ORAL ARGUMENT HAS BEEN SCHEDULED FOR MARCH 18, 2024

No. 23-5161

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

READY TO WIN,

Plaintiff-Appellant,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

On Appeal from the U.S. District Court
for the District of Columbia
No. 1:22-cv-3292, Hon. Randolph D. Moss

PLAINTIFF-APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

1. This case is not moot. Regardless of whether Governor DeSantis remains a "candidate"—which he most likely does for purposes of contribution limits, *cf.* 11 C.F.R. § 110.1(b)(3)(iii)(C)—the district court's ruling ***still*** makes it illegal for RTW to provide him its signed petition to persuade him to resume campaigning, *see* A-320. At minimum, this issue is capable of repetition yet evading review since RTW will similarly seek to draft Governor DeSantis in 2028. *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998).

2. The Court generally subjects FECA's contribution limits only to intermediate scrutiny because contributions usually involve minimal communicative content. *Buckley v. Valeo*, 424 U.S. 1, 21, 25 (1976) (per curiam). The signatories' self-provided contact information in RTW's petition, however, involves substantial expressive and associational components that trigger strict scrutiny.

Additionally, the FEC suggests it determines whether FECA's contribution limits apply to petitions to people who have not yet become candidates based on the petitions' substantive messages. *See* FEC Br. at 31. This is a content-based restriction on speech, subject to strict scrutiny, and invalid. *Reed v. Town of Gilbert*, 576 U.S. 155, 171-72 (2015).

3. FECA's contribution limits do not apply to RTW's signed political petition because it does not meet FECA's definition of "contribution." 52 U.S.C.

§ 30101(8)(A)(i). In ordinary parlance, people would not call either the petition or its signatory contact information a "gift." Several canons of statutory interpretation require this Court to resolve any ambiguity by narrowly construing the term to exclude such petitions. FECA's legislative history further counsels excluding draft petitions.

4. At most, RTW is a conduit committee seeking to provide signatories' information to Governor DeSantis at their request, on their behalf, as conduit contributions. The FEC's advisory opinion and district court's ruling erroneously bar RTW from doing so.

FECA does not exclude RTW from serving as a conduit committee on the grounds it generated too much additional "value" for Governor DeSantis. FECA requires conduit committees to provide contributions they receive and aggregate to the designed recipient, without regard to whether such aggregation generates any additional value. 52 U.S.C. § 30116(a)(8). Indeed, conduit committees which collect monetary contributions are ***required*** to generate "extra" value by compiling contributors' names, addresses, occupations, and employers to provide to the designated recipient candidates. 52 U.S.C. § 30102(b)(1)-(2); 11 C.F.R. §§ 102.8(a)-(b), 110.6(c)(1)(i), (iv)(A). Thus, there is no basis for refusing to recognize RTW as a conduit committee.

5. Under a plain-meaning interpretation of FECA, 52 U.S.C. § 30116(a)(1)(A), the FEC lacks authority to limit the transfer of funds or other items to people who are not "candidates," regardless of whether they may be "testing the waters" for a potential candidacy. Moreover, *Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir. 1981), held FECA doesn't regulate efforts to draft candidates and is inapplicable to people who are merely considering the possibility of running.

6. If this Court concludes RTW's claims fail as a matter of law, it should order dismissal of the Complaint. *Munaf v. Green*, 553 U.S. 674, 691 (2008). The FEC offered no reason it may demand discovery if it is impossible for RTW to prevail regardless of how the evidentiary record develops.

ARGUMENT

I. THIS CASE IS JUSTICIABLE

RTW brought this case to vindicate its right to provide its signed political petition, including signatories' self-provided contact information to Florida Governor Ron DeSantis at three points in time:

(i) ***Pre-Testing-the-Waters*** (i.e., the status of most Americans)—any period in which Governor DeSantis is neither a "candidate" under 52 U.S.C. § 30101(2), nor "testing the waters" for a potential candidacy under 11 C.F.R. § 100.72(a);

(ii) ***Testing-the-Waters***—any period in which he is "testing the waters," but not a "candidate";

(iii) ***Candidacy***—the period after Governor DeSantis qualifies as a "candidate."

RTW's claims concerning either pre-Testing-the-Waters or Candidacy necessarily remain live. In any event, any moot claims are capable of repetition, yet evading review.

A. RTW's Claims Remain Live as Applied to Either the "Pre-Testing-the-Waters" or "Candidacy" Stage of Governor DeSantis' 2024 Presidency Candidacy

Governor DeSantis has indisputably qualified as a "candidate" for President in the 2024 election, but has announced he is suspending his campaign. Alec Hernandez, *Ron DeSantis Suspends His Presidential Bid and Endorses Trump*, NBC NEWS (Jan. 21, 2024), https://www.nbcnews.com/politics/2024-election/ron-desantis-planning-drop-presidential-bid-sunday-rcna134953. Now, one of two possibilities must be true: (i) Governor DeSantis still qualifies as a candidate and remains subject to limits on candidate contributions, or (ii) he has returned to pre-testing-the-waters status with regard to the 2024 election.

