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

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

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INTRODUCTION

The Federal Election Commission ("FEC" or "Commission") has claimed the power to prohibit Americans from providing a signed petition to Governor Ron DeSantis of Florida to encourage him to run for President and, once he declares his candidacy, to remain a candidate. Submitting signed political petitions to potential candidates is a time-honored way of drafting them to run for office. General Wesley Clark explained that he ran for the 2004 Democratic nomination for President because "he was responding to the call of some 60,000 people who signed an online draft petition." Liz Marlantes, *Clark's Fast Political Learning Curve*, CHRISTIAN SCI. MONITOR (Dec. 12, 2003), https://www.csmonitor.com/2003/1212/p01s03-uspo.html. Likewise, in 2015, "more than 210,000 people . . . signed [a SuperPAC's] petition, urging Biden to enter the [presidential] race." Fredreka Schouten, *Biden's Boosters Race to Lock Up Democratic Donors*, USA TODAY (Sept. 2, 2015), https://www.usatoday.com/story/news/politics/elections/2015/09/01/some-democratic-donors-open--biden-white-house-bid/71535676/. And the Supreme Court has recognized, "[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'" *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

The FEC would have this Court believe this case is about a mere mailing list. FEC Br. at 25. To the contrary, Plaintiff Ready for Ron ("RFR") did not simply purchase a list of Republicans and slap a cover sheet on it. Rather, it has spent nine months and over a million dollars soliciting and gathering over 200,000 real, electronic, and telephonic signatures with contact information for its petition to Governor DeSantis to persuade him to become a presidential candidate. The Commission contends it is illegal for RFR to provide that signed petition to Governor DeSantis precisely because it contains its signatories' contact information.

The FEC ignores the fact RFR is merely acting as a conduit. RFR has offered Governor DeSantis' supporters the opportunity—if they wish—to voluntarily choose to join in its political expression and have RFR convey their signatures and the contact information they provide, at their request and on their behalf, to Governor DeSantis as part of its petition. *Cf. ActBlue*, FEC A.O. 2006-30, at 4 (Nov. 9, 2006) ("ActBlue may act as a conduit or intermediary for contributions earmarked for Prospective Candidates."). The fact RFR has made substantial amounts of constitutionally protected independent expenditures to fund these solicitations, *see FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985), does not impact its status as a mere conduit or intermediary, *see WE LEAD*, FEC A.O. 2003-23, at 5-6 (Nov. 7, 2003). To the extent the names and contact information of the petition's signatories have value, the signatories themselves must be recognized as the true contributors, with RFR acting only as a conduit or intermediary to convey them to Governor DeSantis as part of its political petition at the signatories' express request and direction. *See* 52 U.S.C. § 30116(a)(8).

The FEC argues, rather than sending a signed petition brimming with hundreds of thousands of virtual signatures to Governor DeSantis to draft him to run for President, RFR should in effect send him a letter instead. FEC Br. at 24. The FEC's proposal is both politically tone deaf and constitutionally impermissible. ***First***, forcing RFR to sever the signatory names and contact information from its petition violates RFR's right to engage in free political expression by fundamentally changing the very nature, content, and likely impact of its intended communication—a massive political petition. *See Meyer*, 486 U.S. at 421. ***Second***, by preventing RFR from joining together with the petition's signatories in this concerted action, the Commission is needlessly violating RFR's right to engage in political association, as well. *See Citizens Against Rent Control / Coal. For Fair Hous. v. Berkeley*, 454 U.S. 290, 294 (1981). The Commission's

approach likewise hampers Governor DeSantis' ability to associate with those supporters, confirm their authenticity, or provide a direct response to their communication.

Finally, by requiring the petition's signatories to remain either actually anonymous (by having their names excluded from the petition) or effectively anonymous (by having their contact information excluded), the Commission is wrongfully violating the First Amendment right of the petition's signatories to decide for themselves whether to engage in their political speech and association anonymously. *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."). Under both the FECA and the First Amendment, RFR is entitled to provide its signed petition, including the names and contact information signatories provided—as well as any subsequent supplements or updates—to Governor DeSantis at a time of its choosing, including before he starts testing the waters for a presidential candidacy; while he is testing the waters; and after he becomes a candidate.

I. RFR IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS

RFR wishes to provide its signed political petition, along with subsequent supplements, to Governor DeSantis. RFR is entitled to do so, for differing reasons, throughout the presidential election cycle. As an initial matter, no legal authority supports the FEC's contention RFR may not provide the signed petition to Governor DeSantis before he begins testing the waters for a potential candidacy pursuant to 11 C.F.R. § 100.72.

Once Governor DeSantis begins "testing the waters" for a potential candidacy (but before he becomes a "candidate" under the FECA, *see* 52 U.S.C. § 30101(2); *accord* 11 C.F.R. § 100.3(a)), the FEC's only basis for barring RFR from giving its signed petition to him is the Commission's own regulation limiting contributions of funds to individuals who are considering

running for federal office, but have not yet become "candidates" for purposes of the FECA, *see* 11 C.F.R. § 100.72. This regulation exceeds the scope of the FEC's statutory authority, however, because the plain text of the statute this regulation purports to implement unambiguously limits contributions only to "candidates," *see* 52 U.S.C. § 30116(a)(1)(A) and 11 C.F.R. § 110.1(b)(1). The FECA does not empower the FEC to regulate contributions to non-candidates simply because they are considering the possibility of running for office. Moreover, the U.S. Court of Appeals for the D.C. Circuit has already greatly curtailed the Commission's ability to limit draft committees' efforts to persuade potential candidates to run for office, *see FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) [hereafter, "*Machinists*"]. And Congress has, *repeatedly,* refused to amend the FECA's definitions of "contribution" and "expenditure" to include payments made in connection with influencing someone to seek nomination or election to federal office. *See infra* pp. 10-11 n.3.

