Case No. 12-5134

In the

United States Court of Appeals
For the D.C. Circuit

Ralph Nader,

Appellant,

v.

Federal Election Commission,

Appellee.

On Appeal from the United States District Court
For the District of Columbia
Case No 1:10-cv-00989-RCL
Honorable Royce C. Lamberth Presiding

BRIEF OF APPELLANT

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August 10, 2012

APPELLANT'S CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Appellant Ralph Nader hereby submits the following Certificate as to Parties, Rulings and Related Cases.

(A) Parties and Amici. Ralph Nader was the Plaintiff in the District Court and is the Appellant in this Court. The Federal Election Commission was the Defendant in the District Court and is the Appellee in this Court. There were no *amici curiae* or intervenors in the District Court, and there are none in this Court.

(B) Rulings Under Review. Appellant appeals the Opinion and Order of the United States District Court for the District of Columbia (Lamberth, CJ.) dated November 9, 2011, granting Appellee's motion for summary judgment, which is reported at *Nader v. FEC*, 823 F. Supp. 2d 53 (D.D.C. 2011), and the District Court's April 12, 2012 Order denying Appellant's motion to alter or amend its November 9, 2011 Order, which is reported at *Nader v. FEC*, 2012 WL 1216242 (D.D.C. Apr. 12, 2012).

(C) Related Cases. This case has not previously been before this Court or any other court, and there are no related cases under D.C. Cir. R. 28(a)(1)(C).

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GLOSSARY

ACT: America Coming Together

EPS: Enforcement Priority System

FEC: Federal Election Commission

FECA: Federal Election Campaign Act of 1971 (as amended)

IRS: Internal Revenue Service

SEIU: Service Employees International Union

JURISDICTIONAL STATEMENT

Plaintiff Ralph Nader appeals from a final judgment entered by the United States District Court for the District of Columbia on November 9, 2011, which granted summary judgment to Defendant Federal Election Commission, and from the District Court's April 12, 2012 order denying Plaintiff's timely filed motion to alter or amend the District Court's final judgment pursuant to Fed. R. Civ. P. 59(e).

Plaintiff commenced this action in the District Court on June 11, 2010, to seek review of the Federal Election Commission's dismissal of Plaintiff's Administrative Complaint filed under the Federal Election Campaign Act of 1971. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, as an action arising under the laws of the United States, and pursuant to 2 U.S.C. § 437g, which permits a party aggrieved by the agency's dismissal of an administrative complaint to seek review in the United States District Court for the District of Columbia.

Plaintiff's Notice of Appeal was filed April 24, 2012. This appeal is timely pursuant to Fed. R. App. P. 4(a). The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Federal Election Commission dismissed the Administrative Complaint in this case without serving it on a majority of the respondent parties who committed the alleged violations, despite its general counsel's conclusion that the claims against those parties rely on a valid legal theory, and despite its designation of this as a matter of the highest enforcement priority. The questions presented for review are as follows:

> Whether the Federal Election Commission acted contrary to law by dismissing the Administrative Complaint without serving a majority of the respondent parties who committed the alleged violations, where the Agency's failure to serve such parties directly violated the mandatory terms of the Federal Elections Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, as well as its own regulations?
>
> Whether the Federal Election Commission acted contrary to law by dismissing the Administrative Complaint, without opening an investigation, where the Administrative Complaint provides reason to believe the respondent parties may have violated the Federal Elections Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*?

STATEMENT OF THE CASE

This case arises from a complex set of facts, but the legal issues raised on this appeal are simple. In May 2008, consumer advocate and 2004 independent presidential candidate Ralph Nader ("the Candidate") filed his Administrative Complaint with the Federal Election Commission ("FEC" or "the Agency"). Appendix ("App.") at 39-142. The Administrative Complaint presented the FEC with compelling evidence that the respondent parties ("Respondents") named therein made millions of dollars in contributions and expenditures, in violation of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), in an effort to deny Americans the choice of voting for the Candidate in the 2004 general election. In many instances, these violations are itemized by transaction. *See*, *e.g.*, App. at 52, 55, 57. Further, to ease the burden and expense of the FEC's investigation, the Administrative Complaint also included extensive evidentiary exhibits documenting its allegations. App. at 139-142 (index of exhibits). Such evidence not only included Internal Revenue Service ("IRS") filings, FEC filings, court filings, media reports and other public records, but also Respondents' own email records, App. at 45-46, which demonstrate that, contrary to their claims during the 2004 presidential election, they coordinated and directly participated in at least some of the alleged conduct.

