UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

No. 21-1213

DR. JILL STEIN AND JILL STEIN FOR PRESIDENT,

Petitioners,

- v. -

FEDERAL ELECTION COMMISSION,

Respondent.

ON APPEAL FROM AN ORDER ENTERED BY THE FEDERAL ELECTION COMMISSION AT FEC-LRA 1021

BRIEF OF APPELLANTS

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294 (ph)
oliverhall@competitivedemocracy.org

Counsel for Petitioners

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DR. JILL STEIN AND JILL STEIN FOR PRESIDENT, Petitioners, v. FEDERAL ELECTION COMMISSION, Respondent.	)	No. 21-1213 FEC-LRA 1021

PETITIONERS' CERTIFICATE OF PARTIES, RULINGS AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), Petitioners Dr. Jill Stein and Jill Stein for President (together, "**Stein**") respectfully submit the following Certificate as to Parties, Rulings and Related Cases.

(A) Parties and Amici. This appeal arises directly from an agency proceeding before Respondent Federal Election Commission ("**the Commission**"), FEC-LAR 1021, pursuant to which the Commission made a repayment determination following its audit of Stein's 2016 presidential campaign committee. Dr. Jill Stein and Jill Stein for President were the only parties to the agency proceeding. There were no intervenors or *amici curiae* in the agency proceeding.

Jill Stein for President is a political committee. It is not incorporated and has no parent company and no publicly-held company has any ownership interest in it.

(B) Ruling Under Review. Stein seeks review of the Commission's repayment determination, dated September 30, 2021, which directs Stein to repay $175,272 to the United States Treasury. To the best of Stein's knowledge and belief, no Federal Register citation exists for the repayment determination.

(C) Related Cases. This case has not previously been before this Court or any other court, and there are no related cases under D.C. Cir. R. 28(a)(1)(C).

Dated: June 28, 2022

Respectfully submitted,

s/Oliver B. Hall

Oliver B. Hall
D.C. Bar No. 976463
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, DC 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

Advisory Opinions

Miscellaneous

GLOSSARY

DOI: Date of Ineligibility

FECA: Federal Election Campaign Act

NOCO: [Statement of] Net Outstanding Campaign Obligations

JURISDICTIONAL STATEMENT

This appeal is from a repayment order that the Federal Election Commission entered against Petitioners under the Presidential Primary Matching Payment Account Act on October 1, 2021. *See* 26 U.S.C. § 9031, *et seq*.; [App. 60]. The agency had jurisdiction to enter the repayment order pursuant to 26 U.S.C. § 9038(b). This Court has jurisdiction to review the agency's action pursuant to 26 U.S.C. § 9041. Petitioners timely filed their petition for review on October 29, 2021. *See id.* (providing that petition for review must be filed "within 30 days" of the agency action); (ECF No. 1920438 (petition for review filed October 29, 2021)).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Petitioner Dr. Jill Stein ran for President of the United States as a minor party candidate in the 2016 election cycle. Dr. Stein qualified for funding under the Presidential Primary Matching Payment Account Act, but a substantial portion of her campaign's expenditures for ballot access petition drives were deemed ineligible for reimbursement solely because they were incurred after the last date of a major party convention. The Federal Election Commission also declined to credit Dr. Stein's campaign for its actual winding down costs, which are reimbursable under the statute. As a result, the agency entered a repayment order in the amount of $175,272. The questions presented for review are:

I. Whether 26 U.S.C. § 9032(6), which defines the "matching payment period" under the statute, is unconstitutional as applied?

II. Whether the agency's failure to consider the actual winding down expenses that Dr. Stein's campaign incurred was arbitrary, capricious, an abuse of discretion or contrary to law?

Pertinent Statutes and Regulations

Pursuant to Circuit Rule 28(a)(5), the statutes and regulations pertinent to this appeal are submitted herewith in a separately bound Addendum.

STATEMENT OF THE CASE

Introduction

This appeal is from a Repayment Determination that the Federal Election Commission ("the Commission") issued on October 1, 2021 ("Rep. Det."), nearly five years after the conclusion of the 2016 general election, against Green Party presidential candidate Dr. Jill Stein ("Dr. Stein") and her campaign committee Jill Stein for President (together, "the Committee"). [App. 61 (Rep. Det. at 1).] The Repayment Determination requires that Dr. Stein and the Committee repay $175,272 in funds they received pursuant to the Presidential Primary Matching Payment Account Act ("the Matching Payment Act") during the 2016 election cycle. *See* 26 U.S.C. §§ 9031-9042. Because the Committee is essentially defunct and has minimal funds, however, that obligation falls solely upon Dr. Stein, a 71-year-old retiree. As a result, Dr. Stein has been obliged to deplete her personal savings by withdrawing the full $175,272 from her retirement account and placing it in escrow pending the resolution of this appeal. *See* Fed. R. App. P. 18(a)(1).

The Committee challenges the Repayment Order on two grounds. First, the Matching Payment Act provision that defines the period during which candidates are eligible to receive funding is unconstitutional as applied to minor party candidates, because it terminates their eligibility on the last date of a major party convention. *See* 26 U.S.C. § 9032(6). As such, the provision imposes severe and

unequal burdens on minor party candidates, produces arbitrary results, serves no legitimate governmental interest and frustrates the purpose of the Matching Payment Act as applied to minor party candidates. Had the Committee's ballot access expenses been deemed eligible for reimbursement, that alone would have been sufficient to eliminate its repayment obligation.

Second, the Committee challenges the Commission's failure to adjust its estimate of the Committee's winding down costs in its April 22, 2019 Final Audit Report to reflect the Committee's actual winding down costs, as the Commission expressly stated that it would do in its July 10, 2018 Preliminary Audit Report and in its November 19, 2018 Draft Final Audit Report. [*Compare* AR 107 & n.[c], n.12 (Preliminary Audit Report) *with* AR 187 & n.[b] (Draft Final Audit Report) *and* App. 14 (AR 249 & n.12) (Final Audit Report acknowledging that Commission did not consider actual winding down costs incurred after August 31, 2018); *see* App. 63 (Rep. Det. at 3 n.2)]. The evidence demonstrates that the Committee's actual winding down costs from September 1, 2018 through December 31, 2020 totaled $318,823, which is $249,468 more than the $69,355 estimated figure on which the Final Audit Report relies. [App. 55.] Further, the Committee continues to incur winding down costs to the present day. Had the Commission properly considered these actual winding down costs as it repeatedly affirmed it would do, instead of

continuing to rely on its estimated figure, that too would have been sufficient to wipe out the Committee's purported repayment obligation.

Factual and Procedural Background

Dr. Stein was the Green Party's presidential nominee in the 2012 and 2016 general elections. This appeal involves a Repayment Determination issued in connection with the 2016 election cycle, but the Commission's determination that Dr. Stein did not owe any repayment following the 2012 election cycle is relevant to the issues raised herein. Accordingly, the facts demonstrating the disparate treatment that Dr. Stein's campaign committees received under the Matching Payment Act in 2012 and in 2016 are set forth below.

The Matching Payment Act

The Matching Payment Act was enacted in 1974 to provide partial federal financing for the campaigns of qualifying presidential primary candidates. *See* 26 U.S.C. §§ 9031-9042. A candidate who is determined to be eligible under the Act is entitled to receive payments from the Presidential Primary Matching Payment Account to match individual contributions up to $250. *See* 26 U.S.C. §§ 9034(a), 9037. Candidates may only use these funds to defray "qualified campaign expenses," which are defined as expenses incurred in connection with the candidate's campaign for nomination that do not violate federal or state law. *See* 26 U.S.C. § 9032(9).

