No. _____

In the Supreme Court of the United States

RALPH NADER,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the courts below violated the mandate set forth in Rule 1 of the Federal Rules of Civil Procedure, that they be "construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding"?

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INTRODUCTION

Petitioner Ralph Nader invokes the jurisdiction of the Court in this case because the question presented is of primary importance to the integrity of the nation's civil justice system, and because its disposition by the courts below "so far departed from the accepted and usual course of judicial proceedings" as to require correction. Supreme Court Rule 12(a). Specifically, the courts below violated Rule 1 of the Federal Rules of Civil Procedure, which requires that the rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. The courts below violated that mandate by improperly relying on procedural grounds to dismiss this action without permitting Mr. Nader any opportunity for a hearing or adjudication on the merits of his claims.

The federal courts' increasing disregard for the mandate set forth in Rule 1 was recently documented by a preeminent authority on civil procedure. *See* Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013) [hereinafter *Simplified Pleading*]. The "deformation" described consists of "a sequence of procedural stop signs" the federal courts erected in the last quarter-century, which "transformed the relatively uncluttered pretrial process envisioned by the original drafters of the Federal Rules into a morass of litigation friction points." *Id.* at 309. This deformation represents a "seismic" shift, away from the federal courts' historic commitment to "trial on the merits," and toward a new "dismissal culture." *Id.* at 357-58. The consequences are

profound and entirely negative, both for the civil justice system itself, and for "the democratic principles underlying it." *Id*. at 288. In short, plaintiffs are being barred from the courthouse doors, regardless of the merits of their claims.

Although scholarly articles do not customarily inform the Court's deliberations as to whether certiorari is proper, an exception should be made for the modestly-titled "reflections" cited above. Professor Miller is no stranger to the Court. On the contrary, the treatise he co-authored on civil procedure has been cited hundreds of times in the Court's published opinions. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE. When such an authority is compelled to conclude that the lower courts are abandoning "the justice-seeking ethos" embodied by Rule 1, such that "the application of the Federal Rules has lost its moorings," the charge demands notice and appropriate corrective action. *See* Miller, *Simplified Pleading*, at 288, 366.

This case presents the Court with an ideal vehicle for addressing the fundamental question raised herein. As set forth below, few cases more compellingly demonstrate the lower courts' systematic misuse of procedural rulings to dismiss potentially meritorious claims on the pleadings. The Court therefore should grant certiorari, to begin the process of dismantling the "procedural Great Wall of China" the lower courts have erected. *Id.* at 372.

OPINIONS OF THE COURTS AND AGENCY BELOW

The decision of the Court of Appeals for the District of Columbia Circuit is reported at 725 F.3d 226, and appears in the Appendix at 1. The District Court's opinion granting summary judgment to Respondent is reported at 823 F. Supp. 2d 53, and appears in the Appendix at 25. The District Court's order denying Petitioner's motion to alter or amend its judgment is reported at 854 F. Supp. 2d 30, and appears in the Appendix at 10.

STATEMENT OF JURISDICTION

The Court of Appeals entered its decision on August 2, 2013. App. at 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL OR STATUTORY PROVISIONS AND RULES

Rule 1 of the Federal Rules of Civil Procedure states:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 1.

STATEMENT OF THE CASE

This case arises from an administrative complaint Mr. Nader filed with Respondent Federal Election Commission ("FEC" or "the Agency") under the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). *See* 2 U.S.C. § 431 et seq. The FEC closed the matter without conducting an investigation, and Mr. Nader sought review in the District Court pursuant to 2 U.S.C. § 437g. The District Court granted summary judgment to the FEC, App. at 25, and thereafter denied Mr. Nader's motion to alter or amend its judgment. App. at 10. The Court of Appeals ultimately held that Mr. Nader lacks standing, vacated the District Court's orders, and remanded with instructions that the case be dismissed for lack of jurisdiction. App. at 1.

A. The Allegations in the Administrative Complaint and the FEC's Failure to Investigate

The administrative complaint alleges that a number of members, allied entities and/or affiliates of the Democratic Party (collectively, "Respondents") engaged in a concerted nationwide effort to prevent Mr. Nader and the late 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. 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. 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. Respondents initiated these legal proceedings with the knowledge and consent of then-Chair of the Democratic National Committee ("DNC") 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. 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. AR00002-03.

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. AR00008-09.

In the course of such conduct, Respondents made millions of dollars in unlawful campaign contributions and expenditures, in violation of the Act's limitations and prohibitions. 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.

Based on the foregoing allegations, the administrative complaint asserts three counts. Count 1 alleges alleged that the DNC, 18 state or local Democratic Parties, the Kerry–Edwards Campaign, a Section 527 organization called the Ballot Project, and at least 95 lawyers from 53 law firms made unreported contributions to the Kerry–Edwards Campaign, in violation of 2 U.S.C. §§ 434, 441a, and 441b. AR00090–93. The theory on which Count 1 relies is that the value of the legal services provided by law firms and individual lawyers who assisted in ballot challenges to Nader–Camejo constituted "contributions" to either the DNC or the Kerry–Edwards Campaign, and therefore resulted in violations of FECA's reporting requirements and contribution limits, as well as its ban on corporate contributions. AR00091. Count 2 alleges that the Service Employees International Union ("SEIU") and a Section 527 group called America Coming Together ("ACT") made illegal and unreported contributions in connection with their effort to deny Nader–Camejo ballot access in Oregon, in violation of 2 U.S.C. §§ 441b(a) and 441a(a)(2)(B). AR00093-94. Count 3 alleges that the Section 527 respondents violated 2 U.S.C. §§ 434 and 441a by failing to register with the FEC and report contributions. AR00095–98.

The allegations in the administrative complaint are detailed and specific. For example, the parties who

filed each complaint against Nader-Camejo are identified by name, as are the law firms and lawyers representing them. The administrative complaint also includes detailed factual allegations about the Section 527 respondents, including specific examples of the campaign communications they produced and publicized. Where possible, the administrative complaint includes specific allegations regarding the value of the Respondents' illegal and unreported contributions and expenditures. For example, in August 2004, when Respondents' litigation was in its early stages, the president of one Section 527 organization told the *Washington Post* that law firms had already provided $2 million in unpaid legal services. An attorney subsequently admitted that his law firm alone had provided $1 million in unpaid legal services. In addition, the administrative complaint itemizes many of the illegal contributions and expenditures the Section 527 organizations made or accepted.

Finally, to ease the burden and expense of the FEC's investigation, the administrative complaint also included extensive evidentiary exhibits documenting its allegations. AR00101-104 (index of exhibits). Such evidence not only included Internal Revenue Service filings, FEC filings, court filings, media reports and other public records, but also Respondents' own email records, 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 administrative complaint, the FEC assigned it 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 27. 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 34. Nevertheless, in direct violation of the Act and its own regulations, the FEC declined to notify or serve the administrative complaint on a single law firm Respondent, state or local Democratic Party Respondent, or SEIU. *See* 2 U.S.C. § 437g(a)(1)) ("Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed … a violation"); 11 C.F.R. § 111.5(a) (specifying that FEC must "enclose a copy of the complaint"). 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 alleged in Count 1 and Count 2. The Agency relied on prosecutorial discretion to dismiss Count 3.

B. The Proceedings Below

The District Court reviewed the FEC's findings and conclusions relating to each count of the administrative complaint, and upheld them as "reasonable" based on the available evidence. App. at 34-51. Only thereafter did it address the FEC's failure to serve most of the Respondents and obtain their responses to the allegations against them. Such failure "clearly violated" the Act, the District Court conceded, but it excused this "clear defect" in the Agency's action as "harmless error." App. at 52.

The Court of Appeals vacated the District Court's decision and remanded with instructions to dismiss on the ground that Mr. Nader lacks standing. App. at 7. It rejected Mr. Nader's argument that he has "competitor standing" because he did not aver with certainty that he will run for public office again. App. 3-5. It also rejected Mr. Nader's argument that he has "informational standing" because, the Court of Appeals asserted, the disclosure Mr. Nader seeks is not "related" to his "informed participation in the political process." App. at 6.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts Violated Rule 1 By Systematically Invoking Improper Procedural Grounds to Deny Mr. Nader Any Opportunity For a Hearing or Adjudication on the Merits of His Claims and Defenses.

This case represents the last of several attempts Mr. Nader has made, in both federal and state courts, to vindicate his civil rights and seek redress for the injury he sustained as a result of the Democratic Party's effort to "neutralize" his 2004 presidential campaign. In each case, Mr. Nader exceeded the notice pleading requirements set forth in Rule 8, and supported his claims with volumes of evidence. But while the litany of rationales the courts invoked to support their procedural rulings is varied, the result is always the same: in each case, Mr. Nader's claims or defenses were dismissed on the pleadings, without permitting him any hearing or adjudication on the merits. No discovery has been taken, no testimony heard and certainly no jury has rendered a verdict.

Despite being compelled to defend 29 complaints Democrats filed against his campaign in 19 different jurisdictions, Mr. Nader has not yet had his own day in court. Such a result is not merely inequitable; it is contrary to the mandate of Rule 1.

A. The Court of Appeals Improperly Dismissed This Appeal on the Ground That Mr. Nader Lacks Standing.

In its brief opinion holding that Mr. Nader lacks standing in this case, the Court of Appeals misstated both the law and the facts.

As to the law, the Court of Appeals asserted that litigants "who claim a right to information" assert a sufficiently concrete injury to establish standing under FECA only "if the disclosure they seek is related to their informed participation in the political process." App. at 6 (citing *FEC v. Akins*, 524 U.S. 11, 21 (1998)). In fact, however, this Court reached the opposite conclusion in *Akins*. Distinguishing "taxpayer standing" cases, it expressly concluded that "the 'logical nexus' inquiry is not relevant" in cases brought under FECA. *Akins*, 524 U.S. at 22 (distinguishing *United States v. Richardson*, 418 U.S. 166 (1974) and *Flast v. Cohen*, 392 U.S. 83 (1968)). Rather, the Court found it sufficient that a plaintiff "fails to obtain information which must be publicly disclosed pursuant to a statute." *Id.* at 21 (citing *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-374 (1982)). The Court of Appeals' scrutiny and rejection of Mr. Nader's reasons for wanting the information he seeks was therefore improper.

The Court of Appeals also misstated the facts. According to the Court of Appeals, Mr. Nader "does not seek information to facilitate his informed participation in the political process." App. at 6. That is false. In very same sentence of the complaint that the Court of Appeals itself cites, Mr. Nader avers that he "continues to advocate on behalf of minor party and independent candidates." App. at 5 (citing Comp. ¶ 6). Mr. Nader substantially expanded upon that statement in an affidavit, in which he provides specific examples and documentary evidence of his advocacy on behalf of minor party and independent candidates, including in the 2012 election cycle. *See* Second Affidavit of Ralph Nader at ¶¶ 3-7.