Finally, even after Governor DeSantis becomes a candidate, RFR may provide its signed political petition and any subsequent supplements to him for three reasons. ***First***, to the extent the names and contact information for the petition's signatories are deemed "things of value" that qualify as "contributions," the contributors should be the signatories themselves, rather than RFR. RFR is acting as a conduit, passing along signatories' contact information at their request, on their behalf, to Governor DeSantis in the same manner it would pass along a monetary contribution. The fact RFR funded advertisements soliciting people to sign its petition does not affect its status as a mere conduit. ***Second***, under the canons of statutory construction, this Court should not treat a signed political petition as a "contribution" under the FECA. ***Finally***, the FECA's contribution limits are unconstitutional as applied to pure political speech and association such as a signed political petition. If this Court concludes RFR is likely to prevail on any of these three arguments,

then RFR may provide its signed petition and any subsequent supplements to Governor DeSantis at any time, regardless of whether he is testing the waters or has become a candidate.[1]

A. *The FEC Has Failed to Cite Any Statute, Regulation, or Other Source of Law That Allows It to Regulate Transfers to Individuals Who Have Not Yet Begun Testing the Waters or Become a Candidate*

The Commission's advisory opinion arbitrarily, capriciously, and erroneously failed to conclude RFR may provide its signed political petition to Governor DeSantis while he "is neither testing the waters nor a federal candidate." Compl., Ex. 11 at 1. The Commission instead reached a 3-3 deadlock on the issue. *Id*. By failing to affirm the permissibility of RFR's intended activity, the Commission "deprive[d] [RFR] of a legal right—[52 U.S.C. § 30108(c)'s] reliance defense, which it would enjoy if it had obtained a favorable resolution in the advisory opinion process." *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010).

The Commission argues RFR "has failed to demonstrate that its proposed activity is lawful. FEC Br. at 40. The FEC has this exactly backwards. RFR's proposed activity is lawful because there is no legal provision that even arguably prohibits it. Both the Commission's advisory opinion

[1] The FEC argues that RFR's entitlement to injunctive and declaratory relief under Counts III and IV turn on whether RFR prevails in its constitutional and statutory claims in Counts I and II. Not so. Count I argues that barring RFR from providing its signed political petition to Governor DeSantis would violate its First Amendment rights of political speech and association. *See* Complaint ¶¶ 93-96. Count II argues that the FEC's failure to issue the requested advisory opinion violates the Administrative Procedures Act. *Id*. ¶¶ 97-104. Even independent of RFR's request for an advisory opinion, however, RFR is still entitled to a declaration of whether its intended course of conduct—providing a signed political petition to Governor Ron DeSantis—violates the FECA and implementing regulations (and, if so, whether the First Amendment allows those provisions to be enforced under such circumstances). Count III seeks such relief. *Id*. ¶¶ 105-08.

RFR agrees with the FEC's argument that, to prevail on Count IV's request for injunctive relief pursuant to the federal judiciary's equitable powers, it must prevail on one or more of its constitutional, statutory, or regulatory arguments. *Cf*. FEC Br. at 41. Finally, Count V's claim under the FECA, 52 U.S.C. § 30116(a)(1)(A), (a)(8), is presented out of an abundance of caution as an alternative means of pleading RFR's request in Count III for a declaration of its rights under those statutory provisions, to avoid any unnecessary pleading dispute over the precise legal provision under which this cause of action arises. *See* Compl. ¶¶ 117-23.

and its brief to this Court failed to cite even a single statute or regulation authorizing the Commission to regulate transfers to individuals who are neither candidates under 52 U.S.C. § 30101(2); 11 C.F.R. § 100.3(a), nor testing the waters under 11 C.F.R. § 100.72.

The FEC's only substantive argument on this point is that Governor DeSantis would automatically be deemed to be "testing the waters" if he received RFR's signed petition. *See* FEC Br. at 40-41. Governor DeSantis' mere acceptance of a petition informing him about the hundreds of thousands of people who would support his candidacy for President does not establish that he has begun the process of "determining whether [he] should become a candidate." 11 C.F.R. § 100.72. The FEC does not cite a single regulation, advisory opinion, or other source suggesting a person triggers "testing the waters" status simply by receiving unsolicited information.

In short, the FEC offers no legal basis for prohibiting RFR from providing its signed petition to Governor DeSantis while he is neither testing the waters nor a candidate.

B. *RFR May Provide Its Signed Political Petition to Governor DeSantis While He Is Testing the Waters to Decide Whether to Become a Candidate*

RFR also may provide its signed political petition to Governor DeSantis while he is testing the waters, but before he becomes a candidate, for two reasons. ***First***, the FEC's "testing the waters" regulation, 10 C.F.R. § 100.72(a)—which the Commission has interpreted as subjecting ***non-candidates*** to contribution limits while they are deciding whether to become candidates—is arbitrary, capricious, and contrary to law. The regulation conflicts with, and is an unreasonable construction of, the FECA's limits on contributions to candidates. ***Second***, by its plain text, § 100.72 applies only to "funds." The FEC's conclusion that § 100.72(a) applies to RFR's provision of a signed political petition to Governor DeSantis is an unreasonable construction of the regulation's unambiguous text and, accordingly, is arbitrary, capricious, and contrary to law.

1. The FEC's Testing the Waters Regulation is Invalid—The Commission's advisory opinion arbitrarily, capriciously, and erroneously prohibits RFR from providing its signed petition to Governor DeSantis should he begin testing the waters for a potential presidential candidacy. The Commission's sole basis for this conclusion was its interpretation of its "testing the waters" regulation, 10 C.F.R. § 100.72(a). *See* Compl., Ex. 11, at 7-8.

