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January 26, 2009

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Thomasenia P. Duncan
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6021
America Coming Together

Dear Ms. Duncan:

We are writing on behalf of respondent America Coming Together ("ACT") to respond to the complaint dated May 30, 2008 filed by Ralph Nader in this matter ("the Complaint"), and Mr. Nader's supplement to the Complaint dated October 14 ("the Supplement"). As a result of what the Office of General Counsel ("OGC") has termed an "administrative oversight," and because the Complaint contained a defective jurat that was not fixed until October 14, the Commission served ACT with the Complaint and the Supplement for the first time on or about November 6. Because these documents, including their exhibits, are voluminous, ACT requested and received an enlargement of time within which to prepare this response.

ACT now responds and respectfully requests that the Commission determine that there is no reason to believe that ACT violated the Federal Election Campaign Act ("FECA") as Mr. Nader alleges or in any other manner that might be considered from Mr. Nader's factual allegations and legal contentions. Alternatively, the Commission should dismiss this matter as it pertains to ACT because this matter does not merit the significant expenditure of Commission resources that pursuing it would necessarily entail.

I. The Background of the Complaint and the Supplement

The Complaint and the Supplement were filed four years after the events with which they are concerned, namely, state-level administrative and judicial proceedings concerning ballot access for Mr. Nader's independent candidacy for President in 2004. In that election, Mr. Nader and his running mate, the since-deceased Peter Miguel Camejo, appeared on the ballot in 34 states and the District of Columbia and garnered 0.38% of the national popular vote and zero electoral votes. Federal Election Commission, "Federal Elections 2004" 5, 27-39 (2005).

The Complaint and the Supplement comprise the latest of a number of very belatedly devised legal expeditions by Mr. Nader to secure some measure of punishment against those whom he apparently believes impeded his electoral efforts in 2004. On October 30, 2007 – almost three full years *after* Mr. Nader lost the 2004 election – Mr. Nader, Mr. Camejo and six of their individual supporters launched a series of lawsuits in the Superior Court of the District of Columbia, the United States District Court for the Eastern District of Virginia and the United States District Court for the District of Columbia against, variously, ACT and numerous other respondents in the Complaint, including the Democratic National Committee ("DNC"), Kerry-Edwards 2004, Inc. ("Kerry-Edwards"), Senator John Kerry, the Ballot Project ("BP"), the Service Employee International Union ("SEIU"), Reed Smith, LLP ("Reed Smith"), and several individuals associated with the DNC and BP.

The factual allegations in the court complaints regarding ACT, the other defendants and various individuals and groups that those complaints label as "co-conspirators" (all of whom are respondents here) are virtually identical to those in the Complaint itself. But instead of alleging violations of FECA, the court complaints variously assert that the defendants engaged in common-law malicious prosecution and abuse of process and a civil conspiracy to commit those torts, and that the defendants both conspired to and did violate 42 U.S.C. § 1983 and the Qualifications Clause and the First and Fourteenth Amendments of the United States Constitution.

Motions to dismiss filed by ACT and the other defendants in all of those cases have been granted since last May, on grounds, variously, of failure to state a claim, lack of subject matter jurisdiction, application of the *Noerr-Pennington* doctrine, *res judicata* and – with respect to the plaintiffs other than Mr. Nader and Mr. Camejo – lack of standing to sue. *See Nader v. Democratic National Committee*, No. 07-2136, 555 F. Supp. 2d 137 (D.D.C. May 27, 2008)[1]; *Nader v. McAuliffe*, No. 08-0428 (D.D.C. Jan. 7, 2009)[2]; *Nader v. Democratic National Committee*, No. 08-589 (D.D.C. Dec. 22, 2008). ACT is a defendant only in the case dismissed last May 27 – three days before Mr. Nader filed the Complaint here – which raised the common-law causes of action described above.[3] That decision is now on appeal, with briefing due to conclude next month and oral argument scheduled for March 20, 2009.

II. The Complaint, the Supplement and ACT

The Complaint, styled "In the Matter of the Democratic Party Ballot Access Litigation Against the Nader-Camejo Presidential Campaign," alleges that the respondents, described as "allied entities and/or affiliates of the Democratic Party," "conspired to prevent [Ralph] Nader

[1] This decision concluded an action that was originally filed in the Superior Court and then removed to the federal district court by the defendants.

[2] Earlier, this action was transferred from the United States District Court for the Eastern District of Virginia to the United States District Court for the District of Columbia. See *Nader v. McAuliffe*, 549 F. Supp. 2d 760 (E.D. Va. March 7, 2008).

We spare the Commission a narrative of the convoluted procedural paths taken by the various parallel lawsuits.

[3] Exhibit A to this response is a copy of the amended complaint that was dismissed in that case. Exhibit B consists of copies of the two recent and as yet unreported court decisions identified in the text above.

President and Vice President, respectively, during the 2004 general election, with the "purpose to help Democratic [Party] candidates John Kerry and John Edwards win the election by denying voters the choice of voting for a competing candidacy," and that the respondents carried out this effort by "fil[ing] 24 complaints and/or interven[ing] in legal or administrative proceedings to challenge Nader-Camejo's nomination papers in 18 states...." Complaint at 2.

The Complaint is divided into five parts: *first*, an "Introduction" (pp. 2-20), which sets forth Mr. Nader's "conspire[acy]" theory, seeks to assert FECA violations, and describes the alleged nature, operations and pertinent activities of numerous respondent nonfederal 26 U.S.C. § 527 entities (*not* including ACT); *second*, "The Parties" (pp. 20-43), which identifies the 195 named respondents, including ACT, and describes the "John/Jane Doe" respondents; *third*, "Factual Allegations" (pp. 43-90), which sets forth, state by state, the alleged conduct at issue by specific respondents concerning Nader-Camejo's ballot access; *fourth*, three "counts" of alleged FECA violations (pp. 90-98); and *fifth*, a "prayer of relief" that seeks a determination that the respondents violated FECA, civil penalties and an injunction against the respondents (*id.*, p. 98).

The Complaint explicitly identifies as respondents no fewer than 195 individuals, lawyers, law firms and organizations, including ACT, see *id.*, ¶¶ 1-154 (pp. 20-43), as well as unnamed and unnumbered "John Doe and Jane Doe Democratic Party and DNC employees" who allegedly either "assisted in the effort to deny Nader-Camejo ballot access, or who participated in administrative or legal proceedings pursuant to that effort." See *id.* at 23 (¶ 23). The Complaint does not name as respondents any officer, official or employee of ACT, or otherwise identify any such individual except one William Gillis, who is alleged to have been an "ACT employee" in Portland, Oregon. See *id.*, ¶ 262 (p. 74). Accordingly, ACT is but one of at least 195 respondents, and potentially many more.

The Complaint contains few specific allegations concerning ACT. ACT is not mentioned in the Introduction and first appears in the Complaint as one of the 195 respondents, where it is described as a "Democratic Section 527 organization funded in part by SEIU that organized a campaign of harassment and sabotage in an effort to deny Nader-Camejo ballot access *in Oregon*." Complaint ¶ 110 (p. 35) (emphasis added).[4] Consistent with that identification, the Complaint alleges specific activities by ACT virtually all of which take place *only* in Oregon, as follows:

In April 2004, an unnamed "spokesperson" for ACT told CBS News that "'[i]f we think it gets to the point where we need to step in and mobilize to make sure [Nader] doesn't get on the ballot, then we will'." *Id.*, ¶ 257 (p. 72). The Complaint also quotes CBS News in alleging that "'ACT joined forces with other organizations in [Oregon] to discourage people from signing the petition at Nader-Camejo's nominating convention,'" and caused the convention to fail to reach the 1,000-signature mark for ballot access. See *id.* and Exh. 54.

The Complaint's next allegations concerning ACT are that ACT shared a Portland, Oregon office, with SEIU "political campaign staff," an "ACT employee" named William Gillis worked there, and Mr. Gillis "posted a detailed blog entry" about a joint ACT/SEIU effort to "attack the Nader petition drive" under a "plan" to "sabotage" the petitions by signing and then

[4] Later, the Complaint adds: "SEIU was a founding member of ACT and its largest contributor, donating $26 million in 2004, and housing [ACT] in SEIU's offices." *Id.*, ¶ 268 (p. 77).

scratching out the signature where the petitioner was supposed to sign. See *id.*, ¶ 262 (p. 74) and Exh. 59.[5] And, the Complaint alleges, this effort succeeded in part when the Oregon Secretary of State "invalidated hundreds" of Nader-Camejo signatures. See *id.*, ¶ 265 (p. 75).

The Complaint also alleges other conduct in Oregon that challenged the Nader-Camejo petitions, but not by ACT – rather, variously, by "Oregon Democrats," "Multnomah County Democratic Party official Moses Ross," the Oregon Secretary of State, unnamed other "state officials," SEIU, "private investigators hired by SEIU," lawyer Margaret Olney, lawyer Roy Pulvers and the Oregon Democratic Party ("ODP"). See *id.*, ¶¶ 258-61, 264-66 (pp. 72-74, 75-76). Although no actual fact is alleged to connect ACT with those others' alleged activities, the Complaint conclusorily terms everything that occurred in Oregon as "coordinated efforts by the Oregon Democratic Party, SEIU and ACT." See *id.*, ¶ 263 (p. 75)).

The Complaint also describes Oregon state court litigation that ensued over the Secretary of State's decision to disqualify the Nader-Camejo petitions, which, the Complaint acknowledges, concluded with a judicial determination confirming that decision. See *id.*, ¶ 267 (p. 76). The Complaint does *not* allege that ACT had any role in either the administrative proceeding conducted by the Secretary of State or in the subsequent court litigation, and it instead attributes litigation activity solely to the Oregon Democratic Party and SEIU, with the state party alone alleged to have paid a respondent law firm that "represented parties attempting to deny Nader-Camejo ballot access in Oregon." See *id.*, ¶¶ 105-09, 264-67, 269 (pp. 34-35, 75-76, 77).

The Complaint concludes with three "Counts," but Mr. Nader addresses only one and a portion of another to ACT. "Count Two" relies on Complaint ¶¶ 257-69, discussed above, for the proposition that "SEIU and its allied 527 group American Coming Together jointly planned and executed an effort to prevent Nader-Camejo *from complying with Oregon state election laws* by disrupting their nomination conventions, sabotaging their nomination papers and falsely threatening their campaign petitioners." *Id.*, ¶ 313 (pp. 93-94) (emphasis added). Count Two then proceeds to focus solely upon SEIU. See *id.*

"Count Three" focuses on the so-called "527 Respondents" discussed at Complaint pp. 8-20 and ¶¶ 155-71 (pp. 43-51), which do *not* include ACT. See *id.*, ¶¶ 314-19, 321-22 (pp. 95-98). One paragraph alleges that ACT's "contributions and expenditures in connection with its participation in Respondent's effort to deny Nader-Camejo ballot access, as set forth herein (¶¶ 257-69)" (footnote deleted) – that is, in Oregon – "including the compensation paid to ACT staffers who participated in Respondents' efforts, were made to influence a federal election, and therefore constitute further violations of [FECA]." *Id.*, ¶ 320 (p. 97).

The Supplement adds nothing to Mr. Nader's complaint against ACT. Entitled "New Information in Support of the Complaint and Indicating Criminal Misconduct in Connection with Democratic Party Challenges to Candidate Nominating Petitions in the 2004 and 2006 General Elections," the Supplement is wholly concerned with a July 10, 2008 grand jury presentment in Pennsylvania that alleges the misuse of state employees to impede Nader-Camejo ballot access

[5] Exhibit 59, "William Gillis Blog Archive August 2004," is the *only* exhibit that contains *any* description of *any* ACT activity, let alone any that pertains to Mr. Nader. The only other exhibits that refer to ACT, namely, Exhs. 25, 60 and 61, contain *no* Nader-related or other relevant content.

in Pennsylvania in order to benefit the Kerry-Edwards campaign in that state. Neither the Supplement nor the presentment either refers to ACT or includes any factual or legal allegations or other material pertaining to involvement or liability by ACT.

III. The Commission Should Find No Reason To Believe That ACT Violated FECA

A. The Applicable RTB Standards

Under Commission policy, a finding of no RTB is appropriate in any of three circumstances:

- A violation has been alleged, but the respondent's response or other evidence convincingly demonstrates that no violation has occurred;
- A complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible, or
- A complaint fails to describe a violation of the Act.

"Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process" ("Policy Statement"), 72 Fed. Reg. 12545, 12546 (March 16, 2007). As a unanimous Commission has explicated the RTB standard:

> [An RTB] finding...is proper only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the ACT....A complainant's unwarranted legal conclusion from asserted facts, will not be accepted as true....Unless based on a complainant's personal knowledge, a source of information reasonably giving rise to a belief in the truth of the allegations must be identified.

MUR 5141, Statement of Reasons of Commissioners Mason, Sandstrom, McDonald, Smith, Thomas and Wold ("MUR 5141 SOR"), at 2 (March 11, 2002). These standards counsel in favor of a finding of no RTB in this case.

B. The Commission Should Find No RTB Regarding Count Two

Insofar as the Complaint alleges in Count Two that ACT and SEIU "jointly planned and executed an effort to prevent Nader-Camejo from complying with Oregon state election laws," Complaint ¶ 313 (p. 93), the Complaint "fails to describe a violation of [FECA]," Policy Statement, 72 Fed. Reg. at 12546, because the Commission has no jurisdiction to entertain complaints about a violation of any law other than FECA and the presidential election public financing statutes. *See* 2 U.S.C. § 437g(a)(1).

C. The Commission Should Find No RTB Regarding Count Three

Count Three fails to allege any other cognizable FECA violation. Its sole legal contention regarding ACT's alleged conduct is that ACT's "participation in Respondents' effort

to deny Nader-Camejo ballot access, as set forth [in]...¶¶ 257-69" – that is, in Oregon – comprised "contributions and expenditures" that necessarily violated unspecified provisions of FECA. This theory fails for numerous reasons.

First, ACT *could* lawfully make "expenditures" in 2004. The Complaint's theory is predicated on the misidentification of ACT as a nonfederal "Section 527 organization." *Id.*, ¶ 110 (p. 35); see also *id.* ¶ 320 (p. 97) (describing ACT as a "527"). In fact, ACT was (and remains) *both a federal political committee and* a nonfederal § 527 organization. As described in the Conciliation Agreement executed by the Commission and ACT in MURs 5403 and 5466 in August 2007, at ¶ 1 (p. 2), "ACT was established in July 2003 as an unincorporated organization with federal and nonfederal accounts pursuant to 11 C.F.R. § 102.5," and those accounts are registered with and report to, respectively, the Commission and the Internal Revenue Service.[6] As a political committee, of course, ACT could engage in unlimited "expenditures" during 2004 so long as those activities were conducted independently of candidates and political party committees. Accordingly, the Complaint's legal premise – that ACT could not undertake "expenditures" as a matter of law – is incorrect.

Second, it is hardly clear that spending that is designed to prevent a federal candidate from qualifying for a ballot is an "expenditure" under FECA. In AO 1996-39, the Commission considered a Republican House candidate's request to establish a nonfederal account in order to raise and spend funds to defray legal expenses arising from state administrative and court proceedings triggered by challenges from a Republican primary opponent and the state Democratic Party to the sufficiency of her primary election nominating petitions. The Commission advised the candidate that she *could* establish such a separate nonfederal account whose transactions "would not be treated as contribution or expenditure for purposes of [FECA], provided they are raised and spent by an entity other than a political committee." *Id.* at 2. The Commission explained how the effort must be operationally independent of her authorized committee. See *id.* *See also* AO 2003-15 and advisory opinions discussed therein. In keeping with the Commission's analysis in AO 1996-39, even if ACT spent *nonfederal* funds in order to discourage Nader-Camejo petition-signers or to foster erroneous signatures of Nader-Camejo petitions in Oregon, as Mr. Nader apparently alleges, then that would not constitute "expenditureS" under FECA anyway, so, again, Mr. Nader simply fails to allege a violation of FECA.

Third, and similarly, the Complaint errs in asserting that ACT could not lawfully make a contribution, whether to Kerry-Edwards or the DNC (the Complaint fails to identify clearly to whom the assertedly unlawful "contributions" were made). In fact, ACT the political committee lawfully could contribute $5,000 to Kerry-Edwards until the Democratic National Convention in late July 2004, and $15,000 to the DNC throughout 2004.

Fourth, the Complaint fails to explain how ACT's alleged activities in Oregon could comprise a "contribution" in any event. The only conceivable legal rationale for such a finding would be that the alleged conduct comprised an in-kind contribution on a theory of coordination. However, the Complaint provides no reason to believe that coordination took place. The

[6] Accordingly, even if Count Three could be read to allege violations by ACT like those that Mr. Nader alleges against the "527 respondents," ACT *did* "register as [a] political committee[ ]"; the gravamen of Count Three regarding those other organizations is their alleged *failure* to do so.

Complaint does not allege that ACT undertook *any* "public communication" in Oregon that satisfies one of the Commission's "content standards" concerning "coordinated communications." See 11 C.F.R. § 109.21(c). And, the Complaint does not allege *any* contacts between ACT on the one hand and either Kerry-Edwards or the DNC on the other hand, let alone any that might satisfy the Commission's "conduct standards" for coordinated communications. See 11 C.F.R. § 109.21(d). Instead, the Complaint at most asserts in a vague and conclusory fashion that "respondents" acted together, and, as explained below, Mr. Nader's parallel lawsuits explicitly disclaim that any such general references to myriad organizations and individuals is intended to refer to any particular one of them.

A close analysis of the Oregon portion of the Complaint reveals how it fails to allege facts that could support a coordination theory against ACT. That portion describes eight discrete events.

First, as noted above, the Oregon portion quotes a CBS News story that asserts that at the Nader-Camejo nominating convention in April 2004 "'ACT joined forces with other organizations in the state to discourage people from signing the petition....'" *Id.*, ¶ 257 (p. 72) and Exh. 54. But the "other organizations" are nowhere identified, and there is no reason to believe that any candidate or political party was among them, let alone that any such "joining [of] forces" could be construed as an in-kind contribution to any such entity.

Second, the Oregon portion alleges that at the June 2004 Nader-Camejo nominating convention "Oregon Democrats" and a county party official sought to fill the hall with people who would refuse to sign the nominating petition, and that "officials" from "Democratic Secretary of State Bill Bradbury's office" refused Nader-Camejo supporters entry to the convention. See *id.*, ¶¶ 258-59 (pp. 72-73). These factual allegations do not refer in any manner to ACT or anyone else.

Third, the Oregon portion alleges that on the day of that convention, unidentified individuals engaged in a "phone-jamming attack" against "the law offices of Gregory Kafoury, who was serving as Nader-Camejo's Oregon convention coordinator...." *Id.*, ¶ 260 (p. 73). Again, this factual allegation does not refer to ACT or anyone else.

Fourth, the Oregon portion alleges that "private investigators hired by SEIU" and lawyer Margaret Olney contacted Nader-Camejo petitioners in various ways, but it does not refer to ACT or suggest that ACT or anyone else participated in that conduct. See *id.*, ¶ 261 (pp. 73-74).

Fifth, the Oregon portion alleges that ACT and SEIU jointly caused individuals to sign Nader-Camejo petitions on the petitioner's line and then to cross out that signature. But the factual allegations do not refer to any involvement in that effort by the ODP, the DNC, Kerry-Edwards or anyone else as to whom coordination by ACT would be relevant. See *id.*, ¶ 272 (p. 74).

Sixth, the Oregon portion alleges that lawyer Roy Pulvers challenged the Nader-Camejo nomination papers before the Secretary of State, the Secretary of State invalidated enough signatures to deny ballot access to Nader-Camejo, *id.*, ¶¶ 264-65 (p. 75), the ODP paid Mr. Pulvers' law firm in December, and Mr. Pulvers has represented the ODP since 2003. *Id.*, ¶ 269

(p. 77). Again, there is no factual allegation that ACT or anyone else participated in those ODP activities.

Seventh, the Oregon portion alleges that Nader-Camejo initiated state court litigation to overturn the Secretary of State's action, ODP and its officials intervened in that lawsuit, and SEIU participated in it as an *amicus curiae*. But there is no factual allegation that ACT participated in that litigation. See *id.*, ¶¶ 266-67 (pp. 75-76).

Eighth, the Oregon portion alleges various financial transactions between SEIU on the one hand and the DNC on the other, that SEIU supported the Kerry campaign, and that SEIU helped found, contributed to, and shared office space with ACT. But there is no allegation that *any* of these transactions or political activities related to *Oregon*, see *id.*, ¶ 268 (pp. 76-77), or that there were any transactions or other contacts between ACT on the one hand and the DNC, ODP or Kerry-Edwards on the other.

Therefore, the Complaint's passing reference to "such coordinated efforts by the [ODP], SEIU and ACT" in Oregon, see *id.*, ¶ 263 (p. 75), amounts to an "unwarranted legal conclusion[] from asserted facts, [which] will not be accepted as true" by the Commission in deciding whether or not to find RTB. MUR 5141 SOR at 2. And, Mr. Nader has identified no "source of information reasonably giving rise to a belief in the truth of the allegations." See *id.*

Fifth, Mr. Nader raises allegations of interference with his effort to appear on the ballot in Oregon that his campaign did *not* raise during 2004 with either the Secretary of State or the Oregon courts, and contemporaneous documents indicate that Nader-Camejo was *not* denied ballot access in Oregon due to *any* of the reasons that the Complaint now asserts caused that denial. As noted above, the Complaint alleges that ACT and SEIU caused individuals to sign petitions where the petitioner was supposed to sign, and then crossed out those signatures, leading the Secretary of State to invalidate the petitions. See Complaint ¶¶ 262, 265 (pp. 74, 75). But the Secretary of State did *not* invalidate petitions on that ground, and Mr. Nader did *not* allege in Oregon that he did; nor, for that matter, did Mr. Nader raise any claims with either the Secretary of State or the Oregon courts about misconduct at the nominating conventions in Oregon. See *Kucera v. Bradbury*, No. 04C18259 (Marion Cty., Oregon Circuit Ct. Sept. 9, 2004); Plaintiffs' Memorandum in Support of Motion for Injunctive Relief (Sept. 3, 2004), *Kucera v. Bradbury*, *supra*; *Kucera v. Bradbury*, 337 Ore. 385 (2004), *cert. denied*, 544 U.S. 1056 (2005).[7]

Finally, the Commission should find no RTB because the coordination allegation is simply "not credible" otherwise. See Policy Statement, 72 Fed. Reg. at 12546. The Commission has already had occasion to investigate ACT's relationships during 2004 with Kerry-Edwards and the DNC in MURs 5403 and 5466, and, "[f]ollowing the investigation, which produced substantial information about the roles of the individuals involved but no credible evidence that any coordination occurred, the Commission took no further action with respect to the allegations that ACT made coordinated expenditures resulting in excessive in-kind contributions to the Kerry Committee or the DNC," and the Commission found no RTB as to the Kerry Committee

[7] We do not have a copy of the plaintiffs' state court complaint itself, but the claims are set forth clearly in the three documents referenced in the text, which are collected at Exhibit C.

and the DNC in connection with such alleged contributions. MURs 5403 and 5466, Factual and Legal Analysis at 2 (August 28, 2007).

As the Commission learned in conducting that investigation, ACT, in regular consultation with legal counsel, was scrupulous about operating independently from Kerry-Edwards, the DNC and state political parties due to the restrictions against coordination established by FECA and the Commission's regulations. ACT operated under intense public scrutiny throughout 2003 and 2004, was subjected to persistent and critical media reportage, was pilloried by the Republican Party and its allies, and was named a respondent in a series of complaints to the Commission beginning in January 2004; and, the publicity about ACT in part prompted the Commission's far-reaching Advisory Opinion 2003-37 in February and its ensuing and sensational "Political Committee" rulemaking, which "generated an extraordinary amount of public engagement on the issue of when organizations should have to register with and report their activities to the FEC," including over 100,000 comments and two days of public hearings. FEC, "Political Committee Status," 72 Fed. Reg. 5595, 5596 (Feb. 7, 2007). Yet none of this media and adversarial attention or administrative investigation produced *any* evidence that ACT engaged in coordination with Kerry-Edwards, the DNC or any state party committee, because ACT made certain that it did not so engage.

Accordingly, the Commission should find no RTB as to Mr. Nader's possible contention that ACT's alleged conduct in Oregon constituted either an unlawful expenditure or an unlawful contribution to a federal political committee.

D. Count One Does Not and Could Not Apply to ACT

"Count One" focuses on the alleged "national" litigation effort and conspicuously omits ACT (as well as SEIU) from its repeated itemizations of the allegedly culpable respondents. See *id.*, ¶¶ 308, 311, 312 (pp. 91, 93). That omission in itself, of course, warrants finding no RTB as to ACT on Count One. But, in any event, that determination is wholly merited due to the Complaint's vague and conclusory allegations; nothing in the Complaint and its exhibits provides reason to believe that ACT participated in any scheme with the other respondents, let alone the alleged "conspiracy" involving *all* of the respondents.