The Court of Appeals thus misrepresents the factual record the by suggesting that Mr. Nader only "seeks to force the FEC to 'get the bad guys.'" App. at 6 (quoting *Common Cause v. FEC*, 108 F.3d 413, 418 (D.C. Cir. 1997)). On the contrary, Mr. Nader amply demonstrated that the information he seeks in this case would be helpful to his advocacy for democratic reform, and that is more than sufficient to establish his standing under FECA. *See Akins*, 524 U.S. at 21-22. The Court of Appeals therefore had no basis in law or fact to dismiss this appeal.

B. The Court of Appeals Improperly Dismissed *DNC I* on the Ground That the Statute of Limitations Had Expired.

The Court of Appeals' dismissal of the instant appeal was only the most recent of a series of procedural rulings that barred Mr. Nader from the courthouse doors.

In October 2007, Mr. Nader, Mr. Camejo and several voters filed a complaint against the DNC, the Kerry-Edwards Campaign and several other individuals and entities that participated in the effort to neutralize the Nader-Camejo 2004 presidential campaign. Based on facts similar in substance to those alleged in Mr. Nader's administrative complaint, the plaintiffs asserted claims for civil conspiracy, malicious prosecution and abuse of process. In violation of the cardinal rule governing motions to dismiss, the trial court rejected many of the allegations in the complaint, disregarded others, and dismissed the case for failure to state a claim under Rule 12(b)(6). The Court of Appeals affirmed on other grounds. *See Nader v. DNC ("DNC I")*, 567 F.3d 692 (D.C. Cir. 2009). Expressly declining to reach the merits of the plaintiffs' claims, the Court of Appeals held instead that the complaint, on its face, was barred by the District of Columbia's three year statute of limitations. *See id.* at 702. In reaching this conclusion, the Court of Appeals resolved key questions of fact against the plaintiffs, including the date on which they knew or should have known of their cause of action. *See id*. at 699-701. Under District of Columbia law, however, such questions must be left to the trier of fact – not an appellate court judge ruling on the face of the pleadings. *See Diamond v. Davis*, 680 A.2d 364 (1996). The Court of Appeals also disregarded the fact that Reed Smith, LLP, the law firm that filed the defendants' Pennsylvania complaint in 2004, was at the time (and still is) pursuing claims against Mr. Nader. *See DNC I*, 567 F.3d at 702.

C. The Court of Appeals Improperly Dismissed *DNC II* on the Ground That the Action Was Barred By *Res Judicata.*

The procedural blockade against Mr. Nader and his co-plaintiffs continued despite the revelation, in July 2008, that the complaint that Reed Smith filed against Nader-Camejo in 2004 had been illegally prepared by as many as fifty state employees working at taxpayer expense. This evidence was disclosed in a grand jury presentment filed by the Attorney General of Pennsylvania. The ensuing criminal prosecution was successful, and yielded multiple felony convictions and guilty pleas. *See Commonwealth v. Perretta-Rosepink*, No. 1925 MDA 2010 (Pa. Super Ct., March 4, 2013) (unpublished decision); *Commonwealth v. Cott*, No. 1192 MDA 2010 (Pa. Super. Ct., March 4, 2013) (unpublished decision). Based on this newly discovered evidence, Mr. Nader and his co-plaintiffs asserted new claims against a subset of the defendants in *DNC I*, including Reed Smith, pursuant to 42 U.S.C. § 1983. Disregarding the fact that the newly discovered evidence on which those claims were based did not exist when *DNC I* was filed, the trial court held the action to be barred under the doctrine of *res judicata*. This time, the Court of Appeals granted summary affirmance, without even permitting briefing of the issues, much less a hearing. *See Nader v. DNC ("DNC II")*, 2009 U.S. App. LEXIS 24747 (Oct. 30, 2009) (unpublished opinion).

D. The Supreme Court of Maine Improperly Dismissed *Nader v. Maine Democratic Party* Pursuant to the State's Anti-SLAPP Statute.

State courts also joined the blockade. Following the dismissal of *DNC I* and *DNC II*, Mr. Nader and his 2004 Maine electors re-filed their state law claims for civil conspiracy, malicious prosecution and abuse of process in Maine state court. The case initially showed promise. The defendants moved to dismiss pursuant to Maine's anti-SLAPP[1] statute, 14 M.R.S. § 556, and although the trial court granted the motion, it expressed serious misgivings as to the constitutionality of the statute. On appeal, the Supreme Court of Maine reversed the trial court's dismissal, in a unanimous opinion announcing a new evidentiary standard that applies under the anti-SLAPP statute. *See Nader v. Maine Democratic Party*, 41 A.3d 551 (Me. 2011). Finally, it appeared that Mr. Nader and his co-plaintiffs would have their day in court. On remand, the trial court denied the defendants' anti-SLAPP motions under the new standard, and set the case for trial. This time, however, the defendants appealed, and the Supreme Court of Maine not only vacated the trial court's judgment, but remanded with instructions to dismiss. *See Nader v. Maine Democratic Party*, 2013 ME 51 (Me. May 23, 2013). Without identifying the new standard announced in its prior opinion, or what

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[1] The acronym stands for Strategic Litigation Against Public Participation. The statute permits defendants to seek an expedited dismissal of claims asserted against them that are based on their exercise of First Amendment-protected petitioning activities.

the standard requires, the Court held that the evidence the plaintiffs submitted, prior to discovery, was insufficient to withstand dismissal.

E. The State Courts of Pennsylvania and the District of Columbia Improperly Denied Mr. Nader Any Opportunity to Present Newly Discovered Evidence in His Defense in Attachment Proceedings Initiated By Reed Smith, LLP.

Finally, state courts in Pennsylvania and the District of Columbia also improperly relied on procedural grounds to bar Mr. Nader from presenting newly discovered evidence in his defense against claims asserted by Reed Smith, LLP. After filing its complaint against Nader-Camejo in Pennsylvania state court, Reed Smith submitted a request for $81,102.19 in litigation costs, which the trial court granted. The Supreme Court of Pennsylvania affirmed, with two justices dissenting on the ground that the award was not statutorily authorized. *See In Re Nomination Paper of Nader*, 905 A.2d 450 (Pa. 2006). Reed Smith then commenced attachment proceedings against Mr. Nader in the Superior Court for the District of Columbia, seeking to enforce its costs judgment.

While the attachment proceedings were pending, the Attorney General of Pennsylvania filed his grand jury presentment, revealing that Reed Smith's complaint had been prepared illegally, by dozens of state employees working at taxpayer expense. Based on this newly discovered evidence, Mr. Nader filed a petition in Pennsylvania state court, requesting that Reed Smith's costs judgment be set aside or reopened

for an evidentiary hearing. The Pennsylvania state court denied the petition, ruling as a matter of law that the newly discovered evidence was not relevant to its prior decision to grant Reed Smith's request for costs. *See In Re Nomination Paper of Nader*, 568 MD 2004 (Pa. Cmmwlth. Dec. 4, 2008) (unpublished opinion). Thereafter, the ongoing criminal proceedings yielded sworn testimony that the Reed Smith attorney who requested the award of $81,102.19 in costs had coordinated the state employees' effort to prepare the underlying challenge, and personally accepted the state employees' illegally prepared work-product at Reed Smith's offices. Relying on this newly discovered evidence, Mr. Nader filed a motion for reconsideration, which the Pennsylvania state court denied without opinion. *See id*. (order entered Dec. 31, 2008).

Because he had been denied any opportunity to introduce the newly discovered testimony and evidence relating to Reed Smith in the Pennsylvania state courts, Mr. Nader attempted to do so in the District of Columbia courts, where the attachment proceedings were still pending. He was denied there, too. The District of Columbia Court of Appeals ruled that the doctrine of *res judicata* precluded Mr. Nader from raising "claims that have been—or could have been—aired and resolved in previous litigation against the same party." *Nader v. Serody*, 43 A.3d 327, 336 (D.C. 2012). The Court disregarded the fact that Mr. Nader had been denied any opportunity to introduce the evidence it held him precluded from raising.

II. The Court Should Correct the Lower Courts' Violation of Rule 1 By Reversing the Court of Appeals' Holding That Mr. Nader Lacks Standing to Pursue This Appeal.

There is no secret as to who benefits, and who is harmed, by the lower courts' improper reliance on procedural grounds to dispose of potentially meritorious claims. *See* Miller, *Simplified Pleading*, at 357. As the foregoing discussion demonstrates, defendants are the beneficiaries – particularly frequent litigants like business and governmental interests – while the harm is borne by plaintiffs – especially those such as Mr. Nader, who seek to vindicate civil rights. *See id.* at 288, 310 & n.89, 357-67. In disregarding their commitment to the "just" determination of every action and proceeding, the lower courts are thus embracing a peculiar and one-sided conception of cost-efficiency. More to the point, they are adopting a regime that would be unrecognizable to those who promulgated the Federal Rules in 1938. This Court has exercised its supervisory power to address matters of considerable less import. *See*, *e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183 (2010) (invalidating rule permitting cameras in courtroom); *Nguyen v. United States*, 539 U.S. 69 (2003) (vacating judgment entered by panel including non-Article III judge); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (correcting lower court's error in addressing constitutional issue prior to resolving statutory issue). Surely the lower courts' increasing disregard for the mandate set forth in Rule 1 therefore constitutes a sufficient departure from the "accepted and usual course of judical proceedings" as to warrant an exercise of this Court's supervisory power. Supreme Court Rule 10(a).

Accordingly, for the reasons set forth herein, the Court should address the Court of Appeals' violation of Rule 1 in this case, by reversing its decision dismissing this appeal.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed August 2, 2013]

No. 12-5134

RALPH NADER,
APPELLANT

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-00989)

Argued January 14, 2013

Decided August 2, 2013

Oliver B. Hall argued the cause and filed the briefs for appellant.

Seth Nesin, Attorney, Federal Election Commission, argued the cause for appellee. With him on the brief were *Anthony Herman*, General Counsel, *David Kolker*,

Associate General Counsel, and *Adav Noti*, Acting Assistant General Counsel.

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

GRIFFITH, *Circuit Judge*: In the wake of his 2004 run for the presidency, Ralph Nader filed an administrative complaint with the Federal Election Commission alleging that various organizations violated election laws during their efforts to keep him off the ballot. The FEC dismissed Nader's complaint. In the lawsuit that followed, the district court granted summary judgment against him and later denied his motion to alter or amend its judgment. *See Nader v. FEC*, 823 F. Supp. 2d 53 (D.D.C. 2011); *Nader v. FEC*, 854 F. Supp. 2d 30 (D.D.C. 2012). We dismiss Nader's appeal of those decisions because he lacks standing.

I

Nader brought suit under 2 U.S.C. § 437g(a)(8), which provides that "[a]ny party aggrieved by an order of the Commission dismissing a complaint . . . may file a petition with the United States District Court for the District of Columbia." We have observed that this statute "permits a private party to challenge the FEC's decision *not* to enforce" the Federal Election Campaign Act (FECA) and its attendant regulations. *Chamber of Commerce of U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (italics in original). But although § 437g(a)(8) creates a cause of action of considerable breadth, it

"does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997). Neither the parties nor the district court addressed Nader's standing, but we asked the parties for supplemental briefing on the issue because we have "a special obligation to satisfy [ourselves] not only of [our] own jurisdiction, but also that of the lower courts in a cause under review." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (internal quotation marks omitted). Nader relies on the doctrines of competitor standing and informational standing to "satisfy the 'irreducible constitutional minimum' of Article III standing: injury-in-fact, causation, and redressability." *Shaw v. Marriott Int'l, Inc.*, 605 F.3d 1039, 1042 (D.C. Cir. 2010) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). We hold that he lacks standing under both theories.

