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

READY FOR RON,	)	
Plaintiff,	)	Civ. No. 22-3282 (RDM)
v.	)	
FEDERAL ELECTION COMMISSION,	)	OPPOSOTION TO MOTION
Defendant.	)	

**FEDERAL ELECTION COMMISSION'S OPPOSITION TO
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

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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 or mailing 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.

Plaintiff Ready for Ron ("RFR") challenges a Commission Advisory Opinion applying these principles to conclude that RFR 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 RFR 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. That position is based on its counterintuitive assertion that a list of names and contact information is not a mailing list. It makes no difference whether RFR's list is attached to a political statement that RFR is free to make; RFR cannot exempt a contribution from FECA's limits just by including political speech. Neither the First Amendment nor FECA required the Commission to blind itself to the practical effect of RFR's proposal, which would exempt from FECA's limits a transfer of immense value that falls squarely within the contribution limits. This Court should deny RFR's motion for a preliminary injunction.

BACKGROUND

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). The Commission is also authorized to institute investigations of possible violations of FECA, 52 U.S.C. § 30109(a)(1)-(2), and to initiate civil enforcement actions in the United States district courts, *id.* §§ 30106(b)(1), 30107(a)(6), 30107(e), 30109(a)(6). 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 of receiving a complete request. 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," of which the requestor should be promptly notified. 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); *see also Explanation & Justification of Regulations Concerning Jan.8, 1980 Amendments to Fed. Election Campaign Act of 1971*, 45 Fed. Reg. 15080, 15090, 15124 (Mar. 7, 1980). When the Commission issues an advisory opinion finding the proposed transaction or activity lawful under FECA and its regulations, the opinion acts as a safe harbor against sanction for any person who follows the opinion in good faith and is involved in either the proposed transaction addressed in the opinion 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

FECA requires individuals who meet the statutory definition of a "candidate" to designate a principal campaign committee, file periodic campaign finance disclosure reports, and abide by certain source and amount limitations on contributions. *See generally* 52 U.S.C. §§ 30102(e)(1), 30104(a)(1)-(3), 30116(a)(1)(A), 30118, 30119, 30121. 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 the FECA. FEC, Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985); *see* Federal Election Regulations, H.R. Doc. No. 95-44, 40 (1977), *available at* https://www.fec.gov/resources/cms-content/documents/95-44.pdf (explaining regulatory exception from definition of "contribution" for "[p]ayments for the purpose of determining whether and individual should become a candidate if the individual does not subsequently become a candidate"). Commonly referred to as the "testing the waters" exceptions, 11 C.F.R. § 100.72 and § 100.131[1] 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. 11 C.F.R. § 100.72(a). If the person subsequently becomes a candidate, those receipts and disbursements become contributions and expenditures under the FECA, and are therefore subject to the Act's reporting requirements and source and amount restrictions. *Id.*

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

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[1] Formerly, 11 C.F.R. § 100.7(b)(1) and 100.8(b)(1).

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 to require funds received to test the waters be permissible under the FECA's source prohibitions and contribution limits. *Id*.; 11 C.F.R. § 100.72(a). The Commission rejected comments objecting to the proposed regulatory provision, explaining that it "view[ed] the amended regulations as reducing the potential for circumvention of the prohibitions and limitations of the Act," and "ensur[ing] consistent application of the Act's contribution limitations and prohibitions." Payments Received for Testing the Waters Activities, 50 Fed. Reg. at 9994. As a result, "[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; *see also* 52 U.S.C. § 30116(a); *id*. § 30101(8)(A)(i). The Supreme Court also held that the government's interest in preventing quid pro quo corruption is sufficient to justify limits on the "provision of in-kind assistance" to a candidate or his campaign. 424 U.S. 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); *see also* 11 C.F.R. § 110.1(b)(1); FEC, Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 86 Fed. Reg. 7867, 7869 (Feb. 2, 2021) (adjusting limit for inflation pursuant to 52 U.S.C. § 30116(c)). 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 (Ryan for Congress, *et. al*), at *7 (collecting examples); *see, e.g.*, FEC Advisory Op. 2011-02, 2011 WL 7629547 (Scott Brown for U.S. Senate Committee), at *5 (same); FEC Advisory Op. 2002-14, 2003 WL 715988 (Libertarian National Committee), at *2. 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.*, 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); Notice of Proposed Rulemaking, FEC, Mailing Lists of Political Committees, 68 Fed. Reg. 52,531, 52,531 (Sept. 4, 2003) ("One of the principal assets of many political committees is their mailing list."). 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 Ready for Ron

On May 23, 2022, RFR registered with the Commission as a hybrid, nonconnected,[2] unauthorized[3] political committee. Ready for Ron, Statement of Organization, FEC Form 1 (May 23, 2022), https://docquery.fec.gov/cgi-bin/forms/C00815928/1597424/. As a "hybrid" PAC under *Carey v. FEC*, 864 F. Supp. 2d 57 (D.D.C. 2012), RFR 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). (Compl. ¶ 7.) From its contribution account, RFR may make contributions to federal candidates and from its non-contribution account, RFR may make independent expenditures.

Although RFR describes itself as a "draft committee"[4] that was "formed for the purpose of drafting" Florida Governor Ron DeSantis "as a candidate for the Republican nomination for President in the 2024 election," (Compl. ¶ 6,) RFR may make contributions to federal candidates

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[2] A nonconnected committee is a political committee that is not a party committee, an authorized committee of a candidate, or a separate segregated fund established by a corporation or labor organization. *See* 11 C.F.R. §§ 100.5(a), 106.6(a).

[3] An unauthorized committee is a political committee which has not been authorized by a candidate to receive contributions or make expenditures on behalf of such candidate. *See* 11 C.F.R. § 100.5(f).

[4] A "draft committee" is not a designation subject to special registration or reporting requirements under FECA or Commission regulations. 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.

and, to date, has reported making over $76,000 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 for Ron, Financial summary, https://www.fec.gov/data/committee/C00815928/?cycle=2022 (last accessed Jan. 26, 2022).

B. Commission Processing of RFR's Advisory Opinion Request

1. RFR's Request

RFR requested an advisory opinion from the Commission by letter on May 25, 2022 (Compl. Exh. 1 ("A.O. Request").), which it later supplemented with additional information requested by the Commission.[5] RFR's advisory opinion request and various supplements and comments 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. RFR explained that it was engaging in extensive media outreach to support its petition, including television and online advertisements as well as earned media coverage, and provided statistics regarding the extent of this outreach at the time of its request. (*Id.* at 2.) At the time of the request, RFR was planning 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. (*Id*. at 2-3.) According to the request, individuals who wished to "sign" the petition could do so through RFR's website or by phone, and all signatories could provide their name, phone number, email address, and zip code. (*Id.* at 2.) Each signatory *was required to* provide their name and email address. (*Id.* at 2; *see* Compl. ¶ 11.) RFR notified individuals that, by signing the petition, they

[5] The public record regarding RFR's advisory opinion request is available at https://www.fec.gov/data/legal/advisory-opinions/2022-12/.

agreed to have their names and contact information provided to Governor DeSantis. (A.O. Request at 2-3.)

RFR proposed to provide this information — including each signatory's name and email address, in addition to any other contact information the signatory provides — to Governor DeSantis without charge. (A.O. Request at 4.) RFR projected that it "will likely amass well over a million virtual signatures for its petition, along with accompanying [contact information], by the end of 2022," and that its petition would likely eventually include contact information of "millions" of signatories. (*Id.* at 4.) As of RFR's supplemental submission to the request on September 14, 2022, RFR had collected approximately 43,750 signatures and anticipated having over 60,000 by the end of that month; moreover, RFR planned to submit "regular updates" to Governor DeSantis through the 2024 election. (*See* Compl. Exh. 11, Advisory Op. 2022-12 (Ready for Ron) ("Advisory Opinion" or "A.O.") at 3 n.8.) RFR estimated the value of each signatory's contact information to be five cents, based on a "reasonable sample market value of contact information in political distribution lists," and stated that the market value of the information it planned to provide to Governor DeSantis would exceed $2,900.[6] (*Id.* at 3.)

