UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL ELECTION COMMISSION'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF OPPOSING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendant Federal Election Commission ("FEC" or "Commission") hereby submits this response to plaintiff Ready for Ron's ("RFR") Post-Argument Supplemental Brief ("Supplemental Brief" or "RFR Supp.") (Docket No. 25) in further opposition to plaintiff's Motion for Preliminary Injunction (Docket No. 8) (the "Motion") and Memorandum in Support (Docket No. 8-1) ("Memorandum" or "Mem."), as provided in the Court's minute order dated February 28, 2023. RFR's extensive Supplemental Brief totals 32 pages, yet entirely fails to address the issues on which the Court invited supplemental briefing: whether the Commission's treatment of aggregated supporter contact information here is inconsistent with prior Commission authority and the scope of what is properly before the Court on administrative review. (*See* Transcript of Motion Hearing ("Tr.") at 49:8-52:7, 61:12-24 (Feb. 28, 2023).) Instead, RFR's Supplemental Brief consists largely of arguments and authorities that it has previously presented to this Court. To the extent RFR submits new arguments and information with respect to its Administrative Procedure Act ("APA") claims (RFR Supp. at 3-17), this information need not play any part in the Court's decision because, as explained in the

Commission's Supplemental Brief Opposing Plaintiff's Motion for Preliminary Injunction ("FEC Supp.") (Docket No. 24, at 4-5), arguments not presented to the agency in the first instance are deemed waived. RFR's arguments in support of its First Amendment claim (RFR Supp. at 17-28) similarly rehash its prior briefing and argument and present no new basis on which to grant it relief. In sum, RFR's Supplemental Brief fails to squarely address the Court's concerns and does not add to the existing briefing and record in this proceeding.

I. NOTHING IN RFR'S SUPPLEMENTAL BRIEF ESTABLISHES THAT THE COMMISSION'S DECISION UNDER REVIEW IS IN TENSION WITH PRIOR AGENCY PRECEDENT

At the preliminary injunction hearing, the Court invited the parties to provide supplemental briefs addressing (1) whether or not the FEC "has concluded [it] is permissible" for conduit groups like ActBlue and WinRed are "affirmatively allowed to provide email addresses" to ultimate recipients of campaign contributions, and (2) the scope of the proceedings below that are on review here. (Tr. at 49:15, 51:6, 61:4-24.) As the Commission explained in its supplemental brief, counsel for the Commission are aware of no advisory opinion or other agency authority establishing that it would be permissible to collect email information regarding potential contributors and provide that to a prospective or actual candidate free of charge, as RFR seeks to do here. (FEC Supp. 3.) And the primary authorities on which RFR relies in support of any argument for inconsistent treatment were not timely presented to the Commission in a timely manner. (*Id.* at 4-5.)

Critically, RFR's Supplemental Brief cites nothing responsive to either of the Court's inquiries. RFR cites no advisory opinion that would permit an entity to create a mailing list and submit it to a candidate free of charge. (*See* RFR Supp. at 3-14.) RFR also does not distinguish the Commission's rules and judicial precedent which led it to conclude that the thing RFR proposes to give to Governor DeSantis, however it is labeled, is objectively a mailing list and

therefore subject to the Federal Election Campaign Act's ("FECA") in-kind contribution limits.

RFR instead relies again exclusively on Commission authorities that appeared in its prior briefing. As the Commission has explained, RFR's principal Commission authorities, FEC Advisory Op. 2006-30, 2006 WL 3390749 ("*ActBlue*") and FEC Advisory Op. 2003-23, 2003 WL 22827476 ("*We Lead*"), address monetary contributions and information required to comply accurately with FECA's disclosure requirements. Those authorities do not address the provision of valuable information to candidates (such as email addresses), cost-free, beyond that which is required to comply with FECA. (FEC Supp. at 5-8.) Indeed, both ActBlue and WinRed assess processing fees for their services to ensure they do not cover costs that would otherwise be borne by a candidate or committee. (FEC Supp. at 6.) At base, RFR objects to the Commission's conclusion that the facts it presented to the Commission are more similar to a mailing list than a political petition conveying its views, but that conclusion is precisely the kind of determination that the APA reserves for the Commission, subject only to arbitrary and capricious review. Because RFR identifies no advisory opinion or other Commission authority that permits the transfer of aggregations of supporter contact information beyond that which is necessary for compliance with FECA's disclosure requirements — such as supporter email addresses — there is nothing inconsistent about the Commission's analysis here.

