UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEMOCRATIC NATIONAL COMMITTEE, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	)	Civ. No. 1:08-cv-01083 (JDB)

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The Federal Election Commission (Commission or FEC) submits this Reply in support of its Motion for Summary Judgment. The Democratic National Committee (DNC) has failed to show Article III standing. Despite the belated filing of a supporting affidavit, the DNC's claimed injury as a result of Senator John McCain's withdrawal from the Presidential Primary Matching Payment Account Act, *see* 26 U.S.C. §§ 9031-9042 *et seq.*, remains highly speculative and dependent on many factors whose impact cannot be determined. The DNC has also failed to show that any injury it has suffered was caused by Commission inaction, rather than the actions of third parties during the Democratic primary campaign, and that injunctive relief from this Court would redress any harm it suffered in the 2008 primary. In any event, the DNC has failed to counter our showing that the Commission's handling of the DNC's administrative complaint — which raised novel and complex issues unresolved by the FEC's August 2008 vote to permit

Senator McCain to withdraw from the Matching Payment Program — has been reasonable under the highly deferential standard of review.

Although the Commission believes that the case should be dismissed because the DNC lacks standing and because the Commission has acted reasonably, an important factual development has taken place today. Just hours before the filing of this brief, the Commission met in a closed executive session to discuss the underlying administrative complaint. The Commission voted to dismiss the matter, and both the respondent and the complainant have now been notified of the Commission's vote. As a result, the DNC's lawsuit is moot; the DNC has received the relief it requested despite its lack of standing.[1]

I. THE DNC LACKS ARTICLE III STANDING

The DNC did not compete directly against Senator McCain, and its claim that it sustained an Article III injury because Senator McCain did not participate in the Matching Payment Program depends upon unsupported speculation about the actions of many persons involved in the 2008 primary elections, including candidates, campaign contributors, and voters. *See* DNC's Memorandum in Opposition (DNC Opp.) (Docket No. 14) at 5. Although the DNC also relies upon *Shays v. FEC*, 414 F.3d 76, 90-93 (D.C. Cir. 2005), standing in that case was based on claims that a series of FEC regulations applicable to the entire federal election system had created an "illegally structured environment." Here the DNC challenges only the actions of one purported law breaker, not a general regulatory environment. Moreover, the DNC fails even to allege that it suffers from any threat of future injury — such as informational injury, *see FEC v. Akins*, 524 U.S. 11 (1998) — a necessary showing for the kind of prospective relief it seeks.

[1] It is generally inappropriate to raise new grounds for dismissal in a reply. The significance of this Commission action, however, requires its immediate disclosure. If the Court finds that the parties should have an opportunity to brief the impact of this new development, the parties can consult and propose jointly, if possible, how the case should proceed.

A. The DNC Was Not Injured as a Candidate Against Senator McCain, and Its Claimed Injury Is Highly Speculative

Because the DNC is not a candidate who competes with Senator McCain, its claim of standing is foreclosed by *Gottlieb v. FEC*, 143 F.3d 618 (D.C. Cir. 1998). *See* FEC's Memorandum in Support of Motion for Summary Judgment (FEC Mem.) at 12-14. *Gottlieb* dealt with a very similar situation, in which non-candidates sued the FEC regarding Bill Clinton's purported violation of the laws involving Matching Payment Act funds. The D.C. Circuit explained that the political committee plaintiff lacked standing both because it was not a "competitor" in the election, and because "[f]or all we know, any excess funds could have been used for better hotel accommodations, more comfortable transportation, or brightening up the decor at campaign headquarters — purposes which at least arguably did not directly counter or even diminish [the plaintiff's] attempts to influence the electorate." *Id.* at 621-22.