In that connection, the Complaint makes sweeping references to what the "respondents" were and did – namely, they were "allied entities and/or affiliates of the Democratic Party"; their "purpose" was to elect Kerry-Edwards, which they "repeatedly confirmed"; they "fil[ed] complaints" or "intervene[d] in legal or administrative proceedings" in 18 states "with the knowledge and consent of Terry McAuliffe and John Kerry"; they "coordinated their efforts with the DNC, the Kerry-Edwards campaign and at least 18 state or local Democratic parties"; "their law firms provided legal services"; they "established ... The Ballot Project;" they "launched a nationwide communications campaign intended to convince Nader-Camejo supporters to vote for Kerry-Edwards"; they "hired political consultant and pollsters, produced advertisements and press materials, and paid to broadcast these advertisements on television, radio and other media outlets throughout the country;" they "established two websites to publicize their efforts, www.thenaderfactor.com and www.upforvictory.com;" they "funded and coordinated their communications campaign through ... the National Progress Fund and...Uniting People for Victory"; and, they had a "fourth 527 group, American for Jobs." Complaint at 1-10.

However, the specific "[f]actual [a]llegations" about specific respondents instead describe conduct that was almost entirely undertaken either individually by particular respondents or separately from the respondents that the Complaint portrays as the principal actors, namely, the DNC, Kerry-Edwards, BP and three other nonfederal § 527 organizations. *See, e.g., id.* at 7 ("the DNC and the Kerry-Edwards Campaign coordinated their efforts and engaged in joint action with Respondents"). And, in every respect, the characterizations of what "respondents" did together defy common sense and all plausibility – that is, the notion that *all* of these lawyers, law firms and groups acted in concert in any particular instance.

On that point, *all* of Mr. Nader's parallel federal court complaints include a most important caveat: as stated in the complaint filed against ACT and others in *Nader v. Democratic National Committee*, No. 07-2136 (D.D.C.), at ¶ 14, "Unless otherwise stated, the terms 'defendants' and 'conspirators' or 'co-conspirators' and the charges alleged herein do not necessarily apply to every Defendant and every conspirator named in this complaint." (See Exhibit A.) That caveat is tantamount to saying that Mr. Nader does not know and will not say whether a particular group or individual or other person undertook particular conduct, only that it "might" have done so. We submit that the Commission must read the Complaint – whose "[f]actual [a]llegations," again, are virtually identical to those Mr. Nader previously made in his lawsuits – subject to that caveat; that is, unless a *specific* allegation of fact ties a *particular* respondent to *particular* conduct, a generalized reference to "respondents" *cannot* be read to allege that ACT (or for that matter, any other particular respondent) had anything to do with the conduct alleged.

Of course, even in the absence of that caveat, the Commission should not credit the "conspiracy" portions of the complaint in making an RTB determination. In fact, the Commission has already entertained and rejected similarly vague and sweeping allegations of conspiracy against some of the same respondents regarding the same kinds of alleged interference with Nader-Camejo's 2004 ballot access in multiple states. In MUR 5509, the Commission found no RTB on the basis of an OGC report concerning a similar complaint filed by Lenora B. Fulani against the DNC and Kerry-Edwards in August 2004. The Commission determined to find no RTB in part because "the allegations...are speculative and insufficiently specific to justify an investigation," and Ms. Fulani cited "no evidence" to link particular respondents to the various ballot-access challenges. See MUR 5509, First General Counsel's Report at 1-3 (Feb. 29, 2005).[8]

IV. Alternatively, the Commission Should Dismiss the Complaint Against ACT

Alternatively, the Commission should dismiss the complaint against ACT as an exercise of prosecutorial discretion because the matter "do[es] not merit the additional expenditure of Commission resources" and "[t]he seriousness of the alleged conduct is not sufficient to justify

[8] Ms. Fulani also brought an unsuccessful parallel federal court lawsuit that similarly foreshadows Mr. Nader's own litigation and Complaint here. In *Fulani v. McAuliffe*, 2005 U.S. Dist. LEXIS 20400, *14 (S.D. N.Y. 2005), the court granted motions to dismiss filed by defendants that included respondents here DNC, Sen. John F. Kerry and Toby Moffett in part because Ms. Fulani's allegations of a "conspiracy" to foil Nader-Camejo's ballot access in numerous states consisted only of a "broad, conclusory statement regarding the formation of and membership in the conspiracy" (footnote omitted).

the likely cost and difficulty of an investigation to determine whether a violation in fact occurred." See Policy Statement, 72 Fed. Reg. at 12545-46 (footnote omitted).

Mr. Nader is asking the Commission to undertake a spectacularly costly and far-reaching investigation into alleged conduct that occurred (if at all) two presidential election cycles ago and as to which Mr. Nader inexplicably sat on his rights *for years* without seeking any relief in any forum. As it stands, so long as the Complaint "substantial[ly] compli[es] with the technical requirements of 11 C.F.R. § 111.4," 11 C.F.R. § 111.5(a) – which we presume it does now that the jurat has been corrected – FECA requires the Commission to "notify, in writing, [all 195 individuals and entities] alleged in the complaint to have committed...a violation of FECA" and then either dismiss the Complaint or consider their responses before deciding whether or not to find RTB. See 2 U.S.C. § 437g(a)(1).[9]

We cannot estimate the amount of additional resources that the Commission would have to invest in order to ascertain whether and how these 195 respondents (not to mention the potential "John Does" and "Jane Does") engaged with each other with respect to Nader-Camejo's ballot access, but that figure is self-evidently enormous. Meanwhile, the Complaint displays little in the way of facts to relate any of these respondents to each other, and none at all as to ACT except, to a very limited extent, with respect to dealings with SEIU, which, of course, is neither a federal candidate, a political party nor any other kind of political committee. Nor does the Complaint describe matters that, even if proven, would either be legally noteworthy, establish standards that would exert a deterrent or other salutary impact more generally, or deal with a recurrent problem or phenomenon.[10]

Dismissal is also warranted because at least part of the relief Mr. Nader seeks, and that the Commission ordinarily would consider, is foreclosed by the Conciliation Agreement between ACT and the Commission in MURs 5403 and 5466. We certainly acknowledge that the allegations at issue in MURs 5403 and 5466 did not specify events in Oregon or ACT's relationship with the ODP or the Nader-Camejo campaign. And, we acknowledge that the Complaint is correct that the Conciliation Agreement that closed those MURs did not address ACT's activities, if any, with respect to Nader-Camejo ballot access. See Complaint, ¶ 320 (p. 97). However, the Conciliation Agreement *did* "resolve[] all matters with respect to [ACT] arising from MURs 5403, 5440, 5466 and 5612 ... and the Commission will take no further action regarding the allegations made and activities described in those matters as to possible violations of the FECA." Conciliation Agreement ¶ VIII (p. 13). Insofar as the Complaint here might be construed to question ACT's *allocation* of spending between its federal and nonfederal accounts during 2004 with respect to Nader-Camejo's ballot access anywhere, the Conciliation Agreement precludes any complainant from securing relief about it, because the Conciliation Agreement settled *all* ACT allocation issues pertaining to ACT's spending during the 2003-04 election cycle.

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[9] If the Commission has *not* notified one or more of the other 194 "clearly identif[ied]...person[s] or entit[ies] who [are] alleged to have committed a violation," 11 C.F.R. § 114.4(d)(1), then we submit that the Commission must withdraw its notification to ACT. Neither FECA nor the Commission's regulations accord the Commission discretion to dispense with its respondent notification obligation, although the Commission does enjoy considerable discretion as to how to proceed with a matter after providing that notification.

[10] We note that the 2008 election apparently did not involve any effort at all to impede ballot access by either Mr. Nader, who again was an independent candidate for President, or any other presidential candidate.

Finally, it makes no sense from an enforcement standpoint to pursue ACT because ACT no long exists as a functioning organization. As noted in the Conciliation Agreement in MURs 5403 and 5466, at ¶ 1 (p. 2), "ACT decided in 2005 to suspend ongoing active operations and its current intention is to wind down and terminate its affairs upon the conclusion of this matter." ACT's intention did not change, but two months after the parties entered into the Conciliation Agreement Mr. Nader filed his parallel court complaint against ACT. ACT determined that it was unwilling to suffer a default judgment by terminating and not defending that lawsuit, so it has since participated in that litigation, which now overlaps with the new MUR. But, as the Commission knows from ACT's financial reports filed with the Commission and the Internal Revenue Service, ACT substantially emptied its treasury in order to pay its agreed civil penalty to the Commission, and it has little ability to pay another. And, ACT's former staff, including those in Oregon and elsewhere whose cooperation ACT would need in dealing with any investigation, have long since scattered far and wide.

Accordingly, for the reasons set forth above, ACT respectfully requests that the Commission either find no reason to believe that ACT violated FECA or otherwise dismiss this matter as to ACT.

Respectfully submitted,

Laurence E. Gold

Laurence E. Gold

Lyn Utrecht /lag

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Counsel for Respondent America Coming Together

cc: Gary Gruver, CFO, ACT

IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RALPH NADER,
53 Hillside Avenue
Winsted, Connecticut 06098

PETER MIGUEL CAMEJO,
1760 Barhead Court
Folsom, CA 95630

D.B. FANNING
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Flagstaff, AZ 86001

C.K. IRELAND
827 West Summit Avenue
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JULIE COYLE
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HERMAN BLANKENSHIP
235 East Oakland
Toledo, OH 43608

LLOYD MARBET
19142 Southeast Baker's Ferry Road
Boring, OR 97009

GREGORY KAFOURY
320 Stark Street
Portland, OR 97204

PLAINTIFFS,

v.

THE DEMOCRATIC NATIONAL COMMITTEE
430 South Capitol Street, SE
Washington, DC 20003

AMENDED COMPLAINT

Civil Action No. 07-2136-RMU

KERRY-EDWARDS 2004 INC.
10 G Street, NE, Suite 700
Washington, DC 20002

THE BALLOT PROJECT, INC.
1730 Rhode Island Avenue, NW
Washington, DC 20036

AMERICA COMING TOGETHER
1101 Vermont Avenue NW, 9th Floor
Washington, DC 20005

SERVICE EMPLOYEES INTERNATIONAL UNION
1313 L Street, NW
Washington, DC 20005

JOHN KERRY
United States Senate
304 Russell Building, Third Floor
Washington, DC 20510

JACK CORRIGAN
896 Beacon Street
Boston, Massachusetts 02215

TOBY MOFFETT
499 South Capitol Street, SW, Suite 600
Washington, DC 20003

ELIZABETH HOLTZMAN
2 Park Avenue
New York, New York 10016

ROBERT BRANDON
1730 Rhode Island Avenue, NW,
Suite 712
Washington, DC 20036

MARK BREWER
606 Townsend
Lansing, MI 48933

and

REED SMITH, LLP

435 Sixth Avenue :
Pittsburgh, Pennsylvania, 15219. :
:
DEFENDANTS. :
:

Plaintiffs bring this action against Defendants to redress the deprivation of rights secured them by common law. Plaintiffs seek damages, injunctive and declaratory relief and such other further relief as this Court shall deem necessary and proper, and allege the following:

NATURE OF THE ACTION

1. Defendants are members, allies or agents of the Democratic Party who conspired to prevent Plaintiffs Ralph Nader and Peter Miguel Camejo (hereinafter, "Nader-Camejo") from running for President and Vice President of the United States in 2004, in an effort to deny Plaintiff-voters and others the choice of voting for them. Defendants blamed Mr. Nader for the Democrats' loss in the 2000 presidential election, and they worried that he would "steal" votes from the Democratic candidates if he ran again in 2004. Defendants therefore agreed and conspired that if Mr. Nader did run in 2004, they would launch a massive, nationwide unlawful assault on his candidacy, using unfounded litigation to harass, obstruct and drain his campaign of resources, deny him ballot access and effectively prevent him from running for public office. Defendants reached this agreement and formed this conspiracy with wrongful intent, before they could possibly have any reason to believe such litigation was warranted or justified.

2. As the 2004 election approached, Democratic National Committee (DNC) Chairman Terry McAuliffe publicly appealed to Mr. Nader on numerous occasions not to run. "I wanted to convey to Ralph Nader that...if he were to get in the race again, he could pull votes away from the Democratic nominee. ... We can't afford to have Ralph Nader in the race," Mr. McAuliffe told CNN's Wolf Blitzer in February 2004. When Mr.

Nader announced his candidacy shortly thereafter, on February 22, 2004, Defendants set their obstructive plans and conspiracy in motion.

3. In a telephone conversation with Mr. Nader on June 23, 2004, Mr. McAuliffe made one last effort to dissuade Mr. Nader. This time, Mr. McAuliffe asked Mr. Nader voluntarily not to campaign in certain so-called "battleground" states. If Mr. Nader agreed, Mr. McAuliffe said, he would support Mr. Nader's campaign in the remaining states. Mr. Nader declined, and objected to the Democratic Party's effort to deny his candidacy ballot access in various states. That same day, Defendants or their co-conspirators filed their first lawsuit against his campaign.

3. Within the next 12 weeks, between June and September of 2004, Defendants and their co-conspirators filed 24 complaints against the Nader-Camejo Campaign in 17 states, including Arizona, Arkansas, Colorado, Florida, Illinois, Iowa, Maine, Michigan, Mississippi, New Hampshire, Nevada, New Mexico, Ohio, Pennsylvania, Washington, West Virginia and Wisconsin, and intervened in proceedings to remove Nader-Camejo from the ballot in Oregon. Said conspirators also filed five complaints before the Federal Election Commission (FEC). In each state court lawsuit, said conspirators challenged Nader-Camejo's nomination papers and asked state elections officials not to certify them as candidates for President and Vice President in the 2004 general election.

4. Defendants' admitted purpose for bringing these lawsuits, however, was not to vindicate valid legal claims, but rather to bankrupt Nader-Camejo's campaign by forcing the candidates to spend their limited resources of time, talent and money on the defense of unfounded lawsuits. Defendants' motive, which they also admitted, was to

help Democratic candidates John Kerry and John Edwards win the election by forcing their political competitors from the race.

5. Defendants dedicated millions of dollars' worth of illegal and unreported campaign contributions to their conspiracy. They recruited at least 95 lawyers from 53 law firms to pursue their unfounded and abusive litigation and organized hundreds of other lawyers to provide support. Defendants also incorporated several Section 527 political organizations, including one called The Ballot Project, which they incorporated specifically for the purpose of coordinating and financing their nationwide assault of unfounded and abusive litigation.

6. In addition to filing 24 state court complaints and five FEC complaints against the Nader-Camejo Campaign within 12 weeks, said conspirators organized and conducted campaigns of harassment, intimidation and sabotage to prevent the Nader-Camejo Campaign from complying with election laws in several states, and to fabricate grounds for the conspirators' subsequent lawsuits. In one state, for example, conspirators acting fraudulently and under false pretenses took seats in Nader-Camejo's nominating convention but refused to sign their petitions, causing the convention to fall short of the requisite number of validated attendees. In other states, said conspirators sabotaged Nader-Camejo's nomination papers by crossing names out or otherwise invalidating their petitions and, on information and belief, by signing fake names.

7. In violation of state rules of professional conduct, the conspiracy's bar members sent misleading letters to campaign petitioners, falsely threatening them with heavy fines and jail sentences if signatures they collected were invalidated, and also sought subpoenas ordering campaign petitioners on short notice to attend depositions and

produce unreasonably burdensome amounts of personal documents. On numerous occasions, the conspirators, including members of the bar, called campaign petitioners' homes, and even the homes of citizens and potential voters who signed Nader-Camejo's petitions. Private detectives also visited petitioners' homes, unannounced, and claimed to be investigating them. All of this activity was intended to harass and intimidate said petitioners and prevent them from collecting signatures – an effort that succeeded on dozens of occasions.

8. In spite of a multi-million dollar legal team of co-conspirators, and coordinated campaigns of harassment, intimidation and sabotage specifically intended to prevent Nader-Camejo from complying with state election laws, the conspirators eventually lost the great majority of lawsuits they filed. In addition, the FEC dismissed all five of conspirators' FEC complaints without taking action. Defendants nevertheless succeeded in draining Nader-Camejo's campaign of time, money and other resources, and in preventing them from gaining ballot access in several states, thereby denying voters in these states the choice of voting for them, as was their intent. Defendants also caused financial injury and other damages to Mr. Nader and Mr. Camejo personally, and did severe damage to the third-party and independent candidacy structure which Mr. Nader had built at great expense in time, money and other resources.

9. Although the 2004 election ended nearly three years ago, conspirators continue to pursue their wrongful litigation against Mr. Nader to the present day. To force Nader-Camejo off the ballot in Pennsylvania, Defendants enlisted at least 20 lawyers from three law firms, hired handwriting experts and other consultants, and recruited support from approximately 170 Democratic Party operatives. Afterwards, co-

conspirator law firm Reed Smith, which has close ties to the Kerry-Edwards Campaign, submitted a bill of costs in the amount of $81,102.19. No state in the nation has ever assessed such a post-election penalty against candidates who defend their right to appear on the ballot, but the Commonwealth Court of Pennsylvania approved the bill without opinion. Misreading the plain meaning of the statute, a divided Pennsylvania Supreme Court affirmed without citing a single case in which a candidate had been assessed such costs.

10. While this case was before the Pennsylvania Supreme Court, unbeknownst to Mr. Nader and Mr. Camejo, Defendant Reed Smith began representing the Chief Justice as his defense counsel in an ethics investigation before the Pennsylvania Judicial Conduct Board. In addition, Reed Smith and conspirators' second law firm gave $10,000 in campaign contributions to a second Justice, who authored the majority opinion. Reed Smith also has close and long-standing ties with a third Pennsylvania Supreme Court Justice, who served as of counsel at the firm immediately before joining the court. Reed Smith did not disclose these facts at any time during the proceedings before the Pennsylvania Supreme Court, nor thereafter, when the firm induced Mr. Camejo to pay $20,000 to settle the claim against him. Reed Smith subsequently filed Writs of Attachment against Mr. Nader's personal accounts, and currently seeks to condemn $61,638.45 of Mr. Nader's personal funds in satisfaction of its unprecedented fraudulently and wrongfully obtained judgment.

11. Defendants and their co-conspirators conspired to and did in fact abuse judicial processes in an effort to bankrupt the Nader-Camejo Campaign and terminate Nader-Camejo's candidacy during the 2004 presidential election. Conspirators filed 24

state law complaints and five FEC complaints in less than 12 weeks, with the specific intention of causing Plaintiffs financial injury and other damages and violating their constitutional rights. Defendants did in fact cause such damages, and Defendants continue to cause such damages, by pursuing their unfounded and abusive litigation to the present day.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1441(c), as an action removed from the Superior Court of the District of Columbia by consent of all Defendants on November 27, 2007. Venue in the District of Columbia is appropriate pursuant to 28 U.S.C. § 1391(b), as a substantial part of the events giving rise to the action occurred therein.

13. The Superior Court of the District of Columbia had personal jurisdiction over all Defendants pursuant to D.C. Code § 13-423(a)(1), as each Defendant participated in a conspiracy organized and directed by parties located in the District of Columbia, and substantial overt acts taken in furtherance of that conspiracy took place within the boundaries of the District of Columbia. Personal jurisdiction is alternatively conferred on the Superior Court of the District of Columbia by D.C. Code §§ 13-423(a)(3) and 13-423(a)(4).

THE PARTIES

14. Unless otherwise stated, the terms "Defendants" and "conspirators" or "co-conspirators" and the charges alleged herein do not necessarily apply to every Defendant and every conspirator named in this complaint.

15. Plaintiff Ralph Nader is a consumer advocate and 2004 independent candidate for President of the United States. Mr. Nader's address is 53 Hillside Avenue, Winsted, Connecticut, 06098.

16. Plaintiff Peter Miguel Camejo is an entrepreneur and 2004 independent candidate for Vice President of the United States. Mr. Camejo joins this complaint as to all Defendants except he asserts no claims against Defendant Reed Smith. Mr. Camejo's address is 1760 Barhead Court, Folsom, California, 95630.

17. Plaintiff D.B. Fanning is a registered voter in the state of Arizona. Mr. Fanning's address is 827 West Summit Avenue, Flagstaff, Arizona, 86001.

18. Plaintiff C.K. Ireland is a registered voter in the state of Arizona. Ms. Ireland's address is 827 West Summit Avenue, Flagstaff, Arizona, 86001.

19. Plaintiff Julie Coyle is a registered voter in the state of Ohio. Ms. Coyle's address is 4101 Drummond Road, Toledo, Ohio, 43613.

20. Plaintiff Herman Blankenship is a registered voter in the state of Ohio. Mr. Blankenship's address is 235 East Oakland Street, Toledo, Ohio, 43608.

21. Plaintiff Lloyd Marbet is a registered voter in the state of Oregon. Mr. Marbet's address is 19142 Southeast Baker's Ferry Road, Boring, Oregon, 97009.

22. Plaintiff Gregory Kafoury is a registered voter in the state of Oregon. Mr. Kafoury's address is 320 Stark Street, Portland, Oregon, 97204.

23. Defendant the Democratic National Committee is the national head of the Democratic Party, and works with national, state and local Democratic Party organizations to elect Democratic candidates. The DNC's address is 430 S. Capitol Street SE, Washington, D.C., 20003.

24. Defendant Kerry-Edwards 2004 Inc. is the principal campaign committee of the Kerry-Edwards Campaign. The committee's address is 10 G Street NE, Suite 710, Washington, D.C., 20002.

25. Defendant The Ballot Project is a Section 527 organization established on June 2, 2004 to coordinate and finance Defendants' litigation against Nader-Camejo. The organization's address is that of consultants Robert Brandon and Associates, at 1730 Rhode Island Avenue NW, Suite 712, Washington, D.C., 20036.

26. Defendant America Coming Together (ACT) is a Democratic Section 527 organization, funded in part by SEIU, which organized a campaign of harassment, intimidation and sabotage in an effort to deny Nader-Camejo ballot access. ACT's current address is 1101 Vermont Avenue NW, 9th Floor, Washington, D.C., 20005.

27. Defendant Service Employees International Union (SEIU) is a labor union with headquarters in Washington, D.C. SEIU's address is 1313 L Street NW, Washington, D.C., 20005.

28. Defendant John Kerry is a United States Senator from Massachusetts and the 2004 Democratic Party candidate for President. Mr. Kerry's address is United States Senate, 304 Russell Building, Third Floor, Washington, D.C., 20510.

29. Defendant Jack Corrigan is a lawyer who worked for the DNC and the Kerry-Edwards Campaign to plan and execute Defendants' wrongful litigation against Nader-Camejo. Mr. Corrigan also served as John Kerry's personal liaison to the 2004 Democratic National Convention. Mr. Corrigan's address is 896 Beacon Street, Boston, Massachusetts, 02215.

30. Defendant Toby Moffett is president of The Ballot Project and a lobbyist with the Livingston Group. Mr. Moffett's address is 499 South Capitol Street SW, Suite 600, Washington, D.C., 20003.

31. Defendant Elizabeth Holtzman is director of The Ballot Project and a lawyer. Ms. Holtzman's address is 2 Park Avenue, New York, New York, 10016.

32. Defendant Robert Brandon and his firm Robert Brandon and Associates are consultants to the DNC and other clients. Mr. Brandon's firm housed The Ballot Project in its offices. Mr. Brandon's address is 1730 Rhode Island Avenue NW, Suite 712, Washington, D.C., 20036.

33. Defendant Mark Brewer is Chair of the Michigan Democratic Party and Vice Chair of the DNC. Mr. Brewer's address is 606 Townsend, Lansing, MI, 48933.

34. Defendant Reed Smith is a law firm headquartered in Pittsburgh, Pennsylvania. Reed Smith's address is 435 Sixth Avenue, Pittsburgh, Pennsylvania, 15219.

NON-DEFENDANT CO-CONSPIRATORS

35. Non-defendant co-conspirators include the state Democratic Party affiliates of the national Democratic Party who combined and conspired with Defendants to achieve Defendants' unlawful objectives as herein alleged.

36. Non-defendant co-conspirators include the law firms and lawyers who combined and conspired with Defendants and who, acting as Defendants' agents, implemented defendants' illegal scheme in various states as set forth herein.

37. Non-defendant co-conspirator Americans for Jobs is a Section 527 organization established by Timothy Raftis and David W. Jones in 2003 "to accept contributions and make expenditures to influence the election of federal candidates." Americans for Jobs' address is 2000 M Street NW, Suite 800, Washington, D.C., 20036.

38. Non-defendant co-conspirator The National Progress Fund is a Section 527 organization established on May 4, 2004 "to engage in election-related activity for the purpose of supporting progressive issues." The organization was officially terminated on December 31, 2005. The National Progress Fund's address was PO Box 57154, Washington, D.C., 20037.

39. Non-defendant co-conspirator United Progressives for Victory is a political committee registered on June 16, 2004 and terminated on September 21, 2005. The organization's address is that of DNC consultants Robert Brandon and Associates, at 1730 Rhode Island Avenue NW, Suite 712, Washington, D.C., 20036.

