UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERRON FOR CONGRESS,	)	Civil Action No. 11-1466 (RC)
Plaintiff,	)	
v.	)	**MOTION**
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MOTION
FOR SUMMARY JUDGMENT

The Federal Election Commission ("the Commission") respectfully moves the Court for an order granting summary judgment to the Commission pursuant to Rule 56 of the Federal Rules of Civil Procedure. A Memorandum of Points and Authorities in support of the Commission's motion and a Proposed Order are submitted herewith, as required by LCvR 7.

Respectfully submitted,

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May 4, 2012

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HERRON FOR CONGRESS, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	Civil Action No. 11-1466 (RC) **MEMORANDUM**

FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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GLOSSARY

AR	=	Certified Administrative Record
DSCC	=	Democratic Senatorial Campaign Committee
FEC	=	Federal Election Commission
FECA	=	Federal Election Campaign Act
HFC	=	Herron for Congress
MUR	=	Matter Under Review
NRDC	=	Natural Resources Defense Council
NRSC	=	National Republican Senatorial Committee
OGC	=	Office of General Counsel
SOR	=	Statement of Reasons

The Federal Election Commission ("FEC" or "Commission") reasonably exercised its prosecutorial discretion when it dismissed an administrative complaint filed by Herron for Congress ("HFC") against its victorious opponent in a race for Congress. First, HFC lacks standing under Article III. Second, HFC asks this Court improperly to micromanage the Commission's voting and investigative procedures and to substitute its view of the evidence that was before the Commission when it dismissed HFC's administrative complaint.

HFC, established to support the 2010 candidacy of Roy Herron, no longer supports any electoral purpose because Mr. Herron is not a candidate for federal office and has no concrete plans to seek federal office in the future. As such, HFC cannot demonstrate that it faces a threat of imminent injury that warrants the prospective relief it seeks here and therefore lacks Article III standing. Even if HFC had standing, it cannot show that the Commission abused its discretion when it dismissed the administrative complaint. The Court should therefore grant the Commission's motion for summary judgment, deny HFC's motion, and dismiss the complaint with prejudice.

BACKGROUND

A. The Parties

Plaintiff HFC is the authorized committee of Roy Herron, who was the Democratic nominee for the United States House of Representatives from the 8th Congressional District of Tennessee in 2010. Certified Administrative Record ("AR") at AR0001. Mr. Herron lost the 2010 general election to Stephen Fincher, his Republican opponent, who is now the incumbent member of Congress representing that 8th District. (Compl. ¶7.)

The FEC is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election

Campaign Act of 1971, 2 U.S.C. §§ 431-57 ("FECA" or "Act"). *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Congress authorized the Commission to "formulate policy" under FECA, *see, e.g.*, 2 U.S.C. § 437c(b)(1), and to make rules and issue advisory opinions, 2 U.S.C. §§ 437d(a)(7), (8); 437f; 438(a)(8). *See also Buckley v. Valeo*, 424 U.S. 1, 110-11 (1976). The Commission is also authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1)-(2), and the agency has exclusive jurisdiction to initiate civil enforcement actions in the United States district courts, 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e), 437g(a)(6).

B. Statutory Framework

1. Reporting

Within 15 days of becoming a federal candidate, the candidate must designate a principal campaign committee by filing a statement of candidacy with the Commission. 11 C.F.R. § 101.1(a). That committee then manages the finances of the candidate's campaign for that specific election cycle. *See* 2 U.S.C. §§ 431(5), 431(6), 432(e)(1), 432(f). Unless the candidate redesignates the committee to serve as a principal campaign committee in a subsequent election cycle, the committee's function is limited to the election cycle originally designated in the statement of candidacy. *See* 11 C.F.R. §§ 101.1(a), 102.1(a), 102.12(c)(1); FEC Form 2 (Statement of Candidacy) (requiring candidate to identify principal campaign committee and election year), *available at* http://www.fec.gov/pdf/forms/fecfrm2.pdf (last visited May 1, 2012).

The Act requires the principal campaign committees of candidates for the House of Representatives to file regular reports in election years, including pre-election, post election, and quarterly reports, all within a specified time before or after an election. 2 U.S.C. § 434(a)(2). The Act further requires such reports to include the identity of each "person who makes a loan to

the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan." 2 U.S.C. § 434(b)(3)(E). Thus, when a candidate obtains a bank loan for use in connection with the candidate's campaign, the candidate's principal campaign committee must disclose the fact that the candidate has received a bank loan (on Schedule C of its regular reports), as well as the name and address of the lending institution (on Schedule C-1 of its regular reports). *See* 11 C.F.R. § 104.3(d)(4); Instructions for FEC Form 3 and Related Schedules, *available at* http://www.fec.gov/pdf/forms/fecfrm3i.pdf at 14 (last visited May 1, 2012). The committee must also report on Schedule C-1 the date, amount, and interest rate of the loan, and the types and value of collateral or other sources of repayment that secure the loan. 11 C.F.R. § 104.3(d)(1).

2. Prohibition on Corporate Contributions

FECA prohibits corporations and national banks from making, and political committees from knowingly accepting, contributions in connection with any federal campaign. 2 U.S.C. § 441b(a). Commission regulations provide that a bank loan is not a contribution from a bank if made in accordance with applicable banking laws and regulations and in the ordinary course of business. 11 C.F.R. § 100.82(a). A loan will be deemed in the ordinary course of business if it (1) bears the usual and customary interest rate of the lending institution for the category of loan involved; (2) is made on a basis that assures repayment; (3) is evidenced by a written instrument; and (4) is subject to a due date or amortization schedule. *Id*.

C. Administrative Procedures

The Act permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 2 U.S.C. § 437g(a)(1). After reviewing the complaint and any

response filed by the respondents, the Commission may vote on whether there is "reason to believe" that a violation has occurred. 2 U.S.C. § 437g(a)(2). If at least four members of the Commission vote to find "reason to believe," the Commission can institute an investigation. *Id*. After the investigation, the General Counsel can recommend that the Commission vote on whether there is "probable cause" to believe the Act has been violated. 2 U.S.C. § 437g(a)(3). The General Counsel must notify the respondents of his recommendation and provide them with a brief stating the General Counsel's position on the issues. *Id*. The respondents are entitled to at least 15 days to file a responsive brief. *Id*. The General Counsel then prepares a report to the Commission with further recommendations in light of the briefs and the investigation. 11 C.F.R. § 111.16.

If at least four members of the Commission vote to find probable cause to believe that a violation has occurred, 2 U.S.C. § 437g(a)(4)(A)(i), the Commission must attempt for at least 30 days to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondents. *Id*. Conciliation agreements may require a person to pay a civil penalty "which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved." 2 U.S.C. § 437g(a)(5)(A). If these informal methods of conciliation fail, the Commission may, "upon an affirmative vote of 4 of its members," file a *de novo* civil enforcement suit in district court. 2 U.S.C. § 437g(a)(6)(A).

Although the Act does not require the Commission to attempt to conciliate matters until after a finding of probable cause, 2 U.S.C. § 437g(a)(4), the Commission has promulgated regulations for pre-probable cause conciliation to allow for early disposition of appropriate matters. *See* 11 C.F.R. § 111.18(d). At the "reason to believe" stage, the General Counsel may recommend, and the Commission may approve, a proposed pre-probable cause conciliation

agreement that sets forth the Commission's opening settlement offer, including a proposed civil penalty. Any conciliation agreement reached prior to a finding of probable cause has the same force and effect of any other conciliation. 11 C.F.R. § 111.18(d).

If the Commission dismisses a complaint at any stage in the administrative enforcement process, the complainant can seek judicial review of that determination pursuant to 2 U.S.C. § 437g(a)(8)(A). If the Court declares that the Commission's dismissal was "contrary to law," it can order the Commission to conform to the Court's declaration within 30 days. 2 U.S.C. § 437g(a)(8)(C). If the Commission fails to conform to the declaration, the complainant can obtain a private right of action against the administrative respondents. *Id*. *See FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985).

D. Plaintiff's Administrative Complaint and Responses Thereto

On September 29, 2010, HFC filed an administrative complaint with the Commission alleging that the Steve Fincher for Congress Committee ("Fincher Committee" or "Committee") and Phyllis Patterson, its treasurer, violated the Act and the Commission's regulations. AR0001-04. The complaint noted that, on July 23, 2010, the Fincher Committee filed with the Commission a pre-primary election report disclosing that the Committee had received a $250,000 loan on July 8, 2010. AR0002. The pre-primary report indicated that the funds were made or guaranteed by the candidate (AR0008) and that the source of the loan was the personal funds of Steve Fincher. AR0010.

