02-5069

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

FEDERAL ELECTION COMMISSION,

Appellant,

v.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.,*

Appellees.

BRIEF *AMICUS CURIAE* OF THE CAMPAIGN AND MEDIA LEGAL CENTER, THE CENTER FOR RESPONSIVE POLITICS, AND THE NATIONAL VOTING RIGHTS INSTITUTE IN SUPPORT OF APPELLANT

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INTEREST OF AMICI

Amici are public interest organizations dedicated to full and fair enforcement of the nation's election laws. The Campaign and Media Legal Center ("the Legal Center") is a nonprofit, nonpartisan 501(c)(3) organization established in January 2002 to represent the public interest in strong enforcement of campaign finance and campaign media law. Through its legal staff, it participates in the administrative and legal proceedings in which the nation's campaign and media laws are interpreted and enforced. Based in Washington, the Legal Center is associated with the University of Utah's Campaign and Media Studies Program, created to support inquiry and action on these issues through academic research, conferences, and internship programs. The Legal Center's attorneys are among the counsel to the congressional sponsors of the Bipartisan Campaign Reform Act of 2002 in *McConnell v. FEC,* the litigation testing the Reform Act's constitutionality.

National Voting Rights Institute ("NVRI") is a nonprofit, nonpartisan organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to equal and meaningful participation in every phase of electoral politics. Through litigation and public education, NVRI works to promote reform of our campaign finance system to ensure that

those who do not have access to wealth are able to participate fully in the political process. NVRI has litigated numerous campaign finance cases throughout the country, and currently serves as lead counsel for the plaintiffs in *Alliance for Democracy v. FEC*, a case pending in the United States District Court for the District of Columbia in which the plaintiffs have challenged the FEC's failure to act on their complaint alleging serious campaign finance violations by the campaign committee and leadership PAC of current-Attorney General John Ashcroft during his 2000 Senate campaign.

The Center for Responsive Politics ("CRP") is a non-partisan, non-profit research group based in Washington, D.C. that has been tracking money in politics, and its effect on elections and public policy, since 1983. CRP conducts computer-based research on campaign finance issues for the news media, academics, activists, and the public at large. CRP publishes the results of its research on its Web site, www.OpenSecrets.org and www.FECWatch.org, as well as in numerous publications made available to the public. CRP's work is aimed at creating a more educated voter, an involved citizenry, and a more responsive government. Among CRP's projects is FEC Watch, which is dedicated to ensuring enforcement of the nation's campaign finance laws in furtherance of CRP's research and

analysis. CRP's and FEC Watch's work is dependent on the timely and accurate public disclosure of the enforcement activities of the Federal Election Commission.

INTRODUCTION

For more than a generation, when the Federal Election Commission ("FEC" or "Commission") has resolved a complaint alleging an election law violation, the agency has released the information it gathered in the course of its inquiry to the public. This practice is not a mere matter of habit. A number of unique aspects of the enforcement scheme created by Congress in the Federal Election Campaign Act ("FECA" or the "Act") make public access to these investigative files essential to ensuring that the nation's election laws are enforced. The information they contain is indispensable to efforts to hold the Commission accountable for its actions – and for its inaction, as FECA provides.

In FECA, Congress plainly expressed the view that the Commission's activities should be subject to public scrutiny. The statute contemplates an agency dedicated to "total disclosure" of its own records. This interest in close oversight is also evidenced by a FECA provision under which citizens can challenge the Commission's prosecutorial discretion. Affirmance of the

District Court's decision would make it impossible to effectuate Congress' interest in FEC accountability without advancing any comparable goal.

A growing body of evidence vindicates Congress' original view that the FEC should be closely watched. In recent years, the structure of the Commission and the highly politicized process of nominating commissioners have combined to render the watchdog agency a "dog that doesn't bark."[1] Information culled from the kind of investigative files at issue in this case has shown that the Commission frequently fails to pursue campaign finance violators.

Prior to the decision below, two mechanisms helped ensure that the Commission properly enforced the law. The first is the longstanding Commission practice, at issue in the case at bar, of publicly releasing its investigative files in resolved cases. This practice enhanced agency accountability in the same way FECA disclosure laws dissuade political actors from violating the law in the first place: by subjecting agency action and decisions to public scrutiny. The second – and only other – accountability mechanism is the unique, but narrow, citizen enforcement provision found in FECA at 2 U.S.C. § 437g(a)(8). Under that provision, a

[1] "The Dog That Never Barks," *The Washington Post,* November 22, 2002.

person who files a complaint with the agency may seek district court review if the Commission decides to dismiss that administrative complaint.

By striking down the Commission's practice of making the information gathered in the course of its investigations available to the public, the decision below eliminates the first accountability mechanism. Moreover, it severely undermines the second mechanism, making an already limited avenue of review almost meaningless. Because courts apply a narrow standing doctrine in cases brought under 437g(a)(8), the citizen enforcement provision is not always available to challenge FEC decisions. And now, the confidentiality rule established below virtually ensures that potential 437g(a)(8) plaintiffs who do have standing will lack the necessary information to decide whether to seek review at all. That will render 437g(a)(8) a nullity, and make it impossible to effectuate Congress' interest in public oversight and judicial review of FEC decisions.