The Commission has long recognized that expenses incurred by a non-major party presidential candidate such as Dr. Stein for the purpose of qualifying for placement on state ballots are qualified campaign expenses under the Matching Payment Act. [AR 60 & n.4.] Such expenses, however, must be incurred during the "matching payment period." *See* 26 U.S.C. § 9032(6). The matching payment period begins on the first day of the calendar year in which the presidential election will occur. *See id*. As applied to a candidate who seeks the nomination of a party that nominates by national convention and of parties that do not, like Dr. Stein, the matching payment period ends on the earlier of the date on which the national party nominates its candidate for President, or the last day of the last national convention held by a major party during that year. *See id.* The end of the matching payment period is the candidate's Date of Ineligibility ("DOI"). *See* 11 C.F.R. § 9033.5(c).

After a candidate's DOI, expenses incurred by the candidate's committee are not qualified campaign expenses under the Matching Payment Act, with limited exceptions. *See* 11 C.F.R. § 9032.9(a)(1). One such exception is winding down costs. *See* 11 C.F.R. § 9034.4(a)(3)(i). Winding down costs include "costs associated with the termination of political activity" relating to the candidate's campaign for nomination, "such as the costs of complying with" the Federal Election Campaign Act ("FECA"), *see* 52 U.S.C. § 30101, *et seq.*, and the Matching Payment Act, "and other necessary administrative costs associated with winding down the

campaign, including office space rental, staff salaries, and office supplies." 11 C.F.R. § 9034.11.

The Matching Payment Act also imposes limits on each candidate's expenditures. *See* 11 C.F.R. 9035.1(a)(1). Expenditures in excess of these limits are not "qualified campaign expenses" for which candidates may use their matching funds. *See* 11 C.F.R. § 9038.2(b).

The Matching Payment Act requires the Commission to conduct an examination and audit of the qualified campaign expenses of every publicly funded candidate after the campaign for the nomination ends. *See* 26 U.S.C. § 9038(a); 11 C.F.R. § 9038.1. The audit includes an examination of the candidate's Net Outstanding Campaign Obligations ("NOCO"), which is the difference between the "total of all outstanding obligations for qualified campaign expenses as of the candidate's date of ineligibility" and the total value of all cash, assets and amounts owed to the candidate's committee as of that date. 11 C.F.R. § 9034.5(a)(1), (2). If the Commission determines that "any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which [the] candidate was entitled," the candidate must repay "an amount equal to the amount of excess payments." 26 U.S.C. § 9038(b)(1). Likewise, if the Commission determines that any portion of the payments was used

for a purpose other than to defray qualified campaign expenses, the candidate must repay "an amount equal to such amount." 26 U.S.C. § 9038(b)(2).

In the event that the Commission determines that a candidate must make a repayment pursuant to 26 U.S.C. § 9038(b), it must notify the candidate no more than three years after the end of the matching payment period to which the repayment applies. *See* 26 U.S.C. § 9038(c).

Dr. Stein's 2012 Presidential Campaign

Dr. Stein ran for President in 2012 as the nominee of the Green Party. The Commission certified Dr. Stein as eligible to receive matching funds under the Matching Payment Act on August 22, 2012. *See* Final Audit Report of the Commission on Jill Stein for President (October 11, 2011 – August 31, 2014) ("2012 Final Audit"), 3, *available at* https://www.fec.gov/resources/legal-resources/enforcement/audits/2012/Jill_Stein_for_President/FinalAuditReportofthe Commission1323020.pdf (accessed June 14, 2022). Dr. Stein ultimately received a total of $372,130 in matching funds during the 2012 election cycle. *See id*. at 4 n.9.

The Green Party held its national nominating convention on July 12-15, 2012, and Dr. Stein was nominated on July 14, 2012. [AR 36 n.2.] The Green Party was not ballot-qualified in several states, however, and Dr. Stein therefore was obliged to seek ballot access in those states as the nominee of unaffiliated state Green Parties, of other minor parties, or as an independent candidate. [*Id.*] The states in which the

Green Party was not ballot-qualified imposed varying deadlines for the filing of nomination petitions, the last of which was September 6, 2012. [*Id*.]

Coincidentally, September 6, 2012 was also the last day of the last major party convention in the 2012 election cycle. [*Id*.] The Commission therefore determined that Dr. Stein's DOI for the 2012 election cycle was September 6, 2012. [*Id.*]; *see* 11 C.F.R. § 9032.6(b). As a result, all of the costs that Dr. Stein's campaign incurred in connection with its effort to qualify for the ballot in those states in which the Green Party was not ballot-qualified were deemed "qualified campaign expenses" under the Matching Payment Act, and Dr. Stein was able to use matching funds to pay those costs. [AR 36 n.2)]; *see* 26 U.S.C. § 9032(9).

On October 9, 2015, the Commission completed its audit of Dr. Stein's 2012 campaign. *See* 2012 Final Audit, *supra*, at 11. The Commission found that Dr. Stein "did not receive matching fund payments in excess of her entitlement." *Id.* at 11. Accordingly, it did not issue a repayment order.

Dr. Stein's 2016 Presidential Campaign

Dr. Stein ran for President again in 2016 as the Green Party's nominee. The Commission determined that she was eligible to receive matching funds under the Matching Payment Act on April 13, 2016. [AR 18.] Dr. Stein ultimately received $590,936 in matching funds during the 2016 election cycle, which included

payments totaling $456,036 as of the date of the Green Party nominating convention, and an additional payment of $134,900 on January 18, 2017. [AR 72 n.8.]

The Green Party nominated Dr. Stein at its nomination convention on August 6, 2016. [AR 269.] Once again, however, the Green Party was not ballot-qualified in many states, thus obliging Dr. Stein to seek ballot access in those states by submitting nomination petitions. At least 25 of these states imposed nomination petition filing deadlines that fell later than the August 6th date of the Green Party convention. [AR 55.] Unlike 2012, however, when the last date of a major party convention was September 6th, [AR 36 n.2], the last date of a major party convention in 2016 was July 28th. [AR 35.] The Commission therefore determined that Dr. Stein's DOI was August 6, 2016, [AR 43-44], and that she "could not receive the benefit of any state nomination or ballot access date after July 28, 2016." [App. 73 (Rep. Det. at 13).] At that time, the Committee was already engaged in – and incurring the substantial costs of – ballot access petition drives that were underway in 15 states. [AR 56.] These states included Alabama, Connecticut, Idaho, Iowa, Kentucky, Minnesota, Montana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, Utah, Virginia and Wyoming. [*Id.*] The Committee continued to incur these costs until the latest state ballot access deadlines passed on September 9, 2016. [AR 55-56.]

The Committee anticipated that the costs of its ballot access drives would be deemed qualified campaign expenses under the Matching Payment Act even if these costs were incurred after the Green Party nomination convention. [*Id.*] This belief was based not only on Dr. Stein's experience as an eligible candidate under the Matching Payment Act in 2012, when all such costs were in fact deemed qualified campaign expenses, but also on the Commission's long-standing formal guidance. For example:

> It has long been the view of the Commission that, for non-major party candidates, the process by which they satisfy the requirements of State law governing qualification for a position on the general election ballot serve purposes similar to a primary election or other nominating process. This view is supported by the Commission regulations defining the term "election," which state that, for non-major party and independent candidates, the day prescribed by applicable State law as the last day to qualify for a position on the general election ballot may be designated as the primary election for such candidate. 11 C.F.R. 100.2(c)(4)(i). Based on this reasoning, the Commission concluded in Advisory Opinions 1984-25 and 1984-11, that the ballot access expenses of candidates for minor party nominations would be qualified campaign expenses.

[AR 55 (quoting Advisory Opinion 1995-45 (Hagelin), at 2 (emphasis added)).]