HFC alleged two potential violations of the Act: (1) a reporting violation concerning information disclosed about the true source of funds loaned to the Fincher Committee, and (2) a prohibited corporate contribution. HFC asserted that the Gates Banking & Trust Co. ("Gates Bank" or "the Bank"), not Steve Fincher, had provided the $250,000 loan, and that

because the Fincher Committee had failed to reveal the terms of the loan, it was impossible to determine whether the loan had been properly secured. AR0003. If the loan were unsecured, the complaint alleged, the loan constituted an illegal contribution. *Id*.

Processing the complaint in the ordinary course, the Commission's Office of General Counsel ("OGC") designated the administrative complaint as Matter Under Review ("MUR") 6386 and sent out the appropriate notification letters to the complainant and respondents (the Fincher Committee and Gates Bank). AR0019-23.

On October 14, 2010, HFC supplemented its original administrative complaint and noted that the Fincher Committee had recently filed its 2010 Third Quarter Report, which again indicated that Steve Fincher's personal funds were the source of the $250,000 loan. AR0027-28. HFC alleged that since the Fincher Committee was aware of HFC's administrative complaint and the president of Gates Bank had told the press that the Bank was indeed the source of the loan, the Fincher Committee's failure to report Gates Bank as the source of the $250,000 loan in its Third Quarter Report was a knowing and willful violation of the Act. AR0027-28.

In November 2010, the Committee and Gates Bank responded to the administrative complaint. AR0037-81. The Bank stated that "following its usual and customary business practice," it analyzed Mr. Fincher's creditworthiness and collateral and approved his loan application. AR00037. The Bank further asserted that the $250,000 loan to Stephen Fincher complied with FECA and Commission regulations. AR0038-40; *see* 11 C.F.R. § 100.82(a). The Bank explained that the interest rate on the loan was 6.5%, which was 3.25% above the New York prime rate, and thus represented the usual and customary interest rate for this type of loan. AR0038. Gates Bank also asserted that the loan was made on a basis that assured repayment, because the Bank had perfected a security interest in collateral with a fair market value that was

greater than the $250,000 loan amount. AR0039. The Bank explained that such collateral included, at the time the loan was made, a right of offset to Fincher's deposit accounts, as well as the deed of trust on Fincher's house and a crop production note on all of Fincher's 2010 crops. *Id*.

The response of the Fincher Committee largely echoed the response of the Bank. Like Gates Bank, it maintained that the loan met the requirements of the Act and Commission regulations. AR0058-61. The Committee explained that though the loan was "erroneously" and "unintentionally" reported with a zero percent interest rate, it in fact carried a 6.5% interest rate, which was 3.25% over the New York Prime rate and consistent with the usual and customary interest rate for this type of loan. AR0060. The Committee also stated that the loan was cross-collateralized with other bank debt owned by Fincher, as evidenced by a UCC financing statement for the 2010 crop production note and the deed of trust on the Fincher home held by the Bank, both of which were attached to the Fincher Committee's response. *Id*. The Committee also explained that the loan was cross-collateralized with a deposit account jointly held by Stephen Fincher and his wife on which the Bank held a right of offset. *Id*. The Committee further stated that although the cross-collateralized assets held by the Finchers were jointly owned, the amount of the loan did not exceed the candidate's share of those assets. AR0060. Like Gates Bank, the Committee explained that the loan was evidenced by a written instrument, which showed a due date of November 30, 2010. AR0061. The Committee's response also pointed out that the loan was repaid in full by Mr. Fincher on November 17, 2010. *Id*.

As to the allegations in Herron's complaint that the loan was misreported, the Committee admitted that "[a] review of how the Committee reported the loan demonstrated a need to file amended reports . . . ." AR0061. And on December 2, 2010, the Committee filed an amended

2010 pre-primary report (AR0083-110), which included a Schedule C-1 form (AR0110) with the required information about the bank loan, including the collateral.

E. General Counsel's Recommendations

The First General Counsel's Report to the Commission analyzed the claims and evidence presented by the complainants and respondents. AR0687-712. The Office of General Counsel recommended that the Commission find reason to believe that the Fincher Committee, and Phyllis Patterson, in her official capacity as treasurer, violated the Act and Commission regulations by misreporting the source of the loan as coming from Fincher's personal funds instead of from the Bank. AR0687-88. The General Counsel, however, did not recommend that the Commission find reason to believe that the alleged reporting violations were knowing and willful. AR0692. The General Counsel explained that "[w]hile the public would have been better served by more timely amendments, we have no information suggesting that the Committee intentionally delayed submitting them . . . ." *Id.*

As to the alleged violation of 2 U.S.C. § 441b(a) regarding an illegal corporate contribution, the General Counsel recommended that the Commission find no reason to believe that Gates Bank made, or the Committee accepted, an unlawful corporate contribution. AR0697. The General Counsel concluded that the $250,000 loan was made in accordance with applicable banking laws and regulations and in the ordinary course of business. AR0693 (citing 11 C.F.R. § 100.82(a)). The General Counsel explained that there was no information available to contradict the Committee's and Bank's response that the interest rate of 6.5% was 3.25% over New York Prime and was Gates Bank's usual and customary interest rate for this type of loan. AR0694.

The General Counsel also concluded that the supporting documentation, along with the Bank's representation that the equity in the existing secured loans exceeded the amount of the campaign loan, demonstrated that the loan was made on a basis that assured repayment. AR0694-96. Under Commission regulations, a loan is considered made on a basis that assures repayment if three criteria are satisfied: (1) the lending institution making the loan has perfected a security interest in collateral owned by the candidate or political committee receiving the loan; (2) the fair market value of the collateral is equal to or greater than the loan amount and any senior liens as determined on the date of the loan; and (3) the candidate or political committee provides documentation showing that the lending institution has a perfected security interest in collateral. 11 C.F.R. § 100.82(a). The Commission's regulations also provide that such collateral can include, *inter alia*, ownership in real estate, personal property, goods, negotiable instruments, and cash on deposit. *Id.* The General Counsel noted that documents submitted by the respondents showed that Gates Bank had a perfected interest in Fincher's personal residence as evidenced by the deed of trust; Fincher's 2010 crops, as evidenced by a UCC Financing Statement on file with the Tennessee Secretary of State; and a right-of-offset to Fincher's deposit accounts. AR0695. The General Counsel also concluded that the loan was made in the ordinary course of business because it was evidenced by a written instrument and had a maturity date of November 30, 2010. AR0696; 11 C.F.R. § 100.82(a).

The General Counsel made eight separate recommendations to the Commission:

1. Find reason to believe that the Committee and its treasurer violated the reporting provisions at 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(4);

2. Find no reason to believe that Steve Fincher for Congress and its treasurer violated 2 U.S.C. § 441b(a);

3. Find no reason to believe that Gates Bank violated 2 U.S.C. § 441b(a);

4. Enter into conciliation with the Committee and its treasurer prior to a finding of probable cause to believe;

5. Approve [a draft] conciliation agreement;[1]

6. Approve the [draft] factual and legal analyses;

7. Dismiss the matter as to Gates Bank; and

8. Approve the appropriate notification letters to respondents.

F. The Commission's Dismissal of the Administrative Complaint

On June 14, 2011, the Commission considered the General Counsel's recommendations and voted on four separate motions on MUR 6386. Although, as explained below, none of the first three motions garnered a majority required to make a *formal* finding, all six Commissioners voted affirmatively to approve the General Counsel's recommendation to find reason to believe that the Committee violated the Act's reporting provisions. The Commissioners also unanimously voted to find no reason to believe that the Bank gave, or the Committee received, an illegal corporate contribution.

Each of the first three motions included a finding of reason to believe that the Committee had violated the Act's reporting provisions by failing to properly report the receipt of a bank loan. The first three motions also included a finding of no reason to believe that the Bank and the Committee violated the Act by making and accepting, respectively, an unlawful corporate contribution. Each of the first three motions, however, also included a different proposal regarding the appropriate penalty, if any, for the reporting violation. The first motion would have approved a conciliation agreement that would have required the Committee to pay a

[1] This proposed conciliation agreement was redacted from the Certified Administrative Record filed in this case on December 5, 2011, because information related to conciliation attempts, including draft conciliation agreements and proposed civil penalties, must be kept confidential under the Act. 2 U.S.C. § 437g(a)(4)(B).

five-figure civil penalty, and it failed by a vote of 2-4. AR0713-14, 24, 25 n.11. The second motion included a lower five-figure civil penalty, and it also failed, by a vote of 3-3. AR0713-14, 725 n.11. Under the third motion, the Commission would have sent a letter of caution to the Fincher Committee in lieu of a civil penalty. AR0715. And this vote likewise failed by a vote of 3-3. *Id*.

Having failed to agree on whether to seek a civil penalty, the Commission voted on a fourth and final motion, approved by five of six Commissioners, to close the file in MUR 6386 and dismiss the administrative complaint. AR0715. In sum, all six Commissioners agreed with the General Counsel's recommendation that there was reason to believe that the Committee had violated the Act's reporting requirements and that no investigation was required. But because they could not agree upon an appropriate penalty to include in a proposed conciliation agreement, they voted not to devote any further resources and to close the matter. AR0713-15.

On July 21, 2011, Commissioners Bauerly, Walther, and Weintraub, the Commissioners who voted to seek a civil penalty in the proposed conciliation agreement ("civil penalty group"), issued a statement of reasons ("SOR") in MUR 6386. AR0719-22. On September 15, 2011, Commissioners Hunter, McGahn, and Petersen, the Commissioners who voted to send the respondents a letter of caution and not to seek a civil penalty ("letter of caution group"), also issued an SOR. AR0723-30.

Like the votes on the motions, the SORs reflect that all six Commissioners unanimously agreed that there was reason to believe that the Fincher Committee violated the Act. The SORs made clear that the two groups parted ways only on whether to seek a civil penalty from the Committee. "[T]he *sole* dispute with our colleagues," the civil penalty group explained, "is whether the Fincher Committee's misreporting of campaign information . . . warrants a civil

penalty." AR0720 (emphasis added). The civil penalty group further explained that the Act "envisions a penalty in such circumstances and we believe a penalty is appropriate in this matter. Civil penalties provide an important incentive for campaigns to file accurate reports with the Commission." *Id*. This group added that it could not agree only to send the respondents a letter of caution "given the importance of accurate public disclosure of campaign spending and the Commission's authority to obtain penalties for committees that violate the Act's rules." AR0721. "The misreporting here warrants such a penalty and to find otherwise would eviscerate any deterrent effect with respect to future activity." AR0722.

In the other SOR, the letter of caution group explained that although the Committee's reporting violated the technical requirements of the Commission's regulations, sending a letter of caution in lieu of a civil penalty was "consistent with Commission precedent and the Commission's prosecutorial discretion." AR0723. Although the Committee properly reported that it had received a loan, "that was not enough," since Commission regulations also require the Committee to report the terms of the loan and that Gates Bank was the source of the loan. *Id*. Nonetheless, the letter of caution group explained that Committee's incomplete reporting did not result in "other informational injury or prohibited campaign finance activity," and that "absent other harm, the Commission has not demanded civil penalties for this type of reporting error" in the past. *Id*.

The letter of caution group also explained that "the decision not to impose a civil penalty in this matter was an appropriate exercise of agency discretion." AR0728. "The harm this technical reporting requirement seeks to avoid — th[at] the receipt of a loan by the candidate on dubious terms or from a prohibited source — was not present here." AR0728-29. Since "the underlying activity was wholly legal and any harm resulting from the way the Committee

reported the loan was minimal and subsequently clarified," the letter of caution group explained that it "exercised [its] prosecutorial discretion and declined to support a monetary civil penalty in this matter." AR0729. The letter of caution group concluded that "because of our disagreement with our colleagues over what was the *appropriate penalty*, we voted to close the file." AR0729 (emphasis added).

Regarding the allegations of an unlawful corporate contribution, both SORs also agreed with the General Counsel's recommendation to find no reason to believe that the Committee accepted an illegal corporate contribution. AR0719, 0723. The civil penalty group explained that they "supported" the recommendation "[f]or the reasons contained in OGC's report." AR0719 n.1. Likewise, the letter of caution group "agreed with the Office of General Counsel's recommendation that we find no reason to believe the respondents made or accepted a prohibited contribution." AR0723 n.1.

On August 12, 2011, HFC brought this lawsuit alleging that the Commission's failure to find, as a formal matter, that there was reason to believe the Fincher Committee had misreported the campaign loan — even though all six Commissioners voted affirmatively to find reason to believe — was contrary to the Act. HFC also claims that the Commission's failure to find reason to believe that the Committee received an unlawful corporate contribution was contrary to law.[2]

[2] HFC has filed a Statement of Facts in support of its motion (Doc. 15-10). Because this case involves review of agency action based solely on the administrative record, no such statement of facts, or statement of genuine issues in opposition thereto, is required under Local Rule 7(h)(2). Accordingly, the Commission is not filing a statement of genuine issues in opposition, which the Court should not construe as admitting any of the facts in the plaintiff's statement.

ARGUMENT

I. HERRON FOR CONGRESS LACKS CONSTITUTIONAL STANDING

The Court should dismiss this case because HFC lacks standing under Article III. Mr. Herron is not a candidate for any federal office, and his campaign committee suffers no prospective injury that could be remedied by an order from this Court declaring that the Commission acted contrary to law when it dismissed the administrative complaint concerning past activity of Mr. Herron's former political opponent.

By the time HFC filed suit in August 2011, it no longer served any purpose relevant to any future election. The Committee had been established in 2009 to serve as Mr. Herron's principal campaign committee in the 2010 Tennessee congressional elections. (FEC Form 1; Herron for Congress Statement of Organization, *available at* http://query.nictusa.com/pdf/245/29030200245/29030200245.pdf#navpanes=0 (last visited May 1, 2012); Compl. ¶¶ 5-6; *see supra* pp. 1-3.) Mr. Herron, the candidate supported by the Committee, and the only candidate that by law it was able to support, is now a *former* candidate for federal office with no concrete plans to run for election in the future.

Mr. Herron admits that he is *not* a candidate for Congress in 2012 (Plaintiff's Responses to FEC's First Set of Discovery Requests; Response to Requests for Admission ("RFA Resp.") 1, FEC Exh. 1). He also concedes that he has no present, concrete plans to seek federal office in the future. (RFA Resp. 2, FEC Exh. 1 (Herron is only "*considering* running for federal office in the future") (emphasis added)). Because HFC cannot demonstrate any future harm that the Court could remedy with prospective relief, plaintiff fails to meet its burden to establish standing under Article III.

A. Legal Requirements for Constitutional Standing

"Standing must be determined as a threshold jurisdictional matter." *Kucinich v. Bush*, 236 F. Supp. 2d 1, 3 n.5 (D.D.C. 2002) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), and *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02 (1998)). "[I]t is not proper for federal courts to proceed" to other questions when there are "jurisdictional objections." *In re Madison Guar. Sav. & Loan Ass'n*, 173 F.3d 866, 870 (D.C. Cir. 1999). *See also Judicial Watch, Inc. v. FEC*, 180 F.3d 277 (D.C. Cir. 1999) (dismissing petition for review of Commission's decision not to investigate administrative complaint where petitioner lacked standing under Article III).

As the party invoking federal jurisdiction, HFC bears the burden of establishing the elements of constitutional standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). HFC cannot rely on 2 U.S.C. § 437g(a)(8), the FECA provision that allows challenges to the dismissal of an administrative complaint, to satisfy the standing requirements of Article III. "Section 437g(a)(8)(A) does not confer standing; it confers a right to sue upon parties who otherwise already have standing." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997). A plaintiff "cannot establish standing merely by asserting that the FEC failed to process its complaint in accordance with law." *Id.* Instead, HFC is required "clearly to allege facts demonstrating that [it] is a proper party to invoke judicial resolution of the dispute." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990).

Plaintiffs, such as HFC, bear the burden of showing that they meet three elements that constitute the "irreducible constitutional minimum" of standing: (1) an injury-in-fact, (2) a causal connection between the injury and the challenged conduct of the defendant, and (3) a likelihood that the injury will be redressed by a favorable decision of the court. *Lujan*, 504 U.S.

at 560-61. The injury-in-fact must be an invasion of a legally protected interest that is "concrete and particularized" as well as "actual or imminent," not "conjectural" or "hypothetical." *Id*. at 560.

The injury must also be "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party.'" *Id.* at 560-61 (quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Thus, when, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," standing is "substantially more difficult" to prove. *Id.* at 562 (emphasis in original); *see also Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("[A] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.").

HFC cannot carry its burden of meeting any of the three essential elements of constitutional standing.

B. HFC's Allegations of Injury-in-Fact Cannot Satisfy Article III's Requirements Regarding Prospective Relief

HFC alleges (Compl. ¶ 8) that it was "harmed by the violations of FECA described in [its] administrative complaint and the FEC's failure to take timely action, which decreased Mr. Herron's voter support and increased Mr. Fincher's voter support." Even if true, any such *past* harm could not possibly be remedied by an order from this Court requiring the Commission to revisit its handling of HFC's administrative complaint.

The case law is clear. "'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . .'" *Natural Res. Def. Council v. Pena* ("*NRDC*"), 147 F.3d 1012, 1022 (D.C. Cir. 1998) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). "'Because injunctions regulate future conduct, a party has standing to seek

injunctive relief only if the party alleges, and ultimately proves, a real and immediate — as opposed to merely conjectural or hypothetical — threat of *future injury*.'" *Id.* at 1022 (internal citation omitted) (emphasis added). Accordingly, without "'sufficient immediacy and reality' to [HFC's] allegations of future injury," there is no basis to "warrant invocation of the jurisdiction of the District Court." *O'Shea*, 414 U.S. at 497 (quoting *Golden v. Zwickler*, 394 U.S. 103, 109 (1969)).

HFC claims (Compl. ¶ 8) that it "will be harmed in the future by the FEC's dismissal of [its] administrative complaint." But this claim rings hollow. The Committee does not allege that Mr. Herron plans to run again for office, that HFC will again be his principal campaign committee, that Mr. Fincher will again be his opponent, or that Mr. Fincher will again violate the Act. HFC thus utterly fails to show alleged harms that are "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks and citation omitted).

HFC alleges only that "*if* Roy Herron runs for office against Steve Fincher in the future[,] . . . there will be no deterrent for Mr. Fincher to engage in similar violations of FECA, which may increase his opportunity to win elections." (Compl. ¶ 8 (emphasis added).) Such a conditional and speculative allegation falls far short of the required showing. First, HFC *admits* that Herron has no plan to run for any federal office in 2012 and that he has not informed the Committee that he has any plans to run for any federal office in the future. RFA Resp. 1 & 2. Herron does not even make arguments resting on "some day intentions." And the Supreme Court has made clear that even "'some day' intentions — without any description of concrete plans, or indeed even any specification of *when* the some day will be — do not support a finding

of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564 (emphasis in original).[3]

Second, HFC has not alleged anything about Fincher's plans to run for office and whether, if he does, he should be expected to violate the law in any future campaign. And third, the suggestion that the Commission's alleged failure to adequately punish Fincher will diminish Herron's future electoral prospects is too conjectural. "The endless number of diverse factors potentially contributing to the outcome of . . . elections . . . forecloses any reliable conclusion that voter support of a candidate" is attributable to any one factor. *Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980). *See also Shakman v. Dunne*, 829 F.2d 1387, 1397 (7th Cir. 1987).

Moreover, Mr. Herron is not a plaintiff in this case; only HFC, his principal campaign committee from the 2010 election, is a plaintiff. And HFC has admitted that Mr. Herron "has not informed the Committee that he intends to redesignate it as his principal committee for another future campaign." RFA Resp. 3. Consequently, HFC has no ongoing stake in the outcome of this case that meets the requirements of Article III.

Like all principal campaign committees, HFC served a limited purpose: to manage the finances of a specific candidate's campaign for a specific federal office in a specific election cycle. *See* 2 U.S.C. §§ 431(5)-(6), 432(e)(1), 432(f); *see also* Statement of Candidacy of Roy

[3] *See also McConnell v. FEC*, 540 U.S. 93, 226 (2003) ("Because Senator McConnell's current term does not expire until 2009, the earliest day he could be affected by [the challenged provision] is 45 days before the Republican primary election in 2008. This alleged injury in fact is too remote temporally to satisfy Article III standing."); *Golden v. Zwickler*, 394 U.S. at 109-10 (finding claim nonjusticiable when it was unlikely that a particular Congressman would run again for Congress). *Cf. Renne v. Geary*, 501 U.S. 312, 321 (1991) (challenge to state law prohibiting endorsements of candidates in local, nonpartisan elections was not ripe because, among other reasons, none of the plaintiffs alleged a concrete plan to endorse any particular candidate in future elections).

Herron (FEC Exh. 2) (designating plaintiff as principal campaign committee for the 2010 election). Unless and until Herron files a subsequent statement of candidacy for another election cycle, HFC's function is limited to only his candidacy in 2010. *See* 11 C.F.R. § 101.1(a) (candidate's designation of a principal campaign committee); § 102.1(a) (registration of principal campaign committee); § 102.12(c)(1) ("No political committee which supports or has supported more than one candidate may be designated as a principal campaign committee . . . .").[4] Because HFC has not demonstrated that it will imminently perform any functions in any specific future federal election, it follows inexorably that it cannot face "a real and immediate . . . threat of future injury." *NRDC*, 147 F.3d at 1022 (internal citation omitted).

Finally, HFC relies upon a general allegation that the "FEC's failure to require Mr. Fincher to obey the law will encourage dishonest candidates to break the law and discourage honest and law abiding people from running for federal office." (Comp. ¶ 8.) This alleged injury, however, cannot support HFC's standing because it is merely a generalized grievance that affects all citizens and derives from an interest in the proper enforcement of the law. *FEC v. Akins*, 524 U.S. 11, 23 (1998); *Lujan*, 504 U.S. at 573-74; *Common Cause*, 108 F.3d at 419. "In

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[4] HFC's financial disclosure reports confirm that it has been virtually moribund for more than a year. The Committee has not received any contributions since January 2011. *See* HFC First Quarter Report of Receipts and Disbursements ("FEC Form 3"), *available at* http://query.nictusa.com/pdf/699/11930710699/11930710699.pdf#navpanes=0 at 5-6. In the last three quarters of 2011 and the first quarter of 2012, the Committee reported operating expenditures of $2,618 (totals from line 7(a) of quarterly reports) for nothing other than wages, taxes, reimbursed expenses, and fees related to its website. *See* HFC FEC Forms 3 (Second Quarter 2011 through First Quarter 2012)
Second Quarter 2011, *available at* http://query.nictusa.com/pdf/726/11931814726/11931814726.pdf#navpanes=0;
Third Quarter 2011, *available at* http://query.nictusa.com/pdf/174/11952621174/11952621174.pdf#navpanes=0;
Fourth Quarter 2011, *available at* http://query.nictusa.com/pdf/014/12970314014/12970314014.pdf#navpanes=0;
First Quarter 2012, *available at* http://query.nictusa.com/pdf/149/12970908149/12970908149.pdf#navpanes=0.

other words, what [HFC] desires is for the Commission to 'get the bad guys,' . . . . [HFC] has no standing to sue for such relief." *Common Cause*, 108 F.3d at 418. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984).

C. HFC Cannot Satisfy the Causation and Redressability Requirements for Constitutional Standing

Even if HFC could rely on an alleged injury from the 2010 campaign, and it cannot, that injury would not have "stemm[ed] from the FEC's dismissal of … [plaintiff's] administrative complaint" and could not be remedied by this Court. *Judicial Watch*, 180 F.3d at 277 (D.C. Cir. 1999) (per curiam). Here, where HFC is complaining that the Commission failed to pursue the Committee's allegations against Fincher, causation and redressability are closely related.

> When plaintiffs' claim hinges on the failure of government to prevent another party's injurious behavior . . . both prongs of standing analysis can be said to focus on principles of causation: fair traceability turns on the causal nexus between the agency action and the asserted injury, while redressability centers on the causal connection between the asserted injury and judicial relief.

Freedom Republicans, Inc. v. FEC, 13 F.3d 412, 418 (D.C. Cir. 1994) (citation omitted).

Straining to show Article III standing, HFC conflates the alleged harms it suffered by the actions of Fincher and the Commission. *See* Compl. ¶ 8 (HFC was "harmed by the violations of FECA described in the administrative complaint and the FEC's failure to take timely action"). The Commission, the only defendant in this case, obviously did not cause the violations of FECA allegedly committed by Fincher. Such an injury, if it exists, would be "th[e] result [of] the independent action of some third party" and would not be "fairly . . . trace[able] to the challenged action of the defendant [FEC]." *Lujan*, 504 U.S. at 560-61.

Nor did the timing of the Commission's actions cause harm to HFC. Contrary to the Committee's allegation, the Commission took timely action on the administrative complaint,

which was filed on September 29, 2010 (AR0001), a little more than one month before the election.[5] The Commission resolved it promptly and dismissed the complaint on June 14, 2011 (AR0713-15), several months after the election. "Congress, whose members are elected every two or six years, knew full well that complaints filed [with the FEC] shortly before elections . . . might not be investigated and prosecuted until after the event." *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). Because FECA contains a series of procedural steps and timing requirements that the Commission must follow to resolve an administrative complaint, it would have been virtually impossible to complete work on HFC's administrative complaint before the election. *See generally* 2 U.S.C. § 437g(a); *Perot*, 97 F.3d at 559 ("Congress could have chosen to allow judicial intervention in the face of such exigencies, but it did not do so.").

Moreover, this Court obviously cannot order any relief that would change the outcome of the 2010 Tennessee congressional election to redress HFC's alleged past political injury.

Finally, because HFC concedes that it "is not asking this Court to determine the appropriate sanction for the reporting violation," HFC appears to seek only a remand to the Commission to formalize what it has already found unanimously: that there was reason to believe that the Fincher Committee violated the Act. (HFC Br. at 21 n.5.) But HFC's interest in having the Commission take another vote to formally "characterize" the actions of a third party as unlawful cannot support standing. *Wertheimer v. FEC*, 268 F.3d 1070, 1075 (D.C. Cir. 2001) (explaining that plaintiff who sought nothing more than a "legal characterization" of another person's illegal activity lacked standing).

[5] Although paragraph 8 of the complaint conclusorily states that the Commission failed "to take timely action," none of plaintiff's four judicial claims assert that the Commission acted contrary to law by failing to act with sufficient speed. (*See* Compl. ¶¶ 8, 55-78.)

In sum, because HFC has not alleged any facts indicating that Roy Herron will again be a candidate in any specific federal election or that the Committee itself has any meaningful ongoing purpose, prospective relief in the form of a remand to the Commission would not redress any imminent, concrete injury to the Committee. HFC therefore fails to make the required showing for Article III standing, and the Court should dismiss the complaint.

II. THE COMMISSION'S DISMISSAL OF HFC'S ADMINISTRATIVE COMPLAINT WAS A REASONABLE EXERCISE OF PROSECUTORIAL DISCRETION

Even if this Court finds that it has jurisdiction to hear this case, HFC falls far short of meeting its burden to justify overturning the Commission's dismissal of the administrative complaint under the highly deferential standard of review applicable here. The Commission's decision to dismiss the complaint when it could not agree on whether to seek a civil penalty fits squarely within its prosecutorial discretion, as was its determination not to find reason to believe that Gates Bank made, and the Fincher Committee accepted, an illegal corporate contribution.

A. The Standard of Review Under 2 U.S.C. § 437g(a)(8) Is Highly Deferential

In reviewing the Commission's dismissal of an administrative complaint under 2 U.S.C. § 437g(a)(8), it is well-settled that "[a] court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the [FECA] . . . or was arbitrary or capricious, or an abuse of discretion.'" *Common Cause*, 108 F.3d at 415 (internal citation omitted); *accord Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005); *In re Carter-Mondale Reelection Comm., Inc.*, 642 F.2d 538, 542 (D.C. Cir. 1980); *Akins v. FEC*, 736 F. Supp. 2d 9 (D.D.C. 2010). *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31, 37, 39 (1981) ("*DSCC*"). The "arbitrary and capricious" standard of review is "highly deferential" and "presume[s] the validity of agency action." *American Horse Prot.*

Ass'n, Inc. v. Yeutter, 917 F.2d 594, 596 (D.C. Cir. 1990). And "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

The Supreme Court has held that the Commission, which is authorized to "formulate policy" under the Act and has exclusive jurisdiction over the administration and civil enforcement of the Act, 2 U.S.C. § 437c(b)(1), "is precisely the type of agency to which deference should presumptively be afforded." *DSCC*, 454 U.S. at 37. *See also Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988) ("Deference is particularly appropriate in the context of the FECA, which explicitly relies on the bipartisan Commission as its primary enforcer."). Thus, "in determining whether the Commission's action was 'contrary to law,' the task for the [Court is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court." *DSCC*, 454 U.S. at 39 (citations omitted). A court will find an abuse of discretion only when the agency cannot meet "its minimal burden of showing a 'coherent and reasonable explanation of its exercise of discretion.'" *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (quoting *MCI Telecomm. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)).

"Deference is particularly appropriate in this case because it involves the FEC's interpretations of its own regulations." *Buchanan v. FEC*, 112 F. Supp. 2d 58, 70 (D.D.C. 2000). "[W]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). Courts "look to the administrative construction of the regulation if the meaning of the words used is in doubt. That construction is given controlling weight unless it is plainly erroneous or inconsistent with

the regulation." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1475-76 (D.C. Cir. 1992) ("*NRSC*") (internal quotation marks and citation omitted).

Contrary to HFC's argument (HFC Br. at 17-18), this highly deferential standard of review is fully applicable here. The fact that, in part, the agency's decision-making involved applying the Act and Commission regulations to a fact pattern that concerns banking and secured transactions does not alter the standard of review. HFC relies on the Supreme Court's observation in *DSCC*, 454 U.S. at 37, that one reason to defer to the Commission is its "inherently bipartisan" nature and obligation to "decide issues charged with the dynamics of party politics." But as the D.C. Circuit explained in *Hagelin*, the Commission's bipartisan structure is "but one of several reasons the Supreme Court cited in support of deferential review." 411 F.3d at 242. Nothing in *DSCC*, *Hagelin*, or any other authority cited by the plaintiff supports the novel idea that the degree of deference due the Commission's construction of its own regulations varies with the regulations' subject matter.

In any event, the straightforward issues here concerning secured transactions and loan collateral that are one part of the Commission's analysis of whether a loan constitutes a campaign contribution are squarely within the Commission's statutory mandate and regulatory jurisdiction. *See, e.g.*, 2 U.S.C. § 431(8)(B)(vii) (excluding bank loans from the definition of "contribution" if "made in accordance with applicable law and in the ordinary course of business"). Congress has specifically tasked the Commission with exclusive civil authority to interpret and enforce federal statutes relating to the *financing* of federal election campaigns. In addition to its legal and support staff, for example, the Commission employs more than two dozen auditors, who regularly audit congressional and presidential campaigns. *See, e.g.*, 2 U.S.C. § 438(b), 26 U.S.C. §§ 9007(a), 9038(a).

Thus, HFC cannot prevail without satisfying the substantial burden of demonstrating that there is no "coherent and reasonable explanation of [the Commission's] exercise of discretion." *Carter/Mondale Presidential Comm.*, 775 F.2d at 1185 (quoting *MCI Telecomm. Corp. v. FCC*, 675 F.2d at 413). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *DSCC*, 454 U.S. at 39; *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986). *Accord*, *Buchanan*, 112 F. Supp. 2d at 72-73.

B. The Commission Did Not Act Contrary to Law When It Declined to Pursue Plaintiff's Allegations About an Alleged Reporting Violation

The gist of HFC's claim regarding the reporting violation is that the Commission abused its discretion by failing to take a standalone vote on whether there was reason to believe the Fincher Committee violated the Act when it failed to report Gates Bank as the true source of the loan funds. But HFC points to no authority, and we are aware of none, that dictates how the Commission must phrase or structure the votes it takes or that would otherwise support plaintiff's extraordinary request for the Court to micromanage the Commission's voting process.

As explained *supra* pp. 10-11, all six Commissioners agreed that there was reason to believe a reporting violation had taken place, and they voted three times to try to reach consensus about an appropriate penalty to propose in the conciliation process. Failing to do so, they voted once more to close the file and dismiss the administrative complaint. The Commission has great discretion about whether to seek a civil penalty, and its decision to end its consideration of this matter in the face of a disagreement about an appropriate penalty was entirely reasonable.

1. The Commission's Discretion Is Especially Great When Determining an Appropriate Civil Penalty

"The Supreme Court in *Akins* recognized that the Commission, like other Executive agencies, retains prosecutorial discretion." *CREW v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007). Such discretion extends to the Commission's decision not to pursue an enforcement action regarding a particular fact pattern, which "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). These decisions require the agency to consider a number of factors:

> whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.

Id.

Deference to agency decision-making involving prosecutorial discretion is heightened when the Commission's decisions involve appropriate remedies and sanctions. "[T]he breadth of agency discretion is, if anything, at [its] zenith when the action assailed relates primarily not to the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions . . . ." *Niagara Mohawk Power Corp. v. Federal Power Comm.*, 379 F.2d 153, 159 (D.C. Cir. 1967); *accord Louisiana Publ. Servs. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008). It is a "fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy the relation of remedy to policy is peculiarly a matter for administrative competence." *Butz v. Glover Livestock Comm. Co., Inc.*, 411 U.S. 182, 185 (1973) (internal quotation marks omitted). As such, an agency's chosen sanction is not to be overturned unless it is "unwarranted in law" or "without justification in fact." *Id*. at 185-86;

Coosemans Specialties, Inc. v. Dep't of Agric., 482 F.3d 560, 566 (D.C. Cir. 2007). Such "considerable discretion in fashioning remedies" also adheres to an agency's decision not to sanction. *See, e.g.*, *Louisiana Publ. Servs. Comm'n v. FERC*, 174 F.3d 218, 229 (D.C. Cir. 1999) (explaining that agency did not abuse its discretion in refusing to order power companies that violated formula rate tariff to refund customers of competing companies).

The Commission's determination here to dismiss the complaint because the Commissioners could not agree on an appropriate penalty is thus entitled to especially great deference. A case decided in this district court, *Common Cause v. FEC*, Civ. No. 94-02104 (D.D.C. 1996) (Order of March 29, 1996) (FEC Exh. 3), is especially instructive. In that case, plaintiffs filed suit seeking review of the Commission's dismissal of a complaint that included allegations that the National Republican Senatorial Committee ("NRSC") had violated the Act by making unlawful contributions to a Montana senate candidate. Although all five voting Commissioners (one abstained from voting) believed that the NRSC had violated the Act in some fashion, a motion to find probable cause to believe that the NRSC had committed a lesser violation failed to garner the necessary four votes. *Id*. at 5-8. In the absence of agreement on the precise violation, the Commission voted to dismiss the matter. *Id*. at 2. Although the plaintiffs argued that the "Commission's dismissal of the complaint was arbitrary and capricious because the Commission agreed that there was a violation," the Court explained that when "the Commission has split over the amount and nature of a violation, and the Commissioners have supported their respective positions with reasoned explanations that are not clearly erroneous, the Court must defer to the agency's decisions to dismiss the complaint." *Id*. at 8 n.3.

Here, the two groups of Commissioners fully explained their disagreement about the civil penalty. *See supra* pp. 11-13. "Commissioners, no less than judges, may cast their votes solely

to void an impasse, or otherwise to draw the administrative phase to a close." *Publ. Serv. Comm'n v. FPC*, 543 F.2d 757, 777 (D.C. Cir. 1974) (footnotes omitted).

Having come to an impasse regarding a civil penalty, the Commission reasonably avoided the futile exercises of casting a standalone vote to find reason to believe and authorizing the General Counsel to engage in pre-probable cause conciliation with the respondents — and thus avoided another impasse after attempting conciliation. The Act nowhere requires the Commission to expend resources in such a pointless manner or to disaggregate a vote on "reason to believe" from the appropriate penalty to seek in conciliation. Nor does the Act preclude the Commission from considering whether to seek a civil penalty before formally voting to find reason to believe or from engaging in pre-probable cause conciliation. Section 437g(a)(2) places no constraint on what else the Commission may consider while it determines whether there is reason to believe the Act has been violated, and section 437g(a)(5) provides that any conciliation agreement reached with respondents in the mandatory post-probable cause conciliation period "may include a requirement that the person involved . . . shall pay a civil penalty . . . ."[6]

The Commission has explained that it generally "will dismiss a matter when the matter does not merit further use of Commission resources . . . or when the Commission lacks majority support for proceeding with a matter for other reasons." *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (HFC's Att. A). Here, it was entirely reasonable to dismiss the matter at the reason-to-believe stage, rather than authorize conciliation knowing that the Commission was likely to again reach an impasse on the appropriate penalty.

[6] HFC notes (Br. at 21) that section 437g(a)(2) does not *require* the Commission to impose a sanction when it votes on whether there is reason to believe the Act has been violated. But that in no way implies that the section *precludes* the Commission from considering an appropriate penalty at that time.

The Commission's dismissal of the alleged reporting violation without a formal investigation was also reasonable. When the Commission voted on reason to believe, as the General Counsel recognized, all the facts about the loan that were required to be reported were known; further investigation would have served no purpose. The Act required the Fincher Committee to identify from whom it had received a loan, along with any endorsers or guarantors of the loan, as well as the date and amount of the loan. 2 U.S.C. § 434(b)(3)(E). The Commission's regulations further required the Committee to disclose the types and value of collateral or other sources of repayment that secured the loan. 11 C.F.R. § 104.3(d)(1). The Commission had learned from the responses of the respondents and supporting documentation that on July 7, 2010, Steve Fincher had received a $250,000 loan from Gates Bank that he gave to his principal campaign committee and that was cross-collateralized with other bank debt owned by Fincher. In its response, the Committee admitted that it had incorrectly reported the loan and that it was in the process of amending its reports, which it did (*see supra* pp. 7-8). With nothing material left to investigate regarding the alleged reporting violation, the General Counsel recommended that the Commission find reason to believe that the Committee violated the reporting provisions and proceed immediately to pre-probable cause conciliation without further investigation. *See supra* pp. 8-10; *FEC Statement of Policy*, 72 Fed. Reg. 12,545 (HFC's Att. A) ("A 'reason to believe' finding will always be followed by either an investigation or pre-probable cause conciliation.").

Finally, the Commission did not abuse its discretion when it agreed with the General Counsel's recommendation and declined to find reason to believe that the Fincher Committee knowingly and willfully violated the Act's reporting provision. The phrase "knowing and willful" indicates that "actions [were] taken with full knowledge of all of the facts and a

recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3, 1976); *see also FEC v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing "knowing" from "knowing and willful"). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge" that an action was unlawful. *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). Here, the Fincher Committee reported a loan as having come from the candidate's "personal funds," even though the Act and Commission regulations require the principal campaign committee of a candidate who receives a loan to report it as having come from a lending institution. *See supra* p. 3. But as Commissioners Hunter, Petersen, and McGahn noted in their statement of reasons, the Fincher Committee was "not the first" to make the mistake of "reasonably reporting" the source of a bank loan through the candidate to the Committee as a loan from the candidate's "personal funds." AR0729. As such, they described the Committee as having committed a "technical" violation of a "counterintuitive" regulation that "trips up many candidates, especially novice candidates who may have nonprofessional staff or volunteers assisting with their administrative obligations . . . ." AR0728-29. Having noted this possibility, they reasonably determined not to find reason to believe that the Committee's violation was knowing and willful.[7]

HFC's surmise that further investigation into the Committee's state of mind might have uncovered evidence that the violation was undertaken with recognition that it was prohibited by law is beside the point. Agreeing with the General Counsel, no Commissioner believed that the

[7] Although the civil penalty group of Commissioners in its statement of reasons did not separately analyze the knowing and willful violation, they agreed with the General Counsel's recommendation on this claim. In general, when the Commission accepts the General Counsel's recommendations without specifying its own reasoning, the General Counsel's report serves as the basis for judicial review of that decision. *DSCC*, 454 U.S. at 38 n.19. In the report, the General Counsel explained that since there was no information suggesting that the Committee acted intentionally when it delayed submitting amendments to its reports, the General Counsel did not recommend that the Commission find a knowing and willful violation. AR0692.

violation was knowing and willful, and at least three Commissioners viewed the violation as likely inadvertent and "technical" and not serious enough to warrant further investigation. *Id*. That decision and its explanation are reasonable and due considerable deference.

2. Even if the Commission Erred by Not Having a Standalone Vote to Find Reason to Believe, That Error Was Harmless

The harmless error doctrine "tempers judicial consideration of challenges to preliminary, procedural, or intermediate agency action." *FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 87, 90 (D.D.C. 2006) (quoting *Doolin Sec. Sav. Bank v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998)) (internal quotation marks omitted). "If the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *Jicarilla Apache Nation v U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (quoting *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)). Here, the Commission's decision not to hold a standalone vote on whether there was reason to believe the Fincher Committee violated the Act's reporting provisions caused neither the Commission's dismissal of HFC's administrative complaint nor any harm to HFC. Thus, even if that decision was in error, it was harmless.

The Commission dismissed HFC's administrative complaint because it could not agree on whether to seek a civil penalty from the Fincher Committee in pre-probable cause conciliation. *See supra* pp. 10-13. Thus, even if the Commission had formally found reason to believe in a standalone majority vote, it still would have dismissed the administrative complaint, because that decision turned on the disagreement over the proper remedy. A remand from this Court would therefore serve no purpose — it would not affect the ultimate disposition of the administrative complaint.

Moreover, HFC cannot show that it suffered prejudice from this alleged error because, as explained *supra* pp. 16-20, it has failed to show any injury-in-fact. *See Nader v. FEC*, No. 10-989, 2011 WL 5386423, at *13 (D.D.C. Nov. 9, 2011) (holding that Commission's error was harmless because plaintiff could not "identify the harm to him that flowed from the FEC's error."). HFC has conceded (Br. at 21 n.5) that it is not seeking any particular sanction against the Fincher Committee; it appears that it is seeking to "get the bad guys," *Common Cause*, 108 F.3d at 418, by having the Commission formally decide in a single vote that there was reason to believe the Committee violated the Act. Thus, rather than seeking additional information or some other relief, HFC appears to be seeking merely a legal determination that the Committee's reporting was likely inadequate. *See Wertheimer*, 268 F.3d at 1075. As the D.C. Circuit has explained, however, any such marginal increase in information is too "trivial" to provide standing under Article III. *Id.* For similar reasons, any alleged voting irregularity here was too trivial to warrant remedial action by this Court.

All six Commissioners made clear in separate votes — on the public record — that there was reason to believe the Committee violated the Act's reporting provisions. Nowhere in HFC's brief does it explain how it would additionally benefit if on remand the Commission took another, standalone vote on that same question. It cannot. Thus, Herron for Congress has not and cannot meet its "burden to demonstrate prejudicial error." *Jicarilla Apache Nation*, 613 F.3d at 1121.

C. The Commission Did Not Act Contrary to Law When It Did Not Find Reason to Believe That the Fincher Committee Received an Illegal Corporate Contribution

HFC's argument (Br. at 25-26) that the Commission abused its discretion when it failed to find reason to believe that the Fincher Committee received an illegal campaign contribution

fares no better. It rests largely on its dispute with the Commission about the credibility of the representations of Gates Bank and the Fincher Committee, who explained how the loan was made in accordance with applicable law and in the ordinary course of business. The Commission's assessment of this and other evidence, however, was not contrary to law, and was clearly within the Commission's prosecutorial discretion to evaluate and credit the responses and documents provided by the Bank and the Committee. *See Orloski*, 795 F.2d at 168 ("[R]eason to believe standard also itself suggests that the FEC is entitled, and indeed required, to make subjective evaluation of claims.").[8]

The Act "suggests that Congress determined that the FEC should make preliminary investigative decisions on the basis of all the information submitted to it by the charging and responding parties." *Orloski*, 795 F.2d at 168. The Commission's decisions and evaluations at issue here and in *Orloski* take place based upon the administrative record: materials "that were 'before the agency at the time the decision was made[.]'" *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996) (quoting *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). The question before the Court is not whether further investigation might have revealed that the loan at issue was not made in the ordinary course of business, but whether the Commission abused its discretion, based upon the evidence before it, in deciding not to pursue an investigation. HFC cannot prevail without overcoming the substantial burden of demonstrating that there is no rational or defensible basis for the Commission to have concluded, at the early reason-to-believe stage, that the loan at issue appeared to have been made in the

[8] As explained *supra* pp. 10-11, in three separate votes, all six Commissioners voted to find no reason to believe that the Committee accepted a corporate contribution, although no one single vote garnered a majority.

ordinary course of business and that further investment of the agency's resources was unwarranted.

1. The Commission's Decision Was Based on Credible Evidence That the Loan Was Not an Unlawful Corporate Contribution

The General Counsel reviewed "all the information submitted to it by the charging and responding parties," *Orloski*, 795 F.2d at 168, and concluded that the $250,000 loan was made in accordance with applicable banking laws and regulations and in the ordinary course of business. Based on that review, the General Counsel recommended that the Commission find no reason to believe that Gates Bank made, or the Committee accepted, a corporate contribution.[9] AR0693-96. The General Counsel's report amply supports the agency's decision to dismiss plaintiff's administrative complaint without finding reason to believe that the Fincher Committee accepted an illegal corporate contribution.

That HFC would apparently draw different conclusions from the evidence before the Commission — or even that the Commission itself could have reasonably reached a different conclusion — does not make the Commission's actual determination contrary to law. *See Hagelin*, 411 F.3d at 243-44 (analyzing different interpretations that could have been drawn from deposition testimony and deferring to Commission's conclusions).

The General Counsel considered each relevant regulatory requirement under 11 C.F.R. § 100.82 and noted that each was met and, where appropriate, supported by documentation. *See supra* pp. 8-9. The General Counsel noted that Gates Bank represented that the loan bore the bank's usual and customary interest rate, and that the Multipurpose Note and Security

[9] Because both SORs by the two Commissioner groups expressed agreement with the General Counsel's recommendation regarding the alleged corporate contribution, the General Counsel's report serves as the basis for review of the dismissal of that portion of the administrative complaint. *See DSCC*, 454 U.S. at 38 n.19.

Agreement specified that the loan itself was cross-collateralized with other bank debt owned by Mr. Fincher. AR00694-95. Although no security was specifically identified on the Multipurpose Note itself under the heading "Security" (AR0042), the General Counsel noted that the additional terms on page two of the Multipurpose Note (AR0043 at terms 5 & 7) granted the bank a right to offset Fincher's deposit accounts, and that Fincher promised that "'(e)ach present or future agreement securing debt I owe you will also secure the payment of this Loan,' with separate provisions concerning the debtor's private dwelling and household goods." AR0694 (citation omitted). Thus, the General Counsel concluded that documents submitted by the Bank and the Committee demonstrated that the Bank had a perfected security interest in that other bank debt, *i.e.*, Fincher's residence, his 2010 crops, and a right-of-offset against Fincher's deposit accounts. AR0695. The General Counsel also deemed credible the Bank's statement that its loan analysis showed that equity in its existing secured loans with Fincher, as well as in his non-interest bearing account, "substantially exceed the campaign loan amount." *Id*. Since the loan was also evidenced by a written instrument (Multipurpose Note), was subject to a due date (November 30, 2010), and was indeed repaid in full before the maturity date, the General Counsel concluded that "based on the available information, it appears that Gates Bank made the loan in the ordinary course of business." AR0696.

In light of the Commission's discretion to subjectively evaluate claims and determine which evidence it finds credible, *Orloski*, 795 F.2d at 168, it is immaterial whether the Commission may have on other occasions looked beyond the administrative complaint and responses at the reason-to-believe stage.

Finally, contrary to plaintiff's suggestion (HFC Br. at 14, 26), the Commission can rely upon the Bank's and the Committee's responses even though they were not sworn. It is hardly

unusual for prosecutorial investigations to take into account unsworn witness statements and documentation, and HFC has cited no authority for the proposition that the Commission should not rely upon such information. Even in the absence of a formal attestation, a false statement to a federal investigator carries serious consequences — for even unsworn statements made to the government are subject to criminal prosecution under 18 U.S.C. § 1001 if materially false. This provision lends additional weight to the Commission's decision to deem credible the assertions made by both the Bank and the Committee.

2. The Commission Reasonably Decided Not to Expend Additional Resources Investigating the Corporate Contribution Allegation

The Commission's discretion includes the authority to determine the direction and extent of an investigation, which "involves a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831; *see also Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) ("[T]he prosecutorial discretion given to the Commission is entitled to great deference as to the manner in which it conducts investigations . . . ."). While the Commission's exercise of prosecutorial discretion is not entirely unreviewable, "[t]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Heckler*, 470 U.S. at 831-32. Here, despite plaintiff's suspicions of wrongdoing and suggestions for further investigation, the Court should not second-guess the Commission's use of investigative techniques and resources.

The Commission's decision to dismiss the corporate contribution allegation, without finding further investigation necessary, is quintessentially the type of decision that falls within an agency's prosecutorial discretion. As the Supreme Court has explained, a "prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought

as evidence . . . ." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987); *see also Sloan v. U.S. Dep't of Hous. and Urban Dev.*, 236 F.3d 756, 762 (D.C. Cir. 2001) ("[T]he sifting of evidence, the weighing of its significance, and the myriad other decisions made during investigations plainly involve elements of judgment and choice."). An enforcement agency's decision to deem credible the representations of a party or witness falls squarely within that discretion. An agency is "not bound to launch full-blown proceedings simply because a violation of the statute is claimed." *Porter County Chapter v. NRC*, 606 F.2d 1363, 1369 (D.C. Cir. 1979).

Such prosecutorial discretion forecloses plaintiff's various claims (HFC Br. at 11, 14, 27 n.7) that the Commission was required to ask for or review additional documents from the Bank or the Committee regarding the loan's interest rate or the collateral's value. It also forecloses plaintiff's claims (HFC Br. at 25, 33-34, 39) that the Commission was required to review various publicly available materials at this early stage of its enforcement proceedings, or even (HFC Br. at 18) to consult with other federal agencies. For "it is . . . surely committed to the Commission's discretion to determine where and when to commit its investigative resources." *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988).

For example, in *Branstool v. FEC*, No. 92-0284 (D.D.C. Apr. 4, 1995), the plaintiffs alleged that the Commission had abused its discretion by not conducting a sufficiently thorough investigation. *Id*. at 5 (FEC Exh. 4). In that matter, when the Commission found reason to believe, it authorized the General Counsel to conduct a limited investigation that would not include the formal deposition of a particular witness. The plaintiffs alleged that the Commission's refusal to depose a witness amounted to an arbitrary and capricious limit on its own investigatory powers. *Id*. at 6. Noting that "[r]eviewing courts should resist the temptation

to direct agencies as to the manner in which they focus their prosecutorial authority or pursue their investigation," the court held that the Commission's failure to depose the witness, even though it had the power to do so, fell "safely within the ambit of those matters committed to the discretion of the Commission." *Id*. at 7.

Here, HFC's argument that the Commission was required to have asked for additional materials from the respondents has no basis in law. Nothing in 2 U.S.C. § 437g or any other provision of the FECA prescribes any particular actions that the Commission is required to take, or any particular documents it must subpoena, when investigating. *See Feiger v. Gonzales*, No. 07-cv-10533-DT 2007 WL 2351006, at *9 (E.D. Mich. Aug. 15, 2007) ("law is clear that an agency authorized to conduct investigations has broad authority to control the conduct . . . of its investigations"); *CFTC v. Nahas*, 738 F.2d 487, 495 n.17 (D.C. Cir. 1984) ("[A]gencies generally are granted broad deference in determining the scope of their investigative authority.").

Likewise, contrary to HFC's argument (Br. at 25, 33-34, 39) the Commission was not required at the reason-to-believe stage to find and review any particular publicly available information, such as banking treatises or information accessible on Tennessee's official website. No provision of the Act or Commission regulations *require* the Commission to search for such publicly available information at any stage of enforcement proceedings, let alone at the early reason-to-believe stage. Indeed, section 437g(a)(2), cited by HFC, makes no mention whatsoever of publicly available information or informal investigations prior to a reason-to-believe finding. As HFC notes (Br. at 25, 33-34), the Commission explained in a 2007 Statement of Policy (HFC Att. A at 2) that it *may* consider publicly available information in its reason-to-believe deliberations. That does not, however, *oblige* the Commission to search through public records that an administrative complainant has not provided or explain why it

may or may not have decided to seek or review any particular materials in the public domain. "A prosecutor exercises considerable discretion in . . . what information will be sought as evidence . . . ." *Young*, 481 U.S. at 807.

3. HFC's Remaining Arguments Fail as a Matter of Law

HFC faults the Commission for declining to invoke the adverse inference rule and for not considering issues that plaintiff raises for the first time in this litigation. Both arguments lack merit.

First, HFC asserts (Br. at 27-28) that the Commission should have found reason to believe by drawing an adverse inference concerning information *not* provided by Gates Bank. Although the adverse inference rule *allows* a federal agency to infer that relevant evidence within a party's control that the party fails to produce is unfavorable to it, an agency is under no obligation to draw such an inference. It falls instead within the agency's discretion. *See Int'l Union (UAW) v. NLRB*, 459 F.2d 1329, 1339 (D.C. Cir. 1972) ("Generally, as the dissent argues, whether to draw the [adverse] inference is a matter of discretion for the fact finder.").

Here, Gates Bank had represented that the loan was made in the ordinary course of business and had provided supporting documentation. The Commission did not abuse its discretion when it did not draw an adverse inference about materials the Commission itself did not request, and when the Bank's representations to the Commission were subject to criminal prosecution under 18 U.S.C. § 1001 if materially false.

Second, HFC repeatedly faults the Commission (HFC Br. at 18-19, 29-30 & n.9; Compl. ¶ 75) for failing to adequately consider the requirements of Tennessee law regarding banking and secured transactions. But neither the Act nor Commission regulations require the Commission to consider the requirements of state law in determining whether a loan was made in the ordinary

course of business. The Act and Commission regulations provide that a loan will be deemed in the ordinary course of business if it (1) bears the usual and customary interest rate of the lending institution for the category of loan involved; (2) is made on a basis that assures repayment; (3) is evidenced by a written instrument; and (4) is subject to a due date or amortization schedule. 11 C.F.R. § 100.82(a). Nowhere do the Act or Commission regulations specifically require the Commission to consider state law requirements in determining if any of those criteria is met, and HFC has not cited any statutory or regulatory provisions to the contrary.

Regardless, the arguments that plaintiff now makes (HFC Br. at 29 & n.9, 30) that the Commission failed to adequately consider Tennessee banking law are too late, because HFC never presented such arguments to the Commission, and they are not properly raised for the first time before this Court. It is well-settled that arguments that are not raised in a timely fashion before the administrative agency are waived and will not be considered on judicial review. *Washington Assoc. for Television and Children v. FCC*, 712 F.2d 677, 680 (D.C. Cir. 1983) (citing *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952)). "[C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *L.A. Tucker Truck Lines*, 344 U.S. at 37; *see also Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 562 (D.C. Cir. 2002) ("[T[here is a near absolute bar against raising new issues — factual or legal — on appeal in the administrative context."); *Sprint Comm. Co., L.P. v. FCC*, 76 F.3d 1221, 1228 (D.C. Cir. 1996) ("Our role is to review the agency's handling of the objections put before it, not to provide a forum for new arguments based upon different facts that the petitioner could have but did not bring out below.") (citing *L.A. Tucker Truck Lines*, 344 U.S. at 37, 73). Neither HFC's administrative complaint (AR0001-04) nor its supplement (AR0027-28) cite the requirements of

Tennessee law or otherwise urge their consideration. Because these arguments were not advanced below, they cannot form a proper basis for declaring that the Commission acted contrary to law by failing to consider them.

For the same reason, the plaintiff's factual arguments (HFC Br. at 19, 30, 34 n.11) regarding a prior lien on Fincher's 2010 crops in favor of Helena Chemical have been waived. HFC did not refer to or submit any documentation regarding a lien or filing in favor of Helena Chemical in either the administrative complaint or its supplement. *See* AR0001-04, 27-28. By attempting to do so now, plaintiff ignores a bedrock principle of administrative law that courts review only "the materials that were before the agency at the time its decision was made." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623-24 (D.C. Cir. 1997). "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984).

HFC's attempt to introduce this post-decisional evidence violates the principles of finality and deference underlying the general rule barring such evidence in judicial review of administrative decisions. As the Supreme Court has observed,

> [i]f upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

Vermont Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council, Inc., 435 U.S. 519, 554-55 (1978). As such, this Court should disregard the plaintiff's allegations regarding a lien in favor of Helena Chemical.

III. CONCLUSION

Because Herron for Congress lacks standing and because the Commission's dismissal of its administrative complaint was not contrary to law, the Court should grant summary judgment to Commission and deny plaintiff's motion for relief.

Respectfully submitted,

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