ORAL ARGUMENT NOT YET SCHEDULED

No. 23-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

READY TO WIN,
Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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APPELLANT FEDERAL ELECTION COMMISSION'S CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this court are listed in the Certificate as to Parties, Rulings, and Related Cases submitted by plaintiff-appellant Ready to Win.

(B) Ruling Under Review. Plaintiff-appellant appeals the order entered on May 17, 2023 by the United States District Court for the District of Columbia (Moss, J.) denying Plaintiff's Motion for Preliminary Injunction [Docket Entry #30]. The Memorandum Opinion is available at *Ready to Win v. FEC*, Civ. No. 22-3282, 2023 WL 3539633 (D.D.C. May 17, 2023).

(C) Related Cases. The FEC is not aware of any related cases at this time.

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INTRODUCTION

Compiled contact information for groups of people who support a person running for office is one of the most valuable assets of a nascent political campaign. Data on persons likely to be sympathetic to a particular political cause can be rented or purchased in a market for thousands of dollars, and candidates, parties, and other groups closely safeguard this information. As a result, the Federal Election Commission ("FEC" or "Commission") long ago concluded that transfers of membership, mailing, or "contact" lists are subject to limitations on in-kind contributions in the Federal Election Campaign Act ("FECA") and may not be given for free to a person running for office if its market value exceeds that limit. Courts, likewise, have affirmed the Commission's application of this principle to even publicly available information that an outside group compiles to send to a campaign.

In the proceedings below, plaintiff Ready to Win (designated herein as the advisory opinion "Requestor") sought a preliminary injunction challenging a Commission Advisory Opinion applying these principles to conclude that Requestor may not give a potential candidate information that includes, at a minimum, the name and email address of thousands of people who have expressed support for that potential candidacy and which Requestor has spent hundreds of thousands of dollars compiling, at least insofar as the potential candidate is

determining whether to run for office or has decided to run. Requestor's position is based on its counterintuitive assertion that a list of names and contact information is not a mailing list. After multiple rounds of briefing and oral argument, the district court had no trouble affirming the FEC's advisory opinion and rejecting Requestor's theory, finding that FECA's well-established contribution limits to candidates prohibited Requestor's proposed course of conduct, and that there is no constitutional infirmity in their application here. Requestor's contentions regarding pre-candidacy and pre-testing the waters periods are now moot. Even if they were not, however, Requestor fails to show that the district court committed error as to any phase, particularly not the live post-candidacy period. Neither the First Amendment nor FECA requires the Commission to blind itself to the practical effect of Requestor's proposal, which would exempt from FECA's limits a transfer of immense value that falls squarely within the contribution limits. This Court should affirm the district court's denial of Requestor's motion for a preliminary injunction and remand this ongoing matter for further proceedings.

COUNTERSTATEMENT OF JURISDICTION

This Court has jurisdiction over Requestor's interlocutory appeal of the district court's denial of Plaintiff-Appellant Ready to Win's Motion for

Preliminary Injunction, J.A. 279,[1] which the district court treated as a motion for summary judgment and a permanent injunction as to Requestor's non-constitutional claims, J.A. 291.

This Court does not have jurisdiction over the district court's order denying Requestor's Motion for Entry of Judgment, Civ. No. 22-3282 (Docket No. 33) (filed June 23, 2023). While Requestor's Opposition to FEC's Partial Motion to Dismiss (Document #2015872) disavowed any intent to directly appeal the district court's denial of final judgment at this stage, *id.* at 11, Requestor nonetheless asks this Court to dismiss its Complaint in the event this appeal is unsuccessful, which would effectively circumvent the lower court's decision despite discovery pending below.

As explained below, Requestor's contentions regarding the pre-candidacy and testing-the-waters periods are now moot. *See infra*, pp. 20-22.

COUNTERSTATEMENT OF THE ISSUES

1. When a group forms to draft one individual to become a candidate and the individual becomes a candidate, are legal issues related to the period before candidacy moot?

[1] Citations to the Joint Appendix appear in the format "J.A. [X]," where [X] is the Appendix page number.

2. Does the First Amendment allow the government to limit in-kind contributions to candidates to federal office, including contributions in the form of membership or mailing lists with extensive contact information that are a valuable asset to political campaigns?

3. Does the attachment of a political statement to an in-kind contribution to a federal candidate exempt that contribution from generally applicable limitations intended to deter corruption and its appearance, regardless of that contribution's source and monetary value?

4. Should an organization that spends hundreds of thousands of dollars to collect and compile voter contact information, and provides this information to a federal candidate, be considered the source of that contribution?

5. In the event Plaintiff-Appellant Ready to Win is not entitled to a preliminary injunction, should this Court remand this matter to the district court for the resumption of pending discovery prior to a final decision on the merits?

STATUTES AND RULES

The relevant statutory and regulatory provisions are set out in the Addendum to this brief.

STATEMENT OF THE CASE

I. Legal Background

A. The Federal Election Commission's Advisory Opinion Process

The FEC is an independent agency of the United States government with jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act, 52 U.S.C. §§ 30101-46 ("FECA"). *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. Congress provided for the Commission to "prepare written rules for the conduct of its activities," 52 U.S.C. § 30106(e), "formulate policy" under FECA, *see, e.g.*, 52 U.S.C. § 30106(b)(1), and make rules and issue advisory opinions, 52 U.S.C. §§ 30107(a)(7), (8); *id.* §§ 30108; 30111(a)(8); *see also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976) (per curiam). At least four affirmative Commissioner votes are required for the Commission to take certain actions, including, *inter alia*, issuing advisory opinions, promulgating regulations, and advancing enforcement matters. *Id.* §§ 30106(c), 30107(a)(6)-(9).

Anyone may request an advisory opinion regarding the application of FECA and Commission regulations to a specific transaction or activity by that person. 52

U.S.C. § 30108(a); 11 C.F.R. § 112.1(a). FECA generally provides that the Commission "shall render [an] advisory opinion" within 60 days. 52 U.S.C. § 30108(a); *see* 11 C.F.R. § 112.1(b)-(d). Congress recognized, however, that the Commission may not be able to issue an advisory opinion in some cases due to the four-vote requirement, so "[a] 3-3 vote by the Commission on the proposed opinion is considered a response for purposes of the time requirements[.]" H.R. Rep. No. 96-422 (1979), at 20. Accordingly, the Commission adopted a regulation that it shall either issue an advisory opinion or "a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members" within 60 days of receiving a complete request. 11 C.F.R. § 112.4(a), (c). Commission advisory opinions act as a safe harbor against sanction for any person who follows the opinion in good faith and is involved in the same or a materially indistinguishable transaction. 52 U.S.C. § 30108(c).

B. FECA's Regulation of "Candidates" and the Limited Exception for Testing the Waters Activity

Under 52 U.S.C. § 30101(2), "candidate" means "an individual who seeks nomination for election, or election, to federal office," and an individual is deemed a candidate if he or she receives "contributions" or makes "expenditures" in excess of $5,000 or gives consent to another person to receive contributions or make expenditures on his or her behalf aggregating in excess of $5,000. "Contribution" and "expenditure" are defined terms of art. *See* 52 U.S.C. § 30101(8), (9). Those

terms cover only those receipts and disbursements that are made "for the purpose of influencing any election for Federal office." *Id.* § 30101(8)(A)(i), (9)(A)(i); *see also FEC v. Akins*, 524 U.S. 11, 15 (1998). FECA thus establishes automatic thresholds for becoming a candidate, a status which triggers registration and reporting requirements.

Since 1977, the Commission has established "limited exceptions" to these automatic thresholds which permit an individual to test the feasibility of a campaign for federal office without becoming a candidate under FECA. FEC, Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985). Commonly referred to as the "testing the waters" exceptions, 11 C.F.R. § 100.72 and § 100.131 exclude funds received and payments made to determine whether an individual should become a candidate from the definitions of "contribution" and "expenditure," respectively. An individual who undertakes "testing the waters" activities must nevertheless keep records of all funds received and payments made in connection with these activities, which become contributions and expenditures under the FECA if the person subsequently becomes a candidate. 11 C.F.R. § 100.72(a).

Prior to March 1985, the Commission's regulations permitted a candidate to refund any excessive or prohibited contributions received during the "testing the waters" period within 10 days after the individual became a candidate. Payments

Received for Testing the Waters Activities, 50 Fed. Reg. at 9994. However, the Commission "reconsidered this issue and determined that permitting prohibited funds to be used for 'testing the waters' activities extended the exemptions beyond the narrow range of activities they were originally intended to encompass." *Id*. Accordingly, the Commission revised the regulations, *id.*, such that "[o]nly funds permissible under the Act may be used for [testing the waters] activities." 11 C.F.R. § 100.72(a).