II

Injury from an "illegally structured" competitive environment can give rise to competitor standing. *LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011) (internal quotation marks omitted). Nader alleges that he was "forced to compete" in an "illegally structured campaign environment" because his opponents were flouting election laws without suffering any consequences from the FEC. Pet'r's Supp. Br. 8. But the cases in which we have recognized competitor standing in the electoral context highlight the problem with Nader's argument: a favorable decision here will not redress the injuries he claims. In *Shays*, we held that candidates had competitor standing to challenge an FEC regulation they claimed would harm their

chances *in the next election*. *See Shays v. FEC*, 414 F.3d 76, 82, 85-87 (D.C. Cir. 2005). In *LaRoque*, we held that a candidate had competitor standing to seek to enjoin the Attorney General from enforcing the Voting Rights Act in a way that would diminish the candidate's chances of victory *in an upcoming election*. *See LaRoque*, 650 F.3d at 788.

Unlike the plaintiffs in *LaRoque* and *Shays*, who successfully asserted competitor standing in the midst of ongoing campaigns, Nader seeks to compel FEC enforcement against his opponents years after the campaign has run its course. Even if the FEC were to afford Nader the relief he seeks, that outcome would not reverse the ballot-access harms that Nader alleges he suffered in 2004, or compensate him for them. *Cf. Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 45 (1976) (discussing how "prospective relief will remove the harm" (internal quotation marks omitted)); *Shays*, 414 F.3d at 86 (noting that the candidates asserting competitor standing had to "anticipate" defending against potentially illegal campaign tactics); *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 9, 11-12 (D.C. Cir. 1998) (discussing the relief available to a "current" pharmaceutical manufacturer seeking to have its competitor's registration revoked); *Liquid Carbonic Indus. Corp. v. FERC*, 29 F.3d 697, 701 (D.C. Cir. 1994) (noting that the administrative order at issue "will increase competition" as a prospective matter); *Freedom Republicans, Inc. v. FEC*, 13 F.3d 412, 418 (D.C. Cir. 1994) (noting that redressability is "quintessentially predictive").

Nader might have been able to establish standing as a competitor if he had shown that the FEC's

determination injured his ability to fight the next election. But even though Nader has not ruled out another foray into electoral politics, his statements on the matter are too speculative to provide the basis for an injury to his competitive interests. *See McConnell v. FEC*, 540 U.S. 93, 226 (2003) (denying standing to Senator McConnell because his assertion that he might encounter unfavorable treatment under a newly-enacted statute was "too remote temporally"). In contrast to the candidates in *LaRoque* and *Shays*, who had averred that they had concrete plans to run for office in the future, *see LaRoque*, 650 F.3d at 788; *Shays*, 414 F.3d at 82, Nader has alleged only that he "may run for office again," Compl. ¶ 6. As the Supreme Court said in *Lujan*, "'some day' intentions . . . do not support a finding of the 'actual or imminent' injury that our cases require." 504 U.S. at 564.

III

Nader fares no better with his claim of informational standing. A plaintiff has informational standing when he alleges that he has "fail[ed] to obtain information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21 (1998). It is not enough, however, to assert that disclosure is required by law. Only if the statute grants a plaintiff a concrete interest in the information sought will he be able to assert an injury in fact. *See id.* at 24 ("Often the fact that an interest is abstract and the fact that it is widely shared go hand in hand. But their association is not invariable, and where a harm is concrete, though widely shared, the Court has found 'injury in fact.'" (citation omitted)). For instance, in *Akins*, the Supreme Court held that a group of voters had standing to argue

that the FECA entitled them to information about the activities of a lobbying organization because they had an interest in evaluating candidates and outside groups. *See id.* at 21, 24-25. Similarly, in *Shays*, we held that a member of the U.S. House of Representatives had standing to argue that the FEC's disclosure regulations were denying him information owed to the public under the Bipartisan Campaign Reform Act because he had an interest in evaluating the role of outside groups in a presidential election. *See Shays v. FEC*, 528 F.3d 914, 923 (D.C. Cir. 2008).

The Supreme Court's ruling in *Akins* and our ruling in *Shays* establish that litigants who claim a right to information allege the type of concrete injury needed for standing to bring a FECA claim if the disclosure they seek is related to their informed participation in the political process. *See Akins*, 524 U.S. at 21; *Shays*, 528 F.3d at 923. Nader does not seek information to facilitate his informed participation in the political process. Instead, he seeks to force the FEC to "'get the bad guys.'" *Common Cause*, 108 F.3d at 418. His complaint alleges that a large number of lawyers and law firms made undisclosed, in-kind contributions of legal services to the efforts of the John Kerry campaign to keep Nader's name off the ballot in numerous states. He asks the FEC to compel information from participants in the ballot contests in the hope of showing that they violated the prohibitions on undisclosed "contributions" and "expenditures" found in 2 U.S.C. §§ 441a and 441b. Because this amounts to seeking disclosure to promote law enforcement, Nader asserts an injury that is not sufficiently concrete to confer standing. *See Citizens for Responsibility and Ethics in Wash. v. FEC*, 475 F.3d 337, 341 (D.C. Cir.

2007); *Wertheimer v. FEC*, 268 F.3d 1070, 1074 (D.C. Cir. 2001); *Common Cause*, 108 F.3d at 418. And to the extent Nader seeks disclosure to gain a leg up on his opponents in other litigation, that too is sufficiently distant from the reasons that supported the decisions in *Akins* and *Shays* that we hold Nader lacks informational standing.[*]

IV

Because Nader lacked standing, the district court lacked jurisdiction to hear his suit, and we vacate the judgment and remand the case with instructions to dismiss the case for lack of jurisdiction.

So ordered.

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[*] Nader and the opponents of his inclusion on the Pennsylvania ballot have been embroiled in extensive litigation since 2004, and Nader avers that the information sought in his 2008 FEC complaint would be useful to him in those controversies. *See* Nader Aff. ¶¶ 9-17.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 2012

[Filed August 2, 2013]

No. 12-5134

RALPH NADER,	)
APPELLANT	)
	)
v.	)
	)
FEDERAL ELECTION COMMISSION,	)
APPELLEE	)
	)

Appeal from the United States District Court
for the District of Columbia
(No. 1:10-cv-00989)

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby vacated and the case is remanded with instructions to

dismiss the case for lack of jurisdiction, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/
Jennifer M. Clark
Deputy Clerk

Date: August 2, 2013

Opinion for the court filed by Circuit Judge Griffith.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-989 (RCL)

[Filed April 12, 2012]

RALPH NADER,
Plaintiff,

v.

FEDERAL ELECTION COMMISSION,
Defendant.

MEMORANDUM & ORDER

Before the Court is plaintiff's Motion [25] to Alter or Amend the Judgment. Having carefully considered the Motion, Opposition, the absence of a reply, the entire record in this case, and the applicable law, the Court will deny plaintiff's Motion.

I. BACKGROUND

The plaintiff in this case is former Presidential candidate Ralph Nader. He filed an administrative complaint with the Federal Election Commission in May 2008, where he alleged that many individuals, law

firms, and political organizations affiliated with the Democratic Party (collectively, "respondents") conspired to deny him and his running mate ballot access in numerous states as candidates for President and Vice President in the 2004 general election. *See Nader v. Fed. Election Comm'n*, No. 10-989, 2011 WL 5386423, *1 (D.D.C. Nov. 9, 2011). Nader's administrative complaint brought four counts, and claimed that the respondents violated various provisions of the Federal Election Campaign Act of 1971 regarding contribution limits and registration and reporting requirements. *Id.*

The FEC reviewed Nader's administrative complaint and dismissed it by a unanimous vote. It found "no reason to believe" that various respondents had violated FECA, dismissed the administrative complaint as to certain Section 527 groups, and closed the matter as to every other person and entity named in the administrative complaint. *Id.* at *2. Pursuant to 2 U.S.C. § 437g(a)(8), Nader filed a complaint in this Court for wrongful dismissal, arguing that the FEC's decision was contrary to law, arbitrary and capricious, and an abuse of discretion. *Id.* Nader and the FEC filed cross-motions for summary judgment, and the Court granted the FEC's motion in November 2011. *Id.* at *13. Nader then filed the instant Motion, pursuant to Federal Rule of Civil Procedure 59(e), asking the Court to alter or amend the Court's Memorandum Opinion based on various errors he believes that Opinion contains. Pl.'s Mot. to Alter or Amend Judgment [25] 1, Dec. 7, 2011.

II. LEGAL STANDARD

Rule 59(e) of the Federal Rules of Civil Procedure permits a party, within 28 days following entry of a judgment, to file a motion to alter or amend that judgment. Motions filed under Rule 59(e) are generally disfavored, and are granted only when the moving party establishes that extraordinary circumstances justify relief. *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001). A court need not grant such a motion unless it finds that there is an intervening change of controlling law, new evidence, or the need to correct clear error or prevent manifest injustice. *Anyanwutaku v. Moore*, 151 F.3d 1053, 1057–58 (D.C. Cir. 1998) (citations and quotation marks omitted). Such motions are not an opportunity to reargue facts and theories upon which a court has already ruled. *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995).

III. ANALYSIS

Nader's Motion will be denied because it fails to establish that extraordinary circumstances warrant alteration or amendment of the Court's November 2011 Memorandum Opinion. In addition to misquoting and mischaracterizing that Opinion, Nader's Motion rehashes arguments from his Motion for Summary Judgment, while substituting the Court instead of the FEC as the villain.

Nader argues in his Motion that the Court clearly erred by (1) finding that the FEC's failure to notify numerous respondents of Nader's administrative complaint was harmless error; imposing an "improper

evidentiary burden" on him by calling for "actual proof" of FECA violations rather than the less stringent "reason to believe" standard of 2 U.S.C. § 437g(a)(2); and (3) "misconstru[ing] and "disregard[ing]" evidence in the administrative record. *See* Pl.'s Mem. [25] 2. The Court will discuss each of these arguments in turn.

A. Harmless Error

Nader's Motion fails to demonstrate that the Court clearly erred in ruling that the FEC's failure to comply with the notification requirement of § 437g(a)(1) of FECA constituted harmless error. In its Opinion, the Court agreed with Nader that the FEC violated the Act by failing to notify all of the respondents, as § 437g(a)(1) unambiguously requires. *Nader*, 2011 WL 5386423, at *14. However, based upon a well-reasoned decision from this District, the Court found the "harmless error" doctrine applicable to the FEC's procedural failing. *Id.* at *13 (citing *Fed. Election Comm'n v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 90 (D.D.C. 2006)). Since Nader failed to show that *he* was harmed by the FEC's failure to notify the individuals and entities whom he alleged had violated the law, the Court found the FEC's error harmless and declined to reverse the agency's decision. *Id.*

In the instant Motion, Nader does not appear to challenge the Court's reading of *Club for Growth* as finding the harmless error doctrine applicable within the context of violations of the very notification procedure at issue in this case. *See* Pl.'s Mem. [25] 4. Instead, Nader believes that this case should have come out differently because *Club for Growth* involved a "minor" error, whereas here the FEC's failure to

notify various respondents constituted, Nader says, a "complete failure to commence the Act's mandatory enforcement process." *Id.* at 5.

