ORAL ARGUMENT NOT YET SCHEDULED

No. 21-1213

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JILL STEIN, DR. AND JILL STEIN FOR PRESIDENT
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition for Review of an Order of the
Federal Election Commission

BRIEF FOR THE FEDERAL ELECTION COMMISSION

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Respondent Federal Election Commission ("Commission" or "FEC") hereby certifies as follows:

(A) Parties and Amici. This petition by Petitioners Dr. Jill Stein and Jill Stein for President arises from the Commission's repayment determination following its audit of Stein's 2016 presidential campaign committee. Dr. Jill Stein and Jill Stein for President were the only parties to the Commission's proceeding. There were no intervenors or amici curiae in the administrative proceeding. No amici have appeared before this Court.

(B) Ruling Under Review. Petitioners seek review of the Commission's repayment determination, dated September 30, 2021, which directs Stein to repay $175,272 to the United States Treasury. There is no official compilation to cite for the determinations and accompanying statement of reasons, which is reprinted in the Appendix filed by Petitioners at pp.60-79.

(C) Related Cases. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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COUNTERSTATEMENT OF JURISDICTION

Petitioners invoked this Court's jurisdiction under 26 U.S.C. §§ 9038(b) and 9041 to review a final repayment determination for Dr. Jill Stein and the Jill Stein for President Committee (the "Stein Committee" or "the Committee"), made pursuant to the Presidential Primary Matching Payment Account Act, 26 U.S.C §§ 9031-9042. Pursuant to 26 U.S.C. § 9041(a), this Court has jurisdiction over the petition for review.

COUNTERSTATEMENT OF ISSUES PRESENTED

The Presidential Primary Matching Payment Account Act ("Matching Payment Act") provides eligible candidates for nomination for election to be President of the United States with limited public matching funds for each private contribution of up to $250 to be used for certain qualifying campaign expenses that the candidate incurs during a specified period. The matching payment period opens at the beginning of the calendar year in which a general election for President will be held and closes on a date that depends on the method of nomination. For candidates seeking the nomination of a party that nominates its presidential candidates at a national convention, the matching period ends on the date on which the party's nomination occurs. For candidates seeking the nomination of a party which does not hold a national convention, the end of the

matching payment period occurs on the earlier of the date the party nominates its candidate or the last day of the last national convention held by a major party.

During the 2016 presidential election cycle, Stein sought the presidential nomination of the Green Party of the United States, which nominated its candidate at a national convention, and the nomination of several state parties that did not nominate by national convention. The Commission concluded that Stein's matching payment period closed on the date she received the Green Party's nomination because the ineligibility date applicable to any of the state parties would have resulted in a shorter eligibility period. The Commission also concluded that the Committee waived its ability to claim certain winding down costs as eligible expenses because it had not specifically raised those costs until well after the deadline to do so. The questions presented are:

1. Whether the provision of the Matching Payment Act and corresponding Commission regulation defining the "matching payment period," 26 U.S.C. § 9032(6); 11 CFR § 9032.6(b), is unconstitutional as applied to the Stein Committee.

2. Whether it was arbitrary, capricious, or an abuse of discretion for the Commission to determine that the Stein Committee failed to preserve its argument concerning additional winding down expenses for the Commission's consideration of its repayment determination.

STATUTES AND REGULATIONS

Applicable statutory and regulatory provisions are in the Addendum to the Petitioners' Brief.

COUNTERSTATEMENT OF THE CASE

INTRODUCTION

For more than forty years, Congress has provided two forms of public funding for candidates seeking the office of the Presidency of the United States. The Presidential Election Campaign Fund Act offers candidates nominated by eligible major and minor political parties the option of public financing for the general election. *See* 26 U.S.C. §§ 9001-9013. The Matching Payment Act, by contrast, provides limited public matching funds to candidates running in a primary election, that is, seeking the nomination of a major or minor political party. *See id.* §§ 9031-9042.

In 2016, Dr. Jill Stein sought the Green Party's nomination for the office of President of the United States, as well as the nomination of several state parties. Through her campaign committee, Dr. Jill Stein for President, Stein qualified for payments of public matching funds to finance her nomination campaign pursuant to the Presidential Primary Matching Payment Account Act ("Matching Payment Act"), 26 U.S.C. §§ 9031-9042. After Stein was nominated, the Commission

conducted a mandatory audit of the Committee and concluded that it had received a surplus of public funds in the amount of $175,272.

The Committee challenges the Commission's repayment determination on two grounds, but neither supports overruling the Commission's judgment. *See generally* Corrected Br. of Petitioners, Doc. No. 1953536 (July 5, 2022) ("Br."). The Committee first suggests that a straightforward application of the statutory rule establishing an end date for the eligibility for limited public matching funds unconstitutionally discriminates against candidates that seek the nomination of certain minor parties because it limits their ability to use primary matching funds to finance state ballot access activities after that date. But if minor parties face additional costs for ballot access compared to the major parties, those costs stem from the election laws of the various states, not the Matching Payment Act. And the end date Congress selected, which in this case matched exactly with the date Stein received the Green Party's nomination, is defensible as a close approximation to the functional end of the nomination process for minor party candidates.

Separately, the Committee failed to preserve its argument that it incurred additional winding down expenses by failing to raise this issue in its request for administrative review, as required under agency regulations. Commission regulations provide that a candidate's failure to raise such arguments in a timely

fashion during the repayment determination process waives the candidate's right to present those matters in any future stage of the proceedings, and the Committee fails to show that it could not have introduced any evidence regarding the disputed winding down costs at the time of their request for administrative review. The Petition for Review should be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Commission

The Commission is the six-member independent federal agency with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Matching Payment Act and the Federal Election Campaign Act of 1971 ("FECA"). Congress empowered the Commission to "prescribe rules and regulations"; "to conduct examinations and audits" of candidates and committees receiving primary matching funds; "to conduct investigations"; and "to require the keeping and submission of any books, records, and information, which it determines to be necessary to carry out its responsibilities" under the Matching Payment Act. 26 U.S.C. § 9039(b).

B. The Matching Payment Act

Congress enacted the Matching Payment Act to provide partial public financing for the campaigns of candidates who seek nomination for election of the office of President of the United States, and who satisfy certain eligibility

requirements. 26 U.S.C. §§ 9032(2), 9033. Among other requirements, candidates receiving matching payments must agree in writing to comply with all the Commission's documentation requirements, which include retaining and presenting to the Commission upon request properly documented bank records, receipts, and fundraising solicitation material. *Id.* § 9033(a). Participating primary candidates must also agree to cooperate with audits and examinations by the Commission, accept the burden of proving that all disbursements of public funds are for qualified campaign expenses, and repay any amounts required to be paid under the Matching Payment Act. *Id.*; 11 C.F.R. §§ 9033.1, 9033.2. Candidates must also certify that they and their authorized committees "will not incur qualified campaign expenses in excess of the limitations on such expenses under section 9035." 26 U.S.C. § 9033(b)(1).