Upon receiving the Candidate's Administrative Complaint, the FEC assigned it a score of "70/Tier: 1," App. at 235, designating it as a matter of the highest importance under the Agency's proprietary Enforcement Priority System ("EPS"). *See* Guidebook for Complainants and Respondents on the FEC Enforcement Process, 11 (explaining that EPS uses "objective criteria" to evaluate complaints, and generally assigns "high priority" matters for enforcement) (available at www.fec.gov/em/respondent_guide.pdf). The Agency's general counsel also concluded that the Administrative Complaint relies on "a viable theory, namely that spending by corporate law firms to remove a candidate from the ballot may constitute prohibited contributions." App. at 243. Nevertheless, the FEC declined to serve the Administrative Complaint on a single law firm Respondent, or even to notify them it had been filed. Compounding its error, the FEC then relied on its supposed lack of information regarding those Respondents to find "no reason to believe" the few Respondents it did serve violated the Act.

As the District Court recognized, the FEC directly violated the express terms of FECA and its own regulations by failing to serve the Administrative Complaint on a majority of the Respondents responsible for the alleged violations, App. at 24, and by failing to commence the mandatory investigatory process against them. The District Court nonetheless approved the FEC's unlawful dismissal of this

matter as "reasonable" – albeit with reservations as to the Agency's lack of "clarity" and the "drift" between its inaction and the Act's mandatory requirements – by concluding that the FEC's failure to serve the Respondents was "harmless error." App. at 24-27. The cases cited by the District Court do not support this conclusion.

The issue raised on this appeal, therefore, is simply whether the FEC may violate the Act and its own regulations, and willfully refuse to commence an enforcement action, by deliberately failing to serve the respondent parties, where the Agency concludes the claims raised are legally valid and designates the matter as one of its highest enforcement priorities. For the reasons set forth below, the FEC cannot. Further, if the District Court's Opinion approving the FEC's disposition of this case remains undisturbed, it will set a dangerous precedent, by establishing that the FEC can willfully refuse to enforce the Act in any future case, simply by committing the "harmless error" of not serving the respondent parties. The District Court should therefore be reversed, and the FEC's dismissal of the Administrative Complaint should be set aside.

STATEMENT OF FACTS

The Administrative Complaint alleges that Respondents are members, allied entities and/or affiliates of the Democratic Party who conspired to prevent Ralph

Nader and Peter Miguel Camejo ("Nader-Camejo") from running as independent candidates for President and Vice President of the United States, respectively, during the 2004 General Election. App. at 40. Respondents' purpose was to help Democratic candidates John Kerry and John Edwards win the election by denying voters the choice of voting for a competing candidacy. App. at 40. To achieve this purpose, Respondents filed 24 complaints and/or intervened in legal or administrative proceedings to challenge Nader-Camejo's nomination papers in 18 states, including Arizona, Arkansas, Colorado, Florida, Illinois, Iowa, Maine, Michigan, Mississippi, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Washington, West Virginia and Wisconsin. App. at 40.

Respondents initiated these legal proceedings with the knowledge and consent of [then-DNC Chair] Terry McAuliffe and John Kerry, and coordinated their efforts with the DNC, the Kerry-Edwards Campaign and at least 18 state or local Democratic Parties. App. at 40-41. Respondents repeatedly confirmed that the purpose of their litigation was to benefit the Kerry-Edwards Campaign by draining the Nader-Camejo Campaign of resources and forcing Nader-Camejo from the race, thereby denying voters the choice of voting for them. App. at 41.

In addition to filing 24 state court complaints to challenge Nader-Camejo's nomination papers, Respondents launched a nationwide communications campaign

intended to convince Nader-Camejo supporters to vote for Kerry-Edwards. Respondents hired political consultants and pollsters, produced advertisements and press materials, and paid to broadcast these advertisements on television, radio and other media outlets throughout the country. Respondents also established two websites to publicize their efforts, www.thenaderfactor.com and www.upforvictory.com. App. at 46-47.

In the course of such conduct, the Administrative Complaint alleges, Respondents made millions of dollars in unlawful campaign contributions and expenditures, in violation of numerous limitations and prohibitions set forth in FECA. App. at 41-44. Respondents committed further violations by establishing several Section 527 organizations to coordinate and finance their opposition to the Nader-Camejo 2004 independent presidential candidacy, which they failed to register as political committees, as FECA required them to do. App. at 46-58. These allegations are detailed and specific, App. 39-138, and thoroughly documented by reference to 73 exhibits, including IRS filings, FEC filings, court records, Respondents' own email records and documents, and numerous other sources available in the public domain, App. 139-142104, all of which the FEC could have verified, had the Agency taken the steps required by law in response to the filing of a complaint.

