ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5134

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**RALPH NADER,**
Appellant,

v.

**FEDERAL ELECTION COMMISSION**,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

# BRIEF FOR THE FEDERAL ELECTION COMMISSION

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("Commission") submits its 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 Commission was the defendant in the district court and is the appellee in this Court. No parties participated as amici curiae in the district court or in this Court.

**(B)** ***Rulings Under Review***. Nader appeals the November 9, 2011, final order of the United States District Court for the District of Columbia (Lamberth, C.J.) granting the Commission's motion for summary judgment. The district court's summary judgment opinion is available at 823 F. Supp. 2d 52 (D.D.C. 2011) and is reproduced at pages 4-26 of the appendix. Nader also appeals the April 12, 2012, order of the United States District Court for the District of Columbia (Lamberth, C.J.) denying Nader's motion to alter or amend its summary judgment opinion. That opinion is available at 2012 WL 1216242 (D.D.C. Apr. 12, 2012) and is reproduced at pages 27-38 of the appendix.

**(C)** ***Related Cases***. The Commission knows of no "related cases" as that phrase is defined in D.C. Cir. R. 28(a)(1)(C).

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## GLOSSARY

ACT: America Coming Together

DNC: Democratic National Committee

EPS: Enforcement Priority System

FEC: Federal Election Commission

FECA: Federal Election Campaign Act, 2 U.S.C. §§ 431-57

MUR: Matter Under Review

SEIU: Service Employees International Union

## COUNTERSTATEMENT OF ISSUES PRESENTED

Whether the Federal Election Commission ("FEC" or "Commission") acted lawfully in identifying respondents to Nader's administrative complaint, or in the alternative whether the district court correctly held that the Commission's decision not to notify certain persons as respondents was harmless error.

Whether the district court correctly held that the FEC acted lawfully in finding that there was "no reason to believe" that certain respondents to Nader's administrative complaint violated the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), and by dismissing the complaint as to other respondents as a matter of prosecutorial discretion.

## APPLICABLE STATUTES AND REGULATIONS

Selected statutory and regulatory provisions are reproduced in an addendum bound with this brief.

## COUNTERSTATEMENT OF THE CASE

On May 30, 2008, Ralph Nader filed an administrative complaint with the FEC alleging a massive conspiracy against his 2004 presidential campaign. The administrative complaint accused over 150 individuals and entities of having engaged in wrongdoing almost four years earlier. These alleged wrongdoers included the Democratic National Committee ("DNC"), Senator John Kerry's

presidential campaign committee[1] ("Kerry Committee"), several non-profit groups, a number of state Democratic parties, dozens of law firms and individual lawyers, a labor union, and various other entities and individuals, some of whom were identified as "John and Jane Doe Democratic Party employees." The Commission used its discretion to identify the appropriate respondents from amongst the 150+ individuals and entities accused of illegal conduct in the complaint and notified those respondents of the complaint. After receiving responses from several respondents, the Commission found no reason to believe that some of the respondents had violated the law because Nader's allegations presented only speculation about whether any illegal conduct had actually occurred. The Commission dismissed the allegations against the remaining respondents as a matter of prosecutorial discretion, primarily because they had become defunct prior to Nader filing his complaint, and so pursuing them would not be an efficient use of the Commission's resources.

Nader subsequently brought this lawsuit pursuant to 2 U.S.C. § 437g(a)(8) alleging that the FEC acted contrary to law in its handling of his administrative complaint. Nader argued that the Commission acted unlawfully in both its "no

[1] The administrative complaint mentions both Kerry for President 2004, Inc. and Kerry-Edwards 2004, Inc., but seems to allege wrongdoing only by the latter. (J.A. 39, 59.) The Commission found no reason to believe that either entity violated FECA, and for purposes of this brief they are identified collectively as the "Kerry Committee."

reason to believe" determination and its exercise of prosecutorial discretion. Nader also argued that it was unlawful for the Commission not to notify every individual and entity identified in his complaint that he had accused of illegal conduct. On November 9, 2011, the district court granted summary judgment to the FEC. It found that the Commission had acted lawfully in its "no reason to believe" determination and that its decision to dismiss the allegations against the defunct entities was a lawful exercise of prosecutorial discretion. Although the district court found that the Commission had erred by failing to notify additional respondents, it held that this error was harmless because Nader could not demonstrate that the Commission's ultimate decision would have been any different had it made the additional notifications. Nader then filed a motion to alter or amend the summary judgment order; the district court denied that motion on April 12, 2012.

Nader now appeals both the grant of summary judgment to the FEC and the denial of his motion to alter or amend the judgment.

## COUNTERSTATEMENT OF THE FACTS

### I. BACKGROUND

#### A. The Parties

The FEC is the United States government agency with exclusive civil jurisdiction over administration of FECA. Any person who believes that FECA

has been violated may file with the Commission an administrative complaint regarding that alleged violation. 2 U.S.C. § 437g(a)(1). The Commission then notifies the respondents, who have the opportunity "to demonstrate, in writing, to the Commission . . . that no action should be taken against such person." *Id.* Afterwards, the Commission determines by a vote whether the administrative complaint provides "reason to believe" that FECA has been violated. 2 U.S.C. § 437g(a)(2). The Commission may not conduct such a vote, other than a vote to dismiss, without giving respondents 15 days to respond. 2 U.S.C. § 437g(a)(1). If at least four of the FEC's six commissioners vote to find reason to believe that FECA has been violated, the Commission investigates the alleged violation; if there are not four such votes, the Commission either dismisses the administrative complaint or makes a determination that there is "no reason to believe" a violation has occurred. 2 U.S.C. § 437g(a); *see also* Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545-46 (Mar. 16, 2007) (describing the initial stage of the FEC enforcement process).

Plaintiff Ralph Nader was an independent candidate for President of the United States in 2004. (J.A. 39.)

### B. Administrative Complaint and Notification of Respondents

On May 30, 2008, Nader filed an administrative complaint with the FEC, alleging that the DNC, the Kerry Committee, five section 527 organizations,[2] and many other individuals and entities had engaged in a wide range of illegal conduct during the 2004 presidential campaign. (J.A. 39-142.) In all, the administrative complaint's 100 pages of allegations and 475 pages of exhibits listed over 150 individuals and entities that Nader believed had broken the law during the 2004 campaign. (J.A. 275.) The Commission designated the case Matter Under Review ("MUR") 6021. *Id.*

Nader's administrative complaint alleged several violations of FECA. In Count 1, he alleged that various law firms, in conjunction with a variety of other entities, had made prohibited in-kind contributions to the Kerry Committee by providing the committee with free legal services in an effort to keep Nader off the ballot. (J.A. 128-31.) These alleged contributions would purportedly have been illegal because either they were not disclosed, 2 U.S.C. § 434(b), they were made by corporate entities, 2 U.S.C. § 441b, and/or they exceeded the applicable contribution limits, 2 U.S.C. § 441a. In Count 2, Nader alleged that Service Employees International Union ("SEIU") and a section 527 group called America

[2] A "section 527 organization" is a non-profit political advocacy group holding tax-exempt status under section 527 of the Internal Revenue Code. 26 U.S.C. § 527.