C. Contribution Limits and In-Kind Contributions of Mailing and Email Lists

In 1974, Congress substantially revised FECA in response to the Watergate scandal and the "deeply disturbing" reports from the 1972 federal elections of contributors giving large amounts of money to candidates "to secure a political quid pro quo." *Buckley*, 424 U.S. at 26-27. With FECA, Congress primarily intended to "limit the actuality and appearance of corruption resulting from large individual financial contributions." *Id*. at 26. And in *Buckley*, the Supreme Court held that Congress could constitutionally limit the dollar amounts of contributions to candidates for federal office, *id*. at 24, and may limit the "provision of in-kind assistance" to a candidate or his campaign, *id.* at 36-37.

To satisfy these governmental interests, FECA prohibits a political committee, other than a multicandidate committee, from contributing more than $2,900 to any candidate with respect to any election for federal office. *See* 52

U.S.C. §§ 30101(11) (defining "person" to include political committees); 30116(a)(1)(A), (a)(2)(A). A contribution includes "in-kind" contributions, which are "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge." 11 C.F.R. § 100.52(d)(1); *see also* 52 U.S.C. § 30101(8)(A)(i)-(ii) (defining "contribution" to include "anything of value" and "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge").

The Commission has "long recognized" that political committee mailing and email lists have commercial value and are "frequently sold, rented, or exchanged in a market." FEC Advisory Op. 2014-06, 2014 WL 3748239 at *7 (Ryan for Congress, *et. al*) (collecting examples); *see, e.g.*, FEC Advisory Op. 2011-02, 2011 WL 7629547 at *5 (Scott Brown for U.S. Senate Committee) (same); FEC Advisory Op. 2002-14, 2003 WL 715988 at *2 (Libertarian National Committee). Indeed, as "the product of time-consuming, labor-intensive activities that can cost a political committee thousands, even millions, of dollars" to compile, a political committee's list of persons sympathetic to its cause is among "its most valuable assets." *FEC v. Int'l Funding Inst. Inc.*, 969 F.2d 1110, 1116 (D.C. Cir. 1992) (en banc) (internal citations omitted); *see also FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 96 (D.D.C. 1999). Accordingly, the Commission's regulations specifically identify "membership lists" and "mailing lists" as examples of goods that are in-

kind contributions when provided to a candidate or political committee without charge or at less than their usual and normal charge. 11 C.F.R. § 100.52(d)(1).

II. Factual Background

A. Plaintiff-Appellant Ready to Win

On May 23, 2022, Requestor registered with the Commission as a hybrid, nonconnected, unauthorized political committee. Ready for Ron, Statement of Organization, FEC Form 1 (May 23, 2022), https://docquery.fec.gov/cgi-bin/forms/C00815928/1597424/; *see* 11 C.F.R. §§ 100.5(a), (f), 106.6(a). Requestor was "formed to draft Florida Governor Ron Desantis as the Republican Party's nominee for President in 2024." J.A. 12. As a "hybrid" PAC under *Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2012), Requestor may, and does, accept contributions into two accounts: (1) a "contribution" or "hard money" account subject to the FECA's source prohibitions and contribution limits; and (2) to a "non-contribution" account, which accepts unlimited contributions (from individuals other than prohibited sources). J.A. 13. From its contribution account, Requestor may make contributions to federal candidates and from its non-contribution account, Requestor may make independent expenditures.

Following early FECA caselaw, organizations created to "draft" a person to become a candidate for federal office have often not registered as political committees pursuant to FECA. *See, e.g. FEC v. Machinists Non-Partisan Pol.*

League, 655 F.2d 380, 383-84 (D.C. Cir. 1981). Requestor, however, voluntarily chose to register as a political committee.[2] In the 2023-24 election cycle it has reported making over $1,592,000 in independent expenditures opposing Joe Biden, an amount which makes up the entirety of the committee's spending on independent expenditures or contributions. *See* Ready to Win, Financial summary, https://www.fec.gov/data/committee/C00815928/?cycle=2024 (last accessed Jan. 16, 2024).

B. Commission Processing of Requestor's Advisory Opinion Request

1. Requestor's Request

Requestor requested an advisory opinion from the Commission on May 25, 2022, J.A. 51-71, which it later supplemented with additional information requested by the Commission, J.A. 68-72. The request and various supplements proposed to use funds from both its contribution and non-contribution account to finance a nationwide petition to encourage Governor DeSantis to run for president in 2024. Requestor explained that it was engaging in extensive media outreach to support its petition, including television, online advertisements and earned media coverage, and provided statistics regarding the extent of this outreach. J.A. 53.

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[2] Although there is a regulation addressing how a "political committee established solely to draft an individual . . . to become a candidate" may name itself, 11 C.F.R. § 102.14(b)(2), there have never been any special registration or reporting requirements applicable to such committees.

Requestor planned to continue promoting the petition "through radio, podcast, Skywriting, direct mail, billboards, blimps, and other media," and estimated spending an average of $25,000-$50,000 per week on advertisements supporting the petition through 2024. J.A. 53-54. Individuals who wished to "sign" the petition could do so through Requestor's website or by phone, and could provide their name, phone number, email address, and zip code. J.A. 53. Each signatory was required to provide their name and email address. *Id.*; *see* J.A. 14. Requestor notified individuals that, by signing the petition, they agreed to have their names and contact information provided to Governor DeSantis. J.A. 53-54.

Requestor proposed to provide this information — including all provided contact information — to Governor DeSantis without charge. J.A. 55. Requestor projected that its petition would likely eventually include contact information of "millions" of signatories. *Id.* As of September 14, 2022, Requestor had collected approximately 43,750 signatures; moreover, Requestor planned to submit "regular updates" to Governor DeSantis through the 2024 election. *See* J.A. 173 n.8. Requestor stated that the market value of the information it planned to provide to Governor DeSantis would exceed $2,900. J.A. 173.

Requestor presented two questions to the Commission. First, whether Requestor could provide its petition, along with the accompanying list of signatories and their contact information, to Governor DeSantis to attempt to

persuade him to become a candidate for the Republican nomination for president in 2024. J.A. 55. Second, assuming yes, whether Requestor was required to do so before Governor DeSantis either starts testing the waters to become a candidate for the office of president or becomes a candidate for the office of president, should he do either. J.A. 55-56.

2. Decision

The Commission voted in a public meeting on two draft advisory opinions, neither of which garnered the required four votes for approval. The Commissioners then approved by notation, or "tally vote," a draft that reflected the substantial areas of agreement among Commissioners. The resulting Advisory Opinion 2022-12 concluded that Requestor could not provide the names and contact information to Governor DeSantis if he either becomes a federal candidate or begins testing the waters for a potential federal candidacy because the value of that information would exceed the applicable contribution limits on funds used to test the waters. J.A. 171. The Commission also concluded that the proposal was contrary to restrictions on the use of funds in the non-contribution accounts of hybrid committees. *Id*. These conclusions were unanimous among the six FEC Commissioners. J.A. 169.

In reaching its conclusions, the Commission relied on four bases. *First*, the compiled contact information in Requestor's petition was a thing of value,

similar to a mailing or membership list, and the provision of the contact information to Governor DeSantis would therefore constitute an in-kind contribution to Governor DeSantis. J.A. 175. *Second*, Requestor's proposal would result in an excessive contribution to Governor DeSantis if provided to him without charge after he becomes a federal candidate. J.A. 176. *Third*, the proposal to provide the signatories' contact information to Governor DeSantis after he begins testing the waters for a federal candidacy, should he choose to do so, would be contrary to the Commission's regulation at 11 C.F.R. § 100.72. J.A. 177. *Fourth*, the proposal to provide the contact information in the event he either becomes a federal candidate or begins testing the waters would be inconsistent with restrictions on a hybrid PAC's use of its non-contribution account. J.A. 179.

As to whether Requestor could provide the contact information from its petition without charge to Governor DeSantis in advance of any indication that Governor DeSantis was testing the waters, one draft that garnered the approval of three Commissioners concluded that the provision of the petition with contact information would be subject to the testing the waters regulation at any point in advance of a declaration of candidacy. Another draft opinion supported by two Commissioners concluded that neither FECA nor Commission regulations governed the donation of things of value to individuals who are neither federal candidates nor testing the waters. The Commission notified plaintiff that it could

not approve a response to this portion of the advisory opinion request by the required four votes. J.A. 17

C. The Proceedings Below

Nearly one month after receiving its Advisory Opinion, on October 27, 2022, Requestor filed a complaint seeking preliminary and permanent injunctions prohibiting the Commission from applying the "testing of waters" statute or regulations to Requestor's provision of the petition and signatories' contact information to Governor DeSantis; a declaratory judgment holding that 52 U.S.C. § 30116(a) and implementing regulations at 11 C.F.R. § 110.1(b) and (d) are unconstitutional as applied to the provision of a signed draft petition and the petition-related expenditure of funds raised outside the limits and prohibition of the FECA; a declaration that section 30116 does not limit transfers to a person who is not a candidate, and that 52 U.S.C. § 30116(a)(8) allows Requestor to act as a conduit to pass signatures and contact information from a petition's signatories to the recipient; a declaration that 11 C.F.R. § 100.72 (the "testing the waters" regulation) is void and unenforceable; and a request to the Court to vacate A.O. 2022-12. J.A. 48-50.