SUMMARY OF ARGUMENT

This case was wrongly decided because the District Court committed two basic legal errors. First, the District Court concluded that the FEC's failure to serve the Administrative Complaint as required by law was "harmless error." That is incorrect. As the District Court conceded, the FEC "clearly violated" the Act and its own regulations by failing to serve a majority of Respondents who committed the alleged violations. The FEC then relied on its supposed lack of information regarding those Respondents to find "no reason to believe" the Respondents it did serve violated the Act. The Agency's dismissal of the Administrative Complaint is therefore contrary to law, because it relies on an impermissible interpretation of the Act, and it should be set aside on that basis.

Second, the District Court fundamentally misapprehended the issue to be decided in this case. The issue is not whether the Administrative Complaint provides the FEC with "probable cause" for concluding the Respondents violated the Act, as the District Court supposed. Rather, the issue is only whether the Administrative Complaint provides the FEC with "reason to believe" the Respondents may have violated the Act, such that the Agency (after serving the Respondents) was required to commence the mandatory investigative process. Only thereafter does the Act permit the FEC to decide whether the evidence

supports a finding that the Respondents actually did or did not violate the Act. The District Court nevertheless granted summary judgment to the FEC based on its conclusion that the Administrative Complaint does not conclusively establish certain facts. This was error. Both the District Court and the FEC applied an improper evidentiary burden, by demanding what amounts to actual proof that Respondents committed the alleged violations. At the initial stage of the enforcement process, however, the issue is only whether the Administrative Complaint provides legal justification for the FEC to open an investigation – and it surely does that.

STANDARD OF REVIEW

This Court reviews the District Court's decision granting summary judgment to the FEC de novo. *See Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (citation omitted). The Court should set aside the Agency's dismissal of an administrative complaint where such dismissal is "contrary to law." *Id.* (quoting 2 U.S.C. §437g(a)(8)). A dismissal is contrary to law if "(1) the FEC dismissed the complaint as a result of an impermissible interpretation of the Act, or (2) if the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (internal citation omitted).

ARGUMENT

I. The FEC's Dismissal of the Administrative Complaint Is Contrary to Law Because It Relies on an Impermissible Interpretation of the Act.

The FEC failed to take the most rudimentary steps mandated by the Act and its own regulations in response to the filing of the Candidate's Administrative Complaint. Specifically, as the FEC admits, it did not even notify a majority of Respondents who committed the alleged violations that a complaint had been filed against them – much less did it serve those Respondents or seek their response.[1] Instead, the FEC dismissed this matter, nearly two years after it was commenced, without conducting any investigation. This was contrary to law.

A. The FEC's Failure to Serve the Administrative Complaint Violates the Plain Language of the Act and the FEC's Own Regulations.

The FEC's failure to serve Respondents who committed alleged violations was contrary to law because it directly violates the unambiguous language of the Act. "Within 5 days after receipt of a complaint," the Act states, "the Commission shall notify, in writing, any person alleged in the complaint to have committed…a violation." 2 U.S.C. § 437g(a)(1)). Not surprisingly, given its use of the term

[1] The FEC failed to notify or serve the following Respondents named in the Administrative Complaint: Terry McAuliffe; John Edwards; the 18 state Democratic Parties that filed or materially supported complaints challenging Nader-Camejo 2004 nomination petitions; the 95 lawyers and 53 law firms that filed or materially supported such complaints; Service Employees International Union; and the individual officers, employees or agents of the Section 527 Respondents. App. 39-40, 58-81 00020-43. The FEC notified and served only the following Respondents: Americans for Jobs; National Progress Fund; The Ballot Project, Inc.; Uniting People for Victory; America Coming Together ("ACT"); the DNC; and Kerry-Edwards 2004, Inc.

"shall," this Court has construed the foregoing provision to be mandatory. *See American Fed. of Labor v. FEC ("American Fed. of Labor II")*, 333 F.3d 168, 170 (D.C. Cir. 2003) ("When the [FEC] receives a sworn complaint alleging that an election law violation has occurred, it must first notify the alleged violator and give it an opportunity to respond to the accusation"). Thereafter, the Agency reviews "the complaint and any responses filed thereto to determine whether there is 'reason to believe' that a violation of FECA has occurred or is about to occur." *American Fed. of Labor v. FEC ("American Fed. of Labor I")*, 177 F. Supp. 2d 48, 52 (D.D.C. 2001) (quoting 2 U.S.C. § 437g(a)(2)); *see also Hagelin*, 411 F.3d at 239.