Once a candidate establishes that she is eligible, she is entitled to public funds equal to each eligible private contribution received by the candidate up to $250. 26 U.S.C. § 9034(a). Public funds may only be used to defray "qualified campaign expense[s]," and only to the extent that those expenses are incurred within the "matching payment period." *See id.* § 9032(6), (9). Thus, "[m]atching payments may be used for legitimate campaign expenses during the pre-nomination period." H.R. Rep. 93-1239, at 13 (1974) (Conf. Rep.). Candidates are required to repay any funds received that were used for any purpose other than

to defray qualified campaign expenses or outside the period. *See* 26 U.S.C. § 9038(b)(3).

The Matching Payment Act defines a "qualified campaign expense" as "a purchase, payment, distribution, loan, advance, deposit, or gift of money or of anything of value" that is incurred by the candidate or campaign committee "in connection with his campaign for nomination for election." 26 U.S.C. § 9032(9)(A).

Qualified campaign expenses can include winding down expenses. 11 C.F.R. § 9034.11(a). Winding down costs include the "costs of complying with the post election requirements" of the Matching Payment Act and "other necessary administrative costs associated with winding down the campaign, including office space rental, staff salaries, and office supplies." *Id.* Campaigns may thus use public funds to pay for these expenses and potentially lower any repayment obligations, up to a certain limit. *See id.* § 9034.11(b) (reciting limitations on allowance for winding down costs), *id.* § 9034.5(b)(2) (including estimated winding down costs in statement of net outstanding campaign obligations). Expenses for minor party candidates to gain access to the general election ballot are also generally qualified campaign expenses, so long as they are incurred during the period for which the candidate is eligible for matching payments. *See, e.g.*,

FEC Advisory Op. 1995-45 (Jan. 11, 1996) (Hagelin for President), https://www.fec.gov/files/legal/aos/1995-45/1995-45.pdf.

A candidate's eligibility to receive matching funds ends if they cease to be a candidate or if the matching payment period ends. 11 C.F.R. § 9033.5; *see* 26 U.S.C. § 9032(6). The matching payment period begins on the start of the calendar year during which the general election will occur and ends depending on the process by which the party whose nomination the candidate seeks selects its nominee. 26 U.S.C. § 9032(6). If a party nominates a candidate during a national convention, then the matching payment period ends on the date the candidate is nominated. 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(a). If a party does not use a national nominating convention to select its candidate, then the period ends on the earlier of the date the party nominates the candidate or the last day of the last national convention held by a major party during the election year. 26 U.S.C. § 9032(6). *See also* "Establishing eligibility to receive presidential primary matching funds payments," https://www.fec.gov/help-candidates-and-committees/understanding-public-funding-presidential-elections/establishing-eligibility-presidential-primary-matching-funds/. This date is known as the "date of ineligibility" or "DOI." 11 C.F.R. § 9033.5.

The Matching Payment Act requires the Commission to conduct a "thorough examination and audit" of the campaign finances of every publicly funded

candidate after the campaign for the nomination ends. 26 U.S.C. § 9038(a); 11 C.F.R. § 9038.1. Pursuant to the Commission's detailed regulations, the Commission issues to the candidate a Preliminary Audit Report after its auditors review the candidate's books and records, which includes findings regarding calculation of any repayments that will be required by the Act. 11 C.F.R. § 9038.1(c)(1)(iii). The candidate has an opportunity to respond and contest the findings and calculation in the Preliminary Audit Report, including by providing any documentation or supporting materials to contest the Commission's findings. *Id.* § 9038.1(c). The Commission then adopts a Final Audit Report, which includes an "initial repayment determination." 11 C.F.R. § 9038.2(c)(1). The candidate then has another opportunity to contest the findings in the Final Audit Report. The Commission's issuance of the final audit report to the candidate under 11 C.F.R. § 9038.1(d) constitutes notification for repayment purposes. 11 C.F.R. § 9038.2(a)(2). Thus, at this critical juncture, the candidate must raise any issue that it is requesting that the Commission consider before the Commission makes its final repayment determination.

Specifically, "[a] candidate who disputes the Commission's repayment determination(s) shall submit in writing, within 60 calendar days after service of the Commission's notice, legal and factual materials demonstrating that no repayment, or a lesser repayment, is required." 11 C.F.R. § 9038.2(c)(2)(i). A

candidate's "failure to timely raise an issue in written materials presented pursuant to this paragraph will be deemed a waiver of the candidate's right to raise the issue at any future stage of proceedings including any petition for review filed under 26 U.S.C. 9041(a)." *Id.* A candidate may also request to make an oral presentation to the Commission based on the written materials she submits. 11 C.F.R. § 9038.2(c)(3). The Commission's audit process culminates in the issuance of a "final repayment determination" with a statement of reasons that explains the basis of the Commission's determination. 11 C.F.R. § 9038.2(c)(3). This final repayment determination is subject to review by this Court. 26 U.S.C. § 9041.

The Commission also has a program for requesting consideration of legal questions earlier in the process, in which persons and entities may seek Commission review if a material dispute on a question of law exists relating to a determination made by the Commission's Audit Division staff. *See* Legal Policy and Other Guidance, Requests for consideration of legal questions by the Commission, https://www.fec.gov/legal-resources/policy-other-guidance/requests-legal-consideration/. Such a request must be submitted within 15 business days of the staff determination. A ''determination'' for purposes of triggering the 15 business days is either: (1) Notification to the person or entity of legal guidance prepared by the FEC's Office of General Counsel at the request of the Reports Analysis Division recommending the corrective action; or (2) the end of the

Committee's Audit Exit Conference response period. The request must specify the question of law at issue and why it is subject to Commission consideration. The Commission then considers the request and provides a response to the requestor if the matter is not otherwise resolved informally. *See* FEC Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, https://www.fec.gov/resources/cms-content/documents/fedreg_notice_2019-10_EO13892.pdf.

C. The Commission's Audit of the Stein Committee and the Commission's Repayment Determination

Stein is an experienced federal candidate who obtained Matching Payment Act funds during the 2012 presidential campaign. During the 2016 presidential election cycle, Stein sought the nomination of the Green Party of the United States at its national nominating convention. (SA 4 (AR 44).) Because the national Green Party did not have an automatic right to place its nominees on the general election ballot in all fifty States, however, at the same time she also sought the nomination of other independent state parties that were scheduled to hold their elections and conventions on later dates but did not use a national convention.[1]

[1] Stein sought the nomination of a number of parties in addition to the Green Party of the United States, including unaffiliated state green parties that had a variety of ballot access deadlines, including deadlines of June 1, 2016 (Kansas), July 11, 2016 (South Dakota), August 1, 2016 (Vermont) and August 15, 2016 (Utah). Stein also certified that she was seeking the nomination of the Peace and

Stein applied for public funds under the Matching Payment Act, (AR 1-3), and on April 13, 2016, the Commission determined that she was eligible to receive public funds. (AR 19-20.) By the conclusion of Stein's campaign, she had received a total amount of $590,936 in matching fund payments. (Pet. For Review of Agency Action, Doc. No. 1920438, at ECF p. 5 (Oct. 29, 2021) ("Pet.").)