Plaintiff's complaint includes six causes of action: Count I (First Amendment); Count II (Challenge to FECs Refusal to Issue Requested Advisory Opinion under the APA); Count III (Declaratory Judgment under 28 U.S.C.

§ 2201); Count IV (Equality Claim for Injunctive Relief);[3] Count V (52 U.S.C. § 30116(a)(1)(A), (a)(8)); and Count VI (Challenge to FEC's "Testing the Waters" Regulation under the APA, 5 U.S.C. § 702). J.A. 39-48. Nearly two months after filing its complaint, and nearly three months after receiving its Advisory Opinion, Requestor filed a motion for a preliminary injunction with respect to all its claims, accompanied by a memorandum of law in support.[4]

On May 17, 2023, the district court denied Requestor's motion and ruled in the FEC's favor on all counts. J.A. 338. The court began by rejecting the notion this case is about a political petition, finding that "the dispute is about the contact list." J.A. 293. The district court easily held such a contact list falls within the FECA's definition of "contribution[.]" J.A. 293-304. It further held that Requestor is not a "conduit" for transmitting contact information from the petition's signatories to Governor DeSantis pursuant to 52 U.S.C. § 30116(a)(8). J.A. 304-316. Based on these findings, the court determined that "[Requestor] may not provide its contact list to Governor DeSantis free of charge—at any time[,]" and for this reason dismissed Requestor's challenge to the Commission's testing-

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[3] Requestor "is no longer pursuing Count IV[.]" Br. at 1, n.1.

[4] Requestor elected to include in the Joint Appendix certain memoranda of law. *See* J.A. 182-85, J.A. 221-23, J.A. 253-56. Those were improperly included over the Commission's objection. *See* FRAP 30(a)(2); Handbook of Practice and Internal Procedures at 44, https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Handbook%202006%20Rev%202007/$FILE/Handbook20210316.pdf.

the-waters regulation. J.A. 316. Finally, the district court held that the First Amendment does not prohibit the Commission from applying FECA's contribution limits to Requestor's contact list. J.A. 327.

Following the court's decision, on June 23, 2023, Requestor moved for an order granting final judgment as to all claims in the Commission's favor, or in the alternative granting judgment as to all but RtW's First Amendment claim pursuant to Federal Rule of Civil Procedure 54(b) or, as a third alternative, staying discovery during the pendency of its planned appeal to this court. *Order*, Civ. No. 22-3282, at 1-2 (Docket No. 42) (D.D.C. July 28, 2023) ("Final Judgment Denial"); *see* J.A. 6 (district court docket). The FEC opposed this motion, emphasizing that it is entitled to seek discovery as to factual matters impacting RtW's claims for relief under the First Amendment. The district court issued an order on July 28, 2023, in which it denied RtW's motion to enter judgment in the Commission's favor as to all claims, noting that each of RtW's claims touch on First Amendment issues and that the Commission had preserved its right to seek discovery in that regard. Final Judgment Denial at 1-2. However, the district court granted RtW's alternative request to stay discovery pending the outcome of this appeal. *Id.* at 2-3.

D. Requestor's Appeal

Following Requestor's notice of appeal, the FEC filed a Partial Motion to Dismiss Requestor's appeal on August 28, 2023. FEC's Partial Mot. to Dismiss, *Ready to Win. v. FEC*, Civ. No. 23-5161 (Doc. #2014480). The Commission argued that Requestor's statement of issues evidenced an intent to appeal not merely the district court's preliminary order, but the Final Judgment Denial as well. Because the district court made clear that Requestor relies on the First Amendment to support each of its claims, and because the FEC has sought to develop a factual record as to these issues, summary or final judgment as to any of Requestor's claims was and remains inappropriate. Because that decision did not itself grant, deny, or modify an injunction, it is outside the narrow categories for which interlocutory appeal may be had under 28 U.S.C. § 1292, and Requestor's appeal of that decision should be dismissed by this Court for lack of jurisdiction.

On October 31, 2023, the Court issued a per curiam Order referring the partial motion to dismiss to the merits panel and directed the parties "to address in their briefs the issues presented in the partial motion to dismiss rather than incorporate these arguments by reference." Order, *Ready to Win. v. FEC*, Civ. No. 23-5161 (Document #2024570).

SUMMARY OF ARGUMENT

The district court's decision should be upheld in all respects. Requestor's contentions regarding pre-candidacy or testing-the-waters period are moot. Assuming arguendo that they are not, Requestor fails to establish any error in the district courts handling of those or the post-candidacy period. The district court accurately determined that the FEC's advisory opinion was constitutional, and indeed is a straightforward application of FECA's core contribution limits. In addition, the Commission's advisory opinion satisfies APA review. Requestor's contact list is a "contribution" as established by the FEC's prior adjudications and relevant caselaw. Nor is Requestor operating as a "conduit" when Requestor itself has invested extensive money and labor to build and maintain its contact list. And Requestor's challenge to the Commission's testing-the-waters regulation cannot succeed because the Commission reasonably determined that FECA's contribution limits apply to a candidate who is testing the waters of a candidacy.

Finally, in the likely event that this Court affirms the lower court's denial of Requestor's motion for preliminary injunction, the proper remedy is to remand this

case for additional proceedings, rather than taking the extraordinary step of dismissing the Complaint on appeal as Requestor has requested.

STANDARDS OF REVIEW

The Court "review[s] a district court's denial of a preliminary injunction for an abuse of discretion, but in doing so [it] review[s] the district court's legal conclusions de novo and any findings of fact for clear error." *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 10 (D.C. Cir. 2019) (citing *Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1318 (D.C. Cir. 1998)).

ARGUMENT

I. REQUESTOR'S CONTENTIONS REGARDING DESANTIS'S PRE-CANDIDACY AND TESTING-THE-WATERS PERIOD ARE MOOT

Much of Requestor's appeal involves issues related to the period before Governor DeSantis declared his candidacy and when he may have been engaging in activity to test the waters to determine whether to do so, but those matters are now moot given that Governor DeSantis is a declared candidate for president. *See Clark v. United States*, 915 F.2d 699, 701 (D.C. Cir. 1990) ("[T]he [mootness] doctrine requires a federal court to refrain from deciding [the litigation] if events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.").

In its challenge to the FEC's testing-the-waters regulation Requestor implicitly concedes that the challenge to earlier phases is moot but argues that it

qualifies for the exception to mootness for issues "capable of repetition, yet evading review." Br. at 45-46. Requestor is incorrect. To qualify for this exception Requestor must make "the requisite showing of 'a reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Sibley v. Alexander*, 916 F. Supp. 2d 58, 62–63 (D.D.C. 2013) (quoting *Herron for Congress v. FEC*, 903 F. Supp. 2d 9, 14 (D.D.C. 2012) and noting that it in turn cites and quotes *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam)).

Requestor's complaint stems from a fact-bound advisory opinion by the FEC regarding a particular individual that Requestor was formed with the exclusive purpose of supporting. *See supra*, pp. 11-15. For instance, the FEC relied upon Requestor's representations as to how much it had spent to solicit signatory contact information, the type of information it had gathered, and how it proposed to provide this information to Governor DeSantis. *See supra*, pp. 11-13. Requestor does not cite any record evidence suggesting that any of these precise circumstances or any other similar ones are likely to be repeated, presenting only a statement in a brief that it "may seek to provide a similar petition to draft a qualified conservative to run for office in the next election cycle[.]" Br. at 46. That is unsupported speculation. *See Herron for Cong. v. FEC*, 903 F. Supp. 2d 9, 14 (D.D.C. 2012) ("Ordinarily, courts require plaintiffs to submit evidence

suggesting that their controversy is likely to recur.") (citing *Davis v. FEC*, 554 U.S. 724, 736 (2008)).