The Commission's August 17, 2016 notice did not explain why the Commission had determined Dr. Stein's DOI to be August 6, 2016 – the date of the Green Party convention – even though the Commission had determined that Dr. Stein's 2012 DOI was September 6, 2012 – approximately seven weeks after the Green Party's July 14, 2012 nominating convention. [AR 44; 36 n.2.] Thus, on January 12, 2018, in response to the Commission's November 30, 2017 Preliminary

Audit Findings, Dr. Stein and the Committee requested that the Commission determine Dr. Stein's 2016 DOI to be September 9, 2016 – the last date on which Dr. Stein was seeking ballot access in any state. [AR 54-57.] The Commission declined that request on May 15, 2018. [AR 93.] Relying on the advice of counsel, the Commission concluded that the DOI of a candidate nominated by a party that holds a national nominating convention and by other parties that do not, like Dr. Stein, should be determined to be "the date the party nominates the candidate or on the last day of the last national convention held by a major party during the election year, whichever is earlier." [AR 59-60 (citing 26 U.S.C. § 9032(6)(A),(B).]

A candidate in Dr. Stein's position, the Commission reasoned, "should receive the benefit of the later independent State party nomination dates rather than the earlier date of the of the national nominating *provided that such dates were not later than the date of the last day of the last major party nominating convention*." [AR 60-61 (emphasis original) (citing Advisory Opinion 1984-25 (Johnson), at 2).] According to the Commission, this result is necessary "to ensure parity of treatment for all presidential candidates, regardless of the method of nomination," under the Matching Payment Act. [AR 61.] Parity of treatment, in the Commission's view, means that non-major party candidates "have an opportunity to establish eligibility and collect matchable contributions for a period of time that closely approximates the period available to major party candidates." [*Id.*]

The Commission did not address a critical distinction between major party candidates and non-major party candidates: when major party candidates win their party's nomination at a national convention, they are thereby guaranteed automatic access to the ballot in all 50 states and the District of Columbia. Non-major party candidates like Dr. Stein, by contrast, must continue to incur substantial costs to qualify for state ballots – an effort the Commission has repeatedly recognized as the equivalent of a primary election. Yet the Commission expressly concluded that such costs may be considered "qualified campaign expenses" under the Matching Payment Act only if they are incurred before the last day of the last major party nominating convention. [AR 61-62.] Thus, under the Commission's definition of "parity," the Matching Payment Act ensures that major party candidates are eligible for funding during the entire period when they are seeking nomination, but renders non-major party candidates ineligible for funding even if they are actively engaged in seeking the nomination of one or more parties. [AR 62 ("That a presidential candidate may need to incur additional expenses historically associated with the primary election cannot amend or alter this determination.").]

The Commission's 2016 Audit of the Committee

After the conclusion of the 2016 election, the Commission conducted its audit of the Committee pursuant to 26 U.S.C. § 9038(a). The process took place in several steps. On July 10, 2018, the Commission's Audit Division issued a Preliminary

Audit Report. [AR 96-114.] The Preliminary Audit Report found that the Committee "had a surplus of funds as of the date of its ineligibility in the amount of $329,333." [AR 103.] This finding relied on two underlying findings: (1) that the Committee's actual winding down costs after August 1, 2017 were "$0" because the Committee had not yet documented them; and (2) that the Committee had improperly reported $255,671 spent on ballot access petitioning expenditures incurred after Dr. Stein's DOI as qualified campaign expenses. [AR 108.]

The Audit Division recommended that the Committee "provide evidence that the NOCO was not in a surplus position." [AR 103.] In the absence of such evidence, the Audit Division further recommended that the Commission determine that the Committee was "required to make a pro rata repayment [of the surplus] of $66,196." [AR 103]; *see* 11 CFR §9038.3(c)(1) (providing that repayment amount "represents the amount of matching funds contained in the candidate's surplus."). The Audit Division also recommended that the Commission determine that, in the absence of further evidence that the Committee did not have a surplus, the Committee "was not entitled to the Matching Fund payment of $134,900" it received on January 18, 2017. [*Id.*] Despite the Preliminary Audit Report's recommendation that the Committee provide evidence demonstrating that it did not have a surplus, both the audit staff and the Commission's Office of General Counsel had previously concluded that the Committee should not be permitted to provide evidence

documenting its actual winding down costs for the 17-month period from August 1, 2017 through January 31, 2018. [AR 90.]

On September 26, 2018, the Committee submitted its response to the Preliminary Audit Report. [AR 145-47.] The Committee attached thereto "supporting documentation for winding down expenses." [AR 146.] These materials do not appear to be included in the Amended Certified List of Administrative Record Documents that the Commission submitted on May 5, 2022 (ECF No. 1945514). The Committee also included an itemized listing of "Ballot Access Costs" totaling $310,477.88. [AR 146.] This documentation also appears to be omitted from the amended Administrative Record. (ECF No. 1945514). The Committee contended, based on these additional materials, that it "currently has a negative NOCO balance whether additional ballot access costs are considered or not," and thus that "repayment should not be required or should be adjusted accordingly." [AR 147.]

The Commission issued its Draft Final Audit Report on November 19, 2018. [AR 175-97.] The Draft Final Audit Report acknowledges that the Committee submitted additional documentation in support of its actual winding down costs and its ballot access costs in response to the Preliminary Audit Report, but it does not specify the amount of these costs. [AR 184, 187-88.] Instead, the Draft Final Audit Report indicates that the Audit Division "updated its NOCO to reflect increased

ballot access costs incurred prior to DOI and increased winding down actual costs." [AR 184.] The increased actual winding down costs apparently reflected the costs incurred through August 31, 2018, which the Audit Division calculated to be $123,967, for a total of $262,611 in actual winding down costs. [AR 187, 189 & n.16, 190]. The Audit Division also included estimated winding down costs for the period of September 1, 2018 through July 31, 2019 in the amount of $69,355, and stated that "[t]his amount will be compared to actual winding down costs and will be adjusted accordingly." [AR 187 & n.b.]

The Audit Division concluded that "these adjustments reduced the repayment amount," but that "the revised NOCO still reflected a revised surplus position" in the amount of $200,856. [AR 184, 187.] Accordingly, the Audit Division recommended that the Commission determine that the Committee is required to make a pro rata repayment [of the surplus] of $40,372." [AR 184.] The Audit Division also recommended that the Commission determine that the Committee be required to repay the $134,900 matching fund payment it received on January 18, 2017. [AR 191.]

The Committee submitted its response to the Draft Final Audit Report on December 7, 2018. [AR 198-200.] The Committee disputed that its NOCO reflected "a surplus position" and stated that its records reflected a total of $459,204.44 in actual winding down costs through August 31, 2018. [AR 199.] Noting an

"unidentified discrepancy" between that figure and the actual winding down costs of $262,611 reflected in the Draft Final Audit Report, the Committee requested that "its staff be permitted to work with Audit staff … to identify the source of this discrepancy" and to identify any winding down costs that "have not been properly demonstrated…." [*Id.*]

The Commission denied the Committee's request. Its Audit Division and General Counsel reasoned that, after the Commission notified the Committee of its repayment determination, "the Committee will have 60 days to dispute" that determination and that it could "resolve any purported NOCO statement discrepancy in an administrative review." [AR 206.] Further, the Audit Division and General Counsel stated, the Committee could request an oral hearing "to dispute the repayment determination." [AR 206 n.1 (citing 11 C.F.R. 9038.2(c)(2)(ii)).]

The Commission issued its Final Audit Report on April 22, 2019. [AR 236-60.] The Final Audit Report identified August 6, 2016 as Dr. Stein's DOI. [AR 241.] Like the Draft Final Audit Report, the Final Audit Report identified a total of $262,611 in actual winding down costs through August 31, 2018 and included estimated winding down costs for the period of September 1, 2018 through July 31, 2019 in the amount of $69,355. [AR 249.] The Final Audit Report reiterated that its estimated winding down costs "will be compared to actual winding down costs and will be adjusted accordingly." [AR 249 n.b.]

The Final Audit Report thus reached the same conclusions as the Draft Final Audit Report. It found that the Committee had a surplus of $200,856, and that the Committee "is required to make a pro rata repayment [of the surplus] of $40,372." [AR 243.] It also found that the Committee was not entitled to the $134,900 matching fund payment it received on January 18, 2017, and that Dr. Stein and the Committee were required to repay that amount. [AR 243-44.]

