UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RALPH NADER, Appellant v. Federal Election Commission, Appellee.	)	**No. 12-5134**

APPELLANT'S SUPPLEMENTAL BRIEF DEMONSTRATING THAT APPELLANT HAS STANDING TO MAINTAIN THIS ACTION

Pursuant to the Court's January 4, 2013 Order, Appellant Ralph Nader ("the Candidate") respectfully submits this Supplemental Brief demonstrating that he has standing to maintain this action under the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act").

ARGUMENT

The contention that the Candidate lacks standing to maintain this action is a legal non-starter. If the Candidate lacks standing in this case, then virtually no one has standing to seek redress when the Federal Election Commission ("FEC" or "the Agency") dismisses an administrative complaint. Such a result would violate the express terms of the Act and nullify the clear intent of Congress to authorize a broad range of complainants to seek judicial review. As the cases construing FECA

make clear, however, the Candidate does have standing, based on the informational injury he sustained as a result of the FEC's failure to enforce the Act, and also as a competitor of those who committed the alleged violations (collectively, "Respondents"). Therefore, there is no basis for denying the Candidate standing to pursue this appeal – which may explain why the FEC itself never raised the issue.

The discussion below demonstrates the Candidate has standing based on three main points. First, the Candidate has "prudential standing" because he is an "aggrieved" party who falls within the zone of interests protected by the Act. Second, the Candidate has Article III standing because: a) he sustained a cognizable injury-in-fact; b) caused by the FEC's failure to enforce the Act; c) which can be redressed by a decision of this Court. Third, this appeal is not moot because the FEC's failure to enforce the Act continues to harm the Candidate, and because this matter is capable of repetition yet evading review.

I. The Candidate Has Prudential Standing Because He Is an Aggrieved Party Who Falls Within the Zone of Interests Protected by the Act.

The Supreme Court has made clear that prudential standing should not bar parties from seeking judicial review in cases such as this, where the FEC allegedly acts contrary to law by dismissing an administrative complaint. *See Federal*

Election Comm'n. v. Akins, 524 U.S. 11, 19 (1998). On the contrary, the Court concluded in *Akins*, the express terms of the Act demonstrate that Congress intended "to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Id.* (citations omitted). Specifically, by authorizing "any party aggrieved by" the FEC's dismissal of an administrative complaint to seek judicial review, 2 U.S.C. § 437g(a)(8)(A), FECA permits complainants to pursue such redress notwithstanding the limitations prudential standing otherwise might impose. *See id.* (citing *Raines v. Byrd*, 521 U.S. 811, 820, n. 3 (1997) (explicit grant of authority to bring suit "eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch")).

In this case, moreover, the Candidate easily satisfies the test for prudential standing. To do so, the Candidate need not show Congress specifically intended FECA to benefit him, but only that the injury he asserts is "arguably within the zone of interests" the Act protects or regulates. *National Credit Union Admin. v. First Nat. Bank & Trust Co. ("NCUA")*, 522 U.S. 479, 489 (1998) (quoting *Association of Data Processing Service Organizations, Inc. v. Camp* ("*Data Processing*"), 397 U.S. 150, 153 (1970)). Applying that test in *Akins*, the Supreme Court concluded that the injury asserted by the complainants – their inability "to

obtain relevant information – is injury of a kind that FECA seeks to address." *Akins*, 524 U.S. at 20. The Court thus had no difficulty concluding the complainants had prudential standing, even though they were merely voters who sought information about an organization allegedly operating as a "political committee" within the meaning of the Act. *See id.* "We have found nothing in the Act that suggests Congress intended to exclude voters from the benefits of these provisions, or otherwise to restrict standing, say, to political parties, candidates, or their committees," the Court reasoned. *Id.*

Here, too, the Candidate asserts an "informational injury" caused by the FEC's failure to enforce the Act. *Id.* at 25; *see infra* Part II.A. Unlike the complainants in *Akins*, however, the Candidate is pursuing this appeal not merely as a voter, but as a candidate for public office. The Candidate thus satisfies the prudential standing test even more clearly than the complainants in *Akins*, because the Supreme Court has expressly recognized that candidates fall within FECA's zone of interests. *See Akins*, 524 U.S. at 20; *see also Shays v. FEC*, 414 F.3d 76, 84 (D.C. Cir. 2005) ("the zone of interests standard easily encompasses Shays's and Meehan's claims, considering that, as officeholders and candidates for office, they are among those who benefit from [statute's] restrictions on practices Congress believed to be corrupting").

II. The Candidate Has Article III Standing as a Competitor of Respondents Who Sustained an Informational Injury Due to the FEC's Failure to Enforce the Act, Which a Decision By This Court Can Redress.