Coming Together ("ACT") made illegal contributions to the DNC in connection with an attempt to keep Nader off the ballot in Oregon. (J.A. 131-32.) In Count 3, Nader alleged that various section 527 groups and associated individuals, who were associated with ballot access challenges to Nader's campaign, violated the law by failing to register and report as political committees, 2 U.S.C. §§ 432, 434, and by accepting illegal contributions, 2 U.S.C. §§ 441a, 441b. (J.A. 133-36.) In a supplement filed a few months later, Nader alleged that a variety of lawyers and public employees engaged in unspecified violations of FECA in relation to a 2006 Pennsylvania Senate campaign. (J.A. 143-157.)

Although the administrative complaint accused over 150 individuals and entities of illegal activities, "[o]riginally, it appeared that the complaint might be duplicative of previous MURs dismissing similar allegations, and, in order to reserve resources, as well as to comply with the practice of avoiding over-notification, [the FEC] initially notified only the DNC and the Kerry Committee of the complaint." (J.A. 239 (First General Counsel's Report).) After further consideration, Commission staff "later determined that the 527 organizations, which the complaint alleges were unregistered political committees, should also be notified." *Id.* In September 2008, the Commission sent notices to ACT, Uniting People For Victory, United Progressives for Victory, National Progress Fund, Americans For Jobs, and The Ballot Project, Inc. (collectively "the section 527

Groups"). (J.A. 6.) The Commission determined that the remaining individuals and entities identified in the complaint should not be treated as respondents and therefore did not need to receive notification. (J.A. 238 n.2.)

Nader filed a supplement to his administrative complaint on October 14, 2008, accusing another 17 individuals and entities of wrongdoing. (J.A. 143-58, 159-65.) From July 21, 2008, to February 17, 2009, the Kerry Committee, DNC, ACT, and The Ballot Project, Inc., each submitted responses to the administrative complaint. (J.A. 166-233.) Nader filed a second supplement to his complaint on January 7, 2010,[3] and ACT submitted a short response to the second supplement on February 12, 2010. (J.A. 270.) The other respondents did not respond.

### C. Disposition of the MUR

On April 13, 2010, the Commission voted unanimously that MUR 6021 should be closed without proceeding to an investigation. (J.A. 271-72.) The Commission adopted a Factual and Legal Analysis articulating the reason for its determination for each respondent. (J.A. 275-310.) The Commission found no reason to believe that the DNC, the Kerry Committee, their treasurers, or Senator John Kerry personally violated FECA. (J.A. 275-97.) With respect to ACT, the Commission found no reason to believe that it had made undisclosed or excessive in-kind contributions or that it had unlawfully failed to register as a political

[3] Nader and the Commission each erroneously dated this supplement January 2009.

committee under 2 U.S.C. § 433. (J.A. 302-06.) The Commission dismissed the allegation that ACT had illegally failed to report expenditures. (*Id.* at 305-06.) The Commission also dismissed the complaint as to the remaining section 527 Groups. (J.A. 298-301, 307-10.) Consistent with the general practice of the Commission, it made no finding as to the non-respondents (J.A. 238 n.2) and closed the MUR (J.A. 271-72).

### D. The District Court's Summary Judgment Decision

Nader then filed this lawsuit, pursuant to 2 U.S.C. § 437g(a)(8), asserting that the Commission's determinations and dismissal were "contrary to law." The parties filed cross-motions for summary judgment, and the district court found in favor of the FEC. (J.A. 4-26.)

First, the court held that the Commission had acted lawfully when it found "'no reason to believe' that the DNC, the Kerry Committee, their treasurers, or John Kerry personally violated FECA" by accepting illegal campaign contributions in the form of free legal services. (J.A. 14.) The court's determination on that issue was based primarily on the fact that "as to the crucial issue of coordination, the FEC reasonably determined that Nader's supporting facts were insufficient." (J.A. 13.)

Second, the court held that the Commission had lawfully found "'no reason to believe' that ACT violated FECA and [closed] the MUR with respect to SEIU

and other individuals and groups" that Nader had alleged to have made undisclosed contributions to the DNC in connection with a ballot access issue in Oregon. (J.A. 19.) This finding was reasonable, the court held, due to "the dearth of information in Nader's complaint regarding coordination." (J.A. 18.)

Third, the district court held that "the FEC's decision to dismiss the complaint as to the Section 527 groups [for failing to register and report as political committees] was not contrary to law, and represents a reasonable exercise of the agency's considerable prosecutorial discretion." (J.A. 21.) The court held that the Commission had provided "reasonable grounds for not proceeding further," and specifically noted that the "staleness of evidence and the defunctness of several of the groups" were "in large part the responsibility of Nader, who filed his complaint 3.5 years into the 5-year statute of limitations." (J.A. 21.) The district court also found that the FEC had acted lawfully in disposing of another count, which is not part of this appeal. (J.A. 21.)

Finally, the court found that the Commission had erred by "failing to notify the dozens of individuals and groups named in Nader's complaint." (J.A. 24.) However, the court held that this error was harmless because there was "no reason to believe that had the FEC properly notified all alleged 'respondents,' it would have reached a different decision in this case." (J.A. 25.) The court explained that

"[t]he notice procedures set out in Section 437g are for the benefit of those whom Nader alleges violated the Act, not for Nader's benefit." (J.A. 26.)

**E. The District Court's Denial of Nader's Motion to Alter or Amend**

After the district court granted summary judgment to the Commission, Nader filed a motion to alter or amend the judgment, arguing that the district court had made numerous errors. The district court denied the motion, reaffirmed its earlier opinion, and chastised Nader for "misquoting and mischaracterizing that Opinion." (J.A. 29.)

The district court first rejected Nader's challenge to its finding of harmless error on the notice issue. The court noted that Nader's assertion that the Commission had "terminated this enforcement action at its inception" was "literally false," and that Nader's claims of harm arising from the alleged notice defects were "pure speculation, and insufficient to demonstrate that he was harmed." (J.A. 30).

The district court next responded to Nader's claim that the court had erred by failing to apply the "reason to believe" standard in its review of the Commission's actions. The court noted that Nader's argument relied on "repeated misquotation and misconstruction of passages from the Court's Opinion" (J.A. 31), including his insertion of words into quotations, and his references to portions of the opinion that "had nothing to do with" the issue (J.A. 33). The court also

pointed to the numerous times it had referred to the "reason to believe" standard in its opinion. (J.A. 31 (quoting J.A. 8, 13, 17, 19).) The court therefore concluded that "Nader's claim in his Motion that the Court applied the wrong standard of review is entirely frivolous." (J.A. 34.)

Finally, the court reviewed specific evidence that Nader claimed the FEC and the district court had ignored or misconstrued. The court found that these purported errors were actually additional examples of Nader's proposing unsubstantiated conclusions and speculation. (J.A. 35-38.)

## SUMMARY OF ARGUMENT

The Commission receives great deference from the courts when it interprets and enforces FECA. This deference is necessary to allow the Commission to set priorities and allocate its resources in a manner that will best fulfill its mission. The latitude afforded to the Commission includes such matters as designating appropriate respondents and deciding how to exercise its prosecutorial discretion.

Nader's administrative complaint was unique in its scope, size, age, and amount of speculation on critical issues. The Commission took these various factors into account when it determined that the best way to address the allegations in the administrative complaint was to initially notify only the most central of the 150-plus individuals and entities that Nader had accused of wrongdoing. The Commission's course of action had several benefits. It avoided over-notifying

potentially innocent individuals and entities whose alleged wrongdoing was based on complete speculation. It also streamlined the process so that a potential investigation was more likely to be completed in the short time frame before the statute of limitations elapsed. Lastly, it saved Commission resources that could be directed to more meritorious matters.