RFR presented two questions to the Commission. First, whether RFR 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. (A.O. Request at 4.) Second, assuming yes, whether RFR was

[6] RFR bases this estimated value on the following information. First, in support of its petition efforts, RFR purchased a distribution list of registered Republicans who contributed to Republican candidates, but not to President Trump or the Save America PAC. RFR represents that the price it paid to purchase this list with contact information was five cents per name and that it paid more than $2,900 to purchase the list. RFR also bases its estimate on consultations "with commercial data vendors experienced in political marketing." (Compl. Exh. 11 at 3 n.12.)

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. (*Id.* at 4-5.)

2. Decision

The Commission voted in a public meeting on two draft advisory opinions, neither of which garnered the required four votes for approval.[7] The Commissioners then approved by notation, or "tally vote," a draft that reflected the substantial areas of agreement among Commissioners.[8] The resulting Advisory Opinion 2022-12 concluded that RFR 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. (Advisory Opinion at 1.) 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. (*See* Compl. Exh. 10.)

In reaching its conclusions, the Commission relied on four bases. *First*, the compiled contact information in RFR'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. (Advisory Opinion at 5.) *Second*, RFR's proposal — which RFR estimated would cost it $25,000 to $50,000 per week over a

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[7] *See* Draft AO 2022-12 (Ready for Ron) Draft A (Aug. 2, 2022) https://www.fec.gov/files/legal/aos/2022-12/202212.pdf ("Draft A"); Draft AO 2022-12 (Ready for Ron) Draft B (Aug. 2, 2022) https://www.fec.gov/files/legal/aos/2022-12/202212_1.pdf ("Draft B"); Amended Cert., In re: Ready for Ron, AO 2022-12 (certifying Sept. 15, 2022 votes on Sept. 19, 2022) https://www.fec.gov/files/legal/aos/2022-12/202212V_2.pdf.

[8] Cert., In re: Ready for Ron, AO 2022-12 (Sept. 28, 2022) https://www.fec.gov/files/legal/aos/2022-12/202212V_3.pdf.

period of more than two years and would result in a list with a commercial value in excess of $2,900 — would result in an excessive contribution to Governor DeSantis if provided to him without charge after he becomes a federal candidate. (*Id.* at 6.) *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. (*Id.* at 7.) *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 to make contributions to federal candidates. (*Id.* at 9.)

As to 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, one draft that garnered the approval of three Commissioners concluded for the same reasons as explained above 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. (Draft A at 9-15.) 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. (Draft B at 15.) The Commission notified plaintiff that it could not approve a response to this portion of the advisory opinion request by the required four votes. (Advisory Opinion at 1.)

C. Plaintiff's Complaint and Preliminary Injunction Motion

Nearly one month after receiving its Advisory Opinion, on October 27, 2022, RFR filed a complaint against the Commission seeking preliminary and permanent injunctions prohibiting the Commission from applying the "testing of waters" statute or regulations to RFR'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 RFR 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. (Compl. Prayer for Relief ¶¶ 1-3.)

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); 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). (Compl. ¶¶ 93-131.)

Nearly two months after filing its complaint, and nearly three months after receiving its Advisory Opinion, RFR filed a motion for a preliminary injunction with respect to all its claims, accompanied by a memorandum of law in support. (Pl.'s Memo. of Law in Supp. of Pl.'s Mem. For Prelim. Inj. (Docket No. 8-1) (filed Dec. 21, 2022) ("Motion" or "Mem.").)

ARGUMENT

I. PLAINTIFF CARRIES A SIGNIFICANT BURDEN TO QUALIFY FOR THE EXTRAORDINARY REMEDY OF A PRELIMINARY INJUNCTION

A preliminary injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. . . . [It is] never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citations omitted). A plaintiff seeking a preliminary injunction must establish that (1) "he is likely to succeed on the merits,"

(2) "he is likely to suffer irreparable harm in the absence of preliminary relief," (3) "the balance of equities tips in his favor," and (4) "an injunction is in the public interest." *Id*. at 20.

The D.C. Circuit "has suggested, without deciding, that *Winter* should be read to abandon [any] sliding-scale analysis in favor of a 'more demanding burden' requiring Plaintiffs to independently demonstrate both a likelihood of success on the merits and irreparable harm." *Smith v. Henderson*, 944 F. Supp. 2d 89, 95-96 (D.D.C. 2013) (quoting *Sherley v. Sebelius*, 644 F.3d 388, 392-93 (D.C. Cir. 2011)). The D.C. Circuit recently declined to resolve this "tension[,]" while at the same time noting that "even under the sliding-scale approach, the movant must raise at least a 'serious legal question on the merits.'" *Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 726 (D.C. Cir. 2022) (quoting *Sherley*, 644 F.3d at 398); *see also Brown v. FEC*, 386 F. Supp. 3d 16, 24 (D.D.C. 2019) ("[W]ithout a likelihood of success on the merits, [p]laintiffs are not entitled to a preliminary injunction *regardless* of their showing on the other factors.") (emphasis added) (citation omitted).

Plaintiff cannot avoid bearing this heavy burden merely because it alleges that its proposed contribution is of a unique character that puts it beyond the well-established authority of the Commission to limit in-kind contributions to prospective candidates. (Mem. at 43-44.) Plaintiff is highly unlikely to overturn the longstanding limitations and prohibitions on contributions to such individuals, and thus cannot meet its burden to demonstrate it is "likely to succeed on the merits" here. *Winter*, 555 U.S. at 22.

II. RFR IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS FIRST AMENDMENT CLAIM

RFR challenges the application of FECA's contribution limits to restrict its ability to provide a petition, with a mailing list including the contact information of thousands of potential supporters, to Governor DeSantis for no charge because "FECA's contribution limits are

unconstitutional as applied to pure political speech like a signed petition." (Mem. at 6.) RFR is incorrect. RFR's "petition," like many political contributions, doubtless includes a significant element of expressive activity. This does not change the fact that RFR seeks to provide Governor DeSantis with a mailing list including the contact information for the Governor's supporters. Under well-established agency and judicial precedent, the mailing list is a thing of substantial value to a political campaign, and may be limited in accordance with FECA.

A. Application of a Contribution Limit to RFR's Proposed Conduct is Subject to Intermediate Scrutiny, not Strict Scrutiny

Contribution limits, which limit transfers of funds or things of value to prospective or actual candidates for federal office, are governed by intermediate scrutiny. In contrast to limits on expenditures, limits on contributions are subject to a "lesser but still 'rigorous standard of review.'" *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014) (plurality op.) (quoting *Buckley*, 424 U.S. at 29). "Under that standard, even 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.* (cleaned up).

Despite the Supreme Court's longstanding application of intermediate scrutiny to contribution limits, RFR suggests that any limit on its proposed conduct must be a direct limit on speech subject to strict scrutiny. (*See* Mem. at 9 ("[T]he FECA's contribution limits should be subject to strict scrutiny insofar as they apply to RFR's petition . . . .").) But the fact that RFR has appended a political message to its mailing list does not require application of strict scrutiny. Courts have long recognized that all contribution limitations implicate both speech and associational rights. *See, e.g., Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 540 (D.C. Cir. 2019) (en banc) ("The contribution 'serves as a general expression of support for the candidate

and his views' and 'serves to affiliate a person with a candidate.'") (quoting *McCutcheon*, 572 U.S. at 203).