This case arises from Respondents' violations of the Act in connection with their attempt to "neutralize" the Candidate's presidential campaign and destroy his reputation, as set forth in the Administrative Complaint. AR00001-575. To this day, Respondents are still engaged in litigation against the Candidate, in which they have attached his personal bank accounts and seek to enforce a judgment they obtained by means of a criminal conspiracy. *See* Affidavit of Ralph Nader ("Nader Aff.") ¶¶ 9-15 (executed January 18, 2011) (attached as Exhibit A). As a result, the Candidate is now pursuing claims against certain Respondents for civil conspiracy, malicious prosecution and abuse of process. *See Nader v. Maine Democratic Party*, 41 A.3d 551 (Me. 2012) (unanimous decision vacating dismissal and remanding for further proceedings). As the Maine Supreme Court recognized, the Candidate's claims implicate not only his own interests, but also the public interest in a lawful and competitive electoral process. *See id*. at 559 n.8 (Candidate's alleged injuries raise "underlying issues – access to the political process for minor-party candidates, preventing major parties from excluding minor party candidates from entering the political discourse – [that] are arguably of interest to the community as

a whole"). The FEC's failure to enforce the Act in this case thus caused the Candidate a cognizable injury he continues to suffer, which a decision by this Court can redress. The Candidate therefore satisfies the injury, causation and redressability elements of Article III standing. *See Lujan v. Defenders of Wildlife*, 504 U.S 555, 560-61 (1992).

A. The Candidate Sustained a Cognizable Injury-in-Fact as a Competitor of Respondents Who Sustained an Informational Injury.

Candidates who allege that they were forced to compete in an illegally structured campaign environment – as the Candidate alleges here – state a sufficient injury for purposes of Article III. *See Shays*, 414 F.3d at 85. In *Shays*, two members of Congress challenged certain FEC regulations on the ground that they permitted practices prohibited by the Bipartisan Campaign Finance Reform Act ("BCRA"). *See id.* at 84-85. The Congressmen asserted an "injury to their interest, protected by that statute, in seeking reelection through contests untainted by BCRA-banned practices." *Id.* at 85. Analogizing to other cases where litigants challenged agency procedures that conflict with statutory guarantees, this Court concluded that "illegal structuring of a competitive environment" is "routinely recognized" as an injury sufficient to support Article III standing. *Id.* (citations omitted). In such cases, the Court reasoned, litigants suffer injury to their "legally

protected interest in 'fair decisionmaking.'" *Id.* (citations omitted).

The Court found the same logic applied in *Shays*:

> much as administrative procedures determine how interested regulated parties may go about persuading agencies, so do the challenged FEC campaign finance rules structure candidates' regulated opportunities to persuade the electorate. Thus, given that regulated litigants suffer legal injury when agencies set the rules of the game in violation of statutory directives, the same is true here insofar as the FEC has exposed these regulated candidates to BCRA-proscribed campaign practices.

Id. Based on "longstanding precedent," therefore, the Court concluded that when a statute "reflect[s] a legislative purpose to protect a competitive interest, [an] injured competitor has standing to require compliance with that provision." *Id.* (quoting *Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 6 (1968); *see also NCUA*, 522 U.S. at 488 ("competitors of financial institutions have standing to challenge agency action relaxing statutory restrictions on the activities of those institutions"); *Data Processing*, 397 U.S. at 152 ("there can be no doubt" as to injury in fact where an agency authorized competition in a market served by petitioner). Consequently, the Congressmen in *Shays* suffered a cognizable injury in fact because they faced "*intensified* competition" arising from their need to "anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Shays*, 414 F.3d at 86 (emphasis original).

It is undisputed that the Candidate suffered the same injury in this case. On the contrary, the FEC expressly concedes that Respondents' conduct – if proven – violated FECA. AR01730.10 (acknowledging that Candidate's claims rely on "a viable theory, namely that spending by corporate law firms to remove a candidate from the ballot may constitute prohibited contributions"). Consequently, there can be no doubt the Candidate suffered a cognizable injury – and therefore has standing – as a competitor forced to compete in an illegally structured campaign environment. *See Shays*, 414 F.3d at 87 ("our own case law … supports applying competitor standing to politics as well as business") (citing *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998) (recognizing standing of competing candidates); *Common Cause v. FEC*, 108 F.3d 413, 419 n.1 (D.C. Cir. 1997) (same)); *see also Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1 (D.C. Cir. 2009) (recognizing competitor standing in licensing proceedings before Federal Communications Commission); *DIRECTV v. FCC*, 110 F.3d 816 (D.C. Cir. 1997) (same); *Radiofone, Inc. v. FCC*, 759 F.2d 936 (D.C. Cir. 1985) (same).

The Candidate also has standing on the independent ground that he suffered an "informational injury" as a result of the FEC's failure to enforce the Act. *See Akins*, 524 U.S. at 20, 25. Specifically, the Candidate was entitled to know – to take just one example – who financed Respondents' effort to remove him from

various state ballots, and whether Respondents in fact made prohibited contributions and expenditures in connection with this effort, as the FEC concedes they may have done. AR01730.10. The Agency's failure to provide such information would be a cognizable injury-in-fact even if such information proved to be of no use to the Candidate. *See Akins*, 524 U.S. at 21 (citing *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989) (finding an injury-in-fact when plaintiff was denied information that should have been disclosed by statute); *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 373-374 (1982) (deprivation of information about housing availability constitutes "specific injury" permitting standing)). In this case, however, the evidence demonstrates that such information would help the Candidate mitigate the harm to his reputation caused by Respondents' false allegations, *see* Nader Aff. ¶ 16, and it would also assist the Candidate's longstanding and ongoing efforts to advocate on behalf of candidate and voter rights. *See* Nader Aff. ¶ 17. Consequently, the Candidate's lack of information regarding Respondents' allegedly unlawful effort to deny him ballot access constitutes a cognizable injury-in-fact.

