

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

READY FOR RON)	
66 W. Flagler Street)	Judge Randolph D. Moss
Suite 900, #6781)	
Miami, FL 33130,)	No. 1:22-cv-3282-RDM
)	
)	
<i>Plaintiff,</i>)	
)	
v.)	
)	
FEDERAL ELECTION COMMISSION)	
1050 First Street, NE)	
Washington, DC 20463,)	
)	
)	
<i>Defendant.</i>)	
_____)	

**PLAINTIFF READY FOR RON’S
REPLY TO DEFENDANT FEDERAL ELECTION COMMISSION’S
POST-ARGUMENT SUPPLEMENTAL BRIEF**

Plaintiff Ready for Ron respectfully submits this Supplemental Reply Brief in support of its pending motion for preliminary injunction (which it has requested this Court treat as both a motion for permanent injunction and motion for summary judgment on all counts). The FEC has expressly held that simply because speech has value, does not make it any less speech, nor subject it to being treated as a contribution, *Brunswick Corp.*, A.O. 1984-43 (Sept. 14, 1984). ON the contrary, the FEC admits the only reason its advisory opinion deemed RFR’s signed petition to be a “contribution” is because RFR made substantial independent expenditures to solicit and gather signatures for it. FEC Supp. Br. at 2 (emphasizing RFR “expended resources to compile” the petition, and also “intends to spend a significant amount of money to compile [it]” (citing Ready for Ron, A.O. 2022-12, at 6-7)). The Supreme Court, however, “has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a

nonspeech element or to reduce the exacting scrutiny required by the First Amendment.” *Buckley*, *Valeo*, 424 U.S. 1, 16 (1976) (per curium). Thus, the FEC’s core reasoning fails. And its remaining arguments and new authorities only bolster RFR’s case.

I. THE FEC’S SUPPLEMENTAL BRIEF CONFIRMS THE FECA’S CONTRIBUTION LIMITS SHOULD BE SUBJECT TO STRICT SCRUTINY AS APPLIED TO RFR’S PETITION.

The FEC argues contribution limits should apply to RFR’s petition since “RFR has and is continuing to spend large sums of money *to provide encouragement and support to a Governor DeSantis candidacy based on its own desire to see Governor DeSantis elected president.*” FEC Supp. Br. at 8 (emphasis added). Yet again, the FEC confirms it does not object in general to RFR giving Governor DeSantis a signed political petition on a matter of public importance, even if the signatories’ signature blocks incorporate their contact information. Rather, the gravamen of the FEC’s objection is the petition itself encourages Governor DeSantis to become or remain a presidential candidate. The FEC’s position hinges entirely on the substantive message contained in the petition’s text. That is impermissible content-based discrimination. Such discrimination simply cannot arise with regard to monetary contributions and most other forms of in-kind contributions which do not literally contain an express political message. And since substantively similar information with comparable value could be provided to Governor DeSantis in connection with a petition on virtually any other issue of public interest, the FEC’s interest in selectively quashing this particular example of political expression and association appears minimal and insufficient to withstand any degree of constitutional scrutiny.

II. THE PRECEDENTS THE FEC CITES BOLSTER RFR’S CLAIMS

The FEC’s supplemental brief invokes several precedents for the first time in an attempt to contend the signatory contact information embedded in RFR’s petition is a contribution from RFR.

None of the opinions it cites, however, treats contact information which people have chosen to provide, directly or indirectly, to a candidate as a “contribution.” Indeed, the FEC’s consistent failure to even suggest that such contact information may constitute a contribution from either the original supporter or an intermediary undermines its contentions here. Moreover, the new advisory opinions the FEC cites materially bolster RFR’s case; RFR is grateful for the Commission’s support, however inadvertent.