The FEC's failure to serve Respondents in this case also violates the Agency's own regulations. *See* 11 C.F.R. § 111.5(a) (specifying that FEC "shall within five (5) days after receipt notify each respondent that the complaint has been filed…and enclose a copy of the complaint"). The only exception to this requirement arises where an initial review reveals that a complaint is not in "substantial compliance with the technical requirements" set forth in the FEC's regulations. *Id.* (citing 11 C.F.R. § 111.4). Even in such cases, however, the FEC must "notify the complainant and any person(s) or entity(ies) identified … as respondents" that no action will be taken. 11 C.F.R. § 111.5(b). Further, "a copy of

the complaint shall be enclosed" with such notice. *Id.* (emphasis added).

The FEC does not contend that it failed to serve any Respondent in this case based on a technical defect in the Administrative Complaint, nor did the FEC notify the Candidate and the Respondents that it was taking no action due to such a defect, as it would have been required to do. *See id.* Instead, the FEC admits that it failed to serve the Administrative Complaint upon certain Respondents "until a few months after it was filed due to an administrative oversight," and further admits that it deliberately refused to "treat" many other named Respondents "as respondents required to respond to the complaint." FEC Answer ¶ 2. Because such delay and deliberate refusal to serve the Administrative Complaint "violates the plain meaning" of the Act and the FEC's own regulations, it is "arbitrary, capricious and contrary to law." *American Fed. of Labor I*, 177 F. Supp. 2d at 59; *see Everett v. United States*, 158 F.3d 1364, 1367 (D.C. Cir. 1998) (agency's interpretation of regulation will not prevail where inconsistent with plain terms). Therefore, the Agency's dismissal of the Administrative Complaint should be set aside, and the matter remanded with instructions that the FEC notify and serve Respondents, because the Agency's dismissal relies on an impermissible interpretation of the Act. *See Orloski*, 795 F.2d at 161

B. The District Court Erred By Concluding the FEC's Failure to Serve the Administrative Complaint as Required by Law Is Harmless Error.

The FEC's failure to serve the Administrative Complaint on a majority of Respondents who committed the alleged violations, and its failure to commence the mandatory investigative and enforcement process against these Respondents, are threshold issues in this case. The District Court does not address them, however, until the final pages of its Opinion. App. at 24. There, the District Court concedes that the Agency's deliberate refusal to notify and serve the Respondents "clearly violated" the Act, but concludes that this "clear defect" in the Agency's action was "harmless error." App at 24. That is incorrect.

An FEC enforcement action cannot proceed, regardless of its merits, if the Agency never serves the administrative complaint on the respondent parties. The harm resulting from the FEC's error, therefore, is that the Agency was statutorily precluded from making a "reason to believe" finding against any Respondent it failed to serve. *See* 2 U.S.C. § 437g(a)(1). Simply put, because the FEC never took the statutorily mandated steps necessary to determine whether these Respondents violated the Act, it could not possibly conclude they had. Thus, while the FEC purported to make no finding as to these Respondents, App. 239-40, in fact its inaction amounts to a complete nullification of the Act's mandatory procedures for

investigation and enforcement of alleged violations.

The FEC's unlawful dismissal of the Administrative Complaint is especially harmful in this case, because the Agency's general counsel concluded that the claims against the Respondents it did not serve rely on a "viable theory." App. at 243. The FEC also assigned the Administrative Complaint a score of "70/Tier: 1," designating it as a matter of the highest importance under the Agency's proprietary Enforcement Priority System. App. at 235. The FEC's failure to serve the Administrative Complaint as required by law thus prevented it from conducting any investigation into whether the Respondents it failed to serve made millions of dollars in illegal and unreported contributions and expenditures. App. at 41-44.

The District Court concluded that this error is "harmless" based entirely on its finding that there is "no reason to believe" the Agency "would have reached a different decision" if it had served the Administrative Complaint on the Respondents. App. at 25 (citing *City of Portland, Oregon v. EPA*, 507 F.3d 706, 716 (D.C. Cir. 2007)). But the District Court's finding is unwarranted. There is no way to know what an Agency investigation will reveal before it is commenced. Moreover, a primary basis for setting aside the FEC's dismissal of an enforcement action is that "the agency's decision is not supported by substantial evidence" in the administrative record. *Hagelin*, 411 F.3d at 242. With respect to the

Respondents the FEC failed to serve, however, the Agency failed to develop any administrative record whatsoever. These Respondents were never notified the Administrative Complaint was filed, and they were never asked to respond to the allegations against them. Thus, while the District Court may be correct that the Candidate cannot demonstrate, *ex ante*, that the law firm Respondents' responses "would contain information favorable" to proving the Candidate's allegations, that is not relevant. No complainant can ever make such a showing. Instead, it is the purpose of an Agency investigation to resolve such questions. *See American Fed. of Labor II*, 333 F.3d at 170; 2 U.S.C. § 437g.