However, what matters is not how one labels a procedural error, but whether there's actual harm, and on this point Nader's Motion is lacking. Nader's general point—namely, that failure to serve certain respondents with § 437g(a)(1) notice "terminated this enforcement action at its inception," Pl.'s Mem. [25] 3—is literally false, as the enforcement action was not terminated as to any respondent, notified or not, until the Commission's vote to dismiss. Nader's other theory concerning harm likewise succumbs under scrutiny. He suggests that failure to provide § 437g(a)(1) notice to others harmed him because the FEC, if it had notified all respondents, could have reviewed these additional responses to the administrative complaint and so would have made a decision on a more "developed" administrative record. *Id.* at 4. However, as the Court stated in its Opinion, § 437g(a)(1) notification doesn't automatically lead to the production of responses from those the FEC notified—they are not *required* to respond. Therefore Nader's contention that the FEC would have received responses, and would have therefore made a better decision on a more complete administrative record, is pure speculation, and insufficient to demonstrate that he was harmed. Furthermore, Nader doesn't even attempt to demonstrate or argue that such responses, if received by the FEC, would have helped *his* case.

In sum, Nader fails to provide a coherent theory for why he was harmed by the FEC's notification failure, let alone to support such a theory. Having failed to

persuade the Court that it clearly erred, his Motion will be denied.

B. "Improper" Evidentiary Burden

Nader also faults the Court for imposing what he calls an "improper evidentiary burden" on him by requiring "actual proof" of FECA violations rather than the less stringent "reason to believe" standard of 2 U.S.C. § 437g(a)(2). *See* Pl.'s Mem. [25] 2. As an initial matter, the Court notes that it is not surprising that Nader reaches this conclusion, since it is based on repeated misquotation and misconstruction of passages from the Court's Opinion. However, contrary to Nader's assertions, the Court neither expressly nor implicitly applied the wrong standard in its review of the FEC's decision.

The Court's opinion made clear the law governing its review of the FEC's dismissal of Nader's administrative complaint. In the section of the Memorandum Opinion titled, conveniently, "Standard of Review," the Court noted that § 437g(a)(2) of FECA requires the FEC to begin an investigation of a complaint if at least four commissioners find "reason to believe" a violation of the Act has occurred. *Nader*, 2011 WL 5386423, at *3. The Court noted that it was bound to defer to the FEC's decision unless it was contrary to law, arbitrary or capricious, or an abuse of discretion. *Id.* (citing *Hagelin v. FEC*, 411 F.3d 237, 239 (D.C. Cir. 2005)). Throughout the Opinion the Court references these rules in reviewing the FEC's actions. *See, e.g., id.* at *6 ("Nader has not provided the FEC with reason to believe that [the law firms] made expenditures in coordination with the Kerry–Edwards

Campaign"); at *8 ("the Court's evaluation of the administrative record and the FEC's reasoning leads it to conclude that the agency's determination that, as to Count 1, there was 'no reason to believe' that the DNC, the Kerry Committee, their treasurers, or John Kerry personally violated FECA is not contrary to law"); at *10 ("[T]he Court finds that the FEC's decision to find 'no reason to believe' that ACT violated FECA . . . is not contrary to law'"). The Court assumes Nader is aware of these passages.

But perhaps what Nader is saying is that the Court applied the wrong standard *sub silentio*. However, when Nader gets to specific parts of the Court's Opinion that trouble him, none of these show the wrong standard was applied. For example, Nader says that the 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 *establish* 'coordination' between these Respondents and the DNC and Kerry–Edwards 2004." Pl.'s Mem. [25] 7 (emphasis added). However, Nader's insertion of the word "establish" into this quotation results in a misquotation. The Court didn't say that the FEC reasonably determined that Nader's supporting facts failed to "establish" coordination; it stated that the FEC noted that "this allegation was insufficient to *suggest* coordination . . . ." *Nader*, 2011 WL 5386423, at *6 (emphasis added). The Court's use of the word "suggest"—rather than "establish"—is consistent with the statutory requirement that the FEC determine whether there is "reason to believe" a violation of the Act occurred.

Nader again misquotes the Court when he states that "the Court found that the Administrative Complaint fails to 'establish coordination' between" Reed Smith and the DNC or Kerry–Edwards 2004. Pl.'s Mem. [25] 7. Nader's point is that the Court's use of the word "establish" indicates that it held him to a burden of actual proof, rather than the less stringent "reason to believe" standard of § 437g(a)(2). However, Nader supports this point by lifting the words "establish[es] coordination" from two sentences where the Court is not applying the standard of review to the FEC's decision, but describing *Nader's* own contentions about the strength of his allegations. Specifically, the Court stated that "[a]s to Reed Smith, *Nader's complaint suggests* that ties between John Kerry and the firm, as well as the fact that 18 of its attorneys worked on a ballot-access challenge to Nader–Camejo in Pennsylvania, *establishes coordination*, . . . , but it was not unreasonable for the FEC to conclude otherwise." *Nader*, 2011 WL 5386423, at *7 (emphasis added). It should be obvious to Nader that the Court, in this sentence, was summarizing Nader's own characterization[1] of the strength of his evidence, not

[1] Nader's briefs in this litigation, and his administrative complaint, routinely state that certain evidence not only suggests, but conclusively demonstrates, a material fact. *See, e.g.*, Pl.'s Opp'n Def.'s Mot. Summ. J. [19] 4 (stating that the allegations in his administrative complaint were "more than sufficient to *demonstrate* . . . that both Kerry–Edwards 2004 not only 'coordinated,' but also directed and actively participated in Respondents' nationwide effort to challenge Nader–Camejo 2004 . . . ."); AR at 7 (stating that "two pieces of evidence . . . *prove beyond any doubt* that the DNC and the Kerry–Edwards Campaign coordinated their efforts and engaged in joint action with Respondents."); AR at 8 (stating that certain evidence

applying an "actual proof" standard to the allegations in his administrative complaint.

The second sentence of the Court's Opinion in which the words "establishes coordination" appear also describe Nader's characterization of his own allegations. On page seven of his administrative complaint, Nader says it includes "two pieces of evidence that *prove beyond any doubt* that the DNC and the Kerry–Edwards Campaign coordinated their efforts . . . ." AR at 7 (emphasis added). After review of this evidence and Nader's discussion of it, the Court stated that "Nader doesn't explain how this e-mail establishes coordination or even between whom." *Nader*, 2011 WL 5386423, at *7. Again, the Court was only commenting on the fact that Nader did not explain how his evidence delivered the level of proof *he claimed* it delivered. But regardless of how Nader characterized his evidence, the Court concluded that the FEC's determination that this evidence was inadequate was reasonable and entitled to deference.

Finally, Nader isolates language from a section of the Court's Opinion that had nothing to do with the Court's review of the FEC's "reason to believe" determination in order to support his contention that the Court applied the wrong evidentiary burden when reviewing that determination. Nader states that: "The Court contends that the law firm Respondents would not 'necessarily' produce their billing records if the FEC

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provides conclusive proof that law firms conspired with the Democratic Party and Kerry–Edwards Campaign to keep Nader–Camejo off the ballot).

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]." Pl.'s Mem. [25] 10 (quoting *Nader*, 2011 WL 5386423, at *13). Nader claims that by (allegedly) requiring him to "necessarily" establish in his administrative complaint that an investigation would show violations of the Act, the Court clearly erred. *Id.* However, the section of the Court's opinion Nader lifts this language from concerned application of the harmless error doctrine to the FEC's failure to serve the administrative complaint on every respondent. The Court was no longer reviewing the FEC's decision to dismiss the administrative complaint, and so the language Nader quotes is irrelevant to his argument.

In sum, Nader's claim in his Motion that the Court applied the wrong standard of review is entirely frivolous.

C. "Misconstru[ing]" and "Disregard[ing]" Evidence

Finally, alongside his complaint regarding the Court's application of the harmless error doctrine and his assertion that the Court applied the wrong standard, Nader claims that the Court made numerous factual mistakes. *See* Pl.'s Mem. [25] 11. However, none of Nader's examples show that the Court clearly erred.

Nader's first assertion of a factual error arises in his discussion of the Court's review of Count I of his administrative complaint, which asserted that various individuals and entities ("The DNC, 18 state or local

Democratic Parties, the Kerry–Edwards Campaign, the Ballot Project, at least 95 lawyers from 53 law firms, and an unknown number of DNC and state Democratic Party employees . . . .") made illegal campaign contributions to the Kerry–Edwards Campaign by "initiat[ing] or support[ing] litigation to force Nader–Camejo from the ballot in 18 states, for the specific purpose of benefitting the Kerry–Edwards Campaign . . . ." AR at 91. The FEC found Nader's allegations in Count I insufficient in part because it determined (reasonably, in the Court's opinion) that these allegations failed to suggest that the Kerry Committee played a role in the ballot access litigation of these various respondents, as opposed to being merely an indirect beneficiary of their work. AR at 1730.16.

Nader claims that the FEC "completely ignor[ed] the fact that the DNC retained Reed Smith"—one of the respondent law firms—"during the 2004 presidential election." Pl.'s Mem. [25] 8. This is false. The FEC clearly considered this allegation. *See* AR at 1730.11 ("[T]he complaint also alleges that the DNC's disclosure reports show that it paid Reed Smith $136,142 [for political and legal consulting] in October and November 2004."). So did the Court. *Nader*, 2011 WL 5386423, at *6 (citing AR at 1730.10–11).

Nader then accuses the Court of "misconstru[ing]" the record by stating that John Kerry "may have retained [Reed Smith's] services in the past," when "in fact" the record shows that "John Kerry <u>is</u> an important client of Reed Smith." Pl.'s Mem. [25] 8 (quoting *Nader*, 2011 WL 5386423, at *7 and AR at 84). Nader's position is that the law firm's contemporaneous

representation of John Kerry is enough to provide "reason to believe" that Kerry and Reed Smith coordinated with each other. *Id.* As an initial matter, the Court's use of the past tense in referring to Reed Smith's representation of Kerry does not conflict with Nader's administrative complaint, which describes their ties the same way. *See* AR at 49 ("Reed Smith, a law firm that *has represented* John Kerry and Teresa Heinz Kerry in numerous personal and professional matters . . . ."). However, the Court did not ignore the ties between Reed Smith and Kerry. Rather, it found that Nader's allegations concerning these ties, on the one hand, and the participation of a small group of Reed Smith attorneys in ballot access litigation against Nader–Camejo in Pennsylvania, on the other, failed to provide sufficient evidence of coordination between Reed Smith and Kerry or his political organizations *regarding the latter litigation* for the Court to overturn the FEC's finding on that issue. The issue is not whether these parties coordinated on some activities, but whether they coordinated concerning the very activity that Nader alleges led to violations of the Act—*i.e.*, the Pennsylvania ballot-access litigation. On this point, Nader has nothing but speculation. If the Court accepted Nader's argument, not one of Reed Smith's 1,600-plus attorneys could have ever performed work, on a volunteer basis, on ballot challenges to Nader–Camejo, without the FEC being *required* to investigate them and the firm, which is absurd. As the Court ruled, the FEC reasonably declined to launch an investigation absent more specific allegations from Nader suggesting the involvement of the Kerry Committee in directing those specific ballot access challenges.