When a candidate seeks the nomination of several minor parties with different dates of nomination, the Commission has looked to the last nomination date for those non-major parties that do not use a national nominating convention and then compared that date to the last day of the last major party nomination to determine which date is earlier for purposes of the determining the end of the matching payment period. 26 U.S.C. § 9032(6); 11 C.F.R. § 9032.6(a); *see also* SA 2 (AR 35.) The Commission has also used this approach when a candidate seeks the nomination of a minor party that nominates its candidates at a national convention and also seeks the nomination of independent parties, as did Stein in 2016. (SA 12 (AR 60).) In that circumstance, the Commission has determined that the matching payment period ends at the later of (1) the date of the minor party national nominating convention or (2) the latest date an independent state party

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Freedom Party, which was holding its nominating convention in California on August 13, 2016. ((SA 2 (AR 35).)

nominates the candidate that is not after the date of the last major party nominating convention. (SA 12-13 (AR 60-61) (citing FEC Advisory Op. 1984-25, at 2).)

The last day of the last major party national nominating convention during the 2016 election cycle was on July 28. (SA 12 (AR 60).) The Green Party, in contrast, selected Stein as their nominee on August 6, 2016. Because any independent state party nomination would have occurred later than July 28, the Commission determined that the date the Green Party nominated Stein — August 6, 2016 — was the date on which she would no longer be eligible to receive public matching funds for the purpose of seeking the nomination. (SA 1-5, 10-14, 18-19 (AR 34-36, 44-45, 58-62, 84-85)); (*see also* AR 43, 86.) In doing so, the Commission selected the "date that results in the candidate receiving the full benefit of the longest permissible matching payment period to which she is entitled, rather than artificially shortening that period merely because the candidate also [sought] nominations that are decided at earlier dates." (SA 3 (AR 36).) The Commission notified the Committee of its date of ineligibility determination on August 17, 2016. (SA 4-5 (AR 44-45).)[2]

[2] The Commission mistakenly identified the date of ineligibility as August 7 in its February 28, 2018 memorandum on the Committee's Request for Consideration of a Legal Question, resulting in a Commission certification purporting to reaffirm that date as the date of ineligibility. However, the Commission subsequently corrected this error in a corrected certification. (SA 18-19 (AR 84-85));(AR 86.)

Following the conclusion of Stein's campaign, the Commission conducted a mandatory audit of the candidate's finances in accordance with 26 U.S.C. § 9038(a). The Commission notified the Committee that it had preliminarily determined that it had received funds in excess of the amount it was entitled to under the Matching Payment Act. (SA 6-9 (AR 54 -57).) The Commission calculated the Committee's surplus based on the statement of net outstanding campaign obligations, also known as a "NOCO" statement, that the Committee was required to file after the Commission's determination of the candidate's date of ineligibility. *See* 11 C.F.R. § 9034.5.

On January 12, 2018, the Committee submitted a request for consideration of a legal question related to the Commission's preliminary findings. Although the Committee "agree[d] with most of the findings and recommended remedies," it requested "consideration of a single item," namely, for the Commission to reconsider the date of ineligibility. (SA 6-9 (AR 54-57).) The Committee argued that the date of ineligibility should be later because it had to incur expenses to support Stein's efforts to get on the ballot in several states, ranging from August 10, 2016, to September 9, 2016. These dates were all after Stein's nomination at the national convention which was after the last major party nominating convention. (SA 12 (AR 60).) The Commission responded on May 15, 2018, reaffirming its earlier determination. (SA 20-21 (AR 93-94).)

On July 10, 2018, the Commission's Audit Division issued a Preliminary Audit Report that included detailed schedules and an updated net outstanding campaign obligations statement and associated winding down expenses. The Preliminary Audit Report made two relevant findings. First, it explained that auditors considered only ballot access expenses incurred on or before Stein's date of ineligibility. Second, the preliminary report explained that the Stein Committee had not yet submitted winding down costs after August 1, 2017. (SA 16 (AR 64)); (AR 90.) After receiving a 15-day extension, on September 26, 2018, the Committee responded to the Preliminary Audit Report and submitted some bank statements as supporting documentation. (AR 145-147.) Because of incomplete documentation, however, the auditors could not verify all winding down expenses in the Committee's statement of net outstanding campaign obligations. (SA 52 (AR 208).) As a result, the Audit staff concluded that the Committee remained in a surplus position. (*Id.*); (SA 31 (AR 184).)

On November 19, 2018, auditors sent a draft Final Audit Report to the Committee, which included detailed schedules to support the auditors' updated statement of net outstanding campaign obligations and winding down expenses. The increased actual winding down costs reflected the costs incurred through August 31, 2018, which was the last date that the Committee provided documentation to support its winding down expenses. (*See* AR 246.) The Audit

Division also included estimated winding down costs for the period of September 1, 2018, through July 31, 2019, amounting to $69,355, and stated that "[t]his amount will be compared to actual winding down costs and will be adjusted accordingly." (SA 34 (AR 187).)

The Draft Final Audit Report determined that the Committee had a $200,876 surplus as of the date of ineligibility, and of this total surplus, the Committee must repay $40,372, having applied a repayment ratio calculated in accordance with 11 C.F.R. § 9038.3(c)(1). (SA 31 (AR 184).) Further, because a surplus existed as of the date of ineligibility, the draft Final Audit Report found that a matching fund payment of $134,900 that the Candidate received after the date of ineligibility exceeded the entitlement to such funds. *Id.*; *see* also 11 C.F.R. § 9033.5. Based upon these two findings, the Audit Division concluded that the Committee must repay a total of $175,272 to the United States Treasury. This total was derived from adding $40,372, reflecting the portion of the surplus that must be repaid, and $134,900, the full amount that the Candidate received after the date of ineligibility.