Further, *City of Portland* does not support the District Court's conclusion that the FEC's complete failure to serve an administrative complaint can be considered harmless error. In that case, a rule adopted by the Environmental Protection Agency was challenged on the ground that the available evidence permitted the adoption of a lesser requirement. *See City of Portland*, 507 F.3d at 716. Even if that were true, this Court found, the EPA's error "was harmless," because the relevant statute required adoption of "the most stringent feasible" requirement, and so the error did not impact the outcome of the case. *Id.* Here, by contrast, the FEC directly violated the relevant statute, and never commenced the mandatory procedures FECA establishes for investigating potential violations, thus

guaranteeing it would not find a violation against any Respondent it failed to serve.

The only other case cited by the District Court involves an error so minor it underscores the FEC's gross dereliction of its statutory duty here. App. at 25 (citing *FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 90 (D.D.C. 2006)). In sharp contrast with the FEC's deliberate failure to serve the Administrative Complaint on a majority of the Respondents in this case, in *Club for Growth* the FEC timely served the corporate respondent, but misidentified the individual served by his title as officer of an affiliated organization with an almost identical name. *See Club for Growth, Inc.*, 432 F. Supp. 2d at 90. Because the Agency corrected its nominal error within two weeks, and because the corporate respondent "surely had coterminous notice," regardless of the misnomer, the Court found the FEC's action to be "harmless error." *Id.* Thus, in making this finding, the Court was rejecting the claim of the respondent that the error required dismissal. *See id.* The FEC's error was harmless, the Court reasoned, because it was "immaterial" to the Agency's otherwise proper conduct of the enforcement action. *Id.* But the same cannot be said for the FEC's error in this case, because here, the Agency's error prevented it from commencing any action whatsoever with respect to the Respondents it failed to serve.

In sum, there is no precedent to support the District Court's conclusion that

the FEC's refusal to serve the Administrative Complaint as required by law constitutes harmless error. On the contrary, the District Court's Opinion announces a new rule, which will set a dangerous precedent if it is not corrected. The District Court asserts, without citing any authority, that the mandatory notice and service procedures established by Section 437g of the Act are only "for the benefit of" respondents to a complaint, and "not for [a complainant's] benefit." App. at 26. The District Court further asserts, again without citing any authority, that Respondents are "the only persons and entities who could have been prejudiced" by the FEC's failure to abide by those mandatory procedures. App. at 26. Under the District Court's reasoning, therefore, the FEC can refuse to enforce the Act in future cases simply by declining to serve the respondent parties; only they will be "prejudiced," and they surely will not complain. Because such a rule would eviscerate the Act's mandatory enforcement procedures, the District Court is in error.

II. The District Court Misidentified the Issue to Be Decided and Imposed an Improper Evidentiary Burden By Demanding That the Administrative Complaint Provide Proof That Respondents Violated the Act.

The reason the District Court incorrectly concluded that it was "harmless error" for the FEC not to serve the Administrative Complaint on the majority of Respondents is that it fundamentally misapprehended the issue to be decided in

this case. The question is not whether the Administrative Complaint contains sufficient factual support to establish that Respondents did in fact violate the Act, as the District Court assumed, but only whether it contains sufficient factual support to provide "reason to believe" they may have violated the Act. 2 U.S.C. § 437g(a)(2). As the FEC itself has clarified, "a 'reason to believe' finding indicates only that the Commission found sufficient legal justification to open an investigation." *See* Press Release, *FEC Approves Barack Obama Advisory Opinion, Clarifies Enforcement Terms* (March 1, 2007) available at http://www.fec.gov/press/press2007/20070301meeting.html (emphasis added). Thus, the Act does not permit the FEC to determine whether or not a respondent has committed a violation, by making a "probable cause" finding, until after it completes such an investigation. 2 U.S.C. § 437g(a)(3).