RFR cannot alter the constitutional test this Court should apply by appending a political message to an in-kind contribution. Here RFR fails to separate the communicative message of the "petition" from the value of RFR's efforts to compile an extensive mailing list of DeSantis supporters. The fact that RFR includes a political message (a desire for Governor DeSantis to run for president) with its contribution (a mailing list) is neither novel nor extraordinary. The Court "has announced a single unified test that applies an intermediate level of scrutiny to contribution limits" precisely to protect the "heterogeneous First Amendment interests in making political donations," and RFR has failed to show that its own rights are categorically different, such that this Court should immunize its donation from FECA's limitations on the basis of its presumably sincere desire to see Governor DeSantis declare his candidacy. *Libertarian Nat'l Comm.*, 924 F.3d at 541 (citing *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 388 (2000)). Indeed, the Supreme Court rejected an argument similar to plaintiff's in *McConnell v. FEC* by applying intermediate scrutiny to a provision that restricted the ability of federal candidates and national party committees to solicit soft money. 540 U.S. 93, 140 (2003) ("The fact that . . . federal candidates . . . must now ask only for limited dollar amounts . . . in no way alters or impairs the political message 'intertwined' with the solicitation.") (citation omitted).

B. Applying FECA's Contribution Limits to Prevent the Transfer of RFR's Mailing List at no Charge Satisfies Intermediate Scrutiny

1. The Government has a Sufficiently Important, Indeed Compelling, Interest in Preventing *Quid Pro Quo* Corruption and its Appearance

The "Government's interest in preventing *quid pro quo* corruption or its appearance" is "sufficiently important" to meet intermediate scrutiny, and "may properly be labeled 'compelling,' … so that the interest would satisfy even strict scrutiny." *McCutcheon*, 572 U.S. at

199 (citations omitted). The state's interest in preventing *quid pro quo* corruption extends beyond limiting monetary contributions to cover in-kind contributions. *See Buckley*, 424 U.S. at 26-27; *id.* at 36-37. As the Supreme Court has concluded, the "provision of in-kind assistance" to a candidate or his campaign "provides material financial assistance to a candidate[,]" and may thus be limited in the same manner as a contribution. *Id.* at 36. "The ultimate effect is the same as if the person had contributed the dollar amount to the candidate and the candidate had then used the contribution to pay for the" contributed goods. *Id.* at 36-37. "Treating these expenses as contributions when made to the candidate's campaign or at the direction of the candidate or his staff forecloses an avenue of abuse without limiting actions voluntarily undertaken by citizens independently of a candidate's campaign." *Id.* at 37 (footnotes omitted).

2. Application of FECA's Contribution Limits to RFR's Proposed Conduct is Closely Drawn to the Government's Interest

In order to be closely drawn to the important interest, a contribution limit must have a "fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but … a means narrowly tailored to achieve the desired objective." *McCutcheon*, 572 U.S. at 218 (citation omitted). Here, limiting the contribution of a mailing list appended to a political petition restricts only one narrow proposed course of conduct that is close in kind to a transfer of money: spending hundreds of thousands of dollars to compile valuable information about over 100,000 supporters, and then providing it free of charge to a candidate. (Mem. at 3-5.) Those expenses would otherwise have to be borne by a future DeSantis campaign using funds subject to FECA's limitations. As *Buckley* recognized, absolving a campaign from incurring those costs provides "material financial assistance" and

thus creates the risk that they could be used as an avenue for *quid pro quo* corruption. 424 U.S. at 36-37.

Substantial precedent has recognized the potential value — and therefore corruptive potential — of providing mailing lists to a political campaign. For example, the D.C. Circuit has recognized that a political committee's list of persons sympathetic to its cause is among "its most valuable assets." *Int'l Funding Inst.*, 969 F.2d at 1116; *see also* Notice of Proposed Rulemaking, Mailing Lists of Political Committees, 68 Fed. Reg. 52,531, 51,531 (Sept. 4, 2003) ("One of the principal assets of many political committees is their mailing list."). In *Christian Coalition*, a court in this district concluded that a political group's expenditure of resources to compile a list of potential supporters from publicly available sources for an identified candidate, cross-checked against their own information, "created value that was passed on to the" campaign. 52 F. Supp. 2d at 96. The record in that case demonstrated "that mailing lists have commercial value and are routinely rented for fundraising or other solicitation purposes." *Id.*; *see also* FEC Advisory Op. 2014-06, 2014 WL 3748239, at *7 (noting that political committee mailing and email lists are "frequently sold, rented, or exchanged in a market"). Applying contribution limits to transfers of those lists advances the same interests as limits on transfers of monetary contributions.

The facts as provided by RFR illustrate that the value of the so-called signatory information RFR proposes to give to Governor DeSantis at no charge is far from trivial. RFR "is currently spending "$100,000-$200,000 per month" compiling its list, including through general public advertising and purchasing mailing lists from other entities. (Mem. at 4.) The expenditure of such substantial sums to compile a list is clear evidence of its value. *See Christian Coal.*, 52 F. Supp. 2d at 96. RFR's mailing list is all the more valuable because it is comprised of individuals that explicitly support Governor DeSantis. *Compare id.* at 77 (noting

that a mailing list would be "valuable" to the campaign "because those on the list were highly likely to share the Coalition's views on a number of issues") *with* Advisory Opinion at 7 ("The contact information in R4R's petition would be of significant value . . . because it exclusively includes persons who are advocating in favor of Governor DeSantis running for President."). It therefore minimizes the time and effort a DeSantis campaign would need to expend to identify and contact voters who support him, reducing an expense he would otherwise incur and creating the potential that such a transfer could be part of a corrupt bargain. And contrary to RFR's argument, the fact that it proposes to transfer a curated list of DeSantis supporters rather than "barren aggregations of information" (Mem. at 17-18) makes the list more valuable, not less. *See Christian Coal.*, 52 F. Supp. 2d at 96.

The Commission's application of contribution limits to RFR's mailing list is also proportionate to the government's interest. RFR is currently spending hundreds of thousands of dollars a month to compile a list of valuable contact information and seeks to provide that list to a well-known potential candidate at no charge. Its inability to do so imposes at most a marginal burden on RFR's associational freedoms, and leaves open multiple avenues for RFR to engage in free communication and advocacy. That is so because the contribution limit applies only to restrict the private transfer of the mailing list with contact information, not the petition to which it is attached. RFR and others remain free to "discuss candidates and issues," collectively or individually, anonymously or with their names attached. *Buckley*, 424 U.S. at 21. For instance, nothing in the FEC's Advisory Opinion would prevent any citizen from, *inter alia*:

- writing a letter to DeSantis to encourage him to run for president;
- giving speeches or otherwise encouraging fellow citizens to support DeSantis's prospective candidacy;
- banding together with other citizens to run print, television, or internet advertisements encouraging DeSantis to run for federal office; or

- publishing a list of Ready for Ron signatories.

RFR's assertion that application of the contribution limit to its proposed course of conduct bars "pure political speech and expressive association" is therefore incorrect. (Mem. at 9.)

Rather than simply avail itself of these open avenues for political expression, RFR insists that the inclusion of its signers' contact information (which makes the list a clear thing of value) is somehow an essential part of the underlying political message, and hence RFR has a First Amendment right to provide this contact information free of charge. (Mem. at 9.) However, RFR's proffered justifications are irrelevant to its claims, and are not supported by its cited authorities. (*Id.*) For instance, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), in fact stands for the right of speakers to remain *anonymous*. Indeed, the Court in that case went out of its way to distinguish "the kind of independent activity pursued by [plaintiff]" from "the 'prophylactic effect' of disclosure requirements" concerning "contributions to the candidate[.]" *Id.* at 354. RFR's remaining authorities merely state that the circulation of a petition is expressive political activity (a point the Commission does not dispute), but say nothing in regards to either signatory contact information or contributions to political candidates. (Mem. at 9 (citing *Meyer v. Grant*, 486 U.S. 414, 421 (1988); *Doe v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting)).)