1. Governor DeSantis Most Likely Remains a Candidate—Governor DeSantis likely remains a "candidate" under FECA. ***First***, DeSantis continues to satisfy FECA's definition of "candidate" having received more than

$5,000 in contributions for the 2024 presidential election. 52 U.S.C. § 30101(2)(A). ***Second***, neither FECA nor FEC regulations have any provisions for "un-candidating" oneself.

Third, Governor DeSantis' decision to suspend his campaign is not legally binding. He would be reasonably likely to re-activate his campaign should developments occur concerning Trump's health or manifold pending trials. *Cf. Ross Perot Re-Enters Presidential Race*, L.A. TIMES (Oct. 10, 1992), https://www.latimes.com/archives/la-xpm-1992-10-10-me-383-story.html. RTW's petition could be a key factor in such decision.

Fourth, Governor DeSantis remains a candidate insofar as his name will appear on dozens of upcoming primary ballots. Naomi Lim, *DeSantis Qualifies for GOP Primary in 36 States and Territories*, WASH. EXAMINER (Jan. 6, 2024), https://www.washingtonexaminer.com/news/2788696/desantis-qualifies-for-gop-primary-ballot-in-36-states-and-territories/.

Finally, FEC regulations continue to recognize a person as a "candidate" in a particular election—at least for purposes of contribution limits for that election—even after that election ends, it is impossible for that person to win, and he has stopped campaigning. 11 C.F.R. § 110.1(b)(3)(iii)(C) ("***The candidate*** and his or her authorized political committee(s) may accept contributions made after the date of

the election if... [s]uch contributions do not exceed the contribution limitations in effect on the date of such election.") (emphasis added).

It is undisputed candidate contribution limits continue to apply to Governor DeSantis. Thus, all of RTW's constitutional and statutory challenges to FECA as applied to RTW's provision of its petition to a "candidate"—Counts I, II, III, and V—remain live.

2. Alternatively, Governor DeSantis Has Returned to Pre-Testing-the-Waters Status

If Governor DeSantis is no longer a candidate (and there is no evidence he is "testing the waters"), he necessarily has returned to a pre-Testing-the-Waters state. The district court held, and the FEC agrees, providing the signed political petition to someone who is neither testing the waters nor a candidate would automatically trigger either "testing-the-waters" or "candidacy" status. A-318 to A-320; FEC Br. at 50. Should that occur, limits on contributions to candidates would apply, either directly under 52 U.S.C. § 30116(a)(1)(A), or indirectly, via the FEC's testing-the-waters regulation, 11 C.F.R. § 100.72(a); *Wash. State Federal Comm.*, A.O. 1998-18, at *3 (Oct. 9, 1998).

Thus, even if Governor DeSantis is neither a candidate nor testing the waters, RTW remains prohibited from providing its petition to persuade him to resume campaigning. Accordingly, all counts and arguments discussed above in Subsection

I.A.1 remain live, as does Count VI—the sole count which only challenges the FEC's regulation of draft petitions to people who are ***not*** candidates.

B. All of RTW's Claims are Capable of Repetition, Yet Evading Review.

Even if all of RTW's claims and arguments are moot regarding the 2024 election, they are capable of repetition yet evading review for the 2028 election. "Controversies that arise in election campaigns are unquestionably among those saved from mootness under the exception for matters 'capable of repetition, yet evading review.'" *Branch v. FCC*, 824 F.2d 37, 41 n.2 (D.C. Cir. 1987). "Challenges to rules governing elections are the archetypal cases for application of this exception." *LaRouche v. Fowler*, 152 F.3d 974, 978 (D.C. Cir. 1998). Only a "reasonable expectation" the same issues will recur is necessary. *Id*. This case falls within that exception because RTW intends to compile a signed political petition, including signatories' self-provided contact information, to encourage Governor DeSantis to become and remain a candidate for President in 2028. *Holmes v. FEC*, 823 F.3d 69, 71 n.3 (D.C. Cir. 2016).

II. THE FEC HAS FAILED TO ADDRESS THE GRAVAMEN OF RTW'S CONSTITUTIONAL ARGUMENTS.

The FEC and district court have concluded the self-provided contact information for the signatories to RTW's political petition is too valuable to provide to Governor DeSantis, yet not valuable enough to trigger First Amendment

protection. Their shared premise is that while the petition's encouragement of DeSantis' candidacy is constitutionally protected, the contact information which signatories provided to identify themselves and invite a response is not.

