ORAL ARGUMENT NOT YET SCHEDULED

Case No. 12-5134

In the

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

Ralph Nader,

Appellant,

v.

Federal Election Commission,

Appellee.

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

CORRECTED REPLY BRIEF OF APPELLANT

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GLOSSARY

EPS: Enforcement Priority System

FEC: Federal Election Commission

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

SEIU: Service Employees International Union

Appellant Ralph Nader (the "Candidate") respectfully submits this Reply Brief to the brief filed by Appellee Federal Election Commission ("FEC" or the "Agency") on September 10, 2012.

SUMMARY OF ARGUMENT

The Candidate and the FEC present sharply contrasting versions of events in this case, but it is easy to see which one accurately reflects the facts and law, and which one distorts them. The claims alleged in the Candidate's Administrative Complaint rely on a valid legal theory, and are supported by extensive citation to specific pieces of evidence in the record. Candidate's Br. at 19-21. By contrast, the FEC directly violated the express terms of the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), and the Agency's own regulations, by dismissing those claims without serving a majority of the respondent parties (collectively, "Respondents"). The FEC also makes almost no attempt to address the evidence cited by the Candidate, which contradicts the Agency's factual findings and legal conclusions. The FEC's disposition of this action was therefore contrary to law, and its dismissal of the Administrative Complaint should be reversed.

ARGUMENT

I. The FEC's Failure to Serve a Majority of Respondents Who Committed the Alleged Violations Was Contrary to Law.

A. The FEC Does Not Dispute That the Plain Terms of the Act and Its Own Regulations Require It to Serve Respondents.

There can be no doubt that the FEC directly violated the plain terms of the Act and its own regulations by refusing to serve a majority of Respondents who committed the alleged violations. The FEC does not deny it. Even the District Court, which deferred to the FEC on almost every other factual and legal issue, conceded that the Agency's failure to serve these Respondents "clearly violated" the Act. JA 21. As the District Court explained:

> 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.

JA 21. The FEC nonetheless insists on this appeal that it has such "discretion," even though it again fails to cite any statutory or legal authority for that assertion. (FEC Br. at 15-21.) The FEC also fails to address the direct contradiction between its assertion and the plain terms of the Act and the Agency's regulations, both of which expressly provide that the FEC "shall" serve each named respondent. *See* 2 U.S.C. § 437g(a)(1)); 11 C.F.R. § 111.5(a). Consequently, the FEC does not and cannot dispute that its disposition of this matter was "contrary to law," because the Agency relied on "an impermissible interpretation of the Act" to dismiss the Administrative Complaint without serving Respondents. *Orloski v. FEC*, 795 F.2d

156, 161 (D.C. Cir. 1986) (internal citation omitted).

B. The FEC's Belief That It Should Have Discretion Not to Serve Administrative Complaints Is Neither Relevant Nor Sufficient to Justify Its Refusal to Do So in This Case.

Unable to show that it complied with its statutory duty to serve Respondents, the FEC instead embarks on a lengthy discussion of the reasons it believes, as a matter of policy, it should have discretion not to serve them. (FEC Br. 17-28.) This discussion is not relevant. In cases where "Congress has spoken 'directly … to the precise question at issue,'" both the Court and the FEC "must give effect to Congress's unambiguously expressed intent." *American Fed. of Labor v. FEC ("American Fed. of Labor II")*, 333 F.3d 168, 172 (D.C. Cir. 2003) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). Because the Act unambiguously requires that the FEC serve Respondents, therefore, the Agency cannot justify its refusal to do so by second-guessing the wisdom of that requirement. *See id*.

The "potential problems" the FEC envisions are not only insufficient, as a matter of law, to justify its refusal to comply with the Act's mandatory procedures, but the Agency's resort to such hypotheticals also misrepresents this case in three critical respects. (FEC Br. at 17.) First, the claims alleged in the Administrative Complaint are not "frivolous," as the FEC repeatedly implies, (FEC Br. at

17,18,21). Rather, the Agency's own general counsel concluded that they rely on a "viable theory". JA 243. Further, the FEC designated this as a matter of the highest importance under its Enforcement Priority System ("EPS"), which uses objective criteria to evaluate every administrative complaint the Agency receives. JA 235. To the extent the FEC now attempts to justify its unlawful refusal to serve Respondents by attacking the merits of the Administrative Complaint, therefore, the Agency's own legal analysis contradicts such post hac rationalizations.