Dr. Stein's and the Committee's Response to the Final Audit Report and Request for Administrative Review

On June 17, 2019, the Committee submitted its response to the Final Audit Report and request for administrative review pursuant to 11 C.F.R. § 9038.2(c)(2). [AR 261-267.] That request expressly raises the questions presented for review by this Court. Specifically, the Committee asserted that the Commission's "findings concerning the nature of winding down expenses … cannot survive scrutiny," and that "no repayment would be called for" if reimbursement for these and other expenses were permitted. [AR 261.] The Committee further asserted that the Commission's "establishment of an August 6, 2016 DOI was arbitrary, capricious, and contrary to the letter and intent of the matching funds program and its past interpretation and application." [*Id.*] In particular, "the Commission's position that matching funds paid for ballot access and related activities carried out after that date must be repaid is irrational and contrary to the applicable regulations, law and constitutional principles." [*Id.*]

The Commission's Loss of a Quorum

On August 30, 2019, the Commission lost a quorum, rendering it unable to grant the Committee's request for administrative review and a hearing. [App. 66 (Rep. Det. at 6 n.7).] The Commission notified the Committee thereof on September 12, 2019. [AR 272.] The notice stated that "the Commission cannot at this time address your request for an oral hearing," because "the affirmative votes of four Commissioners are required in order to grant a request for an oral hearing in an administrative review of a repayment determination." [*Id.* (citing 11 C.F.R. § 9038.2(c)(2)(ii)).] The notice further stated that the Committee "will be notified" when the Commission regains a quorum and considers the Committee's request for administrative review. [*Id.*]

The Commission's notice to the Committee did not provide the Committee with any guidance as to the status of this matter while the Commission was without a quorum. [*See id.*] The Commission remained without a quorum for the next 16 months, until December 2020. [App. 66 (Rep. Det. at 6 n.7).] During that entire 16-month period, the Committee did not receive any communication from the Commission regarding its request for administrative review. Meanwhile, the Committee continued to incur winding down costs, as it had for each month since August 31, 2018, when the Commission last calculated the Committee's actual winding down costs and reiterated that its estimated winding down costs for future

reportable periods "will be compared to actual winding down costs and will be adjusted accordingly." [AR 249.] None of these costs were anticipated at that time, nor could they have been, because the Committee had no notice that the Commission would lose its quorum and lack authority to take action for the next 16 months.

The Commission's Administrative Review and Oral Hearing

On January 28, 2021 – more than 17 months after the Committee's request for administrative review and an oral hearing – the Commission notified the Committee that it had granted the Committee's request for an oral hearing and scheduled it for February 25, 2021. [AR 274.] The Commission advised the Committee that "you will be given 30 minutes to make an oral presentation to the Commission based upon the legal and factual materials that you submitted." [*Id.* (citing 11 C.F.R. § 9038.2(c)(2)(ii)).] The Commission further advised that the Committee "will have a period of five days following the conclusion of the hearing to submit any additional materials for the Commission's consideration." [*Id.*]

The Commission acknowledged that the Committee's written request for administrative review indicated that it "planned to argue that the Commission's other findings concerning the nature of winding down expenses … were erroneous." [*Id.* (quotation marks omitted).] The Commission then stated that "the administrative review process afforded by 11 C.F.R. § 9038.2(c)(2) allows requestors to challenge only the Commission's repayment determination and is not a proper forum to

address other challenges." [*Id.*] Further, the Commission stated, "any issue not raised in your written materials is deemed a waiver of the candidate's right to raise the issue at any future stage of proceedings." [*Id.* (citing 11 C.F.R. § 9038.2(c)(2)(i); *Robertson v. Federal Election Commission*, 45 F.3d 486, 491 (D.C. Cir. 1995)).] The Commission did not, however, indicate that it had determined that the Committee had "waived" any issue relating to its winding down costs.

The hearing before the Commission took place as scheduled on February 25, 2021. [AR 280-300 (transcript of oral hearing).] The Hearing Officer stated that the "sole purpose" of the hearing was "to give the committee an opportunity to address the Commission and to demonstrate that no repayment or a lesser repayment [than the $175,272 Repayment Order] is required." [AR 284.] The Hearing Officer also reiterated that after the hearing, "the committee will have five days in which to submit additional materials for Commission consideration." [AR 285.]

The Committee, through counsel, presented its argument that the Commission's determination that Dr. Stein's DOI was August 6, 2016 was arbitrary, capricious and contrary to law because it conflicted with the Commission's Advisory Opinions, applicable regulations, and the purpose of the Matching Payment Act. [AR 285-98.] The Committee also advised the Commission that it had "recently provided documentation demonstrating additional winddown costs, which we contend are continuing," and that these "additional winddown costs … would further

increase the NOCO deficit." [AR 295.] "In the absence of a surplus NOCO," the Committee explained, "the prorated payment of $40,372 claimed in the audit report is eliminated, and so too is "the repayment of $134,000 in matching funds…." [AR 295.]

Counsel for the Commission asked just one question following the Committee's presentation: how did the documents demonstrating additional winding down costs that the Committee had submitted "relate to issues that were raised in the committee's recent submission requesting administrative review of the repayment determination?" [AR 296.] In response, Dr. Stein cited the fourth paragraph of the Committee's written request for administrative review and stated:

> the nature of winding down costs … would change the repayment order as well as the calculation of the net outstanding campaign obligation. The surplus would be impacted by winding down expenses as well as ballot access expenses that should be recognized. So that is specifically stated in [the] fourth paragraph.

[AR 297.] Counsel for the Committee added that application of a DOI that "denies matching funds for ballot access and winding down costs … undermines the purpose of the Matching Funds Program…." [AR 298.]

As the Committee indicated in its presentation, the Committee submitted documentation of its actual winding down costs incurred since August 31, 2018 prior to the hearing on February 18, 2021 and February 19, 2021 (the "February Materials"). The Committee submitted additional documentation of its actual

winding down costs within five days of the hearing, as the Commission expressly stated that the Committee could do. [AR 285.] This documentation was submitted between March 1, 2021 and March 4, 2021 (the "March Materials").[1]

The Commission's Repayment Determination

The Commission's Repayment Determination affirmed its preliminary determination that Dr. Stein and the Committee "must repay public funds in the amount of $175,272 … due to the existence of a surplus and to having received public funds in excess of entitlement." [App. 79 (Rep. Det. at 19).]

The Commission first concluded that the Committee "waived any issues or arguments pertaining to winding down expenses by failing to raise them in its request for administrative review." [App. 67 (Rep. Det. at 7).] According to the Commission, "the Committee did not raise the argument regarding the additional winding down expenses until the oral hearing, nearly two years…" after it submitted its written request for administrative review. [*Id.*] The Commission acknowledged that the Committee's request for administrative review expressly stated that the

[1] As discussed *infra* at pp. 27-29, the Commission did not include the February Materials or the March Materials in the Administrative Record it originally filed with this Court. It subsequently acknowledged, however, that the February Materials are properly part of the Administrative Record and thus submitted an Amended Administrative Record (ECF No. 1945514) that includes the February Materials. [AR 326-354.] Additionally, in an Order entered on April 28, 2022 (ECF No. 1944749), the Court stated that "parties may refer to the March materials in their briefs, but they must identify them as such." The March Materials are therefore submitted herewith in the Supplemental Appendix.

Commission's "findings concerning the nature of winding down expenses … cannot survive scrutiny," but reasoned that this did not "give the Commission any notice of the arguments that the Committee is raising about the winding down expenses." [App. 69 (Rep. Det. at 9).]

The Commission's discussion of the Committee's purported waiver of the issue of its actual winding down costs does not acknowledge that the Commission lost its quorum for 16 months after the Committee submitted its written request for administrative review, or that the Committee continued to incur winding down costs during that entire time. [App. 67-69 (Rep. Det. at 7-9).] Thus the Commission did not address the fact that the Committee's written request for administrative review could not possibly have raised the issue of its winding down costs incurred during this period, because the Committee had no notice that the Commission would lose its quorum and lack power to take action on that request for the next 16 months while the Committee continued to incur winding down costs.