RFR further offers that "[p]roviding signatories' contact information also helps establish the authenticity of the signatures and allows Governor DeSantis to confirm they are not fraudulent." (Mem. at 9.) However, RFR states earlier that to virtually sign its petition, the only required information is "their name and e-mail address." (Mem. at 3.) This undercuts the assertion that RFR desires to include signatory information for verifying that the signer is an actual person. Email addresses are easy to create and do little to confirm the signer is not

fraudulent,[9] but are tremendously valuable as a fundraising tool. And RFR does not suggest that there are no alternatives available for verifying signature authenticity.

RFR's theory, if taken to its logical conclusion, would entirely upend limits on in-kind contributions. Under RFR'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," according to which the Commission has clearly operated within the bounds of the First Amendment. *Libertarian Nat'l Comm.*, 924 F.3d at 541.

III. RFR IS UNLIKELY TO SUCCEED ON ITS CLAIM THAT THE COMMISSION UNREASONABLY CONSTRUED FECA TO PROHIBIT TRANSFER OF THE MAILING LIST RFR COMPILED AFTER DESANTIS BECOMES A CANDIDATE OR WHILE HE IS TESTING THE WATERS

Separate from its constitutional claim, RFR's Motion argues that FECA's text cannot be read to cover its proposed activity. But its Motion 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

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[9] *See, e.g., Prechtel v. Fed. Commc'ns Comm'n*, 330 F. Supp. 3d 320, 331 (D.D.C. 2018) (noting that "[o]utside groups have examined" the email addresses of over twenty million commenters on an FCC rulemaking, and "highlighted the extent to which public comments were associated with clearly fraudulent or otherwise dubious email addresses") (citing Pew Research Ctr., *Public Comments to the Federal Communications Commission About Net Neutrality Contain Many Inaccuracies and Duplicates* (2017), https://perma.cc/B9SZ-JUWC).

would apply. Indeed, its Memorandum does not cite or reference the APA, nor does RFR refer the Court to any relevant judicial authorities. RFR makes two references to the "arbitrary, capricious," and "contrary to law" standard, (Mem. at 34, 41,) and references the complaint's APA counts in its request for an injunction. (Mem. at 44.)

RFR'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), the Declaratory Judgment Act, 28 U.S.C. § 2201 (Count III), and a claim for equitable relief (Count IV). But the Commission's advisory opinion here meets APA review, and FECA, the Declaratory Judgment Act, and general equitable principles provide no independent cause of action for review.

A. The Administrative Procedure Act Establishes a Deferential Standard for Review of Agency Action

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). As the D.C. Circuit has explained, 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 substitut[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).

B. Agency Deference Under the Supreme Court's *Chevron* and *Kisor* Framework

RFR's challenge implicates both the Commission's interpretation of FECA's contribution limits to apply to mailing lists and its interpretation of agency regulations to govern RFR's proposed course of conduct. The Commission is entitled to deference on both counts.

Agency interpretations of statutory authority are evaluated under the framework established by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The first step of the *Chevron* analysis is for court must determine "whether Congress has directly spoken to the precise question at issue[,]" and if so "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43.

If the statute is either silent or ambiguous, the second step is for the court to determine whether the interpretation proffered by the agency is "based on a permissible construction of the statute." *Id.* at 843. Here the court accords "considerable weight" to an agency's construction of a statutory scheme it has been "entrusted to administer," *id.* at 844, provided the agency's reading falls "within the bounds of reasonable interpretation." *Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 296 (2013). When Congress leaves a particular statutory term ambiguous or undefined, this is, "in *Chevron* terms, 'an implicit delegation from Congress to the agency to fill in the statutory gaps.'" *Van Hollen v. FEC*, 811 F.3d 486, 495 (D.C. Cir. 2016) (quoting *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). Under this standard, the courts have deferred to the FEC's interpretation of FECA. *See Van Hollen*, 811

F.3d at 495 (disclosure regulation); *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (soft money reporting regulation) ("[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC … to resolve any ambiguities in statutory language. For these reasons, the FEC's interpretation of the Act should be accorded considerable deference.'") (citation omitted); *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (delegation of spending authority) ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded.").

The Supreme Court has clarified that 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. Fed. Commc'ns Comm'n*, 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).

Courts have previously applied *Chevron* deference to the agency's advisory opinions, relying on the fact that FECA "establishes a detailed framework for issuing" such opinions, that in doing so the Commission "fulfills its statutorily granted responsibility to interpret the Act[,]" and that they "have binding legal effect on the Commission" by creating a "safe harbor" for parties who rely on an adopted advisory opinion. *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 185-86 (D.C. Cir. 2001) (repayment of segregated funds); *see Weber v. Heaney*, 793 F. Supp. 1438, 1455 (D. Minn. 1992) (preemption of state law); *see also Util. Workers Union of Am., Loc. 369 v. FEC*, 691 F. Supp. 2d 101, 108 n.10 (D.D.C. 2010) (Because FEC "advisory opinions are

due *Chevron* deference, . . . it is perfectly appropriate for the FEC to cite and rely on them in its adjudications.”).

C. The Commission Reasonably Concluded that RFR Could Not Transfer a List of Potential Supporters to Governor DeSantis after he Begins Testing the Waters or Becomes a Candidate

The Commission considered RFR’s advisory opinion request in accordance with its statutory authority, and its regulations promulgated for the handling of such requests. *See supra* pp. 8-10. The Advisory Opinion interpreted the facts as presented by RFR as applied to FECA and the Commission’s regulations and reached a unanimous decision on two of the three questions RFR posed. *Supra* pp. 10-12. The opinion warrants deference from this Court.

1. The Commission Advisory Opinion is a Reasonable Interpretation of an Ambiguous Statute

FECA prohibits any person, including political committees like RFR, from making a contribution in excess of a dollar limit. 52 U.S.C. § 30116(a)(1); *see id.* § 30101(11). The term “contribution” includes “anything of value made by any person for the purpose of influencing any election for Federal office[.]” *Id.* § 30101(8)(A)(i). Standing alone, that definition does not clarify whether every arguable potential transaction is deemed a contribution. *See Buckley*, 424 U.S. at 23 n.24. The Commission has, therefore, filled the interpretive gap by promulgating additional rules to give content to the statutory phrase. *See* 11 C.F.R. §§ 100.51-100.94.

Advisory Opinion 2022-12 concluded that the portion of RFR’s proposed petition that contained contact information is effectively a mailing list, and therefore a “thing of value” subject to contribution limits under FECA. *See* A.O. at 6 (“[I]t 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.'"). This conclusion was reasonable, and consistent with Commission and judicial precedent.

The Commission has a well-established history of treating a mailing list as a thing of value to a candidate or campaign. 11 C.F.R. § 100.52(d)(1) (defining the provision of "membership lists" and "mailing lists" "without charge" as a contribution); *see* FEC, Factual & Legal Analysis, MUR 7207 (Taub) (June 11, 2021) at 8, https://www.fec.gov/files/legal/murs/7207/7207_24.pdf (noting that "[t]he Commission has long recognized that mailing lists are assets that have value" and concluding that a list of donors was a thing of value within that precedent) (cleaned up); FEC Advisory Op. 2014-06, 2014 WL 3748239, at *8.[10]

RFR does not appear to contend that Congress has "directly spoken on the precise question" of FECA's application to the contact information it proposes to transfer. *Chevron*, 467 U.S. at 842-43. Rather, RFR appears to argue at step two of *Chevron* that the agency's construction of FECA to subject this information to contribution limits is unreasonable. But RFR's arguments in support of that position all rely on its mistaken characterization of its plan as sending a "political petition" and not a "mailing list." (*E.g.*, Mem. at 10-18.) The Commission's Advisory Opinion did not purport to regulate any political message RFR wished to convey in its petition. (*See* A.O. at 4-7.) Rather, the Commission confirmed that RFR could not "provide Governor DeSantis with *the list of names and contact information* from its petition," not that it could not send the petition itself. (*Id.* at 4 (emphasis added).) The Commission's Advisory Opinion thus analyzed RFR's proposed course of conduct only to the extent it proposed to

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[10] *See also* FEC Advisory Op. 2014-09, 2014 WL 4105867 (REED Marketing), at *3 n.6; FEC Advisory Op. 2011-02, 2011 WL 7629547, at *5; FEC Advisory Op. 2002-14, 2003 WL 715988, at *2-4; FEC Advisory Op. 1982-41, 1982 WL 993349 (Dellums), at *1.

convey information closely associated with a mailing list, and its conclusions flow naturally from FECA and prior Commission precedent concluding such types of information are things of value that may not be provided free of charge.

