ORAL ARGUMENT PREVIOUSLY SCHEDULED FOR MARCH 18, 2024

READY TO WIN, *Plaintiff-Appellant*, v. FEDERAL ELECTION COMMISSION, *Defendant-Appellee*.	)	No. 23-5161 EMERGENCY MOTION

PLAINTIFF-APPELLENT READY TO WIN'S EMERGENCY MOTION TO RECALL MANDATE AND/OR FOR RECONSIDERATION OF DISMISSAL DUE TO MOOTNESS

Plaintiff-Appellant Ready to Win ("RTW") respectfully moves that this Court recall the mandate in this case and reconsider its order of Wednesday, March 6, 2024, dismissing this appeal. This case was dismissed, and immediate issuance of the mandate ordered, even though:

1. Defendant-Appellee Federal Election Commission ("FEC") did not file a renewed motion to dismiss this case. *Cf.* FEC's Partial Mot. to Dismiss, Doc. #2014480 (Aug. 28, 2023).

2. This Court neither requested RTW file a separate response to the FEC's February 2, 2024, Suggestion of Mootness (a type of filing not addressed in this Court's rules), *see* FEC, Notice and Suggestion of Mootness, Doc. #2038712 (Feb. 2, 2024), nor issued an order to show cause directing RTW to respond.

3. ***RTW fully responded to all of the FEC's arguments concerning alleged mootness at the outset of the Reply Brief it filed five days after the FEC's Suggestion of Mootness***, making those arguments part of the record on appeal before this Court. *See* RTW Reply Brief, Doc #2039235, at 3-7 (Feb. 7, 2024) (explaining why Governor DeSantis' suspension of his campaign does not moot RTW's claims).

4. RTW reasonably believed any remaining concerns this Court may have about justiciability would be addressed at the March 18, 2024, oral argument, which had already been scheduled.

5. This Court previously ruled on October 31, 2023, that it would carry with the case the separate jurisdictional objections the FEC had raised earlier and allow the merits panel to resolve them. *See* Order, Doc. #2024570 (Oct. 31, 2023) (per curiam).

6. RTW's claims have not, in fact, become moot.

7. Even if RTW's claims have become moot, they are capable of repetition yet evading review.

8. D.C. Circuit rules require the mandate ordinarily issue "7 days after the time for filing a petition for rehearing or a petition for rehearing en banc . . . ." D.C. Cir. R. 41(a)(1).

In short, this Court dismissed this case and immediately issued the mandate without ***either*** addressing the justiciability arguments RTW presented to this Court

in its Reply Brief filed five days after the FEC's Suggestion of Mootness, ***or*** giving RTW notice of its intended actions and providing RTW an opportunity to draw the Court's attention to its counterarguments. Particularly since: (i) RTW had presented its justiciability arguments to this Court shortly after the FEC submitted its Suggestion of Mootness, (ii) D.C. Circuit rules do not require a separate filing in response to any such "Suggestion," and (iii) RTW simply wished to avoid burdening the Court with a duplicative filing, this Court should not dismiss its appeal for mootness without considering the justiciability issue on the merits.

The FEC does not contend it is now legal for Plaintiff Ready to Win ("RTW") to give Governor DeSantis its signed political petition, including signatories' contact information, which expressly encourages Governor DeSantis to become and remain a presidential candidate in the 2024 election. RTW hopes the petition could induce him to resume actively campaigning, particularly with Governor Nikki Haley's recent suspension of her campaign. And RTW seeks to compile a similar petition for Governor DeSantis and present it to him, with signatories' contact information, in the 2028 presidential election cycle. Thus, the FEC seeks to simultaneously chill RTW from engaging in its intended course of conduct while foreclosing judicial review of its unconstitutional, illegal, arbitrary, and capricious advisory opinion. This case is far from moot, and in any event is capable of repetition yet evading review in the next presidential election cycle.

As RTW explained in its Reply Brief, this case remains fully justiciable for three reasons. ***First***, despite Governor DeSantis' suspension of his campaign, federal limits on contributions to candidates remain directly applicable to him. ***Second***, even assuming Governor DeSantis no longer qualifies as a "candidate," the district court has held the provision of RTW's signed political petition with signatories' contact information to him would automatically trigger either "testing-the-waters" status, 11 C.F.R. § 100.72(a), or "candidate" status, 52 U.S.C. § 30101(2)(A), for him, thereby causing the petition to exceed candidate contribution limits. ***Finally***, even if RTW's claim is moot with regard to this presidential election, the matter is capable of repetition yet evading review because RTW remains Ready for Ron and reasonably intends to resume its petition-gathering efforts in the next presidential election cycle.