In contrast, in the cases on which Requestor relies, the parties had "averred that they intend to make [the contributions at issue] in the future," *Holmes v. FEC*, 832 F.3d 69, 71 n.16 (D.C. Cir. 2016), or "made a public statement expressing" the intent to "self-finance another bid for a House seat," *Davis*, 554 U.S. at 735-36 (cleaned up). There is no comparable indication here, nor would one be expected for a group that was formed to support a single individual. *See Herron*, 903 F. Supp. 2d at 13-15 (claim brought by unsuccessful Congressional candidate against the FEC was moot, and did not qualify for the "capable of repetition" exception, where candidate did not demonstrate a "clear and definite intent" to participate in future electoral contests and did not show a similar injury would occur involving (1) the same opponent's (2) receipt of a bank loan that (3) the opponent failed to disclose, which (4) violates applicable FEC regulations).

II. THE FIRST AMENDMENT PERMITS REGULATION OF IN-KIND CONTRIBUTIONS TO CANDIDATES FOR FEDERAL OFFICE, INCLUDING VALUABLE MAILING LISTS WITH EXTENSIVE CONTACT INFORMATION

The district court correctly observed that, at base, "[Requestor]'s arguments reduce to the contention that the First Amendment does not permit the FEC to treat a contact list as a contribution, so long as a 'petition' is attached." J.A. 49. This is not a difficult question. There is no dispute that the right to political expression

generally, and the right to petition current and prospective officeholders in particular, are fundamental rights protected by the First Amendment. But it simply does not follow that Requestor and others must be permitted to exceed FECA's contribution limits because they associate those contributions with protected speech, particularly where, as here, there are numerous other ways in which Requestor can vindicate its right to support Governor DeSantis. Requestor's extreme position finds no support in constitutional law, and if accepted, would fatally undermine government efforts to curb corruption and its appearance.

A. The District Court Correctly Determined that Applying FECA's Campaign Contribution Limitations to Requestor's Proposed Conduct Easily Satisfies Intermediate Scrutiny

The advisory opinion challenged by Requestor deals with the candidate contribution limits at the core of FECA. Requestor's proposed contribution of a mailing list to Governor DeSantis is thus subject to the "closely drawn" standard of First Amendment scrutiny. J.A. 327-28 (citing *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (in turn quoting *Buckley*, 424 U.S. at 25)). "Under that standard, '[e]ven a significant interference with protected rights of political association may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms.'" *Id.* (citations omitted). The closely drawn standard is less demanding than strict scrutiny but is nevertheless a "rigorous standard of review." *Id.* (quoting *Buckley*,

424 U.S. at 29). In reaching its conclusion that intermediate scrutiny applied, the district court cited eight different instances of courts applying the "closely drawn" standard "to many different forms of contribution limits[.]" J.A. 328, n.13 (listing cases).

The district court correctly held that Requestor's desire to make its contribution in the form of a contact list did not alter the applicable level of scrutiny. The court noted that "in fact the FEC seeks to apply FECA's contribution limits only to a contact list, not a petition[,]" and that "the contact list … only indirectly or marginally implicates core First Amendment values." J.A. 328. The court was also unpersuaded by Requestor's attempt to establish that "its contact list has independent expressive value[,]" noting that Requestor's cited authorities regarding "the publication of contact information" were inapposite where Requestor did not seek to publish its list, J.A. 329, and its message would not be meaningfully diluted if the contact information were omitted, J.A. 330.

Applying intermediate scrutiny, the district court had no trouble finding that "'the Government's interest in preventing quid pro quo corruption and its appearance is sufficiently important' to justify the regulation of campaign contributions." J.A. 331 (quoting *Wagner v. FEC*, 793 F.3d 1, 8 (D.C. Cir. 2015) (in turn quoting *McCutcheon*, 572 U.S. at 199)). The court further concluded "that the FEC is likely to demonstrate on the merits that applying FECA's contribution

limits to [Requestor]'s proposed activity furthers the government's interest in preventing quid pro quo corruption and its appearance." J.A. 331. Applying well-established precedent, the court found that "contribution limits in general further the interest in combatting *quid pro quo* corruption and its appearance[,]" J.A. 331 (citing *Buckley*, 424 U.S. at 25–30), and that in-kind contributions, including contact lists specifically, "is typically of significant value to a candidate. J.A. 332 (citing *Christian Coal.*, 52 F. Supp. 2d at 96; *Int'l Funding Inst.*, 969 F.2d at 1116). Finally, the court rejected Requestor's argument that the risk of corruption under these circumstances is minimal because spending the large sums it has to compile its contact list would be "an ineffective instrument for corruption." J.A. 332-33. The court observed first that there 25easonason to assume either "that the poor economic returns [Requestor] describes are true of contact lists in general[,]" J.A. 333, or that "Congress's anti-corruption interest turn on the savvy of the contributor." J.A. 334.

The court further held that the FEC was likely to prevail on its contention that applying FECA's contribution limits to Requestor's contact list is "closely drawn to avoid unnecessary abridgement of associational freedoms." J.A. 335 (citing *McCutcheon*, 572 U.S. at 218 (in turn quoting *Buckley*, 424 U.S. at 25)). Critically, the court found that "treating [Requestor]'s contact list as a contribution in excess of the contribution limits is a narrowly tailored means of preventing

actual or apparent quid pro quo corruption." J.A. 335. In particular the court found that

> this limited restriction leaves untouched [Requestor]'s ability to circulate its petition, to spend unlimited amounts of hard and soft money soliciting signatures for it, and to present it to Governor DeSantis. *Wagner*, 793 F.3d at 25. It also permits any individual who determines that they are Ready for Ron to sign the petition and to have that signature be provided to the Governor. And it allows [Requestor] to collect contact information so that it can itself validate the signatures and ensure that it is only presenting Governor DeSantis with the names of authentic supporters. The FEC's advisory opinion thus places no serious burden on anyone's ability to express their support for Governor DeSantis and to join together with others in so doing. All it prevents is [Requestor] from providing to Governor DeSantis free of charge a classic campaign asset that cost it over $1 million to compile.

J.A. 335-36. The court further rejected Requestor's "one argument in response:" that this limitation "is fatally underinclusive because it leaves [Requestor] so many other options." J.A. 336.

B. Requestor's Arguments that Ignore Controlling Constitutional Law are Inapposite to Its Claim

Critically, Requestor's appeal makes little effort to engage with the many foundational campaign finance cases that the district court relied upon in reaching its conclusions. *See* Br. at 14-31. A large number of the court's factual distinctions, and the foundational constitutional precedent the court cites, are completely unaddressed. Despite FECA's contribution limits being permissible here under the well-established standard, Requestor largely disregards that standard, instead offering inapposite authorities that do not address the

constitutionality of campaign finance legislation and implementing regulations. Yet none of its authorities provide for an unqualified right to provide in-kind contributions to candidates for federal office, nor do they undermine the government's interest in limiting quid pro quo corruption and its appearance.

Contrary to Requestor's contentions, the court did not "refuse" to treat its contact list as a "single integrated communication," Br. at 14, nor is this distinction relevant. The court instead considered all aspects of Requestor's proposed conduct and correctly focused its analysis on the only portion that the government sought to limit: the provision of a valuable in-kind contribution to a federal candidate. J.A. 297 ("the information that the FEC seeks to restrict is not core political speech; it is contact information."); J.A. 328 ("[T]he contact list—as distinct from the petition—only indirectly or marginally implicates core First Amendment values."); *see also* J.A. 280, 293. Cases cited by Requestor in which the government sought to censor the content of speech, including opposition to the draft and sexually explicit material, Br. at 15, are inapplicable. Any effort by plaintiffs in those cases to associate their speech with a valuable campaign contribution would have been subject to a separate and distinct analysis by the Court.

Requestor disregards or misapplies numerous cases in which the Court has engaged in careful and close analysis to determine whether government limitations on speech were constitutionally sound. For instance, Requestor argues that any

attempt to assess the appropriate level of First Amendment protection based on "'the value of the speech" at issue would be "startling and dangerous.'" Br. at 24 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)). Requestor's out of context citation appears to imply that *all* speech of *any* kind is subject to unqualified protection. Of course, *Stevens* makes no such claim, and in that very case the Court recognized several permissible "traditional limitations" on speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *Id.* at 468-69 (listing cases) (citations omitted).

More to the point, in *Buckley* itself the Court endorsed precisely the line drawing in the realm of political speech that Requestor suggests is impermissible. As the district court observed, "perhaps the most fundamental line in campaign finance law" is "one between contributions and independent expenditures. Whereas *Buckley* upheld contribution limits as a permissible means of combatting corruption, 424 U.S. at 29, it reached the opposite conclusion with respect to independent expenditures, *id.* at 45." J.A. 337. "[A]s the Supreme Court has held time and again, because 'contributions lie closer to the edges than to the core of political expression,' *FEC v. Beaumont*, 539 U.S. 146, 161 (2003), contribution limits—like those at play here—may permissibly be regulated, *see McCutcheon v. FEC*, 572 U.S. 185, 197 (2014).'" J.A. 298.