When correctly viewed as a mailing list, which is a "thing of value" to a political candidate, RFR's attempts to rebut the Commission's analysis fall flat. RFR argues that it would be odd to characterize "[p]ure political speech" as a "gift" subject to the contribution limit because the term "gift" must connote a financial aspect in FECA. (Mem. at 11-13.) As the Commission recognized, however, the signatory information RFR proposes to transfer is akin to "political committee mailing and email lists," which "have commercial value and are frequently sold, rented, or exchanged in a market" and therefore certainly have a financial aspect that may be gifted to a candidate. (A.O. at 5 (cleaned up).) Similarly, RFR's argument that a political petition is not a "thing of value" because "petitions … are customarily provided to [public figures] free of charge[,]" (Mem. at 14,) fails because the A.O. did not assert jurisdiction over the petition portion of RFR's conduct, only the portion that transfers valuable contact information.

RFR's own conduct in obtaining signatures to its petition demonstrates that aggregated contact information of potential supporters is a thing of value subject to FECA's contribution limits. In its advisory opinion request RFR explained that it intended to "'rent access to distribution lists from commercial vendors to send e-mails and text messages to potential DeSantis supporters' and that it [had] already paid more [than] $2900 for a contact list of persons who it believes are likely sympathetic to its cause." (A.O. at 5 (quoting A.O. Request at 2, 18).) RFR then undertook great expense to contact persons on that list to identify those who actually supported a potential Governor DeSantis presidential candidacy. (*Id.*) That this type of information is available for rent or purchase on an open market only bolsters the Commission's

conclusion that aggregated lists of potential supporters is a thing of value subject to contribution limits under FECA.

2. The Commission's Conclusion that the Signatory Information Falls Within The Commission's Regulations Governing Mailing Lists is Entitled to Deference

To the extent that there remains any ambiguity about whether the contributor information RFR seeks to give to Governor DeSantis at no charge falls within the scope of a regulable "mailing list" under Commission regulations, this Court should defer to the Commission's conclusion. (*See* A.O. 5-6 (citing 11 C.F.R. § 100.52(d)).) 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*, 139 S. Ct. at 2416-18. The Commission's Advisory Opinion easily meets these criteria.

First, the Advisory Opinion is the Commission's "authoritative" or "official position." *Kisor*, 139 S. Ct. at 2416. The Advisory Opinion was formulated following the prescribed statutory process, and as a result may be relied upon by not only the party requesting the advisory opinion but any party in a materially indistinguishable transaction or activity. 52 U.S.C. § 30108(c) (binding effect of advisory opinions). "Federal Election Commission advisory opinions are binding in the sense that they may be relied upon affirmatively by any person involved in the specific transaction or activity discussed in the opinion or in any materially indistinguishable transaction or activity." *Weber*, 793 F. Supp. at 1454; *see also Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010) (treating the issuance of an FEC advisory opinion as the agency's "final legal position" on the matter).

Second, the Advisory Opinion also "implicate[s] [the Commission's] substantive expertise." *Kisor*, 139 S. Ct. at 2417. The Advisory Opinion relied on the Commission's understanding of political campaign operations and its understanding of markets for information

about potential contributors. It also reflects the Commission's FECA "implementation choices, which call on the FEC's special regulatory expertise," and "were the types of judgments that Congress committed to the sound discretion of the agency." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 86 (D.D.C. 2016); *see Democratic Senatorial Campaign Comm.*, 454 U.S. at 37 ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded.").

Third, the Advisory Opinion reflects the Commission's "fair and considered judgment." *Kisor*, 139 S. Ct. at 2417. "FEC advisory opinions not only reflect the Commission's considered judgment made pursuant to congressionally delegated lawmaking power, but also have binding legal effect." *Nat'l Rifle Ass'n of Am.*, 254 F.3d at 186. The Advisory Opinion was the culmination of a statutorily mandated process by which the Commission receives comments from a requestor and other interested parties, both in writing and at an open hearing. *See supra* pp. 8-12.

Because the Commission's Advisory Opinion here meets all required elements, this Court should defer to its reasonable interpretation of its regulation to prevent RFR from transferring a list of supporters' contact information to Governor DeSantis free of charge should he test the waters or become a candidate.

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

RFR further argues that, "[e]ven if the signatory information contained within RFR's petition is properly deemed to be a "contribution" to Governor DeSantis, the source of that contribution is the signatories themselves," therefore "RFR is merely a conduit passing along a message and contact information from each signatory, at the signatory's request, to Governor DeSantis." (Mem. at 18.) This is incorrect.

Under 52 U.S.C. § 30116(a)(8), "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." The individual signatories to RFR's petition are not "conduit contributions" because RFR has a far more active role than a mere conduit, and the thing being regulated (the compiled signatory information) has value *as a result of the resources invested by RFR itself*. RFR "is currently spending between $100,000-$200,000 per month" to compile the information it wishes to transfer, via "advertisements through various mediums[.]" (Mem. at 4.) It then compiles this information into a list that maximizes its usefulness to Governor DeSantis. (Mem. at 3-4.) It is also increasing the value of its efforts by investing labor by providing quotes and interviews to reporters,[11] publicizing editorials by RFR and financial backers,[12] and promoting a YouTube channel featuring several media appearances by RFR officers publicizing its petition efforts.[13]

RFR's activities are categorically different from the role played by ActBlue, with whom it compares itself. (Mem. at 21-23.) Unlike RFR, ActBlue is not devoted to individual

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[11] Taylor Giorno, *Pro-DeSantis Hybrid PAC to File Lawsuit Challenging Unfavorable FEC Ruling*, Open Secrets (Oct. 3, 2022 4:56 PM), https://www.opensecrets.org/news/2022/10/pro-desantis-hybrid-pac-to-file-lawsuit-challenging-unfavorable-fec-ruling.

[12] Shaun McCutcheon, *If You Want Trump Policies – Support DeSantis*, Townhall (Aug. 25, 2022), https://townhall.com/columnists/shaunmccutcheon/2022/08/25/untitled-n2612216; Dan Backer, *The People Want DeSantis to Run. The FEC Stands in Their Way*, Washington Examiner (Dept. 26, 2022 12:00 AM), https://www.washingtonexaminer.com/opinion/op-eds/the-people-want-desantis-to-run-the-fec-stands-in-their-way.

[13] *Ready for Ron*, YouTube (last visited Jan. 28, 2023), https://www.youtube.com/@readyforron1630.

campaigns, or soliciting money and support for particular organizations or candidates.[14] Nor does ActBlue invest substantial amounts of its own resources to compile a list of supporters and present it to a specific candidate. Furthermore, ActBlue does not spend its own resources to publicize its efforts on behalf of a single candidate. Instead, ActBlue processes payments initiated by the donor as directed by the donor.[15]

The facts here are indistinguishable from those of *Christian Coalition*, 52 F. Supp. 2d at 96, which held that providing a list of names to a campaign was subject to contribution limits because of the resources expended to compile and curate the list, even assuming the names provided were publicly available. So here, RFR's extensive and well-documented activities to compile and curate the mailing list replete with contact information that it plans to forward makes it an active contributor, not a mere intermediary.

4. The Commission Reasonably Determined that RFR May Not Provide Its Mailing List if DeSantis is Testing the Waters

RFR further contends that, even if the Commission permissibly applied FECA's contribution limits to the signatory information appended to its planned petition, the Commission nevertheless erred in concluding that those limits apply if Governor DeSantis is testing the waters and has not yet become a candidate. (Mem. at 24-37.) The Commission, however, properly applied its long-standing regulations governing testing the waters activity, and RFR's other arguments misapply D.C. Circuit precedent.