The Committee submitted a narrative statement in response to the draft Final Audit Report noting additional expenses, but it did not provide any supporting documentation of these expenses, nor did the Committee provide a list of any additional winding down costs to support these expenses. (*See* SA 45-46 (AR 198-200).) Instead, the Committee requested that the Commission delay making its

repayment determination so that the Committee could "work with Audit staff to resolve discrepancies" in the statement of net outstanding campaign obligations. (SA 46 (AR 199).) In recommending against this delay, Commission staff noted that the Committee had been "uncooperative" throughout "the entire audit process." (SA 49 (AR 205).) The Committee had "ignored scheduled conferences, repeatedly missed deadlines, and failed to respond to the Audit Division's numerous requests for supporting documentation that would have helped the auditors verify" the Committee's outstanding obligations. (*Id.*) It took the Committee "more than six months to provide auditors the requested preliminary pre-audit materials," the Committee "failed to attend . . . the November 30, 2017 telephonic exit conference," and prior to the exit conference auditors had "emailed the Committee detailed schedules supporting each potential finding, including. . . associated winding down expenses," placing the Committee on notice more than a year prior to the Draft Final Audit report. *Id.*

The Commission declined the Committees request for additional delay, and instead adopted the Final Audit Report on April 16, 2019. (App. 1-25 (AR 236-60).) The Final Audit Report again identified August 6, 2016, as Stein's Date of Ineligibility. (App. 6 (AR 241).) Like the Draft Final Audit Report, the Final Audit Report included the actual winding down costs through August 31, 2018, the last date the Committee had provided documentation, and included estimated

winding down costs supported by documentation for the period of September 1, 2018, through July 31, 2019, in the amount of $69,355. (App. 14 (AR 249).) Because the Committee had not provided any additional documentation, the Final Audit Report again stated that its estimated winding down costs "will be compared to actual winding down costs and will be adjusted accordingly." (*Id*.) Like the Draft Final Audit Report, there were two components to the repayment determination: 1) the public funds portion of the surplus in the Committee's accounts as of the candidate's date of ineligibility and 2) the public funds received in excess of entitlement. It found that the Committee had a surplus of $200,856, and that the Committee "is required to make a pro rata repayment [of the surplus] of $40,372" (App. 8 (AR 243)), in addition to the $134,900 it received in excess of entitlement. (App. 8-9 (AR 243-44).) The Committee was notified of these findings by letter dated April 17, 2019. (*See* App. 26 (AR 261).)

D. The Stein Committee's Request for Administrative Review

A committee that wishes to challenge a Commission repayment determination must submit written materials within 60 days after service of the Commission's determination. 11C.F.R. § 9038.2(c)(2)(i). On June 17, 2019, the Committee submitted a written request for administrative review pursuant to 11 C.F.R. § 9038.2(c)(2)(i) challenging the Commission's initial repayment determination and requesting an oral hearing. (App. 26-32 (AR 261-267).) The

"pivotal issue" asserted by the Committee in its written request, was its argument that the date of ineligibility was incorrect. (App. 26 (AR 261).) The Committee's written materials did not include any documentation related to winding down costs that the Commission had previously determined were insufficient, or documentation related to further winding down costs incurred after August 31, 2018, in support of increasing the estimated or actual winding down costs. Indeed, the only reference to winding down expenses was the Committee's vague assertion that "it will be shown that the other findings concerning the nature of winding down expenses, misstatement of financial activity and disclosure of debts and obligations likewise cannot survive scrutiny." (*Id.*) That assertion was not supported by any documentation or further argument. (*See id.*)

E. The Commission's Oral Hearing and Reaffirmance of the Committee's Repayment Obligation

Upon the Committee's request, the Commission held an oral hearing on February 25, 2021.[3] (App. 34-54 (AR 280-300).) Between February 18 and 19, 2021, the Committee emailed Commission staff new documents that purported to detail additional winding down expenses that had not been previously submitted.

[3] On September 12, 2019, the Commission notified the Committee that due to the resignation of former Vice-Chair Matthew S. Petersen, the Commission no longer had a quorum of at least four voting members to grant the Committee's request for an oral hearing. Apart from a period of approximately one month extending from May 2020 to early July 2020, the Commission remained without a quorum until December 2020. (AR 272.)

See Br. at 9, 24. Though the Committee had not provided documentation with respect to those expenses previously, FEC staff made the Commissioners aware of the submissions and placed them on a shared network folder so that Commissioners and staff could access them due to the short period of time and the overriding need for the Commissioners to be prepared for the oral hearing. At the oral hearing itself, however, Commission Chair Broussard reiterated that the hearing would "be limited to those matters raised in the [C]ommittee's written response to the Commission's repayment determination that [the Committee] filed on June 17th, 2019" under the process set forth in 11 C.F.R. § 9038.2(c)(2), while also noting that the Committee had five additional days in which to submit additional materials for Commission consideration. (App. 38-39 (AR 284-285).) When asked how the documents submitted in the days before the oral hearing related to issues that were raised in the Committee's written submission, the Committee pointed solely to its general statement that the Commission's "other findings concerning" among other things "winding down expenses" would not "survive scrutiny." (AR 308-309.)

After the oral hearing, between March 1 and March 4, the Committee again emailed FEC employees documents that purported to establish additional winding down expenses that had not been previously raised as issues. *See* Br. at 24.

Because these materials were not timely presented, the Commissioners did not consider these materials. (App. 65-69.)

On September 30, 2021, the Commission issued its final determination of the $175,272 repayment amount and adopted the recommended Statement of Reasons as the legal and factual basis for the Commission's determination. (*See* Pet. at ECF pp. 3-22; AR 301-321; AR 322.) The Commission's Repayment Determination affirmed its determination that Stein and the Committee "must repay public funds in the amount of $175,272." (App. 79 (Rep. Det. at 19).). In making this determination, the Commission explained in its Statement of Reasons that the Committee "waived any issues or arguments pertaining to winding down expenses by failing to raise them in its request for administrative review." (App. 67 (Rep. Det. at 7).)

SUMMARY OF THE ARGUMENT

The Commission properly determined that the Stein Committee was required to repay $175,272, representing surplus public funds in the Committee's accounts and public funds received in excess of entitlement.

The Committee's claim that application of the matching fund period imposes unequal burdens on it because it incurred additional costs to qualify on various state ballots is precluded by Supreme Court precedent. The provision does not impose a discriminatory burden on the Stein Committee simply because it may

result in an eligibility period that does not encompass all state ballot access deadlines. Congress may provide different access to public financing for candidates of political parties that appeal to greater numbers of voters, and the Constitution does not require Congress to treat all declared candidates the same in this context. The Commission's determination was consistent with agency precedent in applying the date that results in the candidate receiving the full benefit of the longest permissible matching payment period to which she is entitled, rather than artificially shortening that period merely because the candidate also seeks nominations of parties that do not hold national conventions. Moreover, the Commission cannot arbitrarily expand the eligibility deadline beyond what Congress provided.

The Committee also failed to preserve its argument that it had additional documentation supporting winding down costs that it claims would negate its repayment obligation. It did not raise this argument until after it had submitted its request for administrative review, nearly two years later during the oral hearing before the Commission. The regulation is clear. Any issues not raised in a request for administrative review are deemed waived. As a result, the Committee waived any issues or arguments it had pertaining to these winding down expenses, and the Commission's decision not to consider this argument was not contrary to law or an abuse of discretion.

The Committee's additional argument, raised for the first time in their brief, that the Commission failed to account for the Committee's claim of increased winding down costs because of the Commission's loss of quorum, is of no consequence to this determination. According to its own submissions, the Committee had purportedly incurred actual winding down costs at the time of its request for administrative review. *See* Br. at 5 (noting additional costs between September 1, 2018 and December 31, 2020, totaling $318, 823). Yet the Committee has failed to show that it could not have introduced additional expenses, and documentation of costs between September 2018 and June 2019, in its request for administrative review submitted on June 17, 2019. The Petition for Review should be denied.

STANDARD OF REVIEW

Under 26 U.S.C. § 9041, judicial review of a Commission determination "is limited to determining whether the Commission's action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Comm. to Elect LaRouche v. FEC*, 613 F.2d 834, 845-46 (D.C. Cir. 1979) (citation omitted). This standard is "highly deferential" and "presume[s] the validity of agency action." *Am. Horse Prot. Ass'n, Inc. v. Yeutter*, 917 F.2d 594, 596 (D.C. Cir. 1990). Thus, "the party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. Nuclear Regulatory*

Comm'n, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc). Under this standard, "[a] court cannot substitute its judgment for that of an agency, and must affirm if a rational basis for the agency's decision exists." *Bolden v. Blue Cross & Blue Shield Ass'n*, 848 F.2d 201, 205 (D.C. Cir. 1988) (internal citation omitted).

The Supreme Court has recognized in the ballot access context that "restrictions on access to the electoral process must survive exacting scrutiny." *Buckley v. Valeo*, 424 U.S. 1, 93-94 (1976) (per curiam). Public campaign financing systems, however, are "generally less restrictive of access to the electoral process than the ballot-access regulations" to which such exacting scrutiny applies. *Id.* at 95. As such, public campaign financing provisions are constitutional under the equal protection component of the Fifth Amendment if they are enacted "in furtherance of sufficiently important governmental interests" and they do not "unfairly or unnecessarily burden[] the political opportunity of any party or candidate." *Id.* at 95-96.

ARGUMENT

I. 26 U.S.C. § 9032(6) IS CONSTITUTIONAL AS APPLIED TO THE COMMISSION'S REPAYMENT DETERMINATION

A. Section 9032(6) is Consistent with the Purpose of the Matching Payment Act and Supreme Court Precedent

The Matching Payment Act "was enacted in 1974 to provide partial federal financing for the campaigns of qualifying presidential primary candidates." *Simon*

v. FEC, 53 F.3d 356, 357 (D.C. Cir. 1995). Another federal program, the Presidential Election Campaign Fund Act, offers candidates that have achieved the nomination of qualifying political parties the option of public funds for use in a general election. *See* 26 U.S.C. § 9001-9013.

Although the Matching Payment Act provides some public funds for a candidate's campaign for a party's nomination, it was never intended to be the sole source of funds or cover all possible expenses. Instead, the Matching Payment Act "provides for limited public financing of primary elections by authorizing matching federal payments for small [private] contributions." H.R. Rep. 93-1239, at 12 (1974) (Conf. Rep.). Further, those funds may only be used to defray statutorily defined "qualified campaign expense[s]." *See* 26 U.S.C. § 9032(9). Eligibility for matching payments is further temporally limited to the time during which the candidate seeks a party's nomination.

The Matching Payment Act sets this outer temporal limit through its definition of the matching payment period. Under the statute, the matching payment period ends at one of two points: (1) the date the party nominates the candidate during a national convention or, (2) if a party does not use a national nominating convention to nominate its candidate, then the period ends either on the date the party nominates the candidate *or* on the last day of the last national convention held by a major party during the election year, whichever is earlier. 26

U.S.C. § 9032(6); 11 C.F.R. § 9032.6(b). This definition ensures that all matching payments are used to defray expenses incurred "during the pre-nomination period." H.R. Rep. 93-1239, at 13 (1974) (Conf. Rep.). Thus, the Matching Payment Act grants minor parties an opportunity to "collect matchable contributions for a period of time that closely approximates the period available to major" party candidates. (AR 319 (citing FEC Advisory Op. 1984-25, at 2).)

As applied to Stein's campaign for the Green Party's nomination, application of the matching payment period results in no differential treatment between major and minor party candidates because the Green Party nominated Stein at a national convention. (*See* AR 315.) As a result, the end of Stein's matching payment period coincides exactly with the end of her campaign for the Green Party nomination, which incidentally covers a longer time-period than would have been available to any major party primary candidate. (*Id.*)

As applied to candidates seeking the nomination of independent state parties that do not select presidential nominees during a national convention, tying the matching payment period to the earlier of the date of nomination or national convention of a major party candidate prevents an opportunity for artificial extension of the period of eligibility. In the absence of such a provision, a candidate seeking the nomination of a major party could also seek the nomination

of an independent state party with a later ballot access deadline, and thereby arbitrarily extend the candidate's eligible period.

The Committee argues that application of the matching payment period fosters inequitable treatment of minor party or independent candidates because it does not guarantee that all ballot access expenses fall within the matching payment period. (Br. at 33-34). On the Committee's view, the matching payment period is invidiously discriminatory because minor parties face higher costs to access the ballot as compared with major parties. (Br. at 34.) But the provision does not impose a discriminatory burden on Petitioners' constitutionally protected rights merely because it may result in an eligibility period that does not encompass all state ballot access deadlines.

The Supreme Court has squarely rejected the proposition that Congress must equalize the burdens minor parties face if it chooses to provide public funding for campaign activity. "The Constitution does not require the Government to 'finance the efforts of every nascent political group' merely because Congress chose to finance" some campaign activity. *Buckley*, 424 U.S. at 98 (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 794 (1974). Simply put, "the Constitution does not require Congress to treat all declared candidates the same for public financing purposes" in light of the "obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one

hand, and a new or small political organization on the other." *Id.* at 97 (citations and quotation marks omitted).

In the Supreme Court's first opinion considering the constitutionality of a public campaign financing scheme, the Court rejected the argument that it was an equal protection violation for a State to reimburse major parties' expenses incurred for holding primaries, but not subsidize minor parties for ballot access expenses. *Am. Party of Tex.*, 415 U.S. at 794.[4] Similarly, *Buckley* rejected the claim that the Matching Payment Act worked as an equal protection violation because it did "not provide funds for candidates not running in party primaries." 424 U.S. at 105-06. Congress, the Court held, could choose to "limit . . . the reach of the reforms encompassed" in providing primary matching funds "without constituting the reforms a constitutionally invidious discrimination. *Id.* at 105.

The Committee's claim that application of the matching period imposes unequal burdens on it because it must "incur substantial costs to qualify for state ballots" that the major parties do not face (Br. 14), is precluded by this precedent. In any event, the increased costs for ballot access the Committee faced resulted from application of various State laws, not the Matching Payment Act. A public campaign financing scheme is not invidiously discriminatory merely because it

[4] "That the aid in American Party was provided to parties and not to candidates, as is" funds made available through the Matching Payment Act, "is immaterial." *Buckley*, 424 U.S. at 95 n.130.

does not place all parties — who face different challenges and costs — on equal financial footing. *See, e.g.*, *Am. Party of Tex.*, 415 U.S. at 794.

The matching payment period also syncs up naturally with the eligibility period during which public funds may be used for a candidate's general election campaign under the Presidential Election Campaign Fund Act. *See* 26 U.S.C. § 9002(12). An eligible candidate receiving public financing for a general presidential election may generally use that funding for qualifying campaign expenses "within the expenditure report period." *Id.* § 9002(11)(B). For major parties, that period begins on the earlier of the first day of September before the election or the date on which the party nominates its presidential candidate. *Id.* § 9002(12)(B). For non-major parties, the period for which general election funding may be used is the same as the "shortest expenditure report period" for a major party. *Id.* § 9002(12)(B). As applied to a party that does not nominate at a national convention, the end of the matching payment period to receive public funds in a primary — the earlier of the date of nomination or the last major party nomination — will typically coincide with the beginning of eligibility to use general election public funds under the Presidential Election Campaign Fund Act. In 2016, the period for any minor party presidential candidate to use public funding in the general election would have commenced on July 28, or nine days prior to Stein's date of ineligibility for primary matching funds. (AR 315.) Stein did not

qualify for general election funding because neither she nor the Green Party received sufficient votes in the relevant presidential elections. *See* 26 U.S.C. § 9004(a). The Committee's argument here to extend the matching payment period past the statutory date is thus inconsistent with the careful dividing line Congress established between broader eligibility for public funds in a primary and the more-limited universe of candidates that could receive public funds in the general election. *See Buckley* 424 U.S. at 103 (upholding general election public funding eligibility requirements). Congress was free to set reasonable divisions between primary and general elections and to distinguish political parties with demonstrated levels of public support without offending equal protection principles.

The Committee also argues that Stein "reasonably anticipated that her 2016 ballot access expenses would be deemed qualified campaign expenses under the Matching Payment Act, as they were in 2012," (Br. at 35), but the Commission applied an identical rule of law in both cases. In 2012, Stein was nominated as candidate for president by the U.S. Green Party on July 14, 2012, at the party's national nominating convention. (AR 319 n.23.) The last day of the last national convention held by a major party in 2012 was September 6, 2012, which happened to coincide with Alabama's deadline for ballot qualification. (*Id.*) The Commission determined that the latest permissible date of ineligibility was the last

day of the last major party convention — September 6, 2012 — and thus that date, rather than the July 14 nomination date, determined the end of Dr. Stein's matching payment period for the 2012 presidential election. (*Id.*) The Commission therefore applied the same methodology in both cases, choosing the latest of the available dates based upon the rules set forth in 26 U.S.C. § 9032(6).

B. The Commission's Decision is Consistent with Agency Precedent

The thrust of the Committee's argument is that it is arbitrary for the Commission's precedent to permit Matching Payment Act funds be used for ballot access expenses when the statute in some circumstances may cut off the time-period for eligibility for public funds at an earlier date. (Br. at 38-40.) The Committee is thus pressing the curious argument that the Commission has been too generous with minor parties in defining qualified campaign expenses. After all, to the extent the Commission's conclusion that primary matching funds may be used for ballot access expenses creates an inequity with Congress's judgment about when such matching payments should end, the statute would control.

The agency precedent the Committee mentions, however, does not contradict the Commission's conclusion here that ballot access expenses are only permissible under the Matching Payment Act if they are incurred within the matching payment period. (*See* Br. at 38-40 (citing FEC Advisory Op. 1975-44 (Socialist Workers 1976 National Campaign Committee); FEC Advisory Op.

1975-53 (Bradley for Senate); FEC Advisory Op. 1995-45 (Hagelin for President)).)

The Commission's Advisory Opinion in Bradley applied a different statute — FECA — as it relates to Senate candidates and therefore does not address the matching payment period for public matching funds under the Matching Payment Act. Bradley considered whether the now-overruled limitation on campaign expenditures contained in FECA applied to an independent candidate for the Senate who sought to qualify for a ballot position in a general election through the gathering of petition signatures instead of seeking nomination in the party primary. FEC Advisory Op. 1975-53 at 1, https://www.fec.gov/files/legal/aos/1975-53/1975-53.pdf. Concluding that the expenditure limits applied, the Commission noted that "[w]ith respect to individuals seeking a ballot position in a general election for Federal office without nomination by a party, a primary election shall be deemed to have occurred on the day prescribed by applicable State law as the last day to qualify for a position on the general election ballot or the date of the last major party primary election whichever is later." *Id.*

The Matching Payment Act and FECA, however, operate entirely differently from one another in this context. FECA's definition of primary election chose the latest of three possible dates to designate as the single primary election date for purposes of an expenditure limit, while the Matching Payment Act is concerned

with delimiting the period of time during which a candidate seeking nomination in up to 50 states, plus territories, may be considered eligible to receive public funding. A necessary component of any public-financing scheme is a formula for determining the amount of money that each participating candidate will receive and a reasonable end point for receipt of funding. The eligibility provision is an appropriately tailored way of making the public-financing scheme attractive to candidates, while placing limits to protect the public fisc. *See Buckley*, 424 U.S. at 103. The Committee's reliance on a separate Commission regulation defining primary election, 11 C.F.R. § 100.2(c)(4), similarly addresses FECA and not the Matching Payment Act, *see* 11 C.F.R. § 100.1.

Nor does the Socialist Worker advisory opinion establish an agency precedent that sets the ballot access deadline as the end of the nomination process. FEC Advisory Op. 1975-44 (Socialist Workers 1976 National Campaign Committee), https://www.fec.gov/files/legal/aos/1975-44/1975-44.pdf. That opinion merely recognizes the interest in providing a uniform date for the end of a primary period to determine the time periods relevant to FECA's per-election contribution limitations. As the Commission observed, "the dates pertaining to petition qualification" for ballot access will "vary from State to State, the Commission considers it necessary to prescribe a uniform date when . . . the petition process ends for minor party presidential candidates." FEC Advisory Op.

1975-44, at 2. The Commission concluded "that the prescribed date should be when the presidential nominee last selected before the general election is nominated by a national nominating convention of a major political party," which "coincides with the date when an eligible minor party presidential candidate, entitled to public funding before the general election, may properly expend or obligate funds 'to further his election' (citing 26 U.S.C. § 9002(11), (12))."[5] *Id.* at 2.

The Commission applied this same reasoning in an advisory opinion regarding Ralph Nader's 2000 Presidential primary campaign. FEC Advisory Op. 2000-18 (August 11, 2000) (Nader 2000 Primary Campaign Committee), https://www.fec.gov/files/legal/aos/2000-18/2000-18.pdf. As is the case here, Nader sought the presidential nomination of the Green Party at its national convention to appear as its candidate where that party had automatic ballot access. *Id.* at 2. Nader also sought the nomination of independent parties that did not hold

[5] Petitioners also reference an additional Commission Advisory Opinion, Advisory Opinion 1995-45 (Hagelin for President). Br. at 25-26; *id.* at 40. As set forth in this Advisory Opinion, general election ballot access expenses are qualified campaign expenses for minor party candidates. *See, e.g.*, Advisory Op. 1995-45 (Hagelin for President). However, as explained *supra* pp. 6-7, to be considered a qualified campaign expense, the expense must be incurred on or before the candidate's date of ineligibility, that is, during the matching payment period. There is nothing inconsistent with this Advisory Opinion and how the Commission defines the matching payment period.

a national convention — including the United Citizens Party — for other states in which the Green Party candidate did not automatically appear on the ballot. *Id*. In some states, Nader sought to use the petition process to obtain ballot access. *Id*. The Commission applied 26 U.S.C. § 9032(6) to conclude that Nader's matching payment period ended on the date the United Citizens Party selected its nominee, rather than the later state petitioning deadlines, because the date of that party's nomination occurred before the last national convention held by a major party in 2000. *Id.* at 4.

Even though it may be correct that "the process by which" minor party candidates "satisfy the requirements of State law governing qualification for a position on the general election ballot serve purposes similar to a primary election or other nominating process," (Br. at 39 (citing FEC Advisory Op. 1995-45, at 2) (internal quotation marks omitted)), that agency judgment does not overrule Congress's decision to cut off eligibility for matching primary funds at an earlier point. To the contrary, the Commission has repeatedly observed that the matching payment period for a candidate that seeks the nomination of a party that holds a national convention and one that does not may select the later nomination date only if such dates were not later than "the last date of the last national nominating convention held by a major political party." FEC Advisory Op. 1984-25, at 2

(May 25, 1984) (Johnson), https://www.fec.gov/files/legal/aos/1984-25/1984-25.pdf.

* * *

Congress was entitled to provide only a limited period for public matching funds for use in a candidate's efforts to secure a party's presidential nomination. Even if minor parties face differential burdens in accessing the ballot, Congress did not discriminate by providing funding that may only be partially used to defray those costs. To the extent the Committee believes all state ballot access costs should be covered, regardless of when they are incurred, it is free to petition Congress for a remedy.

II. THE COMMISSION'S DETERMINATION WAS NOT ARBITRARY, CAPRICIOUS, OR AN ABUSE OF DISCRETION

A. The Committee Failed to Preserve Its Argument Regarding Additional Winding Down Costs

"A candidate who disputes the Commission's repayment determination(s) shall submit in writing, within 60 calendar days after service of the Commission's notice, legal and factual materials demonstrating that no repayment, or a lesser repayment, is required." 11 C.F.R. § 9038.2(c)(2)(i). "The candidate's failure to timely raise an issue in written materials presented pursuant to this paragraph will be deemed a waiver of the candidate's right to raise the issue at any future stage of

proceedings including any petition for review . . . ." *Id.*

Here, the Committee submitted written materials attempting to demonstrate that no repayment was required, but it did not present any "legal and factual materials" related to its assertion that additional winding down costs should be considered. *See id.* The Commission reasonably determined that the issue was waived at that point, and any later documentation submitted by the Committee was too late.

The sole statement the Committee cites to establish that it raised the issue of additional winding down costs in its request for administrative review of the Commission's repayment determination is the fourth paragraph of its written submission. *See* Br. at 41. That paragraph stated that "it will be shown that the other findings concerning the nature of winding down expenses, misstatement of financial activity and disclosure of debts and obligations likewise cannot survive scrutiny." (AR 261.) Every other paragraph of the Committee's submission addressed what it called "the pivotal issue": the date of ineligibility set by the Matching Payment Act. (AR 261-65.) The Committee submitted no factual materials supporting its generalized statement about "the nature of winding down expenses, misstatement of financial activity and disclosure of debts and

obligations."[6] (*See* AR 261.) Under these circumstances, the Commission's conclusion that the Committee had waived it claim for additional winding down expenses was not arbitrary and capricious.

As this Court observed in upholding 11 C.F.R. § 9038.2(c)(2)(i)'s requirement that all issues must be raised in the written submission, the purpose of such a requirement is to ensure that the Commission has timely notice of the nature of any challenges to its authority. *Robertson v. FEC*, 45 F.3d 486, 491 (D.C. Cir. 1995). *Robertson* observed that the purpose and effect of section 9038.2(c) (2)(i) is similar to the court's traditional refusal to consider positions taken during oral argument unsupported by the principal brief. *Id*. But courts require more than a general statement of the kind the Committee made here to preserve an issue or argument for judicial consideration. *See City of Waukesha v. Envtl. Prot. Agency*, 320 F.3d 228, 250-51 n.22 (D.C. Cir. 2003) (considering argument raised by petitioner in reply brief waived, because argument was made in opening brief "only summarily, without explanation or reasoning" and citing *Tribune Co. v. Fed. Communications Comm'n*, 133 F.3d 61, 69 n.8 (D.C. Cir. 1998) (noting party's

[6] The Commission had already given the Committee credit for some winding down expenses. *See supra* at pp. 17-18 (describing actual winding down costs through August 31, 2018). That the Committee was now claiming to have additional documentation to support further expenses it had incurred was not stated in the Committee's request, and it was not incumbent upon the Commission to deduce this argument from this general statement.

arguments must be sufficiently developed to avoid waiver)); *see also United States v. Hunter*, 739 F.3d 492, 495 (10th Cir. 2013) (claim inadequately developed in opening brief is waived). So, too, was it permissible for the Commission to conclude that the Committee's failure to specifically identify winding down expenses it thought the Commission should consider — and its failure to submit supporting factual documentation — operates as a waiver of that issue.

Furthermore, even if the Committee had previously questioned the Commission's treatment of winding down expenses, as the Committee claims (Br. at 35, 43), that does not absolve it of its responsibility to adequately raise the issue in its written challenge to the repayment determination. The Commission's regulation requires the challenges to the repayment determination be raised specifically in the request for administrative review. 11 C.F.R. § 9038.2(c)(2)(i). The request for administrative review does not automatically incorporate all the issues raised and decided during the process culminating in the Final Audit Report. Rather, the Committee must directly identify the subset of issues it wishes to focus upon in the request for administrative review. If all the issues raised during the audit were deemed automatically in play during the administrative review phase, the requirement to raise the issues or waive them in the request for administrative review would make no sense.