If the Commission committed an error in failing to notify some individuals or entities, the district court correctly concluded that error was harmless. Because respondents are not required to respond to administrative complaints, and are unlikely to respond in an inculpatory fashion, any suggestion that such notifications would have obtained for Nader a result he preferred is pure speculation. Nader can point to no harm he suffered from the Commission's designation of respondents.

The district court also correctly concluded that the Commission lawfully found no reason to believe that any respondents received or made illegal contributions. An individual or entity acting independently in an attempt to benefit a candidate or party does not make a contribution under the law. As a result, the only manner by which the DNC or Kerry Committee could have been receiving illegal contributions would have been if they were coordinating the activity described by the administrative complaint. Although Nader produced voluminous detail about many subjects, none of that detail indicates coordination, and the

respondents expressly denied that they had engaged in any. In short, Nader attached hundreds of pages of information to his administrative complaint describing conduct that he can only speculate *might* have been illegal. The Commission therefore acted lawfully by deciding not to launch a full investigation based on Nader's mere speculation.

The district court also correctly found that FEC lawfully dismissed the allegations against the section 527 groups as a matter of prosecutorial discretion. By the time Nader filed his administrative complaint, these groups had long since ceased operating, and an investigation was unlikely to bear fruit. This decision was well within the wide discretion afforded to the FEC in such matters.

## ARGUMENT

### I. STANDARD OF REVIEW

"This Court reviews the district court's grant of summary judgment *de novo*." *Johnson v. Exec. Office for U.S. Attorneys*, 310 F.3d 771, 774 (D.C. Cir. 2002). The district court's findings of fact, however, "may not be set aside unless clearly erroneous," even if they are "based on documentary evidence or inferences from other facts." *Bailey v. Fed. Nat'l Mortg. Ass'n*, 209 F.3d 740, 743 (D.C. Cir. 2000). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law."

*Tate v. District of Columbia*, 627 F.3d 904, 908 (D.C. Cir. 2010) (citations and internal quotations omitted).

A court reviewing the Commission's dismissal of an administrative complaint "may set aside the FEC's dismissal of a complaint only if its action was 'contrary to law.'" *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005) (citing 2 U.S.C. § 437g(a)(8)); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986) (same). The Commission's dismissal of an administrative complaint cannot be disturbed unless it is based on "an impermissible interpretation of [FECA]" or is "arbitrary or capricious, or an abuse of discretion." *Orloski*, 795 F.2d at 161; *see also FEC v. Democratic Senatorial Campaign Comm.* ("*DSCC*"), 454 U.S. 27, 31 (1981). To affirm the agency's action, "it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39. Instead, the court engages in "the narrower inquiry into whether the Commission's construction [is] sufficiently reasonable to be accepted by a reviewing court." *Id*. (citations and internal quotation marks omitted).

Courts defer to both the Commission's legal reasoning and its conduct. The court "review[s] the Commission's interpretation of its own regulations pursuant to an exceedingly deferential standard . . . [and that] interpretation will prevail unless

it is plainly erroneous or inconsistent with the plain terms of the disputed regulation." *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 182 (D.C. Cir. 2001) (internal quotation marks and citations omitted). The Commission also is entitled to great deference as to how it conducts investigations and its decisions to dismiss complaints. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). Thus, provided that the Commission supplies reasonable grounds for its actions, a court should not "second-guess the Commission's exercise of its discretion." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

## II. THE FEC LAWFULLY NAMED RESPONDENTS, OR IN THE ALTERNATIVE, THE DISTRICT COURT CORRECTLY FOUND THAT ANY ERROR IN NOTICE WAS HARMLESS

The FECA enforcement process is not a civil lawsuit between the complainant and respondents. The entire process — which may include an investigation, attempted conciliation, and the filing of a lawsuit — is performed by the Commission without direction or input by the complainant. Although many matters are initiated by outside complaints, it is ultimately the role of the Commission, with assistance from its staff, to determine the best way to enforce the statute.

The Commission's discretion in enforcing FECA includes the power to identify the appropriate respondents to an administrative complaint. An administrative complainant does not determine the subjects of FEC enforcement.

Indeed, the statutory language expressly permits the FEC to dismiss matters against alleged wrongdoers without even waiting for them to respond to the allegations. 2 U.S.C. § 437g(a)(1). The Commission does not take this discretion lightly — to the contrary, the Commission has solicited public comments and held hearings on this specific issue and has adopted various procedures in response.

In this case, the Commission had numerous reasons not to immediately treat all of the 150-plus individuals and entities as respondents. Nader's claims were speculative and old. Treating each member of this alleged conspiracy as a respondent would have placed serious burdens on both the potential respondents and the agency. It would also have slowed down the process in the face of a looming statute of limitations deadline. The FEC acted thoughtfully, not arbitrarily or capriciously, when it chose to carefully identify the proper initial respondents.

To the extent that the failure to notify any or all of the alleged wrongdoers was contrary to law, the district court correctly concluded that this was harmless error. Nader's claim that he was harmed rests on a speculative and unlikely chain of events. For Nader to have obtained a different result, the additional parties receiving notice (who are not required to respond) would have had to voluntarily produce incriminating evidence filling in the gaps missing from Nader's administrative complaint, thereby giving the Commission reason to believe that a violation might have been committed, and leading the FEC to undergo an

investigation resulting in a finding of probable cause to believe that the violations actually occurred. This hypothetical and attenuated sequence does not constitute actual harm under the law.

### A. The Commission Has Discretion to Identify the Appropriate Respondents to an Administrative Complaint

Nader argues that the Commission is required, by both FECA and its implementing regulations, to treat all alleged wrongdoers in an administrative complaint as respondents, no matter how specious or frivolous the claims against them might be. This argument misconstrues both the language and purpose of the notification requirement and is fraught with potential problems.

Although FECA requires notice to any person "alleged to have committed … a violation," both the statute and regulations state that the Commission has the authority to dismiss a complaint without ever hearing from the alleged wrongdoer. *See* 2 U.S.C. § 437g(a)(1) ("Before the Commission conducts any vote on the complaint, *other than a vote to dismiss*, any person so notified shall have the opportunity to demonstrate . . . that no action should be taken . . . ." (emphasis added)); 11 C.F.R. § 111.6(b) (The Commission "shall not take any action, or make any finding, against a respondent *other than action dismissing the complaint*, unless it has considered such response or unless no such response has been served upon the Commission . . . ." (emphasis added)). The purpose of this notice

requirement is therefore clear — it allows accused persons the opportunity to respond to allegations before the Commission can take any action *against* them.

The purpose behind the notice requirement makes evident why the identity of a "respondent" described by 11 C.F.R. § 111.5(a) is a legal determination made by the Commission, not the complainant. Allowing complainants to make this critical determination would create the danger of both under-enforcement (if complainants fail to identify all of the appropriate respondents) and over-enforcement (if complainants name incorrect entities and individuals as respondents). Under Nader's reading of the statute, however, political opponents could harass each other by filing frivolous administrative complaints, and the FEC would be forced to name every person accused of wrongdoing as a respondent and "to direct its limited resources toward conducting a full-scale, detailed inquiry into almost every complaint, even those involving the most mundane allegations. . . . [Because] [r]arely could the FEC dismiss a complaint without soliciting a response . . . ." *Orloski*, 795 F.2d at 165. To limit such abuses — and because the FEC's enforcement procedures can touch upon core constitutional freedoms — the Commission cautiously exercises its enforcement authority, and such authority is judicially reviewed with "extra-careful scrutiny." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-88 & n.17 (D.C. Cir. 1981) ("'[I]t can hardly be doubted that the constitutional guarantee (of the First Amendment) has its

fullest and most urgent application precisely to the conduct of campaigns for political office . . . .'" (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))).