In evaluating the sufficiency of the allegations in the Administrative Complaint, the District Court does not dispute that, if true, they provide "reason to believe" Respondents may have violated the Act, as set forth in each count. 2 U.S.C. § 437g(a)(2). That should end the inquiry at this stage of the proceedings, because the only question to be decided is whether the FEC acted contrary to law by failing to serve the Administrative Complaint and conduct an investigation. *See id.* ("The Commission shall make an investigation of such alleged violation")

(emphasis added). Instead, however, the District Court granted summary judgment to the FEC on the ground that such allegations do not establish that Respondents did in fact violate the Act. But that is a question that cannot be determined until the FEC conducts an investigation and makes a "probable cause" finding. 2 U.S.C. § 437g(a)(3). The District Court thus imposed an improper evidentiary burden, by demanding that the Administrative Complaint satisfy the "probable cause" standard, even though the FEC never conducted an investigation pursuant to Section 437g(a)(2).

A. The District Court Erred By Affirming the FEC's Dismissal of Count I.

Count I of the Administrative Complaint alleges that at least 53 named law firm Respondents made "millions of dollars in illegal and unreported contributions and expenditures to benefit the Kerry-Edwards Campaign." App. at 129. The District Court affirmed dismissal of the claims in Count I primarily on the ground that the FEC "reasonably determined" that the "supporting facts were insufficient" to "suggest coordination" between these Respondents and the DNC and Kerry-Edwards 2004. App. at 13. But a recitation of some of the most relevant supporting facts and evidence refutes that conclusion. For example:

- On September 12, 2004, Judy Reardon, Kerry-Edwards 2004's Deputy National Director for Northern New England, sent an email to DNC official and New Hampshire Democratic Party Chair Kathleen Sullivan and

attorneys Martha Van Oot and Emily Gray Rice, with a complaint against Nader-Camejo 2004 attached, which Reardon personally drafted, and which Attorneys Van Oot and Rice filed with the New Hampshire Ballot Law Commission in Sullivan's name, App. at 87, 102;

- On September 17, 2004, DNC employee and Kerry-Edwards 2004 legal team member Caroline Adler sent DNC staffers an email with an attached document, entitled "Script for Nader Petition Signers," which provided instructions for contacting voters who signed Nader-Camejo nomination petitions, in order to prepare challenges to the petitions, App. at 86-7;

- In a hearing before the Maine Bureau of Corporations, Elections and Commissions on August 30-31, 2004, DNC official and Maine Democratic Party Chair Dorothy Melanson testified under oath that DNC officials had directed her to challenge the Nader-Camejo 2004 Maine nomination petitions, and that the DNC was paying her expenses, including attorneys' fees, App. at 86;

- Reports on file with the FEC confirm that the DNC retained not only the law firm that filed Respondents' challenge in Maine, but also the law firms that challenged Nader-Camejo nomination petitions in Mississippi, Ohio and Pennsylvania, and that the DNC reimbursed travel expenses for attorneys who challenged Nader-Camejo nomination petitions in Florida, App. at 86;

- No fewer than 10 DNC officials directly participated in proceedings challenging Nader-Camejo 2004 nomination petitions nationwide, with at least six initiating the proceedings in their own names, and the DNC also employed a full-time "Nader Coordinator," Perry Plumart, during the 2004 election, App. at 85;

- The Reed Smith Respondents claimed to be working on their challenge free of charge, but campaign finance reports on file with the FEC indicate that the DNC paid Reed Smith $136,142 in "political consulting" and "legal consulting" fees in October and November of 2004, App. at 121;

- Reed Smith's managing partner stated that firm's pro bono committee made the decision to allow firm lawyers to represent the parties who filed Respondents' Pennsylvania challenge, and to bill the case as a pro bono

matter," App. at 88 & n.92, 130 & n.172;

- Reed Smith attorneys reportedly spent at least 1,300 hours preparing Respondents' Pennsylvania challenge, which the firm billed as "charity," without charging any client, App. at 88 & n.92;

- Respondent Efrem Grail, a Reed Smith partner in charge of Respondents' Pennsylvania challenge, stated that the value of the legal services his firm "gave away" in connection with Respondents' Pennsylvania challenge is $1 million, App. at 154;

- In July 2008, a Grand Jury investigation revealed that Pennsylvania state employees had illegally prepared Respondents' Pennsylvania challenge at taxpayer expense, for the benefit of the Kerry Committee, leading the Pennsylvania Attorney General to charge 12 defendants with numerous felony counts of criminal conspiracy, theft and conflict of interest, 11 of whom were convicted or pleaded guilty, App. at 143-157;

- Sworn testimony in the Pennsylvania Attorney General's criminal prosecution identified Reed Smith by name, and Reed Smith partner Efrem Grail as responsible for "coordinating" the state employees' effort to prepare Respondents' Pennsylvania challenge, App. at 161-62.