The Commission next affirmed its conclusion that Dr. Stein's DOI was August 6, 2016, and that ballot access costs incurred after that date could not be considered as qualified campaign expenses under the Matching Payment Act. [App. 70-79 (Rep. Det. at 10-19).] The Commission acknowledged, "as a general matter," that "general election ballot access expenses are qualified campaign expenses for minor party candidates." [App. 70 (Rep. Det. at 10) (citing Advisory Opinion 1995-

45 (Hagelin for President)).] But, the Commission reasoned, "[t]o be considered a qualified campaign expense … the expense must be incurred on or before the candidate's DOI." [*Id.* (citing 11 C.F.R. § 9032.9(a)(1)).]

The Commission determined that Dr. Stein's DOI was August 6, 2016 pursuant to 26 U.S.C. § 9032(6)(A),(B). [*Id.* at 12.] Under that provision, the Commission reasoned, the eligibility of a candidate to receive matching funds when the candidate is nominated by a party that does not nominate by national convention "ends either on the date the party nominates the candidate or on the last day of the last national convention held by a major party during the election year, whichever is *earlier*." [*Id*.] The Commission acknowledged that Dr. Stein sought the nomination of a party that nominates by national convention – the Green Party – but also of several unaffiliated state Green Parties and several other independent parties. [*Id.* at 12-13.] Because none of those state parties held a national nomination convention, however, the Commission found that "Dr. Stein could not receive the benefit of any state nomination or ballot access date after July 28, 2016, the last date of the last major party nominating convention. [*Id.* at 13 (citing 26 U.S.C. § 9032.6; 11 C.F.R. § 9032.6; Advisory Opinion 1984-25 (Johnson) at 2).] The Commission thus concluded that "the most advantageous DOI that the Commission could use to calculate Dr. Stein's DOI under the Matching Payment Act and Commission

regulations was August 6, 2016, the date of the U.S. Green Party's nominating convention." [*Id.*]

The Commission briefly addressed and rejected each of the Committee's arguments that Dr. Stein's DOI should be September 9, 2016, [*id.* at 14-19], the last date on which Dr. Stein was seeking ballot access in any state. [AR 55-56.] It denied that its determination of an August 6, 2016 DOI here deviated from its prior practice and Advisory Opinions on the ground that such authorities are "materially distinguishable from the present circumstances." [App. 76 (Rep. Det. at 16).] The Commission thus asserted that "there is no change of mind or position to explain." [*Id.* at 16 n.22.] The Commission also rejected "the predicate of the Committee's equal protection claim" – that the Matching Payment Act creates "favoritism between major and non-major party candidates" – and asserted that "the Matching Payment Act seeks to avoid creating such favoritism." [*Id.* at 17 (citation omitted).] Moreover, the Commission asserted, even if the Matching Payment Act, as applied here, "results in some disadvantage to minor party candidates vis-à-vis major party candidates, the remedy would lie with Congress, rather than with the Commission." [*Id.*]

The Commission thus concluded that Dr. Stein and the Committee "must repay public funds in the amount of $175,272 to the United States Treasury" within 30 days of its Repayment Determination. [*Id.* at 19.]

Preliminary Proceedings Before this Court

The Committee timely filed its Petition for Review of Agency Action on October 29, 2021. (ECF No. 1920438.) On December 31, 2021, the Court entered an Order establishing a briefing schedule. (ECF No. 1928794.) Thereafter, Dr. Stein and the Committee discovered that the Commission had not included the February Materials and the March Materials in the Administrative Record it filed on December 16, 2021. (ECF No. 1927108.)

On February 9, 2022, the Committee filed an emergency Motion to Suspend Briefing and Motion to Supplement Administrative Record, which requested that the Court order the Commission to submit an amended administrative record that included the February Materials and the March Materials. (ECF No. 1934421.) The Court granted the motion to suspend briefing in an Order entered the same day. (ECF No. 1934475.) The Commission filed a Response in Opposition to the Committee's Motion to Supplement Administrative Record on February 22, 2022, (ECF No. 1936201), and the Committee filed its Reply on March 1, 2022. (ECF No. 1937268.)

The Court granted the Committee's motion to supplement the record with respect to the February Materials in an Order entered on April 28, 2022. (ECF No. 1944749.) The Court referred the motion to the merits panel with respect to the

March Materials. (*Id.*) It concluded, however, that "[t]he parties may refer to the March materials in their briefs." (*Id.*)

STANDING

Dr. Stein and the Committee have standing to challenge the Commission's Repayment Determination. The three elements of standing are well-settled: "(1) injury-in-fact, (2) causation, and (3) redressability." *See Sierra Club v. EPA*, 292 F.3d 895, 900-01 (D.C. Cir. 2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here, both Dr. Stein and the Committee plainly have injury-in-fact: under the Repayment Determination, each of them is liable for the $175,272 repayment. [App. 79 (Rep. Det. at 19).] Further, that injury is caused by the Commission's Repayment Determination, and it may be redressed by an order from this Court directing that the Repayment Determination be reversed. The three elements of standing are therefore satisfied here.

STANDARD OF REVIEW

Statutes such as the Matching Payment Act that provide benefits rather than imposing prohibitions "remain subject to First Amendment limits." *LaRouche v. Federal Election Com'n*, 996 F.2d 1263, 1269 (D.C. Cir. 1993). Furthermore, a public financing system violates the Fifth Amendment guarantee of equal protection if it "unfairly or unnecessarily burden[s] the political opportunity of any party or candidate." *Buckley v. Valeo*, 424 U.S. 1, 96 (1976). In equal protection cases

involving First Amendment rights, "stricter scrutiny is appropriate." *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978). "Thus where noncontent-based distinctions are drawn in a statute affecting First Amendment rights, the Supreme Court has held that the government interest served must be "substantial" and the statutory classification "narrowly tailored" to serve that interest if the statute is to withstand equal protection scrutiny." *Id.* (footnote and citations omitted).

This Court reviews the Commission's repayment orders "under the arbitrary and capricious standard of the Administrative Procedure Act." *LaRouche's Committee New Bretton Woods v. Federal Election Com'n ("LaRouche's CNBW")*, 439 F.3d 733, 737 (D.C. Cir. 2006) (citing 5 U.S.C. § 706(2)(A)). Under that standard, the Court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), or "unsupported by substantial evidence." *Id.* § 706(2)(E). Reversal of an agency decision is proper where "the agency failed to consider relevant factors or made a clear error in judgment." *LaRouche's CNBW*, 439 F.3d at 737 (citation and brackets omitted). Reversal is also proper where "the agency has failed to explain its departure from prior precedent." *Bush-Quayle'92 Primary Committee v. FEC*, 104 F.3d 448, 453 (D.C. Cir. 1997).

ARGUMENT

I. The Matching Payment Act Is Unconstitutional as Applied to Authorize the Commission's Repayment Determination.

This Court has recognized that when the constitutionality of a statute is challenged, "the government enjoys greater leeway in provision of benefits than in outright prohibitions…." *LaRouche*, 996 F.2d at 1268-69. Accordingly, the Court has rejected a constitutional challenge to the Matching Payment Act where a candidate "mounted a categorical, structural challenge" to the statute only after receiving and spending matching funds, "as a ploy to avoid [his] part of [the] bargain." *Robertson*, 45 F.3d at 490. The Committee is mindful of these considerations and asserts a narrow challenge to the constitutionality of a single provision of the Matching Payment Act and its corresponding regulation. *See* 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(b) (hereinafter, "Section 9032(6)"). This challenge is firmly grounded in well-settled constitutional principles and amply supported by the facts in the administrative record.