In any event, the Committee overstates the extent to which it raised winding down costs in its prior submissions to the Commission. As Commission staff had observed, the Committee had been "uncooperative" through the audit process, had "ignored scheduled conferences" and "failed to respond to the Audit Division's numerous requests for supporting documentation." (AR 205.) Despite submitting some documentation, which had not been acceptable to the Commission, the Committee could have submitted additional supporting documentation at any point during the audit process that would, if properly documented, possibly lower the Committee's surplus and thereby its repayment obligation. The Committee, however, provided no explanation as to why it failed to submit appropriate documentation at that time or in its request for administrative review. Instead, it waited until February 2021 — nearly twenty months after the date it was required to submit legal and factual materials demonstrating no repayment was required — to submit documentation for its claimed expenses. The Commission's decision not to consider this evidence was reasonable. *LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F3d 733, 737 (D.C. Cir. 2006) (affirming Commission decision not to include markup charges as qualified campaign expenses "[a]fter

allowing the LaRouche Committee ample opportunity" to prove the charges were quantifiable or reasonable).[7]

The Commission's loss of a quorum between August 2019 and December 2020 is immaterial to the repayment determination. Petitioners now argue that it has incurred additional winding down expenses during that time period, Br. at 43-44, but it did not preserve the issue during the administrative proceedings below in order to present later-incurred expenses. Nor does it excuse the Committee's repeated failure to submit requested documentation of winding down expenses for the period between August 31, 2018, and June 17, 2019, the deadline for its written submission seeking review of the repayment determination. In any event, because the Committee failed to properly preserve its claim for inclusion of additional winding down expenses, these additional expenses are also waived.

Stein's claim of financial hardship neatly elides that the Commission's repayment determination reflects the agency's efforts to recover public monies that should not have been paid, either because her campaign's expenses post-dated its eligibility for public funds or were improperly documented and preserved under

[7] Because it concluded the February Materials and March Materials were not timely submitted and related to issues that had been waived, the Commission has not considered whether those materials are sufficiently documented to be credited or whether they would eliminate or even reduce the Committee's repayment obligation. Should the Court conclude that it was error for the Commission not to consider those materials, the Commission agrees with the Committee that the agency should "address [them] in the first instance." (Br. 48.)

the terms to which all publicly funded candidates must agree. Stein claims to have already deposited sufficient personal funds in an escrow account, (Br. at 4), but to the Commission's knowledge the parties' efforts to establish a compliant account at a financial institution to effectuate a stay on appeal remain ongoing. *See* 11 C.F.R. § 9038.5(c)(2). And, despite Stein's claim that the financial obligation "falls solely upon" her, (Br. at 4), the Commission recently confirmed at the Committee's request that she may use private contributions to repay her obligations resulting from this case. *See* FEC Advisory Op. 2022-04 (June 9, 2022) (Jill Stein for President Comm.)), https://saos.fec.gov/aodocs/2022-04.pdf.

B. The Commission Properly Excluded the March Materials from the Administrative Record.

Judicial review is limited to the record because a court "'should have before it neither more nor less information than did the agency when it made its decision.'" *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). There is a strong presumption against supplementation of the administrative record, and "the practice decidedly is the exception not the rule." *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F.2d 1095, 1104 n.18 (D.C. Cir. 1979). The "designation of the Administrative Record, like any established administrative procedure, is entitled to a presumption of administrative regularity." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993). Only those documents

that are "before" the agency decisionmaker "at the time he made his decision" are properly within the administrative record. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008) (internal quotation marks omitted); *see also Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 55 (D.C. Cir. 2015); *Pacific Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006).

The FEC agreed to supplement the record with the February materials because, despite being untimely submitted, they were determined to have been "circulated" to FEC Commissioners prior to the hearing, and therefore fit this technical requirement for inclusion. *See* 11 C.F.R. § 9038.7(b)(1). The March materials, however, were never "submitted to the Commission for its consideration in making the [repayment] determinations," and thus are not part of the "administrative record." 11 C.F.R. § 9038.7(a). They were properly excluded under both the applicable regulation and fundamental administrative law principles. *See Dist. Hosp. Partners, L.P.*, 786 F.3d at 55 (D.C. Cir. 2015) (concluding that judicial review of agency's action "must 'be based on the full administrative record that was before the Secretary' [of agency] when she made her decision") (quoting *Am. Wildlands,* 530 F.3d at 1002). There are no unusual circumstances requiring supplementation here. *Am. Wildlands,* 530 F.3d at 1002.

As explained *supra* pp. 18-19, the Committee sought to raise the issue involved with the supporting materials proposed for supplementation far beyond the time of their request for administrative review submitted on June 17, 2109, nearly two years later in March of 2021. As such, the materials were untimely and properly not submitted to Commissioners for their consideration.

The Chair of the Commission stated at the oral hearing that, "the committee will have five days in which to submit additional materials for Commission consideration" and that the Commission would make its determination "[p]ursuant to 11 C.F.R. § 9038.2(c)(3)." (AR 285.) But submission of additional materials after an oral hearing does not expand the categories of properly raised issues that could be timely submitted. *Robertson*, 45 F.3d at 491. "[S]oliciting or accepting additional material during or after the oral hearing does not *necessarily* expand the subject matter scope of the original written submissions or implicitly relax the agency's procedural requirement for challenges to agency decisions." *Id.* Thus, this Court specifically concluded in *Robertson* that the Commission's regulation permitting committees to submit materials after an oral hearing "can be interpreted to limit additional material to the previously raised subjects — which is exactly how the Commission does interpret it." *Id*. Accordingly, the Court found that the Commission was within its rights in refusing to consider the petitioner's argument because it had not been timely raised. *Id*.

Similarly here, allowing additional materials to be submitted post-hearing does not override the Commission's regulation that issues must be timely raised and materials must be timely submitted. As the Chair noted during the oral hearing, a party can present additional documentation in support of its position on issues that were *timely* raised in its response. As in *Robertson*, the Commission was not obligated to accept the additional material that related to a subject that was not timely raised by the Committee. And because the Commission decision makers did not review these materials in making their final determination, they were properly excluded from the administrative record. *See* 11 C.F.R. § 9038.2(c)(3); *see also Robertson*, 45 F.3d at 491 ("An agency is entitled to prescribe its own procedures, including requirements that parties give timely notice as to the nature of any challenges to agency authority, at least as regards actions already taken."). The March materials were properly rejected as untimely and are not part of the administrative record as defined by Commission regulations.

The March materials were mentioned in the Commission's Statement of Reasons but only for the limited purpose of explaining the conclusion that they were not being considered due to their untimeliness. (*See* AR 308 (in explaining that the issue had not been properly raised, noting that "between March 1 and March 4, after the oral hearing, the Committee submitted [to FEC staff] new supporting documents that detailed additional winding down expenses"). As such,

the March materials could not have been the basis for the Commission's decision because the Commissioners never had access to them. Simply because the additional materials were submitted to Commission employees post-hearing in no way entitles Petitioners to overcome the regulatory requirement for administrative records in this context.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court deny the Petition for Review and affirm the Commission's repayment determination.

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/s/ *Shaina Ward*
Shaina Ward

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/s/ *Shaina Ward*
Shaina Ward