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[14] ActBlue Support, *Does ActBlue Promote or Endorse Any Candidates or Groups that Use Its Platform?*, ActBlue (last visited Jan. 28, 2023), https://support.actblue.com/donors/about-actblue/does-actblue-promote-or-endorse-any-candidates-or-groups-that-use-its-platform/ ("ActBlue does not endorse any candidates, committees, or organizations that use our platform. . . . We do not promote any groups using our platform, and we do not send emails or texts or fundraise on their behalf.")

[15] *See id.* ("Each group raises its own contributions and only uses ActBlue to process and receive them.").

a. The Commission's Testing the Waters Regulations are Reasonable and Permissible Interpretations of an Ambiguous Statutory Provision

As relevant here, FECA's contribution limits apply to "any candidate." 52 U.S.C. § 30116(a)(1)(A). A person becomes a candidate under FECA 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." 52 U.S.C. § 30101(8)(A), (9)(A).

As with other contexts depending on this definition, *see supra* pp. 25-26, FECA is not unambiguous regarding whether receipts or disbursements made to explore one's candidacy are "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A), (9)(A). For example, FECA's candidacy definition could be read to apply to all individuals who are raising or spending to determine whether to run for federal office, because the identity of individuals that run for office necessarily "influences" the ultimate election. Under that interpretation, any individual that spends $5,000 to determine whether to run for office has become a candidate subject to the full range of FECA's disclosure requirements and contribution limitations. 52 U.S.C. § 30101(2).

Rather than interpreting FECA so as to maximize its statutory authority, however, the Commission has since the early years of its inception opted for a middle-ground interpretation, and concluded that funds raised and spent solely to determine whether to become a candidate are not contributions or expenditures counting toward the candidacy definition, but must be raised and spent subject to FECA's limits and reported if the person subsequently becomes a candidate. *See* 11 C.F.R. §§ 100.72(a), 100.131; *see also* Federal Election Regulations, H.R. Doc. No. 95-

44, 40 (1977), *available at* https://www.fec.gov/resources/cms-content/documents/95-44.pdf (explaining testing the waters exception from definition of "contribution"); Payments Received for Testing the Waters Activities, 50 Fed. Reg. 9992, 9993 (Mar. 13, 1985) (explaining amendments to longstanding testing the waters regulation).

The Commission promulgated these "limited exceptions" in order "to permit individuals to conduct certain activities while deciding whether to become a candidate for Federal office, without making their activities immediately public." Payments Received for Testing the Waters Activities, 50 Fed. Reg. at 9993. At the same time, however, the Commission recognized that fully exempting testing the waters activities from FECA's contribution limits created the potential for "circumvention of the prohibitions and limitations of" FECA. *Id.* at 9994. As a result, "[o]nly funds permissible under the Act may be used for [testing the waters] activities." *Id.*

RFR argues that FECA's candidacy definition admits to "no statutory ambiguity" that requires resolution through a Commission interpretation (Mem. at 34), but it does not seriously grapple with the multiple possible constructions of qualifying contributions or expenditures. Indeed, the Supreme Court in *Buckley* noted that the "for the purposes of influencing" language that underlies the definition of those terms contained "ambiguity" that required judicial construction in the context of FECA's contribution and disclosure requirements. 424 U.S. at 77; *see id.* at 23 n.24. The testing the waters regulation reflects the Commission's judgment of how to apply that ambiguous phrase to the determination of when FECA's requirements apply to an emerging candidacy.

RFR would have this Court believe that the Commission's testing the waters regulations impermissibly expand FECA's reach to cover prospective candidates, when in fact precisely the

opposite is true: the regulations *reduce* the burdens on prospective candidates for federal office, who could otherwise be subject to the automatic thresholds triggering "candidate" status under FECA. *See* 52 U.S.C. § 30101(2) (defining "candidate"). RFR's simplistic formulation that "[a] person who is merely 'testing the waters,' by definition, is not a candidate" simply ignores potential constructions of the language that Congress authored. (Mem. at 34.)

RFR's other arguments against the validity of the testing the waters regulation fare no better. It downplays the risk of *quid pro quo* corruption when a person is deciding whether to become a candidate and suggests that the regulation is an "impermissible 'prophylaxis-upon-prophylaxis approach.'" (Mem. at 34 (quoting *McCutcheon* 572 U.S. at 221). Contrary to RFR's argument, however, 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); *see* Adam Bonica, *Professional Networks, Early Fundraising, and Electoral Success*, 16 Election L.J. 153, 154 (2017) ("A simple model that assumes that the candidate who raises the most money will be victorious correctly predicts the winner in 79 percent of contested primary elections."). As the Commission recognized, exempting testing the waters activities from contribution limits would therefore create a giant loophole for prospective candidates to raise unlimited early amounts in monetary and in-kind contributions outside of the basic contribution limits. *See* Payments Received for Testing the Waters Activities, 50 Fed. Reg. at 9994 (resolving "any misconceptions" that the "'testing the waters' provisions may be used to raise 'seed money' for prospective candidates").

RFR also suggests it is unfair to apply the testing the waters regulation because of uncertainty about whether any particular person may be testing the waters. (Mem. at 35-36.) The cited Commissioner comments merely reflect the uncertainty based on the present record whether Governor DeSantis, who was not a party to RFR's advisory opinion request and is not a party here, is currently "determining whether" to "become a candidate" under FEC regulations. 11 C.F.R. § 100.72(a). But Governor DeSantis surely knows whether he is raising or spending money for that purpose. Indeed, enabling individuals to raise funds to assess potential candidacies in a nonpublic manner demonstrates that the Commission has ensured its construction of FECA was closely drawn.[16] Moreover, any excess contributions, whether monetary or in-kind, can be promptly refunded or returned. *Cf.* 11 C.F.R. § 103.3(b)(3) (requiring political committee treasurers to refund excessive contributions within sixty days of receipt). In practice, therefore, RFR and those individuals subject to the regulation have little risk of being caught unawares.

To the extent the Court finds any ambiguity in FECA's text, such ambiguity must be resolved in favor of the Commission. The Commission is the agency "entrusted to administer" FECA, and the regulation implicates the Commission's substantive expertise in the field of campaign finance law. *See Chevron*, 467 U.S. at 844. The Commission's interpretation of this statute reflects its "implementation choices, which call on the FEC's special regulatory

[16] Although to the Commission's knowledge Governor DeSantis has taken no public stance on whether he intends to run for federal office during the 2024 campaign cycle, published media reports increasingly suggest that DeSantis may have already begun to test the waters for such a candidacy. *See, e.g.*, Hannah Knowles, *DeSantis Advisers Prepare for Potential Presidential Run, Explore Staff Options*, Wash. Post, Jan. 28, 2023, https://www.washingtonpost.com/politics/2023/01/28/desantis-2024-campaign-planning/. Further proceedings in this case may demonstrate that RFR's pre-testing the waters claims are moot.

expertise," and is among "the types of judgments that Congress committed to the sound discretion of the agency." *Citizens for Resp. & Ethics in Wash.*, 209 F. Supp. 3d at 86. "[T]he FEC's express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC . . . to resolve any ambiguities in statutory language[,] thus "the FEC's interpretation of the Act should be accorded considerable deference."'" *Kanchanalak*, 192 F.3d at 1049.