Section 9032(6) defines the term "matching payment period" under the Matching Payment Act. 26 U.S.C. § 9032(6). As applied to the candidate of a party that does not nominate by national convention, it provides that the matching period ends "on the *earlier* of (A) the date such party nominates its candidate … or (B) the last day of the last national convention held by a major party during such calendar year." *Id.* (emphasis added). In effect, Section 9032(6) establishes the DOI of a

minor party candidate – the date after which the candidate is ineligible to receive matching funds.

Because Section 9032(6) defines the end of the matching period as the *earlier* of the date on which a minor party nominates its candidate or the last day of a major party convention, it produces wildly disparate results as applied to minor party candidates. In 2012, for example, Dr. Stein was eligible to receive matching funds for all of her campaign's ballot access expenses because the last day of a major party convention happened to coincide with the last state ballot access filing deadline. *See supra* at pp. 9-10. But in 2016, Dr. Stein was ineligible to receive matching funds for a substantial portion of her ballot access expenses, solely because the last day of a major party convention was much earlier – July 28, 2016 – and many state ballot access deadlines came later. [App. 73 (Rep. Det. at 13.] But for this disparity, there would be no basis for the Commission's Repayment Order. [*Id.* at 10 (recognizing that "general election ballot access expenses are qualified campaign expenses for minor party candidates … [but] the expense must be incurred on or before the candidate's DOI.") (citing 11 C.F.R. § 9032.9(a)(1)).]

A. Statutes That Confer Benefits May Be Unconstitutional as Applied.

It is well-settled that statutes such as the Matching Payment Act, which provide benefits rather than imposing prohibitions, "remain subject to First Amendment limits." *LaRouche*, 996 F.2d at 1269. Furthermore, a public financing

system violates the Fifth Amendment guarantee of equal protection if it "unfairly or unnecessarily burden[s] the political opportunity of any party or candidate." *Buckley*, 424 U.S. at 96. Thus, while the Court rejected the candidate's categorical challenge to the constitutionality of the Matching Payment Act in *Robertson*, it recognized that the candidate could have properly challenged its "criteria for eligibility, disbursement, or *repayment*." *Robertson*, 45 F.3d at 490 (emphasis added). That is precisely what the Committee challenges here.

B. Section 9032(6) Imposes Severe and Unequal Burdens on Dr. Stein's First Amendment Rights as Applied Here.

The Matching Payment Act "has an important impact on the exercise of First Amendment rights, inasmuch as campaign funds are often essential if 'advocacy' [of beliefs and ideas] is to be truly or optimally 'effective.'" *Com. to Elect Lyndon LaRouche v. FEC*, 613 F.2d 834, 844 (D.C. Cir. 1979) (quoting *Buckley*, 424 U.S. at 65-66). That is especially true as applied to "a candidate [who] either lacks national prominence or belongs to a minor party outside the mainstream of American politics." *Id.* It is therefore "particularly important to ensure that the Commission is applying the eligibility criteria for primary matching funds in an even-handed manner." *Id.* (noting "our national commitment to open and robust discussion of all political viewpoints") (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).) Section 9032(6) prevents the Commission from doing so.

When major party nominees win their party's nomination, they are guaranteed placement on every state's general election ballot. By ending the matching funds period on the date of a major party candidate's nomination, therefore, Section 9032(6) ensures that such candidates are eligible to receive matching funds during the entire period of their primary election campaign. By ending minor party candidates' matching funds period on that same date, however, Section 9032(6) cuts off their eligibility irrespective of whether they continue to incur ballot access expenses that otherwise qualify as "qualified campaign expenses" under the Matching Payment Act. [App. 70 (Rep. Det. at 10).]

Here, Dr. Stein reasonably anticipated that her 2016 ballot access expenses would be deemed qualified campaign expenses under the Matching Payment Act, as they were in 2012. [*Id.* at 17 n.23.] That did not occur, for no reason other than a change in the date of the major party conventions. [*Id.* at 13.] The consequence is dramatic: Dr. Stein and the Committee now face a $175,272 Repayment Determination they would not owe if a major party held its convention in September, as it did in 2012, instead of in June, as it did in 2016. [*Id.* at 17 n.23.] As applied here, therefore, Section 9032(6) "unfairly or unnecessarily burden[s] the political opportunity" of a minor party candidate like Dr. Stein. *Buckley*, 424 U.S. at 96. It rendered Dr. Stein ineligible to receive matching funds for ballot access expenses that otherwise would be deemed qualified campaign expenses under the Matching

Payment Act based solely upon the fact that the major parties changed their convention dates. [*Id.* at 10.]

According to the Commission, this arbitrary result furthered Congress's intent "to ensure parity between major and non-major party candidates with respect to the length of time that each would be eligible to receive and spend public funds." [*Id.* at 17.] That is incorrect. Congress intended to ensure that minor party and major party candidates are afforded equal opportunity under the Matching Payment Act – not that they are eligible to receive funding for the same "length of time" – and the Commission conspicuously fails to cite any authority for this misstatement. Both the Supreme Court and this Court have spoken clearly, however, with respect to the legislative intent behind the Matching Payment Act. As the Supreme Court has explained:

> Congress recognized the constitutional restraints against inhibition of the present opportunity of minor parties to become major political entities if they obtain widespread support. As the Court of Appeals said, "provisions for public funding of Presidential campaigns . . . could operate to give an unfair advantage to established parties, thus reducing, to the nation's detriment … the potential fluidity of American political life."

Buckley, 424 U.S. at 96-97 (citations and internal quotation marks omitted).

This Court stated the point even more directly: "it was Congress's explicit intention that the funds be issued on a nondiscriminatory basis." *LaRouche*, 996 F.2d at 1267 (citation omitted). Section 9032(6) does not further that legislative intent by ensuring that major party candidates are eligible to receive funding for the

entire duration of their primary election campaigns, while terminating minor party candidates' eligibility in the midst of their primary election campaigns. On the contrary, Section 9032(6) thereby discriminates against minor party candidates, in violation of Congress's explicit intent. *See id.*

The Supreme Court has long recognized that a statute may be invidiously discriminatory precisely because it treats differently situated candidates alike. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971). "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike," the Court explained. *Id.* (citation omitted). Section 9032(6) is the statutory embodiment of such invidious discrimination.

C. Section 9032(6) Frustrates the Purpose of the Matching Payment Act as Applied to Minor Party Candidates.

To demonstrate that Section 9032(6) can withstand a challenge on equal protection grounds, the Commission must show that it is "narrowly tailored" to serve a "substantial" governmental interest. *Community-Service Broadcasting*, 593 F.2d at 1122 (citations omitted). The Commission fails to do so. There is no governmental interest – substantial or otherwise – in ensuring that all candidates are eligible to receive funding under the Matching Payment Act for the same "length of time," as the Commission incorrectly asserts. [App. 77 (Rep. Det. at 17).] Rather, as this Court and the Supreme Court have emphasized, the governmental interest behind the Matching Payment Act is that it be administered "on a nondiscriminatory

basis," *LaRouche*, 996 F.2d at 1267, that does not "give an unfair advantage to established parties…." *Buckley*, 424 U.S. at 96-97.

Section 9032(6) is invidiously discriminatory not merely because it serves no governmental interest, however, but because it frustrates the purpose of the Matching Payment Act as applied to minor party candidates. This Court has repeatedly recognized that the purpose behind the statute is "to provide partial federal financing for the campaigns of qualifying presidential primary candidates." *Simon v. Federal Election Com'n.*, 53 F.3d 356, 357 (D.C. Cir. 1995); *see LaRouche*, 996 F.2d at 1267 ("The object of the statute is to enhance the ability of candidates to present their positions and themselves to voters in presidential primaries.") (citation omitted). To be sure, this is not a guarantee of full funding for a presidential candidate's primary campaign, but that is because the statute establishes a *matching* program: once candidates are deemed eligible, they are "entitled to receive payments … to match individual contributions up to $250." *Simon*, 53 F.3d at 357. This funding is intended "to defray 'qualified campaign expenses,'" which are defined as "expenses incurred in connection with the campaign for the presidential nomination that do not violate federal or state law." *Id.* (citing 26 U.S.C. § 9032(9); 11 C.F.R. § 9034.4(a) (1995)).