Although by no means exhaustive, this list is more than sufficient to demonstrate that, contrary to the District Court's conclusion, the record contains ample supporting facts to "suggest" that both Kerry-Edwards 2004 and the DNC not only "coordinated," but also directed and actively participated in Respondents' nationwide effort to challenge Nader-Camejo 2004 nomination petitions. Indeed, the record contains compelling evidence, including Respondents' own email records, sworn admissions, campaign finance reports, and court documents demonstrating their participation in the alleged conduct.

The language the District Court adopts in its Opinion demonstrates that it imposed an improper evidentiary burden, by demanding facts amounting to actual proof that Respondents violated the Act. In particular, the District Court found that the Administrative Complaint fails to "establish[] coordination" between Respondent Reed Smith and the DNC and Kerry-Edwards 2004. App. at 14. But the issue is only whether the facts alleged provide "reason to believe" these Respondents may have coordinated with one another. 2 U.S.C. § 437g(a)(2). And they do. For example, like the FEC, the District Court finds "no evidence of coordination between Reed Smith and its attorneys and the Kerry-Edwards Campaign with regard to the Pennsylvania ballot-access litigation," App. at 14, but fails to address the fact that the DNC retained Reed Smith during the 2004 presidential election. App. at 121. Further, the District Court misconstrues the factual record by asserting that Respondent John Kerry "may have retained that firm's services in the past," App. at 11, when in fact, the record discloses that "John Kerry himself is an important client of Reed Smith," who retained the firm in at least one other matter arising out of the 2004 presidential election. App. at 87-88 & n.91, 122 (emphasis added). These facts alone establish a prima facie basis for a finding of coordination among these parties. Therefore, contrary to the District Court's conclusion, App. at 11, it was manifestly unreasonable for the FEC

to conclude otherwise – without bothering to serve Reed Smith – because it is the purpose of an investigation to resolve such factual questions. 2 U.S.C. § 437g(a)(2).

The District Court similarly disregards or misconstrues evidence relating to the Grand Jury investigation of Respondents' Pennsylvania challenge. For example, the District Court finds it "reasonable" for the FEC to conclude that the Grand Jury made "no findings as to the Kerry Committee or Reed Smith," App. at 13, but disregards the Grand Jury's findings that the Pennsylvania challenge was expressly intended to benefit the Kerry-Edwards Campaign. App. 150-53. The District Court further disregards the testimony identifying Reed Smith by name, and in particular the testimony that Reed Smith partner Efrem Grail "was coordinating the effort" by state employees to prepare Respondents' Pennsylvania challenge at taxpayer expense. App. 161-62. Again, such evidence establishes a prima facie basis for concluding that Reed Smith may have made unlawful and unreported contributions and expenditures for the benefit of Kerry-Edwards 2004, but the District Court, like the FEC, failed to address it.

More generally, the District Court asserts that there is a "yawning gap" between the allegations in the Administrative Complaint and the conclusion that the Respondent law firms – who were never asked to respond to the allegations –

"were making unreported expenditures, coordinated with the DNC or the Kerry-Edwards Campaign." App. at 11. At most, the District Court reasons, the Administrative Complaint alleges "parallel conduct and shared goals, not coordination." App. at 14. That is not even an accurate statement of the record. It disregards, for example, the fact that the DNC retained several other law firm Respondents, in addition to Reed Smith, who filed challenges in states other than Pennsylvania. App. at 86. Stronger evidence of coordination between the DNC and the Respondent law firms is hard to imagine.

To the extent that the District Court addresses such evidence, it confuses the issue by asserting that the DNC's payment of the Respondent law firms undermines the claim that the firms made unreported contributions. App. at 16. But the relevance of the payments is that they establish a prima facie basis for concluding that Respondents coordinated with one another – not that the payments themselves were necessarily illegal. The District Court concedes as much in its discussion of Dorothy Melanson's sworn testimony, in which she admits that the DNC directed her to file Respondents' Maine challenge and retained her attorneys, but suggests that Melanson also "gives testimony" to the opposite effect. App. at 16. But Melanson does not give "testimony" to the opposite effect – she makes a comment to a newspaper. Regardless, the FEC was obligated to resolve this factual

dispute by serving the relevant Respondents and conducting an investigation. 2 U.S.C. § 437g(a)(2). Had it done so, it would have discovered that its own records, which are included in the factual record in this very case, resolve the conflict in favor of a finding of coordination, by proving that the DNC did in fact retain Melanson's attorneys. App. at 99.