Concerns about the proper exercise of enforcement authority were at the forefront of the Commission's thinking when, in 2003, it solicited public comments and held a public hearing specifically about enforcement procedures. *See* FEC, *Enforcement Procedures*, 68 Fed. Reg. 23,311 (May 1, 2003). Although the very first subject on which comments were requested involved identifying the appropriate respondents to a complaint, *id.* at 23,312, not a single commenter argued that the Commission lacked that authority. (All comments are available at http://www.fec.gov/agenda/agendas2003/notice2003-09/comments.shtml.) Every commenter to express an opinion, despite disagreeing on numerous other subjects, agreed that the Commission had the power to make such a determination. *See, e.g.*, *Comment of California Political Attorneys Association*, at 2 ("The CPAA believes the Commission has sufficient latitude within its statutory and regulatory enforcement powers to designate respondents that the Commission believes may have committed a violation of the FECA."); *Comments of FEC Watch and the Center for Responsive Politics*, at 1 (opining that the decision about whom to treat as a respondent "is not an exact science and will require judgment and prosecutorial discretion on the part of the agency").

Many commenters explained the negative effects that follow from being named as a respondent in an FEC administrative complaint. *See, e.g.*, *Comment of Free Speech Coalition, Inc., and Conservative Legal Defense and Education Fund*, at 2 ("Becoming a respondent is a significant event for an individual or entity, and often requires the expenditure of legal fees in self-defense."); *Comment of Perkins Coie*, at 3-4 ("[N]aming a person as a respondent may seem an insignificant act. To a respondent it is often of major consequence. It may require hiring of an attorney. It can create paralyzing fear that something that they did or might do may expose them to significant civil and potentially criminal liability."); *id.* at 16 ("One can hardly overstate how emotionally and even financially disruptive it can be for an innocent individual to be named as a respondent in a matter in which he or she had absolutely no involvement."); *Comment of Republican National Committee*, at 2 (stating that the Commission's overdesignation of respondents "has caused needless cost and anxiety for organizations and individuals named that must then hire attorneys and file a response"); *Statement for the Record of Jan Witold Baran, Wiley, Rein & Fielding LLP*, at 3 (naming of too many respondents "add[s] an enormous amount of pressure and anxiety to persons and entities merely included in the complaint for factual context"); FEC, *Transcript of Public Hearing on Enforcement Procedures*, at 230 (2003), http://www.fec.gov/agenda/agendas2003/notice2003-09/enforce_trans.pdf

("[Respondents] are put in the position of having to go back and reconstruct what happened, to retain counsel, to have counsel prepare filings. There is a lot of cost involved in that, pain, anguish . . . ." (statement of William J. Olson, Free Speech Coalition and Conservative Defense and Education Fund)).

The problem of over-notification, discussed above, has predictable and irreversible burdens on improper respondents. By contrast, the problem of under-notification is usually correctable, because the Commission has the ability to add additional respondents throughout the pendency of a MUR. Such additional respondents can be added prior to a Commission investigation, as several were in this case, or after the Commission has already found reason to believe that one or more of the original respondents have violated the law. This flexibility allows the Commission to engage in robust enforcement of the statute, while diminishing burdens against potential respondents that might have been included as a result of mistake or improper motivation. *Cf. AFL-CIO v. FEC*, 333 F.3d 168, 178 (D.C. Cir. 2003) (noting that the Commission must "screen out frivolous complaints at the reason to believe stage" in order to reduce the incentive for "political opponents to file charges against their competitors to . . . chill[ ] the expressive efforts of their competitor" (internal quotation marks omitted)).

### B. The Commission Did Not Act Arbitrarily or Capriciously in Identifying Respondents to the Administrative Complaint

Nader's administrative complaint was highly unusual in several respects. It was massive. It alleged illegal conduct by a vast conspiracy of individuals and entities. It was old. And it appeared to be based largely on speculation. While the Commission is capable of enforcing even such taxing administrative complaints, it is also entitled to take these considerations into account when deciding whether the matter justifies the necessary resources in the overall context of the agency's enforcement objectives. *See generally* FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg 12,545, 12,546 (Mar. 16, 2007) (noting that Commission will dismiss an administrative complaint "when the matter does not merit further use of Commission resources" due to, *inter alia*, "likely difficulties with an investigation").

The typical FEC administrative complaint involves fewer than half a dozen respondents; the administrative complaint in this case alleged wrongdoing by 54 law firms, 98 individuals employed by law firms, 18 state Democratic parties, certain "John and Jane Doe Democratic Party employees," and 13 individual officers, employees and agents of the 527 Group respondents, adding up to more than 150 potential respondents. Most of these individuals and entities could only have engaged in wrongdoing if they had been coordinating with the DNC and/or

Kerry Committee, a critical issue on which Nader had neither personal information nor evidence. Because Nader filed his complaint (and supplemented it twice thereafter) almost four years after the allegedly illegal conduct, evidence was likely to be stale and the five-year statute of limitations was a significant concern.

### 1. Notification of All Individuals and Entities Identified in the Administrative Complaint Would Have Created Unnecessary Burdens for Respondents

As discussed above, being a respondent to a MUR can be a serious burden, especially when accused of wrongdoing arising four years earlier, as in this case, because records may no longer exist and memories may have faded. When the administrative complaint is based on speculation, imposing this burden may be unjustified.

The Commission and its staff took great care to balance the agency's enforcement priorities with the objective of minimizing unnecessary burdens on potential respondents. Because virtually all the allegations of illegality were contingent upon a single issue — coordination — the Commission properly achieved that balance here. More than 150 individuals and entities were accused of making unlawful contributions (mostly in the form of free legal services) to the DNC and Kerry Committee. (*E.g.*, J.A. 40-41 ("Respondents initiated these legal proceedings with the knowledge and consent of [the DNC chairman] and John Kerry, and coordinated their efforts with the DNC, the Kerry-Edwards Campaign

and at least 18 state or local Democratic Parties."); J.A. 44 ("[T]he total value of the legal services that their law firms unlawfully contributed to the Kerry-Edwards Campaign greatly exceeds $2 million.").) If neither the DNC nor the Kerry Committee accepted illegal contributions by coordinating with these other individuals and entities, that single fact would be dispositive as to all of them. It therefore made sense to first proceed against the DNC and Kerry Committee (as well as their treasurers and John Kerry personally), and subsequently against the section 527 Groups. Had the Commission received information later suggesting some or all of the additional individuals and entities should be treated as respondents, it retained the authority to so designate them.

This measured approach made particularly good sense regarding the 98 individual law firm employees that Nader accused of wrongdoing, especially given that he has never explained exactly how these individuals could have made illegal contributions. If these individual law firm employees were not compensated for their work on the ballot challenges, then their work would have fallen under FECA's "Volunteer Exception" and would not have been contributions at all. *See infra* pp. 41-42. If instead their law firms were compensating them for working on the ballot challenges, then it would have been the law firms, not the individual lawyers, that made the allegedly illegal contributions. Nevertheless, Nader believes, and continues to assert in this Court, that the FEC was required to subject

almost 100 lawyers to the burden of the enforcement process, even though his various speculations do not include a coherent theory as to how these individuals could have violated FECA.