Requestor's attempt to frame its contact list as "pure political speech" beyond the reach of the government, Br. at 22-26, is thus unpersuasive. The FEC of course agrees that political speech is a fundamental right, which includes the ability to join with others and express that right in the form of a petition or any other message addressing a political candidate. But as the district court correctly found, Requestor's right to speak and petition candidates are not at issue. *See* J.A. 293 ("The FEC stresses that it sees no problem with RFR providing its petition—complete with the list of signatures—to Governor DeSantis."); *id.* (citing FEC briefing and noting that "[Requestor] 'has many alternative avenues for communicating its message' including through 'a petition without the contact information'"). The authorities cited by Requestor regarding the importance of the right to petition, Br. at 22-23, provide no support for challenging government action that does not seek to regulate its right to petition in any way. Nor does the fact that the Court has "applied First Amendment protection" to "informational statements[,]" Br. at 24 (citations omitted), help this Court address whether the government has an interest in regulating Requestor's contact list. In contrast, *Buckley* and its progeny explicitly endorse the government's authority to limit in-kind candidate contributions. *Buckley*, 424 U.S. at 26-27, 36-37; *see Christian Coal.*, 52 F. Supp. 2d at 96.

Requestor's theory, if taken to its logical conclusion, would entirely upend limits on in-kind contributions. Under Requestor's approach, for example, an outside group could prepare a 30 second video lauding a candidate's qualities at great expense, and then claim a constitutional right to provide this video to the candidate free of charge because making a video is protected First Amendment speech. Any in-kind contribution would be immune from regulation provided it contained a threshold level of expressive activity, which the Commission and the courts would be required to define. Such a regime would plainly undermine the government's interest in preventing corruption and in predictable enforcement of the anticorruption law. Avoiding such complications is precisely why "the Court has announced a single unified test" to evaluate "contributors' heterogeneous First Amendment interests in making political donations[.]" *Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 541 (D.C. Cir. 2019).

C. The FEC is Not Engaged in Content Discrimination

Requestor's argument that the FEC is engaging in content-based discrimination is meritless. The alleged "substantive content" that the Commission seeks to regulate is that "the petition's text seeks to persuade Governor DeSantis to run for President." Br. at 27-28. Requestor avers that "[i]f the petition concerned virtually any other issue in the world—urging Governor DeSantis to resign and become the Walt Disney Corporation's next CEO, for example—the FECA's

contribution limits would be inapplicable."[5] *Id.* at 28 (citing 52 U.S.C. § 30101(8)(A)(i)); *see id.* at 18-19.

As an initial matter, Requestor's contentions relate only to a moot portion of the case. *See supra*, pp. 20-22. The district court's analysis contested by Requestor was whether the transmission of the contact list was "for the purpose of influencing" an election and thus a regulable "contribution" under FECA was a necessary analytical step before Governor DeSantis became a candidate. *See* J.A.283 n.2, 294, 323. Now that he is a candidate, outside of delineated exemptions all in-kind support including "mailing lists" that Requestor might provide to his campaign, *i.e.* "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge," "is a contribution." 11 C.F.R. § 100.52(d)(1). That would include an exhaustively created contact list of individuals that thought highly enough of Governor DeSantis to believe that he should become a CEO of a major multinational corporation. *Contra* Br. at 27-28.

Moreover, even if Requestor's content-based arguments related to a live dispute and accurately characterized governing law, Requestor does not directly

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[5] Requestor's hypothetical is inapposite because it presents substantially different facts from those the FEC considered, and does not speak to the reasonableness of the decision the FEC actually made. *See U. S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 526 (D.C. Cir. 1978) (the court examines "the actual choice made to determine whether it is arbitrary or capricious.")

allege, and makes no attempt to demonstrate, that the Commission's actions were influenced in any way by the particular candidate Requestor seeks to support, namely Governor DeSantis. On the other hand, Requestor does not deny that in the pre-candidacy phase "that the FEC only [sought] to regulate its provision of the contact list to Governor DeSantis because [Requestor] wants to provide with him the list 'for the purpose of influencing an[] election for Federal office.'" J.A. 330 (citing Requestor briefing and quoting 52 U.S.C. § 30101(8)(A)(i)). As the district court observed, "[Requestor] does not dispute" that it had such a purpose at that time, J.A. 323, nor could it given the substance of its petition. Of course, "[a]ll regulation of campaign contributions is content based in the sense that it targets only contributions made for the purpose of influencing elections for Federal office, not all transfers of money or things of value at any time for any reason. Yet *Buckley* held and the Supreme Court has many times affirmed that strict scrutiny does not apply to contribution limits . . . . [and Requestor] offers no persuasive reason why the same principles should not apply here." J.A. 330. Requestor has provided no answer to the court's analysis.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE COMMISSION MAY CONSTRUE FECA TO APPLY TO THE TRANSFER OF THE MAILING LIST REQUESTOR COMPILED AFTER GOVERNOR DESANTIS BECAME A CANDIDATE AND WHILE HE WAS TESTING THE WATERS

Separate from its constitutional claim, Requestor's Brief argues that FECA's text and the FEC's testing-the-waters regulation cannot be read to cover its proposed activity. Br. at 31-51. But as in the district court, Requestor's Brief does not clearly explain which cause of action is likely to succeed on the basis of this argument. Nor does it explain what standard of review would apply. Requestor's Brief does not cite or reference the APA, and offers only limited references to judicial authorities interpreting it. Requestor makes one reference to the "arbitrary, capricious," and "contrary to law" standard, (Br. at 50,) and references the complaint's APA counts in its recount of this matter's procedural history.[6] (*Id.* at 4-5.)

As the district court correctly determined, the Commission's advisory opinion here meets APA review, J.A. 293-327, and FECA, the Declaratory

[6] Requestor's complaint purports to assert causes of action arising under the Administrative Procedure Act for the Commission's refusal to issue the requested advisory opinion (Count II) and to its testing the waters regulation (Count VI). It also purports to assert a direct cause of action under FECA, 52 U.S.C. § 30116(a)(1)(A), (a)(8) (Count V) and the Declaratory Judgment Act, 28 U.S.C. § 2201 (Count III).

Judgment Act, and general equitable principles provide no independent cause of action for review. J.A. 290.

A. The Commission Reasonably Construed the Term "Contribution" in FECA to Determine That Requestor Could Not Transfer a List of Potential Supporters to Governor DeSantis after he Begins Testing the Waters or Becomes a Candidate

The district court determined that "[t]he contact list that [Requestor] proposes to give to Governor DeSantis easily falls within [FECA]'s definition of a 'contribution.'" J.A. 294. This Court should affirm.

The arbitrary and capricious standard of review as set forth in the APA is "highly deferential" and "presume[s] the validity of agency action." *Am. Horse Prot. Ass'n v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). The standard for determining whether a Commission determination was "arbitrary or capricious" or otherwise "an abuse of discretion" entails a "very deferential scope of review that forbids a court from substitute[ing] its judgment for that of the agency." *Van Hollen v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016) (internal quotation marks omitted)). To meet that standard, plaintiffs must show that "the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). "[T]he party challenging an agency's action as

arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

The Commission's interpretation of FECA, as expressed in the challenged advisory opinion, is entitled to deference. As the district court noted, "[t]he D.C. Circuit has held that FEC advisory opinions interpreting FECA are entitled to *Chevron* deference, *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 184–86 (D.C. Cir. 2001); *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (stating that the FEC is "precisely the type of agency to which deference should presumptively be afforded")."[7] J.A. 293-94. With respect to the FEC's determination that Requestor's contact list falls within FECA's definition of a "contribution," however, the court found that "although *Chevron* applies, pacing through the *Chevron* two-step is unnecessary because the FEC's conclusion that [Requestor]'s contact list constitutes a 'contribution' under FECA is 'not only reasonable but also the best interpretation of the statute,' and it is the one the Court

[7] An agency's interpretation of its own regulations is entitled to deference where it is the agency's "authoritative" or "official position," "implicate[s] its substantive expertise," and reflects "fair and considered judgment[.]" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416–18 (2019); *see Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 507 (D.C. Cir. 2020). Where these "three guiding principles" weigh in favor of the agency's regulation, the agency's interpretation will prevail. *See Doe v. Sec. & Exch. Comm'n*, 28 F.4th 1306, 1313-16 (D.C. Cir. 2022). The advisory opinion at issue here easily meets these criteria, and thus the Court should defer to the FEC's interpretation of its regulations therein.

would adopt irrespective of *Chevron*." J.A. 294 (quoting *Wash. Reg'l Medicorp v. Burwell*, 813 F.3d 357, 362 (D.C. Cir. 2015)).