A. **ReCellular**—In *ReCellular*, A.O. 2010-21 (Oct. 8, 2010), cited in FEC Supp. Br. at 3, a private corporation, ReCellular, proposed to establish a commercial service through which it would purchase people’s used cell phones. A person would enter information about their used phone into ReCellular’s website, and ReCellular would “offer[] a purchase price to the consumer” based on the used phone’s fair market value. *Id.* at 1-2. If the person accepted the offer, they would have the option of either having ReCellular mail them a check, or instead directing ReCellular to provide those funds to a political committee, as a contribution from that person. *Id.* at 2. When such a contribution occurred, ReCellular would send an e-mail to the recipient political committee notifying it of the contribution and forwarding the contributor’s “name, address, email address, occupation and name of employer.” *Id.* at 5. The FEC concluded this arrangement was permissible, so long as the recipient political committee paid ReCellular “for the incremental expense of emailing the customer’s name, address, occupation and employer, and date of contribution, if this expense is not paid by the consumer.” *Id.* at 7.

Far from weakening RFR’s position, ReCellular strongly supports it. First, ReCellular was a private corporation prohibited from either making political contributions or acting as a conduit committee. *See* 52 U.S.C. § 30118; *see also ReCellular*, A.O. 2010-21, at 4. Accordingly, the only way it could provide any of the services discussed in the advisory opinion was in the context of a

commercial transaction for which it was compensated at fair market value. *ReCellular*, A.O. 2010-21, at 4. RFR, in contrast, is a political committee which is permitted to act as a conduit without being compensated by either contributors or the recipient candidate.

Second, ReCellular did not contend it was itself either participating in political speech or facilitating political association among like-minded people in support of any particular message.

Third, and most importantly, the FEC did not conclude that the *contributor information* contained within the e-mail would itself have otherwise constituted an in-kind contribution. Likewise, the FEC did not conclude the recipient candidate had to reimburse ReCellular for the value of that contributor information on the grounds the contributor information would otherwise constitute an in-kind contribution. To the contrary, the potential contribution at issue was “the incremental cost to ReCellular of sending a notification email to [the recipient] political committee with the contributor’s name, address, occupation and employer.” *Id.* at 7. The FEC emphasized that, to avoid making an illegal in-kind corporate contribution of *its services*, ReCellular would have to ensure the recipient candidate “pay[s] the usual and normal charge ‘for expenses related to processing and transmitting contributions and contributor information[.]’” *Id.* (quoting *Working Assets*, A.O. 2003-16 (Feb. 9, 2007)).

Arguably, the FEC’s conclusion in *ReCellular* may have been in tension with the Supreme Court’s ruling earlier the same year in *Citizens United v. FEC*, 558 U.S 310 (2010), which held the FEC may not bar corporations from making expenditures to engage in election-related expression. Regardless, the FEC’s own view of the potential contribution in *ReCellular* was neither the contact information itself nor the value of that information. To the contrary, the illegal in-kind corporate contribution would have been the marginal costs incurred by the corporation in conveying the information to the recipient candidate.

Here, as mentioned above, RFR is a political committee, not a corporation, and is not required to justify its actions here as part of a commercial transaction. Moreover, it would be unconstitutional to limit RFR's independent expenditures by prohibiting it from incurring marginal costs to transmit its petition to Governor DeSantis. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480 (1985). Accordingly, the primary authority upon which the FEC relies *clearly supports* RFR's contention the FEC has not historically treated contact information a person chooses to provide, directly or indirectly, to a candidate as a contribution.

B. Democracy Engine—*Democracy Engine*, A.O. 2022-03 (June 27, 2022), seems to support RFR's position to an even greater degree. *Democracy Engine*, LLC was a limited liability company that wished to offer a web-based service to process certain conduit contributions to candidates. A corporation's separate segregated fund ("SSF") would pay *Democracy Engine* to establish a webpage that would accept conduit contributions from members of the public for particular candidates selected by the SSF, hold those contributions in a special account, then forward them to the designated candidate within ten days. *Id.* at 3. The SSF would solicit members of the public to visit its webpage to make contributions to its chosen candidate or candidates, which would be processed by *Democracy Engine*. *Id.* *Democracy Engine*, in turn, would provide information to the SSF about the contributors and their contributions—and the SSF could use that data however it wished. *Id.*

The FEC concluded "a corporate SSF may solicit the general public to make contributions through a customized website hosted by *Democracy Engine* and receive real-time data about any resulting contributions." *Id.* at 4. The FEC pointed out that, although corporations are prohibited from making contributions to candidates, their SSFs may make expenditures to solicit

contributions to candidates. *Id.* at 5 (citing 11 C.F.R. § 114.5(i)). It further held the sponsoring SSF could use or even sell any data it received as a result of those contributions. *Id.* At 6.