Nader next argues that the Court "disregard[ed] or misconstrue[d]" evidence in the record relating to a Pennsylvania grand jury investigation, which dealt generally with alleged misconduct by Pennsylvania state employees and the use of taxpayer funds for campaign purposes. Pl.'s Mem. [25] 8. In particular, Nader claims that the Court deferred to the FEC's conclusions on the insufficiency of this evidence while allegedly disregarding the grand jury's finding that the Pennsylvania ballot challenge was designed to benefit John Kerry's campaign. *Id.* (discussing *Nader*, 2011 WL 5386423, at *8). Nader also claims that the Court disregarded evidence indicating that a Reed Smith attorney was "coordinating" the Pennsylvania ballot-access challenge. *Id.* (citing AR at 1748–49). However, contrary to Nader's assertions, the Court did not "disregard" or "misconstrue" any of this. As the Court held early on in the Memorandum Opinion, 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, *Nader*, 2011 WL 5386423, at *5, and so the Court did not feel the need to repeat the obvious—that the ballot-access challenge to Nader–Camejo in Pennsylvania was meant to help John Kerry. As to the evidence concerning the involvement of a Reed Smith attorney on the Pennsylvania ballot challenge, *see* AR at 1748–49, the Court did not point to this evidence in its Opinion because it duplicated evidence that the Court had already determined failed to suggest coordination between the Reed Smith attorneys involved in the challenge and John Kerry or the DNC; this evidence was not "disregarded."

Nader also challenges the Court's deference to the FEC's findings as to Count II of his administrative complaint, which alleges, among other things, that the Service Employees International Union ("SEIU") and a Section 527 group called America Coming Together ("ACT") made illegal, unreported contributions to the DNC. AR at 93–94. The FEC dismissed the administrative complaint as to the allegations in Count II in part because the complaint failed to allege facts suggesting that "SEIU and ACT's activities in Oregon were coordinated with the Kerry Committee, the DNC, or any other entity." AR at 1730.19. In the instant Motion, Nader continues to press his argument that the fact that SEIU's Secretary–Treasurer, Anna Burger, was also a member-at-large of the DNC (the lowest level of DNC membership) suggests the two entities coordinated with each other specifically on an Oregon ballot challenge to Nader–Camejo. Pl.'s Mem. [25] 11. But, as the Court found when it covered this ground the first time, the FEC reasonably disagreed with Nader. Furthermore, Nader's claim in his Motion that this connection between Ms. Burger and the DNC shows that she "very well might have acted as the liaison between her two organizations," *id.*, only further highlights the speculative nature of his assertion that the SEIU and the DNC coordinated their efforts on the Oregon ballot challenges. Nader's identification of mere disagreements he has with the Court's Opinion is insufficient to warrant relief under Federal Rule of Civil Procedure 59(e). *See Hutchinson v. Staton*, 994 F.2d 1076, 1082 (4th Cir. 1993).

Finally, regarding the Court's review of the FEC's findings as to Count III of his administrative complaint, Nader simply rehashes his arguments from

his briefs at the summary-judgment stage, without engaging with the Court's analysis or otherwise casting doubt on the Court's decision to defer to the FEC's reasonable exercise of its prosecutorial discretion as to the Section 527 groups Nader claimed violated FECA by failing to register as political committees. *See, e.g.*, Pl.'s Mot. Summ. J. [16-1] 2–3, 19–20; Pl.'s Opp'n Def.'s Mot. Summ. J. [19] 9–11.

In sum, while Nader has identified numerous areas of disagreement between him and the Court, he has failed to show that the Court clearly erred or that any extraordinary circumstances justify relief from the Court's Opinion, and so his Rule 59(e) Motion will be denied.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's Motion [25] to Alter or Amend the Judgment is DENIED.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on April 12, 2012.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-989 (RCL)

[Filed November 9, 2011]

RALPH NADER, Plaintiff,

v.

FEDERAL ELECTION COMMISSION, Defendant.

MEMORANDUM OPINION

Before the Court are plaintiff's Motion [16] for Summary Judgment and defendant's cross-Motion [18] for Summary Judgment. Having carefully considered the Motions, Oppositions, Replies, the entire record in this case, and the applicable law, the Court will grant defendant's Motion for Summary Judgment and deny plaintiff's Motion for Summary Judgment. A review of the background of the case, the governing law, the parties' arguments, and the Court's reasoning in resolving those arguments follows.

I. BACKGROUND

In May 2008, former Independent Party Presidential candidate Ralph Nader filed an administrative complaint with the Federal Election Commission ("FEC"). AR at 1. He alleged a conspiracy by many individuals, law firms, and political organizations affiliated with the Democratic Party to deny him and his running mate, Peter Camejo, ballot access in 18 states as candidates for President and Vice President of the United States in the 2004 general election. *Id.* at 2. This effort allegedly resulted in violations of the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"). *Id.* at 3.

Nader's complaint contained three counts. Count 1 alleged that the Democratic National Committee ("DNC"), "18 state or local Democratic Parties, the Kerry–Edwards Campaign, the Ballot Project," and "at least 95 lawyers from 53 law firms" made unreported contributions to the Kerry–Edwards Campaign, in violation of 2 U.S.C. §§ 434, 441a, and 441b. *Id.* at 90–93. Nader's theory was that the value of the legal services provided by law firms and individual lawyers who assisted in ballot challenges to Nader–Camejo constituted "contributions" to either the DNC or the Kerry–Edwards Campaign, and therefore resulted in violations of FECA's reporting requirements and contribution limits, as well as its ban on corporate contributions. *Id.* at 91. Count 2 accused the Service Employees International Union ("SEIU") and a Section 527 group called America Coming Together ("ACT") of making unreported contributions in connection with an effort to deny Nader–Camejo ballot access in Oregon, in violation of 2 U.S.C. §§ 441b(a) and 441a(a)(2)(B). *Id.* at

93–94. Count 3 alleged that several Section 527 organizations violated, *inter alia*, 2 U.S.C. §§ 434 and 441a by failing to register with the FEC and report contributions. *Id.* at 95–98.

The FEC assigned Nader's complaint a Matter Under Review ("MUR") number of 6021, and notified him that the "respondent(s)" in the complaint would receive notice within five business days, *id.* at 576, as is required by FECA. 2 U.S.C. § 437g(a)(1). Although Nader's complaint alleged that hundreds of individuals and entities violated FECA, the agency initially notified only David Thorne (treasurer of Kerry–Edwards 2004, Inc.), AR at 577, and Andrew Tobias (treasurer of the DNC). *Id.* at 579. The FEC decided to limit the number of persons and entities it would notify because it believed (erroneously) that Nader's complaint was "duplicative of previous MURs dismissing similar allegations," and because limiting the number of notices would "reserve resources" and comport with its "practice of avoiding over-notification." *Id.* at 1730.06. Also, at some point in the FEC's consideration of Nader's complaint, it assigned to it an "Enforcement Priority System" rating of "70/TIER: 1," indicating that the Nader matter had been deemed, at least initially, to be of a high enforcement priority. *See id.* at 1730.02; Pl.'s Notice [22] 2.

In September 2008 (and again in January 2009), Mr. Nader supplemented his complaint, naming dozens of additional alleged violators of FECA and adding what amounted to a fourth count, which asserted that Pennsylvania state employees had worked on petition challenges at taxpayer expense to prevent Green Party nominee Carl Romanelli from appearing on the ballot

as an Independent candidate for United States Senate in 2006. AR at 609. Also in September 2008, the FEC decided to notify the various Section 527 groups that Nader, in Count 3, claimed had failed to register as political committees. *Id.* at 729 (American Coming Together ("ACT")), 731 (Uniting People for Victory), 733 (United Progressives for Victory), 735 (National Progress Fund), 737 (Americans for Jobs), 739 (The Ballot Project, Inc.).

In November 2009, the FEC's General Counsel, Thomasenia P. Duncan, submitted a 32-page report to the Commission that recommended, *inter alia*, that the Commission find no reason to believe that the DNC, the Kerry Committee, their treasurers, or John Kerry personally violated FECA. *Id.* at 1730.32. The Commission later voted 6-0 in favor of the General Counsel's recommendations, and closed MUR 6021. *Id.* at 1810–11. Specifically, the Commission made the following findings:

1. Find no reason to believe that the Democratic National Committee, and Andrew Tobias, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 434(b).

2. Find no reason to believe that Kerry for President 2004, Inc. and David Thorne, in his official capacity as treasurer, violated 2 U.S.C. §§ 441b, 441a(f) and 434(b).

3. Find no reason to believe that Kerry–Edwards 2004, Inc. and David Thorne, in his official capacity as

treasurer, violated 2 U.S.C. §§ 441b, 441a(f) and 434(b).

4. Find no reason to believe that John Kerry violated the Federal Election Campaign Act of 1971, as amended, or the Commission's regulations.

5. Find no reason to believe that America Coming Together violated 2 U.S.C. §§ 434(b) and 441a(a)(1)(A) with respect to the allegation that it made an undisclosed excessive in-kind contribution.

6. Find no reason to believe America Coming Together violated 2 U.S.C. § 433.

7. Dismiss the complaint as to The Ballot Project.

8. Dismiss the complaint as to National Progress Fund, Uniting People for Victory, and Americans for Jobs.

9. Dismiss the complaint as to America Coming Together with respect to the allegation that it violated 2 U.S.C. § 434 by failing to report ballot expenditures.

10. Approve the Factual and Legal Analyses, as recommended in the First General Counsel's Report dated November 30, 2009 . . . .

11. Approve the appropriate letters.

12. Close the MUR 6021 file as to all Respondents and other persons and entities named in the complaint, as supplemented.

Id. at 1810–11.

After MUR 6021 was closed, Nader filed this complaint in this Court for wrongful dismissal pursuant to 2 U.S.C. § 437g(8)(A). Compl. [1] 30. Nader claimed that the FEC's decision was contrary to law, arbitrary and capricious, and an abuse of discretion because the agency failed to notify all of the respondents named in the administrative complaint and because its decision to dismiss the complaint as to certain respondents and close the MUR was unsupported. *Id.* at 1–2.

II. STANDARD OF REVIEW

Congress passed the Federal Election Campaign Act of 1971 as a "comprehensive approach to the problem of political campaign reform and excessively high campaign costs. Its provisions deal with the communications media, campaign contributions, disclosure and reporting requirements, and tax incentives to encourage the small donor to contribute to the candidate or party of his choice." *Hernstadt v. FCC*, 677 F.2d 893, 897 (D.C. Cir. 1980) (quoting S. Rep. No. 96, 92d Cong., 1st Sess. 33 (1971)).