RFR's pleas to apply various canons of construction similarly fall short. (Mem. at 37-39.) RFR's discussion of the "constitutional avoidance canon" cites no authority addressing the electoral context where the government's anticorruption interests were at stake, and indeed cites authority where the canon was applied to uphold the Secretary of Health and Human Services' regulations. (Mem. at 38 (citing *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (holding "that the regulations promulgated by the Secretary do not raise the sort of grave and doubtful constitutional questions . . . that would lead us to assume Congress did not intend to authorize their issuance.") (citation omitted)).) RFR also invokes the "major questions doctrine," which applies in "cases in which the history and the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *W. Va. v. EPA*, 142 S. Ct. 2587, 2608 (2022) (internal quotations omitted). The application of a contribution limit to a proposed course of conduct, however, is precisely the type of authority Congress intended the Commission to assert, and in any event applies only to a relatively narrow and esoteric question of federal law. Finally, "the rule of lenity" does not compel a court "to reject the FEC's otherwise reasonable interpretation of an ambiguous statutory provision" merely because the

"governing statute authorizes criminal enforcement" under some circumstances. *Kanchanalak*, 192 F.3d at 1050 n.23 (citation omitted).

b. Neither Machinsts nor Subsequent Congressional Inaction Prevents the Commission from Applying a Contribution Limit to In-Kind Donations from RFR

In spite of this ample textual support and precedent, RFR nevertheless insists that the D.C. Circuit's decision in *FEC v. Machinists Non-Partisan Political League* places so-called draft groups completely outside the Commission's jurisdiction. (*See* Mem. 25-28.) But the holding of that case was not nearly so broad. Rather, the *Machinists* court merely concluded that "draft" groups fell outside of FECA's definition of "political committee," and therefore could not be subject to a subpoena as part of an investigation as to whether a draft group received funds in excess of the dollar amount limits on contributions *to political committees*. 655 F.2d 380, 390 (D.C. Cir. 1981) (describing FEC "complaint alleging that [respondent's] contributions to various 'draft-Kennedy' groups in excess of $5,000 violated the contribution limitations of FECA").

The "sole proffered jurisdictional basis" the FEC asserted for jurisdiction in the matter underlying *Machinists* was the "purely legal claim that 'draft' groups are 'political committees' under FECA." *Id.* The D.C. Circuit rejected that as a sufficient basis for a sweeping subpoena to an entity who had provided funds to draft groups. *Id.* at 395-96. But *Machinists* does not suggest that a group engaging in activities to encourage a person to run for office is exempt from FECA's generally applicable limits on *making* in-kind contributions, nor did it determine how FECA's candidacy definition or contribution limits would apply to a person actively raising and spending money to determine whether to become a candidate. Indeed, *Machinists* explicitly distinguished FEC investigations of groups supporting persons who had announced candidacies, and noted approval of investigations into whether draft groups were acting on behalf of

candidates, which further suggests that the Commission's determinations as to RFR were not within the scope of the opinion. *See Machinists*, 655 F.2d at 392 (noting that none of the draft groups at issue were "promoting a 'candidate' for office, as Congress uses that term in FECA" and the reduced potential for corruption "where a group's activities are *not related in any way* to a person who has decided to become a candidate") (emphasis added); *id.* at 397 (suggesting the permissibility of investigating whether "groups were, or may have been, operating on behalf of [the] candidate"); *see also id.* at 386 n.7 (noting that the case concerned only "the jurisdiction of the FEC over the subject matter of contribution limitations *to* draft groups" and "does not concern whether these groups … are subject to the Commission's jurisdiction for other purposes") (emphasis added).

RFR's reliance on subsequent legislative inaction related to draft groups is similarly legally incorrect and factually inapposite. RFR argues that that "Congress has repeatedly declined the FEC's requests to amend FECA's definition of 'contribution' to include disbursements made to influence someone to run for federal office" and therefore this Court should not read such language into the existing statute. (Mem. at 29.) However, this history should play no part in the Court's decision, because "[a]bsent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Post-enactment legislative history is accorded even less weight. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020). "[S]peculation 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." *Id.* (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); *see PDK Lab'ys Inc. v. U.S. D.E.A.*, 362 F.3d 786, 794-95

(D.C. Cir. 2004) ("In all cases, 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,' . . . and have 'very little, if any, significance.'" (quoting *United States v. Price*, 361 U.S. 304, 313 (1960); *Rainwater v. United States*, 356 U.S. 590, 593 (1958)).

Reliance on subsequent congressional inaction is particularly problematic here because nearly every legislative proposal RFR cites (Mem. 29-32) post-dates the initial adoption of the testing the waters regulation, which dates back to 1977. *See supra* pp. 3-5. The Commission submitted the regulation for congressional review. *Id.*; *see* 52 U.S.C. § 30111(d) (requiring FEC to submit proposed rules to Senate and House of Representatives for disapproval). If anything, the lack of congressional action in these circumstances suggests legislative acquiescence to the Commission's interpretation of FECA.

What is worse, RFR misrepresents the Commission's proposed legislative changes. The recommendations RFR cites reflect the Commission's recommendation that Congress consider limiting contributions *to a draft committee*, not an admission that in-kind contributions *from* a draft committee to an individual testing the waters are beyond the scope of the statute. *See* FEC, *Annual Report 1976*, at 74 ("Congress may wish to amend the limitation section to make the $1,000 limitation applicable to contributions to political committees whose purpose is to influence a clearly identified individual or individuals to become a candidate."). RFR's attempts to elide this distinction by de-emphasizing the recipient of the disbursement in the proposed legislation it cites does not make this distinction any less significant. (*Id.* at 31 (describing "funds provided in the course of attempting to influence a person to run for federal office").) In short, RFR simply has not shown that any Congress considered contributions from "draft

committees" to be exempt from FECA, rendering this "particularly dangerous" species of legislative history entirely inapposite. *Bostock*, 140 S. Ct. at 1747.

c. The Commission's Application of Its Testing the Waters Regulation to In-Kind Contributions Is Permissible

RFR's final challenge to application of the testing the waters regulation is that it only applies to "funds," not in-kind contributions like the signatory information it proposes to transfer. (Mem. at 36-37.) As RFR concedes, however, the Commission has long interpreted its testing the waters regulation to apply both to in-kind contributions as well as monetary ones. *See* FEC Advisory Op. 1981-32, 1981 WL 721644 (Askew), at *5 ("The fact that the quoted regulation refers specifically to 'funds received' was not intended to change the general rules as to what is meant by the term 'contributions;' nor was the regulation language intended to deny the applicability of the exemption to 'in kind' donations for testing the water activity."); FEC Advisory Op. 1985-40, 1986 WL 1301186 (Republican Majority Fund), at *3 (same). That interpretation of the regulation is entitled to deference. *Kisor*, 139 S. Ct. at 2416-18. But more fundamentally, RFR again fails to comprehend that the testing the waters regulation is a partial exemption from FECA's requirements, not an additional limitation. "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. If the testing the waters regulation does not apply, this offers no help to RFR's position.

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In sum, the testing the waters regulations are permissible interpretation of FECA's statutory text that balances ability of a prospective candidate to explore his candidacy without

triggering full disclosure while also furthering the government's interest in preventing corruption. Despite their long history in force, RFR offers virtually no evidence that these regulations excessively burden speech or are unworkable in their implementation. RFR has simply not met its burden, and certainly cannot demonstrate any "likelihood of success" sufficient to enjoin this longstanding regulation ahead of trial.

IV. RFR IS UNLIKELY TO SUCCEED ON ITS CLAIM THAT IT HAS A RIGHT TO PROVIDE THE SIGNATORY INFORMATION TO GOVERNOR DESANTIS BEFORE HE IS TESTING THE WATERS

RFR's final tack is that the Commission "erred in failing to affirm" its "right to provide its signed petition with signatories' contact information to Governor DeSantis before he starts 'testing the waters.'" (Mem. at 41.) As the Commission explained, it "could not approve a response by the required four affirmative votes as to whether R4R may provide the contact information from its petition to Governor DeSantis when Governor DeSantis is neither testing the waters nor a federal candidate." (A.O. at 10.) Despite the Commission's split, RFR is unlikely to succeed on the merits of this claim because it has failed to demonstrate that its proposed activity is lawful.