Yet another example of the improper evidentiary burden the District Court imposed comes in its discussion of the email from Kerry-Edwards 2004 official Judy Reardon to the attorneys who filed Respondents' New Hampshire challenge. App. at 15. Attached to Reardon's email is a draft version of the complaint that the law firm Respondent Orr & Reno filed, which Reardon authored. The Court does not dispute that this email demonstrates coordination between Kerry-Edwards 2004 and Orr & Reno, but faults the allegations for failing to specify whether the attorneys were "compensated for this specific work or even how much work they performed." App. at 15. No private complainant has access to the billing records of a law firm, however – instead, that is precisely the sort of information the FEC could obtain by conducting the investigation required by the Act. 2 U.S.C. § 437g(a)(2).

Here, then, is the crux of the District Court's error with respect to Count I. The Court contends that the law firm Respondents would not "necessarily"

produce their billing records if the FEC had served them as it was required by law to do, and "even if they did...there is no reason to think that these responses would contain information favorable to [the Candidate]." App. at 25. But a complainant need not include evidence "necessarily" establishing that an investigation will lead to a conclusion that the respondent parties violated the Act. Instead, the Act expressly contemplates that enforcement actions might be dismissed, following a "reason to believe" finding and an investigation, because the FEC finds no "probable cause" for concluding the respondent parties violated the Act. 2 U.S.C. § 437g(a)(3). The District Court's demand that the Candidate submit evidence strong enough to preclude the possibility of such a finding, in the absence of any investigation whatsoever, was error.

B. The District Court Erred By Affirming the FEC's Dismissal of Count II.

The District Court's errors in affirming the FEC's dismissal of Count II mirror its errors in affirming dismissal of Count I. Count II alleges that Respondents Service Employees International Union ("SEIU") and America Coming Together ("ACT") made unlawful and unreported contributions to the DNC in connection with Respondents' Oregon challenge. Without serving the Administrative Complaint on SEIU, the FEC concluded that "the available information" does not support a finding that these Respondents coordinated their

efforts with the DNC and Kerry-Edwards 2004, and the District Court found that determination to be "entitled to deference." App. at 18.

As an initial matter, the FEC's failure to serve SEIU, in violation of the plain language of the Act and its own regulations, is precisely the sort of agency action that is not entitled to deference. *See American Fed. of Labor I*, 177 F. Supp. 2d at 55. But even if it were, the District Court once again defers to the FEC's resolution of factual questions, which the FEC made without conducting an investigation. The FEC concluded, for example, that there is no basis for inferring coordination between SEIU and the DNC, even though Anna Burger is an official in both organizations, and the District Court found that determination to be "not clearly erroneous." App. at 18-19. That determination was clearly erroneous, however – Ms. Burger very well might have acted as the liaison between her two organizations, which is a factual predicate sufficient to establish that SEIU and the DNC may have coordinated their Oregon efforts – and the FEC's resolution of that factual question without conducting an investigation or even serving SEIU was contrary to law.

Similarly, the District Court erred by accepting the FEC's conclusion that evidence in the record did not "necessarily mean" that SEIU made an unlawful contribution or contributions to the DNC. App. at 19. The standard is not whether

the allegations in the Administrative Complaint "necessarily" establish that Respondents violated the Act, but only whether there is "reason to believe" they might have violated the Act. 2 U.S.C. § 437g(a)(2).

C. The District Court Erred By Affirming the FEC's Dismissal of Count III.

The District Court affirmed the FEC's dismissal of Count III, which alleges that several political organizations violated the Act by failing to register as political committees and comply with the Act's prohibitions and limitations, on the ground that "the FEC is in a better position than [the Candidate]" to determine its enforcement priorities. App. at 21. As the District Court acknowledges, however, that determination is subject to judicial review. App. at 21. Here, the Agency failed to pursue violations that were itemized by transaction, and which were further supported by reference to the relevant IRS filings. App. 52-58. With respect to Count III, in other words, the Administrative Complaint included evidence practically amounting to actual proof, and the District Court's deference to the FEC's dismissal of these claims was unwarranted.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed, and the FEC's dismissal of the Administrative Complaint should be set aside.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2012, I served the foregoing Brief of Appellant and the accompanying Appendix on behalf of the Plaintiff, by means of the Court's CM-ECF system, upon the following parties:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains less than 14,000 words (including footnotes and endnotes), excluding those parts exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman, size 14 point.

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