B. The FEC's Failure to Enforce the Act Caused the Candidate's Injuries.

To determine whether the FEC caused the Candidate's injuries for purposes

of Article III, the inquiry is whether the injury is "fairly traceable" to the Agency's decision about which the Candidate complains. *See Akins*, 524 U.S. at 25. Here, as in *Akins*, the Candidate's "'injury in fact' is 'fairly traceable' to the FEC's decision not to issue [his] complaint," because that decision is what deprived the Candidate of the information he seeks. *Id.* Further, the FEC's failure to enforce the Act in this case, or even to investigate whether Respondents committed the alleged violations, denied the Candidate redress for the injury he sustained as a competitor targeted by his opponents' allegedly illegal tactics. *See Shays*, 414 F.3d at 86.

C. This Court Can Redress the Candidate's Injury By Directing the FEC to Act in Accordance With the Law.

For the same reasons that the Candidate's injury is "fairly traceable" to the FEC's decision in this case, it can be redressed by a decision from this Court directing the Agency to act in accordance with the law. *See Akins*, 524 U.S. at 26.

III. This Matter Is Not Moot Because the Candidate Continues to Sustain Injury, and Because the Matter Is Capable of Repetition Yet Evading Review.

Finally, this matter is not moot because the Candidate continues to sustain injury as a result of the FEC's failure to enforce the Act in this case. *See supra* Part II.A (citing Nader Aff. ¶¶ 16-17). The Candidate would therefore benefit from a decision directing the Agency to act in accordance with the law. Consequently, he

continues to have a live interest in this matter, which precludes a finding of mootness.

This matter also is not moot because it is – like all election challenges – "capable of repetition, yet evading review." The Supreme Court has routinely used this exception to Article III's continuing injury requirement to preserve federal challenges to electoral practices after elections have passed. No caveat has been created for the FEC. In *Davis v. Federal Election Commission*, 554 U.S. 724, 735 (2008), for example, the Supreme Court stated that challenges to FEC decisions "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." (Quoting *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007)).

Lower courts have likewise applied the "capable of repetition, yet evading review" exception to challenges made against FEC decisions and requirements on several occasions. *See Shays v. Federal Election Commission,* 424 F. Supp. 2d 100 (D.D.C. 2006) (applying "capable of repetition yet evading review exception to challenge made against FEC); *Alliance for Democracy v. Federal Election Commission,* 335 F. Supp. 2d 39 (D.D.C. 2004) (same); *Natural Law Party v. Federal Election Commission,* 111 F. Supp.2d 33 (D.D.C. 2000) (same). *See also*

Real Truth About Obama, Inc. v. Federal Election Commission, 2011 WL 2457730 (E.D. Va., June 16, 2011) (same).[1]

Accordingly, this case, too, fits into the well-established exception to the mootness doctrine for cases "capable of repetition but evading review."

[1] An often misstated requirement is that a plaintiff must claim that he will run for office again to invoke the "capable of repetition, yet evading review" exception. Most courts to address the issue have rejected this alleged requirement. *See, e.g., North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake,* 524 F.3d 427, 435 (4th Cir. 2008) (rejecting the argument that an ex-candidate's claims are "capable of repetition, yet evading review" only if the ex-candidate specifically alleges his intent to run for office in future elections); *Moore v. Hosemann,* 591 F.3d 741, 744 (5th Cir. 2009) ("Following the lead of the Supreme Court, ... in election cases we have [held that] ... "even if it were doubtful" that the plaintiff would again be affected by the allegedly offending election statute, "precedent suggest[ed] that [the] case [was] not moot, because other individuals certainly [would] be affected by the continuing existence" of the statute. It is true that the Supreme Court's most recent election law decisions ... both noted that the plaintiffs had alleged they would again be adversely affected by the complained-of law. But the Court still "has not ... dismissed an election case as moot where the plaintiff failed to allege that he would be governed by the same flawed law in the next election."). In any case, the Candidate has submitted an affidavit that amply demonstrates his ongoing interest in the instant matter. *See* Nader Aff. ¶¶ 9-17.

CONCLUSION

The Candidate satisfies the test for prudential standing and all elements of Article III standing. Further, this matter is not moot because the Candidate maintains a live interest in its outcome, and because, like all election law cases, it is capable of repetition yet evading review. Therefore, there is no basis for denying the Candidate standing to pursue this appeal. Should the Court entertain any doubt as to the foregoing points, the Candidate respectfully requests a reasonable opportunity to brief these issues in full.

Dated: January 10, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2013, I served the foregoing Appellant's Supplemental Brief on the Issue of Standing, on behalf of Appellant, by means of the Court's CM/ECF system, upon the following:

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