisory opinion improperly chills RFR from engaging in statutorily permitted conduct, RFR will be unable

to seek monetary compensation from the Commission for this unwarranted chill on its activities. *See Odebrecht Constr. v. Sec'y Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013) ("In the context of preliminary injunctions, numerous courts have held that the inability to recover monetary damages because of sovereign immunity renders the harm suffered irreparable.").

Third, the balance of hardships sharply favors RFR. The FEC has no valid interest in either enforcing an unconstitutional law or precluding RFR from engaging in conduct that does not violate the FECA. *See Pursuing Am. Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016).

Finally, an injunction is in the public interest. "[T]here is no public interest in the perpetuation of unlawful agency action." *Texas v. Biden*, 10 F.4th 538, 560 (5th Cir. 2021) (per curiam) (alteration omitted). More specifically, "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). Thus, this Court should grant RFR its requested preliminary injunction.

CONCLUSION

For these reasons, this Court should grant Plaintiff RFR's motion for a preliminary injunction barring the FEC, at any point, from commencing enforcement proceedings against RFR either for providing Governor DeSantis with its signed petition containing signatories' contact information (or any updates or supplements) while the preliminary injunction remains in effect—regardless of whether Governor DeSantis is testing the waters for a presidential run or has become a candidate for President—or for funding such efforts from its non-contribution account.

Dated this 21st day of December, 2022.

Respectfully submitted,

/s/ Dan Backer

Dan Backer, Esq. (D.C. Bar No. 996641)
Chalmers & Adams LLC
441 N. Lee Street, Suite 300

Alexandria, VA 22314
(202) 210-5431
dbacker@ChalmersAdams.com

Lilian Rodriguez-Baz, Esq.*
Chief Legal Counsel, Ready for Ron
66 W Flagler Street, Suite 900
Miami, FL 33130
(561) 291-9897
Lilian@ReadyForRon.com

*Motion for pro hac vice admission forthcoming
Attorneys for Plaintiff