Gottlieb made clear that "[o]nly another candidate" could make a claim of injury from an opposing candidate's improper use of matching funds because no one else is "in a position to receive matching funds itself." 143 F.3d at 621. The DNC attempts to distinguish *Gottlieb* on the basis that the *Gottlieb* plaintiff was a political action committee rather than a national party committee like the DNC, but this difference is immaterial. *See* DNC Opp. at 8. Like the plaintiff in *Gottlieb*, the DNC cannot receive matching funds, which was the standard articulated by *Gottlieb*. 143 F.3d at 621. Although the DNC's status as national party committee gives it the ability to spend more on *coordinated* expenditures for its preferred candidate, *see* 2 U.S.C. § 441a(d), all political committees can make unlimited *independent* expenditures,[2] and those are the kind of expenditures the DNC claims were adjusted because of Senator McCain's withdrawal

[2] *See Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996).

from the Matching Payment Program. Thus, for all relevant purposes here, the DNC and the political committee plaintiff in *Gottlieb* are similarly situated.[3]

The DNC argues that it has been injured because it "was compelled to spend funds that it would not have otherwise spent, and that it could not really afford, in order to respond to Senator McCain's spending during the months of March, April and May 2008." DNC Opp. at 3. As evidence of this purported injury, the DNC has now produced an affidavit from its Executive Director, Thomas McMahon. However, the affidavit fails to provide sufficient information to demonstrate an injury in fact. Mr. McMahon asserts that the DNC undertook "certain expenses that *at the time* would not have otherwise been undertaken" (Decl. ¶ 19; emphasis added), but this assertion only goes to the timing of the expenditures, not that they were wasteful or harmful.

In particular, the DNC asserts that it would have preferred to "conserve its resources for the general election," DNC Opp. at 5, but the McMahon affidavit provides no evidence that the approximately $600,000 the DNC allegedly spent on advertising in March-May 2008 was less effective than it would have been if used during the general election. Even accepting the DNC's contention that candidate and national committee spending should be considered together, Senator Obama and the DNC spent in excess of $363 million from June 2008 through the general election. *See* Exhibit 1. The DNC has failed to show that it is worse off as a result of spending that $600,000 a few months earlier. The DNC also argues (DNC Opp. at 8) that "the DNC is

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[3] The DNC claims that if Senators Obama and Clinton have standing, then "it is clear that the DNC would have associational standing to assert the rights of those candidates." DNC Opp. at 10 n. 1. The DNC bases this argument on the Fifth Circuit's decision in *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 587-88 (5th Cir. 2006). However, in that case the Fifth Circuit noted that *Gottlieb*, which is binding precedent in this Circuit, is more restrictive of standing than Fifth Circuit precedent. *See Texas Democratic Party*, 459 F.3d at 587 n.5. In any event, it is by no means clear that Senators Obama or Clinton would have Article III standing to bring a claim in this case, because, *inter alia*, their claims for future injury would also likely be speculative. *See infra* pp. 12-13.

responsible for taking the lead in opposing the Republican Party's presumptive presidential nominee if one emerges — as was the case in this instance — before the Democratic Party has such a presumptive nominee," an assertion that seems at odds with the DNC's claim that if Senator McCain's spending had been limited, it would have "conserved its resources" for the general election.[4]

Moreover, although Mr. McMahon declares that the DNC spent more money in the primary season as a result of Senator McCain's withdrawal from the Matching Payment Program, he does not assert that the DNC had, overall, less money to spend.[5] As we previously explained, "if Senator McCain had stayed in the matching fund program, the DNC's contributors — knowing that the Senator's spending would be capped — might have been less motivated to contribute to the DNC and the Democratic candidates." FEC Mem. at 14. Mr. McMahon does not dispute this possibility. To the contrary, Mr. McMahon attaches several email solicitations (Decl. Exhs. 1-3) to potential contributors that make explicit reference to Senator McCain's

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[4] The McMahon affidavit also provides no evidentiary support for the DNC's argument in its brief (DNC Opp. at 9) that Senator McCain was devoting resources to the general election while Senators Obama and Clinton were devoting resources exclusively to the primary election. More generally, the McMahon affidavit provides no evidence that Senator McCain (or the Republican National Committee) was spending money during the primary season to oppose the Democratic candidates.

[5] The Commission has not engaged in discovery in this case; the Court had stated that "the parties' disagreement [on standing] will focus on the interpretation of the case law governing standing, rather than factual disputes." *See* Order of Sept. 19, 2008 (Docket No. 10). The FEC thus cannot determine whether the DNC's spending during this election cycle was atypical. To the extent that the Court believes that the DNC may have standing based upon the McMahon affidavit, the FEC renews its request for limited jurisdictional discovery so that it can examine the factual assertions made by Mr. McMahon. There is simply no record to support Mr. McMahon's statements of injury and "self-serving statements contained in an affidavit will not defeat a motion for summary judgment when those statements are 'without factual support in the record.'" *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 504 (7th Cir. 2004)) (*quoting Slowiak v. Land O'Lakes, Inc*., 987 F.2d 1293, 1295 (7th Cir. 1993)) (emphasis omitted).

alleged lawbreaking. If those email solicitations resulted in increased contributions to the DNC, then Senator McCain's alleged violation of spending limits may have represented a net *benefit* to the DNC, rather than an injury.