Section 100.72(a) states "funds" an individual receives while "determining whether [he] should become a candidate" are deemed to be contributions if that individual "subsequently becomes a candidate." 10 C.F.R. § 100.72(a). The Commission has construed this regulation far beyond both its text as well as the underlying statute. It has concluded individuals who are not "candidates" are nevertheless subject to the FECA's contribution limits while they are testing the waters. *See, e.g.*, *Washington State Federal Comm.*, FEC A.O. 1998-18, at *3 (Oct. 9, 1998); *Congressman Vic Fazio*, FEC A.O. 1985-38, at 3 (Jan. 17, 1986). Accordingly, the Commission ruled RFR may not provide its signed petition to Governor DeSantis once he is deemed to be "testing the waters." *See* Compl. Ex. 11, at 1.

This interpretation is flatly contrary to the FECA's unambiguous text. As the FEC candidly admits, "FECA's contribution limits apply to 'any candidate.'" FEC Br. at 31 (quoting 52 U.S.C. § 30116(a)(1)(A)). The term "candidate" is not left to administrative discretion, but rather is statutorily defined. The FECA unambiguously defines "candidate" as "an individual who seeks nomination for election, or election, to federal office." 52 U.S.C. § 30101(2). A person is deemed to meet that standard if they have received contributions or made expenditures in excess of $5,000. *Id*. § 30101(2)(A)-(B). Since § 100.72(a), as construed by the FEC, applies contribution limits to individuals who do not yet satisfy the statutory definition of "candidate," the regulation goes beyond the bounds of the contribution limits established by the FECA and is invalid. *Cf. Air*

Transp. Ass'n of Am., Inc. v. USDA, 37 F.4th 667, 671-72 (D.C. Cir. 2022) (holding that, where Congress authorized an agency to "collect fees to fund a reserve" through 2002, the agency lacked authority to continue collecting those fees in later years). As no statutory ambiguity exists for the Commission to resolve, it is not entitled to *Chevron* deference. *Cf*. FEC Br. at 34-35.

This conclusion is consistent with the D.C. Circuit's ruling in *Machinists*, 655 F.2d 380. That court concluded a person who is being "drafted" to run for federal office is not a "candidate" under FECA. *Id*. at 392; *see also Unity08*, 596 F.3d at 867-68. Disbursements made for the purpose of convincing someone "that he would make a good 'candidate' or should become a 'candidate'" are neither contributions under the FECA nor subject to limits. *Machinists*, 655 F.2d at 396. Moreover, such draft efforts have no "potential for corruption" that has been "specifically identified by Congress." *Id*. at 392.[2] Thus, *Machinists* confirms the plain-meaning interpretation that § 30116(a)(1)(A)'s contribution limits apply only to contributions to ***candidates***, and not potential future candidates who may be "testing the waters."

The FEC mocks what it terms RFR's "simplistic formulation" of this issue. FEC Br. at 33. Yet "[a]ny other conclusion would run counter to Justice Frankfurter's timeless advice on statutory interpretation: '(1) Read the statute; (2) read the statute; (3) read the statue!'" *Sierra Club v. EPA*, 536 F.3d 673, 678 (D.C. Cir. 2008) (quoting In re *England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (Roberts, J.)). Neither of the FEC's responses are persuasive. ***First***, the Commission contends § 100.72 is valid because it is less drastic than the Commission's ostensible alternative of automatically deeming anyone deciding whether to run for federal office to be a "candidate" for

[2] The Court has held that only the prevention of actual or apparent quid pro quo corruption is a constitutionally valid basis for imposing contribution limits. *McCutcheon v. FEC*, 572 U.S. 185, 192 (2014).

FECA purposes. FEC Br. at 31 ("FECA's candidacy definition could be read to apply to all individuals who are raising or spending to determine whether to run for federal office . . . ."); *see also id*. at 33. That the FEC may seek to muster harsher alternatives to § 100.72, however, fails to address the root issue of whether § 100.72 conflicts with the underlying statute, 52 U.S.C. § 30116(a)(1)(A). It does. Section 100.72 is not valid simply because the FEC seeks to frame it as a "middle-ground interpretation" of the FECA. FEC Br. at 31.

Moreover, this case is not the proper venue for determining the validity of the FEC's hypothetical alternative to § 100.72. It would be odd, however, for the FEC to automatically deem anyone ***considering whether*** to seek nomination or election to federal office to be a candidate, when the FECA defines "candidate" as someone who ***is "seek[ing]*** nomination . . . or election, to federal office." 52 U.S.C. § 30101(2) (emphasis added). That would be like declaring a person is a federal judge simply because the Senate is debating whether to confirm their nomination. Thus, the FEC's threatened alternative to § 100.72 seems to suffer from the same problem as § 100.72.

Second, the FEC suggests § 100.72 is a desirable means of preventing "'circumvention of the prohibitions and limitations of' FECA." FEC Br. at 32. It emphasizes "the risk of *quid pro quo* corruption when a person is deciding whether to become a candidate." *Id*. at 33. The D.C. Circuit has warned, however, that "neither courts nor federal agencies can rewrite a statute's plain text to correspond to its supposed purposes." *Landstar Exp. Am., Inc. v. Fed. Maritime Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009); *see also Baker Botts L.L.P. v. ASARCO LLC*, 576 U.S. 121, 135 (2015) ("Our job is to follow the text even if doing so will supposedly undercut a basic objective of the statute."). Indeed, "the fact that following the text of a statute may conflict with the statute's larger purpose alone does not warrant departing from the text." *Eagle Pharms, Inc. v. Azar*, 952 F.3d 323, 334 (D.C. Cir. 2020). Here, Congress has established limits on contributions to "candidates."