Here, the Commission concedes that all of the Committee's ballot access expenses would be "qualified campaign expenses" under the Matching Payment Act

but for one factor: the Committee incurred some of the expenses outside the matching payment period, as defined by Section 9032(6). [App. 70, 71-72 (Rep. Det. at 10, 11-12).] Section 9032(6) thus renders minor party candidates ineligible to receive funding for qualified campaign expenses based solely on the fact that they incurred the expenses after the major party conventions. [*Id.* at 12-13.] Consequently, as applied to Dr. Stein, Section 9032(6) made it impossible for the Matching Payment Act to fulfill its purpose.

D. Section 9032(6) Compels the Commission to Act in a Manner That Is Arbitrary, Capricious and Contrary to the Agency's Own Regulations and Authorities.

In a series of advisory opinions dating back to 1975, the Commission expressed its commitment "to construe the provisions of the [FECA] in a manner consistent with Constitutional requirements, regardless of a candidate's party affiliation or independent status." AO 1975-44, at 2 (Socialist Workers 1976). It thus found that under the FECA, "the petition process required of the presidential candidates of the minor parties [is] the equivalent of the primary elections and convention process of the major party candidates." *Id.* Similarly, in the case of an independent candidate's campaign for Senate, the Commission concluded that "a primary election shall be deemed to have occurred on the day prescribed by applicable State law as the last day to qualify for a position on the general election

ballot or the date of the last major party primary election[,] whichever is later. AO 1975-53, at 1 (Bradley for Senate).

The position taken by the Commission in these cases is consistent with the regulation that establishes statutory definitions under the FECA:

> With respect to individuals seeking federal office as independent candidates, or without nomination by a major party (as defined in 26 U.S.C. 9002(6)), the primary election is considered to occur on one of the following dates, at the choice of the candidate:
>
> > (i) The day prescribed by applicable State law as the last day to qualify for a position on the general election ballot may be designated as the primary election for such candidate.
> >
> > (ii) The date of the last major party primary election, caucus, or convention in that State may be designated as the primary election for such candidate.
> >
> > (iii) In the case of non-major parties, the date of the nomination by that party may be designated as the primary election for such candidate."

11 CFR § 100.2(c)(4) (emphasis added).

Decades later, the Commission summarized its position as follows:

> It has long been the view of the Commission that, for non-major party candidates, the process by which they satisfy the requirements of State law governing qualification for a position on the general election ballot serve purposes similar to a primary election or other nominating process. *See* Advisory Opinions 1984-11 and 1975-44. This view is supported by the Commission regulations defining the term 'election,' which state that, for non-major party and independent candidates, the day prescribed by applicable State law as the last day to qualify for position on the general election ballot may be designated as the primary election for such candidate. 11 CFR 100.2(c)(4)(i). Based on this reasoning, the Commission concluded in Advisory Opinions 1984-25 and 1984-11, that the ballot access expenses of

> candidates for minor party nominations would be qualified campaign expenses.

AO 1995-45, at 2 (Hagelin for President 1996).

Section 9032(6) is in direct conflict with the foregoing authorities, and with 11 CFR § 100.2(c)(4) in particular. Whereas the latter provision allows a minor party candidate to choose the last state ballot access filing deadline as its primary election date, *see* 11 CFR § 100.2(c)(4)(i), Section 9032(6) requires the Commission to define that same candidate's primary election date as the *earlier* of the date on which the candidate was nominated or the date of the last major party convention. *See* 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(b). As applied to Dr. Stein, this requirement produced arbitrary and capricious results: in 2012, the Commission found that her campaign's ballot access expenses were all qualified campaign expenses and no repayment was required; in 2016, by contrast, the Commission found that a substantial portion of those expenses were not qualified campaign expenses and that repayment of $175,272 is required. There is no rational basis for such an inequitable and unjust result.

The Court should declare Section 9032(6) unconstitutional as applied.

II. The Commission's Failure to Consider the Committee's Actual Winding Down Costs Was Arbitrary, Capricious, an Abuse of Discretion and Contrary to Law.

One stark fact underlies this appeal: the Commission itself does not contend that Dr. Stein and the Committee would have any repayment obligation at all if the

Commission had considered the Committee's actual winding down costs instead of relying on the estimated figure in its Final Audit Report. After expressly stating that it would "adjust" its estimate to reflect actual winding down costs, [AR 187 & n.[b]], however, the Commission declined to do so on the ground that the Committee had "waived" the issue. [App. 63 (Rep. Det. at 3 n.2).] That is incorrect. The Committee expressly raised the issue in its request for administrative review, [AR 261], it argued that the Commission should make that adjustment in the oral hearing before the agency, [AR 297-98], and it timely submitted evidence to support its position – the February Materials and the March Materials that the Commission omitted from the record. [AR 326-54 (February Materials); Supp. App. (March Materials).] The Commission's failure to address the issue or consider the February Materials and March Materials was therefore arbitrary, capricious, an abuse of discretion and contrary to law.

A. The Committee Did Not "Waive" Its Right to Raise Arguments Relating to Its Winding Down Expenses.

It is undisputed that the Committee expressly raised its challenge to the Commission's findings relating to the Committee's winding down expenses as set forth in the Final Audit Report. [AR 261.] The Committee's request for administrative review states that the Commission's "findings concerning the nature of winding down expenses … cannot survive scrutiny," and that "no repayment would be called for" if reimbursement for these and other expenses were allowed.

[*Id*.] That is a clear and plain statement of the Committee's argument that the winding down expenses in the Final Audit Report are incorrect – that they are too low.

The Commission asserts, however, that the Committee failed to "give the Commission any notice of the arguments that the Committee is raising about the winding down expenses." [App. 69 (Rep. Det. at 9) (citing *Robertson*, 45 F.3d at 491).] That assertion does not comport with the facts. Not only did the Committee expressly raise its argument in its written request for administrative review, [AR 261], but also, the Committee had previously raised this very argument in the proceedings before the Commission. It further requested that "its staff be permitted to work with Audit staff … to identify the source of this discrepancy" and to identify any winding down expenses that "have not been properly demonstrated…." [AR 199.] The Commission denied that request on the ground that the Committee would have the opportunity to resolve "any purported NOCO statement discrepancy in an administrative review" and in "an oral hearing "to dispute the repayment determination." [AR 206 & n.1 (citing 11 C.F.R. 9038.2(c)(2)(ii)).] The Commission therefore had actual notice of the Committee's argument that the winding down expenses included in the Final Audit Report were too low, and contemplated that the Committee could address that argument during the administrative review process.

Furthermore, the Final Audit Report, like the Draft Final Audit Report and the Preliminary Audit Report before it, stated on the record that the Commission would adjust its estimated winding down expenses to reflect the Committee's actual winding down expenses. [AR 107 n.[c], 187 n[b], 249 n.[b].] The Committee reasonably relied on these statements. The Commission did not notify the Committee that it would decline to make that adjustment unless the Committee submitted documentation of its actual winding down expenses by a particular date. Nor has the Commission cited any regulation or statutory provision that authorizes it to do so. The Commission simply reversed its long-standing commitment to making the adjustment without providing the Committee any prior notice. [App. 63 (Rep. Det. at 3 n.2.]