In addition, the McMahon affidavit provides no evidence that addresses whether Senator McCain even would have been the Republican nominee if he had participated in the Matching Payment Program — or whether such participation might have prolonged his contest among the other Republican contenders, perhaps matching the length of the Democratic contest. *See* FEC Mem. at 14 n.3. The DNC appears to assume that, even if Senator McCain had been subject to expenditure limits, he still would have presumptively won the nomination relatively early, but then done nothing to begin his fight against the Democrats for several months. If Senator McCain had been bound by the spending limits, he would likely have conducted his entire primary campaign differently, and his Republican primary opponents might not have dropped out of the race as soon. The McMahon affidavit essentially rests on speculation that one scenario was more likely than another, but such uncertainty does not satisfy Article III's requirement that the plaintiff demonstrate a concrete injury in fact.

The DNC also claims to have been injured because it was "forced to face Senator McCain during the entire period prior to the Republican Convention in a competitive environment that was illegally structured because of the FEC's failure to process the DNC's administrative complaint." DNC Opp. at 6. The DNC relies upon *Shays*, 414 F.3d 76, but as we showed (Mem. at 14-16), *Shays* is inapposite. Unlike the situation in *Shays*,

> Senator McCain's single withdrawal from the matching fund program is not a general set of regulations that govern elections for all candidates. The DNC does not even allege that there is a system wide failure in the Matching Payment Program or that certain candidates would be disadvantaged if they refused to compete in an "illegally structure[d] … competitive environment …"

FEC Mem. at 16 (quoting *Shays*, 414 F.3d at 87). The DNC makes no attempt to address this argument in its opposition. If one purported lawbreaker could singlehandedly make an entire environment "illegally structured," it would radically expand the *Shays* decision, because any plaintiff would be able to point to a single alleged lawbreaker and claim that the political environment was therefore "illegally structured." The *Shays* opinion dealt with the situation "when *regulations* illegally structure a competitive environment." *Id.* at 87 (emphasis added). The DNC's case, however, involves a single candidate who allegedly violated the law. In any event, even if the DNC's allegations were sufficiently broad to constitute a challenge to an illegally structured environment, all the major candidates and the two major parties were playing by the same rules: Senators Clinton and Obama were not subject to spending limits because they similarly declined to participate in the Matching Payment Program. Thus, the "environment" was same for everyone and the DNC suffered no cognizable injury.

B. The DNC Has Still Failed To Show That Any Injury It May Have Suffered Was Caused By The Commission

To establish standing, the DNC must show not only that it has suffered an injury, but also that there is a "causal connection between the injury and the conduct complained of … ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The DNC argues (Opp. at 10) that "causation is clear," but every step of the DNC's causation argument is based on unstated assumptions, and the causal chain is simply too attenuated to support Article III standing. At the same time, the DNC virtually ignores the real cause of its alleged harm: that any injury it suffered was actually caused by the independent actions of Senators Obama and Clinton, *i.e.*, their prolonged primary battle. The DNC appears to rely on the following causal chain:

1. The FEC failed to prevent Senator McCain's withdrawal from the Matching Payment Program; therefore,
2. Senator McCain spent more funds campaigning against Democratic candidates in March-May 2008; therefore,
3. The DNC had to spend money earlier than it had planned to respond because the Democratic candidates were unwilling to do so; and therefore,
4. The DNC had less money during the primary season to spend for other purposes.

This chain does not hold together. The DNC provides no evidence that Senator McCain actually spent more funds campaigning against Democrats than he otherwise would have during the relevant time period; it is unclear that Senators Obama and Clinton failed to spend money to oppose Senator McCain during that time period; despite the two DNC ads described in the McMahon affidavit, it is unclear that the DNC would have "conserved" its overall resources during the relevant time period if Senator McCain had less money; it is unclear that Senator McCain would have been the Republican nominee if he had not withdrawn from the Matching Payment Program; and it is unclear that the DNC had less money to spend as a result of Senator McCain's spending during that time because the DNC's fundraising may have benefited from his withdrawal from the program. *See supra* pp. 5-6; FEC Mem. at 14.