Given the speculative nature of Nader's allegations, the potentially unnecessary burden on respondents, and the staleness of the allegations, it was neither arbitrary nor capricious for the Commission to decide not to name every person identified in Nader's complaint as a respondent in the enforcement process.

### 2. Notifying All Persons Named in the Administrative Complaint Would Have Caused Delay and Diverted Resources from Other Commission Priorities

The Commission's decision to proceed initially only against certain alleged wrongdoers was intended not only to diminish burdens to potentially innocent parties, but also to improve enforcement. The administrative complaint was filed almost four years after the underlying conduct occurred, and the statute of limitations to commence a lawsuit seeking civil penalties is five years. *See* 28 U.S.C. § 2462. Nader's delayed filing left the Commission with scarce time because the statute has various time-consuming requirements intended to provide respondents with an ample opportunity to participate in the process. *See generally Perot v. FEC*, 97 F.3d 553, 557-58 (D.C. Cir. 1996) (describing FEC enforcement procedures).

All respondents to a complaint are afforded fifteen days to respond from the time of actual receipt of notification. 11 C.F.R. § 111.6(a). Respondents frequently receive extensions of time to respond, as several of the respondents in this case did. After the responses have been received or the time to receive them has elapsed, the FEC then reviews the complaint and any responses to determine whether there is "reason to believe" that a violation of FECA has occurred. 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.7. If four or more Commissioners vote that there is reason to believe a violation has occured, the Commission undertakes an investigation of the alleged violation, which may include the subpoena of documents, depositions, written questions, and other methods of information gathering. 2 U.S.C. § 437g(a)(2); 11 C.F.R. § 111.9-.12. After completion of an investigation, the General Counsel must notify a respondent if he intends to recommend that the Commission vote to find "probable cause" to believe FECA has been violated, and if so, he must provide the respondent a brief stating his position, to which the respondent has fifteen days to respond. 2 U.S.C. § 437g(a)(3). After that, the Commission votes on whether there is probable cause to believe FECA has been violated. 2 U.S.C. § 437g(a)(4)(A)(i). If at least four Commissioners find that there is probable cause to believe a violation occurred, the respondent receives another notification. 11 C.F.R. § 111.17. The statute then requires a conciliation period of at least thirty days after probable cause is found

(or a shorter period immediately before an election). 2 U.S.C. § 437g(a)(4)(A)(i); *see also* 11 C.F.R. § 111.18. At the conclusion of the conciliation period, if no agreement has been reached between the Commission and a respondent, the Commission must vote again by affirmative vote of four Commissioners before it may seek enforcement of FECA in federal district court. 2 U.S.C. § 437g(a)(6)(A); 11 C.F.R. § 111.19.

Because this part of the enforcement process can take well over a year for complex matters — and must conclude before the statute of limitations expires — the Commission urges potential complainants to file as soon as possible. *See Guidebook for Complainants and Respondents on the FEC Enforcement Process*, at 6, http://www.fec.gov/em/respondent_guide.pdf ("Complaints should be filed as soon as possible after the alleged violation becomes known to the complainant in order to preserve evidence and the Commission's ability to seek civil penalties in federal district court within the five-year statute[ ] of limitations. . . .").

In this case, the Commission and its staff believed that notifying more than 150 respondents had the potential to derail the progress of the MUR, jeopardizing the ability to complete the enforcement process prior to the statute of limitations deadline. Any difficulties in notification or investigation of some respondents could have delayed the case against the most important respondents. Limiting the number of respondents made it far more likely that an investigation, if necessary,

could be completed before the statute of limitations period elapsed. The Commission retained the authority to name additional respondents and expand its investigation if warranted.

Finally, the Commission has finite resources to devote to its enforcement matters. The Commission likely would have needed to devote substantially more resources to this matter if it had proceeded against more than 150 individuals and entities. As discussed above, an FEC investigation may include document subpoenas, depositions, written questions, and other methods of information-gathering. And here, the relevant documents and witnesses were spread throughout the country, potentially adding to the strain on enforcement resources. As this Court has explained:

> [W]e have no basis for reordering agency priorities. The agency is in a unique — and authoritative — position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way. Such budget flexibility as Congress has allowed the agency is not for us to hijack.

*In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991); *Rose*, 806 F.2d at 1091 ("It is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintendance directing where limited agency resources will be devoted."). In sum, the Commission reasonably concluded that naming more than 150 persons as respondents was an unwarranted burden in a case that was several years old and based largely on speculation.

### C. Even If the Commission Erred in Providing Notice, the District Court Correctly Concluded that Any Error Was Harmless

Even if the FEC erred in failing to notify some individuals and entities, the Court should affirm the district court's finding that this error was harmless. (J.A. 26.) In applying the harmless error doctrine, courts take an outcome-determinative approach and examine whether the procedural error contributed to the agency's conclusion. *See, e.g.*, *City of Portland v. EPA*, 507 F.3d 706, 716 (D.C. Cir. 2007) (holding that EPA's reliance on discredited science was harmless error because it did not change the agency's ultimate determination); *Steel Mfrs. Ass'n v. EPA*, 27 F.3d 642, 649 (D.C. Cir. 1994) (holding that agency errors are harmless "when a mistake of the administrative body is one that clearly had no bearing . . . on the substance of the decision reached" (internal quotation marks and citation omitted)); *see also* 5 U.S.C. § 706 (requiring that, in judicial review of agency action, "due account shall be taken of the rule of prejudicial error"). This approach was taken in the only other reported decision where a court found the FEC to have committed harmless error due to a defect in notice. *See FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 90-91 (D.D.C. 2006) (determining that "notice defect" constituted harmless error because of a likely lack of prejudice).

Nader does not argue that notifying additional respondents would have altered the FEC's disposition of his administrative complaint, nor could he. Instead, he argues that the Commission's lack of notification makes it impossible

to know whether the outcome would have changed, and that the Court should simply assume that Nader was harmed so that the district court's "dangerous precedent" does not "eviscerate the Act's mandatory enforcement procedures." (Nader Br. at 17.) Nader's novel argument lacks support from any legal authority and relies on misstatements about the consequences that flow from notification.[4]

Nader suggests that the precedent is "dangerous" because the Commission's failure to notify certain individuals and entities would forever immunize them against enforcement based on the administrative complaint. (Nader Br. at 15-16 ("[T]he FEC . . . 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."); *id.* at 16 ("[T]he Agency's error prevented it from commencing any action whatsoever with respect to the Respondents it failed to serve.").) As the district court stated in addressing the

[4] Nader suggests that the Commission's actions are "especially harmful" in part because Commission staff initially assigned the administrative complaint a high ranking under its Enforcement Priority System ("EPS"). (Nader Br. at 14.) But as the district court noted, "[t]he fact that the FEC at one point believed internally that this matter was of a high enforcement priority does not automatically render its ultimate decision to dismiss contrary to law." (J.A. 17 (citing *White v. FEC*, No. Civ. A. 94-2509, 1997 WL 459849, at *3 (D.D.C. July 31, 1997)).) "It seems eminently reasonable that a complaint involving high-profile political figures and over a hundred groups and individuals was initially thought by the FEC to merit special attention, but that upon further examination the agency concluded that there was not enough 'there' there to warrant a complex investigation." (*Id.*) In any case, "rules of agency procedure and practice" such as the EPS do not create a private right of action. *Chrysler Corp. v. Brown*, 441 U.S. 281, 314 (1979).

same argument, it is "literally false." (J.A. 30.) The MUR was not closed as to any individual or entity until the Commission voted to dismiss it, and the Commission retained the power to notify additional respondents at any time prior to that point.