Requestor's challenge to the Commission's interpretation of the term "contribution" largely re-iterates its arguments below and provides no basis for overturning the district court's judgment. *First*, Requestor argues that its mailing list "does not constitute a 'contribution' because it cannot be deemed a 'gift.'" Br. at 32. Requestor neither engages with the district court's consideration of this precise question, J.A. 295-96, nor cites FECA or cases interpreting the statute's definition of "contribution." Rather, Requestor relies on two FEC advisory opinions from 1976 and 1977 that merely state that the term should be construed "reasonably" and in accord with "customary practice." Br. at 32. Requestor does not claim that these advisory opinions considered anything like the contact list it seeks to provide to Governor DeSantis, and indeed they did not. *See* FEC Advisory Op. 1976-86, 1976 WL 419397 at *1 (McDonald for Congress) (billboard advertisements); FEC Advisory Op. 1977-51, 1977 WL 438159 at *2 (Hon. Cecil Heftel) (receipt of "macadamia nuts" of "minimal value").

Requestor also offers uncited and unpersuasive reasons for why its contact list should not be considered a "gift" in "ordinary parlance[.]" Br. at 32-33. However, even assuming that this narrow focus on the meaning of "gift" in "ordinary parlance" were appropriate, the district court cited no less than five

dictionary definitions to demonstrate that even in ordinary parlance, "gift" means "something that is voluntarily transferred by one person to another without compensation." J.A. 295 (listing dictionary definitions). In contrast, Requestor cites no authority suggesting that its own definition is more appropriate, and its hypotheticals regarding a greeting card, public school roster, or a phone directory, Br. at 32-33, do not involve contexts where things of value are regulated due to fundamental governmental interests. The district court correctly observed that its definition of gift "is the only one that is plausible in context" given "FECA's concern is the provision of benefits to candidates[.]" J.A. 296.

Second, Requestor argues that "FECA should be construed narrowly, as excluding signed political petitions, to avoid unnecessarily raising serious constitutional questions." Br. at 33 (citation omitted). But even assuming that the district court's definition of "contribution" were not the only plausible one, and that any ambiguity were not resolved by deference to the FEC's reasoned judgment expressed in an official advisory opinion, *Nat'l Rifle Ass'n of Am.*, 254 F.3d at 184–86, the district court correctly identified this argument as a "non-sequitur[,]" J.A. 298, given that the FEC does not seek to limit Requestor's right to petition in any meaningful way. "Campaign finance regulation, in general, involves some regulation of political speech[,]" and "the history of campaign finance regulation and dozens of opinions from the Supreme Court, the D.C. Circuit, and this Court

that approve the regulation of speech in the form of campaign contributions." J.A. 298.

Third, Requestor's invocation, Br. at 33-35, of three substantive cannons, "constitutional avoidance, the major questions doctrine, and the rule of lenity[,]" are inapplicable here, for precisely the reasons set out by the district court. J.A. 298-301. As the court noted, these canons apply only when the language to be interpreted is "doubtful" or "ambiguous," when the government's interpretation gives rise to "grave" constitutional concerns, or when the authority conferred to an agency "lack[s] historical precedent[.]" J.A. 300. Such concerns are clearly absent here. As the district court found, the challenged advisory opinion was a straightforward application of FECA's contribution limits to a contact list in accord with the statute's "ordinary meaning[.]" J.A. 296. The Commission has repeatedly and uncontroversially found that such lists constitute things of value subject to FECA's limitations. *See supra*, pp. 9-10. And the agency's authority to regulate such in-kind contributions was explicitly upheld in *Buckley*, 424 U.S. at 36-37, and subsequently, *see, e.g., Christian Coal.*, 52 F. Supp. 2d at 96.

Fourth and finally, Requestor's invocation of FECA's legislative history to bolster its preferred definition of "contribution," Br. at 35-37, does not refute the contrary findings of the district court in this regard, J.A. 323-26. As the court found, FECA's legislative history should play no role in this proceeding because

Requestor's statutory interpretation is directly at odds with FECA's unambiguous provisions. J.A. 323-24. Despite acknowledging that it is providing its mailing list "for the purpose of influencing any election for Federal office[,]" Requestor nonetheless avers that individuals should be able to accept such items without restriction if they have not yet declared a candidacy. But as the district court rightly found, Requestor has failed to meet its burden to show that the Commission erred in this regard. J.A. 323-24 (citing 52 U.S.C. § 30101(2)(A)).

Moreover, "even if the Court were to consider it, this legislative history provides no meaningful support for [Requestor]'s contention." J.A. 324. This is because Requestor's averred history "pertain[s] to efforts to bring *contributions to draft committees* within the scope of the Act and does not address the regulation of contributions *from draft committees* to individuals." *Id.* (emphasis in original). As a result, "it is far from clear that the inference [Requestor] would have the Court draw from the legislative history is the right one[,]" J.A. 325, and the district court offered several plausible bases upon which congress could have declined to act on the relevant proposed amendments. J.A. 326-27. As the district court noted, Requestor's invocation of "speculation about why a later Congress declined to adopt new legislation offers a 'particularly dangerous' basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt." J.A. 326 (quoting *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1747 (2020)).

B. The Commission Reasonably Determined that Requestor is Not Serving as a "Conduit" for the Contributions of Others

Requestor is not a conduit committee, and has never proposed that it should be permitted to operate as one, subject to the well-established rules the FEC has established for such committees. Instead, Requestor argues that because its proposed course of action bears some surface-level similarities to actual conduit committees, it would be irrational to prohibit its conduct. At the same time, Requestor makes no representation that it has or will comply with the rules governing such committees, and indeed suggests that doing so would be unconstitutionally burdensome. J.A. 308-09. In context, Requestor's analogy to conduit committees is properly viewed as a post-hoc rationalization of its actions, and as the district court found, "the FEC reasonably decided that [Requestor] is not acting as a mere conduit for the contributions of others[.]" J.A. 316.

To attempt to demonstrate that it is merely acting as a conduit for the contributions of its signatories, Requestor relies heavily on analogies to organizations such as ActBlue and WE LEAD that the Commission has endorsed as conduits in other advisory opinions. However, an examination of how these organizations operate serves to underscore their difference from Requestor. For instance, while Requestor repeatedly references the FEC's endorsement of ActBlue acting as a conduit committee, the very advisory opinions that Requestor cites make clear that ActBlue operates in a manner highly distinct from what Requestor

proposes. *See* FEC Advisory Op. 2014-19, 2015 WL 1754737 at *6 (Act Blue); FEC Advisory Op. 2006-30, 2006 WL 3390749 at *6 (Act Blue). ActBlue charges a ~3.95% processing fee to the campaigns receiving contributions, and explicitly acknowledges that it is "legally required to pass along processing costs to the campaign so that we do not make in-kind contributions to them." ActBlue Support, Do you charge a fee for contributions?, ActBlue (last visited Jan. 15, 2024), https://support.actblue.com/donors/contributions/do-you-charge-a-fee-for-contributions/. WinRed, a similar organization that Requestor highlighted in its complaint, J.A. 35-36, also charges transaction fees ranging from 3.2% to 3.94%. Pricing, How much WinRed charges in transaction fees, WinRed (last visited Jan. 15, 2024), https://support.winred.com/en/articles/3097721-pricing.

Moreover, the FEC relied on these organizations' representations that they would comply with the applicable regulations. The ActBlue and We Lead advisory opinions highlighted by Requestor detail the regulatory requirements for conduit contributions and conditioned their conclusions on compliance with those requirements. *See* FEC Advisory Op. 2003-23, 2003 WL 22827476 at *2-3 (We Lead) (requestor's proposed conduct was permissible "as long as [it] complies with the requirements set forth below," including the requirement that earmarked contributions be forwarded to recipient treasurer within 10 days of receipt); ActBlue, 2006 WL 3390749 at *2, 4 ("ActBlue must forward earmarked

contributions to the candidates within ten days of the date that the candidate registers a presidential campaign committee with the Commission.")

In contrast, Requestor has made no representations to the Commission that it would meet these requirements, and the facts suggest that it will not. Requestor plans to provide its mailing list to Governor DeSantis at a time and place of its choosing, irrespective of Governor DeSantis's candidacy status. (Mem. at 4-5.) Requestor is not forwarding the valuable contact information to Governor DeSantis within ten days. 11 C.F.R. § 102.8(a), (c). Nor is Requestor making regular reports to the Commission and to the appropriate DeSantis committee disclosing the original source of any of the data Requestor proposes to transfer. 11 C.F.R. 110.6(c)(1). Under these circumstances, Requestor exerts significantly more control over the timing and conveyance of the contribution than was proposed in either the Act Blue or We Lead advisory opinions. *Cf.* 11 C.F.R. § 110.6(d)(2) ("If a conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the earmarked contribution shall be considered a contribution by [the] intermediary."). And far from agreeing to meet these requirements, Requestor "asks that, if it is treated as a conduit, it not be subjected to conduit reporting requirements" because such requirements constitute an "unreasonable" and "substantial burden[.]" J.A. 308-09.