Furthermore, the Commission could not have caused any Article III injury to the DNC during the March-May 2008 time period that the DNC repeatedly identifies as the period during which it was injured.[6] That was the period in which the DNC argues that the Republicans had a

[6] *See, e.g.*, DNC Opp. at 3 ("the DNC was compelled to spend funds that it would not have otherwise spent, and that it could not really afford, in order to respond to Senator McCain's spending during the months of *March, April and May 2008*.") (emphasis added); *id*. at 5 ("*During the months of March, April and May of 2008*, Senator McCain was able to expend the resources of his primary campaign to promote his candidacy and advocate for his own election in

"presumptive nominee" but the Democrats did not.[7] The DNC filed its administrative complaint in this case on February 25, 2008. The statute that governs this lawsuit explicitly provides a 120-day window for the Commission to act after the filing of an administrative complaint before a lawsuit under 2 U.S.C. § 437g(a)(8) can be filed. Therefore, as a matter of law, there was nothing unlawful about any alleged FEC delay until, at the earliest, June 24, 2008, when the 120-day period elapsed. Thus, the FEC could not have unlawfully caused the DNC an injury in March through May of 2008. While the Commission certainly has the discretion to act quickly in the first months after it receives an administrative complaint, it could not have acted contrary to law by failing to take action against Senator McCain during the primary season.

C. The DNC Has Failed To Establish, As It Must to Show Standing, That Any Injury Would Be Redressed By A Favorable Decision

To establish Article III standing, the DNC bears the burden of proving that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks and citation omitted). We explained (Mem. at 17-18) that no action of this Court, or any court imposing a civil penalty on Senator McCain, can now remedy an alleged competitive injury to the DNC stemming from the 2008 primary campaign.

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the general election … .") (emphasis added); *id*. at 10 ("but for the FEC's failure and refusal to enforce the law, as requested by the DNC's administrative complaint, Senator McCain could not have afforded to make any significant expenditures *during March, April and May of 2008* … .") (emphasis added).

[7] The start and end dates of this period are subject to debate, and the DNC itself appears to use two different definitions of "presumptive nominee," depending upon which party's nominee it is characterizing. The DNC argues that Senator McCain became a presumptive nominee some time prior to February 25, 2008, despite acknowledging that at that time he had not yet received a majority of delegates to the Republican National Convention. *See* DNC Response to FEC's Statement of Material Facts ¶ 21. Yet the McMahon Affidavit states that "[t]he Democratic Party did not select a presidential nominee until June 3, 2008 [the last two primaries in the Democratic primary schedule]." McMahon Decl. ¶ 6. Senator Obama had a substantial lead in delegates and was the prohibitive favorite well before June 3, 2008.

In response, the DNC suggests (Opp. at 11-13) that it need not prove redressability. The two arguments made by the DNC on this point are unsupported by the law.

1. The DNC Is Not Asserting A "Procedural Right," But Alleging a Substantive Violation by Senator McCain

The DNC argues (Opp. at 12) that it need not prove redressability because its claim of injury is "akin to a violation of a procedural right," but the DNC is not asserting a procedural right.[8] This case is about the DNC's underlying allegation that Senator McCain has committed a substantive violation of law. The only procedural rights of the DNC involved in this case are the statutory rights to file an administrative complaint under 2 U.S.C. § 437g(a)(1) and a court action under 2 U.S.C. § 437g(a)(8) — rights that the DNC has already exercised.

