

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

_____)	
READY FOR RON,)	
)	
Plaintiff,)	Civ. No. 22-3282 (RDM)
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	SUPPLEMENTAL BRIEF
)	
Defendant.)	
_____)	

**FEDERAL ELECTION COMMISSION’S SUPPLEMENTAL BRIEF OPPOSING
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

Defendant Federal Election Commission (“FEC” or “Commission”) hereby submits this supplemental brief in opposition to plaintiff Ready for Ron’s (“RFR”) Motion for Preliminary Injunction (Docket No. 8) (the “Motion”) and Memorandum in Support (Docket No. 8-1) (“Memorandum” or “Mem.”), in accordance with the Court’s minute order dated February 28, 2023. As suggested at the preliminary injunction hearing, this brief narrowly addresses the Court’s request for Commission precedent with regards to so-called “conduit contributions,” and its relevance to RFR’s proposed course of conduct. For the reasons articulated herein, the Commission’s Advisory Opinion 2022-12 reasonably and permissibly determined, consistent with Commission precedent, that RFR’s proposed conduct is not akin to a conduit contribution, and that RFR instead seeks to make an in-kind contribution to Governor DeSantis in excess of FECA’s well-established limitations.

As detailed in the Commission’s Response in Opposition to RFR’s Motion (Docket No. 16) (“Opposition” or “Opp.”), in Advisory Opinion 2022-12 all six FEC Commissioners unanimously concluded, following extended briefing by RFR as well as comments by other

interested parties, that RFR could not provide the names and contact information contained in its petition 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.¹ Opp. at 10. The Commission’s Advisory Opinion directly addressed RFR’s contention that it is a mere conduit for the contributions of others, and explained that

it is well established under the Commission’s regulation that “mailing lists” or “membership lists” compiled by political committees are an in-kind contribution under the Act if provided at less than the “usual and normal charge.” As the D.C. District Court recognized in *FEC v. Christian Coalition*, “[e]ven if the names on the . . . list were publicly available, the fact that the [respondent] expended resources to compile the list” of persons likely to support a candidate “created value that was passed on” when that list was provided to the candidate.

(See Compl. Exh. 11, Advisory Op. 2022-12 (Ready for Ron) (“Advisory Opinion” or “A.O.”) at 6-7 (citing *FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 96 (D.D.C. 1999)).) The Commission thus directly addressed and rejected RFR’s contention that it was acting as “a mere conduit of other people’s information” such that it should not be viewed as the entity making the contribution. (*Id.* at 9.) Because RFR “intends to spend a significant amount of money to compile the list of contact information in its petition” and “asserts that the resultant list will have a commercial value in excess of \$2900[.]” “R4R may not provide the contact information to

¹ The Commissioners could not approve a response regarding whether RFR 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 by the required four votes. (Opp. at 11.) 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. (*Id.*)

RFR’s argument that it is merely a “conduit” and not the source of its proposed contribution to Governor DeSantis does not appear to depend upon the timing of its proposed contribution, including whether Governor DeSantis is then testing the waters of a potential candidacy or is a “candidate” as defined by FECA. (See Mem. at 18-24 (discussing conduit contributions within section of argument titled “Ready for Ron May Provide Its Signed Petition to Governor DeSantis at Any Time”).)

Governor DeSantis without charge[.]” *Id.* at 7. That conclusion represents the Commission’s considered and official position and satisfies the deferential standard of review for agency actions challenged under the Administrative Procedure Act. (Opp. at 21-28.)

The Court made further inquiries at oral argument regarding prior Commission advisory opinions and, so far as counsel are able to determine, the Commission has never opined that it is permissible to collect email information regarding potential contributors and provide that to a prospective or actual candidate free of charge, as RFR seeks to do here. The most closely analogous cases the Commission has identified generally opine that the candidate should cover the cost of the provision of email addresses of contributors to a federal candidate, in contrast with plaintiff’s proposal. For instance, in FEC Advisory Op. 2010-21, 2010 WL 4024418 (ReCellular Inc.) at 6-7, the Commission concluded it was permissible for a for-profit entity that purchased used cell phones for resale to allow those who sold it cell phones to select a political committee to receive the payment, and include email information about that donor, but only if the political committee or the donor covered the cost of the transaction. In FEC Advisory Op. 2022-03, 2022 WL 2452587 (Democracy Engine) at 3, the requestor noted that it planned to provide a platform for certain groups to solicit the general public to make contributions to candidates or political committees and required those responding to the solicitation to provide personal information including email addresses “as part of its processing services to ensure that the ultimate recipient committees are provided ‘the data they need under the law’ to file reports with the Commission and for [the Requestor’s] own accounting purposes.” The opinion did not separately address whether the inclusion of email address information was a thing of value, nor is it even clear whether all such information was transferred to the political committee or whether the Commission considered that issue. In addition, the requestor proposed to charge a

commercially reasonable fee for its service, distinguishing this opinion from RFR's proposal to provide the information for free. *Id.* at *2, 3; *see also* FEC Advisory Op. 2014-06, 2014 WL 3748239 (Ryan for Congress) (candidate may use PAC email list so long as he pays fair market value).²