Under FECA, "[a]ny person who believes a violation of [the] Act . . . has occurred, may file a complaint" with

the FEC. 2 U.S.C. § 437g(a)(1). After the agency reviews the complaint, notifies alleged violators of the Act that a complaint has been filed against them, and provides an opportunity for response, its six commissioners vote on whether there is "reason to believe" a violation has occurred. *Id.* § 437g(a)(2). If at least four commissioners find "reason to believe" a violation has occurred, the FEC must begin an investigation. *Id.* If not, the FEC dismisses the complaint, and the complainant can seek judicial review in the United States District Court for the District of Columbia. *Id.* § 437g(a)(8); *see also Hagelin v. FEC*, 411 F.3d 237, 239 (D.C. Cir. 2005).

This Court may set aside the FEC's dismissal of Nader's complaint only if its action was "contrary to law," *see* 2 U.S.C. § 437g(a)(8), *e.g.*, "arbitrary or capricious, or an abuse of discretion." *Hagelin*, 411 F.3d at 242. This highly deferential standard presumes that the agency's decision is valid, and allows reversal "only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error of judgment." *Id.* (citations and quotation marks omitted). Courts must judge the propriety of the agency's action solely on the grounds invoked by the agency, and a decision of "less than ideal clarity" must still be upheld so long as "the agency's path may reasonably be discerned." *Common Cause v. FEC*, 906 F.2d 705, 706 (D.C. Cir. 1990) (citations and quotation marks omitted). Alongside its decisions to prosecute and conduct investigations, the FEC's decisions to dismiss complaints are entitled to great deference as long as it supplies reasonable grounds. *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010).

III. THE PARTIES' MOTIONS [16, 18] FOR SUMMARY JUDGMENT

Mr. Nader wants the FEC's decision to close MUR 6021 and dismiss the complaint as to various groups and individuals set aside, arguing that the agency ignored evidence, employed faulty reasoning, and violated FECA's procedural rules by failing to notify each and every one of the hundreds of individuals, law firms, and political entities named in his administrative complaint of the lawsuit filed against them. The FEC seeks deference to its decision, arguing that its determination that an investigation should not be initiated is supported by the administrative record and reasonable in the light of the insufficiency of Nader's allegations and supporting evidence as well as the significant administrative burden placed upon the agency by Nader's 575-page administrative complaint. The Court will discuss these and other arguments in the context of the four counts Nader brought in his administrative complaint, as supplemented.

A. Count 1: Illegal and Unreported Contributions and Expenditures

The heart of Mr. Nader's administrative complaint is his allegation in Count 1 that numerous individuals, law firms, and political entities made "millions of dollars in illegal and unreported contributions and expenditures to benefit the Kerry–Edwards Campaign." AR at 91. This general allegation involves a number of independent legal violations. First, the Kerry– Edwards Campaign and the DNC are obligated under FECA to report contributions. Second, candidates for federal office may not knowingly receive

contributions in excess of certain statutory limits. Third, the DNC and state political committees may not themselves make contributions to the Kerry–Edwards Campaign in excess of statutory limits. Finally, any of the law firms named in Nader's complaint that are organized in the corporate form are prohibited from making contributions to the DNC or the Kerry–Edwards Campaign. At the center of this web of related violations is the question of whether the ballot-access legal work performed by the dozens of lawyers and law firms named in Nader's complaint constitutes a "contribution" under FECA that is subject to its restrictions. Before addressing this and other issues, the Court will consider the governing law.

1. Legal Standards

FECA contains numerous provisions relating to reporting by candidates and political organizations, as well as limits on the amount of money groups and individuals can contribute. Section 434 requires treasurers of political committees to file periodic reports of receipts and disbursements with the FEC. 2 U.S.C. § 434(a)(1). These reports must disclose "contributions" from various sources, including "persons other than political committees." *Id.* § 434(b)(2)(A).

A "contribution" under the Act includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." *Id.* § 431(8)(A)(i). "Contribution" also includes "the payment by any person of compensation for the personal services of another person which are rendered

to a political committee without charge for any purpose," *id.* § 431(8)(A)(ii), as well as "expenditures made by any person in cooperation, consultation, or concert, with, or at the request of suggestion of, a candidate, his authorized political committees, or their agents . . . ." *Id.* § 441a(7)(B)(i). Excluded from the definition of "contribution" is "the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee" (the "volunteer exception"). *Id.* § 431(8)(B)(i).

Contributions are subject to strict limits. *See, e.g.*, §§ 441a(a)(1)(A), 441a(a)(2)(B), 441a(d). Candidates may not knowingly accept a contribution in excess of these limits. *Id.* § 441a(f).

In addition to these reporting requirements and dollar limits on contributions, FECA also prohibits corporations and unions from making any contributions in connection with an election to any political office. *Id.* § 441b(a). However, independent expenditures by corporations and unions in connection with elections for political office are lawful. *Citizens United v. FEC*, 130 S. Ct. 876, 913 (2010).

1. Analysis

While the FEC's General Counsel believed that Count 1 of Nader's complaint was based upon a "viable theory"—namely, that "spending by corporate law firms to remove a candidate from the ballot may constitute prohibited contributions"—she concluded that "the available facts do not support the allegations." *Id.* at 1730.10. This ground, adopted by the Commission in its

Factual and Legal Analysis, *see id.* at 1836–41, formed the basis for the Commission's conclusion that there was "no reason to believe" that John Kerry, his campaign organizations ("Kerry for President 2004, Inc." and "Kerry–Edwards 2004, Inc.") or their treasurers, or the DNC or its treasurer violated the Act or the Commission's regulations. *Id.* at 1730.16, 1858, 1810 (Findings Nos. 1–4). The Court finds that the administrative record and the FEC's reasoning (in general) support its decision.

The first problem the Commission identified in Nader's complaint was that, although he named over 53 law firms and 95 lawyers that assisted individuals and Democratic state and local parties in initiating ballot-access litigation across the country, he did not specify, "with one exception, which firms allegedly provided free services or to whom, which of those firms are incorporated, and of those, which firms compensated their attorneys who worked on the ballot challenges." *Id.* at 1730.10, 1837. Nader says that this mis-describes his complaint. Pl.'s Mot. Summ. J. [16-1] 13. His complaint, he says, states that the named law firms "provided their legal services for the benefit of the Kerry–Edwards Campaign" and that nearly every lawyer working on the challenges "apparently received normal compensation from their law firms." *Id.* (quoting AR at 92). Nader further argues that as to the issue of whether these law firms were incorporated, this allegation could be confirmed by the FEC by a simple internet search. *Id.*

The Court finds that the FEC's evaluation of this aspect of Nader's complaint was reasonable and supported its decision. The mere fact that these law

firms, or individual lawyers employed by them, "intend[ed] to benefit the Kerry–Edwards Campaign," AR at 92, would not make their activities "contributions" to the Kerry–Edwards Campaign that would be subject to the restrictions of FECA. Even assuming that the lawyers engaged in this ballot-access work were not acting as volunteers pursuant to FECA's volunteer exception because their law firms paid them their normal compensation while they were engaged in challenging Nader–Camejo's nomination papers in various states, a law firm, whether incorporated or not, can spend as much as it wants exercising its First Amendment right to freedom of speech so long as these expenditures are not made in coordination with a candidate or political committee. *See Citizens United*, 130 S. Ct. at 913. FECA only restricts "expenditures" made "in cooperation, consultation, or concert, with, or at the request of suggestion of, a candidate, his authorized political committees, or their agents . . . ." *Id.* § 441a(7)(B)(i). However, for nearly every one of the 53 named firms, Nader doesn't tell the FEC how the law firm coordinated with the Kerry–Edwards Campaign such that its expenditures would constitute regulated contributions rather than protected independent expenditures.

As to these law firms' corporate status, which is central to Nader's allegation that they violated 2 U.S.C. § 441b's ban on corporate contributions, it is not the FEC's burden to fill in the necessary blanks in Nader's complaint. This Court's review of the 53 law firms listed in Nader's administrative complaint turned up only seven organized as "professional corporations," with the others either organized in non-corporate forms or listed with no indication of how they are organized.

If it is in fact as easy as Nader says it is for the FEC to confirm that these law firms are incorporated, Pl.'s Mot. Summ. J. [16-1] 13, then it ought to have been equally easy for Nader to dig up these important facts himself. And, again, whether these law firms are incorporated is immaterial if Nader has not provided the FEC with reason to believe that each of them made expenditures in coordination with the Kerry–Edwards Campaign.

Not all of the FEC's reasoning, however, is satisfactory. The FEC believed that Nader's allegations with respect to one law firm—Reed Smith—were sufficiently specific, but also found these allegations to be "contradictory." AR at 1730.10, 1837. The FEC notes that in one place Nader says that Reed Smith billed its costs for a Pennsylvania challenge to Nader–Camejo's nominating papers to "charity, without charging any client," while elsewhere reporting that Reed Smith received compensation from the DNC in the amount of $136,142 for "political consulting" and "legal consulting" fees in October and November 2004. *Id.* at 1730.10–.11, 1837–38. However, as noted by Nader, Pl.'s Mot. Summ. J. [16-1] 15–16, calling these allegations "contradictory" would be a terminological inexactitude. A contradiction is a direct logical inconsistency, such as a "deathless Death" or a "virtuous tyrant," reflecting the axiom that a thing cannot be and not be at the same time. But it is entirely possible that Reed Smith charged the DNC for some work while also challenging Nader–Camejo in Pennsylvania for free. This aspect of the FEC's reasoning is irrational.

But as to the crucial issue of coordination, the FEC reasonably determined that Nader's supporting facts were insufficient. Nader claims that the Ballot Project, Inc., which he describes as a Section 527 group established to prepare legal challenges to the ballot qualifications of candidates for public office, AR at 39, "directed" the ballot-access litigation in various states "in conjunction with the DNC and the Kerry–Edwards Campaign," *id.* at 50, but the FEC noted that this allegation was insufficient to suggest coordination absent "supporting facts suggesting that the Ballot Project's efforts were on behalf of the Kerry Committee or other indicia of concerted activity . . . ." *Id.* at 1852. Although Nader claims that the Ballot Project's recruitment of law firms was "for the express purpose of benefitting the Kerry–Edwards Campaign," the most that he has alleged is parallel conduct and shared goals, not coordination.

As to Reed Smith, Nader's complaint suggests that ties between John Kerry and the firm, as well as the fact that 18 of its attorneys worked on a ballot-access challenge to Nader–Camejo in Pennsylvania, establishes coordination, *id.* at 49–50, but it was not unreasonable for the FEC to conclude otherwise. That 18 attorneys at a law firm with somewhere north of 1,600 attorneys decided to dedicate their skills to the task of getting their preferred candidate elected, even adding the fact the John Kerry may have retained that firm's services in the past, provides no evidence of coordination between Reed Smith or its attorneys and the Kerry–Edwards Campaign with regard to the Pennsylvania ballot-access litigation. The FEC's commissioners did not act unreasonably in wanting more from Nader on this point before launching an

expensive, time-consuming, and far-reaching investigation of allegations that, by April 2010, had grown long in the tooth.