The evolution of the "procedural rights" standing cases shows that the DNC is trying to stretch the doctrine beyond its breaking point. In *Lujan v. Defenders of Wildlife*, the Supreme Court considered an environmental group's challenge to a rule promulgated by the Secretary of the Interior, who had allegedly violated a regulation by failing to consult on the rule with other agencies. 504 U.S. 555, 558-59 (1992). The Court held that the environmental group's purported injury was not redressable and therefore the plaintiff lacked standing. *Id*. at 571. The Court also rejected the argument that claims involving procedural rights automatically satisfy Article III standing, holding that even though procedural rights are "special," it is necessary that "the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed)." 504 U.S. at 572-73 nn.7 & 8. The D.C. Circuit also addressed

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[8] Even if the DNC were asserting a procedural right, the courts' special approach to such cases "does not mean — nor could it — that the plaintiff asserting the breach of a procedural right is not required to establish the constitutional minima of injury-in-fact, causation, and redressability. It only means that the necessary showing to support those minima is reduced." *Wyoming Outdoor Council v. U.S. Forest Service*, 165 F.3d 43, 51 (D.C. Cir. 1999).

the redressability part of the standing analysis in procedural rights cases in *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996), which similarly dealt with an environmental group challenging a federal agency for failure to comply with a federal statute by not preparing an Environmental Impact Statement. The court ultimately found that the plaintiff lacked standing because it was unable to "show that the government act performed without the procedure in question will cause a distinct risk to a particularized interest of the plaintiff." 94 F.3d at 664.

In *Shays*, the D.C. Circuit relied upon this line of cases to determine that two members of Congress had standing to challenge FEC's regulations as "too lax," even though the congressmen could not prove that the challenged regulations "disadvantage their reelection campaigns." 414 F.3d at 82, 91. Although the case did not involve an agency procedure like the environmental cases cited above, the court held that the *Shays* plaintiffs' right to participate in campaigns that comply with statutory directives was "'procedural' insofar as campaign finance rules establish procedures through which candidates seek reelection …." *Id.* at 91.

The DNC now relies on *Shays* to argue that its case is "procedural" and therefore its constitutional standing requirements are reduced. But *Shays* dealt with a set of generally applicable regulations that created rules analogous to "procedures" that govern all federal campaigns, which is why the court analogized the situation to the violations of procedures alleged in cases like *Lujan* and *Florida Audubon Society*. By contrast, the DNC's underlying substantive complaint is about the application of one rule to a single allegedly wrongful act by Senator McCain. The DNC's position would turn every application of the campaign finance statutes into a "procedure" for purposes of standing, a prospect that clearly was not intended

when *Lujan* made reference to procedural rights cases being "special." The DNC has not been denied any procedural right.

2. Prospective Relief Will Do Nothing to Remedy the DNC's Alleged Injury

Even if the Court were to grant the relief the DNC seeks, and even if that order eventually resulted in an injunction or civil penalty, such prospective relief would do nothing to remedy the political injury the DNC claims it suffered from Senator McCain's activities during the 2008 primary season. The DNC does not allege that any relevant statute authorizes any compensation to it for the past political injuries it alleges, and any civil penalties would be payable to the government, not the DNC. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106-07 (1998). *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.167, 185 (2000) (civil penalties payable to the government do not redress past injury).

It is well-established that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief … if unaccompanied by any continuing, present adverse effects." *Natural Resources Defense Council v. Pena*, 147 F.3d 1012, 1022 (D.C. Cir. 1998) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). "'Because injunctions regulate future conduct, a party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate — as opposed to merely conjectural or hypothetical — threat of future injury.'" *Id.*, 147 F.3d at 1022 (quoting *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994)); s*ee also Haase v. Sessions*, 835 F.2d 902, 911 (D.C. Cir. 1987) (requiring evidence of future harm to demonstrate standing for either injunctive or declaratory relief) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102-05 (1983)). Thus, because the DNC has not alleged in its complaint any facts indicating that Senator McCain is

likely to run again for president, enter the matching fund program, and then withdraw from it under similar circumstances, prospective relief designed to discourage Senator McCain from engaging in similar activities in future federal elections would redress no real or imminent injury to the DNC.[9]

The DNC ignores these key principles when it states that the Commission's argument would render 2 U.S.C. § 437g(a)(8) a "nullity." DNC Opp. at 12. A plaintiff who can show continuing adverse effects — such as a voter who seeks information that FECA requires to be reported or a candidate who will run again for office and complains about an illegally structured campaign environment — can meet the necessary requirements under Article III and thus have both statutory and constitutional standing under section 437g(a)(8). *See FEC v. Akins*, 524 U.S. 11, 24 (1998) (standing exists because of the "informational injury at issue"); *Shays*, 414 F.3d at 92 (standing exists because "Shays and Meehan face reelection every two years"). The DNC, however, cannot meet these requirements because it makes no attempt to demonstrate *any* continuing adverse effects from Senator McCain's allegedly unlawful spending.[10]