In addition to failing to comply with the well-established rules for conduits, Requestor's proposed course of action is distinct from what the FEC has previously approved because the collection and compiling of contact information creates value beyond that offered by a conduit committee forwarding monetary contributions, thus creating a thing of value that is "more than the sum of its parts." J.A. 305. "It has taken [Requestor] nearly a year of work, over $1 million, and considerable initiative to identify and to solicit the hundreds of thousands of signatories of its petition and to amalgamate their contact information into a contact list." J.A. 306. "Had [Requestor] not expended that time and money, no such list would exist." J.A. 306. These solicitations have explicitly targeted those who support the candidacy of Governor DeSantis, clearly and substantially increasing the value of the list to that candidate.

Moreover, while Requestor disclaims doing any work to verify, and thus further enhance the value of, the information on its list, it is nonetheless the case that "much of the value of a contact list lies in the fact that someone has engaged in the effort to compile the list in a useful manner." J.A. 308. "By conducting an expensive campaign of nationwide outreach and compiling the fruits of that outreach in a single, useable contact list of motivated supporters, [Requestor] created a 'thing of value' beyond that which is attributable to the 'contribution' of each individual petition signatory." J.A. 305-06. As the court observed, if all

signatories "individually sent their contact information through letters, e-mails, text messages, and phone calls to Governor DeSantis, it would require considerable labor on his part to intake and organize that information in a usable form." J.A. 308. Instead, Requestor "has done that work for him." J.A. 308. Requestor itself concedes that the task of compiling this information is onerous, given that it suggests complying with conduit committee requirements would be a "substantial burden" that is "unreasonable" and even "unconstitutional." J.A. 308-09. On this basis, the court concluded that "[t]hat [FEC's] determination was not only reasonable but unassailable." J.A. 306. In any case, it was not "clear error."

Requestor is also distinguishable from a conduit committee because Requestor will retain the value of, and control over, the individual "contributions" (i.e. contact information) it seeks to pass on to the DeSantis campaign. At a Commission public hearing held September 15, 2022, counsel for Requestor indicated both that the organization would retain the contact list and acknowledged that the list is valuable to Requestor. *See* YouTube, FEC Open Meeting of September 15, 2022, https://www.youtube.com/watch?v=BWfuTD46wwM at 12:48-13:03. That continued possession of the information at issue suggests that Requestor retains control over who can gain access to it and when. If Requestor later provides its mailing list or a portion of it to any federal candidate other than Governor DeSantis, it would be exercising discretion or control, and would

undoubtedly be making a contribution in its own name. 11 C.F.R. § 110.6(d)(2). The result should be no different if Requestor provides the contact information to Governor DeSantis. Even assuming that Requestor's signatories have effectively directed their individual "contribution" to Governor DeSantis, Requestor's future use of the list, either for its own organizing activities or to sell for profit, would involve the "exercise" of "direction or control" concerning the contributor's "choice of recipient," in violation of FEC regulations. 11 C.F.R. § 110.6(b)(2)

Beyond simply relitigating its case in chief, Requestor challenges the district court's assessment on three factual bases. However, Requestor's disputes with the court's factual findings are meritless, and in any case do not demonstrate "clear error[.]" *Guedes*, 920 F.3d at 10.

First, Requestor charges that the district court erred by incorrectly assuming that collecting monetary contributions constitutes a "de minimus" logistical and financial effort, whereas collecting contact information as Requestor has done constitutes a more "onerous" undertaking. Br. at 41-42. However, as detailed *infra*, pp. 47-48, what distinguishes Requestor's undertaking from that of other organizations addressed in FEC advisory opinions is the extent it seeks to engage in massive and *unrecouped* effort to support a single candidate. Moreover, Requestor cannot credibly contest the court's finding that the burden of collecting and compiling contact information into a usable list is "onerous" when Requestor

has effectively conceded this fact in this litigation. When faced with the prospect of being required to comply with the FEC's conduit committee regulations, Requestor implored that "if it is treated as a conduit, it not be subjected to conduit reporting requirements, in part because 'listing potentially hundreds of thousands' of contributions would be a 'substantial burden' that is 'unreasonable' and even 'unconstitutional.'" J.A. 308-09.

Critically, Requestor does not offer any evidence that the district court's factual determinations in this regard were incorrect. And Requestor has consistently opposed any discovery or factfinding that could contradict the court's factual findings, based on its assertion that "[t]his case involves pure questions of law[.]" Br. at 51; *see infra*, pp. 53-56. Requestor forsook discovery as to all of its claims, and is ill-positioned to challenge the district court's conclusions based on a lack of record evidence. *See* J.A. 291 ("[Requestor] contends that discovery is unnecessary and would needlessly delay resolution of this matter.").

Second, Requestor argues that the district court erred in finding that "conduits do not themselves bear the transaction costs associated with the separate payments," when in fact this is true only for corporations. Br. at 42-43. However, the advisory opinions Requestor relies upon demonstrate that the FEC has not previously authorized anything like the conduct Requestor seeks to engage in.

For instance, Requestor asserts that in NewtWatch PAC, FEC A.O. 1995-09, at 3 (Apr. 21, 1995), the FEC "conclude[ed]" that "expenses a conduit committee incurs in processing online financial transactions 'are operating expenditures of the committee[.]'" Br. at 42-43. In fact, NewtWatch PAC was not and never claimed to be a "conduit" of any kind, and this term does not appear in the opinion. The quoted text refers to NewtWatch's reporting of the 2% processing fee it planned to provide to a financial services company as compensation for processing contributions *to* NewtWatch, and the FEC explicitly noted that these services "would be a prohibited contribution by [the financial services company] if uncompensated." *Id.* at 3.

Requestor similarly cites FEC Advisory Op. 2019-15 at 4-6 (NORPAC), https://www.fec.gov/files/legal/aos/2019-15/2019-15.pdf , for its "holding" regarding a political committee, but in that opinion the Commission approved "NORPAC's proposal to deduct a flat-rate, fixed percentage fee from earmarked contributions that it forwards in order to reimburse its merchant processing costs as well as its solicitation and administrative costs." *Id.* at 1. NORPAC is a "nonconnected [political] committee," *id.*, not a corporation, and nonetheless proposed to cover its administrative expenses by deducting a percentage of each contribution before passing that money onto the designated candidate, *id.* at 4. This provides no support for Requestor's claim that "FECA allows political

committees to act as conduits and pay such administrative, processing, or other such costs themselves[.]" Br. at 42-43. Given that Requestor plans to retain the valuable contact list it has solicited even after providing it to Governor DeSantis, which it may sell and/or use for its own organization-building, there is no reason that it should be subject to less requirements than a committee that merely seeks to cover its costs, and Requestor has failed to establish that the FEC has acted inconsistently or irrationally in this case.

Third, while Requestor does not seriously dispute that the collective value of many peoples' contact information is "more than the sum of its parts," it nonetheless maintains that this is not legally relevant. Requestor cites no legal authority for its position, and instead merely criticizes the court's opinion for failing to cite precedent on this issue. However, the lack of case law holding on this precise question is indicative only of the fact that Requestor's position is extreme.

Requestor further criticizes the court's reliance on *Christian Coalition*, 52 F. Supp. 2d at 77, because that case did not squarely address conduit committees. Br. at 44-45. This criticism is misplaced, as this case was cited for the limited proposition that a contact list is a highly valuable campaign asset with unique value to particular campaigns. J.A. 306-07. In that case the court determined that the value of the list at issue was enhanced by the defendant's "cross-check" of the list

against its own mailing list, making it more likely that the list would be valuable to the recipient candidate's campaign "because those on the list were highly likely to share the Coalition's views on a number of issues[.]" J.A. 306 (quoting *Christian Coal.*, 52 F. Supp. 2d at 77). That court explained that "[e]ven if the names on the [particular] list were publicly available, the fact that the Coalition expended resources to compile the list and cross-check it with the Coalition's house file, created value that was passed on to the North campaign." J.A. 306 (quoting *Christian Coal.*, 52 F. Supp. 2d at 96). These findings are directly applicable here, where Requestor proposes to provide Governor DeSantis with a mailing list curated with contact information of the Governor's supporters, and developed with Requestor's considerable money and labor to compile the list into a convenient format.

It was, therefore, entirely reasonable for the district court to conclude "that [Requestor] is not acting as a mere conduit for the contributions of others and that its decision is not inconsistent with any prior advisory opinions that either party has brought to the Court's attention." J.A. 316. That decision should be affirmed.