Second, the FEC contends that serving Respondents as required by the Act "had the potential to derail the progress of the MUR, jeopardizing the ability to complete the enforcement process prior to the statute of limitations deadline," (FEC Br. at 27), but in fact the opposite is true. By refusing to serve the very Respondents who could have confirmed that the violations alleged in Count 1 and Count 2 occurred, the FEC guaranteed that no enforcement process would commence against them. And while the FEC notes that it "retained the authority" to proceed against those Respondents if it later "received information" providing reason to believe they violated the Act, (FEC Br. at 24), the Agency actually did receive such information, but still refused to serve the relevant Respondents.

In two supplements to the Administrative Complaint, the Candidate submitted evidence that Respondent Reed Smith, LLP, a law firm retained by

Respondent DNC during the 2004 general election, filed a legal challenge for the benefit of Respondent Kerry-Edwards 2004, which Pennsylvania state employees illegally prepared at taxpayer expense. JA 143-59. Such evidence included Reed Smith partner Efrem Grail's reported admission that his firm "gave away" $1 million in legal services in connection with the effort, JA 154, at a time when Reed Smith reportedly represented Respondent John Kerry in other matters. JA 88 n.91. None of that evidence, however, was enough to prompt the FEC to serve Reed Smith – as the Act already required it to do.

Similarly, when presented with sworn testimony that Reed Smith trained the state employees who illegally prepared Respondents' Pennsylvania challenge at taxpayer expense, JA 161, and that Efrem Grail was responsible for coordinating their efforts, JA 161, the FEC again refused to serve Reed Smith and the other relevant Respondents. Now, in an attempt to explain away its willful refusal to comply with the Act's mandatory procedures, the FEC misrepresents the foregoing evidence by asserting that it relates to "a 2006 Pennsylvania Senate Campaign," (FEC Br. at 6), and that it is "not part of this appeal." (FEC Br. at 9.) That is false. Further, such assertions merely underscore the FEC's inability to reconcile its disposition of this matter with the evidence in the record.

Third, the FEC significantly exaggerates the burden that merely serving

Respondents as required by law would impose, and ignores reasonable steps the Agency could have taken to mitigate that burden. For example, the FEC could have served Respondents electronically, and requested that they waive any formal service requirement. The FEC also could have served each law firm Respondent, and requested that it respond on behalf of the individual Respondents it employed. Further, as the FEC well knows, having entered into tolling agreements with the few Respondents it actually served, it could have done so with the Respondents it refused to serve, if it were concerned about completing an investigation within the 1-1/2 years before the statute of limitations expired.

Instead, the FEC contends, its refusal to serve a single law firm Respondent or the Service Employees International Union ("SEIU") was a "measured approach," (FEC Br. at 24), because the Agency "reasonably concluded" that serving them would impose "an unwarranted burden." (FEC Br. at 28.) But even if that conclusion were reasonable – and it is not – the Act does not permit the FEC to make such determinations. Therefore, it is not the "judiciary" that threatens to "ride roughshod over agency procedures" in this case, as the FEC suggests, (FEC Br. at 28 (citation omitted)), but the Agency itself. Presented with a valid administrative complaint that relies on a valid legal theory and specific, credible evidence that Respondents made millions of dollars in illegal and unreported contributions and

expenditures, the FEC refused to take the most rudimentary steps necessary to determine whether it had reason to believe the violations actually occurred. Such deliberate failure to comply with the Act's mandatory enforcement procedures is a paradigmatic example of agency action that is contrary to law and arbitrary and capricious.

C. The FEC's Failure to Serve a Majority of Respondents Who Committed the Alleged Violations Was Not Harmless Error.

The FEC contends, in the alternative, that its failure to serve the Administrative Complaint as required by the Act was "harmless error," because the Candidate "can point to no actual harm to himself" that resulted therefrom. (FEC Br. at 29-33.) But the FEC's reliance on the harmless error doctrine is misplaced. As a threshold matter, the Act expressly recognizes that complainants are "aggrieved" by the Agency's dismissal of their complaints. *See* 2 U.S.C. 437g(a)(8)(A). The Candidate was therefore aggrieved, within the meaning of the Act, by the FEC's failure to pursue any enforcement action against the Respondents it refused to serve.

Further, as the FEC concedes, its error in failing to serve Respondents cannot be excused as harmless if the error affected the outcome of this matter. (FEC Br. at 29.) And as the FEC elsewhere concedes, the Act precluded it from making a reason to believe finding against any Respondent it failed to serve. (FEC

Br. at 17 (quoting 2 U.S.C. § 437g(a)(1)). Therefore, by the FEC's own admission, its error necessarily had an outcome-determinative effect on this matter, by guaranteeing it would make no reason to believe finding against such Respondents unless and until the Agency remedied its error – which it never did.