I. GOVERNOR DESANTIS REMAINS SUBJECT TO LIMITS ON CONTRIBUTIONS TO CANDIDATES

Governor DeSantis remains a "candidate" for purposes of the Federal Election Campaign Act ("FECA"), or otherwise remains subject to limits on contributions to "candidates," for several reasons. ***First***, Governor DeSantis continues to satisfy FECA's definition of "candidate" since he received more than $5,000 in contributions for the 2024 presidential election and has not returned all of those funds. 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 the campaign should certain developments occur concerning Donald Trump's health or numerous pending trials. *Cf. Ross Perot Re-Enters Presidential Race*, L.A. TIMES (Oct. 10, 1992).[1] RTW's signed political petition could be a key factor persuading him to do so. ***Fourth***, Governor DeSantis quite literally remains a candidate insofar as his name will appear on the ballot in dozens of presidential preference primaries to come over the upcoming months and voters remain legally free to choose him. *See* Naomi Lim, *DeSantis Qualifies for GOP Primary in 36 States and Territories*, WASH. EXAMINER (Jan. 6, 2024).[2]

Finally, and perhaps most importantly, FEC regulations continue to recognize a person as a "candidate" in a particular election—and subjects that person to contribution limits for that election—even after that election occurs (regardless of whether they win or lose). 11 C.F.R. § 110.1(b)(3)(iii)(C). This provision states, "***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." *Id.*

[1] https://www.latimes.com/archives/la-xpm-1992-10-10-me-383-story.html.

[2] https://www.washingtonexaminer.com/news/2788696/desantis-qualifies-for-gop-primary-ballot-in-36-states-and-territories/.

(emphasis added). In other words, FEC regulations continue to recognize and treat a person as a candidate in a particular election even after it becomes literally impossible to win that election and they have stopped campaigning in it—at least for purposes of limits on contributions to candidates.

Here, the FEC does not contend Governor DeSantis may now accept transfers in connection with the 2024 election without regard to FECA's limits on contributions to candidates. Nor does the FEC ever declare RTW may provide its signed political petition, including signatories' contact information, to Governor DeSantis to induce him to continue or resume his candidacy in the 2024 election. To the contrary, limits on contributions to candidates continue to apply to Governor DeSantis, and he remains a "candidate" for FECA purposes, regardless of whether he chooses to actively campaign or has even endorsed another candidate. Thus, this case is not moot.

II. EVEN IF GOVERNOR DESANTIS IS NOT A CANDIDATE, RTW IS STILL NOT FREE TO GIVE ITS SIGNED PETITION TO HIM BASED ON THE DISTRICT COURT'S RULING AND FEC'S ADVISORY OPINION

Even if Governor DeSantis were no longer a candidate in the 2024 election, both the FEC's arguments and the district court's ruling would still bar RTW from giving him its signed political petition, including signatories' contact information.

RTW brought this case to vindicate its right to provide its petition to Governor DeSantis during three different time periods:

(i) ***Pre-Testing-the-Waters Phase*** (i.e., most people)—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 Phase***—any period in which he is "testing the waters" under 11 C.F.R. § 100.72(a), but not a "candidate" 52 U.S.C. § 30101(2);

(iii) ***Candidacy Phase***—the period after Governor DeSantis qualifies as a "candidate" under 52 U.S.C. § 30101(2).

If Governor DeSantis is no longer a candidate, then he necessarily—as a matter of law—is either "testing the waters" or has returned to a "pre-testing-the-waters" state (or whatever alternate terminology this Court chooses to adopt for that concept). In either case, both the FEC's failure to issue a favorable advisory opinion as well as the district court's ruling would prohibit RTW from providing its signed political petition, including signatories' contact information, to him.

On the one hand, the FEC's "testing the waters" regulation subjects people who are considering a potential candidacy to FECA's limits on contributions to candidates. 11 C.F.R. § 100.72(a); *Wash. State Federal Comm.*, A.O. 1998-18, at *3 (Oct. 9, 1998). Both the FEC's advisory opinion and the district court concluded

RTW may not provide its signed political petition to Governor DeSantis while he is testing the waters. The FEC advisory opinion concluded:

> [RTW's] proposal to provide the signatories' contact information to Governor DeSantis after he begins testing the waters for a federal candidacy, should he do so, is contrary to the Commission's regulation at 11 C.F.R. § 100.72(a). . . . [I]f Governor DeSantis were to begin testing the waters for a potential federal candidacy . . . [RTW] would not be able to provide [the signed petition] to Governor DeSantis without charge.

A-177 to A-178 (Advisory Opinion). Echoing this, the district court likewise declared, "RFR may not provide the [signed political petition] to Governor DeSantis if he is testing the waters" because § 100.72(a) "requires that transfers [during that period] comply with the Act's contribution limits." A-316 (District Court Ruling).