Nader also suggests that the lack of notice prevented the Commission from obtaining any information about those individuals and entities. (Nader Br. at 14-15 ("With respect to the Respondents the FEC failed to serve, however, the Agency failed to develop any administrative record whatsoever.").) This is also false. In fact, the Commission had a significant record regarding the conduct of these individuals from both the administrative complaint and the responses submitted by the respondents, all of whom denied coordination. The record included four affidavits from individuals associated with the Ballot Project explicitly refuting Nader's charges of coordination.

Nader also suggests that, had the Commission sent notices to the remaining individuals and entities, it would have instituted an "investigation" that could have discovered unknown information favorable to Nader's position. (Nader Br. at 15 ("[I]t is the purpose of an Agency investigation to resolve such questions [as whether a respondent might provide information favorable to Nader]").) But Nader has skipped over a step. Before the Commission undertakes any investigation, such as subpoenaing documents or taking depositions, four

Commissioners must find that there is reason to believe that a violation has occurred. 11 C.F.R. §§ 111.7, 111.9-.12. Nader's alleged harm, therefore, rests on a shaky series of unlikely predictions: that if only the Commission had noticed additional parties, they would have responded to the allegations, even though they have no such obligation under the law. Further, that those responses would have helped Nader's case, rather than benefiting the entity that actually made the response (and its alleged co-conspirators). And that this self-incriminating response would have persuaded at least four Commissioners that there was reason to believe a violation had occurred. Lastly, that the resulting investigation would have uncovered information supporting Nader's speculations. This scenario is too attenuated to render the Commission's notification decision prejudicial error. *See Cornelius v. Nutt*, 472 U.S. 648, 663 (1985) (holding that agency's discharge of employees need not be reversed because "[a]lthough the agency committed procedural errors, those errors do not cast doubt upon the reliability of the agency's factfinding or decision"); *Am. Farm Lines v. Black Ball Freight Svc.*, 397 U.S. 532, 539 (1970) ("It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules . . . when in a given case the ends of justice require it. The action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party." (citation and internal

quotations omitted)); *see also* 5 U.S.C. § 706 (APA provision regarding prejudicial error).

Because Nader can point to no actual harm to himself, the Court is left only with Nader's parade of horribles — *i.e.*, that because potential respondents will never complain about having not been notified, the FEC can act with impunity and simply refuse to enforce FECA. As an initial matter, section 437g(a)(1) — which permits the FEC to dismiss matters against alleged wrongdoers without even waiting for them to respond to the allegations — makes evident that the purpose of the notice requirement is to give the *accused* a chance to exonerate themselves prior to an investigation, not to bolster the information in an administrative complaint. Further, there is not a shred of evidence to suggest that the Commission will "refuse to enforce the Act in future cases" by declining to name appropriate parties as respondents in response to administrative complaints. (Nader Br. at 17.) The FEC did not do so here: Rather, it proceeded against the parties most central to the allegations, consistent with its mission to enforce FECA; at worst, the Commission committed harmless error in identifying those parties. Nader's hypothetical scenario in which the FEC goes rogue by refusing to enforce its own enabling statute is pure fantasy.

## III. THE DISTRICT COURT CORRECTLY FOUND THAT THE FEC LAWFULLY EXERCISED ITS DISCRETION WHEN IT DISMISSED NADER'S ADMINISTRATIVE COMPLAINT

The FEC found no reason to believe that any respondents received or made illegal campaign contributions, because Nader's allegations were entirely speculative and particularly devoid of evidence that the Kerry Committee had "played a role in this activity, rather than just being the indirect beneficiary." (J.A. 284 (Factual & Legal Analysis, Kerry *et al*.).) The Commission also dismissed allegations against several section 527 groups as a matter of prosecutorial discretion because each of the entities had long since stopped operating by the time Nader filed his administrative complaint. The district court correctly determined that the Commission acted lawfully.

As a general matter, Nader criticizes the district court not only for its analysis of each specific count, but also because it "fundamentally misapprehended the issue to be decided" and because it "imposed an improper evidentiary burden, by demanding that the Administrative Complaint satisfy the 'probable cause' standard" rather than the appropriate "reason to believe" standard. (Nader Br. at 17-19.)[5] These generalized arguments about the district court's purported mistakes

[5] Nader confuses the issue further by stating that his facts "establish a prima facie basis for a finding of coordination." (Nader Br. at 22.) The "reason to believe" standard is not the same as establishing a prima facie basis. *See Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 ("A 'reason to believe' finding

are riddled with misstatements and mischaracterizations of the district court opinion. For example, Nader states that "the District Court assumed" incorrectly that the FEC's determination was whether the administrative complaint provided "sufficient factual support to establish that Respondents did in fact violate the Act." (Nader Br. at 18.) The district court made no such assumption. Indeed, Nader made the exact same accusation in his motion to alter or amend, and the court accurately pointed out in response that: (1) it had used the correct standard; (2) it had specifically referenced that correct standard numerous times in the opinion; and (3) the examples Nader cited to suggest otherwise were all misquotes and out-of-context statements from other sections of the opinion. (J.A. 30-34.)

Similarly, Nader tells this Court that "[i]n 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 . . . ." (Nader Br. at 18.) Nader made the same accusation in his motion to alter or amend, and the district court made clear in response that Nader's allegations, *even if true*, completely failed to address certain critical issues necessary for a finding of illegal conduct. (J.A. 35-36 ("The issue is not whether these parties coordinated on some activities, but whether they coordinated

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followed by an investigation would be appropriate when a complaint credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope.").

concerning the very activity that Nader alleges led to violations of the Act . . . . On this point, Nader has nothing but speculation."); J.A. 36 (pointing out the irrelevance of Nader's evidence that attorneys were acting in Kerry's interests because "the fact that legal work is intended to benefit a candidate does not suggest illegality absent coordination between the candidate and the parties performing the free work." (citing J.A. 12)).) Thus, and as discussed further below, Nader's objections to the district court's analysis are categorically meritless.

### A. The Commission Did Not Abuse Its Discretion When It Determined that There Was No Reason to Believe that the DNC, Kerry Committee, Their Treasurers, or John Kerry Received Illegal Contributions in the Form of Free Legal Services

Count 1 of Nader's administrative complaint alleged that the DNC, the Kerry Committee, and associated individuals received illegal in-kind contributions in the form of free legal services. (J.A. 128-131.) The Commission's General Counsel agreed that this was a potentially "viable theory": A donation of corporate legal services to a candidate or party in an effort to remove an opposing candidate from the ballot could constitute an illegal contribution. (J.A. 243.) Nonetheless, the Commission found no reason to believe that the illegal scenario that Nader hypothesized had actually taken place, and the Court should defer to that exercise of the agency's prosecutorial discretion.

The FEC came to its conclusion for two distinct reasons. First, expenditures made independently of a campaign, even if they are intended to benefit that

campaign, do not constitute contributions under 2 U.S.C. § 431(8)(A). Second, the definition of "contribution" under FECA also does not include "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee." 2 U.S.C. § 431(8)(B)(i) (the "Volunteer Exception"). Because Nader provided no information on these two critical issues that would be necessary to evaluate illegality, and because the respondents specifically denied that any such illegal conduct had taken place, the Commission had no reason to believe that FECA had been violated.