As noted, RFR has embarked on a nationwide effort and collected valuable information about potential supporters of Governor DeSantis. It is spending in excess of $100,000 per month to do so, using robocalls and other advertisements to gain signatories to the petition and their information. (Mem. Exh. 1, Llanes Decl. ¶¶ 9, 16, 25 (Docket No. 8-2).) And it is undertaking all these efforts expressly to "support" Governor DeSantis's "nomination or candidacy" for president. (Mem. at 5.) Under these circumstances, it would not be arbitrary or capricious for the Commission to have determined that, were Governor DeSantis to accept the signatory information from RFR, that would be part and parcel with "determining whether" to "become a candidate" and therefore testing the waters. 11 C.F.R. § 100.72(a).

The three Commissioners who voted in favor of the draft advisory opinion reached that conclusion. Draft A at 12. Their votes were sufficient to control the outcome on this portion of plaintiff's advisory opinion request.[17] For the same reasons as explained above, those Commissioners concluded that the provision of the proposed petition with contact information at any time in advance of candidacy would be "subject to the testing the waters regulation." *Id.* Given that plaintiff plans to spend thousands of dollars each week to provide Governor DeSantis with supporters' contact information on an ongoing basis for his unrestricted use, including potentially as a candidate, *id.* at 12 & n.43, it was permissible for the agency not to have issued the response that plaintiff sought on this question.

V. RFR IS UNLIKELY TO SUCCEED ON ITS DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND FECA CLAIMS

Because plaintiff's substantive constitutional and statutory claims fail, its claims for declaratory and injunctive relief (Counts III and IV, respectively) fail as well. *See, e.g.*, *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) ("It is a 'well-established rule that the Declaratory Judgment Act is not an independent source of federal jurisdiction. Rather, the availability of [declaratory] relief presupposes the existence of a judicially remediable right.'") (quoting *C & E Servs., Inc. of Washington v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir. 2002)); *Base One Techs., Inc. v. Ali*, 78 F. Supp. 3d 186, 199 (D.D.C. 2015) ("Injunctive relief . . . is not a freestanding cause of action, but rather—as its moniker makes clear—a form of relief to redress the other claims asserted by Plaintiff") (dismissing claim for injunctive relief).

RFR's direct claim under FECA (Count V) similarly fails for lack of a discernible cause of action and lack of a waiver of sovereign immunity. *See Unity08*, 596 F.3d at 866 (noting that

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[17] One additional Commissioner supported neither of the initial draft advisory opinions. *See supra* p. 11 & n.7.

FECA does not "provide any private right of action against the Commission" for direct review of advisory opinions); *Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations Auth.*, 283 F.3d 339, 344 (D.C. Cir. 2002) (explaining the limited availability of non-statutory review); *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999) (reiterating that the United States government and its agencies may generally not be sued absent a waiver of immunity).

VI. RFR HAS FAILED TO DEMONSTRATE IRREPARABLE HARM

The extraordinary remedy of preliminary injunctive relief is available only upon a "clear showing" that it is necessary, and not "based only on a possibility of irreparable harm." *Winter*, 555 U.S. at 22; *see Sampson v. Murray*, 415 U.S. 61, 88 (1974) ("[T]he basis of injunctive relief in the federal courts has always been irreparable harm") (citation and internal quotation marks omitted). The D.C. Circuit "has set a high standard for irreparable injury," underscoring that the injury "must be both certain and great . . . actual and not theoretical." *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006) (internal quotation marks omitted).

RFR has failed to show substantial or irreparable harm. It asks the Court to bar the FEC from taking enforcement action with regard to providing its petition and mailing list to Governor DeSantis, alleging that "[t]his interference with pure political speech and association constitutes *per se* irreparable harm. (Mem. at 44 (citing *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009), and *Davis v. District of Columbia*, 721 F.3d 638, 653 (D.C. Cir. 2013)).) Plaintiff also alleges that "RFR will be unable to seek monetary compensation from the Commission for this unwarranted chill on its activities." (*Id.* at 44-45 (citing *Odebrecht Constr. v. Sec'y Fla. DOT*, 715 F.3d 1268, 1289 (11th Cir. 2013)).)

However, plaintiff wrongly assumes that irreparable harm flows automatically from its contentions of First Amendment infringement. (Mem. at 44.) The law requires plaintiff "to do more than merely allege a violation of freedom of expression in order to satisfy the irreparable

injury prong of the preliminary injunction frame-work." *Chaplaincy of Full Gospel Churches*, 454 F.3d at 301. Furthermore, the harm plaintiff describes is not irreparable. The speech value of a contribution, or a transfer of funds, is that it "serves as a general expression of support" and "serves to affiliate a person with a candidate [or in this instance, a party]." *Buckley*, 424 U.S. at 21-22. But as the Commission has detailed, there are multiple avenues open to RFR and other Governor DeSantis supporters to express their support, collectively and individually. *See supra* Part II.B.2.

RFR's request is also at odds with the purpose of a preliminary injunction, which "is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Here the "status quo" is plainly the continued operation of regulations plaintiff challenges, which have been in force continuously since their last amendment in 1985. *See supra* pp. 3-5. Rather than seeking to preserve the status quo, plaintiff seeks to "upend" it by asking this Court to issue a legal ruling overturning a decades-old regulation limiting contributions to prospective federal candidates at precisely the time when such individuals are soliciting support from donors before announcing their candidacies for office ahead of November 2024 federal elections. *See Sherley*, 644 F.3d at 398 (denying preliminary injunction motion that sought to upend the status quo).

Plaintiff's failure to establish irreparable harm "'alone is sufficient' for a district court to refuse to grant preliminary injunctive relief." *Hicks v. Bush*, 397 F. Supp. 2d 36, 40 (D.D.C. 2005) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)). As one court in this District concluded in rejecting a motion to preliminarily enjoin limits on contributions to political parties, "[p]laintiffs will not 'suffer irreparable harm in the absence of preliminary relief'; they will simply be required to adhere to the regulatory regime

that has governed campaign finance for decades." *Rufer v. FEC*, 64 F. Supp. 3d 195, 206 (D.D.C. 2014).

VII. THE INJUNCTION PLAINTIFF SEEKS WOULD HARM THE GOVERNMENT AND UNDERMINE THE PUBLIC INTEREST

The third and fourth preliminary injunction factors, harm to the opposing party and weighing the public interest, respectively, "merge when the Government is the opposing party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors weigh heavily in favor of preserving the status quo and denying plaintiffs' request for extraordinary injunctive relief. Indeed, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of [the] people, it suffers . . . injury." *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). Worse still, plaintiff is asking this Court to disrupt the nation's campaign finance system by issuing a legal ruling permitting a particular organization (and thus potentially others) with the resources to undercut long-standing limits on contributions designed to deter corruption. *See Buckley*, 424 U.S. at 24. At the same time, plaintiff has steadfastly refused to avail itself of the many ways in which it may express its support of Governor DeSantis, and convey the support of others, in a manner that will not contravene longstanding limitations meant to curb corruption. *See supra* Part II.B.2.

Rather than preserving the status quo, as preliminary injunctions are intended, *Camenisch*, 451 U.S. at 395, granting relief here "would do precisely the opposite," *Rufer*, 64 F. Supp. 3d at 206. There would also be no satisfactory way to unscramble the effects of RFR's proposed conduct if an injunction were granted yet the Commission's position be vindicated on final review. The signatory information would be transferred and Governor DeSantis could use it for any purpose, including fundraising for any run for federal office. The value of that information having exceeded the relevant contribution limit, there would be no suitable way to

precisely unwind the advantage Governor DeSantis would have received from the temporary suspension of otherwise valid rules. "Permitting that to happen would be imprudent, to say the least, and certainly not in the public interest." *Rufer*, 64 F. Supp. 3d at 206.

CONCLUSION

For the foregoing reasons, plaintiff's motion for a preliminary injunction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 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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