The FEC also considered evidence highlighted by Nader as conclusive on the issue of coordination, and found it to be lacking. *Id.* at 1853–54, 1838–39. The first is an e-mail from Caroline Adler—described by Nader as a DNC and Kerry–Edwards Campaign employee, *id.* at 7—to DNC employees working on challenges to Nader–Camejo's nominating papers. *Id.* at 160–61. An attachment to the e-mail, titled "Script for Nader Petition Signers," was allegedly used by DNC employees when calling people who had signed Nader–Camejo petitions. *Id.* at 7. However, Nader doesn't explain how this e-mail establishes coordination or even between whom. While Nader claims that the telephone script was authored by a lawyer associated with the DNC and John Kerry, 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.

The second e-mail is from Judy Reardon—whom Nader describes as the Kerry–Edwards Campaign's deputy national director for northern New England, *id.* at 165—to Martha Van Oot, a lawyer at Orr & Reno, P.A., which is a New Hampshire law firm. *Id.* at 31. The e-mail suggests that Ms. Reardon drafted a complaint challenging Nader's New Hampshire nominating papers for various individuals who filed it in their names (some of whom are attorneys) and who were represented by Ms. Oot as well as Emily Rice,

another attorney at Orr & Reno.[1] Nader believes that this e-mail demonstrates coordination between "the DNC and/or the Kerry Committee" and, one presumes, Orr & Reno. Pl.'s Opp'n Def.'s Mot. Summ. J. [19] 3. The agency, however, credited the DNC's and the Kerry Committee's responses that this e-mail did not support the conclusion that the DNC or Kerry Committee were accepting corporate in-kind contributions from Orr & Reno or any other law firms. AR at 1839, 1854. Even assuming that Ms. Reardon's action could be deemed an action of the DNC or the Kerry–Edwards Campaign, nothing in the e-mail or its attachment, or elsewhere in Nader's complaint, indicates that these attorneys or Orr & Reno were not compensated for this specific work or even how much work they performed. This is perhaps a reflection of the fact that in naming so many entities and individuals, Nader's complaint (despite its length) is generally short on factual support as to any given entity or individual. Therefore it is not surprising that the FEC, looking at this e-mail, felt disinclined to investigate Orr & Reno, let alone the dozens of other law firms and lawyers without any connection to this e-mail.

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[1] The draft complaint indicates that it was brought on the behalf of Kathleen Sullivan, Hazel Tremblay, Dorie Gizzard, and Brian Farias. AR at 175. Ms. Sullivan is listed in Nader's complaint as a "respondent," *id.* at 30, and is described as the New Hampshire Democratic Party Chair and as a DNC official. Neither Ms. Tremblay, Ms. Gizzard, nor Mr. Farias is elsewhere mentioned in Nader's complaint. Martha Van Oot and Emily Rice are listed as the Orr & Reno attorneys who represented Sullivan, Tremblay, Gizzard, and Farias in the challenge. *Id.* at 175. Both of those attorneys are listed as respondents in Nader's complaint, as well as three other attorneys who were sent an e-mail in this chain (Mark Atkins, Burt Nadler, and Martin Honigberg). *Id.* at 31.

Nader also cites as proof of coordination the testimony, from a 2004 hearing before the Maine Bureau of Corporations, Elections and Commissions, of Maine Democratic Party Chair Dorothy Melanson. *Id.* at 4; Pl.'s Opp'n Def.'s Mot. Summ. J. [19] 3. Nader claims that this testimony shows that Ms. Melanson was directed, by the DNC, to initiate a ballot challenge to Nader–Camejo in Maine, and that the DNC paid her to do so. AR at 4. While this testimony, in this Court's opinion, provides some support for the claim that Ms. Melanson's activities were performed in coordination with the DNC, *see e.g.*, AR at 106, 108, elsewhere she gives testimony to the effect that her ballot-access activity was performed on her own initiative. *Id.* at 110. In any event, she testified that the Democratic Party promised to pay her for her work, which raises an obvious problem for Nader's claim that unreported contributions were made to the DNC by Ms. Melanson. *Id.* at 111–12. Therefore it was not unreasonable for the FEC to conclude that the evidence cited by Nader failed to support his contention that lawyers and law firms made unreported contributions, in the form of free legal services, to either the DNC or the Kerry–Edwards Campaign.

The FEC likewise determined that Nader's allegations related to a 2008 Pennsylvania Grand Jury Presentment failed to support his claim that law firms were making unreported and prohibited contributions to the Kerry–Edwards Campaign. *Id.* at 1839. That Presentment, attached to a supplement Nader provided to his administrative complaint, deals generally with alleged misconduct by dozens of Pennsylvania state employees and the use of taxpayer funds for campaign purposes. *Id.* at 758. In one section of the Presentment,

id. at 812–15, it details the alleged misappropriation of taxpayer resources by state employees related to a challenge to the Pennsylvania nominating papers of Nader–Camejo. However, according to the FEC's reasonable reading of the Presentment, it made "no findings as to the Kerry Committee or [Reed Smith], and [did] not link any of the activities charged to any activities or knowledge of the Kerry Committee, the DNC, lawyers, or to any actors outside of Pennsylvania." *Id.* at 1840. The FEC reasonably concluded that the factual allegations in the Presentment provided no support for Count 1 of Nader's complaint. *Id.*

In sum, the Court's evaluation of the administrative record and the FEC's reasoning leads it to conclude that the agency's determination that, as to Count 1, there was "no reason to believe" that the DNC, the Kerry Committee, their treasurers, or John Kerry personally violated FECA is not contrary to law. The 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. *See White v. FEC*, No. Civ. A. 94-2509, 1997 WL 459849, *3 (D.D.C. July 31, 1997). Nor does it put the lie to the FEC's argument that the issue of resource allocation played an important role in its decision to dismiss. 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.

B. Count 2: Illegal and Unreported Contributions and Expenditures

Count 2 of Mr. Nader's administrative complaint accuses the Service Employees International Union ("SEIU") and a Section 527 group called America Coming Together ("ACT") of making undisclosed contributions to the DNC in connection with an effort to deny Nader–Camejo ballot access in Oregon, in violation of 2 U.S.C. §§ 441b(a) and 441a(a)(2)(B). *Id.* at 93–94. Nader claimed that SEIU violated Section 441b's ban on union contributions to national political parties, that such contributions exceeded the $15,000 limit in Section 441a(a)(2)(B), and that the union further violated FECA by paying a law firm to investigate Nader–Camejo petitioners and by paying its own staff to participate in the ballot-access challenges. AR at 94. The Commission found "no reason to believe" that ACT violated FECA. *Id.* at 1810. As to SEIU, the FEC failed to notify the union of Nader's complaint, and Nader's allegations with respect to it were essentially dismissed when the agency closed the MUR with respect to "all Respondents and other persons and entities named in the complaint . . . ." *Id.* at 1811.

In evaluating Nader's allegations and factual support, the FEC identified many of the same problems with these allegations vis à vis SEIU and ACT as it found with respect to Nader's allegations in Count 1 against the DNC, Kerry Committee, John Kerry, and various law firms and lawyers. The FEC stated in its General Counsel report and in its factual and legal analyses that Nader's complaint "does not allege, and the available information does not suggest, that SEIU's

and ACT's activities in Oregon were coordinated with the Kerry Committee, the DNC, or any other entity." *Id.* at 1730.19, 1843.

In reaching this conclusion, the agency examined Nader's claim that SEIU and the DNC maintained "close political and financial ties" in part because Anna Burger—SEIU's Secretary–Treasurer—is a "DNC official." *Id.* at 76. Nader believes that the fact that Ms. Burger is a "DNC official" "plainly establishes" reason to believe that ACT and SEIU coordinated with the DNC or the Kerry–Edwards Committee on the Oregon ballot challenges, Pl.'s Mot. Summ. J. [16-1] 17. However, the FEC reasonably concluded otherwise, and its determination is entitled to deference by this Court. The FEC determined that the fact that Ms. Burger is a "member-at-large" of the DNC (which is the lowest level on the DNC totem pole, AR at 388–99) provided no basis for inferring that she was involved in the DNC's decision making such that coordination between the DNC and SEIU arose from her activities. AR at 1730.19 (applying 11 C.F.R. § 109.21(d)(2)). Given the dearth of information in Nader's complaint regarding coordination between the Kerry–Edwards Campaign or the DNC and SEIU or ACT, this Court finds that the FEC's determination as to the insufficiency of Nader's complaint is supported by the record and not clearly erroneous.

The FEC also reasonably discounted the evidence Mr. Nader offered to support his claim that the SEIU made large, unreported contributions to the DNC, thereby violating FECA's prohibition against labor-union contributions to national political committees. *Id.* at 76 (citing 2 U.S.C. § 441b(a)).

Nader's support for this allegation comes from the SEIU's website, where, in a press release, the union stated that it "gave $1 million to the DNC . . . ." *Id.* at 523. However, the FEC concluded that this statement was ambiguous and didn't necessarily mean that SEIU literally cut a check to the DNC in the amount of $1 million. *Id.* at 1730.19. The FEC also believed that this statement, as interpreted by Nader, was essentially refuted by the SEIU in a prior MUR (also involving a claim that SEIU violated 2 U.S.C. § 441b) and was not the sort of statement the union would be expected to make publicly if true. *Id.* at 1730.19. Given this apparent refutation and the absence of supporting evidence in the SEIU's disclosures to the FEC, *id.* at 1730.20, the FEC concluded that Nader's allegations were insufficient to warrant an investigation of either SEIU or ACT. *Id.* This Court, after reviewing Nader's complaint and the FEC's analysis, concludes that the FEC's decision not to pursue these allegations further has support in the record and is not contrary to law.

In sum, the Court finds that the FEC's decision to find "no reason to believe" that ACT violated FECA and to close the MUR with respect to SEIU and other individuals and groups connected with Nader's allegations in Count 2, *id.* at 1810–11, is not contrary to law.

C. Count 3: Failure to Register

Count 3 of Nader's administrative complaint alleges that the "Section 527 Respondents"—namely, the National Progress Fund, United Progressives for Victory, Uniting People for Victory, the Ballot Project, and Americans for Jobs—failed to register with the

FEC as political committees, in violation of FECA. *Id.* at 9, 18, 19 (citing 2 U.S.C. § 441 *et seq.*). Nader also claims that these groups knowingly accepted contributions and made expenditures in violation of the contribution limits in Sections 441a(a)(1) and 441a(a)(2). *Id.* at 95. Of these five entities, only ACT and the Ballot Project responded to Nader's complaint. *See id.* at 1455, 1612.