Thus, *Democracy Engine* confirms even a corporation’s SSF may make expenditures to solicit conduit contributions to be transmitted to a candidate. Any contributions from a person, through the SSF’s webpage on Democracy Engine, to a candidate count as conduit contributions from that person to the candidate, *see* 52 U.S.C. § 30116(a)(8)—even though that contribution may be aggregated together with other contributions to the same candidate in Democracy Engine’s special account until all of those funds are transmitted to the recipient candidate (subject to the 10-day deadline). The FEC did not limit the amount an SSF could spend to solicit conduit contributions to the candidate it supported. Nor did the FEC suggest that, if the SSF were especially successful in soliciting conduit contributions and their total value exceeded some arbitrary aggregate amount, those contributions would somehow be attributed to the SSF.

In short, *Democracy Engine* concerned a much more potentially problematic situation than RFR. The advisory opinion involved a corporate SSF, rather than an ordinary political committee. It involved monetary conduit contributions, rather than contact information for a petition’s signatories. It did not involve any pure political expression or political association through a petition. And, perhaps most notably, ***the FEC expressly authorized the SSF sponsoring the web page for conduit contributions to retain data about the contributors and their contributions to use however it wished.*** The FEC’s supplemental brief complains, “RFR plans to send to Governor DeSantis only a copy” of the signatories’ names and accompanying contact information, and “will retain” a copy “for its own use.” FEC Supp. Br. At 8. *Democracy Engine* expressly confirms such conduct is completely permissible and does not affect an intermediary’s status as a conduit. Accordingly, in the event this Court decides contact information for a political petition’s

signatories constitutes an in-kind contribution, RFR is entitled to at least as much protection as the SSFs in Democracy Engine.¹

Furthermore, FEC AO 2022-03 expressly considered Democracy Engine’s Privacy Policy which states, “We share contributors’ information with recipients of your contribution. For most contributions, the information we share includes name, postal address, telephone number, email address, occupation, employer, and employer’s address.” Democracy Engine, *Privacy Policy*, <https://democracyengine.com/privacy-policy/>.² The FEC did not consider a conduit committee’s provision of a contributors telephone number and email address to a recipient candidate to be a contribution. Moreover, recipient candidates do not compensate either Democracy Engine or the

¹ The FEC suggests it is inappropriate for this Court to consider authorities such as *WE LEAD* or *Democracy Engine* on the grounds “issues not raised before agency are waived.” FEC Supp. Br. at 5 (quoting *Wallaesa v. Fed. Aviation Admin.*, 824 F.3d 1071, 1078 (D.C. Cir. 2016)). Far from advancing a new issue, however, RFR is simply invoking additional supporting legal authorities in support of claims made before the agency, in its Complaint, as well as in its motion for a preliminary injunction—as allowed by the D.C. Circuit. *See United States v. Rapone*, 131 F.3d 188, 196 (D.C. Cir. 1984) (adjudicating appellant’s jury trial claim because he “is not attempting to raise the issue of a jury trial for the first time on appeal. Rather, he simply offers new legal authority for the position that he repeatedly advanced before the district court—that he was entitled to have his case tried before a jury.”); *see also Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 748 n.6 (D.C. Cir. 2017) (recognizing a litigant’s argument may “evol[e] from its opening to reply brief,” but that “is not an uncommon occurrence” and permissible so long as “the core of [the] argument . . . remained the same. And once an argument is before [the federal judiciary], it is our job to get the relevant case law right.”); *Yanofsky v. U.S. DOC*, 306 F. Supp. 3d 292, 301 (D.D.C. 2018) (recognizing ability of courts, when adjudicating questions of law, to consider legal authorities beyond those considered by the agency). The FEC also notes the principle it cites “holds special force where . . . an appeal follows adversarial administrative proceedings.” FEC Supp. Br. at 5 (quoting *Wallaesa*, 824 F.3d at 1078). By that reasoning, the principle must apply with *less* force here, since the FEC’s proceedings on RFR’s advisory opinion request were *not* adversarial.