II. THE REMAINING PORTIONS OF RFR'S SUPPLEMENTAL BRIEF REHASH EARLIER ARGUMENTS, AND ARE IN ANY EVENT UNCONVINCING

Separate and apart from its arguments related to the issues on which the Court invited supplemental briefing, RFR avails itself of the opportunity to rehash its previous arguments in support of its request for a preliminary injunction. But to the extent these arguments present anything new, they do not establish RFR's right to the extraordinary relief of an injunction.

First, it was permissible for Commissioners to conclude that RFR's proposal to send

Governor DeSantis a petition with the contact information of thousands of supporters and potential donors would result in an excessive in-kind contribution if Governor DeSantis accepts it. RFR's three ways of analyzing its proposed transaction (RFR Supp. at 4-14) simply ignore the Commission's authorities concluding that a mailing list is a thing of value that is subject to contribution limits. How RFR acquired the mailing list is relevant only to the extent that its spending demonstrates the value of the resulting list. If RFR had purchased a mailing list on the open market, or compiled one from publicly available sources, it could not transfer that list to a candidate free of charge. *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 96 (D.D.C. 1999). Nor does it matter whether RFR spent to create its mailing list with a pure or corrupt intent (RFR Supp. at 24-25), as the validity of a campaign finance contribution limit does not depend on whether a particular donor wishes to engage in a corrupt bargain, *see Buckley v. Valeo*, 424 U.S. 1, 29-30 (1976) (per curiam) (concluding that FECA's contribution limits are constitutional even though it "may be assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action"). RFR's laundry list of activity that the FEC does not regulate (RFR Supp. at 7-11 (citing, *inter alia*, the provision of macadamia nuts)) says nothing about the FEC's historical regulation of transfers of mailing lists. Here the Commission reasonably concluded that RFR's proposed course of conduct was more similar to the free transfer of a mailing list than a political petition or conduit transaction. Nothing in RFR's Supplemental Brief undermines that conclusion.

Second, nothing in the Commission's advisory opinion dictates how any potential DeSantis supporter may express him or herself. RFR says the FEC would permit RFR to speak only if it does so anonymously (RFR Supp. At 1-2), but that is incorrect. The FEC concluded only that RFR could not transfer information that is indistinguishable from a mailing list under

longstanding regulations. As the FEC has repeatedly noted (*e.g.,* FEC Opp'n to Mot. for Preliminary Injunction 18-19), and RFR concedes (RFR Supp. 17-19 (acknowledging that the FEC's opinion only restricts RFR's ability to include "contact information," not that it requires anonymous speech), nothing in FECA prohibits anyone from identifying themselves in the petition, and the Commission has in no way foreclosed other avenues for RFR and others from taking other measures to ensure Governor DeSantis will view their support as authentic.[1] Indeed, the Commission's advisory opinion would not even appear to restrict RFR from identifying a signatory as "Dan Backer, Alexandria VA" or similar methods of identifying the specific individual behind the message if they so choose. The only issue on which the Commission opined was RFR's proposal to aggregate thousands of email addresses and other contact information — what the agency viewed as the functional equivalent of a mailing list — and provide that to a prospective candidate free of charge. (*See* Compl. Exh. 11, Advisory Op. 2022-12 (Ready for Ron) ("Advisory Opinion" or "A.O.") at 6-7.)