### 1. Nader Merely Speculated that the Kerry Committee and the DNC Coordinated Ballot Challenges

For an illegal contribution to have been made, there must have been an actual "contribution" under the Act. 2 U.S.C. § 431(8)(A)(i). But since *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court has recognized that independent expenditures made merely for the benefit of a party or candidate are not "contributions." *Id*. at 46 & n.53. By contrast, expenditures made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents" are considered in-kind contributions, because often they are as useful to the campaign as a direct monetary contribution. 2 U.S.C. § 441a(a)(7)(B)(i); *see also* 2 U.S.C. § 441a(a)(7)(B)(ii) (defining coordination with political parties). Nader's allegation of illegality therefore could not be sustained unless the legal work was

coordinated with the DNC or Kerry Committee. Nader provided only speculation, however, that such coordination had taken place.

The Commission not only lacked affirmative evidence supporting Nader's allegation of illegal coordination, it also received sworn denials from multiple respondents and four separate affidavits from the Ballot Project — the group that coordinated the ballot challenge efforts — specifically refuting Nader's allegation.[6] These affidavits averred that "[t]he Ballot Project did not undertake any of its activities at the direction, request, or suggestion of, or in conjunction or concert with" the Kerry Committee, the DNC, or any state or local entities, and that it "acted independently" of all those entities. (J.A. 223, 226, 229, 232.) These respondents had first-hand knowledge of their own participation in the relevant events and provided a credible account that neither the DNC nor the Kerry Committee were involved in the legal challenges. The responses indicated that it was the Ballot Project, not the DNC or Kerry campaign, that contacted attorneys and made arrangements for ballot challenges in various states, without direction

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[6] A district court recently criticized the Commission for relying on a respondent's affidavit in dismissing an administrative complaint, *see La Botz v. FEC*, Civ. No. 11-1247, slip op. (D.D.C. Sept. 5, 2012), https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2011cv1247-22, but the affidavits submitted in response to Nader's complaint bore none of the infirmities present in that case. For example, the Ballot Project's affiants had personal knowledge of the issues in dispute and their testimony was consistent, while the affidavit in *La Botz* was "not clearly supported by personal knowledge and [was], in fact, contradicted by contemporaneous written evidence." *Id*. at 15.

from the DNC or Kerry Committee. After reviewing Nader's mere assumptions and the multiple sworn affidavits from individuals who had actual knowledge of the relevant events, the Commission reasonably declined to pursue a formal investigation. (J.A. 294 (Factual & Legal Analysis, DNC *et al.*) ("[U]nwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true" and "[s]uch purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of the FECA has occurred.") (internal quotation marks omitted).)

Nader argues that there was in fact evidence of coordination, and he lists eleven bullet points that purportedly are illustrative. (Nader Br. 19-20.) But the specific information Nader points to was examined by both the FEC and the district court and does not provide any evidence of coordination. (J.A. 10-14 (district court's review of this evidence); J.A. 243-44, 246-49 (FEC General Counsel's review).[7] Nader's bullet points show merely that the Kerry Committee

[7] Nader's brief defines the term "Respondents" as all of the individuals and entities accused of wrongdoing in the administrative complaint. (Nader Br. at 3.) Throughout Nader's brief, he simply assumes coordination by repeatedly stating that "Respondents" engaged in a particular activity, without specifying which individuals or entities he is referring to, even though the actions described can only possibly refer to some of them (*see, e.g.*, Nader Br. at 6 ("Respondents initiated these legal proceedings"); *id.* ("Respondents launched a nationwide communications campaign"); *id.* at 7 ("Respondents committed further violations by establishing several Section 527 organizations"). This same tendency to lump together different individuals and entities as if they were operating as a single unit

and DNC had shared goals and interests with many of the individuals and entities that filed the ballot challenges, or that some individuals had connections with multiple entities, unrelated to the *specific* acts of alleged coordination in the administrative complaint. For example, as the district court noted with respect to the email referenced in Nader's second bullet point, "there remains a yawning gap between these allegations and the conclusion that law firms were making unreported expenditures, coordinated with the DNC or the Kerry-Edwards Campaign." (J.A. 14.)

Nader makes numerous other unsubstantiated leaps by claiming, for example, that if a law firm provided *paid* legal services to the DNC, it must have also provided *free* legal services to the DNC. (Nader Br. at 20.) Likewise, Nader relies on testimony from a Maine Democratic Party official in another matter that she expected the DNC to pay her legal bills to challenge certain nomination petitions, but he fails to provide any link between payment for that work and coordination with the Kerry Committee. (*Id.*) Similarly, Nader does not explain how the fact that a DNC worker had the title "Nader Coordinator" indicates that the DNC was coordinating with others regarding ballot access challenges, rather than simply trying to convince voters to support Kerry instead of Nader. (*Id.*) In each of these instances, as in his complaint as a whole, Nader simply assumes with

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pervades Nader's administrative complaint and its purported evidence of coordination.

little or no basis in fact that his allegations provided reason to believe that the DNC or Kerry Committee engaged in improper coordination.

### 2. The Administrative Complaint Contained No Evidence that Ballot Challenge Attorneys Were Compensated for Their Work

Nader's allegations were also deficient because they failed to consider whether the accused lawyers had provided legal services under the Volunteer Exception. 2 U.S.C. § 431(8)(B)(i). If individual attorneys were providing legal work, and were not being compensated by their firms for that work, then neither the firm nor the individual attorneys made a contribution to anyone. *Id.* As the Commission noted, "any free attorney services may have been provided by volunteers without any sponsorship from their employer." (J.A. 279.) Nader provided no information about "which firms compensated their attorneys who worked on the ballot challenges." (J.A. 290.) Nader's mere recitation of the various ballot challenges was therefore entirely consistent with the possibility that the attorneys were engaged in lawful conduct.

Absent evidence to the contrary, it is reasonable to believe that the lawyers working on the ballot challenges did so pro bono without being compensated by their law firms. For example, a partner in a law firm can volunteer for a campaign, even during normal business hours, without having such work constitute a contribution from the law firm to the campaign. FEC Advisory Op. 1979-58,

http://saos.nictusa.com/aodocs/1979-58.pdf. This flexibility allows volunteer work as long as the attorney's compensation is not "tied to the number of hours he or she work[ed]" and the attorney has "discretion in the use of his/her time," such that he would not normally have received a "reduction of income . . . [if he] spent less time on firm matters than may have been spent during a previous period." *Id.*; *see also* FEC Advisory Op. 1980-107, http://saos.nictusa.com/aodocs/1980-107.pdf (same). Because most attorneys at law firms receive the majority of their income through salaries, not hourly wages, it is also possible for a non-partner to volunteer for a campaign, yet still complete his normal job responsibilities on other matters for compensation.

The Commission is not required to find reason to believe that a law firm has made an illegal campaign contribution merely because one or more of its lawyers has worked on a matter.

### B. The District Court Correctly Held that the Commission Lawfully Found No Reason to Believe that ACT Made Illegal Contributions

Nader argues that the district court erred by holding that the Commission acted lawfully in finding no reason to believe that ACT had made undisclosed and excessive in-kind contributions. (Nader Br. at 26.) Specifically, Nader's administrative complaint alleged that ACT and SEIU had made illegal in-kind contributions in the form of expenditures meant to keep Nader off the ballot in Oregon. (J.A. 131-32.)