II. THE DNC HAS FAILED TO ESTABLISH THAT THE FEC'S PURPORTED DELAY HAS BEEN UNREASONABLE

We explained (Mem. at 19-27) that the Commission receives great deference in its handling of administrative complaints, and that application of the factors described in *Democratic Senatorial Campaign Comm. v. FEC* (*DSCC*), No. Civ. A 95-0349, 1996 WL

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[9] Moreover, the DNC provides no evidence that other candidates it may oppose in the future are likely to engage in similar conduct and, as discussed above, the DNC's underlying administrative complaint involves only a challenge to the application of the Matching Payment Program rules to one candidate, not a challenge to a general rule or procedure the Commission has promulgated to implement the statute.

[10] The same reasoning distinguishes the instant case from *Kean For Congress Comm. v. FEC*, 398 F. Supp. 2d 26, 34-35 (D.D.C. 2005), which also involved an "informational injury" whose remedy would have provided information that could be useful to the plaintiff in the future.

34301203, at *4 (D.D.C. Apr. 17, 1996), shows that the agency's handling of the DNC's administrative complaint raising complex legal issues at the height of a presidential election campaign has been reasonable. The DNC continues to insist (Opp. at 13-14) that resolving its administrative complaint requires little further effort following the Commission's August 2008 meeting, but the DNC greatly oversimplifies what is involved in the matter, and overlooks the other work before the Commission following its long period without a quorum.

As we noted (Mem. at 19-20, 22-23), review of the Commission's prosecutorial discretion and allocation of resources is highly deferential. The legislative history of section 437g(a) demonstrates that Congress intended the Commission to have significant prosecutorial discretion in the handling of complaints. Senator Pell explained the limited purpose of the provision:

> The Commission is entrusted with the responsibility of passing on complaints. . . . And to assure that the Commission does not shirk its responsibility to decide[,] that section . . . provides that a total failure to address a complaint within 120 days is a basis for a court action. But [this basis] for judicial intervention [is] not intended to work a transfer of prosecutorial discretion from [the] Commission to the courts.

125 Cong. Rec. S19099 (daily ed., Dec. 18, 1979) (quoted in *DSCC*, 1996 WL 34301203, at *7-8). Accordingly, the test for determining whether the Commission acted contrary to law is whether the Commission has abused its discretion, or acted in an arbitrary and capricious manner. *Common Cause v. FEC*, 489 F. Supp. 738, 742 (D.D.C. 1980). This "'arbitrary and capricious'" standard of review is "highly deferential" and "presume[s] the validity of agency action." *American Horse Protection Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). Thus, "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (*en banc*); *see In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538, 542 (D.C. Cir. 1980). The

Commission has the prerogative to implement its resources without "the judiciary [riding] roughshod over agency procedures or sit[ting] as a board of superintendence directing where limited agency resources will be devoted." *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986).

The DNC fails to respond to most of the Commission's detailed showing (Mem. at 21-27) that the handling of the DNC's administrative complaint has been reasonable under the factors identified in *DSCC*, but the DNC continues to assert that, in effect, all the Commission has left to do is dismiss the complaint. However, we explained (Mem. at 25-27) what was involved in handling a complex matter in the posture of the DNC's complaint, and that far more remained to be done following the Commission's recent vote to permit Senator McCain to withdraw from the Matching Payment Program. The Commission has acted reasonably on the DNC's complaint.[11]

[11] The DNC claims that the Commission's Office of General Counsel "has assumed the blame for the Commission's failure to dismiss the DNC's administrative complaint …" by noting that it has not submitted a written recommendation to the Commission. DNC Opp. at 13. The Commission made no such statement, nor would it have on the public record, because the handling of administrative complaints is required to be confidential. 2 U.S.C. § 437(g)(a)(12). Instead, the Commission merely explained the general nature of the task before it and relied in part on public information about the Commission's consideration of Senator McCain's request to withdraw from the Matching Payment Program.

III. CONCLUSION

The Commission's motion for summary judgment should be granted because the DNC has failed to establish Article III standing and because the Commission has not acted contrary to law.

Respectfully submitted,

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