52 U.S.C. § 30116(a)(1)(A). The plain text of this unambiguous statute does not leave room for the FEC to extend these contribution limits to people who are not candidates (but may be considering becoming candidates). Policy concerns about potential circumvention of the FECA's contribution limits must be addressed to Congress.[3]

[3] RFR explained in its opening brief Congress has repeatedly refused to extend FECA to cover draft efforts, including but not limited to draft committees. *See* RFR Br. at 28-31. The FEC contends "RFR misrepresents the Commission's proposed legislative changes." FEC Br. at 38. The FEC's charge of dishonesty is spurious and belied by RFR's brief. *See* RFR Br. at 28-29.

The FEC claims, "The recommendations RFR cites reflect the Commission's recommendation that Congress consider limiting contributions *to a draft committee*. . . ." *Id*. (emphasis in original). That is a reasonable, albeit somewhat selective, summary of the Commission's 1976 recommendations. As RFR explained, however:

> 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'"). . . .

Thus, RFR's brief disproves the FEC's false claim. And RFR's brief ***understated*** the matter. The FEC reiterated the same, always unsuccessful legislative recommendation for several years:

> 1. Bring Funds Raised and Spent for Undeclared but Clearly Identified Candidates Within the Act's Purview. Section 431(8)(A)(i) should be amended to include in the definition of "contribution" funds contributed by persons "for the purpose of influencing a clearly identified *individual* to seek nomination for election or election to Federal office...." Section 431(9)(A)(i) should be similarly amended to include within the definition of "expenditure" funds expended by persons on behalf of such "a clearly identified individual."

FEC, *Legislative Recommendations, 1988*, at 1 (Apr. 1988) (emphasis in original), https://www.fec.gov/resources/cms-content/documents/legrec1988.pdf; *accord* FEC, *Legislative Recommendations, 1989*, at 16 (Mar. 9, 1989), https://www.fec.gov/resources/cms-content/documents/legrec1989.pdf; FEC, *Legislative Recommendations, 1990*, at 31 (Mar. 21, 1990), https://www.fec.gov/resources/cms-content/documents/legrec1990.pdf; FEC, *Legislative Recommendations – 1991*, at 36 (Mar. 28, 1991), https://www.fec.gov/resources/cms-

Third, the FEC dismisses the relevance of the D.C. Circuit's ruling in *Machinists*. *See* FEC Br. at 36-37. The Commission argues *Machinists* did not "determine how FECA"s candidacy definition or contribution limits would apply to a person actively raising and spending money to determine whether to become a candidate." *Id*. at 36. To the contrary, the court emphasized that the target of a draft campaign is not a "candidate . . . as Congress uses that term in FECA." *Machinists*, 655 F.2d at 392. The *Machinists* Court repeatedly emphasized the distinction between "activities [to] support an existing 'candidate'" on the one hand, and "attempts to convince the voters or [the individual himself] that he would make a good 'candidate' or should become a 'candidate,'" on the other. *Id*. at 396. And the Court rejected the notion efforts to draft a potential candidate carry even a "potential for corruption," thereby greatly limiting the FEC's ability to constitutionally regulate such advocacy. *Id*. at 392.

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content/documents/legrec1991.pdf. Representative Steny Hoyer introduced a materially identical bill in 1999, but Congress did not pass it. *See* H.R. 1818, 106th Cong., 1st Sess. (May 14, 1999).

The Commission continued to fruitlessly reiterate this recommendation as late as 2001. FEC, *Priority Legislative Recommendations*, at 5 (2001), https://www.fec.gov/resources/cms-content/documents/legrec2001.pdf. Thus, undersigned counsel did not make any misrepresentations to this Court. This Court may determine for itself the veracity of the FEC's material statements concerning the FEC's own legislative proposals (available on its own website).

The fact that, for well over a decade, Congress consistently refused to adopt the FEC's proposed expansion of the definitions of "contribution" and "expenditure" to include transfers or other payments for the purpose of influencing someone to seek office simply underscores the severe limits of FECA's applicability to efforts to draft potential candidates. The Commission cites numerous cases rejecting the relevance of such post-enactment legislative history. FEC Br. at 37-38. Many other cases, however, rely on Congress' consistent rejection of legislative proposals as a guide to what existing law does ***not*** mean. *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (refusing to construe federal environmental law as authorizing a particular program because "Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program"); *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 281 (1972) (resolving dispute over a federal statute's collective bargaining requirements based partly on the fact "Congress has consistently declined to interfere with free collective bargaining"); *United States v. Int'l Boxing Club*, 348 U.S. 236, 244 (1955) (refusing to recognize exemption to antitrust statute in part because Congress rejected four subsequent bills that would have granted such relief).

Machinists precludes the FEC from expanding the statutory definition of "candidate" to apply to people still deciding whether to run for office, or instead subjecting such people to the same restrictions as actual candidates (like contribution limits). The FEC's erroneously cramped interpretation of *Machinists* renders both its advisory opinion as well as § 100.72(a) invalid. Thus, the FEC's "testing the waters" regulation, § 100.72, is arbitrary, capricious, contrary to law, and unenforceable. Accordingly, there is no restriction on RFR's ability to provide its signed political petition to Governor DeSantis while he is "testing the waters" for a potential candidacy.[4]

2. The FEC's Testing the Waters Regulation Does Not Apply to In-Kind Contributions—Even assuming § 100.72 is valid, by its plain text it governs only "***[f]unds*** received solely for the purpose of determining whether an individual should become a candidate." 10 C.F.R. § 100.72(a) (emphasis added). Both the FECA and FEC regulations consistently distinguish between funds and in-kind contributions. *See, e.g.*, 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a). Section 100.72, however, is completely silent as to in-kind contributions, much less a signed political petition. Accordingly, even on its own terms, § 100.72(a) provides no basis for the FEC's advisory opinion barring RFR from providing its signed political petition to Governor DeSantis. The FEC states it has "long interpreted its testing the waters regulation to apply both to

[4] The FEC's brief also underscores the indeterminacy and unworkability of the FEC"s interpretation of the "testing the waters" regulation. On the one hand, the Commission argues "RFR and those individuals subject to the regulation have little risk of being caught unawares by it." FEC Br. at 34. Yet on the very same page, the Commission cites a *Washington Post* article to suggest "that DeSantis ***may have already begun*** to test the waters." *Id*. at 34 n.16 (emphasis added); *cf*. Video of Sept. 15, 2022 FEC Hearing at 35:35 to 35:55 (statement of FEC Chair Dickerson) (stating it is "unknown" whether Governor DeSantis is testing the waters without "read[ing] every possible press report"), https://www.youtube.com/watch?v=BWfuTD46wwM. If the Commission is unable or unwilling to adopt a definitive position as to whether the facts set forth in its cited newspaper article are sufficient to constitute "testing the waters" under § 100.72, neither RFR, a potential contributor, nor a candidate can reasonably be expected to do so. RFR cannot be expected to divine Governor DeSantis' subjective thoughts and intentions.

in-kind contributions as well as monetary ones." FEC Br. at 39. The FEC's brief does not explain, however, how such an interpretation is remotely consistent with the regulation's text.

The Commission also suggests RFR would be even worse off if § 100.72 were inapplicable. Without that regulation, the only operative restriction would be FECA's underlying limits on contributions to candidates. 52 U.S.C. § 30116(a)(1)(A). As noted earlier, the term "candidate" is defined as "an individual who seeks nomination for election, or election, to federal office." *Id*. § 30101(2). Under that definition, the FEC would be unable to treat a person who was ***not*** yet seeking nomination or election to federal office as a candidate, simply because they were considering the possibility of doing so. Thus, even if § 100.72 is valid, it regulates only the provision of "funds" to people who are testing the waters for a potential candidacy. It provides no basis for the FEC's prohibition on RFR's provision of its signed petition to Governor DeSantis should the Commission deem him to be testing the waters.

C. *RFR May Provide Its Signed Political Petition to Governor DeSantis at Any Time, Even If He Becomes a Candidate*

Independent of the preceding arguments, RFR is able to present its signed petition to Governor DeSantis at any time it wishes, even if he becomes a candidate, for three reasons. ***First***, at most, any valuable information in the petition should be deemed a conduit contribution from the supporters who signed the petition, through RFR, to Governor DeSantis. Such contributions would neither be aggregated nor count against RFR's contribution limit. ***Second***, the canons of statutory construction suggest a signed political petition should not be deemed a "contribution" subject to the FECA's contribution limits at all. ***Finally***, the FECA's contribution limits are unconstitutional as applied to core political speech and association such as a signed petition encouraging an individual to run for federal office.

1. A Signatory's Contact Information Should Be Treated as a Conduit Contribution from the Signatory to Governor DeSantis—The FEC contends that RFR's signed petition should be treated as a contribution because it contains valuable information—the names and contact information of the petition's signatories. Applying this reasoning, however, the signatories who provided that information—not RFR—should be deemed the contributor. The FECA provides that when a person makes a contribution earmarked for a particular candidate to a political committee, the contribution is treated as originating with that person, rather than the intermediary committee, and does not count against that intermediary committee's contribution limits. *See* 52 U.S.C. 30116(a)(8); 11 C.F.R. § 110.6(a). The committee is a mere conduit. *Id*.

Here, it is undisputed RFR solicited people through various mediums, such as the Internet, phone, and in person, to virtually affix their name and contact information to its petition. People were invited to join the petition if they wished to endorse the petition's message by having RFR append their name and contact information to it and then transmit the signed petition to Governor DeSantis on their behalf. RFR Br. at 18-19 (citing Declaration of Gabriel Llames, ¶¶ 14-15). RFR included each person's name and contact information on the petition only at their express and specific request and direction. *See id*. at 19 (citing Llames Decl., ¶ 17). To the extent a signatory's name and contact information have value and qualify as a contribution, the signatory himself should be deemed the contributor, with RFR functioning as an intermediary or conduit pursuant to 52 U.S.C. § 30116(a)(8).

If RFR had solicited ***monetary*** contributions from Governor DeSantis' supporters to hold in a draft fund until he became a candidate, there would be no question:

(i) RFR could collect the maximum legal amount from each contributor, even if the aggregate amount of contributions totaled millions of dollars, to hold in a draft account until

DeSantis declared his candidacy, *ActBlue*, FEC A.O. 2006-30, at 4 (Nov. 9, 2006) ("ActBlue may act as a conduit or intermediary for contributions earmarked for Prospective Candidates.");

(ii) each individual supporter who provided funds for the nominee account—not RFR—would be deemed the contributor of their respective funds, *id*. at 6 ("[T]he earmarked contributions would be contributions from the original contributor to the Prospective Candidate . . . .");

(iii) RFR would be required to provide Governor DeSantis with the name, address, and other information about each contributor, *id*. at 6-7 (citing 11 C.F.R. § 110.6(c)(1)(iii)-(iv)); and

(iv) RFR could engage in unlimited independent expenditures soliciting such contributions, *see WE LEAD*, FEC A.O. 2003-23, at 5 (Nov. 7, 2003) ("If WE LEAD's solicitations in this earmarking program were made independent of any candidate . . . by virtue of this independence the direct costs of solicitation incurred by WE LEAD would constitute independent expenditures."); *see also FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) (invalidating limits on independent expenditures by PACs because such expenditures "are entitled to full First Amendment protection").

The results should be no different simply because RFR is soliciting signatures on a political petition for Governor DeSantis, rather than monetary contributions for him. Indeed, since RFR is neither soliciting nor providing monetary contributions to Governor DeSantis, it should be subject to far greater freedom than conduit committees soliciting money for draft funds.

The FEC offers three faulty arguments in response. ***First***, the FEC contends RFR cannot be a conduit because it has a "far more active role" in soliciting signatures than most conduit committees. FEC Br. at 29. The FEC provides no evidentiary support for this factual assertion; the record is completely silent as to the amount of money that other conduit committees spend to solicit funds. In any event, it is irrelevant. As the FEC's opinion in *WE LEAD*, FEC A.O. 2003-23 at 6

(Nov. 7, 2003), concludes, any funds RFR spends in soliciting signatures for its petition are independent expenditures and do not affect its status as a mere intermediary or conduit. *See also UBAAPAC*, FEC A.O. 2011-14, at 2 (Sept. 22, 2011) (reiterating solicitations to raise funds for a federal candidate do not constitute in-kind contributions to that candidate). The Commission did not bother to cite or discuss *WE LEAD* in its advisory opinion in this case. Thus, RFR's expenditures, *see* FEC BR. at 29, are irrelevant to its status as a conduit under the FECA.

Second, the FEC contends RFR cannot be a conduit because it has engaged in further political expression concerning its petition. The FEC argues RFR is "increasing the value of its efforts by investing labor by providing quotes and interviews to reporters, publicizing editorials by RFR and financial backers, and promoting a YouTube channel featuring several media appearances by RFR officers publicizing its petition efforts." FEC Br. at 29. RFR does not dispute it has engaged in these activities. Again, however, the FEC has not pointed to record evidence any of these activities impact the fair market value of the signatories' contact information.

To the contrary, RFR's Executive Director Gabriel Llanes has worked with the purchase, sale, rental, and exchange of political mailing, contributor, and distribution lists for years. *See* Declaration of Gabrial Llanes in Support of Reply Brief, ¶¶ 4-5. As such, he is familiar with the factors impacting their fair market value. He explains the average value per name on such lists depends on factors intrinsic to the list itself, such as how recently the data was gathered, how reliably the people on the list respond to communications or solicitations, how much metadata and other information has been integrated into the list, and the amount that is known about the preferences and beliefs of the people on the list. *Id*. ¶ 11.

Mr. Llanes further stated, based on his experience, none of the activities the FEC identified, including providing quotes to reporters or participating in interviews about the petition, publicizing

editorials about it, promoting a YouTube channel concerning it, or facilitating media appearances to publicize it, impact the fair market value of the signatories' contact information. *Id*. ¶¶ 12-13. Moreover, he emphasized "RFR has not done anything to enhance the value or utility of the list of signatories for its petition." *Id*. ¶ 10. To the contrary, RFR has refrained from enhancing the utility and value of the petition's official signatory list as it typically would for a mailing or contributor list, such as by incorporating metadata or cross-referencing it with other databases. *Id*. ¶¶ 8-10.

In short, RFR has exercised its First Amendment right to engage in pure political expression to publicize its petition to the broadest audience of potential like-minded patriots. Its independent expenditures neither qualify as in-kind contributions to Governor DeSantis nor impact the fair market value of information concerning the petition's signatories. And the Commission would create a serious unconstitutional conditions problem if it permitted RFR to solicit signatures for its petition only under the bizarre condition RFR refrained from publicizing it. *Cf. Davis v. FEC*, 554 U.S. 724, 739 (2008) (holding a "drag on First Amendment rights is not constitutional simply because it attached as a consequence of a statutorily imposed choice").

Finally, the FEC asserts "[t]he facts here are indistinguishable from those of *Christian Coalition*, 52 F. Supp. 2d at 96." FEC Br. at 30. This statement is outrageously false. In *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 77, 96 (D.D.C. 1999), the Christian Coalition, a nonprofit corporation, "expended resources" to compile a list of delegates to the 1993 Virginia Republican Convention who both supported the Coalition's preferred candidate for Lieutenant Governor and appeared in the Coalition's database and mailing list ("house file"). A staff member provided a copy of that list to a consultant for Oliver North's U.S. Senate campaign. *Id*. at 77, 96. This Court concluded the group's provision of the list constituted an illegal in-kind contribution because it had "expended resources to compile the list and cross-check it with [its] house file." *Id*. at 96.

The FEC completely ignores the key differences between *Christian Coalition* and here. Most basically, there was no suggestion the Christian Coalition was acting as a conduit to provide information on behalf of any third parties to the North campaign. Thus, *Christian Coalition* is completely irrelevant to § 30116(a)(8)'s standards for conduit transactions. Here, in contrast, RFR seeks to provide a signed political petition to Governor DeSantis containing the names and contact information of people who affirmatively decided to sign the petition and asked RFR to provide their information to Governor DeSantis on their behalf.

Moreover, the Christian Coalition simply provided a data file to the North campaign which contained neither expressive nor associative value. Here, in contrast, RFR seeks to give Governor DeSantis a signed political petition encouraging him to run for President and containing the names and contact information of the signatories as both an integral part of that message as well as a powerful form of political association. This case involves constitutionally protected speech and association completely lacking in *Christian Coalition*. In short, *Christian Coalition* is completely distinguishable on both the facts and the law.

In sum, this Court should recognize RFR is a conduit, providing information from the petition's signatories to Governor DeSantis at the signatories' request and on their behalf. To the extent the signatories' names and contact information is valuable, the signatories themselves, rather than RFR, are the contributors. 52 U.S.C. § 30116(a)(8). Thus, the FEC acted arbitrarily, capriciously, and contrary to law in barring RFR from providing its signed petition to Governor DeSantis whenever it wishes, including after he becomes a candidate.

2. Alternatively, as a Matter of Statutory Construction, this Court Should Conclude the FECA's Contribution Limits Are Inapplicable to Signed Political Petitions Rather Than Granting the FEC *Chevron* Deference—The FEC argues that the FECA's definition of

"contribution" is "ambiguous," and an "interpretive gap" therefore exists as to whether it applies to signed political petitions. FEC Br. at 24; *see also id*. at 27 (reiterating the statute's ambiguity). In light of this ambiguity, the Commission contends this Court should defer to its interpretation that the term includes signed political petitions. The Commission's argument misapplies *Chevron*.

In *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 572 (1988), the NLRB similarly sought *Chevron* deference for its interpretation of § 8(b)(4)(ii)(B) of the National Labor Relations Act as prohibiting unions from peacefully distributing handbills urging the public to engage in a secondary boycott. The Court held that, ordinarily, the Board's interpretation of the Act would be subject to *Chevron* deference. *Id*. at 574. It continued, however, "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id*. at 575. When an agency's interpretation of a statute "rais[es] . . . serious constitutional concerns," a court must reject it in favor of an alternate "construction that obviates deciding" the constitutional issue. *Id*. at 578; *see also id*. at 588; *Solid Waste Agency v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) ("We thus read the statute as written to avoid the significant constitutional and federalism questions raised by [the agency's] interpretation, and therefore reject the request for administrative deference."). In other words, the "canon of constitutional avoidance trumps *Chevron* deference." *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008).

Here, the FEC concedes the FECA's contribution limits are ambiguous. Construing those contribution limits to prohibit signed political petitions to draft potential candidates would raise serious First Amendment questions. Thus, *DeBarelo*'s constitutional avoidance canon requires this Court to reject the FEC's interpretation and hold the statute inapplicable to RFR's conduct.

3. To the Extent the FECA Bars RFR From Providing a Signed Political Petition to Governor DeSantis, it Violates the First Amendment as Applied—If this Court concludes the FECA applies to its signed political petition, then the FECA's contribution limits are unconstitutional as applied. Contribution limits are generally subject to intermediate scrutiny. The FEC argues that standard should apply in this case, as well. FEC Br. at 14-15. Yet this argument ignores the unique circumstances of this case. The Court has never applied contribution limits in a manner that prohibits pure, non-commercial political speech and direct political association through collective action. To the contrary, the Court has explained intermediate scrutiny is generally appropriate for contribution limits because they typically "entail[] only a marginal restriction" and "little direct restraint" upon "the contributor's ability to engage in free communication." *Buckley v. Valeo*, 424 U.S. 1, 20, 21, 25 (1976) (per curiam). Moreover, political contributions usually provide only a "general expression of support" without expressing the underlying basis for it. *Id*. at 21. The communicative aspect of a political contribution usually "rests solely on the undifferentiated, symbolic act of contributing." *Id.* at 21.

This reasoning is flatly inapplicable to RFR's signed political petition. The petition is comprised of both a direct message to Governor DeSantis expressing support for his candidacy as well as the signatories' names and contact information. Without those names and contact information, the petition is no longer a petition, but rather simply a letter. The signatories' names and contact information are both an essential element of the petition and part of the message being conveyed to Governor DeSantis—***these*** are the people who want to draft you to run for President. The inclusion of the names and contact information is also essential to allow the petition's signatories to associate with each other through the petition in a collective effort to draft Governor DeSantis. *See 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 . . . ."). Additionally, as RFR's Executive Director explained, including the signatories' names and contact information also helps establish the signatures' authenticity, allowing Governor DeSantis to confirm they are not fraudulent, demonstrates the signatories' dedication and commitment, and provides Governor DeSantis a way to respond, rather than relegating the signatories to an essentially anonymous one-way communication. *See* Llames Decl. ¶ 28. The signatories also have a First Amendment right to decide for themselves whether their political expression will be anonymous, or instead to have their participation in the petition revealed to Governor DeSantis. *McIntyre*, 514 U.S. at 342 (1995) ("[A]n author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment."). Thus, applying the FECA's contribution limits to RFR's signed petition directly and substantially burdens core constitutional rights. This Court should apply strict scrutiny and hold them unconstitutional as applied.

The FEC contends it has a compelling interest in preventing RFR from providing its signed petition to Governor DeSantis. Yet it suggests RFR can minimize any burden on its rights by simply "publishing a list of Ready for Ron signatories." FEC Br. at 19. This argument completely undercuts the FEC's claims concerning the gravity of its asserted interests. The FEC fails to explain why the risk of corruption is substantially greater if RFR e-mails Governor DeSantis the signed petition rather than a link to a website where he may download it—especially since a list of DeSantis supporters would presumably have limited value to anyone other than him. In any event, RFR does not have permission from the petition's 200,000+ signatories to publicize their identities or contact information. A substantial number of them, particularly in Democratic areas, may not want their support of him publicly disclosed to avoid the possibility of harassment. Under the circumstances of this case, FECA's contribution limits are unconstitutional as applied.

II. RFR SATISFIES THE ADDITIONAL REQUIREMENTS FOR A PRELIMINARY INJUNCTION

A. *An Injunction is Necessary to Prevent Irreparable Harm to RFR*

A preliminary injunction is necessary to prevent irreparable harm to RFR. The Commission selectively quotes *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 301 (D.C. Cir. 2006) (quoting FEC Br. at 42-43), for the proposition that a plaintiff must "do more than merely allege a violation of freedom of expression in order to satisfy the irreparable injury prong of the preliminary injunction frame-work." The Commission fails to quote the following sentence, however, in which the Court adds a plaintiff seeking a preliminary injunction must "establish that they are or will be engaging in constitutionally protected behavior to demonstrate that the allegedly impermissible government action would chill allowable individual conduct." *Id*.

RFR satisfies this requirement. The FECA, FEC regulations, the likelihood of FEC enforcement (and possible DOJ criminal referral), and the FEC's advisory opinion combine to exert a substantial chilling effect on RFR, deterring it from providing its signed political petition to Governor DeSantis. The petition is both core political speech and an inimitable manifestation of political association, as well. *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." (quoting *Citizens Against Rent Cont.*, 454 U.S. at 295)).

The need for interim relief is especially acute here because RFR's signed political petition is a particularly time-sensitive communication that will lack relevance once the parties' presidential nominees have been decided, or should Governor DeSantis decide not to run without ever having seen the depth of his public support. To have maximal impact, a draft petition encouraging a potential candidate to enter or remain in a race should be delivered early in an election cycle. "Timing is of the essence in politics. . . . When an event occurs, it is often necessary

to have one's voice heard promptly, if it is to be considered at all." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). "A delay 'of even a day or two' may be intolerable when applied to ''political' speech in which the element of timeliness may be important.'" *NAACP, W. Region v. Richmond*, 743 F.2d 1346, 1356 (9th Cir. 1984); *see also Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1046 (9th Cir. 2006). Thus, "undue delay results in the unconstitutional suppression of protected speech." *FW/Pbs, Inc. v. Dallas*, 493 U.S. 215, 228 (1990) (op. of O'Connor, J.). This Court should prevent such irreparable harm.

The Commission suggests because RFR's petition should be viewed as a political contribution, prohibiting it does not cause irreparable harm because it only "serves as a general expression of support" for Governor DeSantis. FEC Br. at 43 (quoting *Buckley*, 424 U.S. at 21-22). The FEC's argument simply underscores the weakness of its position on the merits. Unlike actual political contributions, RFR's petition is both an express and specific declaration of support, as well as a vehicle through which Governor DeSantis' supporters may associate together to encourage him to run. RFR is suffering irreparable injury precisely ***because*** its petition is not merely a monetary contribution, but rather constitutes pure political speech and association.

The Commission further argues an injunction would not "preserv[e] the status quo." FEC Br. at 43; *see also id*. at 44. Yet a key function of a preliminary injunction is not to preserve the status quo, but rather to prevent irreparable injury. *See Meis v. Sanitas Serv. Corp.*, 511 F.2d 655, 656 (5th Cir. 1975) ("[T]he purpose of a preliminary injunction is always to prevent irreparable injury so as to preserve the court's ability to render a meaningful decision on the merits."); *accord Golden Gate Rest. Ass'n v City of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008); *United Food & Commer. Workers Union, Local 1099 v. S.W. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 348

(6th Cir. 1998); *see also Douglas v. Jeannette*, 319 U.S. 157, 163 (1943). Again, the FEC's advisory opinion and substantial likelihood of enforcing the FECA against RFR if RFR provides its signed political petition to Governor DeSantis are causing irreparable harm by chilling the political speech and association of both RFR and its petition's signatories.

Finally, the FEC suggests compelling RFR to "adhere to the regulatory regime that has governed campaign finance for decades" cannot cause irreparable harm. FEC Br. at 43-44. In the case it cites for that proposition, however, *Rufer v. FEC*, 64 F. Supp. 3d 195 (D.D.C. 2016), the court had already concluded the challenged provisions were valid as applied to the plaintiffs and did not violate their constitutional rights, *see id*. at 205-06. The FEC has not offered a single case where a federal court ruled the plaintiff had established a likely First Amendment violation, yet it allowed the Government to proceed with that violation. To the extent RFR has a First Amendment right to provide its signed petition to Governor DeSantis, the FEC's violation of that right constitutes irreparable harm. *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) ("[T]he 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.))).

B. *Both the Balance of Hardships and Public Interest Favor Injunctive Relief*

The FEC's arguments concerning the remaining requirements for injunctive relief are similarly unavailing. The balance of hardships tilts in favor of RFR, and the public interest favors an injunction. The FEC argues that it is harmed "any time" it is prevented "from effectuating statutes." FEC Br. at 44 (quoting *New Motor Veh. Bd. of Cal. v. Orrin W. Fox Co.*, 422 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). But a governmental entity has no valid interest in enforcing a legal provision that would be unconstitutional as applied. *See Pursuing Am. Greatness*

v. FEC, 831 F.3d 500, 511 (D.C. Cir. 2016); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[E]nforcement of an unconstitutional law is always contrary to the public interest.").[5]

The Commission goes on to contend there would be "no satisfactory way to unscramble the effects of RFR's proposed conduct if an injunction were granted yet the Commission's position be vindicated on final review." FEC Br. at 44. In the unlikely event this Court ultimately rules against RFR, it could always compel RFR to retrieve the signed petition from Governor DeSantis and, under the circumstances, likely order the Governor to return it pursuant to Fed. R. Civ. P. 65(d)(2)(C)'s rules concerning nonparties. Even if Governor DeSantis contacted some of the petition's signatories in the interim—assuming he had not otherwise acquired contact information for them—such a consequence hardly cries out for "unscrambl[ing]," particularly in the context of a $6.4 billion dollar presidential campaign. Open Secrets, *Cost of Election*, https://www.opensecrets.org/elections-overview/cost-of-election?display=T. Finally, the FEC accuses RFR of seeking to "disrupt the nation's campaign finance system." FEC Br. at 44. To the contrary, the FEC is stretching campaign finance law far beyond its intended bounds by prohibiting a form of pure political speech and association—petitioning—that lies at the heart of the First Amendment. In short, RFR has satisfied the equitable factors for injunctive relief.

CONCLUSION

This Court should grant Plaintiff RFR's motion for a preliminary injunction.

[5] *See also KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (holding neither the city nor the public has an "interest in enforcing an unconstitutional ordinance."); *Joelnew v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004); *Planned Parenthood Ass'n v. Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (declaring that, due to the "likelihood that the Ordinance will be found unconstitutional," it is "questionable whether the City has any 'valid' interest in enforcing the Ordinance"); *Fla. Businessmen for Free Enter. v. Hollywood*, 648 F.2d 956, 959 (5th Cir. 1981) ("The public interest does not support the city's expenditure of time, money, and effort in attempting to enforce an ordinance that may well be held unconstitutional.").

February 15, 2023

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