C. The Commission Reasonably Determined that Requestor May Not Provide Its Mailing List if Governor DeSantis is Testing the Waters

As explained above, Requestor's Count VI is now moot. *See supra*, pp. 20-22. Even assuming arguendo that it was not, however, the FEC's interpretation of

its authority to regulate Requestor's conduct was reasonable, and Requestor has not met its burden to show otherwise. "Candidate" status under FECA is triggered either by (a) "seek[ing] nomination for election, or election, to Federal office"; or (b) receiving "contributions" or making "expenditures" aggregating in excess of $5,000. 52 U.S.C. § 30101(2). Whether a receipt or disbursement is a contribution or expenditure depends on whether it is made or received "for the purpose of influencing any election for Federal office." *Id.* § 30101(8)(A), (9)(A).

As the district court noted, Requestor's attack on the testing the waters regulation is "puzzling" given that "the testing-the-waters regulation is a limited exemption from FECA's otherwise applicable disclosure requirements[,]" and "it is a mystery how [Requestor] would benefit from a decision setting that exemption aside[.]" J.A. 320-321; *see* 11 C.F.R. §§ 100.72(a), 100.131; *see also supra*, pp. 6-8. Were this regulation struck down, "it would mean that Governor DeSantis would qualify as a "candidate" for all statutory purposes were he to accept Requestor's proposed in-kind contribution." J.A. 321.

As at the district court noted, Requestor's appeal relies heavily on the D.C. Circuit's decision in *Machinists*, 655 F.2d 380. *See* Br. at 45-50. But in *Machinists* the court held that only organizations supporting or opposing a "candidate" are subject to regulation as political committees. 655 F.2d at 393-94. Accordingly, the court found that the Commission could not exercise jurisdiction

over organizations that sought only to "draft" former Senator Edward Kennedy to run for president, nor apply FECA's contribution limits to the Machinists Non-Partisan Political League which sought to fund those organizations. *Id.* at 383-84.

Requestor misreads *Machinists* to stand for a "the sweeping proposition that FECA does not regulate efforts to 'draft' candidates for federal office, and argues that the decision establishes [Requestor]'s right to provide its signed petition to 'draft' Governor DeSantis at any[] time before he becomes a candidate[.]" J.A. 321-22. (citations and quotations omitted). But *Machinists* "does not speak to the definition of 'candidate.'" J.A. 322. Nor does Requestor address the circular nature of its position: the receipt of contributions makes one a candidate, but a thing of value is not a contribution unless given to someone who is already a candidate. J.A. 322-23. *Machinists* does not dictate the outcome that Requestor seeks in this litigation, and Requestor has not shown that the Commission or the court committed error when it declined to authorize Requestor's valuable contribution. J.A. 322.

Nor is the enforcement of FECA's contribution limits in this context an impermissible "prophylaxis-upon-prophylaxis" approach. Br. at 49. It is instead a straightforward application of FECA's core contribution limits to a federal candidate. As the Commission noted previously, the early days of an election are "critical" to determining viability for office. *FEC v. Cruz*, 142 S. Ct. 1638, 1651

(2022). The value of early fundraising is of outsized importance for prospective candidates because "seed money is associated with later fund-raising success even with controls for candidate quality" and other confounding variables. R. Biersack, P. Herrnson & C. Wilcox, *Seeds for Success: Early Money in Congressional Elections*, 18 Leg. Studies Q. 535, 548 (1993).

Finally, Requestor realleges a semantic argument: that the testing-the-waters regulation's use of the term "funds" rather than "contributions" means that the former term covers only financial instruments, rather than "anything of value." Br. at 49-50. The court was right to dismiss this argument as irrelevant. "If [Requestor] were to prevail on that argument, the exception would not apply, and thus any prospective candidate who accepts an in-kind contribution worth more than $5,000 would, by virtue of the statute, become a candidate." J.A. 327. "The fact that in kind goods or services are not expressly mentioned in the regulation exemption to the definition of contribution could arguably indicate that such in kind gifts would be viewed as contributions and thus trigger candidate status if they aggregated in excess of $5,000." FEC Advisory Op. 1981-32, 1981 WL 721644 at *5 (Donald M. Middlebrooks). In any case, Requestor does not and cannot dispute that the Commission has long interpreted its testing the waters regulation to apply both to in-kind contributions as well as monetary ones. *See*

supra, pp. 9-10. That interpretation of the regulation is entitled to deference. *Kisor*, 139 S. Ct. at 2416-18.

IV. THE COURT SHOULD REMAND THIS MATTER FOR PENDING DISCOVERY

Requestor asserts that "This case involves pure questions of law[.]" Br. at 51. For this reason, and despite the interlocutory nature of its appeal and pending discovery requests in the district court, it argues that this Court should take the unusual step of dismissing this matter outright, rather than remanding to the district court for further proceedings. The Court should deny Requestor's request because it is in effect an attempt to appeal a separate interlocutory order of the district court over which this Court does not have jurisdiction, and would eliminate the parties' opportunity for necessary discovery.

As detailed *supra*, p. 17, following the district court's order denying Requestor's motion for a preliminary injunction, Requestor moved for the entry of final judgment in favor of the FEC, arguing there, as here, that this case consists of pure questions of law that make discovery unnecessary, and the court should therefore enter judgment in the FEC's favor to facilitate its appeal. The court denied this motion, and the FEC accordingly submitted discovery requests to Requestor regarding its First Amendment claim. Because the court has already rejected Requestor's effort to avoid discovery and have final judgment entered in

favor of the FEC, Requestor should not be permitted to circumvent that order by having *this* Court dismiss its complaint in its entirety.

This Court lacks jurisdiction over the district court's denial of Requestor's motion for entry of judgment, and it should not reward Requestor's attempt to circumvent jurisdictional barriers by effectively appealing it here. This Court has jurisdiction over only "final decisions" of district courts, 28 U.S.C. § 1291, with a limited exception for certain "interlocutory orders[,]" 28 U.S.C. § 1292(a)(1). This exception is construed "narrowly" because the "congressional policy against piecemeal review[.]" *Salazar ex rel. Salazar v. D.C.*, 671 F.3d 1258, 1261–62 (D.C. Cir. 2012) (quoting *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 84 (1981)). Despite earlier indicating that it planned to appeal the district court's denial of its motion to enter final judgment, Requestor subsequently conceded that it was not appealing that order. Pl.-Appellant's Opp. to FEC's Partial Mot. to Dismiss at 2-4, Civ. No. 23-5161 (Document #2015872). Given this concession, this Court has a vested interest in ensuring that the Federal Rules are not undermined by permitting what would be in effect an appeal of that very order. That interest is particularly acute here, where Requestor is seeking a final ruling that could be the subject of further review and, if Requestor is successful, would permanently alter federal campaign finance regulation. It should not be able to do so on the basis of the

expedited, largely one-sided presentation of evidence from the preliminary-injunction process.

Moreover, discovery is merited in this case, and indeed had already begun before it was stayed to permit Requestor to take this interlocutory appeal. The FEC served initial written discovery requests on plaintiff on July 5, 2023. *Inter alia*, the Commission seeks to establish the true value of Requestor's contact list, which is likely substantially higher than the $11,000 figure the court relied upon, and which will provide important factual context regarding the danger of quid pro quo corruption. The FEC similarly seeks to test Requestor's unilateral assertions as to how the contact list was created and maintained, which addresses whether Requestor is merely serving as a conduit for the contributions of others to the DeSantis Campaign.

The FEC also seeks to test Requestor's assertions as to the harm it and others have suffered, facts which speak to the extent of the burden the Commission's actions have imposed on plaintiff. This includes whether Requestor either has or plans to support the DeSantis Campaign beyond the illegal course of action it has proposed. Requestor has presented an apparently false binary choice of either providing its contact list to the DeSantis campaign free of charge or not providing the information at all. Indeed, a public social media post following the Court's preliminary-injunction decision presented the view that "the court's ruling

means we're now the only ones able to communicate with those patriots [the petition signers] to build a bottom-up grassroots program to draft/nominate/elect Ron in 2024."[8] Requestor's apparent intention to be the exclusive user of its contact list through 2024 highlights the question why Requestor does not sell or rent its petition list to the DeSantis campaign, and further why it does not raise money for the DeSantis campaign from the supporters it has identified. The FEC is entitled to explore these outstanding questions through discovery.

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision below in its entirety and remand this matter to the district court for further proceedings.

Respectfully submitted,

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[8] @Ready4Ron, Twitter (May 18, 2023, 9:44AM), https://twitter.com/Ready4Ron/status/1659193307719933955.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,994 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2024, I electronically filed the Brief for Federal Election Commission with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. Service was made on the following through CM/ECF:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

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