In short, the Commission advisory opinions most closely addressing the issue highlighted by the Court approved of the requestor's conduct under circumstances where the candidate receiving emails would be charged a fee for the services provided by the requestor (including the collection and provision of emails). RFR, by contrast, proposes to spend "\$100,000-\$200,000 per month" to compile this data and provide it to Governor DeSantis free of charge. (Mem. at 4.) None of these advisory opinions undermine the Commission's conclusion in A.O. 2022-12 that a compilation of supporter contact information, including email addresses, is a thing of value, and providing this information to Governor DeSantis free of charge when he is testing the waters or operating a campaign would violate FECA's limitations on contributions to candidates.

Neither of the Commission advisory opinions RFR principally relies upon are inconsistent with the Commission's rejection of RFR's conduit theory in A.O. 2022-12 or the

² Other Commission advisory opinions either failed to reach any kind of consensus regarding email addresses or did not clearly address whether these could be provided to actual or potential candidates. *See, e.g.*, FEC Advisory Op. 1999-36, 2000 WL 180333 (Campaign Advantage) (Commission authorized third party to process electronic check contributions which required the donor to submit email information so that the third party could email a "digital signature authentication code" and to notify the donor of problems with the donation, without discussion of whether email information was transmitted to the candidate, and in any event the third party charged a fee to the candidate's campaign for the service); FEC Advisory Op. 2011-02, 2011 WL 7629547 (Brown) (Commission split on whether a candidate could collect email addresses of those persons attending a book signing set up by publisher to promote candidate's book, with those Commissioners finding that proposal impermissible concluding that it would take advantage of expenses borne by the publisher and therefore be an impermissible corporate in-kind contribution, and three Commissioners would have concluded that proposed transaction was permissible because the book signing was not a fundraising event).

above authorities that indicate candidate campaigns must pay a fee when corporations propose to pass contact information of supporters/prospective contributors. As an initial matter, the Court need not even reach this issue because RFR failed to raise those advisory opinions to the Commission in a timely manner. “It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review.” *Wallaesa v. Fed. Aviation Admin.*, 824 F.3d 1071, 1078 (D.C. Cir. 2016) (quoting *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004)). That principle “holds special force where, as here, an appeal follows adversarial administrative proceedings in which parties are expected to present issues material to their case.” *Id.*; see also *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) (“[T]here is a near absolute bar against raising new issues — *factual or legal* — on appeal in the administrative context.”) (emphasis added) (citation omitted). RFR failed to cite FEC Advisory Op. 2003-23, 2003 WL 22827476 (“*We Lead*”) in any of its submissions to the Commission in connection with the Advisory Opinion. RFR cited FEC Advisory Op. 2006-30, 2006 WL 3390749 (“*ActBlue*”) for the first time in its third requestor’s counsel comment, submitted to the Commission September 28, 2022, the same day the Commission approved the final Advisory Opinion. (See Compl. Exh. 9, Advisory Op. 2022-12 (Ready for Ron) (“Third Comment”) at 1. Even granting the idea that RFR preserved its general argument that it should be viewed as a conduit, it failed to raise in a timely manner relevant authority to support its suggestion that the Commission’s rejection of that theory would result in inconsistent treatment.

In any event, both *We Lead* and *ActBlue* are distinguishable from the Commission’s Advisory Opinion under review here in material respects. The Commission’s analysis in *ActBlue* and *We Lead* addressed only the transmission of information to authorized committees that was

required for those committees to meet their reporting obligations with respect to monetary contributions. *See We Lead*, 2003 WL 22827476 at *3 (“the name and address of the contributor and the date of receipt must be forwarded with the contribution”); *ActBlue*, 2006 WL 3390749 at *5 (“The information would have to include the name and address of the contributor, and the date of receipt of the contribution.”). Plaintiff does not propose to forward any monetary contributions, which entail a higher need for verification, to Governor DeSantis. And neither advisory opinion addressed the transmission of constituent contribution email addresses, let alone a mailing list as such. To the extent those entities are transmitting more information outside the scope of the Commission’s analysis, the agency did not address the permissibility of those actions.