Upon review of the administrative record and the parties' arguments, the Court concludes that the FEC's decision not to investigate the allegations related to Count 3 of Nader's complaint is not contrary to law. As an initial matter, the FEC's General Counsel noted that ACT, contrary to Nader's allegations, was registered as a political committee and had been since 2003. *Id.* at 1730.27. The Commission therefore found that there was "no relieve to believe" that as to ACT, a violation of 2 U.S.C. § 433 had occurred. *Id.* at 1810. While the agency noted that ACT, in its response, had neither confirmed nor denied that it had made expenditures related to ballot-access litigation against Nader–Camejo, the FEC determined that an investigation of this allegation would be hampered by the fact that ACT was "essentially [] defunct," *id.* at 1730.27, and because any such investigation, concerning alleged activity more than five years old, would "encounter difficulties with obtaining relevant documents" and "stale witness memories." *Id.* at 1730.28. Those same issues apply to the Ballot Project, which was dissolved in September 2005. *Id.* While Nader argues that the FEC is exaggerating the difficulty of investigating these defunct organizations, the Court believes that the FEC is in a better position

to evaluate its own resources and the probability of investigatory difficulties than is Mr. Nader.

As to the other Section 527 groups—United Progressives for Victory, Uniting People for Victory, Americans for Jobs, and the National Progress Fund—the FEC recognized that these groups, based on the allegations in Nader's complaint, may have engaged in political activity that would have obligated them to register as political committees, but it concluded that each of them was either defunct or had ceased operations, and that in those circumstances its prosecutorial discretion should be exercised to dismiss the allegations as to those groups. *Id.* at 1730.30.

The Court finds that the FEC's decision to dismiss the complaint as to the Section 527 groups named in Count 3 was not contrary to law, and represents a reasonable exercise of the agency's considerable prosecutorial discretion. The FEC has "broad discretionary power in determining whether to investigate a claim," and its decisions to dismiss complaints are entitled to great deference as well, as long as it supplies reasonable grounds. *Akins*, 736 F. Supp. 2d at 21. Nader has not provided any evidence or presented any arguments that suggest abuse of this discretion; he appears only to argue that it should have been exercised differently. Pl.'s Mot. Summ. J. [16-1] 19–20. However, as the Supreme Court has noted, a decision to *not* investigate a claim involves a complicated balancing of various factors that are "peculiarly within [the agency's] expertise," including whether a violation has occurred, whether the agency's resources are better used elsewhere, whether its action would result in success, and whether there are

sufficient resources available to take any action at all. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

While, unlike in the *Heckler* case, judicial review is available under FECA to complainants dissatisfied with the FEC's decisions not to investigate, *see* 2 U.S.C. § 437g(8)(A), the agency has provided reasonable grounds for not proceeding further. The FEC is in a better position than is Mr. Nader to evaluate the strength of his complaint, its own enforcement priorities, the difficulties it expects to encounter in investigating Nader's allegations, and its own resources. Furthermore, the difficulties identified by the FEC in terms of staleness of evidence and the defunctness of several of the groups against whom Nader has made allegations are in large part the responsibility of Nader, who filed his complaint 3.5 years into the 5-year statute of limitations. Nader appears to argue that the FEC is precluded from making this argument so long as he files his complaint within the 5-year statute of limitations, Pl.'s Mot. Summ. J. [16-1] 19, but the statute of limitations only provides a hard limit on when such actions can be brought. The passage of time, even within the period, will obviously impair investigations, and the FEC's conclusion that Nader's delay would impact the difficulty of any investigation is not contrary to law.

D. Count 4: Allegations Involving the 2006 Romanelli Campaign

What the FEC calls "Count 4" of Nader's complaint relates to a series of allegations set out in an October 2008 supplement to Nader's administrative complaint. AR at 741. That supplement notified the FEC of new

information arising out of a Grand Jury Presentment released by a Pennsylvania Attorney General in July 2008. *Id.* In general, the Presentment concerned charges of conspiracy, theft, and conflict of interest against members and employees of the Pennsylvania House Democratic Caucus. *Id.* Nader claimed that the use of taxpayer money for campaign purposes alleged in the Presentment was also involved in the Nader–Camejo ballot challenge in that state. *Id.* He asked the FEC to name additional respondents (*i.e.*, various Pennsylvania state legislators), to investigate the information in the Presentment to determine "whether Respondents committed civil violations of FECA," and to refer MUR 6021 as a whole to the Justice Department for a criminal investigation. *Id.* at 742. He also asked the FEC to add additional respondents and to investigate civil violations of FECA related to an alleged scheme relating to a ballot challenge against Carl Romanelli, who was a Green Party candidate for United States Senate in 2006. *Id.* This latter allegation is perhaps most properly labeled as an additional count, since the information in the Presentment related to Reed Smith and the state legislators appears to relate only to the allegations in Count 1.

As to Nader's claim related to a ballot-access challenge against Carl Romanelli, Nader appears to have abandoned that claim and does not address it anywhere in his summary-judgment submissions. Nevertheless, the FEC's decision to close MUR 6021 as to any respondents and entities associated with Count 4 is not contrary to law. *Id.* at 1811. The FEC reasonably concluded that Nader's claim was too speculative to warrant an investigation. *Id.* at 1730.31. For example, Nader alleged in his original complaint in

this Court that the Senate campaign of Bob Casey was involved in the challenge to Mr. Romanelli's nominating papers, using the labor of state employees and "misappropriated taxpayer funds," Compl. [1] 19, but the FEC reasonably concluded that Nader's allegations represented an expansive gloss on the Presentment, which did not charge Mr. Casey, his campaign, or lawyers working on his behalf with any wrongdoing. AR at 1730.31.

The FEC's decision not to proceed with an investigation of the allegations in Count 4 was further supported by its determination that a state investigation of criminal activity by state employees was ongoing, and that an investigation by the FEC would require an extensive amount of the agency's limited resources. *Id.* Particularly given that Mr. Nader fails to present any arguments to the contrary in his summary-judgment submissions, the agency's conclusions on this score are reasonable and not contrary to law.

While the agency's decision to essentially dismiss Count 4 would be entitled to deference in any case, the Court also notes that Mr. Nader lacks Article III standing to bring a claim involving a ballot challenge in an election for the U.S. Senate in which he was not a candidate. To establish standing, a plaintiff must identify an injury in fact that is actual or imminent and traceable to the challenged action of the defendant, and show as well that it is likely, and not merely speculative, that a favorable decision would redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Mr. Nader has not asserted any

injury to him as a result of the ballot-access litigation initiated against Mr. Romanelli.

In sum, the FEC's decision to close MUR 6021 as to all respondents and entities associated with Count 4 of Nader's complaint, as supplemented, is not contrary to law.

E. The FEC's Failure to Notify Various Individuals and Entities

Perhaps the most persuasive aspect of Mr. Nader's motion is his argument that the FEC mishandled his administrative complaint. He claims that the agency's decision to dismiss the complaint should be set aside because it violated FECA by failing to notify dozens of "respondents" concerning the administrative complaint filed against them. Pl.'s Mot. Summ. J. [16-1] 6–11.

The Court finds that Nader is correct that the FEC's failure to notify all persons and entities who were alleged to have violated the Act was improper. FECA says very clearly that "[w]ithin 5 days after receipt of a complaint, the Commission *shall* notify, in writing, *any person* alleged in the complaint to have committed [a violation of FECA]." 2 U.S.C. § 437g(a)(1) (emphasis added). The FEC has not identified any statutory or other authority for the proposition that, despite the Act's clear language, it has discretion to notify whomever it wants as "respondents" to the administrative complaint. The statute clearly strips the agency of that discretion. While the FEC may be correct that, as interpreted by Mr. Nader and this Court, FECA provides complainants with a means to harass their opponents with frivolous complaints and

tax the agency's limited resources, Def.'s Mot. Summ. J. [18] 20, it is not within the FEC's or this Court's power to "interpret" away a clear law to solve these problems. Correcting ill-advised legislation is a responsibility entrusted to Congress alone. By failing to notify the dozens of individuals and groups named in Nader's complaint, the FEC clearly violated the procedural requirements of FECA.

However, despite this clear defect in the FEC's handling of Nader's administrative complaint, this was harmless error. The FEC's failure to follow the notice procedures in Section 437g of FECA should be disregarded by courts if such errors are harmless. *FEC v. Club For Growth, Inc.*, 432 F. Supp. 2d 87, 90 (D.D.C.) (quoting *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998)). While Nader says that the FEC's failure to follow FECA's procedural requirements was "no harmless error," Pl.'s Mot. Summ. J. [16-1] 12, he doesn't specifically identify the harm to him that flowed from the FEC's error.

At various points in his submissions, Nader suggests that certain information that would have been useful to the FEC could have been obtained if it had served each and every one of the persons and entities named in his administrative complaint, but at no time is it clear that by doing so a benefit to Nader would have resulted. The Court finds no reason to believe that had the FEC properly notified all alleged "respondents," it would have reached a different decision in this case. *See City of Portland v. EPA*, 507 F.3d 706, 716 (D.C. Cir. 2007). For example, Nader claims that the FEC could have obtained information

about law firms' billing records by serving them with his administrative complaint, Pl.'s Mot. Summ. J. [16-1] 14, but this doesn't accurately describe what would necessarily have followed the FEC's notification of these firms. First, none of those law firms was required to respond or provide any information absent a subpoena. Second, even if they did choose to respond with evidence of their billing practices, there is no reason to think that these responses would contain information favorable to Nader. Nader assumes the same elsewhere, when he states that the FEC, if it had served SEIU with Nader's complaint, would have confirmed that the union made illegal unreported contributions to the DNC. *Id.* at 18. However, nothing indicates that such confirmation would have resulted from proper notification of SEIU. The FEC did evaluate Nader's allegations as to SEIU, and it determined that Nader hadn't given the agency enough information for it to conclude that an investigation of the union, let alone service of the complaint, would produce evidence of FECA violations.

The notice procedures set out in Section 437g are for the benefit of those whom Nader alleges violated the Act, not for Nader's benefit. Since MUR 6021 was closed as to all persons and entities named in Nader's complaint, the only persons and entities who could have been prejudiced by the FEC's error were ultimately absolved of liability.

Therefore the Court finds that the FEC's failure to follow the notice requirements of Section 437g is harmless.

IV. CONCLUSION

Although the FEC's decision making in this case was, at times, of less than ideal clarity, and although its practices with respect to notification of respondents merit the agency's attention given the drift this Court has observed between those practices and the procedural requirements of FECA, the agency's decision in this case is not contrary to law. Therefore, for the reasons stated above, the Court will grant defendant's Motion [18] for Summary Judgment and deny plaintiff's Motion [16] for Summary Judgment.

A separate Order consistent with this Memorandum Opinion shall issue this date.

Signed by Royce C. Lamberth, Chief Judge, on November 9, 2011.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 10-989 (RCL)

[Filed November 9, 2011]

RALPH NADER,	)
Plaintiff,	)
	)
v.	)
	)
FEDERAL ELECTION COMMISSION,	)
Defendant.	)
	)

ORDER AND JUDGMENT

For the reasons stated in the accompanying Memorandum Opinion filed this date, it is hereby

ORDERED that plaintiffs' Motion [16] for Summary Judgment is DENIED and defendant's Motion [18] for Summary Judgment is GRANTED. It is further

ORDERED that judgment is entered for defendant. All claims are hereby dismissed.

SO ORDERED.

Signed by Royce C. Lamberth, Chief Judge, on November 9, 2011.