On the other hand, if Governor DeSantis is neither a candidate nor testing the waters, then RTW ***still*** remains without legal protection to provide its signed political petition to him to persuade him to resume campaigning. The FEC's advisory opinion wrongfully deprives RTW of any safe-harbor status for such activities, 52 U.S.C. § 30108(c)(2), by failing to address whether RTW may provide its signed petition to Governor DeSantis while he is neither a candidate nor testing the waters. A-180 (Advisory Opinion) ("The Commission could not approve a response by the required four affirmative votes as to whether [RTW] may provide the contact information from its petition to Governor DeSantis when Governor DeSantis is neither testing the waters nor a federal candidate."); *see also* A-285 to A-286 (District Court Ruling)

("[T]he [FEC's] failure to issue an [advisory] opinion because of disagreement among commissioners deprive[s] the requester of the protection against any subsequent enforcement." (citing *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010))).

Most importantly, the district court affirmatively held RTW "may not provide its [signed political petition] to Governor DeSantis," even if he is not testing the waters. A-316 to A-317 (District Court Ruling). It elaborated:

> [A]lthough the Commission did not entirely resolve the question, the Court concludes that it makes no difference whether Governor DeSantis has declared his candidacy, whether he has invoked the regulatory exception for "testing the waters," or ***whether he has done neither*** at the point at which he accepts [RTW's] contact list. By accepting the list, he would necessarily commit himself to either a candidacy or testing the waters, both of which require contributors (including in-kind contributors) to comply with FECA's contribution limitations.

A-280 to A-281 (District Court Ruling) (emphasis added); *see also* A-319 (District Court Ruling) ("There is therefore ***no scenario*** in which Governor DeSantis could accept the contact list without triggering FECA's limitations.") (emphasis added).

Thus, even if Governor DeSantis is neither a candidate nor testing the waters, RTW remains prohibited from giving him its petition to persuade him to resume campaigning. According to the district court's erroneous ruling, merely accepting RTW's signed political petition would automatically trigger either testing-the-waters status or candidacy status for Governor DeSantis, thereby subjecting him to contribution limits. RTW's claims in this case accordingly remain live.

III. THESE ISSUES ARE CAPABLE OF REPETITION, YET EVADING REVIEW

Finally, even if this Court concludes RTW's claims regarding the 2024 election cycle are moot, these issues are capable of repetition, yet evading review. "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); *accord Fulani v. Brady*, 935 F.2d 1324, 1336 (D.C. Cir. 1991). Indeed, this Court has held, "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) (emphasis added). All that is necessary is a "reasonable expectation" the same issues will recur. *LaRouche*, 152 F.3d at 978 (quoting *Spencer v. Kenma*, 118 S. Ct. 978, 988 (1998)). *Holmes v. FEC*, 823 F.3d 69, 71 n.3 (D.C. Cir. 2016), expressly applied the capable-of-repetition exception to a constitutional challenge to contribution limits.

As far back as its Complaint, RTW alleged:

> [RTW] is reasonably likely to engage in similar petition campaigns to draft individuals, potentially including Governor DeSantis, to run for federal office in future election cycles. It is reasonably likely to seek to provide such petitions, supplements, and/or updates to the petitions to potential candidates before they begin testing the waters, while they are testing the waters, and after they become candidates. It is reasonably likely to seek to fund such efforts, in whole or in part, through its non-contribution *Carey* account.

A-39.

RTW believes the country will be Ready for Ron in 2028. It reasonably intends to again compile a signed political petition, including signatories' contact information, to provide to Governor DeSantis to encourage him to become and remain a candidate for President in 2028 when that election cycle commences. RTW does not wish to either limit the number of signatories to that petition or exclude signatories' contact information. Accordingly, this case is capable of repetition yet evading review. *LaRouche*, 152 F.3d at 978; *Holmes*, 823 F.3d at 71 n.3. The FEC's concerns about RTW's purported lack of "commit[ment] to supporting Governor DeSantis in a future presidential contest," FEC Notice at 4, are baseless.

REQUEST FOR EXPEDITED CONSIDERATION

Pursuant to D.C. Cir. L.R. 27(f), RTW respectfully requests expedited consideration of this motion. This Court has ordered immediate issuance of the mandate without the standard waiting period, and minutes later the district court immediately *sua sponte* dismissed this case due to mootness. Without some form of expedited relief or ruling from this Court concerning its mootness determination, RTW has no apparent means of challenging the district court's dismissal and attempting to continue litigating this matter before either court.

CONCLUSION

For these reasons, this Court should consider this motion on an expedited basis, recall the mandate, reconsider its dismissal of this appeal due to mootness, and grant other appropriate relief.

Respectfully submitted,

March 6, 2024

_/s/ Dan Backer_____
Dan Backer, Esq. (D.C. Bar No. 996641)
CHALMERS, ADAMS, BACKER
& KAUFMAN LLC
441 N. Lee Street, Suite 300
Alexandria, VA 22314
(202) 210-5431
dbacker@ChalmersAdams.com

Attorney for Plaintiff-Appellant
Ready to Win