A. The District Court Should Have Considered Signatories' Contact Information in Context, as Part of RTW's Political Petition, Rather Than in Isolation

This Court should assess RTW's right to provide the signed political petition as a whole to Governor DeSantis. The FEC should not be able to disassemble the petition into constituent parts, divorced from their context, and individually assess whether each is constitutionally protected. FEC Br. at 27 (acknowledging the district court "focused its analysis on the only portion [of RTW's signed political petition] that the [FEC] sought to regulate"). For example, in *Bigelow v. Virginia*, 421 U.S. 809, 812-13 (1975), Virginia law prohibited abortions and made it illegal for publications to encourage anyone to obtain an abortion. A Virginia newspaper ran an advertisement encouraging women to travel to an abortion clinic in New York, where the procedure was legal. *Id*. at 812.

The Court held the First Amendment fully protected the advertisement as a whole. *Id*. at 822. While acknowledging portions of the advertisement "simply propose[d] a commercial transaction," the Court emphasized it also contained "factual material of clear 'public interest.'" *Id*. The Court didn't parse the advertisement to separate the commercial solicitation from the factual information

to determine which segments could be constitutionally proscribed. *Id*. ("***Viewed in its entirety***, the advertisement conveyed information of potential interest and value.") (emphasis added).

In *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 622-23 (1980), a group challenged an ordinance restricting door-to-door solicitations by charities. The Court held door-to-door solicitors often both "[s]olicit financial support" and communicate information. *Id*. at 632. Rather than parsing a speaker's statements to separate factual portions enjoying full constitutionally protection from solicitations portions which could be regulated, the Court held both aspects of such communications were "characteristically intertwined." *Id*. at 632-33. Accordingly, the communications as a whole received full First Amendment protection. *Id*.; *Cincinnati v. Discovery Network*, 507 U.S. 410, 420 (1993) ("[I]mportant commercial attributes of various forms of communication do not qualify their entitlement to constitutional protection."); *Jamison v. Texas*, 318 U.S. 413, 417 (1943) ("[The state] may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because [a section of] the handbills invite the purchase of books."). Thus, the district court and FEC err by focusing solely on the signatory contact information rather than the petition as an integrated whole.

B. Considered Independently, Signatories' Contact Information is Entitled to Full First Amendment Protection

Even adopting the district court's and FEC's myopic focus on signatories' contact information, the First Amendment protects communication of mundane, narrow, factual information such as the price of a good, *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996), and the alcoholic content of beer, *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481, 483 (1995); *cf. Pearson v. Shalala*, 164 F.3d 650, 654 (D.C. Cir. 1999).

The Supreme Court has also have held the First Amendment protects communications containing people's contact information. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 417, 419-20 (1971) (realtor's name and phone number); *see also Ostergren v. Cuccinelli*, 615 F.3d 263, 271 n.8, 272 (4th Cir. 2010) (social security numbers); *Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1004 (E.D. Cal. 2017) (legislators' home addresses and telephone numbers); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1139, 1150 (W.D. Wash. 2003) (police officers' addresses, telephone numbers, birthdays, and social security numbers).

Thus, signatories' contact information is not "low-value" speech falling below some arbitrary, FEC-determined threshold for constitutional protection. Rather, such information allows signatories to:

(i) identify themselves with specificity and distinguish themselves from others with the same name,

(ii) convey the sincerity of their support,

(iii) allow the authenticity of their signature to be confirmed and, perhaps most importantly,

(iv) invite a response from Governor DeSantis.

The FEC's notes the district court held these precedents "inapposite" for two reasons. First, RTW "did not seek to publish its list." FEC Br. at 24 (citing A-329). Irrelevant. The First Amendment applies equally regardless of whether a communication's recipient is an individual or a large group. *Meyer*, 486 U.S. at 424 (holding the First Amendment fully protects "the most effective, fundamental... avenue of political discourse, direct one-on-one communication"); *McCullen v. Coakley*, 573 U.S. 464, 489 (2014) (conversations).

Second, the FEC reiterates the district court's contention RTW's "message would not be meaningfully diluted if the contact information were omitted." FEC Br. at 24 (citing A-330), *see also id*. at 28-29. In *United States v. Stevens*, 559 U.S. 460, 470 (2010), however, the Court rejected the Government's attempt to "determine whether the First Amendment even applies" to speech based on its "value." It declared, "Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Id*. at 470; *see also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group*, 515 U.S. 557, 573 (1995)

("meaningful expressive value" is not required for expression to be constitutionally protected).

The FEC retorts *Stevens* recognized "several permissible 'traditional limitations' on speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." FEC Br. at 28 (quoting *Stevens*, 559 U.S. at 468-69). The FEC fails to mention, however, that political petitions to candidates have never been recognized as an exception to the First Amendment (regardless of whether they contain signatory contact information).

Collective political expression such as petitions lie at the heart of the First Amendment. *Meyer*, 486 U.S. at 421 (1988); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981); *Brown v. Glines*, 444 U.S. 348, 363 (1980) (Brennan, J., dissenting). These holdings never suggested such protection applies only when signatories are effectively anonymous or it is impossible for the recipient to respond. Thus, the signatory contact information in RTW's petition is entitled to full First Amendment protection.

C. The Unique Expressive and Associational Aspects of RTW's Petition Entitle It to Greater Constitutional Protection Than Mere Political Contributions

This Court should hold federal contribution limits unconstitutional as applied to in-kind contributions comprised primarily of pure political expression and association, such as RTW's petition. The FEC and district court correctly note that

contribution limits—including limits on in-kind contributions—are generally subject only to intermediate scrutiny and constitutionally valid. *Cf*. FEC Br. at 27-29. The FEC seeks to apply this facial analysis to RTW's petition by dismissing it as a contact list with an unrelated political note hastily attached as a desultory fig leaf to circumvent contribution limits. FEC Br. at 22 (arguing RTW is attempting to prevent "the FEC [from] treat[ing] a contact list as a contribution" simply by attaching a "petition" (quoting A-49)); *id*. at 23 (arguing RTW is "associat[ing]" its "contributions with protected speech"); *id*. at 27 .

By viewing the signed political petition as merely a generic "mailing list," *id*. at 23, or "contact list," *id*. at 24, 25, 29, the FEC and district court overlook its inherent characteristics which should, under *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), trigger strict scrutiny. The FEC notes political contributions generally may be limited because "[they] lie closer to the edges than to the core of political expression." FEC Br. at 28 (quoting *FEC v. Beaumont*, 539 U.S. 146, 161 (2003)); *see also Buckley*, 424 U.S. at 21, 25 (contribution limits generally "entail[] only a marginal restriction upon the contributor's ability to engage in free communication" and "involve[] little direct restraint on... political communication"). Most political contributions involve no political expression beyond the "undifferentiated, symbolic act of contributing." *Id*.

In contrast, RTW's signed petition—including signatories' contact information—is literal communication. Each signatory voluntarily chose to provide information to RTW to add to the petition to convey to Governor DeSantis on their behalf as part of a collective expression of political support. A-189; *see also* A-191, A-192. Accordingly, prohibiting RTW from providing its petition to Governor DeSantis with signatories' contact information is a direct prohibition on pure political speech. *Hurley*, 515 U.S. at 573 (emphasizing a speaker's First Amendment right "to choose the content of his own message," including determining what "statements of fact" to include).

The inclusion of signatories' contact information also constitutes a substantial form of political association with Governor DeSantis because it allows each signatory to identify themselves to him, rather than remaining effectively anonymous by providing only a name (quite literally, "Who is John Galt?"). *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[A]n author's decision to remain anonymous... is an aspect of the freedom of speech protected by the First Amendment."). Such contact information also enhances the appearance of a signature's authenticity and allows Governor DeSantis to confirm the signatory is an actual person rather than a fabricated name.

Finally, and most importantly, the inclusion of signatory contact information is necessary to allow Governor DeSantis to respond, if he wishes. A petition cannot

be a meaningful vehicle for association with its recipient if that recipient has no way of further interacting with the petition's signatories. *See Meyer*, 486 U.S. at 421 (recognizing petitions involve "***interactive*** communication concerning political change" (emphasis added)); *FEC v. Akins*, 524 U.S. 11, 29 (1998) (recognizing "communications" as a fundamental component of the "constitutionally protected rights of association").

The First Amendment prohibits the FEC from treating RTW's signed political petition as if it were $20,000 worth of donated office equipment. Applying contribution limits to the petition substantially burdens both pure political expression and association in ways *Buckley* neither contemplated nor authorized. Those limits, as applied in this case, should be subject to strict scrutiny and invalidated.

D. The FEC's Conception of the Constitutional Right to Petition is Chillingly Narrow

The FEC claims it "does not seek to regulate RTW's right to petition ***in any way***." FEC Br. at 29; *see also* FEC Br. at 22-23. But the right to petition as the FEC envisions it is indefensibly cramped. Under the FEC's approach, a person may provide a draft petition to a potential or actual candidate only if they:

- limit the number of signatories;
- change the substantive content of their political communication by stripping signatories' personal information, making it impossible for the recipient to meaningfully identify, authenticate, or respond to them; or

- violate signatories' privacy by publishing it on the Internet.

FEC Br. at 26 (citing A-335-36).

The FEC confesses its minimalist construction of the First Amendment would prohibit "an outside group [from] prepar[ing] a 30 second video lauding a candidate's qualities at great expense, and then... provid[ing] this video to the candidate free of charge...." FEC Br. at 30. Unacceptable. The First Amendment protects a group's right to engage in pure political speech by telling a candidate why the group supports him, whether orally, by e-mail, or video. Neither the medium of communication, *see Stevens*, 559 U.S. at 481-82 (recognizing the First Amendment applies to videos), nor the fact a communication costs money to prepare, allows the FEC to so grossly limit pure political expression, *Buckley*, 424 U.S. at 16 (rejecting the notion "the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element" that allows the communication to be regulated); *Va. State Bd. of Pharm. v. Va. Citizens Cons. Coun., Inc.*, 425 U.S. 748, 761-62 (1976).

The FEC further declares, so long as Governor DeSantis is a candidate, it would prohibit any group from providing any petition containing signatories' contact information on any topic to him. FEC Br. at 31. Such a sweeping prohibition on pure expression cannot be constitutional.

E. The FEC Effectively Admits Content-Based Discrimination Is Necessary to Decide When FECA's Contribution Limits Apply to Petitions to Non-Candidates

Finally, the FEC's brief appears to concede a substantial part of RTW's First Amendment argument. As discussed above, the FEC declares so long as Governor DeSantis is a candidate, contribution limits apply to any signed political petition to him containing signatories' contact information, from any group, on any topic. FEC Br. at 31. But the FEC also implies contribution limits apply to a signed political petition to a person who does ***not*** qualify as a candidate only if it encourages them to run for federal office. *Id*. In other words, the applicability of FECA's contribution limits to a petition to a non-candidate depends on the petition's message. Accordingly, as applied to petitions to non-candidates, FECA's contribution limits are content-based restrictions on expression and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 160, 171-72 (2015) (deeming an ordinance which applied only to signs "designed to influence the outcome of an election" to be a "content-based regulation of speech" subject to strict scrutiny).

Ignoring *Reed*, the FEC notes FECA's applicability to RTW's petition did not depend on the particular candidate RTW supported. FEC Br. at 32. True, but irrelevant. Content-based restrictions are subject to strict scrutiny even if they "do[] not discriminate among viewpoints within that subject matter," *Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1472 (2022).

The FEC also reiterates its tired observation that contribution limits are generally subject only to intermediate scrutiny and constitutionally valid. FEC Br. at 32. True, but irrelevant. Contribution limits can become impermissible content-based restrictions on speech when applied to pure political expression and association like a political petition.

III. RTW'S SIGNED POLITICAL PETITION IS NOT A "CONTRIBUTION" UNDER FECA

Under 52 U.S.C. § 30101(8)(A)(i), RTW's signed political petition must constitute a "gift" to qualify as a "contribution" subject to FECA's limits. FEC Br. at 36-37. Citing dictionary definitions, the FEC argues the term "gift" includes anything "voluntarily transferred by one person to another without compensation." *Id*. at 37 (quoting A-295). This tautological definition—a "gift" is anything you give someone—is inaccurately overbroad compared to ordinary usage. *Ayestas v. Davis*, 584 U.S. 28, 44 (2018) (interpreting "necessary" to mean "merely important or strongly desired" because that is how it is "often used" in "ordinary speech," even through dictionaries define it to mean "essential"); *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2072 (2018) (rejecting "expansive sense" in which dictionaries define "money," because "that isn't how the term was ordinarily used").

A person may "voluntarily transfer[]" any number of things to another "without compensation"—including greeting cards, public school student rosters, and employee phone directories—which no one would call a "gift" in common

parlance. Moreover, the FEC asks this Court to ignore the Commission's own precedents which establish the term "contribution" should be construed "'reasonably' and in accord with 'customary practice,'" FEC Br. at 36 (quoting *McDonald for Congress*, A.O. 1976-86 (Oct. 6, 1978); *Hon. Cecil Heftel*, A.O. 1977-51 (Nov. 16, 1977)). Those opinions' interpretive principles for determining whether something is a "contribution," while not specific to petitions, apply here. *Id.* Moreover, the FEC's shocking assertion of authority to prohibit anyone from giving candidates signed petitions on absolutely any topic if they include enough signatories' contact information is reason enough to reject the agency's extremist interpretation. *See* FEC Br. at 31.

Alternatively, the FEC admits the definition of "contribution" is ambiguous in this case. A-223. Accordingly, the constitutional avoidance canon, major questions doctrine, and rule of lenity all counsel in favor of construing the term narrowly to exclude RTW's petition.[1] The FEC's contends this argument is a "non-sequitur" because the agency "does not seek to limit [RTW's] right to petition in any meaningful way." FEC Br. at 37. Yet this case involves a range of serious constitutional questions. *See supra* Part II. This Court should construe the term "contribution" narrowly—rather than deferring to the FEC—to avoid them. *Nat'l*

[1] The FEC fails to address the rule of lenity, an independent basis for construing "contribution" in RTW's favor. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

Mining Ass'n v. Kempthorne, 512 U.S. 702, 711 (D.C. Cir. 2008) (recognizing the constitutional avoidance canon "trumps" *Chevron* deference); *e.g.*, *Chamber of Commerce v. FEC*, 69 F.3d 600 (D.C. Cir. 1995); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir. 1981).

This Court may also resolve any statutory ambiguity by referring to FECA's legislative history. In *Machinists*, this Court reviewed that history to conclude FECA does not regulate "draft" efforts to "convince" a person "that he would make a good 'candidate' or should become a candidate.'" 655 F.2d at 396. The FEC incorrectly claims FECA's legislative history is irrelevant because it involves only "efforts to bring ***contributions to draft committees*** within the scope of the Act and does not address the regulation of contributions ***from draft committees*** to individuals." FEC Br. at 39 (quoting A-324; emphasis in original).

To the contrary, as RTW's opening brief demonstrated, Congress has for decades consistently ***rejected*** the FEC's repeated efforts to expand the general definition of "contribution" to include disbursements—***not just disbursements to draft committees***—"for the purpose of drafting a clearly identified individual as a candidate for Federal office or encouraging a clearly identified individual to become a candidate for Federal office." *See* RTW Br. at 36 & n.11; *see also* A-325 (citing rejected bills); *accord* H.R. 1818, 106th Cong., 1st Sess., § 106(a)(1) (May 14,

1999). Narrow construction of "contribution" is especially appropriate to prevent draft petitions from being swept within FECA's scope. *Machinists*, 655 F.2d at 392.

IV. AT MOST, RTW IS A CONDUIT THROUGH WHICH PETITION SIGNATORIES SOUGHT TO PROVIDE THEIR CONTACT INFORMATION TO GOVERNOR DESANTIS

Alternatively, RTW should be deemed a conduit through which its petition's signatories convey their contact information to Governor DeSantis. *See* 52 U.S.C. § 30116(a)(8). RTW will provide that contact information to Governor DeSantis only at the express direction, and on behalf, of each signatory. At a minimum, RTW is engaging in the same solicitation, collection, and aggregation of contributions as the conduit committee in *WE LEAD*, A.O. 2003-23, at 5-6 (Nov. 7, 2003), except RTW is soliciting in-kind contributions in the form of contact information while WE LEAD solicited monetary contributions. *See also UBAAPAC*, A.O. 2011-14, at 2 (Sept. 22, 2011); *Democracy Engine*, A.O. 2022-03, at 5-6 (June 27, 2022). The FEC's reasons for refusing to recognize RTW as a conduit don't hold water.

First, the FEC points out commercial conduits such as WinRed and ActBlue provide their services for a fee. FEC Br. at 41. But the FEC does not (and cannot truthfully) contend committees like RTW—which are not associated with corporations and serve as conduits solely out of ideological and political motivations—are legally required to charge any such fee, or generally do so. *See, e.g.*, *WE LEAD*, A.O. 2003-23, at 5-6.

Second, the FEC disingenuously complains RTW has "fail[ed] to comply with the well-established rules for conduits." FEC Br. at 43; *id*. at 41-42. Based on the FEC's advisory opinion and lower court ruling, however, there is no legal way for RTW to do so without a favorable ruling from this Court. The FEC further protests RTW has asked both the Commission and the district court whether, either under the First Amendment or as a matter of statutory interpretation, it may be exempt from some of the technical requirements governing conduit committees. FEC Br. at 42. Such requests may neither be held against RTW nor impact the threshold legal question of whether RTW in fact qualifies as a conduit committee which is subject to those requirements in the first place.

Third, the FEC suggests RTW cannot be a conduit since it spent millions of dollars to solicit signatures for its petition. FEC Br. at 43. Such solicitations for conduit contributions constitute independent expenditures, however, *WE LEAD*, A.O. 2003-23, at 5-6, and PACs have a First Amendment right to make unlimited independent expenditures, *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985). RTW's spending on solicitations is irrelevant to whether it qualifies as a conduit. A-307.

Fourth, the FEC declares RTW cannot be a conduit committee because the act of aggregating signatories' contact information creates additional "value" that

qualifies as a contribution from RTW to Governor DeSantis. FEC Br. at 43-44. Every aspect of this argument fails.

1. The FEC assumes that the value of RTW's signed political petition is "more than the sum" of the individual values of each signatory's contact information. FEC Br. at 43 (quoting A-305). In other words, the FEC claims the value of a conduit contribution includes:

> (i) the total value of each individual monetary or in-kind contribution considered independently, which is treated as a contribution from each donor, respectively, to the recipient candidate, 52 U.S.C. § 30116(a)(8),
>
> ***as well as***
>
> (ii) the additional "extra" value the conduit committee itself creates by aggregating together those individual monetary or in-kind contributions and conveying them together to the designated recipient, which it is legally required to do, 11 C.F.R. § 102.8(c).

This reflects a completely new perspective on conduit contributions the FEC has never before advanced in any regulation, prior advisory opinion, or enforcement matter. As noted above, when a conduit contribution is made, FECA deems the original contributor of the funds or in-kind contribution to be the contributor. 52 U.S.C. § 30116(a)(8). Neither FECA nor FEC regulations contemplate that each conduit contribution ***also*** involves a contribution from the conduit committee itself

of whatever "extra" value is allegedly created by the act of aggregating numerous small individual contributions together.

Moreover, to the extent aggregation of numerous small contributions inherently generates "extra" value, FECA's authorization of conduit committees not only permits, but affirmatively requires, the conveyance of such value to the designated recipient. 11 C.F.R. § 102.8(c). Neither FECA nor FEC regulations, however, empower the FEC to count any such extra value against the conduit committee's contribution limits.

2. The FEC also emphasizes the district court's finding—unsupported by any citation to record evidence—that aggregating petition signatories' contact information somehow provides ***more*** "extra" value than aggregating monetary contributions. As discussed below in point #3, this finding is clearly erroneous since conduit committees that collect monetary contributions are ***also*** required to solicit, collect, and aggregate various pieces of contact and other identifying information about each contributor. 52 U.S.C. § 30102(b)(1)-(2); 11 C.F.R. §§ 102.8(a)-(b), 110.6(c)(1)(i), (iv)(A). Accordingly, conduit committees which accept monetary contributions are categorically doing ***more*** work—and from the FEC's perspective adding more "extra" value—than RTW.

Putting that aside, there is no limit to the number or aggregate value of contributions which a conduit committee may solicit, aggregate, and transfer to a

candidate—so long as each individual contribution comprising that aggregate is within applicable base limits. Thus, there is no limit to the amount of "extra" value a conduit committee may generate by aggregating monetary contributions. In other words, however much extra "value" RTW has generated, a conduit committee which solicits monetary contributions could legally solicit, collect, and aggregate enough additional contributions to generate just as much value. Accordingly, the relative amounts of "extra" value generated by the aggregation of monetary contributions, signatory contact information, or other types of in-kind contributions is a red herring.

3. As mentioned above, the FEC ignores the fact every conduit committee which solicits, collects, and aggregates monetary contributions ***also*** must solicit, collect, and aggregate contributors' contact information—name, address, occupation, and employer—to convey to the designated recipient. 52 U.S.C. § 30102(b)(1)-(2); 11 C.F.R. §§ 102.8(a)-(b), 110.6(c)(1)(i), (iv)(A). Such conduit committees are not required to charge either the contributor or the candidate for the costs associated with "the collection and compiling of [that] contact information," regardless of whether the act of "compil[ing] the list in a useful manner" generates additional value for the recipient. *Cf*. FEC Br. at 43 (quoting A-308).

Had RTW solicited a one-dollar ($1.00) conduit contribution from each signatory, it would have been not only permitted, but required to collect and aggregate contact information from them to provide to the recipient candidate. *Id*. at

43-44. In the FEC's warped view of campaign finance law, it is illegal for RTW to provide its signed political petition with signatory contact information to Governor DeSantis since RTW did not simultaneously solicit monetary conduit contributions for him. This is exactly backwards.

4. Finally, neither the FEC nor the district court offer any way to determine how much of the value of RTW's petition arises from the contact information itself and is attributable to each signatory, and how much of that value arises from the act of aggregation and is attributable to RTW. *Cf*. FEC Br. at 43-44. Neither FECA nor FEC regulations contemplates any such calculation. Both the district court and FEC erroneously attributed the ***entire*** fair market value of the petition to RTW. A-307. That cannot be correct. At most of the value of a compiled list of signatories' contact information arises from the contact information each signatory provided.

In short, the fact RTW may have generated "extra" value by soliciting, collecting, and aggregating numerous in-kind contributions does not preclude it from being a conduit committee.

Fifth, the FEC complains RTW will retain a copy of the signatories' contact information. FEC Br. at 44. But RTW's maintenance of a complete copy ***of its own signed petition*** raises no risk of corruption. Moreover, the FEC has already held political committees or other entities which facilitate conduit contributions may

retain, use, and even sell contact information they collect from contributors. *Democracy Engine*, A.O. 2022-03, at 6.

The FEC's discussion of this issue underscores why RTW may be treated as a conduit. It declares:

> If [RTW] 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. ***The result should be no different if [RTW] provides the contact information to Governor DeSantis.***

FEC Br. at 44-45 (emphasis added).

Of course the results should differ! In the FEC's hypothetical:

(i) no signatory asked RTW to provide their contact information to other candidates;

(ii) the contact information is not being provided to those other candidates as part of a petition containing a political message in which the signatories joined;

(iii) no signatory expressed an interest in associating with or receiving communications from those other candidates; and

(iv) RTW would be deciding on its own, after the fact, where signatories' contact information was being forwarded.

The FEC's hypothetical lacks the key factors which distinguish RTW's signed political petition from an ordinary mailing list.

For these reasons, RTW is entitled—at a minimum—to be treated as a conduit committee with regard to its signed political petition.

V. FECA DOES NOT PROHIBIT PROVIDING SIGNED POLITICAL PETITIONS TO INDIVIDUALS WHO ARE NOT YET CANDIDATES

FECA's contribution limits, in relevant part, unambiguously apply only to transfers to a "candidate." 52 U.S.C. § 30116(a)(1)(A). The FEC has nevertheless interpreted a regulation, 11 C.F.R. § 100.72(a), as extending contribution limits to people who are not yet candidates, but are "testing the waters" for a potential candidacy. *Wash. State Federal Comm.*, A.O. 1998-18, at *3. The district court allowed the FEC to go even further by applying contribution limits to non-candidates who have not yet even reached that "testing the waters" stage.

The FEC's brief provides no statutory authority for applying contribution limits to anyone other than a "candidate." Congress has consistently refused to amend the definition of "contribution" to include payments made to draft someone to become a candidate. *See supra* Part III. The FEC's only response is that the early stages of a campaign are important. FEC Br. at 51-52. Regardless, FECA's plain text doesn't let the FEC limit transfers to anyone other than candidates.

Alternatively, *Machinists* counsels strongly against applying contribution limits to draft petitions seeking to persuade a non-candidate—regardless of whether he is testing the waters—to run for office. *Machinists* emphasized the fundamental

distinction between: (i) "activities [to] support an existing 'candidate,'" which FECA expressly regulates, and (ii) "attempts to convince the voters or [an individual] that he would make a good 'candidate' or should become a 'candidate,'" about which FECA is silent. 655 F.2d at 396; *id*. at 392 (emphasizing the target of a draft campaign is not a "candidate... as Congress uses that term in FECA").

Machinists further noted efforts to draft a potential candidate do not carry the same potential for corruption as contributions to actual candidates. *Id*. at 392. As *Machinists* confirms, nothing in FECA's legislative history suggests Congress intended to restrict draft efforts. Thus, at the very least, this Court should construe FECA narrowly to permit the provision of signed draft petitions, including signatory contact information, to non-candidates (regardless of whether they are "testing the waters").

VI. THE FEC IS NOT ENTITLED TO CONTINUE LITIGATING THIS CASE IF RTW'S CLAIMS FAIL AS A MATTER OF LAW.

The district court's legal rulings in its denial of RTW's motion for a preliminary injunction were sufficient to defeat all of RTW's claims as a matter of law. In the event this Court's legal determinations similarly make it impossible for RTW to prevail, the proper remedy is to order dismissal of the Complaint. The FEC's arguments to the contrary are frivolous.

The FEC begins by disingenuously contending RTW is "attempt[ing] to appeal a separate interlocutory order of the district court over which this Court does not have jurisdiction." FEC Br. at 53. Instead, as RTW has repeatedly explained, this Court has jurisdiction to order dismissal of a complaint in an interlocutory appeal from a district court order concerning a preliminary injunction when the plaintiff's claims fail as a matter of law. *Munaf v. Green*, 553 U.S. 674, 691 (2008); *Ark. Dairy Coop. Ass'n v. USDA*, 573 F.3d 815, 821 (D.C. Cir. 2009). The FEC ignores these binding precedents. FEC Br. at 53-56. Dismissal would simplify the case's current bifurcated posture and prevent pointless discovery and futile trial court proceedings.

The FEC stubbornly insists, however, on its supposed entitlement to take discovery. FEC Br. at 55-56. It never explains why the discovery it identifies would be necessary if RTW's claims fail as a matter of law, or how any evidence adduced could make judgment in its favor inappropriate. The FEC also warns dismissal is problematic because, "if [RTW] is successful," it could "permanently alter federal campaign finance law." FEC Br. at 54. But RTW seeks dismissal only if it is ***not successful*** here, in which case campaign finance law would remain unchanged. This case turns on pure questions of law; if the Complaint fails as a matter of law, dismissal is warranted.

CONCLUSION

RTW respectfully asks this Court to grant its requested relief.

Respectfully submitted,

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