Nader's argument here suffers from the same infirmity as his arguments regarding legal services: He did not present any evidence creating a reason to believe that there had been any coordination. The Commission noted that the administrative complaint "does not allege, and the available information does not suggest, that ACT's activities in Oregon were coordinated with the Kerry Committee, the DNC, or any other entity" so it "does not indicate that the activities in question resulted in the making of an in-kind excessive contribution to either the Kerry Committee or the DNC." (J.A. 304.)

Nader's sole purported evidence of such coordination is that an individual named Anna Burger is both a member-at-large of the DNC and the SEIU's Secretary-Treasurer, and therefore Ms. Burger "very well might have acted as the liason between her two organizations." (Nader Br. at 27.) The fact that an officer of a union happens to also be one of more than 400 members of the DNC does not mean that the DNC was coordinating (or even involved with) any of the union's activities. The Commission was reasonable in refusing to infer that every organization that shares an employee or member is coordinating as to all activities.

### C. The District Court Correctly Found that the Commission Lawfully Exercised Prosecutorial Discretion in Dismissing the Complaint Against the Section 527 Groups

Count III of Nader's administrative complaint alleged that the section 527 groups illegally failed to register and report as political committees in the 2004

election cycle. (J.A. 133-36.) The FEC ultimately exercised its prosecutorial discretion and dismissed the allegations against these groups. (J.A. 299, 300-01, 306, 307-08, 309-10.) The district court properly held that this exercise of discretion was not contrary to law. (J.A. 21.)

"[T]he Commission, like other Executive agencies, retains prosecutorial discretion." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). Even when the FEC agrees with the legal view of an administrative complaint, it can still choose whether to pursue a matter "in the exercise of its discretion." *FEC v. Akins*, 524 U.S. 11, 25 (1998). All agencies, including the FEC, are afforded great deference in their decisions about whether to bring an enforcement action. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise.").

Nader does not suggest that the Commission lacks discretion, but argues that in this case that discretion was abused because Nader's administrative complaint "included evidence practically amounting to actual proof" of the alleged illegal conduct. (Nader Br. at 28.) But Nader fails to address any of the reasons why the FEC decided not to pursue the claims, and he does not acknowledge that his own inaction was at least partially responsible for the Commission's decision not to investigate. The vast majority of actions described in the administrative complaint

were not only *knowable* in 2004, but were *actually known* to Nader and his campaign because they involved litigation to keep him off the ballot. Despite the fact that Nader knew all this information in 2004, he did not file his administrative complaint until May 30, 2008.

The Commission faced several challenges as a result of Nader filing his administrative complaint almost four years after the allegedly illegal conduct. First, all of the section 527 Groups alleged to have violated FECA had long since ceased operations and become defunct. (J.A. 299, 300, 302, 307, 309.) The Commission reasonably believed that this fact would have made it exceedingly difficult to recover any civil penalties, even if an enforcement action seeking such penalties were warranted. (J.A. 299, 300, 302, 307, 309.)

Second, Nader's delay in filing the administrative complaint diminished the likelihood of a fruitful investigation, due to a combination of stale evidence, defunct entities, and a looming statute of limitations. This Court has explained that an important reason for a statute of limitations is "[t]he concern that after the passage of time 'evidence has been lost, memories have faded, and witnesses have disappeared.'" *3M Co. v. Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). FECA provides for both injunctive relief and civil penalties, 2 U.S.C. § 437g(a)(6)(A), but FEC enforcement actions for civil penalties are subject to a

general five-year statute of limitations, 28 U.S.C. § 2462. In this case, the Commission reasonably determined, after reviewing the evidence submitted by Nader, that the age of the alleged violations "raise[d] obstacles under the five-year statute of limitations." (J.A. 299, 300, 304, 307, 309.)

Finally, the Commission has numerous demands on its finite resources. It is not contrary to law for the Commission to focus those resources on claims that are current and that can be fully vindicated. Neither the enforcement provisions in 2 U.S.C. §§ 437g(a)(1)-(6) nor the judicial review provision in 2 U.S.C. § 437g(a)(8) require that the Commission pursue claims that are stale. It is neither Nader's nor the courts' role to manage how the Commission deploys its limited resources. *See supra* p 28. Thus, the district court correctly found that the Commission's decision to dismiss these claims was a lawful exercise of its discretion.

## CONCLUSION

The FEC acted appropriately and lawfully in considering the administrative complaint at issue in this case. The Commission carefully considered the allegations, notified appropriate respondents, and ultimately decided not to pursue an investigation. To the extent that the Commission erred by failing to provide notice to any individuals or entities, the district court correctly concluded that this error did not harm Mr. Nader. This Court should affirm the decision below.

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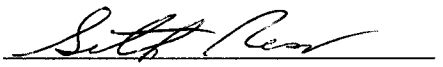

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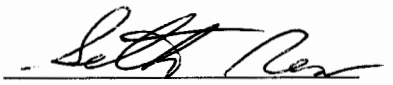
September 10, 2012

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 10,797 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.



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## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September 2012, I caused the Federal Election Commission's brief in *Nader v. FEC,* No. 12-5134, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

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I further certify that I also will cause the requisite number of paper copies of the brief to be filed with the Clerk.

September 10, 2012

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**2 U.S.C. § 437g Enforcement**

(a) *Administrative and judicial practice and procedure*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clauses (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

* * *

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case

of a violation of section 441f of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a

proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 441f of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

* * *

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

**11 C.F.R. § 111.5 Initial complaint processing; notification**

(a) Upon receipt of a complaint, the General Counsel shall review the complaint for substantial compliance with the technical requirements of 11 CFR 111.4, and, if it complies with those requirements shall within five (5) days after receipt notify each respondent that the complaint has been filed, advise them of Commission compliance procedures, and enclose a copy of the complaint.

(b) If a complaint does not comply with the requirements of 11 CFR 111.4, the General Counsel shall so notify the complainant and any person(s) or entity(ies) identified therein as respondent(s), within the five (5) day period specified in 11 CFR 111.5(a), that no action shall be taken on the basis of that complaint. A copy of the complaint shall be enclosed with the notification to each respondent.

**11 C.F.R. § 111.6 Opportunity to demonstrate that no action should be taken on complaint-generated matters**

(a) A respondent shall be afforded an opportunity to demonstrate that no action should be taken on the basis of a complaint by submitting, within fifteen (15) days from receipt of a copy of the complaint, a letter or memorandum setting forth reasons why the Commission should take no action.

(b) The Commission shall not take any action, or make any finding, against a respondent other than action dismissing the complaint, unless it has considered such response or unless no such response has been served upon the Commission within the fifteen (15) day period specified in 11 CFR 111.6(a).

**11 C.F.R. § 111.9 The reason to believe finding; notification**

(a) If the Commission, either after reviewing a complaint-generated recommendation as described in 11 CFR 111.7 and any response of a respondent submitted pursuant to 11 CFR 111.6, or after reviewing an internally-generated recommendation as described in 11 CFR 111.8, determines by an affirmative vote of four (4) of its members that it has reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction, its Chairman or Vice Chairman shall notify such respondent of the Commission's finding by letter, setting forth the sections of the statute or regulations alleged to have been violated and the alleged factual basis supporting the finding.

(b) If the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter.