
UNITED STATES COURT OF APPEALS
for the
DISTRICT OF COLUMBIA CIRCUIT

No. 21-1213

DR. JILL STEIN AND JILL STEIN FOR PRESIDENT,

Petitioners,

- v. -

FEDERAL ELECTION COMMISSION,

Respondent.

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

REPLY BRIEF OF PETITIONERS

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

Counsel for Petitioners

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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

**PETITIONERS' CERTIFICATE OF PARTIES, RULINGS AND RELATED
CASES**

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

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

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

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

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

Dated: August 18, 2022

Respectfully submitted,

s/Oliver B. Hall

Oliver B. Hall

D.C. Bar No. 976463

CENTER FOR COMPETITIVE DEMOCRACY

P.O. Box 21090

Washington, DC 20009

(202) 248-9294

oliverhall@competitivedemocracy.org

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
SUMMARY OF ARGUMENT.....	3
ARGUMENT.....	4
I. The Commission Fails to Rebut the Committee’s Claim That Section 9032(6) Violates the Equal Protection Clause as Applied.....	4
A. Section 9032(6) Imposes an Unequal Burden on Minor Party Candidates as Applied.....	5
B. The Burden Imposed By Section 9032(6) Is Severe.....	11
C. Section 9032(6) Is Not Narrowly Tailored to Serve Any Governmental Interest and Undermines the Purpose of the Matching Payment Act.....	14
II. The Commission Fails to Rebut the Committee’s Claim That the Commission’s Failure to Consider the Committee’s Actual Winding Down Costs Was Arbitrary, Capricious, an Abuse of Discretion and Contrary to Law.....	16
A. The Committee Did Not “Waive” Its Argument That the Commission Must Consider Evidence of Its Actual Winding Down Costs.....	18
B. The Court Should Order the Commission to Supplement the Record With the March Materials and to Reconsider Its Repayment Determination Based on All the Evidence.....	23
CONCLUSION.....	27

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases

<i>American Party of Texas v. White</i> , 415 U.S. 767 (1974).....	8
<i>Bar MK Ranches v. Yuetter</i> , 994 F.2d 735 (10th Cir. 1993).....	24
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976).....	5,8,9,10,11
<i>City of Waukesha v. Env'tl. Prot. Agency</i> , 320 F.3d 228 (D.C. Cir. 2003).....	20
<i>IMS, P.C. v. Alvarez</i> , 129 F.3d 618 (D.C. Cir. 1997).....	26
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971).....	5,7,11
<i>LaRouche v. Federal Election Com'n</i> , 996 F.2d 1263 (D.C. Cir. 1993).....	14,15,16
<i>Robertson v. Federal Election Commission</i> , 45 F.3d 486 (D.C. Cir. 1995).....	10,11,19,25,26
<i>Simon v. Federal Election Com'n.</i> , 53 F.3d 356 (D.C. Cir. 1995).....	14,15,16
<i>Tribune Co. v. Fed. Communications Comm'n</i> , 133 F.3d 61 (D.C. Cir. 1998).....	20
<i>United States v. Hunter</i> , 739 F.3d 492 (10th Cir. 2013).....	20

Statutes

26 U.S.C. § 9032(6).....	2,3,4,5,6,7,9,10,11,12,13,14,15,16,27
--------------------------	---------------------------------------

Regulations

11 C.F.R. § 9032.6.....	2,5,11
11 C.F.R. § 9038.2(c)(2)(i).....	19
11 C.F.R. § 9038.7(a).....	24

Rules

Fed. R. App. P. 18(a)(1).....	13
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Miscellaneous

Federal Election Commission, <i>Jill Stein for President – Financial Summary (January 1, 2022 – June 30, 2022)</i>	13
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Petitioner Dr. Jill Stein (“Dr. Stein”) and her campaign committee Jill Stein for President (together, “the Committee”) respectfully submit this Reply to the Brief of Respondent filed by the Respondent Federal Election Commission (the “Commission”) on July 28, 2022 (ECF No. 1953536) (“Resp. Br.”).

INTRODUCTION

This appeal involves a miscarriage of justice that cries out for judicial intervention. Nearly five years after the 2016 presidential election, the Commission issued its Repayment Determination in an attempt to claw back \$175,272 that the Committee properly received under the Matching Payment Act, even though it is undisputed that any repayment obligation would be wiped out if the cost of the Committee’s ballot access petition drives – which the Commission concedes are the equivalent of a primary election – were treated as qualified campaign expenses, as they were in 2012. It is also undisputed that any repayment obligation would be wiped out if the Commission would simply tally the Committee’s actual winding down costs, rather than relying on a low-ball estimate that does not even account for a 16-month period when the Commission sat inert, lacking a quorum, while the Committee continued to incur winding down costs that were not and could not have been anticipated.

The Commission would have the Court treat this matter as a routine audit arising from the straightforward application of a statute that raises no constitutional

concerns, but that is a mischaracterization of the law and facts giving rise to this appeal. As applied here 26 U.S.C. § 9032(6) – the provision that establishes a candidate’s date of ineligibility under the Matching Payment Act – imposes severe and unequal burdens on minor party candidates, it produces arbitrary results that serve no governmental interest, and it frustrates the purpose of the Matching Payment Act itself.¹ Further, if this were a routine audit the Commission would have determined long ago that the Committee owes nothing and closed the books on this matter without the need for litigation. Meanwhile, a 71-year-old retiree’s personal savings hang in the balance. Because the Committee itself is essentially defunct and has minimal funds, Dr. Stein has been obliged to withdraw the full \$175,272 from her retirement account to satisfy the Repayment Determination while this appeal is litigated.² The Court should correct this manifest injustice. It should declare Section 9032(6) unconstitutional as applied and reverse the Repayment Determination or, in

¹ 26 U.S.C. § 9032(6) and its corresponding regulation, 11 C.F.R. § 9032.6, are referenced hereinafter as “Section 9032(6)”.

² The Commission states that the parties have not yet “establish[ed] a compliant account at a financial institution to effectuate a stay on appeal....” (Resp. Br. at 42.) The parties agreed to establish such an account at Amalgamated Bank in Washington, D.C. and the Committee signed the final paperwork to do so in June 2022. Dr. Stein has withdrawn the \$175,272 from her retirement account and delivered it to the attorney representing her in the proceedings before the Commission, Mr. Harry Kresky, in the form of a bank check. The Commission has apparently not yet executed the paperwork establishing the Amalgamated Bank account, but Mr. Kresky will deposit the check in the account as soon as the Commission does so and the account is established.

the alternative, the Court should reverse the Repayment Determination and remand this matter to the Commission with instructions that the Commission credit the Committee with its actual winding down costs.

SUMMARY OF ARGUMENT

The Committee has appealed from the Commission's Repayment Determination on two grounds, each of which provides an independently sufficient basis for reversal. First, the Committee argues that Section 9032(6) violates the Fifth Amendment guarantee of equal protection because it ensures that major party candidates are eligible to receive funding for the entire duration of their primary election campaigns but terminates minor party candidates' eligibility in the midst of theirs. The provision thus imposes severe and unequal burdens on minor party candidates, produces arbitrary results, serves no legitimate governmental interest and frustrates the purpose of the Matching Payment Act as applied to minor party candidates.

The Commission fails to rebut this claim. It does not and cannot show that Section 9032(6) imposes an equal burden on minor party and major party candidates, or that the burden imposed on the Committee here is less than severe. The Commission likewise fails to demonstrate that Section 9032(6) advances any legitimate governmental interest. The Court should therefore declare Section

9032(6) unconstitutional as applied and reverse the Commission's Repayment Order.

Reversal is also warranted because the Commission's failure to consider the Committee's actual winding down costs, and the Commission's insistence upon relying on its much lower estimate of those costs, is arbitrary, capricious, an abuse of discretion and contrary to law. The Commission's assertion that the Committee "waived" this issue has no merit. It is contradicted by the record and unsupported by the authorities on which the Commission purports to rely. In the event that the Court declines to hold Section 9032(6) unconstitutional as applied, therefore, the Court should reverse the Repayment Order and remand this matter for consideration of the Committee's actual winding down costs.

ARGUMENT

I. The Commission Fails to Rebut the Committee's Claim That Section 9032(6) Violates the Equal Protection Clause as Applied.

The fundamental points that form the basis for the Committee's equal protection claim are not genuinely in dispute. First, Section 9032(6) unequally burdens minor party candidates by terminating their eligibility for funding in the midst of their primary election campaigns while guaranteeing that major party candidates remain eligible for funding during the entire duration of their primary election campaigns. Second, the unequal burden that Section 9032(6) imposes as applied here is severe: but for that provision, the Committee would not owe one cent

of the \$175,272 the Commission demands in repayment. Third, Section 9032(6) is not narrowly tailored to further any governmental interest but rather frustrates the purpose of the Matching Payment Act as applied to minor party candidates. Because the Commission does not and cannot rebut these points, Section 9032(6) violates the Committee's right to equal protection as applied. *See Buckley v. Valeo*, 424 U.S. 1, 96 (1976) (a public financing system violates the Fifth Amendment guarantee of equal protection if it "unfairly or unnecessarily burden[s] the political opportunity of any party or candidate.").

A. Section 9032(6) Imposes an Unequal Burden on Minor Party Candidates as Applied.

The Supreme Court has long recognized that "the grossest discrimination can lie in treating things that are different as though they were exactly the same." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). As the Committee has explained, Section 9032(6) embodies such invidious discrimination. (Brief of Petitioners (ECF No. 1953536) ("Pet. Br.") at 33-37.) It provides that candidates seeking the nomination of a party that does not nominate by national convention become ineligible to receive funding no later than the date on which major party candidates become ineligible. *See* 26 U.S.C. 9032(6); 11 C.F.R. 9032.6(b). But there is a critical difference between these two types of candidates: when major party candidates become ineligible by winning their party's nomination, they are guaranteed automatic access to every state's general election ballot, whereas minor

party candidates may continue to incur the substantial costs of petitioning for access to many state ballots.

As the Commission concedes, a minor party candidate's petition drive to obtain access to a state's general election ballot is the functional equivalent of a primary election. (Resp. Br. at 7-8, 35.) As such, the costs of ballot access petition drives are "generally qualified campaign expenses...." (*Id.* at 7.) There is just one hitch – the costs must be incurred "during the period for which the candidate is eligible for matching payments." (*Id.*)

Here, the Commission determined pursuant to Section 9032.6(a) that Dr. Stein became ineligible on August 6, because that is the date on which she won the Green Party's nomination at its national convention. (Resp. Br. at 12-13.) Even though the Committee was on that date in the midst of multiple petition drives to secure access to the general election ballot in many states – and incurring the substantial costs thereof, (Pet. Br. at 11) – the Commission concluded that such costs could no longer be considered "qualified campaign expenses" under the Matching Payment Act, based solely on the fact that the last day of a major party convention was July 28. (Resp. Br. at 13.) As applied to the Committee in 2016, therefore, Section 9032(6) terminated Dr. Stein's eligibility for funding in the midst of her primary election campaign.

According to the Commission, Section 9032(6) as applied here “results in no differential treatment between major and minor party candidates” simply because Dr. Stein was nominated by the Green Party at a national convention and the Commission applied the same rule to Dr. Stein as to the major party candidates who were nominated at their parties’ national conventions. (Resp. Br. at 26.) That is incorrect. Section 9032(6) rendered Dr. Stein ineligible to receive funding for ballot access costs that the Commission concedes would have been qualified campaign expenses but for one factor: they were incurred after the last day of the last major party convention. (Resp. Br. at 27.) Major party candidates do not incur such costs after their conventions. The Commission’s assertion that Section 9032(6) prescribed Dr. Stein’s eligibility “for a period of time that closely approximates” the eligibility period of the major party candidates is therefore no defense to the Committee’s equal protection claim. (Resp. Br. at 26). Section 9032(6) is invidiously discriminatory precisely because it applies the same rule to minor party and major party candidates even though they are not similarly situated. *See Jenness*, 403 U.S. at 442. In so doing, the provision ensures that major party candidates are eligible for funding for the full duration of their primary election campaigns, but terminates minor party candidates’ eligibility for funding in the midst of theirs.

The Commission insists that Section 9032(6) is not invidiously discriminatory because “[t]he Constitution does not require the Government to ‘finance the efforts

of every nascent political group’ merely because Congress chose to finance” some campaign activity. (Resp. Br. at 27 (quoting *Buckley*, 424 U.S. at 98 (quoting *American Party of Texas v. White*, 415 U.S. 767, 794 (1974))).) But the Committee has never contended that the Government has such a duty, nor must it do so to prevail on its equal protection claim. The Commission’s assertion that *American Party of Texas* and *Buckley* “preclude” that claim (Resp. Br. at 28) is simply wrong: neither case addresses the issue raised in this appeal, much less do they preclude the Committee’s claim.

In *American Party of Texas*, certain minor parties asserted an equal protection challenge to a Texas statute that provided public funding for major parties’ primary elections, but did not provide funding for minor parties’ petition drives. See *American Party of Texas*, 415 U.S. at 791-94. The Supreme Court rejected the challenge, observing that it was primarily asserted by a party that “failed to qualify for the general election ballot.” *Id.* at 794. The Court concluded that the State’s obligation to provide funding for primary elections held by parties whose gubernatorial candidates received more than 200,000 votes did not entail the obligation to provide public funding for every entity that “unsuccessfully attempt[s] to win a place on the general election ballot.” *Id.* at 792, 794.

Here, by contrast, there is no dispute that Dr. Stein successfully won a place on many state ballots and was qualified to receive funding under the Matching

Payment Act. The Committee did receive such funding. The Committee challenges Section 9032(6), however, because it guarantees that major party candidates are eligible for funding for the entire duration of their primary election campaigns, but terminated Dr. Stein's eligibility in the midst of hers. The language that the Commission cherry-picks from *American Party of Texas* is therefore inapposite. (Resp. Br. at 27.) Nothing in that case supports the Commission's assertion that the government may impose such unequal treatment on candidates that qualify for funding.

The Commission's reliance on *Buckley* is similarly misplaced. That case involved an equal protection challenge to the eligibility criteria for candidates to receive funding under the Federal Election Campaign Act. *See Buckley*, 424 U.S. at 93-104. The statute provided for greater funding for candidates of parties that had demonstrated greater public support, lesser funding for candidates of parties with lesser support, and precluded funding for candidates of parties that failed to demonstrate a requisite modicum of support. *See id.* at 97. The Supreme Court upheld the criteria, reasoning that "[i]dentical treatment of all parties ... would not only make it easy to raid the United States Treasury, it would also artificially foster the proliferation of splinter parties." *Id.* at 98 (citation and internal quotation marks omitted). *Buckley* therefore stands for the unremarkable proposition that the

government may condition public funding on a corresponding demonstration of public support. *See id.* at 97-98.

The Court's observation in *Buckley* that Congress need not "treat all candidates the same for public financing purposes" supports the conclusion that Congress was "justified in providing both major parties full funding and all other parties only a percentage of the major-party entitlement." *Buckley*, 424 U.S. at 98. It does not support the Commission's assertion that, having determined Dr. Stein's eligibility for funding, Congress was justified in terminating her eligibility in the midst of her primary election campaign simply because the major party candidates have won their nominations and thereby obtained automatic access to the general election ballot in every state. On the contrary, *Buckley* expressly recognizes that a public financing system violates the Fifth Amendment guarantee of equal protection if it "unfairly or unnecessarily burden[s] the political opportunity of any party or candidate." *Buckley*, 424 U.S. at 96. That is the essence of the Committee's challenge to Section 9302(6). Moreover, this Court has reaffirmed that a candidate may properly challenge the Matching Payment Act's "criteria for eligibility, disbursement, or repayment," *Robertson v. Federal Election Commission*, 45 F.3d 486, 491 (D.C. Cir. 1995) (emphasis added), which is what the Committee does here.

The Commission further asserts that the unequal burden imposed by Section 9032(6) as applied here "results from application of various State laws, not the

Matching Payment Act.” (Resp. Br. at 28.) That is incorrect. The unequal burden arises from the fact that Section 9032(6) arbitrarily establishes a minor party candidate’s date of ineligibility based on the date on which the major party candidates become ineligible. *See* 26 U.S.C. 9032(6); 11 C.F.R. 9032.6(b). The provision does so without regard for the disparate consequences that flow from treating these differently-situated candidates as though they were exactly alike. It is therefore invidiously discriminatory. *See Jenness*, 403 U.S. at 442.

B. The Burden Imposed By Section 9032(6) Is Severe.

The Commission conspicuously fails to address the severity of the burden that Section 9032(6) imposes as applied here, and with good reason. By any reasonable standard, the burden is severe. This case is not like *Robertson*, in which a candidate accepted funding under the Matching Payment Act and then “mounted a categorical, structural challenge” to the statute “as a ploy” to avoid repayment. *Robertson*, 45 F.3d at 490. Nor is it like *Buckley*, where the plaintiffs claimed they were entitled to the same public funding to which major parties with greater public support were entitled. In that case, the Court reasonably concluded that the public funding plan did not “disadvantage[] nonmajor parties by operating to reduce their strength below that attained without any public financing.” *Buckley*, 424 U.S. at 98-99.

Here, by contrast, nearly five years after the conclusion of the 2016 general election, the Commission is attempting to claw back \$175,272 in matching funds,

none of which would be owed if Section 9032(6) had not terminated Dr. Stein's eligibility in the midst of her primary election campaign. [App. 61 (Rep. Det. at 1).] Further, the Commission did not inform Dr. Stein that her date of ineligibility was August 6, 2016 until August 17, 2016, when the Committee was already committed to paying the costs of the petition drives that were underway in multiple states. (Pet. Br. at 11.) As a result, the Committee accepted the funds in good faith and spent them on the petition drives, which the Commission concedes are "generally qualified campaign expenses," (Resp. Br. at 7), only to discover after the fact that they are not.

The Commission further concedes that in 2012, all of Dr. Stein's ballot access costs were deemed qualified campaign expenses, and that consequently, no repayment of the funds she received under the Matching Payment Act was due. (Resp. Br. at 11-12; Pet. Br. at 9-10.) The only reason for this disparate outcome is that in 2012, the last date of a major party nominating convention was September 6, which happened to coincide with the last deadline for filing nomination petitions in any state, whereas in 2016 the last date of a major party nominating convention was July 28, which was well in advance of several state filing deadlines. (Pet. Br. at 10-11.) But for that fact, which has no bearing on whether a minor party candidate is making expenditures for primary election activities and over which the candidate has no control, the Committee would have no repayment obligation here.

To make matters worse, the Committee is now essentially defunct and has minimal funds available. *See* Federal Election Commission, *Jill Stein for President – Financial Summary (January 1, 2022 – June 30, 2022)*, available at <https://www.fec.gov/data/committee/C00581199/> (accessed August 17, 2022) (showing \$52,747.96 in cash on hand and \$90,750.00 in outstanding debts). As Dr. Stein is personally liable for the repayment obligation, she has been forced to withdraw the full amount, \$175,272, from her retirement savings to place in escrow pending the outcome of this appeal. *See supra* at n.2; *see also* Fed. R. App. P. 18(a)(1).

The Commission asserts that the Committee’s claim of “financial hardship” ignores the Commission’s “efforts to recover public monies that should not have been paid,” either because Dr. Stein was ineligible or because the Committee’s expenses were “improperly documented and preserved.” (Resp. Br. at 41.) The Committee addresses the Commission’s legalistic treatment of the issue of winding down expenses *infra* at Part II. With respect to Dr. Stein’s ineligibility, however, that is due entirely to the arbitrary application of Section 9032(6), which cannot justify the severe and unequal burden the provision imposes as applied here.³

³ The Commission’s blithe assurance that the Committee “may use private contributions” to satisfy the Repayment Determination does little to alleviate the burden, (Resp. Br. at 42), because contributions to a political campaign that ended nearly seven years ago are minimal, as reflected by the fact that the Committee’s outstanding debts exceed its current cash on hand. *See supra* at p.11.

C. Section 9032(6) Is Not Narrowly Tailored to Serve Any Governmental Interest and Undermines the Purpose of the Matching Payment Act.

In the proceedings below, the Commission attempted to justify the severe and unequal burden that Section 9032(6) imposes as applied here on the ground that it furthered Congress's intent "to ensure parity between major and non-major party candidates with respect to the length of time that each would be eligible to receive and spend public funds." (Pet. Br. at 35.) As the Committee has explained, this misstatement of law directly contradicts the precedent of the Supreme Court and this Court, and the Commission does not and cannot cite any authority for it. (Pet. Br. at 35-36.) In enacting the Matching Payment Act, "it was Congress's explicit intention that the funds be issued on a nondiscriminatory basis." *LaRouche v. Federal Election Com'n.*, 996 F.2d 1263, 1267 (D.C. Cir. 1993).

Now the Commission abandons its prior position and asserts a number of new rationales in an attempt to justify the severe and unequal burden that Section 9032(6) imposes. None of them has merit. The Commission asserts, for instance, that the Matching Payment Act "was never intended to be the sole source of funds or cover all possible expenses," (Resp. Br. at 25), but that has never been in dispute. As the Committee has acknowledged, the Matching Payment Act establishes a matching program, whereby candidates are "entitled to receive payments ... to match individual contributions up to \$250." (Pet. Br. at 38 (quoting *Simon v. Federal*

Election Com'n., 53 F.3d 356, 357 (D.C. Cir. 1995).) The Commission's assertion therefore misses the point of this appeal: the question presented is not whether Section 9032(6) prevented the Committee from obtaining public funding for all of its expenses, but rather whether the provision prevents public funds from being issued "on a nondiscriminatory basis." *LaRouche*, 996 F.2d at 1267.

Section 9032(6) plainly fails that test. Its failure is demonstrated by the arbitrary results it produced as applied to Dr. Stein in 2012 versus 2016. In 2012, the provision authorized all of Dr. Stein's ballot access costs as qualified campaign expenses, but in 2016 it prohibited a substantial portion of them. The only reason for this difference is that the last day of a major party nominating convention in 2012 was September 6, whereas in 2016 it was July 28.

What governmental interest is served by a statutory provision that produces such wildly disparate results? The Commission asserts just one. Section 9032(6) is necessary, the Commission contends, to prevent the "artificial extension of the period of eligibility." (Resp. Br. at 26.) According to the Commission, if Section 9032(6) were not in effect, "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." (*Id.* at 26-27.) But if that is the interest furthered by the provision, then Section 9032(6) is grossly over-inclusive because it also applies to nonmajor party candidates.

Furthermore, it could easily be more narrowly tailored simply by specifying that a major party candidate becomes ineligible on the date on which the candidate wins the major party's nomination.

As applied to nonmajor party candidates, Section 9032(6) furthers no governmental interest at all. It cuts off their eligibility to receive primary election matching funds in the midst of what the Commission concedes is their primary election campaign. (Resp. Br. at 7-8, 35.) Section 9032(6) does not artificially extend minor party candidates' eligible period – it artificially shortens it without any justification. The provision therefore frustrates the very purpose of the Matching Payment Act as applied to minor party candidates. *See Simon*, 53 F.3d at 357 (purpose of Matching Payment Act is “to provide partial federal financing for the campaigns of qualifying presidential primary candidates.”); *LaRouche*, 996 F.2d at 1267 (“The object of the statute is to enhance the ability of candidates to present their positions and themselves to voters in presidential primaries.”) (citation omitted).⁴

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

⁴ The Commission suggests that the Commission “is free to petition Congress for a remedy,” (Resp. Br. at 36), but even if successful such an effort would come too late to remedy the Repayment Order in this case. Consequently, the Committee's only opportunity to obtain a remedy is to seek redress from this Court.

The Commission's failure to consider the Committee's actual winding down costs, as it committed to do repeatedly in the proceedings below, is a separate and independently sufficient ground for reversal of the Repayment Determination. Significantly, the Commission does not dispute that if it had done so, the Committee would not owe one cent of its purported \$175,272 repayment obligation. The Commission also does not dispute that the Committee explicitly raised this issue in its timely-filed written request for review, (Resp. Br. at 37), or that the Committee timely filed evidence in support of its argument that its actual winding down costs eliminate its purported repayment obligation – *i.e.*, the financial records the Commission designated as the “February Materials” and the “March Materials” but omitted from the Administrative Record.⁵

Based upon the foregoing undisputed facts, the Commission could have properly resolved this matter simply by reviewing the February Materials and March Materials, [AR 326-54 (February Materials); Supp. App. (March Materials)], verifying the Committee's actual winding down costs, and then relying on those costs to determine whether the Committee actually has any repayment obligation. The evidence in the record demonstrates that doing so would have eliminated the

⁵ The Commission maintains that the February Materials and March Materials “were not timely submitted,” (Resp. Br. at 41 n.7), but it does not dispute that the Committee submitted all of this evidence within five days of the administrative hearing before the Commission, as it was expressly authorized to do. (Fed. Elec. Com's Opp. to Pet.'s Mot. to Supp. Record (ECF No. 1936201) at 7-8 & n.4.)

Committee's purported repayment obligation and obviated the need for this appeal. [AR 326-54 (February Materials); Supp. App. (March Materials).] Furthermore, the entire process likely would not take more than a few hours of a competent auditor's time.

Instead, without disclosing it to the Committee or to the Court, the Commission withheld the February Materials and the March Materials from the Administrative Record, which obliged the Committee to file its Emergency Motion to Suspend Briefing and Motion to Supplement Administrative Record. (Pet. Br. at 28-29.) Pursuant to the Court's April 28, 2022 Order granting that motion in part (ECF No. 1944749), the February Materials are now part of the Administrative Record, and the parties are permitted to reference the March Materials in their briefing. Yet the Commission concedes that it did not consider any of this timely filed evidence. (Resp. Br. at 37.) In the event that the Court does not declare Section 9032(6) unconstitutional, therefore, the Court should remand this matter to the Commission for consideration of that evidence in the first instance.

A. The Committee Did Not "Waive" Its Argument That the Commission Must Consider Evidence of Its Actual Winding Down Costs.

According to the Commission, it was justified in disregarding the very evidence that proves the Committee has no repayment obligation, and withholding that evidence from the Administrative Record, because the Committee "waived" its

opportunity to raise the issue of its actual winding down costs. (Resp. Br. at 37.) The Commission insists that the Committee's express statement that the Commission's "findings concerning the nature of winding down expenses ... cannot survive scrutiny," and that "no repayment would be called for" if reimbursement for these and other expenses were allowed [AR 261] was insufficient to preserve the issue. (Resp. Br. at 37-38.) The Commission is incorrect.

As the Commission concedes, the purpose of the requirement that all issues must be raised in a written submission under 11 C.F.R. § 9038.2(c)(2)(i) is "to ensure that the Commission has timely notice of the nature of any challenges to its authority." (Resp. Br. at 38 (citing *Robertson*, 45 F.3d at 491).) Here, it is undisputed that the Committee *did* raise the issue of its winding down costs in its written submission. [AR 261.] This case therefore stands in sharp contrast to *Robertson*, in which the "petitioner's *written* submission simply did not make" an argument first raised in the oral hearing before the Commission. *Robertson*, 45 F.3d at 491 (emphasis original).

The other cases the Commission cites are likewise distinguishable. In one case, the petitioners argued in a reply brief that "EPA violated § 1412(b)(3)(B) by failing to specify 'an upper bound, lower bound, and central risk estimate' or to identify 'the range of alternative risk estimates produced by other methods that use the dial painter studies,' and ignored the congressional directive 'to inform the public

of alternative risk estimates that put the regulation in broader public health context.” *City of Waukesha v. Env'tl. Prot. Agency*, 320 F.3d 228, 250-51 n.22 (D.C. Cir. 2003) (internal quotation marks and citations omitted). The Court deemed this complex scientific argument waived because the petitioner’s opening brief raised it “only summarily, without explanation or reasoning” that made it comprehensible. *Id.* Here, by contrast, the Committee’s argument is simply that its actual winding down costs exceed the Commission’s estimate of those costs. Further, the Committee explained that “no repayment would be called for” if the Commission considered these costs. [AR 261.] Unlike the complex scientific argument in *City of Waukesha*, further explanation is not needed to make that argument comprehensible.

In another case, the Court concluded that an argument was *not waived*, even though the appellant “devoted only one paragraph in a 58 page brief” to developing it. *Tribune Co. v. Fed. Communications Comm’n*, 133 F.3d 61, 69 n.8 (D.C. Cir. 1998). Finally, a Court concluded that an appellant had waived her equal protection claim because she failed to address a required element of the claim in her opening brief. *See United States v. Hunter*, 739 F.3d 492, 495 (10th Cir. 2013). The Committee committed no such error here. The Commission’s own authorities thus demonstrate that the Committee did not waive its winding down costs argument here.

Moreover, the Commission itself does not contend that it lacked notice of the nature of the Committee's challenge to its reliance on estimated rather than actual winding down costs, nor could it: the Committee expressly asserted that "no repayment would be called for" if the Commission considered the Committee's actual winding down costs. [AR 261.] In addition, when the Commission declined to allow the Committee the opportunity resolve the issue during the administrative proceedings, the Commission expressly contemplated that the issue could be addressed during the "administrative review" process. [AR 199, 206.] The Commission therefore had actual notice of the nature of the Committee's argument.

Despite this fact, the Commission asserts that the Committee had a "responsibility to adequately raise the issue in its written challenge to the repayment determination." (Resp. Br. at 39.) The Committee did so. By the same token, the Commission has a responsibility not to feign ignorance with respect to a dispositive issue that the Committee expressly raised for review in its written submission. Given what is at stake in this appeal – the removal of \$175,272 from a retiree's personal savings in satisfaction of a debt she does not owe – the Commission's resort to strained legalistic argumentation in an effort to evade judicial review of that issue is unconscionable.

The impropriety of the Commission's reasoning is exemplified by its insistence that the Committee "waived" its right to raise the issue of the winding

down costs it incurred during the 16-month period from August 2019 to December 2020, when the Commission unexpectedly lost a quorum and was unable to take action on the Committee's request for administrative review. (Resp. Br. at 41.) The Committee could not possibly have raised this issue in a request for review that it submitted on June 17, 2019, because the Commission had not yet lost its quorum. [AR 261-67.] In the Commission's view, however, the Committee must do the impossible – it must predict the future – in order to “preserve the issue” for review. (Resp. Br. at 41.) Reversal of the Repayment Determination is warranted based on this issue alone, because the imposition of an impossible burden violates due process and any semblance of fairness.

More broadly, fundamental principles of justice and equity warrant reversal of the Repayment Determination. The Commission's refusal to consider the Committee's actual winding down costs appears to be motivated as much by pique than by any genuine concern for proper notice and preservation of issues. The Commission attacks the Committee, for example, for being “uncooperative” and failing to respond to requests for documentation, and further asserts that the Committee “overstates the extent to which it raised winding down costs in its prior submissions to the Commission.” (Resp. Br. at 40.) In so doing, the Commission overstates the extent to which a grassroots minor party candidate's campaign staffed largely by laypeople and volunteers is equipped to navigate the Byzantine

procedures and regulations that the Commission administers. Campaign finance law is challenging for sophisticated legal professionals; it can be near-impossible for anyone else to master. To the extent that the Commission found the Committee “uncooperative” it is a reflection of that reality – not any willful disregard on behalf of the Committee, which would be contrary to the Committee’s own interests.

The straightforward application of well-settled legal principles to the facts demonstrates that Committee should prevail in this appeal. The Committee expressly raised the issue of winding down costs in its timely-filed written request for administrative review and it should be permitted the opportunity to litigate that issue based on the relevant evidence. The Commission’s assertion that the Committee waived this issue is contradicted by the record and unsupported by the authorities on which the Commission purports to rely. Moreover, to deny the Committee its right to administrative and judicial review would be to elevate form over substance at the expense of truth and justice. It is the difference between requiring a candidate to pay \$175,272 that she does not owe and requiring a federal agency to perform its statutory duty based on the relevant evidence, not a rigid and narrow application of the waiver doctrine. That is, after all, the Commission’s very reason for existence.

B. The Court Should Order the Commission to Supplement the Record With the March Materials and to Reconsider Its Repayment Determination Based on All the Evidence.

The Commission should be required to supplement the record with the March materials, and to reconsider its Repayment Determination based upon all the evidence in the record, for the reasons stated in the preceding discussion and in the Committee’s opening brief at Part II.B-C. (Pet. Br. at 46-50.) Nothing in the Commission’s brief alters that conclusion.

The Commission asserts that it is not required to include the March materials in the record because they “were never ‘submitted to the Commission for its consideration in making the [repayment] determinations,’ and thus are not part of the ‘administrative record.’” (Resp. Br. at 43 (quoting 11 C.F.R. § 9038.7(a)).) That is incorrect. The contents of the administrative record are prescribed by § 9038.7(a), and that section is not abrogated simply because the Commission declines to consider evidence that a party properly submits. Otherwise, the Commission could evade judicial review of any issue – even those timely and properly raised – provided that it declines to consider the evidence relating to it. As the Commission’s own authorities emphasize, “an agency may not unilaterally determine what constitutes the Administrative Record [and thereby limit the scope of this Court’s inquiry].” *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993). The Court should not permit the Commission to do so here.

The Commission faults the Committee for the timing of its evidentiary submissions, “nearly two years” after the Committee timely submitted its request for

administrative review, (Resp. Br. 44), but disregards the fact that the Commission had notified the Committee that it lacked a quorum during that time and could take no action on the Committee's request. At no time during this period did the Commission notify the Committee that it should submit its evidence despite the Commission's inability to consider it. At no time during the entire administrative process did the Commission notify the Committee of any deadline for submitting its evidence. The Committee accordingly submitted its evidence within five days of the Commission's oral hearing, as the Commission expressly advised the Committee that it could do. [AR 274.]

The Commission asserts that “a Commissioner’s statement that a committee could submit additional materials after an oral hearing does not expand the categories of materials that could be timely submitted,” and 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.’” (Resp. Br. at 44 (quoting *Robertson*, 45 F.3d at 491.)) But here, the Committee does not seek to “expand the categories of materials” that it should be permitted to submit. On the contrary, the Committee only seeks inclusion of evidence submitted following the administrative hearing, at the Commission’s direct invitation, which unequivocally pertains to an issue that the Committee properly raised in a timely-filed written request for

administrative review. *Robertson* expressly approves that procedure. *See Robertson*, 45 F.3d at 491. *Robertson* therefore supports the Committee's position, not the Commission's.

Indeed, the Commission concedes that "a party can present additional documentation in support of its position on issues that were *timely* raised" in a written request for administrative review. (Resp. Br. at 45 (emphasis original).) Despite the Commission's repeated assertions to the contrary, it is a matter of record that the Committee did raise the winding down costs issue in a timely filed written request for administrative review. (AR 261.) The Commission's failure to include the Committee's evidence relating to that issue in the record is therefore contrary to law.

To the extent that the Commission has undermined the process of judicial review by omitting the March Materials from the Administrative Record, that omission counsels in favor of remanding this matter for consideration based upon the full evidentiary record – not affirming a decision that the Commission made without regard for the relevant evidence. As the Commission concedes, a court "should have before it neither more nor less information than did the agency when it made its decision." (Resp. Br. at 42 (quoting *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997).) Here, the Commission *did* have the March Materials before it when it made its Repayment Determination, but it declined to consider that

evidence. As the Commission further concedes, if the Court concludes its failure to consider that evidence was error, remand is the appropriate remedy. (Resp. Br. at 41 n.7.)

CONCLUSION

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

Dated: August 18, 2022

Respectfully submitted,

s/Oliver B. Hall

Oliver B. Hall

D.C. Bar No. 976463

CENTER FOR COMPETITIVE DEMOCRACY

P.O. Box 21090

Washington, DC 20009

(202) 248-9294

oliverhall@competitivedemocracy.org

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2022, I caused the foregoing document to be filed using the Court's CM/ECF system, which will effect service upon all counsel of record.

/s/Oliver B. Hall

Oliver B. Hall

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of FRAP 32(a)(7)(B) because it contains 6,350 words (including footnotes and endnotes), excluding those parts exempted by FRAP 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word, Times New Roman, size 14 point.

/s/Oliver B. Hall

Oliver B. Hall