² Democracy Engine had a materially indistinct private policy in place at the time of its request. *See* <https://web.archive.org/web/20220331234647/https://democracyengine.com/privacy-policy/>. That link above shows Democracy Engine’s privacy policy as of March 31, 2022; it filed its FEC advisory opinion request the next day. *See* <https://www.fec.gov/data/legal/advisory-opinions/2022-03/>.

sponsoring SSF for either the fair market value of this contributor information, or the marginal cost of forwarding the information to them. Since the sponsoring SSF covers all of Democracy Engine's costs in connection with the SSF's webpage, *see* A.O. 2022-03, at 2, the SSF is in effect forwarding telephone numbers and e-mail addresses from people who make conduit contributions through the SSF's webpage to the recipient candidate. Yet the FEC does not treat the sponsoring SSF as having made its own separate in-kind contribution of that contributor contact information to the recipient candidate, nor report any value for that contributor contact information as part of the contribution itself. And, again, nothing turns on how much the SSF spends to solicit people to visit its webpage and make conduit contributions. Neither the FECA nor the First Amendment allows the FEC to treat RFR worse for soliciting and forwarding signatures and accompanying self-provided contact information for a political petition than it does a corporate SSF soliciting monetary conduit contributions.

C. **Previously Cited Advisory Opinions**—The FEC attempts to distinguish its *ActBlue* advisory opinions by pointing out “ActBlue charges a ~3.95% processing fee to the campaigns receiving contributions.” FEC Supp. Br. at 6. Nothing in either the website to which the FEC cites or the FEC's advisory opinions ties these fees for processing contributors' monetary contributions to ActBlue's provision of contributors' phone numbers and e-mail addresses to candidates. Nor is there any suggestion these fees are calibrated to either the value of contributors' contact information or the marginal cost of aggregating and providing it to candidates. Although such fees might be *ex post* rationalized in this manner, *ActBlue* does not suggest anyone has ever regarded a conduit committee forwarding contributors' contact information to a candidate as an independent in-kind contribution.

In any event, ActBlue is a commercial platform. Ordinary conduits, such as those in *WE LEAD* and those the SSFs in *Democracy Engine* wished to establish, do not charge either contributors or candidates for either the monetary contributions those committees collect to pass along to recipient candidates, or the accompanying contributor information those committees are required to provide to the recipient candidates. *See* 11 C.F.R. §§ 110.6(c)(1); 102.8. With regard to *WE LEAD*, the FEC misses the boat by arguing the opinion “addressed only the transmission of information to authorized committees that was required for those committees to meet their reporting obligations with respect to the monetary contributions.” FEC Supp. Br. at 5-6. The core of RFR’s conduit argument is that, just as the FEC permitted *WE LEAD* to solicit, collect, aggregate, and pass along unlimited *actual monetary contributions* to a candidate, so too should it permit RFR to solicit, collect, aggregate, and pass along unlimited in-kind contributions in the form of contact information voluntarily provided by each of its petition’s signatories.³ Because RFR is engaging solely in constitutionally protected pure speech and direct association, the FEC seeks to treat it worse than outright fundraisers. That gets campaign finance law exactly backwards.

III. RFR’S FAILURE TO DISCUSS COMPLIANCE WITH CERTAIN REQUIREMENTS GOVERNING CONDUIT COMMITTEES DOES NOT PREVENT IT FROM BEING DEEMED A CONDUIT COMMITTEE.