Moreover, 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 March 9, 2023), <https://support.actblue.com/donors/contributions/do-you-charge-a-fee-for-contributions/>. WinRed, a similar organization that RFR highlighted in its complaint, (Compl. at 2-3, ¶ 84,) also charges transaction fees ranging from 3.2% to 3.94%. Pricing, *How much WinRed charges in transaction fees*, WinRed (last visited March 14, 2023), <https://support.winred.com/en/articles/3097721-pricing>. To any extent that the Court has concerns regarding public information plaintiff raises regarding ActBlue, a more comprehensive view of such information shows that ActBlue operates in ways that are distinguishable from what plaintiff proposes.

In addition, the *ActBlue* and *We Lead* advisory opinions detailed the regulatory requirements for conduit contributions and conditioned their conclusions on compliance with those requirements. *See We Lead*, 2003 WL 22827476 at *2-3 (opining that 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 RFR made no representations to the Commission that it would meet these requirements, and the facts before the Court suggest that it will not. RFR 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.) RFR is not forwarding the valuable contact information to Governor DeSantis within ten days. 11 C.F.R. § 102.8(a), (c). Nor is RFR making regular reports to the Commission and to the appropriate DeSantis committee disclosing the original source of any of the constituent data RFR proposes to transfer. 11 C.F.R. 110.6(c)(1). Under these circumstances, RFR 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.”). It was, therefore, entirely reasonable and permissible for the Commission to conclude that RFR’s proposed conduct would result in an excessive in-kind contribution notwithstanding *ActBlue* and *We Lead*, as those requestors indicated they would continue to comply with Commission

regulations and who applied objective markers to trigger the transfer of the contributions to the ultimate recipient committees. (Opp. at 21-28.)

Furthermore, the *ActBlue* and *We Lead* advisory opinions' address those organizations' efforts to serve as a conduit for monetary contributions, as opposed to valuable contact information. This distinction is significant because under those circumstances ActBlue and We Lead do not retain any of the value of the contribution once it is passed to the designated recipient. In contrast, RFR plans to send to Governor DeSantis only a copy of its mailing list, and will retain its mailing list for its own use. At a Commission public hearing held September 15, 2022, counsel for RFR indicated both that the organization would retain the mailing list and acknowledged that the list is valuable to RFR. *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 RFR retains control over who can gain access to it and when. If RFR 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 RFR provides the contact information to Governor DeSantis, since RFR has and is continuing to spend large sums of money to provide encouragement and support to a Governor DeSantis candidacy based on its own desire to see Governor DeSantis elected president of the United States. (A.O. at 6-7.)

While other Commission authorities have not explicitly addressed the potential free provision of email addresses to candidates, it is noteworthy that providing supporter emails to Governor DeSantis is neither required by Commission regulations nor necessary for RFR to achieve its stated goals. The Commission's existing regulations do not require the contributor's

email address to verify identity. Instead, FECA requires each political committee to report the name, mailing address, occupation, and employer of any individual who contributes more than \$200 to the committee in a calendar year, along with the amount and date of the individual's contributions. *See* 52 U.S.C. §§ 30101(13)(A), 30104(b)(3)(A); *see also* 11 C.F.R. §§ 100.12, 104.8(a). Similarly, conduits and intermediaries of earmarked contributions are required to report “[t]he name and mailing address of each contributor” and the amount of each earmarked contribution. *See* 11 C.F.R. § 110.6(c)(1)(iv). Here, while RFR claims that providing contact information with its petition “helps establish the authenticity” of the signatures (Mem. at 9), RFR has failed to rebut the point that such addresses are more useful as a fundraising tool than as a means of verifying the authenticity of persons, (*see* Opp. at 20 & n.9).

Finally, in the event this Court determines under the APA that the FEC did not sufficiently consider its prior advisory opinion precedent in connection with RFR’s Advisory Opinion, the proper recourse is remand to the agency. *See Util. Workers Union of Am., Loc. 369, AFL-CIO v. FEC*, 691 F. Supp. 2d 101, 106 (D.D.C. 2010) (“[If the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”) (quoting *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 599 (D.C. Cir. 2007).)

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CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2023, I served the foregoing pursuant to Fed. R. Civ. P. 5(b)(2)(E) on counsel of record, as a registered ECF user, through the Court's ECF system.

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