The Commission's refusal to adjust its estimate of the Committee's winding down expenses to reflect the Committee's actual winding down expenses is especially improper given that the Commission unexpectedly lost its quorum in August 2019 and did not regain a quorum for the next 16 months, until December 2020. [*Id.* at 6 n.7.] During all of this time, the Committee has continued to incur winding down expenses. Yet the Final Audit Report only includes estimated winding down expenses through July 31, 2019. [AR 249.] Furthermore, the Final Audit Report *reduces* the estimated winding down expenses included in the Preliminary Audit Report "from $100,880 to $69,335 to reflect the remaining

winding down period." [AR 249 n.[b].] That action, by itself, is arbitrary and capricious: it fails to account for the fact that the Commission itself prolonged the Committee's winding down period for 16 months after the date on which the Commission determined that the winding down period would end. [*Compare* AR 249 n.[b] *with* App. 66 (Rep. Det. at 6 n.7.]

The Committee did not waive its right to raise the argument that the Commission's estimate of its winding down costs should be adjusted to reflect the actual winding down costs that the Committee incurred from August 2019 to the present. The Committee was required to submit its written request for administrative review within 60 days of the repayment determination included in the Final Audit Report. *See* 11 C.F.R. § 9038.2(c)(2). It timely did so on June 17, 2019. [AR 261.] At that time, the Committee had no notice that the Commission would lose its quorum in August 2019 and lack power to act on the Committee's request for the next 16 months. [App. 66 (Rep. Det. at 6 n.7).] Therefore, the Committee could not possibly have raised any issue with respect to the winding down costs it would incur from August 2019 to the present, and it has not waived the issue.

This case thus stands in stark contrast with the cases on which the Commission purports to rely. In *Robertson*, for example, the Court concluded that the petitioner waived an argument that the petitioner entirely omitted from its written request for administrative review and "waited until the oral hearing" to raise. *See Robertson*,

45 F.3d at 491. Here, by contrast, the Committee expressly raised its challenge to the Commission's findings with respect to the Committee's winding down expenses in its written submission. [AR 261.] *Robertson* is further distinguishable because the argument the petitioner had waived concerned an agency omission that occurred before the petitioner filed its written request for administrative review. *See Robertson*, 45 F.3d at 491 (waiver may apply "as regards [agency] actions already taken.") (citation omitted). In this case, however, the Committee's challenge to the Commission's findings relating to the Committee's winding down expenses relies in part on the Commission's failure to consider the Committee's winding down expenses incurred from August 2019 to the present, after the Committee filed its written request for review in June of 2019. [AR 261.]

The Commission cites a number of cases in passing for the proposition that the "general statement" in the Committee's written submission is insufficient "to preserve an issue or argument for judicial consideration," [App. 68 (Rep. Det. at 8], but these cases are inapposite. The Committee did not make a "general statement" about the Commission's findings relating to its winding down expenses. Rather, it asserted that those findings were incorrect and that no repayment would be required if the Commission corrected them. The Committee did not waive this issue.

B. The Court Should Order the Commission to Supplement the Record With the March Materials.

The Commission improperly omitted from the administrative record all of the evidence the Committee submitted in support of its argument that the winding down expenses in the Final Audit Report are incorrect. The Commission took that action without notifying the Committee, despite advising the Committee in writing and at the oral hearing that it "will have a period of five days following the conclusion of the hearing to submit any additional materials for the Commission's consideration." [AR 274, 285.] The Committee properly did so in submissions before the hearing in February 2021 [AR 326-54] and immediately following the hearing in March 2021. [Supp. App. 1-166.] The Commission had no authority to omit this evidence from the administrative record or to decline to consider it.

The rules governing this appeal expressly provide that the Commission is required to submit the entire record for this Court's review. *See* Fed. R. App. P. 17(b)(1)(A) ("The agency must file the original or a certified copy of the entire record….) (emphasis added). The rules further specify that "the record on review … of an agency order consists of … [inter alia] the pleadings, evidence, and other parts of the proceedings before the agency." Fed. R. App. P. 16(a) (emphasis added). As the mandatory language of Rule 17(b) makes clear, an agency does not have discretion to pick and choose among the evidence it includes in the record. Instead, it must submit the entire record. *See* Fed. R. App. P. 17(b)(1)(A).

The regulation that defines the administrative record is consistent with Rule 16(a) and provides that it "consists of all documents or materials submitted to the Commission for its consideration in making [repayment] determinations." 11 C.F.R. § 9038.7(a). The March Materials plainly meet that definition. The Court should therefore order the Commission to supplement the record with them.[2]

It is well-settled that supplementation of the record in an appeal from an agency ruling is warranted under certain circumstances. *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). One such circumstance is where "the agency deliberately or negligently excluded documents that may have been adverse to its decision." *Id.* (*quoting James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).) That circumstance is satisfied here. The Commission deliberately excluded the February Materials and the March Materials based upon its determination that the Committee did not timely raise the issue of winding down expenses in a written request for administrative review, and that determination is incorrect. [AR 261.]

The March Materials are also plainly "adverse" to the Commission's ruling. *American Wildlands*, 530 F.3d at 1002. As explained *infra* at Part II.C, the February Materials and March Materials demonstrate that the Committee's actual winding

[2] The Court has already ordered the Commission to supplement the record with the February Materials. (ECF No. 1944749.)

down expenses not only exceeded the estimated winding down expenses on which the Final Audit Report relies, but are sufficient to wipe out any purported repayment obligation entirely. Thus, this evidence may be dispositive of this appeal and the Commission should be required to address it in the first instance.

C. The Court Should Reverse the Commission's Repayment Determination and Remand With Instructions to Consider the Evidence Demonstrating the Committee's Actual Winding Down Expenses.

The Commission concedes that agency staff made the February Materials available to the Commission but asserts that "staff did not circulate the March [Materials]" or make them available to the Commission. [Opp. to Pet. Mot. to Supp. Rec., 7-8 (ECF No. 1936201).] The Commission also concedes that it did not consider this evidence demonstrating the Committee's actual winding down costs, but instead relied on an estimate that only covers the period ending July 31, 2019. [App. 64 (Rep. Det. at 4.] The Court should therefore remand this matter to the agency for consideration of that evidence.

The February Materials and March Materials demonstrate that the Committee's actual winding down expenses totaled $233,472 for the period ending July 31, 2019 – not the $69,355 estimated figure on which the Repayment Determination relies. [*Compare* App. 55 *with* App. 64 (Rep. Det. at 4).] Additionally, this evidence demonstrates that the Committee incurred another $80,558 in winding down expenses between August 1, 2019 and December 31, 2020

– the period during which the Commission lost its quorum and was unable to act on the Committee's request for administrative review. [App. 55.] The Committee incurred another $4,793 in winding down expenses through March 2, 2021, when the Committee submitted this evidence. [*Id.*] The Committee's actual winding down expenses as of that date thus total $318,823, which is more than enough to eliminate the purported surplus on the Committee's NOCO and wipe out any repayment obligation. [*Id.*]

This matter could have been dismissed without the need for this appeal if the Commission had simply considered the foregoing evidence and properly adjusted its estimate of the Committee's winding down costs to reflect its actual winding down costs, which is a routine step in the audit process that the Commission itself committed to doing. Moreover, the consequences of the Commission's failure to make that adjustment here are severe. Dr. Stein has been obliged to drain her retirement account of $175,272 in satisfaction of a Repayment Determination that she manifestly does not owe. The Court should remand this matter to the Commission with instructions to remedy its error and rectify this injustice.

CONCLUSION

For the foregoing reasons, the Court should declare Section 9032(6) unconstitutional and reverse the Commission's Repayment Order. Alternatively, the Court should reverse the Commission's Repayment Order and remand this matter with instructions to the Commission to adjust its estimate of the Committee's winding down costs to reflect the Committee's actual winding down costs.

Dated: June 28, 2022

Respectfully submitted,

/s/Oliver B. Hall

Oliver B. Hall
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, D.C. 20009
(202) 248-9294
oliverhall@competitivedemocracy.org

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2022, I caused the foregoing document to be filed using the Court's CM/ECF system, which will effect service upon all counsel of record.

/s/Oliver B. Hall
Oliver B. Hall

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 11,289 words (including footnotes and endnotes), excluding those parts exempted by FRAP 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman, size 14 point.