The FEC also contends RFR cannot be a conduit committee because it did not promise to either forward signatories’ contact information to Governor DeSantis within ten days of receipt, or separately disclose each and every signatory to the FEC. FEC Supp. Br. at 7. This argument is nonsensical. Whether RFR qualifies as a conduit committee is an issue which needs to be resolved *before* determining whether it has complied with the rules governing conduit committees. If the

³ As noted in RFR’s supplemental brief, this Court need not reach the conduit issue if it concludes either: (i) the signed petition does not constitute a contribution, or (ii) applying contribution limits under these circumstances would fail constitutional scrutiny under the First Amendment.

FEC initiates an enforcement action against an entity for failing to file disclosure reports FECA requires for political committees, that entity cannot defend itself by claiming it does not qualify as a political committee since it hasn't filed any such reports. The same reasoning applies here.

Governor DeSantis is not currently a candidate—there certainly is no evidence in the record establishing he is—and has not yet created a candidate committee. Accordingly, under the FEC's advisory opinions governing candidate draft committees, RFR is not yet obligated to provide him with any conduit contributions (i.e., the petition signatures) it has collected. To the contrary, the latest RFR may provide any accumulated conduit contributions to him is 10 days after he creates a candidate committee. *See, e.g., ActBlue*, A.O. 2006-30, at 4 (Nov. 9, 2006) (“ActBlue must forward earmarked contributions to the candidates within ten days of the date that the candidate registers a presidential campaign committee with the Commission.”). RFR addressed potential disclosure requirements in both its opening brief and main supplemental brief. *See* Plaintiff Ready for Ron's Memorandum in Support of Motion for Preliminary Injunction, D.E. #8-1, at 19-20 n.2 (Dec. 21, 2022); Plaintiff Ready for Ron's Post-Argument Supplemental Brief, D.E. # 25, at 38 n.6 (Mar. 14, 2023). The burden, futility, and invasion of privacy of requiring RFR to publicly report each petition signatory's identity as a condition of being able to circulate its petition strongly mitigates in favor of concluding this case does not involve a contribution in the first place. In any event, the fact RFR may be required to adhere to additional restrictions if this Court concludes it is a conduit committee does not somehow prevent it from being deemed a conduit committee or strip it of the protections afforded them. *See* 52 U.S.C. § 30116(a)(8) (noting conduit contributions do not count against a conduit committee's contribution limits).

IV. THE FEC’S NEW ARGUMENT BOLSTERS RFR’S CONDUIT CLAIM

The FEC contends, “If RFR later provides its mailing list or a portion of it to any federal candidate other than Governor DeSantis, it would be exercising discretion or control, and would undoubtedly be making a contribution in its own name.” FEC Supp. Br. at 8 (citing 11 C.F.R. § 110.6(b)(2)). *Exactly right*. In the scenario the FEC conjured, involving RFR’s hypothetical provision of data from the petition to new recipients other than Governor DeSantis:

- (i) RFR did not receive an individualized request from each signatory to provide their contact information to those new recipients;
- (ii) the contact information is not being provided in connection with a political petition which the signatories agreed to join in order to convey a political message;
- (iii) the signatories have not expressed any interest in associating with or receiving communications from the list’s new recipients; and
- (iv) RFR would be deciding on its own, after the fact, with no notice to the signatories, where their contact information was being forwarded.

In short, the FEC’s hypothetical lacks the factors which expressly distinguish RFR’s signed political petition from an ordinary in-kind contribution of a mailing list. The fact RFR—like the petition’s signatories themselves—is hoping the petition persuades Governor DeSantis to become or remain a presidential candidate, *see* FEC Supp. Br. at 8, does not reduce the protection afforded its petition.

CONCLUSION

RFR is entitled to an injunction barring the FEC from ever enforcing FECA’s contribution limits or related restrictions against it for providing its signed political petition with signatories’ self-provided contact information to Governor DeSantis while this Court’s order remains in effect,

regardless of whether he is testing the waters or a candidate. Because this is not a matter for which the exercise of agency discretion is required, this Court should issue an injunction without a prior remand. *Cf.* FEC Supp. Br. at 9.

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