40. Non-defendant co-conspirator Uniting People for Victory is a Section 527 organization founded by United Progressives for Victory and registered with the IRS on July 21, 2004. The organization's address is that of DNC consultants Robert Brandon and Associates, at 1730 Rhode Island Avenue NW, Suite 712, Washington, D.C., 20036.

41. Non-defendant co-conspirator Citizens for Responsibility and Ethics in Washington (CREW) is a 501(c)(3) legal organization that claims to promote "ethics and accountability in government and public life by targeting government officials – regardless of party affiliation – who sacrifice the common good to special interests." The overwhelming majority of individuals and organizations CREW targets, however, are real

or perceived competitors of the Democratic Party. CREW's address is 1400 Eye Street NW, Suite 450, Washington, D.C., 20005.

42. Non-defendant co-conspirator Kathleen Sullivan is former Chair of the New Hampshire Democratic Party and a DNC official. Ms. Sullivan's address is 95 Market Street, Manchester, NH 03101.

43. Non-defendant co-conspirator Daniel Schneider is, on information and belief, an attorney in Washington, D.C. who filed an FEC complaint against the Nader-Camejo Campaign. Mr. Schneider's address is unknown.

44. Non-defendant co-conspirators include the officers and affiliates of the Section 527 organizations and 501(c)(3) organization named herein, including: David W. Jones; Tricia Enright; Chris Kofinis; Karl Frisch; Ginny Hunt; John Hlinko; Katie Aulwes; Karen Mulhauser; Helen Hunt; and Melanie Sloane.

FACTUAL ALLEGATIONS

I. Defendants Conspired to Abuse Judicial Processes with Intent to Cause Plaintiffs Financial Injury and Other Damages and Violate Their Constitutional Rights.

45. After the Democrats' defeat in the 2000 election, Defendants and their co-conspirators decided to try to prevent Mr. Nader from running for president if he announced his candidacy in 2004. Defendants had already settled on a strategy to accomplish this goal when Mr. Nader made his announcement on February 22, 2004. "Our intent was to drain and distract him," The Ballot Project president Toby Moffett later explained to the *Hartford Courant*. Defendants agreed and conspired to launch a nationwide legal assault on Mr. Nader's campaign, which would drain the campaign of

money, time and other resources, in a deliberate attempt to use the sheer burden of litigation itself as a means to prevent Mr. Nader from running for public office. Defendants reached this agreement with wrongful intent, before they could possibly have any reason to believe litigation against Mr. Nader was warranted or justified, and before there was any colorable or potential legal basis for such litigation.

46. Having settled on that strategy, the organizers and leaders of the conspiracy met privately to discuss their plans on July 26, 2004, at the Four Seasons Hotel in Boston. DNC consultant Robert Brandon organized the meeting and, on information and belief, the DNC paid for it. Approximately three dozen people attended, including The Ballot Project president Toby Moffett, The Ballot Project director Liz Holtzman and Democratic consultant Stanley Greenberg.

47. At said Four Seasons meeting, the leaders and organizers of the conspiracy discussed polling, research, and strategy to undermine the Nader-Camejo Campaign in key states where they believed it would adversely affect Democratic candidates John Kerry and John Edwards most, including Arizona, Florida, Iowa, Michigan, Nevada, Oregon, Pennsylvania, Virginia, West Virginia and Wisconsin. The leaders and organizers of the conspiracy specifically agreed to sue and otherwise obstruct Nader-Camejo not only in these "battleground" states, but also in as many other states as possible. According to Defendant Moffett, however, the purpose of this litigation was simply "to drain [Mr. Nader] of resources and force him to spend his time and money."

48. Defendant Moffett had conducted a limited campaign against Mr. Nader's candidacy in the 2000 election. Mr. Moffett considered that effort a failure,

because Mr. Nader was listed on most state ballots in 2000. "We're not going to let him do it again," Mr. Moffett vowed at the said Four Seasons meeting.

49. The Democratic National Convention began the same day as the conspirators' Four Seasons meeting, and was taking place across town at Boston's Fleet Center. The conspirators planned to use the convention as a platform to introduce their litigation strategy to delegates from state Democratic Parties, and to solicit financial support from major party donors.

50. The conspirators prepared a memo for this purpose, which they planned to circulate at the convention. This memo outlined the conspirators' comprehensive plan of attack against the Nader-Camejo Campaign, which involved not only a nationwide legal assault, but also a communications campaign intended to convince voters not to vote for Nader-Camejo. The memo further stated that Defendants would coordinate and finance their activities with three 527 organizations the conspirators had established. One was The Ballot Project, and the other two were called the National Progress Fund and Uniting People for Victory.

51. The conspirators distributed their memo to donors and delegates at the convention and discussed the perceived threat of Nader-Camejo's candidacy. They briefed donors and delegates about their litigation plans and solicited contributions to their 527 organizations. The conspirators also recruited state Democratic Party officials to join their effort, and specifically instructed the officials to bring groundless and abusive lawsuits in their states as part of a nationwide strategy to bankrupt the Nader-Camejo Campaign and force Nader-Camejo from the race. "This guy is still a huge

threat," Defendant Moffett said at the convention, in reference to Mr. Nader. "We're just not going to make the same mistake we made in 2000."

52. Defendant Moffett told New Mexico Democratic Party Chair and DNC official John Wertheim that he should appoint someone to spearhead the effort to keep Nader-Camejo off the ballot in that state. Mr. Wertheim agreed to do so. "This is a central focus of my own duties as chairman," Mr. Wertheim told *The New Mexican*.

53. At the close of the Democratic convention, on July 29, 2004, DNC Chairman McAuliffe reiterated his claim that "We can't afford to have Ralph Nader in the race." *Business Week* reported Mr. McAuliffe's statement under the headline, "The Dems' Game Plan to Create a Two-Man Race." That "Game Plan," which Defendants jointly planned and executed with their co-conspirators, was to file groundless and abusive lawsuits and otherwise obstruct the Nader-Camejo Campaign as many times in as many states as possible during the 2004 election.

54. Eighteen state or local Democratic Parties eventually joined Defendants' conspiracy and either initiated or materially supported unfounded and abusive lawsuits filed against the Nader-Camejo Campaign, or intervened in proceedings to deny Nader-Camejo ballot access. The state Democratic Parties of Arkansas, Colorado, Florida, Maine, Michigan, Mississippi, Nevada, New Hampshire, Washington and Wisconsin initiated such lawsuits, while the state Democratic Parties of Arizona, Illinois, Iowa, New Mexico, Ohio, and Pennsylvania materially supported such lawsuits filed in their states. In Oregon, state Democratic Party officials intervened in proceedings to deny Nader-Camejo ballot access. In West Virginia, local Democratic Party officials filed a

complaint seeking to compel the Secretary of State to refer Nader-Camejo's nomination papers to the Attorney General's office for investigation.

55. In addition to the state law complaints, conspirators filed five FEC complaints against the Nader-Camejo Campaign. Co-conspirator CREW filed two complaints, Michigan Democratic Party Chair Mark Brewer filed one, New Hampshire Democratic Party Chair Kathleen Sullivan filed one, and District of Columbia-based attorney Daniel Schneider filed conspirators' fifth FEC complaint.

56. Of the 24 state court complaints conspirators filed against Nader-Camejo nationwide, DNC officials filed seven in their own names, including Scott Maddox of Florida, Dorothy Melanson of Maine, Mark Brewer of Michigan, Wayne Dowdy of Mississippi, Kathleen Sullivan of New Hampshire (two) and Paul Berendt of Washington. In addition, DNC official James Edmundson of Oregon intervened in the proceedings filed in that state, and on information and belief, DNC officials Michael Madigan of Illinois and John Wertheim of New Mexico assisted in complaints filed in their states. Finally, DNC official Anna Burger is Secretary-Treasurer of SEIU, the conspirators' Oregon plaintiff. Thus, on information and belief, at least ten DNC officials directly participated in the conspirators' nationwide legal assault.

57. Furthermore, unidentified DNC officials specifically directed state party officials to initiate litigation against Nader-Camejo. The DNC also hired and paid for several state parties' lawyers and, on information and belief, coordinated with The Ballot Project to secure *pro bono* counsel in other states. High-level DNC staff developed and coordinated the conspiracy's nationwide litigation strategy, while rank-and-file DNC staff helped prepare the conspirators' complaints.

58. For example, an email DNC employee Caroline Adler sent to DNC staff contained an attachment entitled "Script for Nader Petition Signers," which DNC employees used to help conspirators manufacture evidence upon which to challenge Nader-Camejo's nomination papers. The electronic document's properties indicate that DNC and Kerry-Edwards Campaign consultant Jack Corrigan authored this document.

59. The Kerry-Edwards Campaign also joined the conspiracy, coordinating with lawyers and directly participating in the conspiracy's litigation. For example, an email from Judy Reardon, the Kerry-Edwards Campaign's deputy national director for northern New England, indicates Ms. Reardon herself drafted one of the conspirators' complaints and coordinated with the Democratic Party officials and attorneys who filed it, including New Hampshire Democratic Party Chair Kathleen Sullivan.

60. The Ballot Project directed the conspiracy in conjunction with the DNC and the Kerry-Edwards Campaign, all headquartered in the District of Columbia, and coordinated with state Democratic Parties to recruit attorneys to provide counsel for the conspiracy's nationwide legal assault. As Defendant Moffett told the *New York Times*, "We're doing everything we can to facilitate lawyers in over 20 states."

61. At least 95 lawyers from 53 law firms eventually joined the litigation. The DNC, state Democratic Parties and The Ballot Project collectively paid these firms nearly $1 million, while their co-conspirator bar members contributed in excess of $2 million in *pro bono* legal services.

62. Despite their massive expenditure of resources and their campaigns of harassment, intimidation and sabotage, the conspirators eventually lost the vast majority of lawsuits they filed. The FEC also dismissed all five complaints conspirators filed.

The conspirator's intent, however, was not to vindicate valid claims, but to use the sheer burden of litigation itself as a means to bankrupt and disrupt the Nader-Camejo Campaign, to keep Nader-Camejo off the ballot, and to suppress the candidates' speech and the Plaintiff-voters' rights of association. As Defendant Moffett admitted to the *Washington Post* in August 2004, "We wanted to neutralize his campaign by forcing him to spend money and resources defending these things, but much to our astonishment we've actually been more successful than we thought we'd be in stopping him from getting on at all."

63. After the 2004 election, Defendant Moffett reaffirmed Defendants' unlawful intent. "We had a role in the ballot challenges," Defendant Moffett told *The Guardian UK* in December 2004. "We distracted him and drained him of resources. I'd be less than honest if I said it was all about the law. It was about stopping Bush from getting elected."

64. During the election, however, Defendants denied and fraudulently concealed their involvement in conspirators' groundless and abusive litigation against Nader-Camejo. In September 2004, for example, DNC spokesman Jano Cabrera told the Associated Press, "Our state parties made the decision to make sure that if Ralph Nader wanted to get on the ballot, that he was playing by the rules." Mr. Cabrera also specifically denied that the DNC was funding the state parties' litigation. In fact, FEC records now confirm, the DNC hired several of the state parties' law firms.

65. Defendant John Kerry likewise denied involvement in conspirators' wrongful litigation. "I respect [Mr. Nader]. I'm not going to attack him in any way," Mr. Kerry told the Associated Press in April 2004. "I'm just going to try to talk to his people

and point out that we've got to beat George Bush. And I hope that by the end of this race I can make it unnecessary for people to feel they need to vote for someone else." In fact, however, despite John Kerry's prior disavowal, the Kerry-Edwards Campaign directly participated in at least one lawsuit conspirators filed against Nader-Camejo.

66. Defendants' conspiracy against the Nader-Camejo Campaign in 2004 was unprecedented in its magnitude and scope. The DNC, the Kerry-Edwards Campaign, The Ballot Project, 18 state or local Democratic Parties, at least 95 lawyers from 53 law firms, and hundreds if not thousands of Democratic Party operatives conspired with the specific intent of using legal and administrative processes to bankrupt the Nader-Camejo Campaign and prevent Nader-Camejo from running for President and Vice President, thereby denying millions of Americans the choice of voting for them. Accordingly, Defendants unlawfully conspired to abuse legal and administrative processes to achieve four distinct but related improper purposes:

i. Defendants unlawfully conspired to cause financial injury and other damages to the Nader-Camejo 2004 presidential campaign;

ii. Defendants unlawfully conspired to cause financial injury and other damages to Mr. Nader and Mr. Camejo personally;

iii. Defendants unlawfully conspired with state actors and acted under color of state law to violate Nader-Camejo's constitutional rights by preventing them from appearing on the ballot as candidates in the 2004 presidential election;

iv. Defendants unlawfully conspired with state actors and acted under color of state law to violate Plaintiff-voters' constitutional rights, and those of others similarly situated, by denying voters their free choice of candidates in the 2004 presidential election.

II. Defendants Engaged in Acts of Harassment, Intimidation and Sabotage in Furtherance of Their Conspiracy.

67. The conspirators knew that litigation alone would be insufficient to prevent Nader-Camejo from gaining ballot access in certain states. Therefore, to support their legal assault, conspirators in these states engaged in acts of harassment, intimidation and sabotage, often under fraudulent or false pretenses. These acts were specifically intended to prevent Nader-Camejo from complying with state election laws, and to manufacture legal grounds for the conspirators' otherwise baseless claims.

68. In Ohio, where Mr. Nader received 117,857 votes in 2000, and where Nader-Camejo could gain ballot access in 2004 by collecting 5,000 signatures, conspirators orchestrated a massive campaign of harassment and intimidation to prevent Nader-Camejo petitioners from collecting signatures. Conspirators hired private investigators to visit petitioners' homes and warn them that they were the subject of a "background check" the investigators were conducting. Conspirators' lawyers also attempted to subpoena 27 different petitioners, and repeatedly called them at home to demand their compliance. The subpoenas' demands were so unreasonable and burdensome that compliance would have prevented petitioners from doing anything else – including collecting signatures. Specifically, the subpoenas demanded that petitioners on short notice report to the offices of law firms throughout the state and produce:

> (1) All documents, including but not limited to correspondence, memoranda, notes, electronic mail, and part-petitions, relating to the obtaining of signatures from Ohio residents for part-petitions and/or the Statement of Candidacy and Nominating Petition filed by Ralph Nader;
>
> (2) All documents, including but not limited to correspondence, memoranda, notes, and/or electronic mail, relating to communications with: any persons affiliated with Ralph Nader; and any persons acting as solicitors to obtain signatures for Ralph Nader to qualify him for certification to the ballot for the general election as an independent candidate in Ohio;

(3) All documents, including but not limited to correspondence, memoranda, notes, electronic mail, contracts, bank checks, and bank account statements, relating to your being paid for obtaining signatures for Ralph Nader to qualify him for certification to the ballot for the general election as an independent candidate in Ohio;

(4) All documents, including but not limited to, voter registration cards, drivers' licenses, bank account statements, leases, deeds, property tax assessments, and utility bills, evidencing your residence since January 1, 2000; and

(5) All documents, including but not limited to, voter registration cards, evidencing the states in which you have been registered to vote."

69. In Oregon, where Mr. Nader received 77,357 votes in 2000, and where Nader-Camejo could gain ballot access in 2004 by holding a nominating convention with 1,000 attendees, conspirators openly admitted their intention to interfere. "If we think it gets to a point where we need to step in and mobilize to make sure he doesn't get on the ballot, then we will," a spokesperson for America Coming Together (ACT), a Democratic 527 founded by SEIU, told CBS News in April 2004. ACT, SEIU, Oregon Democratic Party members and at least one local Oregon Democratic Party official subsequently engaged in a coordinated effort to disrupt two Nader-Camejo nominating conventions, held in April and in June, causing them to fail. When Nader-Camejo later tried to gain ballot access by collecting signatures on nominating petitions, ACT and SEIU organized teams of operatives to sabotage the petitions under false pretenses, by deliberately signing them in the wrong place, thereby invalidating the entire sheet. Conspirators then resorted to the same harassment and intimidation tactics they employed in Ohio. Private detectives visited petitioners' homes and threatened them with jail time, while their co-conspirator attorneys sent misleading letters falsely threatening petitioners with "conviction of a felony with a fine of up to $100,000 or prison for up to five years" if they submitted signatures that were later invalidated.

70. In Pennsylvania, where Mr. Nader received 103,392 votes in 2000, and where Nader-Camejo could gain ballot access in 2004 by submitting 25,697 signatures, on information and belief conspirators sabotaged Nader-Camejo's petitions under false pretenses by signing thousands of fake names. Nader-Camejo petitioners expunged approximately 7,000 such names, but did not detect a small number (687 or 1.3% of the total) among the 51,273 signatures they submitted. The conspirators later used this manufactured evidence as a basis for their lawsuit and subsequent demand for $81,102.19 in litigation costs.

71. The conspirators' campaign of harassment, intimidation and sabotage was decisive to the success of their litigation against Nader-Camejo. The conspirators won their lawsuits in Ohio, Oregon and Pennsylvania, and Illinois, but lost in every other state. Nader-Camejo also withdrew in Arizona, where the conspirators sued first, due to the prohibitive cost of defending the litigation. Mr. Nader was on the ballot in each of these states as a candidate in the 2000 presidential election, and Nader-Camejo would have been in 2004 but for the conspirators' unlawful interference.

III. Defendants or Their Co-Conspirators Filed 24 State Law Complaints and Five FEC Complaints Against the Nader-Camejo Campaign in Furtherance of Their Conspiracy.

1) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in Arizona.

72. On June 23, 2004, Dorothy Schultz and Betty Elizabeth Hughes, registered Democrats in Arizona, filed a complaint in the Maricopa County Superior Court challenging Nader-Camejo's nomination papers under A.R.S. § 16-351. The complaint identified Andrew S. Gordon and the law firm of Coppersmith, Gordon,

Schermer, Owens and Nelson, P.L.C. as attorneys for Dorothy Schultz and Betty Elizabeth Hughes.

73. State law prohibits the Arizona Democratic Party from filing challenges in its own name, but Chairman and DNC official Jim Pederson told the Associated Press that the Party had supported the plaintiffs and had informed the Kerry-Edwards Campaign about the lawsuit.

74. On July 2, 2004, Nader-Camejo was forced to withdraw their nomination papers and end the proceeding due to the prohibitive cost of the litigation.

75. On August 16, 2004, Nader-Camejo filed a complaint in the United States District Court for the District of Arizona, challenging Arizona's filing deadline.

76. On August 31, 2004, plaintiff Schultz filed an intervenor's motion to dismiss and requested Rule 11 sanctions in Nader-Camejo's District Court proceeding. Plaintiff Schultz's motion to dismiss identified Thomas K. Irvine, Larry J. Wulkan, the Irvine Law Firm, P.A., Marty Harper, Kelly J. Flood and Shughart, Thompson and Kilroy, P.C. as her attorneys.

77. On September 10, 2004, the District Court denied Plaintiff Schultz's Rule 11 motion and denied Nader-Camejo injunctive relief. Nader-Camejo did not appear on the Arizona ballot as candidates in the 2004 presidential election.

78. In 2004 the DNC transferred at least $253,458 to the Arizona Democratic Party, and at least $2,500 to Arizona Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

2) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in Arkansas.

79. On September 10, 2004, Linda Chesterfield, a registered Democrat in Arkansas, and the Democratic Party of Arkansas filed a complaint in the Circuit Court of Pulaski County, Sixth Division, challenging Nader-Camejo's nomination papers under Ark. Stat. Ann. § 7-7-103(d). The complaint identified Robin J. Carroll, the law firm of Vickery and Carroll, P.A. and Brian D. Greer as plaintiffs' attorneys.

80. On September 20, 2004, the Circuit Court of Pulaski County ordered the Secretary of State to remove Nader-Camejo from the Arkansas state ballot.

81. On September 21, 2004, Nader-Camejo appealed to the Supreme Court of Arkansas, which vacated the lower court's order and directed the Secretary of State to certify Nader-Camejo's nomination papers. Nader-Camejo appeared on the Arkansas ballot as candidates in the 2004 presidential election.

82. In 2004 the DNC transferred at least $266,101 to the Arkansas Democratic Party, and at least $286,364 to Arkansas Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

3) Defendants or their co-conspirators filed two complaints against the Nader-Camejo Campaign in Colorado.

83. On September 13, 2004, Valentin Vigil, Gary Fedel and Susan Fedel, registered voters in Colorado, and Colorado Democratic Party Executive Director Julie DeWoody, on behalf of the Colorado Democratic Party, filed a complaint in the District Court of Denver County, Colorado challenging Nader-Camejo's nomination papers under C.R.S. 1-4-501(3). The complaint identified David Fine, Michael Belo, the law firm

Kelly, Haglund, Garnsey and Kahn, LLC, and the law firm Berenbaum, Wienshienk and Eason as their attorneys.

84. On September 13, 2004, Nancy Pakieser, a registered Democrat in Colorado, and Maurice O. Nyquist, a registered voter in Colorado, filed a separate complaint in the District Court of Denver County, Colorado, challenging Nader-Camejo's nomination papers under C.R.S. 1-4-501(3). The Pakieser complaint identified Mark G. Grueskin of the firm Isaacson, Rosenbaum, Woods and Levy, P.C. as their attorneys.

85. In an oral decision, the District Court dismissed both complaints, and Nader-Camejo appeared on the Colorado ballot as candidates in the 2004 presidential election.

86. IRS records indicate that The Ballot Project coordinated with Isaacson Rosenbaum and reimbursed the firm for its expenses. In addition, in 2004 the DNC transferred at least $224,930 to the Colorado Democratic Party, and at least $1,973,504 to Colorado Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

4) Defendants or their co-conspirators filed two complaints against the Nader-Camejo Campaign in Florida.

87. On September 2, 2004, Candice Wilson and Alan Herman, registered voters in Florida, Scott Maddox, Chairman of the Florida Democratic Party, and the Florida Democratic Party filed a complaint in the Second Judicial Circuit Court for Leon County, Florida, challenging Nader-Camejo's nomination papers under Fla. Stat. § 102.168. The complaint identified Stephen Rosenthal, Michael Olin, Maria Kayanan, Mark Herron, Richard Rosenthal, the law firm Podhurst Orseck, P.A., the law firm

Messer, Caparello and Self, P.A., and the Law Offices of Richard Rosenthal as attorneys for the plaintiffs.

88. On September 2, 2004, Florida voters Harriet Jane Black, William Chapman, Robert Rackleff and Terry Anderson filed a separate complaint in the Second Judicial Circuit Court for Leon County, Florida, challenging Nader-Camejo's nomination papers under Fla. Stat. § 102.168. The complaint identified Edward Stafman as attorney for the plaintiffs. Subsequent filings identified Brooke Lewis and David Miller of the firm Broad and Cassel, and Joel Perwin of the Law Office of Joel S. Perwin as attorneys for the plaintiffs.

89. On September 9, 2004, the Circuit Court issued a preliminary injunction enjoining the Secretary of State from certifying Nader-Camejo as candidates for President and Vice President in Florida. "I'm quite confident in the ruling," Circuit Court Judge Kevin P. Davey told the *Washington Post*. "There's at least 15 reasons as to why they won't qualify, at least 15 that I counted up. If it was one or two, I'd be worried about it, but there's a whole lot of reasons Mr. Nader and Mr. Camejo aren't going to appear on the ballot in Florida."

90. "Florida is huge – huge," Mr. Moffett told a Knight-Ridder reporter after Judge Davey's decision. "Florida is not only important for the obvious reasons, but also as a symbolic victory."

91. On September 10, 2004, Nader-Camejo appealed to Florida's First District Court of Appeals for a stay of the Circuit Court's preliminary injunction. Attorneys Stephen Rosenthal, Michael Olin, Maria Kayanan, Mark Herron, Richard Rosenthal and Joel Perwin filed an opposition to this appeal. The Court of Appeals *sua*

sponte certified the case to the Supreme Court of Florida. The Supreme Court accepted jurisdiction but directed the Circuit Court to proceed to final judgment first.

92. On September 15, 2004, the Circuit Court issued an order enjoining the Secretary of State from certifying Nader-Camejo as candidates for President and Vice President in Florida.

93. On September 16, 2004, attorneys Edward Stafman, Kelly Overstreet Johnson, David Miller and Brooke Lewis submitted an appellees' brief to the Supreme Court of Florida in support of plaintiffs below. Attorneys Laurence Tribe, Joel Perwin, Stephen Rosenthal, Michael Olin, Maria Kayanan, Mark Herron, Richard Rosenthal, Martin Lederman, Eric Seiler, Amy Brown and Katherine Pringle submitted a separate appellees' brief in support of plaintiffs below.

94. Attorney Pringle's bio on her firm's website states that she "served as co-counsel to the Kerry for President Campaign in litigation concerning the 2004 Florida election ballot."

95. On September 17, 2004, attorney Laurence Tribe argued before the Florida Supreme Court on behalf of the plaintiffs below that Nader-Camejo did not meet the requirements to be candidates for President and Vice President in Florida. Defending his involvement, Mr. Tribe told Harvard Law School's independent newspaper *The Record*, "I believe that Ralph Nader is unfortunately responsible for the fact that Bush rather than Gore became the 43rd President."

96. A team of attorneys assisted Mr. Tribe, including M. Stephen Turner, Edward Stafman, Kelly Overstreet Johnson, David Miller, Brooke Lewis, Stephen

Rosenthal, Michael Olin, Maria Kayanan, Mark Herron, Thomas Findley, Richard Rosenthal and Joel Perwin.

97. On September 17, 2004, the Supreme Court of Florida reversed the trial court and vacated the Court of Appeals' injunction. Nader-Camejo appeared on the Florida ballot as candidates in the 2004 presidential election.

98. The conspirators reportedly recruited 30 lawyers in total to challenge Nader-Camejo's Florida nomination papers. The conspirators did not sue other candidates on Florida's ballot, Mr. Moffett told the *Washington Post*, because those candidates didn't pose a threat to the Kerry-Edwards Campaign.

99. IRS records indicate that The Ballot Project paid $150,000 to Broad and Cassel for representing the Florida plaintiffs, and another $5,000 to attorney Samuel Dubbin. The Ballot Project also paid $20,534 to American University professor Allan Lichtman to testify as an expert witness. FEC records indicate that the Florida Democratic Party retained Messer, Caparello and Self, and paid the firm $57,481 in 2004. FEC records also indicate that the DNC reimbursed Joel S. Perwin and Martin Lederman $975 and $536, respectively, for travel expenses in 2004. Finally, in 2004 the DNC transferred at least $1,709,626 to the Florida Democratic Party, and at least $4,789,765 to Florida Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

5) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in Illinois.

100. On June 28, 2004, John F. Tully, Jr., a registered Democrat in Illinois, filed a complaint with the Illinois State Board of Elections challenging Nader-Camejo's

nomination papers under 10 ILCS 5/10-8. Michael Kasper and Michael Kreloff served as Mr. Tully's attorneys before the Board of Elections and in subsequent proceedings. Mr. Kasper is General Counsel and Treasurer of the Illinois Democratic Party. Mr. Kreloff is a Democratic Party Committeeman from Cook County.

101. Neither Mr. Kasper nor Mr. Kreloff disclosed his employment by or affiliation with the Illinois Democratic Party in court filings, but the *Illinois Times* reported that Mr. Tully "formally filed the objection" on the Party's behalf. Media reports and records from the Chicago Board of Election Commissioners also indicate that Democratic Speaker of the Illinois State House Michael Madigan's staff secured copies of Nader-Camejo's nomination papers in order, on information and belief, to help prepare Mr. Tully's complaint.

102. On July 6, 2004, the Board of Elections invalidated thousands of signatures on Nader-Camejo's nomination petition and determined that it was short of the 25,000 required by Illinois law.

103. On July 27, 2004, Nader-Camejo sought a preliminary injunction in the United States District Court for the Northern District of Illinois, Eastern Division, to enjoin the Board of Elections from removing them from the Illinois ballot.

104. On August 4, 2004, Mr. Tully, through his Democratic Party attorneys Mr. Kasper and Mr. Kreloff, filed a motion to dismiss Nader-Camejo's complaint in the District Court.

105. On August 19, 2004, the Board of Elections found that Nader-Camejo were not certified as candidates for President and Vice President in Illinois.

106. On August 23, 2004, the District Court denied Nader-Camejo's motion for a preliminary injunction. Nader-Camejo immediately appealed to the United States Court of Appeals for the Seventh Circuit.

107. On August 27, 2004, Nader-Camejo sought expedited review of the Board of Elections' August 19th decision in the Illinois Appellate Court for the First District from the Circuit Court of Cook County.

108. On September 23, 2004, the Illinois Appellate Court affirmed the Board of Elections' decision to remove Nader-Camejo from the Illinois ballot.

109. On September 29, 2004, the Seventh Circuit Court of Appeals denied Nader-Camejo's appeal. Nader-Camejo did not appear on the Illinois ballot as candidates in the 2004 presidential election.

110. The Ballot Project paid Mr. Kreloff $12,000 for legal consulting in 2004. In addition, in 2004 the DNC transferred at least $86,301 to the Illinois Democratic Party, and at least $5,000 to Illinois Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

6) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in Iowa.

111. On August 20, 2004, Lee Baldwin Jolliffe, a registered Democrat, filed a complaint with the Iowa State Commissioner of Elections challenging Nader-Camejo's nomination papers under Iowa Code § 44.4. The complaint identified Steven P. Wandro, the law firm of Wandro, Baer and Casper, P.C., Glenn L. Norris and the law firm of Hawkins and Norris, P.C. as her attorneys.

112. On August 26, 2004, Ms. Jolliffe told the Des Moines Register that she was a supporter of John Kerry, and that she filed her objection because "I was really upset with the last election," when Democrat Al Gore lost to George W. Bush. The Des Moines Register also identified Mr. Wandro and Mr. Norris as Democrats.

113. Ms. Jolliffe filed her complaint based upon a review of Nader-Camejo's petition to determine whether the signers were included as registered voters on the Iowa Democratic Party's Voter Activation Network, a proprietary database of voters. Ms. Jolliffe thus received valuable material support from the Iowa State Democratic Party in preparing her complaint.

114. On August 30, 2004, Iowa's Secretary of State found Nader-Camejo's nomination papers valid. Nader-Camejo appeared on the Iowa ballot as candidates for President and Vice President.

115. In 2004 the DNC transferred at least $1,294,404 to the Iowa Democratic Party, and at least $1,420,650 to Iowa Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

7) Defendants or their co-conspirators filed two complaints against the Nader-Camejo Campaign in Maine.

116. On August 23, 2004, Maine Democratic Party Chair and DNC official Dorothy M. Melanson filed a complaint with Maine's Secretary of State challenging Nader-Camejo's nomination papers under 21-A M.R.S. § 356. The complaint identified Michael K. Mahoney and the law firm Preti, Flaherty, Beliveau, Pachios, and Haley as Ms. Melanson's attorneys.

117. On August 23, 2004, Benjamin Tucker, a registered Democrat in Maine, filed a second complaint challenging Nader-Camejo's nomination papers under 21-A M.R.S. § 356. Mr. Tucker's complaint identified James T. Kilbreth and the law firm Verrill and Dana, LLP as Mr. Tucker's attorneys.

118. On August 30-31, 2004, the Maine Bureau of Corporations, Elections, and Commissions held a public hearing on Ms. Melanson's and Mr. Tucker's complaints. At the hearing, Ms. Melanson testified that she was a salaried employee of the Democratic Party, and that she had formerly held many positions with the DNC. In fact, Ms. Melanson was and is currently a DNC official. In response to questioning from Nader-Camejo's attorney, Ms. Melanson testified:

> Q: I'm asking you if the Democratic Party has contacted you personally and said we will support with money with other supports that as you need them to bring a challenge against the petitions of Ralph Nader in Maine. Has the Democratic Party contacted you personally and asked you to do this?
>
> A: Yes.
>
> Q: And have they said they will help you pay for it?
>
> A: They have said they would help in many ways.
>
> Q: Did they say they would help you pay for it?
>
> A: Yes.
>
> Q: Are they paying for your attorneys?
>
> A: They are.
>
> Q: Do they expect that you should make a response to them in your capacity as state Democratic Chair once these hearings are concluded and a decision is rendered by the Secretary of State's office?
>
> A: Are they expecting to hear what the decision is?

Q: From you personally?

A: Yes.

Q: Was this part of the agreement that you made with them? I mean, I characterize what I've heard so far as an agreement between them and you to perform certain deeds for funds and to make a response as part of this agreement. Is that correct? In other words, they're expecting a report?

A: There are members of the DNC who certainly want to hear what the outcome of this is.

Q: They're expecting to hear this from you and from no other person?

A: Or from my attorneys.

119. On September 8, 2004, the Secretary of State denied both Ms. Melanson's and Mr. Tucker's complaints. Ms. Melanson appealed to the Kennebec Superior Court of Maine on September 10, 2004. The Superior Court denied the appeal on September 27, 2004. Ms. Melanson appealed that decision to the Maine Supreme Judicial Court, which affirmed the Superior Court on October 8, 2004. Nader-Camejo appeared on the Maine ballot as candidates in the 2004 presidential election.

120. The DNC retained Preti, Flaherty, Beliveau, Pachios, and Haley in September and October of 2004, and paid the firm $32,282 in legal and political consulting fees. In addition, in 2004 the DNC transferred at least $222,412 to the Maine Democratic Party, and at least $373,559 to Maine Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

8) Defendants or their co-conspirators filed an FEC complaint and a state court complaint against the Nader-Camejo Campaign in Michigan.

121. On July 9, 2004, Michigan's Secretary of State refused to certify Nader-Camejo's nomination as the Reform Party candidates for President and Vice President in Michigan.

122. On July 15, 2004, Nader-Camejo filed a nomination petition to gain ballot access as a independent candidates for President and Vice President. The next day, the Michigan Democratic Party issued a press release entitled, "Democrats to File Complaint Unless Nader Withdraws."

123. On July 22, 2004, Mark Brewer, Michigan Democratic Party Executive Chair and Vice Chair of the DNC, filed a complaint with the Michigan State Bureau of Elections challenging Nader-Camejo's nomination papers under NCLS § 168.552. The complaint identified Mary Ellen Gurewitz, Andrew Nickelhoff, and the law firm of Sachs, Waldman as attorneys for the plaintiffs.

124. Ms. Gurewitz's bio on the Sachs Waldman website states that Ms. Gurewitz "provides representation to the Michigan Democratic Party and has represented many candidates...in election related matters, including ballot access." Mr. Nickelhoff's bio states that Mr. Nickelhoff "provides representation and advice to the Michigan Democratic Party, as well as Democratic Party organizations and candidates."

125. On September 3, 2004, the Michigan State Court of Appeals ruled that Nader-Camejo was qualified to appear on Michigan's ballot. Nader-Camejo appeared on the Michigan ballot as candidates in the 2004 presidential election.

126. On September 17, 2004, Mr. Brewer filed an FEC complaint against the Nader-Camejo Campaign, requesting that the FEC suspend presidential matching fund payments to the campaign. The FEC took no action against the Nader-Camejo Campaign and dismissed the complaint by unanimous vote on June 23, 2005.

127. In 2004 the DNC transferred at least $251,327 to the Michigan Democratic Party, and at least $2,963,649 to Michigan Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

9) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in Mississippi.

128. On September 3, 2004, Wayne Dowdy, DNC official and Chairman of the Mississippi Democratic Party, filed a complaint on behalf of the party with the Mississippi State Board of Election, challenging Nader-Camejo's nomination papers under Miss. Code Ann, 23-15-963. The complaint identified Samuel L. Begley and Begley Law Firm, PLLC as attorneys for the plaintiffs.

129. On September 7, 2004, the Board of Election Commissioners held a hearing on the complaint. Mr. Begley, Brad Pigott of Pigott, Reeves, Johnson and Minor, P.A., and Richard Davidson represented the Democratic Party at the hearing. At the hearing's conclusion, the Board denied the Democratic Party's complaint. Nader-Camejo appeared on the Mississippi ballot as a candidates in the 2004 presidential election.

130. The DNC paid the Begley Law Firm legal consulting fees of $6,501 on October 15, 2004. In addition, in 2004 the DNC transferred at least $89,519 to the

Mississippi Democratic Party. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

10) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in Nevada.

131. On August 24, 2004, registered Democrats Renee McKinley and Joan T. Ward, joined by registered voter Myrna McKinley and the Nevada State Democratic Party, filed a complaint in Nevada's First Judicial District Court challenging Nader-Camejo's nomination papers under Nev. Rev. Stat. Ann. § 298.109. The complaint and subsequent court filings identified Paul E. Larsen, Allen J. Wilt, and the law firm of Lionel, Sawyer and Collins as attorneys for the plaintiffs.

132. On August 30, the District Court commenced a three-day expedited hearing to consider the complaint. Ian Glinka, Director of Information Technology for the Nevada State Democratic Party, testified that he had reviewed Nader-Camejo's nomination papers and concluded that thousands of signatures were invalid.

133. On September 1, 2004, the District Court denied plaintiffs' complaint, and they appealed to the Nevada State Supreme Court, which affirmed the District Court on September 15, 2004. Nader-Camejo appeared on the Nevada ballot as candidates in the 2004 presidential election.

134. In 2004 the DNC transferred at least $575,458 to the Nevada Democratic Party, and at least $1,146,292 to Nevada Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

11) Defendants or their co-conspirators filed an FEC complaint and two state court complaints against the Nader-Camejo Campaign in New Hampshire.

135. On August 10, 2004, New Hampshire Democratic Party Chair Kathleen Sullivan filed an FEC complaint against the Nader-Camejo Campaign. The FEC took no action against the Nader-Camejo Campaign and dismissed the complaint by unanimous vote on June 23, 2005.

136. On September 7, 2004, DNC official and New Hampshire Democratic Party Chair Kathleen Sullivan and the New Hampshire Democratic State Committee filed a complaint with the New Hampshire Ballot Law Commission challenging Nader-Camejo's nomination papers under RSA 655:44.

137. On September 13, 2004, Kathleen Sullivan and New Hampshire voters Hazel R. Tremblay, Dorie M. Grizzard and Brian Farias filed a second complaint challenging Nader-Camejo's nomination papers under RSA 655:44. The complaint identified Martha Van Oot, Emily Gray Rice and the law firm Orr and Reno, P.A. as attorneys for the plaintiffs.

138. Ms. Van Oot and Ms. Rice worked on the lawsuit in coordination with Kathleen Sullivan and Judy Reardon, the Kerry-Edwards Campaign's deputy national director for Northern New England. Ms. Reardon drafted the complaint, while Ms. Van Oot made hand-written revisions, which were circulated to Ms. Sullivan, Ms. Reardon and attorneys Mark Atkins of Welts, White and Fontain, Burt Nadler of Petrucelly and Nadler, and Martin Honigberg of Sulloway and Hollis.

139. On September 24, 2004, the Commission voted unanimously to deny the two complaints. Nader-Camejo appeared on the New Hampshire ballot as candidates in the 2004 presidential election.

140. The Kerry-Edwards Campaign paid Ms. Reardon $64,000 from March to July, 2004. In addition, in 2004 the DNC transferred at least $284,554 to the New Hampshire Democratic Party, and at least $978,590 to New Hampshire Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

12) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in New Mexico.

141. At the 2004 Democratic National Convention, The Ballot Project president Toby Moffett told New Mexico State Democratic Party Chair and DNC official John Wertheim that he should appoint someone to spearhead the party's efforts to deny Nader-Camejo ballot access in New Mexico. Mr. Wertheim agreed to do so, stating, "This is a central focus of my own duties as chairman."

142. On September 10, 2004, attorney Eric Sedillo Jeffries, the New Mexico contact for the group Lawyers for Kerry, wrote to New Mexico's Secretary of State that he represented "at least three Democrats who will probably be filing a suit on the Nader petitions received by your office." On the last page of Attorney Jeffries' letter, he indicated that he had copied several parties, including the clients referenced above and Mr. Nader. Attorney Jeffries used the standard "cc:" designation to indicate this fact. On a separate page of the letter, which was otherwise blank, Attorney Jeffries indicated that he had secretly copied three additional parties via email. Jeffries used the standard "bcc:"

designation to indicate this fact. The three additional parties were New Mexico State Democratic Party Deputy Executive Director Gideon Elliot, New Mexico State Democratic Party Chair and DNC Official John Wertheim, and attorney Andrew Schultz.

143. On September 15, 2004, plaintiffs Moises Griego, Richard W. Kirschner, Abraham Gutman, Vanessa M. Alarid and Laura LaFlamme filed a complaint in the Second Judicial District Court of New Mexico, presumably under N.M. Dist. Ct. R.C.P. 1-096, seeking a preliminary injunction to prevent the Secretary of State from placing Nader-Camejo on New Mexico's ballot as candidates for President and Vice President of the United States. The complaint identified Eric Sedillo Jeffries, Andrew G. Schultz, the law firm Jeffries, Rugge, and Rosales, P.C., and the law firm Rodey, Dickason, Sloan, Akin and Robb, P.A. as attorneys for the plaintiffs.

144. On September 17, 2004, District Court Judge Wendy York issued an order denying Nader-Camejo's right to run as independent candidates for President and Vice President in New Mexico. Three days later, several New Mexico voters revealed that Judge York had donated $1,000 to Democratic presidential candidate John Kerry's campaign. Judge York's order was vacated, and she recused herself from the case. That same day, District Court Judge Theresa Baca issued an identical order.

145. On September 23, 2004, pursuant to Nader-Camejo's appeal, the New Mexico State Supreme Court stayed the District Court's order, and directed the Secretary of State not to destroy or distribute any ballots pending further order. That same day, three registered New Mexico voters filed a complaint seeking injunctive relief in the United States District Court for the District of New Mexico. The complaint requested the

federal District Court to direct the Secretary of State to place Nader-Camejo on New Mexico's ballot as candidates for President and Vice President of the United States.

146. On September 24, 2004, the federal District Court held a hearing. Attorney Jerry Todd Wertheim made an oral motion to intervene on behalf of state court plaintiff Venessa Alarid. The court denied Attorney Wertheim's motion. Jerry Todd Wertheim is a partner with the firm Jones, Snead, Wertheim and Wentworth, P.A., where New Mexico Democratic Party Chair and DNC official John Wertheim is also a partner.

147. On September 28, 2004, the federal District Court directed the Secretary of State to place Nader-Camejo on New Mexico's ballot. Nader-Camejo appeared on the New Mexico ballot as candidates in the 2004 presidential election .

148. In 2004 the DNC transferred at least $621,992 to the New Mexico Democratic Party, and at least $1,167,980 to New Mexico Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

13) Defendants or their co-conspirators filed two complaints against the Nader-Camejo Campaign in Ohio.

149. On August 18, 2004, the Nader-Camejo Campaign submitted to the Ohio Secretary of State's Election Division a nomination petition with 14,473 signatures. State law required the campaign to submit 5,000 valid signatures, and no more than 15,000 signatures in total.

150. On August 30, 2004, Ohio voters Benson A. Wolman, Jerilyn L. Wolman, Zachary E. Manifold, Julia E. Manifold, Bassel Korkor, Rebecca S. Mosher, Barry C. Keenan, Gerald L. Robinson, Scott Austin, Mary C. Woods, Johnathon Brunner,

Max Kravitz and Daniel T. Kobil filed a complaint with Ohio's Secretary of State challenging Nader-Camejo's nomination papers under ORC Ann. 3513.05 and 3513.257. The complaint identified Donald J. McTigue and the law offices of Donald J. McTigue as attorneys for the plaintiffs.

151. On August 30, 2004, Attorney McTigue requested the Secretary of State to issue subpoenas to nine Nader-Camejo Campaign petitioners, commanding them to appear at the offices of McGinnis and Associates, a court reporting firm, only four days later, on September 3, 2004. Attorney McTigue's request stated:

> Each subpoena should command the individual to bring with them all documents which relate in any manner to the circulation of nominating petitions on behalf of Ralph Nader...in Ohio or any other state, all documents which document any contract or payment from the circulation of such petitions, all documents regarding their voter registration status in Ohio or any other state at anytime, and all assessments, which evidence any residence or residences by such person in Ohio during the years 2000 through 2004.

The Secretary of State did not issue any subpoenas pursuant to this request.

152. On September 2, 2004, plaintiffs Benson Wolman, Marjorie Bender and Robert Crosby, Jr. filed a second complaint, presumably also under ORC Ann. 3513.05, and 3513.257, for a declaratory judgment and injunctive relief in the Court of Common Pleas for Franklin County. The plaintiffs requested a preliminary injunction enjoining the Secretary of State from placing Nader-Camejo on Ohio's ballot as candidates for President and Vice President.

153. On September 4, 2004, plaintiffs Benson Wolman, Marjorie Bender and Robert Crosby, Jr. secured subpoenas from the Franklin County Court of Common Pleas for several Nader-Camejo Campaign petitioners. The subpoenas identified John P.

Gilligan and Russell J. Kuttell of the law firm Schottenstein, Zox and Dunn, L.P.A, and Attorney McTigue as attorneys for the plaintiffs.

154. The subpoenas commanded Nader-Camejo petitioners to appear and give testimony at law firm offices throughout Ohio. Six petitioners were to appear at the offices of Schottenstein, Zox and Dunn, L.P.A. in Cleveland on September 8, 2004. Six petitioners were to appear at the offices of Beckman, Weil, Shepardson and Faller, LLC in Cincinnati on September 9, 2004. Eleven petitioners were to appear at the offices of Sebaly, Shillito and Dyer, L.P.A. in Dayton on September 10 and 13, 2004. Four petitioners were to appear at the offices of Eastman and Smith, Ltd. in Toledo on September 14, 2004.

155. The subpoenas also commanded each Nader-Camejo petitioner – many of them volunteers – to produce:

1) All documents, including but not limited to correspondence, memoranda, notes, electronic mail, and part-petitions, relating to the obtaining of signatures from Ohio residents for part-petitions and/or the Statement of Candidacy and Nominating Petition filed by Ralph Nader.

2) All documents, including but not limited to correspondence, memoranda, notes, and/or electronic mail, relating to communications with:

    a. any persons affiliated with Ralph Nader; and

    b. any persons acting as solicitors to obtain signatures for Ralph Nader to qualify him for certification to the ballot for the general election as an independent candidate in Ohio.

3) All documents, including but not limited to correspondence, memoranda, notes, electronic mail, contracts, bank checks, and bank account statements, relating to your being paid for obtaining signatures for Ralph Nader to qualify him for certification to the ballot for the general election as an independent candidate in Ohio.

4) All documents, including but not limited to, voter registration cards, drivers' licenses, bank account statements, leases, deeds, property tax assessments, and utility bills, evidencing your residence since January 1, 2000.

5) All documents, including but not limited to, voter registration cards, evidencing the states in which you have been registered to vote.

156. One volunteer petitioner received repeated phone calls from Andrew Clubock, an attorney in Washington, D.C. with the law firm Kirkland and Ellis, who left only his name and the message, "Call me about the subpoena." Another volunteer petitioner received a visit to her home from a private detective who claimed to be investigating her. He left a card and told her to call his firm.

157. On September 7, 2004, Ohio's Attorney General filed a motion for a protective order in the Court of Common Pleas to prevent enforcement of plaintiffs' subpoenas. The Attorney General's memorandum in support of the motion stated:

> The Plaintiffs in this case seek to prohibit Ralph Nader from securing a spot to run for president on the Ohio ballot. As part of that strategy, either these specific plaintiffs, or those acting in concert with them, have filed protests with the Ohio Secretary of State concerning various Nader petitions.

158. On September 7, 2004, Attorneys Gilligan, Kuttell and Steven D. Forry of Schottenstein, Zox and Dunn and Attorney McTigue filed a motion to compel depositions and requested oral argument on the motion. The same day, attorney Attorney Clubock of Kirkland and Ellis wrote to Nader-Camejo's counsel, threatening, "we have no choice but to take all appropriate action to enforce the subpoena and seek any other potential remedies for your conduct."

159. On September 8, 2004, the Secretary of State found that 6,464 signatures on Nader-Camejo's petition were valid and certified the petition. That same day, the

Court of Common Pleas granted the Secretary of State's motion for a protective order and stay of discovery.

160. On September 24, 2004, attorneys Andrew Clubock, Gregory F. Corbett and Jennifer Levy of Kirkland and Ellis conducted a deposition of Nader-Camejo Campaign Manager Theresa Amato, which lasted approximately 1-1/2 hours.

161. On September 28, 2004, pursuant to hearings on conspirators' complaints, the Secretary of State invalidated 2,756 more signatures and reversed certification of Nader-Camejo's petition.

162. On October 6, 2004, Nader-Camejo filed for injunctive relief in the United States District Court for the Southern District of Ohio, Eastern Division. On October 7, 2004, the plaintiffs filed a motion to intervene, asserting that they "are truly the real parties in interest here." The court granted the plaintiffs' motion to intervene and denied Nader-Camejo's motion for injunctive relief on October 12, 2004. Nader-Camejo appealed to the Sixth Circuit Court of Appeals, which denied the appeal on or about October 18, 2004.

163. On October 19, 2004, the Ohio Supreme Court denied Nader-Camejo's request for a writ of mandamus. Nader-Camejo did not appear on the Ohio ballot as candidates in the 2004 presidential election.

164. According to the *Toledo Blade*, the Ohio challenge to Nader-Camejo's nomination papers was "filed by attorneys hired by or allied with the Ohio Democratic Party...[as] part of a nationwide effort to prevent Mr. Nader from siphoning votes from Democratic presidential candidate John Kerry." In fact, Attorney Gilligan of Schottenstein, Zox and Dunn was the Columbus, Ohio contact and Attorney Gregory

Corbett of Kirkland and Ellis was the Washington, D.C. contact for the group Lawyers for Kerry. In addition, Attorney McTigue identified the Ohio Democratic Party as his client in an email to Ohio county boards of elections on August 22, 2004. Attorney McTigue also wrote a letter to the Cuyahoga County Board of Elections on December 10, 2004, stating that John Kerry had personally appointed Attorney McTigue "as his legal counsel...with full authority to act on behalf of him and John Edwards" during the Ohio recount of the 2004 presidential election returns.

165. The DNC retained Schottenstein, Zox and Dunn, L.P.A. and paid the firm $39,486 in legal and political consulting fees in September and October of 2004. The DNC also retained Kirkland and Ellis, and paid the firm $247,711 in legal and political consulting fees in September and November of 2004. In addition, in 2004 the DNC transferred at least $2,585,189 to the Ohio Democratic Party, and at least $3,065,661 to Ohio Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

14) Defendants or their co-conspirators intervened in proceedings to deny Nader-Camejo ballot access in Oregon.

166. In April 2004, a spokesperson for the Democratic 527 organization ACT told CBS News, "If we think it gets to a point where we need to step in and mobilize to make sure [Nader-Camejo] doesn't get on the ballot, then we will." Later that month, according to CBS, "ACT joined forces with other organizations in the state to discourage people from signing the petition" at Nader-Camejo's April nominating convention, causing the convention to fall short of the 1,000 signing attendees necessary to qualify for ballot access under state law.

167. On June 26, 2004, Nader-Camejo held another nominating convention. This time the conspirators, acting under false pretenses, took seats at the convention but refused to sign Nader-Camejo's petitions. The conspirators acted pursuant to an email Multnomah County Democratic Party official Moses Ross sent to party members, stating:

> We need as many Oregon Democrats as possible to fill that room and NOT sign that petition. If we attend in large numbers and politely refuse to sign, Nader is denied his needed numbers. It's that simple. Please make every attempt to attend this important event.

168. State officials from Democratic Secretary of State Bill Bradbury's office restricted entry to the convention to one doorway, and counted attendees with a manual clicker. In violation of state law providing that nominating conventions may last up to 24 hours, state officials shut the doors after counting approximately 1,100 attendees, before Mr. Nader had even addressed the convention. State officials thereafter refused entry to Nader-Camejo's legitimate supporters. This action by state officials, together with the actions of conspirators who attended the convention but refused to sign the petitions, caused the convention to fall short of the 1,000 signing attendees.

169. On the same day that conspirators disrupted Nader-Camejo's June convention, they also organized a campaign of harassing phone calls to the office of Plaintiff-voter Gregory Kafoury, which was serving as Nader-Camejo's nomination convention headquarters. Each caller to Mr. Kafoury's office spoke virtually identical words, as if speaking from a script, and the calls came so rapidly that they incapacitated the office phones for the entire day.

170. After disrupting Nader-Camejo's two nominating conventions, the conspirators launched a coordinated campaign of harassment, intimidation and sabotage intended to prevent Nader-Camejo from gaining ballot access by submitting signatures,

as Oregon state law alternatively permits. On August 12, 2004, private investigators hired by SEIU visited petitioners at their homes and falsely threatened them with jail time if signatures they collected were subsequently invalidated. The investigators also delivered petitioners a letter from attorney Margaret Olney of the law firm Smith, Diamond and Olney, which reiterated the false threat. The letter stated that the petitioners must certify that they "obtained the signatures of qualified voters," or face "conviction of a felony with a fine of up to $100,000 or prison for up to five years." This false threat was accompanied by a suggestion that the petitioners call Attorney Olney if they had any information to assist an investigation she claimed her firm was conducting. The blog Blue Oregon subsequently quoted SEIU local 49 chief Alice Dale admitting that SEIU had mailed the letters to 59 petitioners, and that "Two were delivered in person."

171. SEIU and ACT took even more extreme measures to deny Nader-Camejo ballot access. According to Portland, Oregon ACT employee William Gillis, the groups jointly orchestrated a campaign to sabotage Nader-Camejo's petitions. Following is an excerpt from Mr. Gillis' blog, posted in August 2004:

> The offices that I work in, at America Coming Together, are shared by SEIU's election campaign and both organizations are rather heavily tied...For days now, most of the ACT staff had been aware of, if not complicit in, a scheme against the Nader Campaign.
>
> People were pulled into side rooms and the higher echelons of both staffs exchanged a barrage of unusual whispered conversations. What's more, today was set up to be a massive single-day canvassing effort on the part of ACT.
>
> In the last few days I've heard of a concerted effort among the ACT/SEIU staff to attack the Nader petition drive.
>
> A few of my fellow canvassers who were likely to be in the vicinity of the Nader campaign told me they had been asked to "mistakenly" invalidate

> petition papers. Misspelling names or information was a classical attack, but the SEIU had figured a better method.
>
> On every page of signatures in an Oregon petition there is a small section on the bottom for the signature gatherer to sign, asserting their valid oversight. If asked to sign the Nader petition, our canvassers were encouraged to accidentally sign their name in that section instead. Upon realizing their mistake, these innocent canvassers would scribble it out, thus invalidating an entire sheet of signatures.

172. Despite coordinated efforts by the Oregon Democratic Party, SEIU and ACT to prevent Nader-Camejo from complying with state law, on August 24, 2004 the Nader-Camejo Campaign submitted 18,186 signatures, already certified as valid by county elections officials, to Secretary Bradbury's office. This was almost 2,800 more valid signatures than Oregon law required.

173. On August 25, 2004, attorney Roy Pulvers sent a letter to Secretary Bradbury challenging Nader-Camejo's nomination papers. Mr. Pulvers is a contributor to the DNC and a member of the Oregon Democratic Party's President Council, "the party's largest revenue source for "federal" dollars to support presidential, senatorial, and congressional candidates." Attorney Pulvers sent a second letter the same day, asserting that Nader-Camejo's nomination papers were "misnumbered" and should be disqualified.

174. On September 2, 2004, Secretary Bradbury sent Nader-Camejo a letter stating that "there are not sufficient qualified signatures for you to gain ballot access." In an unprecedented act, Secretary Bradbury had invalidated thousands of signatures that county elections officials had already certified as valid, and which Nader-Camejo submitted in accordance with instructions from Secretary Bradbury's own office. Secretary Bradbury invalidated hundreds of these signatures due to alleged defects in Nader-Camejo petitioners' own signatures – just as SEIU and ACT had planned.

175. On September 9, 2004, pursuant to a complaint filed by the Nader-Camejo Campaign, Oregon's Marion County Circuit Court found that Secretary Bradbury's action violated Oregon law. Of the methods Secretary Bradbury used to disqualify Nader-Camejo's validated signatures, the Court wrote, "Neither action was authorized by administrative rule or statute, and each was inconsistent with both the state elections policy as established by the Legislature...and with the prior policy of the Secretary of State." The Court ordered Secretary Bradbury to certify Nader-Camejo's nomination papers.

176. On September 17, 2004, the Oregon Supreme Court deferred to Secretary Bradbury's discretion to interpret and enforce state election laws and granted him a writ of mandamus requiring the Circuit Court to vacate its order. The Oregon Democratic Party, John Neel Pender, the Party's Executive Director, and James Edmundson, the Party's Chair, intervened as parties to this proceeding. The United States Supreme Court declined to review the case, and Nader-Camejo did not appear on the Oregon ballot as candidates in the 2004 presidential election.

177. SEIU maintains close political and financial ties with the DNC. SEIU's Secretary-Treasurer, Anna Burger, is a DNC official, and SEIU endorsed and publicly committed its resources to electing John Kerry in 2004. SEIU also donated $1,000,000 to the DNC in 2004, while the DNC made numerous payments to SEIU, including $33,072 in political consulting fees in October and November 2004. SEIU was also a founding member of ACT and its largest contributor, donating $26 million in 2004, and housing the 527 in SEIU's Portland office.

178. In 2004 the DNC transferred at least $261,609 to the Oregon Democratic Party, and at least $896,002 to Oregon Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

15) Defendants or their co-conspirators filed two complaints against the Nader-Camejo Campaign in Pennsylvania.

179. On August 9, 2004, Philadelphia resident Ralph Dade filed a class action complaint against the Nader-Camejo Campaign in Philadelphia Court of Common Pleas, alleging that he and several others were owed approximately $200 each for signatures they had collected for the campaign. The complaint identified Louis Agre, a Philadelphia Democratic Party Ward leader, and Thomas Martin as attorneys for the plaintiffs. Nader-Camejo disputed the claim on the ground that plaintiffs had submitted invalid signatures, and the complaint was dismissed.

180. On August 9, 2004, Linda S. Serody, Roderick J. Sweets, Ronald Bergman, Richard Trinclisti, Terry Trinclisti, Bernie Cohen-Scott, Donald G. Brown and Julia O'Connell, registered Democrats in Pennsylvania, filed a second complaint in the Pennsylvania Commonwealth Court, challenging Nader-Camejo's nomination papers under 25 PS § 2937. The complaint identified Gregory Harvey, another Philadelphia Democratic Party Ward leader, and Efrem Grail, Daniel Booker, Cynthia Kernick, Brian A. Gordon, Reed Smith LLP, Montgomery McCracken, Walker and Rhoads LLP, and the law offices of Brian A. Gordon as attorneys for the plaintiffs.

181. The complaint challenged approximately 35,000 of the 51,273 signatures on Nader-Camejo's nominating petition on technical grounds, and alleged numerous

procedural grounds for disqualifying Nader-Camejo from Pennsylvania's ballot. Plaintiffs' attorneys prepared the complaint in cooperation with Pennsylvania Democratic Party leaders, including state House Minority Leader Bill DeWeese and former Democratic Whip Mike DeWeese, and with support from approximately 170 Democratic Party operatives Mr. DeWeese and Mr. Veon recruited.

182. On numerous occasions before, during and after the litigation, Mr. DeWeese, Mr. Veon and other party officials stated that the purpose of their lawsuit was to help John Kerry win the election. In July 2004, before Plaintiffs filed their complaint, Pennsylvania Democratic Party Executive Director Don Morabito told the *Philadelphia City Paper*, "we want to make sure" Nader-Camejo doesn't detract votes from Mr. Kerry. On August 2, 2004, Mr. DeWeese told the *Pittsburgh Post-Gazette*, "Working with the AFL-CIO, we will do everything humanly possible to fight [Nader-Camejo]....You don't need a Ph.D in mathematics to understand that 100 percent of the vote [Nader-Camejo] gets will be skimmed from Senator Kerry's total." On August 9, 2004, the day plaintiffs filed their complaint, Mr. DeWeese told the *Post-Gazette*, "We are being completely open about our intentions. Our goal is to help elect John Kerry the next President of the United States." After the election, Mr. DeWeese and Mr. Veon issued a press release stating, "our efforts to strike [Nader-Camejo] from the ballot proved successful for John Kerry in Pennsylvania."

183. On August 30, 2004, the Pennsylvania Commonwealth Court set aside Nader-Camejo's nomination papers and ordered their names stricken from the Pennsylvania ballot, because they were running as independent candidates in Pennsylvania and as candidates of a political party in other states.

184. On September 2, 2004, Nader-Camejo appealed to the Pennsylvania Supreme Court. The Pennsylvania Supreme Court reversed and vacated the Commonwealth Court's order on September 20, 2004, and remanded to the Commonwealth Court for hearings. The Commonwealth Court immediately scheduled hearings in approximately 48 counties and 13 courtrooms; seven hearings were scheduled simultaneously in six different counties, with two hearings in Philadelphia.

185. On September 22, 2004, Nader-Camejo's attorneys notified the court that they lacked staff to attend voter review hearings in 48 counties, and that they lacked attorneys to appear in 13 different courtrooms, because the conspirators' nationwide legal assault had severely depleted the campaign's resources. Nader-Camejo's attorneys therefore requested the court to hold hearings in only one or two courtrooms. The Commonwealth Court rejected this request on September 23, 2004. Several hearings therefore proceeded without counsel present on behalf of Nader-Camejo.

186. To prepare for these hearings, the conspirators simply recruited more attorneys. On August 19, 2004, attorney Daniel Booker of Reed, Smith told the *New York Times* that "eight to ten lawyers in his firm were working on the case, 80 hours each a week for two weeks, and could end up working six more weeks." Attorney Booker indicated that his firm had also taken on more than 100 volunteers to work on the case.

187. In fact, Attorney Booker's estimate was low: Reed, Smith attorneys Ira Lefton, Christopher K. Walters, Milind Shah, Jeremy Feinstein, Mark Tamburi, James Doerfler, John McIntyre, Lisa Campoli, Barbara (Kiely) Hager, Andrea (Simonson) Weingarten, Jeffrey Breech, Kim Watterson, Melissa Oretsky and James Williamson joined the litigation, for a total of at least 17 Reed, Smith attorneys. On October 1, 2004,

American Lawyer reported that these attorneys had logged 1,300 *pro bono* hours on the case. "And that's just the pre-election challenge," the magazine reported.

188. On October 13, 2004, following three weeks of hearings in counties across Pennsylvania, Commonwealth Court Judge James Gardner Colins, who was elected to the bench as a Democrat, issued an opinion invalidating more than 30,000 of Nader-Camejo's signatures on technical grounds. For example, approximately 9,000 signatures were invalidated because qualified electors – who could vote – had not yet registered on the day they signed Nader-Camejo's nomination petition (even though Pennsylvania law specifies no such requirement). Another 6,000 signatures were invalidated because voters' current addresses didn't match their registered addresses. Thus, after striking a total of 32,455 signatures on these and other technical grounds, Judge Colins concluded that only 18,818 signatures were valid, and set aside Nader-Camejo's nomination papers.

189. On October 14, 2004, Judge Colins issued an order directing Mr. Nader and Mr. Camejo personally to pay all litigation costs arising from plaintiffs' challenge. No state in the nation – including Pennsylvania – has ever ordered candidates to pay such costs after defending their right to ballot access.

190. On October 19, 2004, a divided Pennsylvania Supreme Court affirmed the Commonwealth Court's order removing Nader-Camejo from the Pennsylvania ballot. The United States Supreme Court denied Nader-Camejo's petition for a writ of certiorari on October 23, 2004. Nader-Camejo did not appear on the Pennsylvania ballot as candidates in the 2004 presidential election.

191. On December 3, 2004, attorneys Efrem Grail, Daniel Booker and Cynthia Kernick of Reed Smith, Gregory Harvey of Montgomery, McCracken, Walker and Rhoads, and Brian A. Gordon, a solo practitioner, submitted a bill of costs to the Commonwealth Court of Pennsylvania in the amount of $81,102.19. The attorneys claimed that the bill "is true and correct and accurately reflects costs incurred by [plaintiffs]." In fact, however, the plaintiffs did not incur any costs, being nominal parties conspirators recruited to sue the Nader-Camejo Campaign. As the true party in interest seeking to collect the costs, Reed Smith nevertheless submitted its bill on the plaintiffs' behalf, claiming "Justice requires that this Court award [plaintiffs] the costs incurred." Reed Smith's attorneys never informed the Pennsylvania Commonwealth Court that the DNC had already paid the firm $136,142, nor did they clarify or correct their many public claims to be working on the case pro bono.

192. Reed Smith lawyers also falsely claimed, in the brief they filed before the Pennsylvania Supreme Court in support of their bill of costs, that Nader-Camejo's nomination papers included "literally thousands of forged petition signatures." In fact, however, Judge Colins counted only 687 out of 51,273 signatures (or 1.3%) as "forgeries," which were submitted by people engaged in mischief or sabotage. Pennsylvania Supreme Court Justice Thomas Saylor previously emphasized this fact in a dissenting opinion, in an effort to correct prior distortions of the record. Justice Saylor also noted that the record contained "no evidence" to support Reed Smith's allegations of fraud by anyone associated with the Nader-Camejo Campaign.

193. To the contrary, Nader-Camejo Campaign staff voluntarily expunged approximately 7,000 apparently fictitious names from Nader-Camejo's nomination

petitions, in an effort to lessen the Commonwealth Court's burden. On information and belief, conspirators including Ralph Dade and the other plaintiffs in the dismissed class action complaint signed these names under false pretenses, in a deliberate attempt to sabotage Nader-Camejo's petitions and manufacture evidence to support their Commonwealth Court complaint.

194. On January 14, 2005, Judge Colins entered an order approving the bill of costs without opinion, despite the fact that the record contains "no evidence" – much less a finding – of wrongdoing by anyone associated with the Nader-Camejo Campaign. A divided Pennsylvania Supreme Court nevertheless affirmed without citing a single case as precedent for the order, thus upholding what appears to be the first post-election penalty assessed against a candidate in the history of American jurisprudence.

195. During the proceedings before Pennsylvania Supreme Court, Reed Smith never disclosed several ties the firm had with Justices of the court, which give rise to an obvious appearance of impropriety that would have provided grounds for Nader-Camejo to seek the Justices' disqualification. Specifically:

- Reed Smith represented Chief Justice Ralph Cappy as his defense counsel in an ethics investigation that was ongoing while this case was before the Pennsylvania Supreme Court;
- Reed Smith and Montgomery, McCracken, Walker and Rhoads gave $10,000 in campaign contributions ($5,000 from each firm) to Justice Sandra Newman, who authored the majority opinion, in November 2005, while this case was before the Pennsylvania Supreme Court, and Reed Smith gave Justice Newman another $6,100 during her previous election;
- Reed Smith extended an open-ended offer of employment to Justice Ronald Castille in 1985, which he accepted in 1991 and served of counsel at Reed Smith for nearly three years immediately before he joined the Pennsylvania Supreme Court in 1993;

- **Reed Smith and Montgomery, McCracken, Walker and Rhoads gave at least $67,900 in campaign contributions to four out of five Justices who voted to affirm judgment in Reed Smith's favor, and to one Justice who concurred and dissented; at least $58,900 of this total came from Reed Smith and its lawyers.**

196. The appearance of impropriety arising from these ties between Reed Smith and the Justices of the Pennsylvania Supreme Court is manifest and unmistakable. In this case, moreover, the appearance of impropriety is compounded by Reed Smith's status not merely as plaintiffs' counsel, but also as the true party in interest seeking to collect a money judgment in the proceedings. Nevertheless, at no time during these proceedings did Reed Smith disclose its ties with four out of five Justices who voted to affirm the unprecedented $81,102.19 judgment in Reed Smith's favor.

197. By contrast, the lone dissenter, Justice Thomas Saylor, has no apparent ties to Reed Smith. Justice Saylor dissented on the ground that Pennsylvania law – like the laws of every other state in the nation – simply does not authorize a taxation of costs against candidates who defend their nomination papers, but only against parties who challenge candidates' nomination papers.

198. Reed Smith's concealment of its ties with the Pennsylvania Supreme Court Justices thus constitutes a fraud upon the court, because the firm induced its judgment in a manner that deprived Nader-Camejo of the opportunity to move for the Justices' disqualification, in violation of basic principles of fairness, impartiality and due process.

199. Even while concealing their own fraud, Reed Smith's attorneys repeatedly slandered Mr. Nader in the news media with accusations of fraud, and libeled him on the *pro bono* page of their website, where they published the following defamatory statement:

> Our intensive effort to remove Ralph Nader from the 2004 Presidential ballot in Pennsylvania won national headlines, with the courts upholding our claim that 30,000 signatures supporting Mr. Nader were forged or otherwise fraudulent.

200. On March 8, 2007, Mr. Nader wrote to the partners of Reed Smith to protest this ongoing defamation, as well as the fraud and misrepresentation by which the firm obtained its judgment. Mr. Nader had not yet discovered that the judgment itself was tainted by an overwhelming appearance of impropriety arising from the foregoing undisclosed ties with the Pennsylvania Supreme Court Justices. Reed Smith immediately removed the libelous language from its website, but otherwise did not respond.

201. Neither Mr. Nader nor Mr. Camejo discovered Reed Smith's ties to the Pennsylvania Supreme Court Justices until September 2007. Thus, prior to that time, Reed Smith induced Mr. Camejo to pay the firm $20,000 to settle its claim, without disclosing the fraud upon the court the firm had perpetrated. Mr. Nader did not settle. Reed Smith therefore commenced attachment proceedings against his personal accounts.

202. On July 13, 2007, Reed Smith served Amalgamated Bank with an Application for Writ of Attachment, filed with the Superior Court of the District of Columbia, stating that "any money, property or credits of Ralph Nader in Amalgamated Bank's possession are hereby seized by this Writ of Attachment." In fact, however, the Superior Court had entered no such writ. Amalgamated Bank nevertheless froze Mr. Nader's accounts on July 13, 2007.

203. On July 17, 2007, the Superior Court of the District of Columbia entered writs of attachment against Amalgamated Bank, M&T Bank and PNC Bank as garnishees of Mr. Nader's accounts. Pursuant to these writs, Amalgamated Bank froze $27,420.16, and PNC Bank froze $34,218.29, for a total of $61,638.45. Reed Smith filed a motion to

condemn these funds on August 28, 2007, which was denied, and another on September 25, 2007, which was granted on October 25, 2007. On November 7, 2007, Mr. Nader filed a motion to vacate Reed Smith's judgment for fraud upon the court, among other grounds. That motion is pending.

204. Reed Smith attorneys repeatedly told the news media in 2004 that the Democratic Party had not retained or paid Reed Smith, thereby fraudulently concealing the firm's involvement in Defendants' conspiracy. In fact, however, the DNC retained Reed Smith and paid the firm $136,142 for "political consulting" and "legal consulting" during the election. In addition, Reed Smith has represented John Kerry, Teresa Heinz Kerry, the HJ Heinz Corporation and the Heinz Family Foundation. Reed Smith most recently defended Senator Kerry in a civil lawsuit for defamation, which arose out of the 2004 election and was decided in August 2006. Furthermore, "Heinz is still a major and active client," *Legal Business* reported in December 2006/January 2007.

205. On August 3, 2004, The Ballot Project paid attorney Gregory Harvey's firm Montgomery, McCracken, Walker and Rhoads $6,000 for reimbursed costs. In October and November of 2004, the DNC paid Reed Smith $136,142 in legal and political consulting fees. In addition, in 2004 the DNC transferred at least $182,825 to the Pennsylvania Democratic Party, and at least $5,132,220 to Pennsylvania Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

16) Defendants or their co-conspirators filed two complaints against the Nader-Camejo Campaign in Washington.

206. On August 31, 2004, attorney Parker Folse III sent Washington's Secretary of State a letter stating, "I represent a voter who has an interest in whether Mr. Nader has complied with the law." Mr. Folse asked Secretary Reed not to certify Mr. Nader as a candidate for President of the United States in Washington until Mr. Folse could examine the nomination papers. Mr. Folse indicated that attorney Drew D. Hansen would assist him. Later that day Attorney Folse sent the Secretary of State another letter alleging that Nader-Camejo's nomination papers included an insufficient number of valid signatures. On September 1, 2004, Attorney Folse sent another letter outlining additional concerns and requesting an investigation.

207. On September 1, 2004, the Secretary of State certified Nader-Camejo's nomination papers and ordered their placement on the Washington ballot as candidates for President and Vice President.

208. On September 3, 2004, attorney James Foley filed a complaint on behalf of attorney Ken Valz in the Thurston County Superior Court of Washington, challenging Nader-Camejo's nomination papers under RWC 29A.20.191. The complaint's "legal argument" was one paragraph long, and concluded with a request that Nader-Camejo's nominating signatures be declared invalid.

209. On September 8, 2004, Attorneys Folse, Hansen and Rachel Black filed a separate complaint in the Thurston County Superior Court on behalf of the Washington State Democratic Central Committee, Josh Castle, DiAnne Grieser, Randy Poplock, Ann Thoeny and Elizabeth Walter, challenging Nader-Camejo's nomination papers under RWC 29A.20.191. The complaint requested the court to overrule the Secretary of State

and to remove Nader-Camejo from the Washington ballot as candidates for President and Vice President.

210. DiAnne Grieser signed an online petition to support John Kerry as the Democratic Party's presidential nominee in 2008, identifying herself as the 2003-2004 moderator for the Kerry-Edwards Campaign blog. Randy Poplock identified himself on the John Kerry Meetup Online Message Board as an affiliate of the 527 United Progressives for Victory, and an organizer for the Kerry-Edwards Campaign.

211. On September 15, 2004, the court upheld the Secretary of State's decision, and Nader-Camejo appeared on the Washington ballot as candidates in the 2004 presidential election.

212. In 2004 the DNC transferred at least $490,000 to the Washington Democratic Party, and at least $534,894 to Washington Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

17) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in West Virginia.

213. On July 29, 2004, the Nader-Camejo Campaign submitted nomination papers with a petition including more than 23,000 signatures to satisfy West Virginia's requirement of 12,962 signatures. Secretary of State Joe Manchin certified 15,302 signatures as valid and determined that Nader-Camejo qualified as candidates for President and Vice President in West Virginia.

214. On August 16, 2004, Kanawha County Democratic Executive Committee Chairman Norris Light, Democratic Party presidential elector Phil Hancock, and

registered voters Deirdre Purdy, Gary Collins and Karen Coria filed a petition in the West Virginia Supreme Court of Appeals seeking a writ of mandamus ordering Secretary Manchin either to initiate an investigation into Nader-Camejo's nomination papers, or to refer the matter to the Attorney General's office. The petition identified Jason E. Huber and the law firm of Forman and Huber, L.C. as petitioners' attorneys.

215. Attorney Huber had previously written an open letter to the West Virginia Mountain Party, which was already qualified for ballot listing in the 2004 election, urging the party not to nominate Mr. Nader as its presidential candidate. "The most obvious risk with horrendous consequences," Attorney Huber wrote, "is that a Nader nomination will cost Kerry the presidential race...This risk is most apparent in key states like West Virginia." The letter continued:

> Considering this, we must take every precaution to assure that Kerry wins West Virginia even if it includes keeping Nader off the ballot. ... It is for these reasons that I ask all those who support a Nader nomination to cast aside your third-party ideals for this one election (like I have done)...hold your nose and vote Kerry in 2004.

216. On August 19, 2004, Secretary Manchin, a Democrat who was running for governor, reversed his prior decision, "accompanied by intense political pressure from the Democratic Party," the *Wall Street Journal* reported. Secretary Manchin thus wrote to West Virginia Attorney General Darrell McGraw, also a Democrat, stating that "a measure of doubt exists as to the validity" of Nader-Camejo's petition. The letter requested Attorney General McGraw to institute a *quo warranto* proceeding to determine the validity of Nader-Camejo's nomination papers under West Virginia Code § 3-5-23.

217. The basis for Secretary Manchin's newfound doubt was that a group of citizens had complained that Nader-Camejo petitioners did not display proper credentials

or did not display the petition appropriately. Several citizens filed affidavits to this effect, but only four out of approximately 23,000 people who actually signed the petition raised such complaints.

218. On August 23, 2004, Attorney General McGraw filed a Complaint in Quo Warranto "in the name of the state of West Virginia" in Kanawha County Circuit Court. The complaint stated, "the State of West Virginia prays that this Court immediately issue an order requiring Defendant Ralph Nader to appear at said hearing and show cause why he should not be precluded from being nominated." The complaint sought "such declaratory and injunctive relief regarding the purported nomination of Ralph Nader as may be warranted by the evidence."

219. On or about August 30, 2004, the Circuit Court dismissed Attorney General McGraw's complaint. The Court called the complaint "extraordinary" and noted that "the testimony of a half dozen citizens" was insufficient to invalidate an entire petition signed by 23,000 citizens. Attorney General McGraw nevertheless appealed to the West Virginia Supreme Court of Appeals, which denied the appeal on September 9, 2004. Nader-Camejo appeared on the West Virginia ballot as candidates in the 2004 presidential election.

220. In 2004 the DNC transferred at least $152,433 to the West Virginia Democratic Party, and at least $878,315 to West Virginia Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

18) Defendants or their co-conspirators filed a complaint against the Nader-Camejo Campaign in Wisconsin.

221. On September 10, 2004, the Democratic Party of Wisconsin and Kim Warkentin, its Executive Director, filed a complaint before the Wisconsin Elections Board challenging Nader-Camejo's nomination papers. The complaint identified Jeralyn B. Wendelberger, the Democratic Party of Wisconsin's counsel, as plaintiffs' attorney. In subsequent proceedings Lester Pines, Tamara Packard, the law firm Cullen, Weston, Pines & Bach LLP, Brenda Lewison, Tricia Knight, James Troupis, Eric McLeod, John Scheller, Brian Rybarik and the law firm Michael Best & Friedrich, LLP also represented the plaintiffs.

222. On September 22, 2004, the Elections Board dismissed plaintiffs' complaint and ordered Nader-Camejo to be placed on the Wisconsin ballot as candidates for President and Vice President.

223. On September 24, 2004, the Democratic Party of Wisconsin and Executive Director Warkentin appealed the Elections Board decision to Wisconsin's Dane County Circuit Court. The Circuit Court found that the Elections Board applied an incorrect standard when reviewing plaintiffs' complaint. On September 28, 2004, the Circuit Court ordered Nader-Camejo removed from the ballot.

224. On September 28, 2004, Nader-Camejo filed an Emergency Petition for Writ of Mandamus requesting the Wisconsin Supreme Court to assume original jurisdiction over the matter. The Supreme Court granted Nader-Camejo's petition and held a hearing on the same day.

225. On September 30, 2004, the Wisconsin Supreme Court found that the Elections Board did not abuse its discretion and vacated the Circuit Court decision.

Nader-Camejo appeared on the Wisconsin ballot as candidates in the 2004 presidential election.

226. On October 18, 2004, the Wisconsin Democratic Party paid Cullen, Weston, Pines & Bach LLP $553 for "Nader Ballot Challenge Legal Support." In addition, in 2004 the DNC transferred at least $544,542 to the Wisconsin Democratic Party, and at least $2,688,997 to Wisconsin Victory 2004. On information and belief, conspirators used a portion of these funds to finance acts done in furtherance of the conspiracy.

19) Defendants or their co-conspirators in Washington, D.C. filed three FEC complaints against the Nader-Camejo Campaign.

227. In addition to the foregoing litigation conspirators initiated or supported in 18 states, co-conspirator CREW filed two FEC complaints and co-conspirator Daniel Schneider filed one FEC complaint in the District of Columbia. The basis for CREW's first FEC complaint was nothing more than a newspaper article reporting that the Nader-Camejo Campaign shared office space with a non-profit organization. The FEC took no action against the Nader-Camejo Campaign and dismissed the complaint by unanimous vote on February 10, 2005. The FEC took no action against the Nader-Camejo Campaign and dismissed CREW's second complaint by unanimous vote on June 23, 2005. The FEC took no action against the Nader-Camejo Campaign and dismissed Mr. Schneider's complaint by unanimous vote on April 21, 2006. Campaign staff and attorneys dedicated a significant amount of time, energy and resources to respond to these complaints.

IV. Defendants' Conspiracy Caused Plaintiffs Financial Injury and Other Damages and Violated their Constitutional Rights.

228. Defendants' conspiracy caused severe financial injury to Nader-Camejo's 2004 presidential campaign. Defendants' nationwide legal assault in the form of abuse of process and malicious prosecution forced Nader-Camejo to secure counsel in 18 states, while conspirators' campaign of harassment, intimidation and sabotage consumed Nader-Camejo Campaign staffers' time. Nader-Camejo's campaign manager herself was personally compelled to attend depositions and other legal proceedings rather than running the campaign. In short, Defendants' efforts to bankrupt the Nader-Camejo Campaign produced its intended effect: in October 2004, Mr. Nader was forced to loan the campaign $100,000 to cover legal bills, staff salaries and operating expenses. The campaign has not repaid this loan.

229. Not content merely to try to bankrupt Nader-Camejo's campaign, Defendant Reed Smith sought to collect payment on a wrongfully obtained, fraudulently induced judgment from Mr. Nader and Mr. Camejo personally. Reed Smith induced Mr. Camejo to pay the firm $20,000 to settle its claim, and currently seeks to condemn $61,638.45 of Mr. Nader's funds, which it has already attached.

230. Furthermore, although Nader-Camjeo prevailed in the great majority of lawsuits filed against them, Defendants' conspiracy largely succeeded in achieving its unlawful objectives. Five states denied Nader-Camejo ballot access as a direct result of Defendants' unlawful conduct. Moreover, the burden of defending their right to ballot access in lawsuits in 18 states – many of them simultaneous – prevented Nader-Camejo from dedicating resources necessary to gain ballot access in a dozen others. Denial of ballot access in these states also deprived Nader-Camejo of valuable fundraising opportunities to solicit voters for contributions as qualified candidates.

231. More than 1.3 million Americans living in the 17 states that denied Nader-Camejo ballot access in 2004 voted for Mr. Nader in 2000. Hundreds of thousands signed Nader-Camejo's petitions in 2004. Defendants therefore denied Plaintiff-voters and every other voter similarly situated in 17 states their free choice of candidates in the 2004 presidential election. Defendants' conspiracy thus violated not only Mr. Nader's and Mr. Camejo's constitutional rights, but also those of Plaintiff-voters and millions of other voters.

232. In summary: Defendants conspired to and did in fact cause financial injury and other damages to Ralph Nader's and Peter Miguel Camejo's 2004 presidential campaign and to the third-party and independent candidacy structure previously built by Mr. Nader; Defendants conspired to and did in fact cause financial injury and other damages to Mr. Nader and Mr. Camejo personally; Defendants conspired to and did in fact violate Ralph Nader's and Peter Miguel Camejo's constitutional rights by unlawfully interfering with and obstructing their campaign in the 2004 presidential election; and Defendants conspired to and did in fact violate Plaintiff-voters' and millions of other voters' constitutional rights by denying them their free choice of candidates in the 2004 presidential election, all in an effort to preserve their electoral monopoly and perceived entitlement to votes. The 2004 election has long since concluded, yet Defendant Reed Smith persists in its flagrant and willful abuse of process, with the knowledge of Defendant DNC and Defendant John Kerry, in an effort to enforce an unprecedented, wrongfully obtained, fraudulently induced and unquestionably tainted judgment. Defendants thus leave Plaintiffs no alternative but to seek relief from this Court.

COUNT I
(Conspiracy To Commit Abuse Of Process and Malicious Prosecution)

233. Plaintiffs incorporate by reference paragraphs 1-232 as if set forth fully herein.

234. Defendants conspired and agreed among themselves to violate Plaintiffs' constitutional rights and cause them financial injury and other damages by orchestrating a nationwide legal assault on the Nader-Camejo 2004 presidential campaign.

235. Defendants' purpose was to use unfounded and abusive litigation as a means to bankrupt the Nader-Camejo Campaign and force Mr. Nader and Mr. Camejo from the 2004 presidential election, thereby denying voters the choice of voting for them. Defendants' motive was to help John Kerry and John Edwards win the election by unlawfully forcing their political competitors from the race.

236. In furtherance of Defendants' conspiracy, conspirators filed 24 complaints against the Nader-Camejo Campaign within 12 weeks between June and September of 2004, pursuing unfounded and abusive litigation against the campaign in 18 different states. Conspirators also engaged in acts of harassment, intimidation and sabotage, often under fraudulent pretenses, as described herein.

237. Plaintiffs were damaged by Defendants' acts.

COUNT II
(Abuse of Process and Malicious Prosecution: Arizona, Arkansas, Colorado, District of Columbia, Florida, Illinois, Iowa, Maine, Michigan, Mississippi, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Washington, West Virginia and Wisconsin)

238. Plaintiffs incorporate by reference paragraphs 1 through 237 as if set forth fully herein.

239. Defendants conspired and agreed among themselves to abuse judicial processes and engage in malicious prosecution in order to cause Plaintiffs financial injury and other damages and violate Plaintiffs' constitutional rights by filing 24 complaints against the Nader-Camejo Campaign in less than 12 weeks between June and September of 2004.

240. Defendants' purpose was to use unfounded and abusive litigation as a means to bankrupt the Nader-Camejo Campaign and force Mr. Nader and Mr. Camejo from the 2004 presidential election, thereby denying voters the choice of voting for them. Defendants' motive was to help John Kerry and John Edwards win the election by unlawfully forcing their political competitors from the race.

241. Defendants' conduct as set forth herein violated the common law of abuse of process and malicious prosecution under the state law of Arizona, Arkansas, Colorado, District of Columbia, Florida, Illinois, Iowa, Maine, Michigan, Mississippi, Nevada, New Hampshire, New Mexico, Ohio, Oregon, Pennsylvania, Washington, West Virginia and Wisconsin.

242. In furtherance of their conspiracy to abuse judicial processes and engage in malicious prosecution, the Defendants named herein and others either initiated or materially supported litigation filed against the Nader-Camejo Campaign in their states. The DNC, The Ballot Project and the Kerry-Edwards Campaign coordinated with State Democratic Parties to hire or secure *pro bono* counsel to prosecute this litigation.

243. Plaintiffs were damaged by Defendants' acts.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

1) Compensatory damages in an amount to be determined at trial;

2) Punitive damages in an amount to be determined at trial;

3) Permanent injunctive relief against all ongoing and future violations of law by Defendants and their co-conspirators as set forth herein;

4) Attorneys' fees;

5) Court costs; and

6) Such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Plaintiffs hereby demand a trial by jury in this action.

Dated: Washington, D.C.
January 23, 2008

Respectfully Submitted,

/s/ Oliver B. Hall

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER *et al.*,	:		
	:		
Plaintiffs,	:	Civil Action No.:	08-0589 (RMU)
	:		
v.	:	Document Nos.:	9, 10, 13, 24, 25, 26
	:		
THE DEMOCRATIC NATIONAL COMMITTEE *et al.*,	:		
	:		
Defendants.	:		

MEMORANDUM OPINION

DENYING AS MOOT THE DEFENDANTS' MOTIONS TO DISMISS THE PLAINTIFFS' COMPLAINT; GRANTING THE DEFENDANTS' MOTIONS TO DISMISS THE PLAINTIFFS' AMENDED COMPLAINT

I. INTRODUCTION

This matter is before the court on the defendants' motions to dismiss the plaintiffs' original complaint and the defendants' motions to dismiss the plaintiffs' amended complaint. The plaintiffs – the 2004 presidential hopeful Ralph Nader, his running mate Peter Camejo and six voters who supported the Nader-Camejo 2004 ticket – have brought suit against the Democratic National Committee ("DNC"), Kerry-Edwards 2004 Inc. ("Kerry-Edwards"), John Kerry and Reed Smith, LLP, alleging violations of the United States Constitution and 42 U.S.C. § 1983. In support of their motions to dismiss the amended complaint, the defendants point to a May 27, 2008, memorandum opinion and order in which this court, addressing claims arising out of the same set of events and brought by the same plaintiffs against the same defendants as the instant action, granted the defendants' motions to dismiss. The defendants contend, *inter alia*, that the May 27, 2008 decision is res judicata as to the claims and issues presented in this action. The plaintiffs, however, argue that the elements required for claim preclusion and issue

preclusion have not been satisfied here. In light of the filing of the amended complaint, the court denies as moot the defendants' motions to dismiss the plaintiffs' original complaint. And because the court determines that the May 27, 2008 decision precludes the plaintiffs' claims in this action, it grants the defendants' motions to dismiss the amended complaint.

II. FACTUAL & PROCEDURAL BACKGROUND

As the facts giving rise to the plaintiffs' claims have been set forth in prior opinions, the court will not restate them in exhaustive detail here. *See Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 144-46 (D.D.C. 2008); *Nader v. McAuliffe*, 549 F. Supp. 2d 760, 761-62 (E.D. Va. 2008). Following Nader's unsuccessful presidential bid in 2004, the plaintiffs instituted a flurry of litigation alleging that the defendants conspired to "launch a massive, nationwide unlawful assault on [Mr. Nader's] candidacy, using unfounded litigation to harass, obstruct and drain his campaign of resources, deny him ballot access and effectively prevent him from running for public office." Am. Compl. ¶ 1. Specifically, the plaintiffs filed suit in the Superior Court of the District of Columbia alleging conspiracy, abuse of process, malicious prosecution and violations of 42 U.S.C. § 1983 and the Constitution. The defendants[1]

[1] The defendants in the D.C. Superior Court action were the same four defendants as in the instant action – the Democratic National Committee ("DNC"), Kerry-Edwards 2004, John Kerry and Reed Smith LLP – as well as DNC attorney Jack Corrigan, DNC consultant Robert Brandon, DNC Vice Chair Mark Brewer, The Ballot Project, The Ballot Project's president Toby Moffett, The Ballot Project's director Elizabeth Holtzman, America Coming Together ("ACT") and the Service Employees International Union ("SEIU"). *See* Am. Compl., *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137 (D.D.C. 2008) (No. 07-2136). While Mr. Corrigan, Mr. Brandon, Mr. Brewer, The Ballot Project, Mr. Moffett, Ms. Holtzman, ACT and the SEIU are not defendants in the instant action, they are named as "non-defendant co-conspirators" in the amended complaint. Am. Compl. ¶¶ 31-38.

later removed that action from the D.C. Superior Court to this court, where it was docketed as Civil Action No. 07-2136. The plaintiffs then amended their complaint and removed the federal claims, leaving only the allegations of conspiracy, abuse of process and malicious prosecution. On May 23, 2008, the court dismissed Civil Action No. 07-2136, determining that it lacked jurisdiction to consider the plaintiffs' malicious prosecution claims that directly attacked prior state court judgments, and that the First Amendment barred the plaintiffs' remaining claims. *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d at 145.

The day after the plaintiffs filed suit in the D.C. Superior Court, they filed a nearly identical suit against Terry McAuliffe, former chair of the DNC, and Steven Raikin, director of The Ballot Project, in the United States District Court for the Eastern District of Virginia. *Compare* Compl., *Nader v. McAuliffe*, No. 08-0428, *with* Compl., *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d at 137 (No. 07-2136). That action was later transferred from the Eastern District of Virginia to this court and docketed as Civil Action No. 08-0428. Finally, after this court dismissed the plaintiffs' amended complaint in Civil Action No. 07-2136, the plaintiffs filed the instant action in this court on April 4, 2008, alleging conspiracy and violations of 42 U.S.C. § 1983 and the Constitution.

On June 5, 2008, defendants Kerry-Edwards, John Kerry and the Democratic National Committee filed motions to dismiss the complaint. Defendant Reed Smith, LLP's motion to dismiss followed on June 6, 2008. The plaintiffs amended their complaint on July 21, 2008,[2] *see*

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[2] Because the plaintiffs filed an amended complaint after the defendants moved to dismiss the original complaint, the court denies as moot the defendants' motions to dismiss the original complaint. *See P & V Enters. v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 2d 134, 135 n.1 (D.D.C. 2006).

Am. Compl., and the defendants then moved to dismiss the amended complaint, asserting that the court's dismissal of Civil Action No. 07-2136 is res judicata as to the claims and issues presented here,[3] *see* Kerry Mot. to Dismiss Am. Compl. ("Kerry Mot. to Dismiss") at 5-9; Reed Smith Mot. to Dismiss Am. Compl. ("Reed Smith Mot. to Dismiss") at 8-9. The defendants also aver that the plaintiffs have failed to state a conspiracy claim, Kerry Mot. to Dismiss at 16-17; Reed Smith Mot. to Dismiss at 9-14, that the defendants are immune from suit, Kerry Mot. to Dismiss at 10-11; Reed Smith Mot. to Dismiss at 14-17, that the plaintiffs fail to state a claim for violation of constitutional rights, Kerry Mot. to Dismiss at 12-13; Reed Smith Mot. to Dismiss at 17-20, that the defendants did not act under color of state law, Kerry Mot. to Dismiss at 13-16; Reed Smith Mot. to Dismiss at 21-23, and that the plaintiffs' claims are time-barred, Kerry Mot. to Dismiss at 17-18; Reed Smith Mot. to Dismiss at 23-24. The plaintiffs oppose the defendants' motions to dismiss on each of these grounds. *See generally* Pls.' Opp'n to Defs.' Mots. to Dismiss ("Pls.' Opp'n"). The court now turns to the parties' arguments concerning the res judicata doctrine.

[3] Although the defendants filed separate motions to dismiss, all of the motions articulate generally the same arguments. More specifically, defendant Reed Smith filed a motion to dismiss, *see* Reed Smith Mot. to Dismiss Am. Compl., defendant DNC filed a motion to dismiss incorporating by reference Reed Smith's motion to dismiss, *see* DNC Mot. to Dismiss Am. Compl., and defendants Kerry-Edwards 2004 and John Kerry filed a joint motion to dismiss relaying the same arguments as those raised in defendant Reed Smith's motion to dismiss, *see* Kerry Mot. to Dismiss Am. Compl. Accordingly, the court will address all defendants' motions jointly.

III. ANALYSIS

A. Legal Standard for Rule 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003) (citing FED. R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 511-14 (2002), or "plead law or match facts to every element of a legal theory," *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal quotation marks and citation omitted).

Yet, the plaintiff must allege "any set of facts consistent with the allegations." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007) (abrogating the oft-quoted language from *Conley*, 355 U.S. at 45-56, instructing courts not to dismiss for failure to state a claim unless it appears beyond doubt that "no set of facts in support of his claim [] would entitle him to relief"); *Aktieselskabet AF 21. November 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 16 n.4 (D.C. Cir. 2008) (affirming that "a complaint needs *some* information about the circumstances giving rise to the claims"). While these facts must "possess enough heft to 'sho[w] that the pleader is entitled to relief,'" a complaint "does not need detailed factual allegations." *Twombly*, 127 S. Ct. at 1964,

1966. In resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations – including mixed questions of law and fact – as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning*, 292 F.3d at 242. While many well-pleaded complaints are conclusory, the court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. District of Columbia*, 353 F.3d 36, 40 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. The court's resolution of a Rule 12(b)(6) motion represents a ruling on the merits with res judicata effect. *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

B. Legal Standard for Res Judicata

"The doctrine of res judicata prevents repetitious litigation involving the same causes of action or the same issues." *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C. Cir. 1983). Res judicata has two distinct aspects – claim preclusion and issue preclusion (commonly known as collateral estoppel) – that apply in different circumstances and with different consequences to the litigants. *NextWave Pers. Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 254 F.3d 130, 142 (D.C. Cir. 2001); *Novak v. World Bank*, 703 F.2d 1305, 1309 (D.C. Cir. 1983). Under claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Under issue preclusion or collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue

in a suit on a different cause of action involving a party to the first case." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Allen*, 449 U.S. at 94). In short, "claim preclusion forecloses all that which might have been litigated previously," while issue preclusion "prevents the relitigation of any issue that was raised and decided in a prior action." *I.A.M. Nat'l Pension Fund*, 723 F.2d at 949; *Novak*, 703 F.2d at 1309. In this way, res judicata helps "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and [] prevent serial forum-shopping and piecemeal litigation." *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); *see also Allen*, 449 U.S. at 94.

C. The Res Judicata Doctrine Bars the Plaintiffs' Claims

The defendants first contend that res judicata bars the plaintiffs' claims because they arise from the same nucleus of facts as the state law claims that the court dismissed in Civil Action No. 07-2136. Kerry Mot. to Dismiss at 6-8; Reed Smith Mot. to Dismiss at 8-9. The defendants also assert that the plaintiffs could have raised the instant claims in Civil Action No. 07-2136; in fact, they note that the original complaint in Civil Action No. 07-2136 *did* contain the claims now contained in this action, but for strategic reasons, the plaintiffs amended that complaint to delete them. Kerry Mot. to Dismiss at 9; Reed Smith Mot. to Dismiss at 9.

The plaintiffs oppose the defendants' motions, arguing first that res judicata is an affirmative defense that generally must be raised in a defendant's answer, not in a motion to dismiss. Pls.' Opp'n at 22. Recognizing that res judicata has been successfully raised in motions to dismiss in cases in which "all relevant facts are shown by the court's own records," the plaintiffs assert that the court's records here lack "a key 'relevant fact' [necessary to the res judicata analysis] . . . namely, the existence of a final judgment." The plaintiffs allege that

because the order dismissing Civil Action No. 07-2136 is pending on appeal, it is not a final judgment and, consequently, cannot give rise to an affirmative defense of res judicata in a motion to dismiss. *Id.* The plaintiffs also contend that res judicata does not bar the instant complaint because it rests on facts that did not yet exist when the plaintiffs filed the complaint in Civil Action No. 07-2136. Specifically, the plaintiffs note that their claims here rely on "the [July 2008] criminal indictment [in Pennsylvania state court] of as many as 12 state employees who participated in Defendants' conspiracy," which the plaintiffs could not have raised when they instituted Civil Action No. 07-2136 in late 2007. *Id.* at 22-23.

In response, the defendants refute the plaintiffs' assertion that the May 2008 order cannot support res judicata because it is pending on appeal. Kerry Reply to Pls.' Opp'n ("Kerry Reply") at 2; Reed Smith Reply to Pls.' Opp'n ("Reed Smith Reply") at 3-4. "[T]he pendency of an appeal," the defendants declare, "does not suspend the operation of a final judgment for purposes of claim or issue preclusion." Reed Smith Reply at 3-4. In addition, the defendants dispute the plaintiffs' contention that the July 2008 grand jury presentment defeats the defendants' res judicata argument. Kerry Reply at 3-5; Reed Smith Reply at 2-3. They argue that because all of the underlying facts alleged in the presentment existed before the plaintiffs instituted Civil Action No. 07-2136, the plaintiffs could have alleged them in Civil Action No. 07-2136. Kerry Reply at 4-5; Reed Smith Reply at 2-3. In other words, "[a]lthough the Presentment document is 'new,' the facts it sets forth are not." Reed Smith Reply at 2. The court now addresses each of these arguments in turn.

As a preliminary matter, the court must address the plaintiffs' assertion that a motion to dismiss is not the proper vehicle for raising the defendants' res judicata argument. Res judicata

is an affirmative defense that is generally pleaded in a defendant's answer, but courts have also allowed parties to assert it in a Rule 12(b)(6) motion to dismiss. *Stanton v. D.C. Ct. of Appeals*, 127 F.3d 72, 76-77 (D.C. Cir. 1997). Res judicata may be asserted in a motion to dismiss when "all relevant facts are shown by the court's own records, of which the court takes notice." *Hemphill v. Kimberly-Clark Corp.*, 530 F. Supp. 2d 108, 111 (D.D.C. 2008) (citing *Evans v. Chase Manhattan Mortgage Corp.*, 2007 WL 902306, at *1 (D.D.C. Mar. 23, 2007)). Here, the defendants' res judicata arguments rest on the court's May 27, 2008, order dismissing Civil Action No. 07-2136. Contrary to the plaintiffs' assertions, that order is "final" for res judicata purposes even though it is pending on appeal. *Nat'l Post Office Mail Handlers v. Am. Postal Workers Union*, 907 F.2d 190, 192 (D.C. Cir. 1990); *Hunt v. Liberty Lobby, Inc.*, 707 F.2d 1493, 1497 (D.C. Cir. 1983) (observing that "[u]nder well-settled federal law, the pendency of an appeal does not diminish the res judicata effect of a judgment rendered by a federal court"). As a result, the defendants' res judicata arguments are properly brought in their motions to dismiss.

Next, the court must determine whether the instant claims "were or could have been raised in" Civil Action No. 07-2136. *See Drake*, 291 F.3d at 66. As the defendants correctly point out, the claims brought in the instant action were, in fact, raised in Civil Action No. 07-2163 before the plaintiffs voluntarily withdrew them. *See* Compl., *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d at 137 (No. 07-2136). But even were this not the case, the court would still readily conclude that these claims could have been raised in Civil Action No. 07-2136 because the two cases are based on the same cause of action; that is, they "share the same 'nucleus of facts.'" *Drake*, 291 F.3d at 66 (quoting *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir.1984)). Specifically, the federal claims contained in the amended complaint and the

state law claims asserted in Civil Action No. 07-2136 stem from the defendants' alleged conspiracy, described identically in both complaints, to "launch a massive, nationwide unlawful assault on [Mr. Nader's] candidacy, using unfounded litigation to harass, obstruct and drain his campaign of resources, deny him ballot access and effectively prevent him from running for public office." Am. Compl. ¶ 1; Am. Compl. ¶ 1, *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d at 137 (No. 07-2136).

The fact that the plaintiffs' amended complaint mentions the Pennsylvania grand jury presentment does not alter this result. The presentment, which the grand jury issued "in furtherance of its ongoing investigation of the Pennsylvania Legislature," charges former Pennsylvania State Representative Mike Veon, as well as ten staffers who worked for Representative Veon and the Pennsylvania House Democratic Caucus, with participation in a "concerted plan to use taxpayer funds, employees and resources for political campaign purposes." Am. Compl., Ex. A at 1, 73-75. The presentment targets the Pennsylvania state legislature; it charges none of the defendants in the instant action. *Id.* Further, because the conduct alleged in the presentment occurred between 2004 and 2007, the plaintiffs could have raised those allegations when they instituted Civil Action No. 07-2136 on October 30, 2007. *See generally id.* The res judicata doctrine, therefore, bars the instant claims. *See Brown v. Felsen*, 442 U.S. 127, 131 (1979) (noting that "[u]nder res judicata, upon a final judgment on the merits parties to a suit are barred, as to every matter that was offered and received to sustain or defeat a cause of action, as well as to any other matter that the parties had a full and fair opportunity to

offer for that purpose." As a result, the court's dismissal of Civil Action No. 07-2136 precludes the instant claims.[4]

IV. CONCLUSION

For the foregoing reasons, the court denies as moot the defendants' motions to dismiss the plaintiffs' complaint and grants the defendants' motions to dismiss the plaintiffs' amended complaint. An Order consistent with this Memorandum Opinion is separately and contemporaneously issued this 22nd day of December, 2008.

RICARDO M. URBINA
United States District Judge

[4] Because the court determines that its decision to dismiss Civil Action No. 07-2136 precludes the plaintiffs' claims in this action, it grants the defendants' motions to dismiss on res judicata grounds and has no need to reach the defendants' other arguments.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RALPH NADER *et al.*,	:		
	:		
Plaintiffs,	:	Civil Action No.:	08-0428 (RMU)
	:		
v.	:	Document Nos.:	47, 48
	:		
TERRY MCAULIFFE *et al.*,	:		
	:		
Defendants.	:		

MEMORANDUM OPINION

GRANTING THE DEFENDANTS' MOTIONS TO DISMISS THE PLAINTIFFS' AMENDED COMPLAINT

I. INTRODUCTION

This matter is before the court on the motions to dismiss filed by defendants Terry McAuliffe, former Chairman of the Democratic National Committee ("DNC"), and Steven Raikin, Director, Treasurer and Secretary of a political organization called the Ballot Project. The plaintiffs – Ralph Nader, his former running mate Peter Camejo and six of their supporters – brought the instant suit and many others following Nader's unsuccessful presidential bid in 2004. They claim that the defendants committed conspiracy, abuse of process, malicious prosecution and violations of the United States Constitution[1] and 42 U.S.C. § 1983. The defendants have moved to dismiss. Because the court's dismissal of the plaintiffs' claims in Civil Action No. 07-2136 bar the state law claims raised in this action under the doctrine of res judicata, the court grants the defendants' motions to dismiss those claims. And because the court rejects the plaintiffs' allegation that the defendants acted "under color of state law" as required for a § 1983 claim, the court grants the defendants' motions to dismiss the plaintiffs' federal claims.

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[1] Specifically, the plaintiffs allege that the defendants violated the Qualifications Clause and the First and Fourteenth Amendments. Am. Compl. ¶¶ 252-257.

II. FACTUAL & PROCEDURAL BACKGROUND

The facts giving rise to the plaintiffs' claims have been set forth in greater detail in several prior opinions. *See Nader v. Democratic Nat'l Comm.*, 2008 WL 5273109, at *1-*2 (D.D.C. Dec. 22, 2008); *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137, 144-46 (D.D.C. 2008); *Nader v. McAuliffe*, 549 F. Supp. 2d 760, 761-62 (E.D. Va. 2008). In short, the plaintiffs allege that supporters of the Kerry-Edwards 2004 campaign "presided over a nationwide conspiracy to suppress voter choice during the 2004 General Election" by filing ballot eligibility complaints to undermine Nader's candidacy. Pls.' Opp'n to Defs.' Mots. to Dismiss ("Pls.' Opp'n") at 3-4. To rectify the alleged violations of state and federal law, the plaintiffs brought suit in this court, in the Superior Court of the District of Columbia and in the United States District Court for the Eastern District of Virginia against various individuals associated with the Democratic ticket.

More specifically, the plaintiffs filed suit in the D.C. Superior Court against the DNC and three DNC officials, Kerry-Edwards 2004, John Kerry individually, Reed Smith LLP ("Reed Smith"), the Ballot Project and two Ballot Project officials, America Coming Together ("ACT") and the Service Employees International Union ("SEIU"), alleging conspiracy, abuse of process, malicious prosecution and violations of 42 U.S.C. § 1983 and the Constitution. The defendants removed the action to this court, where it was docketed as Civil Action No. 07-2136. The plaintiffs then amended their complaint and removed the federal claims, leaving only the allegations of civil conspiracy, abuse of process and malicious prosecution. *See* Am. Compl., *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137 (No. 07-2136). On May 23, 2008, the court dismissed Civil Action No. 07-2136, determining that it lacked jurisdiction to consider the

plaintiffs' malicious prosecution claims that directly attacked prior state court judgments, and that the First Amendment barred the plaintiffs' remaining claims. *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d at 145.

The day after the plaintiffs filed suit in the D.C. Superior Court, they filed the instant complaint against defendants McAuliffe and Raikin in the Eastern District of Virginia.[2] The amended complaint in this action, which is nearly identical to the original complaint in Civil Action No. 07-2136 save for the identities of the defendants, *compare* Compl. *with* Compl., *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d 137 (No. 07-2136), was later transferred from the Eastern District of Virginia to this court, *see* Mem. Op. (Mar. 7, 2008) (granting the defendants' motion to transfer venue to this court). Finally, after this court dismissed the plaintiffs' amended complaint in Civil Action No. 07-2136, the plaintiffs filed Civil Action No. 08-0963 against the DNC, Kerry-Edwards 2004, John Kerry and Reed Smith in this court, alleging conspiracy and violations of 42 U.S.C. § 1983 and the Constitution. After determining that its dismissal of Civil Action No. 07-2136 was res judicata as to the claims raised in Civil Action No. 08-0963, the court dismissed the latter action on December 22, 2008. *See generally Nader v. Democratic Nat'l Comm.*, 2008 WL 5273109 (D.D.C. Dec. 22, 2008).

Defendants McAuliffe and Raikin have moved to dismiss the instant amended complaint.[3] With respect to the state law claims, they incorporate by reference the defendants'

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[2] Because the complaint filed in the Eastern District of Virginia bore the caption "In the Superior Court of the District of Columbia," *see* Compl., the plaintiffs amended the complaint to correct the caption, *see* Am. Compl.

[3] Each defendant's motion to dismiss incorporates the other by reference. *See* Def. McAuliffe's Mot. to Dismiss ("McAuliffe Mot.") at 1; Def. Raikin's Mot. to Dismiss ("Raikin Mot.") at 2.

motions to dismiss in Civil Action No. 07-2136. *See* Def. McAuliffe's Mot. to Dismiss Am. Compl. ("McAuliffe Mot.") at 1; Def. Raikin's Mot. to Dismiss Am. Compl. ("Raikin Mot.") at 1. And in support of their motions to dismiss the plaintiffs' federal claims, the defendants contend that the claims fail to allege state action, *see* McAuliffe Mot. at 4-11; Raikin Mot. at 6-8; fail to allege a constitutional violation, *see* McAuliffe Mot. at 11; are time-barred, *see* Raikin Mot. at 8-10; and are conclusory, *see id.* at 10. The court now turns to these arguments.

III. ANALYSIS

A. Legal Standard for Rule 12(b)(6) Motion to Dismiss

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). The complaint need only set forth a short and plain statement of the claim, giving the defendant fair notice of the claim and the grounds upon which it rests. *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040 (D.C. Cir. 2003) (citing FED. R. CIV. P. 8(a)(2) and *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pre-trial procedures established by the Rules to disclose more precisely the basis of both claim and defense to define more narrowly the disputed facts and issues." *Conley*, 355 U.S. at 47-48 (internal quotation marks omitted). It is not necessary for the plaintiff to plead all elements of his prima facie case in the complaint, *Swierkiewicz v. Sonoma N.A.*, 534 U.S. 506, 511-14 (2002), or "plead law or match facts to every element of a legal theory," *Krieger v. Fadely*, 211 F.3d 134, 136 (D.C. Cir. 2000) (internal quotation marks and citation omitted).

Yet, the plaintiff must allege "any set of facts consistent with the allegations." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007) (abrogating the oft-quoted language from *Conley*, 355 U.S. at 45-56, instructing courts not to dismiss for failure to state a claim unless it appears beyond doubt that "no set of facts in support of his claim [] would entitle him to relief"); *Aktieselskabet AF 21. Nov. 2001 v. Fame Jeans, Inc.*, 525 F.3d 8, 16 n.4 (D.C. Cir. 2008) (affirming that "a complaint needs *some* information about the circumstances giving rise to the claims"). While these facts must "possess enough heft to 'sho[w] that the pleader is entitled to relief,'" a complaint "does not need detailed factual allegations." *Twombly*, 127 S. Ct. at 1964, 1966. In resolving a Rule 12(b)(6) motion, the court must treat the complaint's factual allegations – including mixed questions of law and fact – as true and draw all reasonable inferences therefrom in the plaintiff's favor. *Macharia v. United States*, 334 F.3d 61, 64, 67 (D.C. Cir. 2003); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165 (D.C. Cir. 2003); *Browning*, 292 F.3d at 242. While many well-pleaded complaints are conclusory, the court need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Warren v. District of Columbia*, 353 F.3d 36, 40 (D.C. Cir. 2004); *Browning*, 292 F.3d at 242. The court's resolution of a Rule 12(b)(6) motion represents a ruling on the merits with res judicata effect. *Haase v. Sessions*, 835 F.2d 902, 906 (D.C. Cir. 1987).

B. The Court Grants the Defendants' Motions to Dismiss Counts I and II of the Amended Complaint

1. Legal Standard for Res Judicata

"The doctrine of res judicata prevents repetitious litigation involving the same causes of action or the same issues." *I.A.M. Nat'l Pension Fund v. Indus. Gear Mfg. Co.*, 723 F.2d 944, 946 (D.C. Cir. 1983). Res judicata has two distinct aspects – claim preclusion and issue preclusion (commonly known as collateral estoppel) – that apply in different circumstances and with different consequences to the litigants. *NextWave Pers. Commc'ns, Inc. v. Fed. Commc'ns Comm'n*, 254 F.3d 130, 142 (D.C. Cir. 2001); *Novak v. World Bank*, 703 F.2d 1305, 1309 (D.C. Cir. 1983). Under claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Drake v. Fed. Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). Under issue preclusion or collateral estoppel, "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (quoting *Allen*, 449 U.S. at 94). In short, "claim preclusion forecloses all that which might have been litigated previously," while issue preclusion "prevents the relitigation of any issue that was raised and decided in a prior action." *I.A.M. Nat'l Pension Fund*, 723 F.2d at 949; *Novak*, 703 F.2d at 1309. In this way, res judicata helps "conserve judicial resources, avoid inconsistent results, engender respect for judgments of predictable and certain effect, and [] prevent serial forum-shopping and piecemeal litigation." *Hardison v. Alexander*, 655 F.2d 1281, 1288 (D.C. Cir. 1981); *see also Allen*, 449 U.S. at 94.

Because "res judicata belongs to courts as well as to litigants," a court may invoke res judicata *sua sponte*. *Stanton v. D.C. Ct. of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997); *see also Tinsley v. Equifax Credit Info. Servs., Inc.*, 1999 WL 506720, at *1 (D.C. Cir. 1999) (per curiam) (noting that a district court may apply res judicata upon taking judicial notice of the parties' previous case).

2. The Res Judicata Doctrine Bars Counts I and II of the Amended Complaint

Presumably because the parties briefed the motions to dismiss in April 2008 – that is, before the court dismissed Civil Action No. 07-2136 on May 27, 2008 – the defendants did not raise res judicata as a bar to the plaintiffs' claims of conspiracy, abuse of process and malicious prosecution. *See generally* McAuliffe Mot.; Raikin Mot. All parties, however, agree that the claims raised in Civil Action No. 07-2136 are identical to the state law claims brought in Counts I and II of the instant action. *See* McAuliffe Mot. at 1; Raikin Mot. at 1; Pls.' Opp'n at 1-2. The court's dismissal of Civil Action No. 07-2136 was based on its determination that it lacked jurisdiction to consider the plaintiffs' malicious prosecution claims that directly attacked prior state court judgments and that the First Amendment barred the plaintiffs' remaining claims. *Nader v. Democratic Nat'l Comm.*, 555 F. Supp. 2d at 145. Because Counts I and II of the instant complaint are identical to the state law claims dismissed in Civil Action No. 07-2136, the court will not permit the parties to relitigate those claims here. *See I.A.M. Nat'l Pension Fund*, 723 F.2d at 949. Accordingly, the court grants the defendants' motions to dismiss Counts I and II of the amended complaint.

C. The Court Grants the Defendants' Motions to Dismiss Counts III and IV of the Amended Complaint

1. Legal Standard for § 1983 Claims

Section 1983 creates a cause of action against

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.

42 U.S.C. § 1983. A plaintiff bringing a § 1983 claim "must allege both (1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that the defendant acted 'under color of' the law of a state, territory or the District of Columbia." *Hoai v. Vo*, 935 F.2d 308, 312 (D.C. Cir. 1991) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970)). Although § 1983 ordinarily does not create a cause of action related to the conduct of private parties, private conduct may be deemed to be "under color of state law" when it is "fairly attributable" to the state. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). This occurs in two circumstances: when private parties "conspire with state officials, and when they willfully engage in joint activity with a state or its agents." *Hoai*, 935 F.2d at 313. A showing of state action required to demonstrate a violation of the Fourteenth Amendment encompasses a showing of action "under color of state law" for the purposes of § 1983. *LaRouche v. Fowler*, 152 F.3d 974, 988 n.18 (D.C. Cir. 1998). Courts must adhere carefully to the dichotomy between state action and private action, as it "preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar*, 457 U.S. at 936. Thus, a § 1983 claim brought against a private party cannot survive a motion to dismiss if the plaintiff fails to allege

that the defendant was engaged in state action or acted under color of state law. *Hoai*, 935 F.2d at 312.

2. The Defendants Are Not State Actors and Did Not Act Under Color of State Law

The defendants move to dismiss Counts III and IV of the amended complaint – which allege conspiracy and violations of § 1983 and the Constitution – contending that they are not state actors and did not act under color of state law. McAuliffe Mot. at 4-11; Raikin Mot. at 6-8.[4] The plaintiffs disagree, *see* Pls.' Opp'n at 8-14, arguing that their "allegations are sufficient to establish state action under a 'public function' test or a 'joint action' test," *id.* at 13. The court now addresses each of these two theories.

First, the plaintiffs allege that the defendants "were engaged in a public function when they conspired, by and through the DNC and its state Democratic Party affiliates, to suppress voter choice in the 2004 presidential election by preventing a competing candidacy from gaining ballot access." *Id.* at 4. Noting that the "operative test" for whether a private party has engaged in a public function in this context is whether the party "exercise[d] power over the electoral process," the plaintiffs maintain that the defendants satisfied this standard by "exercis[ing] a unilateral power delegated by the State to challenge competing candidates," as well as by "engag[ing] in the public function of testing the candidates' qualifications for public office." *Id.* at 11.

[4] The defendants advance three other arguments in support of their motions to dismiss: first, they contend that the plaintiffs have failed to allege a constitutional violation because there is no constitutional right to be free of challenges to ballot access petitions, McAuliffe Mot. at 11; second, they assert that the plaintiffs' claims are time-barred, Raikin Mot. at 8-10; and third, they submit that the plaintiffs failed to plead with sufficient particularity their allegations of conspiracy, *id.* at 10. As a result of its determination that the defendants' conduct is not actionable under § 1983 because it did not take place under color of state law, the court has no occasion to reach these contentions.

The defendants refute the plaintiffs' characterization, noting that "[f]iling challenges to ballot petitions . . . is not a function traditionally performed by the state or traditionally employing state powers;" to the contrary, state ballot access statutes give private citizens the right to file challenges of the sort that the defendants filed here. Def. McAuliffe's Reply in Support of Mot. to Dismiss ("McAuliffe Reply") at 6. Further, citing *Fulani v. McAuliffe*, a case brought against defendant McAuliffe by supporters of the Nader-Camejo ticket in 2004, the defendants argue that "to the extent that Plaintiffs accuse Defendants of using State election law to impede the Nader/Camejo candidacy and violate Plaintiffs' equal protection rights or right to vote, that claim fails as a matter of law" because "'merely resorting to the courts and being on the winning side of a lawsuit does not make a party' responsible for depriving a plaintiff of his rights." McAuliffe Mot. at 6 (quoting *Fulani v. McAuliffe*, 2005 WL 2276881 (S.D.N.Y. Sept. 19, 2005)). In the defendants' view, the plaintiffs' true grievance is with the "fairness and constitutionality of the ballot access statutes," but that "is an issue for a different case." *Id.*

As a preliminary matter, the court agrees with the defendants' observation that merely filing, and winning, a lawsuit does not give rise to a constitutional claim unless the plaintiff alleges that the judge presiding over the lawsuit was a co-conspirator or a joint actor with a private party. *Dennis v. Sparks*, 449 U.S. 24, 28 (1980). The plaintiffs make no such allegation; therefore, to the extent that the plaintiffs' reliance on the "public function" test stems from the defendants' appeal to the courts, *see, e.g.*, Pls.' Opp'n at 7 (declaring that the defendants "conspired to prevent Mr. Nader and Mr. Camejo from running for public office . . . and to deny Plaintiff-voters the choice of voting for them, by . . . wag[ing] a nationwide assault of groundless and abusive litigation"), their § 1983 claim fails. Further, it is well-settled that a public function

"is not simply one 'traditionally employed by governments,' but rather one 'traditionally exclusively reserved to the State.'" *LaRouche*, 152 F.3d at 990 (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978)). The plaintiffs offer no facts that plausibly suggests that filing ballot access challenges is a function "traditionally exclusively reserved to the States." *See Twombly*, 127 S. Ct. at 1965 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (stating that "on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation'")).[5] Moreover, the fact that private citizens may file challenges under the ballot access statutes[6] is antithetical to the assertion that doing so is a function traditionally exclusively reserved to the States. As a result, the court rejects the plaintiffs' assertion that the defendants engaged in an exclusively public function by filing challenges under the state ballot access statutes.

In addition to arguing that the defendants are liable under § 1983 based on a "public function" theory, the plaintiffs also contend that "[a] finding of state action . . . is further justified by the joint participation [in the defendants' alleged conspiracy by] state officials in several states." Pls.' Opp'n at 13. They cite eight specific acts of state officials in Illinois, New Mexico, Oregon, Pennsylvania, the District of Columbia and West Virginia that, in their view,

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[5] The plaintiffs make much of the fact that the act of conducting and regulating an election has been held to be an exclusively public function, Pls.' Opp'n at 10; *see also Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978), but because the allegedly unconstitutional conduct here consisted of filing challenges to eligibility for office rather than actually conducting or regulating an election, that authority is not on point.

[6] Although the pleadings do not provide the text of all of the state ballot access statutes under which the defendants challenged the Nader candidacy, they cite two such statutes as examples, one of which provides that "[a]ny legal voter . . . having objections to any certificate of nomination or nomination papers or petitions filed, shall file an objector's petition [with] the State Board of Elections," 10 ILL. COMP. STAT. 5/10-8, and the other of which places no limit on who may object to a nomination paper or petition, *see* 25 PA. STAT. ANN. § 2937.

demonstrate that the defendants were engaged in joint action with state officials and can therefore be held liable under § 1983. *Id.* at 4-6, 13.

The defendants counter that although the plaintiffs argue that the defendants engaged in joint activity with state officials, they fail to name any state actors as defendants or as non-defendant co-conspirators. Def. Raikin's Reply in Support of Mot. to Dismiss at 4. Further, the defendants note that the state officials the plaintiffs identify "fall into two categories: (1) employees of state legislatures who assisted the alleged co-conspirators to draft ballot access challenges, and (2) state court judges, secretaries of state and state attorneys with responsibility to see that the state's statutes were enforced." McAuliffe Reply at 8. As to the former category, the defendants aver that the employees of state legislatures who helped draft ballot access challenges did not lend the imprimatur of the state to the ballot access challenges. *Id.* at 8-9. And as to the latter, while the defendants concede that the state officials performed a state function by enforcing the states' ballot access laws, they submit that these officials' actions are protected by qualified immunity. *Id.* at 9.

A private party can be held liable under § 1983 when he or she conspires or acts in concert with state actors. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 & n.6 (1982) (contrasting cases in which the Supreme Court upheld § 1983 suits based on the joint activity principle with cases in which it declined to apply the principle because the state officials' role in the conduct was not sufficiently prominent); *see also Adickes*, 398 U.S. at 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)) (explaining that "[t]o act 'under color' of law does not require that the accused be an officer of the State[, because] [i]t is enough that he is a willful participant in joint activity with the State or its agents"). Here, despite advancing vague assertions that the

defendants engaged in a "conspiracy that involved the State . . . and which implicates the State," Pls.' Opp'n at 4, and accusing state actors of "engag[ing] in acts that furthered Defendants' conspiracy," *id.* at 13, the plaintiffs do not contend that state officials entered into a conspiracy with the defendants to violate the plaintiffs' constitutional rights, *see* Am. Compl. ¶¶ 25-46 (failing to list any state officials as alleged "non-defendant co-conspirators"); *cf. Adickes*, 398 U.S. at 152 (holding that private defendants could be held liable as state actors if they "reached an understanding" with state officials to deny the plaintiffs' constitutional rights); *Hoai*, 935 F.2d at 313 (rejecting the plaintiff's claim that the defendant acted under color of state law because the plaintiff failed to allege that the defendant conspired with state officials). Nor do they "identify any facts that are suggestive enough to render a . . . conspiracy plausible." *Twombly*, 127 S. Ct. at 1965. As a result, the court rejects the plaintiffs' assertion that the defendants acted in concert with state actors.

Furthermore, although the plaintiffs acknowledge that a key factor in the joint action analysis is whether the private conduct received the imprimatur of the state, *see Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982); *Franz v. United States*, 707 F.2d 582, 594 n.45 (D.C. Cir. 1983), they fail to articulate how the defendants' conduct here received the public imprimatur of the state. As the defendants correctly point out, the public officials who were involved in the ballot access challenges – state court judges, secretaries of state and state's attorneys – are shielded from liability. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989) (holding that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"). And the sole remaining allegation on which the plaintiffs' joint activity theory rests – that some individuals employed by state legislatures assisted in drafting ballot access challenges – fails to establish "a

sufficiently close nexus between the State and [the defendant] . . . so that the action of the latter may be fairly treated as that of the State itself." *Blum*, 457 U.S. at 1004 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974) (affirming the dismissal of the complaint because the defendant's conduct did not constitute state action)); *see also Griffin v. Maryland*, 378 U.S. 130, 135 (1964) (noting that "[i]f an individual is possessed of state authority *and purports to act under that authority*, his action is state action") (emphasis added). Accordingly, the court rejects the plaintiffs' claim that the defendants' conduct is actionable under § 1983 and grants the defendants' motions to dismiss Counts III and IV of the amended complaint.

IV. CONCLUSION

For the foregoing reasons, the court grants the defendants' motions to dismiss the plaintiffs' amended complaint. An Order consistent with this Memorandum Opinion is separately and contemporaneously issued this 7th day of January, 2009.

RICARDO M. URBINA
United States District Judge

IN THE CIRCUIT COURT OF STATE OF OREGON
FOR THE COUNTY OF MARION

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY SAMANTHA BERG, and TIMOTHY JOHNSON, GREGORY KAFOURY, **Plaintiffs,** **v.** **BILL BRADBURY, Secretary of State,** **Defendant.**	**Case No. _____** **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF**

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NATURE OF THE CASE.

Plaintiffs include a candidate for Vice-President of the United States, several persons who were actively involved in gathering signatures for the nominating petition for the ticket of Ralph Nader and Sandra Kucera for President and Vice-President of the United States, and several persons who signed the nominating petition as electors, and several Oregon electors who seek the opportunity to exercise their franchise effectively in voting for the Nader/Kucera ticket in the November 2, 2004, general election. Pro Se Plaintiff Kafoury is the co-chair of Nader for President 2004 in Oregon (hereinafter "Nader Campaign.")

The Secretary of State's refusal to recognize the 18,000+ signatures on the nominating petitions, fully validated and verified by the county election offices pursuant to ORS 249.740(5) and ORS 249.008(1), violates the rights of Plaintiffs under Oregon statutes, the Oregon Constitution, and the U.S. Constitution. Defendant's conduct is arbitrary, capricious, lacking basis in fact, lacking findings of fact, lacking conclusions of law, lacking any reasoning or justification whatever. Further, his action violates the rights of Plaintiffs to exercise their rights to free speech and assembly, to peaceably petition the government, to exercise their rights to vote as registered Oregon electors. and to the application of due process and equal protection of law under the Fifth Amendment, made applicable to state action by the Fourteenth Amendment.

Defendant Bradbury is the Secretary of State of Oregon and is responsible for enforcing the election laws of Oregon, including all those statutes and constitutional provisions regulating the nomination of candidates by elector petition. His actions here are entirely contrary to ORS 247.005, which states:

> It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise.

error in the date on his own signature on the petition sheet. As argued below, these petitions contained valid signatures and should not have been excluded in the first place. After they completed their verification processes, the county elections offices returned the rest of the signature sheets to the Nader Campaign.

On August 24, 2004, the Nader Campaign submitted the signature sheets containing the valid and verified signatures to the Secretary of State. The Nader Campaign heard nothing from the Secretary of State until September 1, 2004, when the Secretary of State called a press conference where the representative of the Nader campaign was physically excluded from the room.

The Nader Campaign received nothing in writing from the Secretary of State until September 2, 2004, when it received a 1-page telecopied letter from Margie Franz of the office of the Secretary of State, stating that the number of valid signatures counted by the Secretary of State was 15,088 (Exhibit A to the Appeal/Petition). This number is 218 fewer signatures than the 15,306 required for the nomination sought. Neither the Nader Campaign nor Plaintiffs have received documents from the Secretary of State stating why each rejected signature sheet was rejected. .

Plaintiffs have a cursory summary of sheets that were rejected for what are purported to be irregularities in the numbering of some of the submitted petition sheets, and have read in the press that a large number of signatures (in the range of 2,500) were contained on sheets which the Secretary of State contended were not sequentially numbered for each county, as allegedly required by the 2004 State Candidate's Manual: Individual Electors, p. 4. Plaintiffs have been informed in cursory fashion that about 700 other signatures were contained on sheets which the Secretary of State rejected for some perceived deficiency in the circulator's signature or the date accompanying the circulator's signature.

> *Springfield School Dist. No. 19*, 294 Or. 357, 370, 657 P.2d 188 (1982); enables the court on judicial review to give an appropriate degree of credence to the agency interpretation, *Springfield Education Assn. v. School Dist. No. 19*, 290 Or. 217, 228, 621 P.2d 547 (1980); 'serve[s] to assure proper application of the law in the individual case,' *Ross v. Springfield School Dist. No. 19*, 300 Or. 507, 517, 716 P.2d 724 (1986); *Ross v. Springfield School Dist. No. 19*, supra, 294 Or. at 370 [657 P.2d 188]; prevents judicial usurpation of administrative functions, DAVIS, ADMINISTRATIVE LAW TEXT 321, § 16.03 (3d ed 1972); assures more careful administrative consideration, i.e., protects against careless or arbitrary action, Id. at 321-22; provides a source of guidance for agency personnel as well as for persons governed by the statute, *Ross v. Springfield School Dist. No. 19*, supra, 300 Or. at 517 [716 P.2d 724]; helps develop and maintain the consistency in administration, Id.; facilitates the parties' planning, i.e., helps parties plan their cases for rehearings and judicial review, DAVIS, ADMINISTRATIVE LAW TEXT, supra, at 322; and keeps agencies within their jurisdiction. Id."

(Footnote omitted.)

Here, the Secretary of State conducted no proceeding, heard no evidence, found no facts, adopted no rationales, made no conclusions of law. Whether his rejection of the petitions are considered a decision made pursuant to a contested case or other than a contested case, the decision was not made by a process that accorded Plaintiffs any due process or that produced the requisite findings, rationales, and conclusions.

II. SECOND CLAIM FOR RELIEF: DEFENDANT CANNOT LAWFULLY REFUSE TO RECOGNIZE VALID VOTER SIGNATURES ON PETITIONS THAT MAY CONTAIN ERRORS CAUSED BY CIRCULATORS OR OTHERS.

Defendant has apparently rejected over 3,000 valid and verified voter signatures on grounds that some "errors" were made by circulators or by the Nader Campaign in submitting the signature sheets to the Secretary of State. As the arguments below indicate, the "errors" alleged by the Secretary of State to the press were not "errors" at all. Even if they were, such errors under Oregon law do not allow the Secretary of State to refuse to count the valid and verified voter signatures on those petitions.

Defendant has offered no justification for this, and none can be found in the case law. In fact, Oregon cases indicate that voter signatures are not to be invalidated, even when the circulator has violated the law in signing as the circulator. In *Nelson v.*

accepted and validated all of the sheets at issue here, and the Secretary of State has no authority to reject such sheets for ad hoc and previously unheard of reasons.

A review of the facts is required here. As stated in the Affidavit of Gregory Kafoury and the Affidavit of Travis Diskin, the Nader Campaign was complying with the only legal requirement for the sequential numbering of the signature sheets, which is contained in the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS,[1] p. 4, which states:

> Within each individual county, sequentially number each signature sheet in the space provided; and
>
> Submit signature sheets to the appropriate county elections offices for verification * * *

The Nader Campaign did this, until they learned that the Secretary of State was directing some of the county elections officers to "pull out" and reject hundreds of signature sheets due to the Secretary of State's perception of problems with the signatures of the circulators or the dates accompanying those signatures.

Out of a superabundance of caution, the Nader Campaign wished to submit the signature sheets to the Secretary of State with sequential numbering within each county packet, with no "gaps" in the numbers. This is not required by any law or any rule, as the requirement quoted above applies only to the submittal of signature sheets to the county and not later to the Secretary of State, but the Nader Campaign wished to avoid giving the Secretary of State any possible excuse for rejecting the signature sheets. Further, the Manual requires only "sequential" numbering and not consecutive numbering. "Sequential" is defined by WEBSTER'S REVISED UNABRIDGED DICTIONARY (1998) as "succeeding or following in order" and by the American Heritage Dictionary of the English Language (4th ed. 2000) as: "forming or characterized by a sequence, as of units or musical notes." A sequence need not be

1. The full document is available at http://www.sos.state.or.us/elections/manuals/indiv.pdf.

consecutive or merely sequential numbers to such sheets). The team did so by numbering the unnumbered verified sheets and plugging them into the "gaps." Where there ended up being too few unnumbered verified sheets to fully plug the "gaps," the Nader Campaign took high-numbered sheets off the bottom of the county stack and renumbered them to plug the remaining "gaps."[3] Both numbers remained legible; the original # had a single line drawn through it.

There is no statute or rule prohibiting what the Nader Campaign did with the signature sheets. Even where numbering of petition sheets is required by rule, as in the verification process for statewide initiative petitions, the numbering rule has never been applied or implemented to disqualify whole sheets and elector signatures. See, Affidavit of Ruth Bendi.

The Nader Campaign, out of an abundance of caution, sought and followed the advice of the Office of the Secretary of State. Whether or not that advice was correct, there is no requirement that the signature sheets submitted to the Secretary of State, after verification by the county elections officers, be numbered, either consecutively or sequentially. Nor is there any prohibition against the petitioners or the Nader Campaign writing new numbers on some of the verified sheets returned to them by the county elections officers. In fact, the county elections officers themselves wrote new numbers on many of the sheets. Finally, the entire course of conduct followed by the Nader Campaign was pursuant to the specific advice of the Office of the Secretary of State.

Defendant is estopped from claiming that following his advice regarding numbering of the sheets warrants tossing away some 2,354 valid and verified signatures. Further, Defendant has no authority to reject signature sheets for lack of consecutive or sequential numbering, as there is no such legal requirement applicable to these signature sheets when submitted to the Secretary of State.

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3. Some of the verified sheets received back from the county elections officers show another set of numbers, usually below the line on each sheet for the "SHEET NUMBER." These additional handwritten numbers were written on the sheets by the county elections officers, not by the Nader Campaign.

at the instruction of John Lindback, and never notified plaintiffs of the fact. Thus plaintiffs kept submitting petition sheets from these circulators thereafter in total good faith and reliance that the elector signatures would be verified. See, Diskin Affidavit, Exs. G and K. Had plaintiffs ever been notified that these circulator signatures were somehow "questionable," they would have provided the person or the exemplars weeks ago. As it stands, Johnson, Wong, Rosenloff, Constancio, Pettet and others never had notice of a problem, nor were they given any chance to rebut the apparent "finding" that their signatures were "bad," all to the detriment of their rights, and the rights of electors and the campaign.

BLACK'S LAW DICTIONARY (8TH ED. 2004) defines "signature" as:

1. A person's name or mark written by that person or at the person's direction. [citations omitted]

2. Commercial law. Any name, mark, or writing used with the intention of authenticating a document. UCC §§ 1- 201(b)(37), 3-401(b). [citations omitted] "The signature to a memorandum may be any symbol made or adopted with an intention, actual or apparent, to authenticate the writing as that of the signer." Restatement (Second) of Contracts § 134 (1979).

The marks made by the circulators Johnson, Rosenloff, Wong, certainly qualify as "signatures." Further, plaintiffs will submit affidavits of several other circulators, further attesting to the authenticity of their signatures on disqualified sheets.

B. SHEETS WITH DATING ERRORS OR CORRECTIONS TO THE DATE ON THE CIRCULATOR'S SIGNATURE.

1. TRIVIAL DATE CORRECTIONS WHERE THE INTENTION OF THE CIRCUCLATOR IS MANIFESTLY CLEAR.

It appears that Defendant may have rejected some of the sheets due to the way the circulator dated his or her signature or corrected such date that the circulator may have begun to write incorrectly. The Affidavit of Travis Diskin attaches a bundle of signature sheets for which Plaintiffs were never given a reason, never told of a cure or correction for future use, and never given notice of the perceived problem. These are Exhibits E and K to his affidavit.

precluding from the verification process, without a very exacting standard of compelling justification, thousands of signatures, which in effect requires the plaintiffs to collect far more valid signatures than the number prescribed by the Oregon Constitution and statutes. Imposition of this burden violates Plaintiffs' rights under the First and Fifth Amendments to the U.S. Constitution, applicable to the states by the Fourteenth Amendment.

The United States Supreme Court requires that burdens on the process of qualifying candidates for the federal ballot be justified a scheme narrowly tailored to achieve a compelling state interest (know as "exacting scrutiny"). ***Anderson v. Celebrezze***, 460 U.S. 780, 786-88 (1983), stated:

> Nevertheless, as we have recognized, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter*, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972). Our primary concern is with the tendency of ballot access restrictions "to limit the field of candidates from which voters might choose." Therefore, "[i]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." Ibid.
>
> The impact of candidate eligibility requirements on voters implicates basic constitutional rights. Writing for a unanimous Court in *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958), Justice Harlan stated that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." In our first review of Ohio's electoral scheme, *Williams v. Rhodes*, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10, 21 L.Ed.2d 24 (1968), this Court explained the interwoven strands of "liberty" affected by ballot access restrictions:
>
> > "In the present situation the state laws place burdens on two *different*, although overlapping, kinds of rights--the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms."
>
> As we have repeatedly recognized, voters can assert their preferences only through candidates or parties or both. "It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues." *Lubin v. Panish*, 415 U.S. 709, 716, 94 S.Ct. 1315, 1320, 39 L.Ed.2d 702 (1974). The right to vote is "heavily burdened" if that vote may be cast only for major-party candidates at

> This conclusion is particularly evident in a case such as this one where there is no evidence regarding the reasons for rejection of signatures by local registrars and, indeed, no evidence that the registrars fully performed their checking function at all. Given the fundamental importance of affording a fair and reasonable means of ballot access to independent candidates, we further hold that judicial review of the signature certification process is necessary to safeguard the integrity of the electoral process and to effectuate the legislative intent to afford such access. Furthermore, the burden of proof must be placed on the Secretary of the Commonwealth to demonstrate that there were valid reasons for noncertification of signatures, rather than forcing the candidate to negate all potential reasons for rejection for each particular contested signature.

In the years after *Anderson v. Celebrezze*, the United States Supreme Court adopted even greater constitutional protection for the political aims of persons gathering signatures on petitions, holding that the First Amendment protects the rights of petitioners to communicate with voters. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) [hereinafter "*ACLF*"]; *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Such communication from petitioners to voters is the most highly protected speech and can be restricted only by means narrowly tailored to meet a critical state interest. Simply put, the state provision affecting petitioning must survive "exacting scrutiny" for determination of whether "it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777, 98 S.Ct. 1407, 1415-1416, 55 L.Ed.2d 707 (1978).

In *Meyer v. Grant*, *supra*, the Court struck down state law prohibiting the use of paid signature gatherers because it "makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." 486 U.S. at 428. In *ACLF*, the Court concluded that the activity of gathering signatures deserved even more than the "exacting scrutiny" applied in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995):

Here, all of the restrictions apparently adopted and applied by Defendant similarly impair the First Amendment rights of Plaintiffs. This is particularly true for those seeking to appear on the ballot for President and Vice-President, as the U.S. Constitution precludes the use of write-in votes (since technically all votes are cast for the "electors" to the electoral college). *Williams v. Rhodes*, supra, 393 U.S. at 37.

Defendant's burdens violate the rights both of prospective candidates, such as plaintiff Kucera, of petition circulators, and of voters. Electors of Oregon have the right to sign petitions for initiatives, referenda, recall, and candidate nominations. Once the State has adopted these processes for political change, the protections of the U.S. Constitution apply when voters seek to exercise this form of franchise.

In addition to First Amendment protections, the opportunity to effectively sign initiatives is also protected by the Fifth and Fourteenth Amendments. In *Idaho Coalition United for Bears v. Cenarussa*, 342 F.3d 1073, 1076 (9th Cir. 2003), the court recognized that voting on initiative measures is a fundamental right subject to Fifth and Fourteenth Amendment guarantees.

> Voting is a fundamental right subject to equal protection guarantees under the Fourteenth Amendment. *See Reynolds v. Sims*, 377 U.S. 533, 561-62, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). The ballot initiative, like the election of public officials, is a " 'basic instrument of democratic government,' " *Cuyahoga Falls v. Buckeye Comm. Hope Found.*, 538 U.S. 188, 123 S.Ct. 1389, 1395, 155 L.Ed.2d 349 (2003) (quoting *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 679, 96 S.Ct. 2358, 49 L.Ed.2d 132 (1976)), and is therefore subject to equal protection guarantees.

Denying an elector the opportunity to provide a valid signature on a petition is akin to denying an elector the right to vote in an election. More specifically, it would be akin to requiring that every voter's completed ballot be turned over to a third party (the "collector," who would bundle the ballots into a large envelope, sign it, and deliver it to the election office) and allowing the State to invalidate every ballot contained in a large envelope upon which the collector had made any slip of the pen in writing down the

limitation, which determines what standard governs the choice [where individual freedom ends and where state power begins].

Thomas, 323 U.S. at 530.

In addition to acting in a capacity akin to voting, electors signing petitions are engaging in core political speech to the wider public. They are seeking to place upon the ballot, for the consideration of all electors, their candidates. They are thus entitled to the same protections as are petitioners/circulators from impairment by state actions.

Here, each plaintiff elector is being denied the right to effectively sign the petitions of their choice by the *ad hoc* policies of the Secretary of State, as detailed above. These policies deprive the signor of any assurance that her valid signature will be counted. The Secretary of State's policies deprive signors of their right to validly sign petitions, because he is disqualifying those signatures on bases that have nothing to do with the validity of the signature. Instead, he is throwing them out because the circulator has allegedly made some minor "error" in the date on the signature of the circulator that the Secretary of State now deems to be fatal to the signatures on every sheet containing such an "error." He is also throwing away hundreds of sheets with valid signature of electors, because he does not like the way the circulator's signature looks and will not accept any documentation regarding the normal appearance of the circulator's signature (apart from an Oregon voter registration card, the requirement of which has been found conclusively to be an unconstitutional restriction on the initiative process in *Buckley v. ACLF*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999).

VI. SIXTH CLAIM FOR RELIEF: DISQUALIFYING SIGNATURE SHEETS ON THE BASIS OF ALLEGED ERRORS BY CIRCULATORS VIOLATES PLAINTIFFS' RIGHTS UNDER THE OREGON CONSTITUTION.

The implementation of a rule which disqualifies voter signatures on a nominating petition on the basis of alleged (or proven) errors by circulators (in signing, dating, or placing numbers upon the sheets) significantly burdens the collection of signatures by

VII. SEVENTH CLAIM FOR RELIEF: REJECTING CIRCULATOR SIGNATURES UNLESS THEY MATCH THE SIGNATURES UPON OREGON VOTER REGISTRATION CARDS VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHTS, DISCRIMINATES ARBITRARILY BETWEEN OREGON REGISTERED VOTERS AND OTHERS, AND VIOLATES THE OF DUE PROCESS GUARANTEE AND FREEDOM OF TRAVEL GUARANTEES OF OUT-OF-STATE CIRCULATORS.

The implementation of a rule which prohibits signing a circulator signature line with any reasonable variation to the signature as it appears on the circulator's Oregon Voter Registration card, without any opportunity to cure or correct the circulator signature line, violates the rights of Plaintiffs who were circulators to participate in the nominating petition process without burdens on their right to travel across state lines and into Oregon to engage in core political speech and to circulate petition sheets on matters of concern to them.

Defendant's practice of making acceptance of a circulator signature dependent upon examination of an Oregon Voter Registration card violates the First Amendment rights of those individual supporters of the Nader/Kucera ticket who are not registered voters in Oregon and impermissibly discriminates against those Oregon residents who are not registered to vote and in favor of those Oregon residents who are registered to vote.

Defendant's apparent practice seeks to evade the edict of the United States Supreme Court in *ACLF* that a state cannot restrict the gathering of signatures on petitions to registered voters of the state. By rejecting circulator signatures that he does not happen to like, while resurrecting such signatures only if they match an Oregon voter registration card, Defendant is violating *ACLF* and the constitutional rights of Americans who are not Oregon registered voters.

VIII. REQUESTED RELIEF.

Based on the above discussion, the Court should issue an order:

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTIVE RELIEF by emailing an electronic copy to the email address stated below and by placing a true copy into the U.S. Mail, first class postage prepaid, addressed to the attorney listed below:

Katherine Georges
Assistant Attorney General
400 Justice Building
Salem, OR 97310

Dated: September 3, 2004

Linda Williams

9-7

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

FILED
SEP - 9 2004
Marion County Circuit Court

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESE WINDER, KRISTIN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,

Plaintiffs,

v.

BILL BRADBURY, Secretary of State,

Defendant.

Case No. 04C18259

OPINION AND ORDER

Oregon law vests considerable discretion with the Secretary of State for the administration of our election laws. ORS 246.110 provides that the Secretary is the chief elections officer of this state and that it is the Secretary's responsibility to maintain uniformity in the application, operation, and interpretation of the election laws. ORS 246.120 instructs the Secretary to prepare and distribute "detailed and comprehensive written directives" to each county clerk and to assist and instruct each county clerk on election procedures. Under ORS 246.150, the Secretary of State is also authorized to adopt written rules to facilitate and assist in maintaining a maximum degree of correctness, impartiality, and efficiency in the administration of the election laws.

"All signatures must be personally witnessed by the petition circulator and the circulator's certification must be completed and dated after all signatures have been collected; and

- No additional signatures may be added to that signature sheet once the circulator has signed the certification and dated the sheet."

Step 2 specifies that before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must:

- "Sort the signature sheets by county;
- Within each individual county, sequentially number each signature sheet in the space provided; and
- Submit signature sheets to the appropriate county elections offices for verification, in sufficient time for the verification process to be finished before submitting the completed nominating petition to the Elections Division."

Next, on page 5, the Manual specifies that "as soon as possible the county elections official certifies the signatures and returns the signature sheets to the chief sponsor of the certificate of nomination with the total number of valid signatures." Thereafter, "the chief sponsor files the completed nominating petition with the Elections Division" of the Secretary of State. The petition consists of both a Certificate of Nomination by Individual Electors and "Verified signature sheets with the sufficient number of signatures."

The above general description details the process prescribed by the rule for the preparation, circulation, and verification and filing of the nomination petitions as set forth by the administrative rules of the Secretary of State. There are only a few more specific additional regulations detailing Signature Sheet Requirements, Petition Signer Requirements, Circulator Requirements, and Signature and Distribution Requirements. These are set forth on pages 12 and 13 of the Manual, and all relate back to the statutory requirements set forth in ORS 249.740 as discussed above.

Those more detailed and specific rules do provide that failure to obtain written approval before circulating the forms for the signature sheets "will result in the rejection of those sheets." Notably, however, no other similar rule authorizes the wholesale rejection of signature sheets for errors other than signature sheet format violations.

Specifically, the only additional requirements for petition circulators are two: "The circulator of the candidate nominating petition must sign the circulator's certification . . . ." And "The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification." The rule warns that violation of

These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

Mr. Lindback also testified that pursuant to his written instructions to the county clerks, as set forth in Exhibits 2 and 3 to the Affidavit of John Lindback, Director of the Elections Division, the county clerks were to screen petition sheets for circulator signature and dating problems before verifying the electors signatures appearing thereon, and were further instructed to verify only those elector signatures submitted "on signature sheets that do not have any issues." Presumably, these written instructions, prepared in August of 2004 for the Nader signature campaign, were distributed under the authorization set forth in ORS 246.120. However, these instructions are inconsistent with both the state elections policy established by the Legislature in ORS 247.005, and with the Secretary's own written rules as set forth in the Manual, as well as with the Secretary's policy position set forth in Nelson v. Keisling.

Interestingly, while some counties, most notably Multnomah, complied with these new written instructions, other counties apparently did not. Then, after the non-complying counties submitted their verified elector signature certificates on the signature petitions, Mr. Lindback and his staff went through those petitions again in Salem and disqualified and removed additional signature sheets that had verified elector signatures certified by the county clerk. This was done solely because of perceived signature and dating problems with the circulators' certifications. There appears to be no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage.[1]

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[1] The only potential statutory authority for this additional disqualification procedure would seem to be ORS 249.004 which permits filing officers to verify the validity of the contents of documents filed with the officer under Chapter 249. However, "the validity of the contents of the documents" at issue here would be the verified signatures of the electors and the county clerks' certification of the total number of verified signatures. Once the electors' signatures have been verified as valid by the county clerk, there would be no policy reason to seek to disqualify them for alleged defects in the circulator certifications that would not run afoul of ORS 247.005: "It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of the franchise." In any event, ORS 249.004 was not cited as authority for the Secretary's disqualification of the previously verified electors' signatures which had already been certified to him by the county clerks. The only purpose cited by Mr. Lindback was "to maintain uniformity and consistency in the interpretation of the elections law" in accordance with ORS 246.110. Affidavit of John Lindback at page 5.