Thus, while the FEC contends that the Candidate "has skipped over a step" in his analysis of the Agency's error, (FEC Br. at 31), in fact it is the FEC that skipped every single step mandated by the Act following the filing of the Administrative Complaint. It hardly takes a "shaky series of unlikely predictions" to recognize the resulting harm, as the FEC asserts. (FEC Br. at 32.) Rather, such a fundamental error is necessarily prejudicial, because it precluded the FEC from obtaining any evidence from the Respondents it failed to serve. *See Edwards v. Balisok*, 520 U.S. 641, 646 (1997) (recognizing, in prison disciplinary context, that certain procedural errors are so fundamental that they "necessarily imply" prejudice). But such harm need not be inferred here. On the contrary, the FEC expressly relied on its supposed lack of information regarding the Respondents it failed to serve as the basis for its dismissal. (FEC. Br. at 37-39 (asserting that Agency lacked evidence of "coordination" between law firm Respondents and the DNC and Kerry-Edwards 2004); FEC Br. at 42-43 (asserting that Agency lacked evidence of "coordination" between SEIU and the DNC and Kerry-Edwards

2004).) Because this information would have been available to the FEC but for its refusal to serve those Respondents, its failure to do so was not harmless error.

II. The District Court Erred By Concluding That the FEC's Dismissal of the Administrative Complaint Was Not Contrary to Law.

The FEC asserts, no fewer than 22 times, that the Candidate's allegations were "speculative," (*e.g.* FEC Br. at 34), and that this justifies the Agency's failure to serve Respondents as required by the Act. In particular, the FEC asserts that the Administrative Complaint was "devoid of evidence" that Kerry-Edwards 2004 played a role in the alleged conduct. (FEC Br. at 34.) If that were so, however, it should have been an easy matter for the FEC to address the specific pieces of evidence the Candidate cites in support of those allegations, (Candidate's Br. at 19-21), and to explain why the Agency found such evidence lacking. Instead, the FEC conspicuously disregards almost all of that evidence, including the email records demonstrating that a high-level Kerry-Edwards 2004 staffer drafted at least one of Respondents' complaints. (Candidate Br. at 19-20). The FEC's reasoning therefore contradicts evidence in the record.

A. The FEC's Conclusion That It Had No Reason to Believe Respondents Made Illegal and Unreported Contributions and Expenditures to Benefit the DNC, Kerry-Edwards 2004 or John Kerry Contradicts Evidence in the Record.

The FEC asserts that the Candidate "merely speculated" that Kerry-Edwards

2004 and the DNC coordinated Respondents' legal challenges. As the evidence cited in the Candidate's brief demonstrates, this assertion is false. (Candidate Br. at 19-21.) The FEC simply fails to address the relevant evidence.

The FEC is also incorrect that it received "sworn denials from multiple respondents" that "specifically refut[ed]" any allegation of coordination. (FEC Br. at 38.) In fact, apart from the Ballot Project Respondents' affidavits, the FEC did not receive a sworn statement from any Respondent. Further, the Agency cites nothing in the record to support its otherwise conclusory assertion, which confuses certain Respondents' mere denial of the legal conclusion that they violated the Act with a refutation of the evidence suggesting they did.

The FEC also makes much of the "possibility that the [Respondent] attorneys were engaged in lawful conduct" under the Act's so-called "Volunteer Exception." (FEC Br. at 41 (citing 2 U.S.C. § 431(8)(B)(i)). That provision is inapplicable to the facts of this case, however, because the FEC's regulations make clear that conduct qualifies only where the "volunteer" attorney makes "occasional, isolated, or incidental use" of the law firm's facilities. 11 C.F.R. § 114.9(1). The "safe harbor" contemplated by the provision thus applies only where the "volunteer activity...does not exceed one hour per week or four hours per month." 11 C.F.R. § 114.9(2)(i). The FEC's reliance on the Volunteer Exception is therefore misplaced.

B. The FEC's Conclusion That It Had No Reason to Believe SEIU Violated the Act Contradicts Evidence in the Record.

The FEC asserts that it "was reasonable in refusing to infer" that SEIU coordinated with the DNC and Kerry-Edwards 2004 based on the allegations and evidence in the Administrative Complaint. (FEC Br. at 43.) The issue, however, is whether the FEC acted contrary to law by drawing that conclusion without serving SEIU or seeking its response. As set forth *supra* at Part I, such failure to follow the Act's mandatory provisions was contrary to law, and the FEC does not and cannot dispute it.

CONCLUSION

For the foregoing reasons, and those stated in the Candidate's opening brief, the District Court should be reversed, and this case should be remanded to the Federal Election Commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 26, 2012, I caused the foregoing Corrected Reply Brief of Appellant to be served by means of the Court's CM-ECF system on the following:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains less than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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