Third, contribution limits like the one at issue here are subject to intermediate scrutiny, not strict scrutiny. RFR again argues that the Commission is engaged in "a direct content-based restriction on pure political speech" (RFR Supp. at 17-18), but this argument is meritless and fails to justify the application of strict scrutiny to its First Amendment claim. The Supreme Court has long concluded that contribution limits are subject to intermediate scrutiny *even though* they may have some impact on a person's First Amendment rights. *See Buckley*, 424 U.S. at 20-21 (acknowledging that limitations on contributions entail a "marginal restriction

[1] For instance, as the Commission explained at oral argument, if RFR spent its own resources to verify the authenticity of the Governor DeSantis supporters it had identified and then supplied its petition to Governor DeSantis without signatory contact information, this would greatly alleviate concerns in the A.O. regarding RFR's proposed course of action. (Tr. at 37:8-20.)

upon the contributor's ability to engage in free communication"); *Libertarian Nat'l Comm. v. FEC*, 924 F.3d 533, 541 (D.C. Cir. 2019) (en banc) (explaining that the Supreme 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[.]") (citation omitted). RFR's speculation about what the Commission would have permitted if the content of its petition had been different (RFR Supp. at 21-24) is misplaced here. The content of RFR's petition was not referenced in the A.O. and played no apparent part in the agency's decision-making. It is not even clear that the content of RFR's petition was reviewed because it was not directly submitted in RFR's advisory opinion request. Though RFR's submissions included a link to its website, its advisory opinion request and later comments did not relay the content of its proposed petition. In any event, RFR's assertion to the Commission that its purpose is to influence Governor DeSantis to run for federal office was an accepted premise of the opinion-letter process and the briefing on this motion. Had RFR written a different letter but admitted the same purpose, there is no indication that the resulting advisory opinion would have changed.

Fourth, RFR's proposed transaction does not make it a conduit for the contributions of others. As the FEC has explained, the Commission rejected RFR's conduit theory as a factual matter in Advisory Opinion 2022-12. (FEC Supp. at 1-3.) That conclusion was a reasonable and permissible interpretation of FECA and Commission regulations for several reasons, among them the fact no contributions will be forwarded and RFR has not, and to this day does not, suggest it will comply with Commission regulations as to the time for passing such contributions to the recipient candidate and associated reporting obligations. (*Id.* at 7-8; RFR Supp. at 28-31.) Assuming the transfer of a mailing list is subject to contribution limits, nothing the

Commission has said would require the public disclosure of the underlying names in the list without their consent. (*But see* RFR Supp. at 30 n.6.)

Finally, RFR suggests that Governor DeSantis could accept a mailing list without triggering candidacy status *precisely because of* the testing the waters regulation it asserts is invalid. (RFR Supp. at 28-32.) But those positions are mutually exclusive. Assuming arguendo that the Commission's testing the waters regulation (11 C.F.R. § 100.72) did not exist, FECA's text nonetheless applies contribution limits to "candidates," and that term is defined objectively to include a person who accepts contributions above a dollar limit, which the value of the mailing list exceeds. 52 U.S.C. § 30101(8), (9). Therefore, whether or not the testing the waters regulation is valid, RFR still could not make an above-limits in-kind contribution to Governor DeSantis as it proposes.

RFR's Supplemental Brief fails to squarely address the Court's concerns and does not add to the existing briefing and record in this proceeding. Between the administrative and court processes to date, plaintiff has presented 205 pages of legal argument with shifting rationales and authorities that do not establish the requisite likelihood of success. For the reasons articulated in extensive briefing and oral argument before this Court, plaintiff has failed to qualify for the extraordinary relief of a preliminary injunction, and its motion for such relief should be denied.

Respectfully submitted,

/s/Jacob S. Siler

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

March 17, 2023

Jacob S. Siler (D.C. Bar No. 1003383)
Assistant General Counsel
jsiler@fec.gov

Christopher H. Bell (D.C. Bar No. 1643526)
Attorney
chbell@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 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.

/s/ Jacob S. Siler

Jacob S. Siler (D.C. Bar No. 1003383)
Assistant General Counsel
jsiler@fec.gov