The only credible means of holding the FEC accountable is for organizations like *amici,* along with the media and private citizens, to scrutinize the basis for its decisions. With no temporal limit on the agency's confidentiality provisions, the Commission's incentive to enforce the law, and the public's confidence in the agency's actions, will shrink to the vanishing point.

ARGUMENT

I. IN FECA, CONGRESS SOUGHT "TOTAL DISCLOSURE" OF CAMPAIGN INFORMATION AND PROVIDED FOR STRICT PUBLIC OVERSIGHT OF THE FEC

The Federal Election Commission's practice, observed since the agency's creation in 1974, of releasing its investigative files to the public after it resolves an investigation is not a matter of tradition. Instead, the practice is firmly grounded in the nation's foundational interest in open government – in letting the public know "what the government is up to."[2]

Full, unencumbered public access to government information has long been a baseline principle of American law.[3] The public concern with governmental openness and accountability – so critical to a functioning democracy – which animates that principle is particularly acute in the context of election campaigns. Public reporting of the way candidates fund their races, for example, is the most basic element of our system of campaign finance law. Indeed, it has often been called its cornerstone.[4]

When Congress established the nation's modern election law regime in FECA, the legislature's intent could not have been clearer: "to achieve

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[2] *Dep't of Justice v. Reporters' Comm. for Freedom of Press,* 489 U.S. 749, 773 (1989).
[3] *See Grosjean v. American Press Co.,* 297 U.S. 233, 250(1936)("informed public opinion is the most potent of all restraints upon government"); *Buckley v. Valeo,* 424 U.S. 1, 67 n80 (1976)(quoting Justice Louis Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933)).
[4] *See Buckley v. American Press Co.,* 525 U.S. 182, 223 (1999)(O'Connor, J., concurring)("total disclosure has been recognized as the essential cornerstone to effective campaign finance reform, and fundamental to the political system")(citations omitted).

'total disclosure' by reaching 'every kind of political activity.'"[5] Through FECA's public reporting requirements, as this Court has noted, Congress sought to "promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process."[6]

For more than a generation, the Federal Election Commission has followed the path Congress laid, making all Commission records "available to the public unless they are specifically exempt . . ." from disclosure.[7] This policy, including the Commission's construction of the interlocking provisions of section 437g as allowing disclosure of the record in closed enforcement cases, directly serves Congress' goal of maximum disclosure. Indeed, when considered in the context of the unique structure of FECA's enforcement regime, public release of this information is the only way to hold the Commission accountable at all.

A central fact of our campaign law underlies the heightened public interest in the FEC's actions: The Commission has sole investigative authority, and its power to commence civil actions against violators is the exclusive civil remedy for enforcement of FECA.[8] The one narrow

[5] *Buckle*y, 424 U.S. at 76 (footnote omitted) (quoting S.REP. NO. 92-229, 92ND CONG., 1ST SESS., P. 57 (1971)).
[6] *NRCC v. Legi-Tech*, 795 F.2d 190, 192 (D.C. Cir. 1986).
[7] *See* 11 C.F.R. § 4.2(a),(b) (1999).
[8] *See* 2 U.S.C. § 437d (e).

exception to this rule allows a citizen to bring his or her own enforcement action pursuant to 2 U.S.C. § 437g(a)(8)(C) against an individual alleged to have violated FECA if each of the following criteria have been met: (1) the citizen made a complaint to the FEC pursuant to 2 U.S.C. § 437g(a)(1); (2) the FEC either failed to act on the complaint or dismissed the complaint; (3) the citizen had standing to bring a suit challenging such inaction or dismissal pursuant to 2 U.S.C. § 437g(a)(8); (4) the citizen brought and won a 437g(a)(8)(A) lawsuit against the FEC, satisfying deferential review; and (5) in contravention of court order, the FEC refused to act or re-visit its decision to dismiss the complaint brought pursuant to 437g(a)(1).

Congress' decision to include a citizen enforcement provision in FECA is particularly noteworthy because decisions by prosecutorial agencies are not normally subject to court review.[9] In ongoing litigation challenging the Commission's failure to act on a complaint against the 2000 Senate campaign of now-Attorney General John Ashcroft, the plaintiffs in that case canvassed approximately 450 federal agencies and located only one other comparable statute authorizing citizens to challenge an agency's

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[9] *Federal Election Commission v. Akins*, 524 U.S. 11, 26 (1998) ("[T]he FEC argues that we should deny respondents standing because this case involves an agency's decision not to undertake an enforcement action--an area generally not subject to judicial review. . . . [T]his Court [previously] noted that agency enforcement decisions 'have traditionally been committed to agency discretion,' and concluded that Congress did not intend to alter that tradition in enacting the APA. . . . We deal here with a statute that explicitly indicates the contrary")(quoting *Heckler v. Chaney,* 470 U.S. 821 (1985)).

failure to act in a timely manner.[10] The provision thus serves to further demonstrate the congressional preference for close oversight of the agency charged with overseeing the nation's elections in compliance with federal laws.

II. DISCLOSURE OF FEC INVESTIGATIVE FILES IS ESSENTIAL TO PUBLIC OVERSIGHT OF THE COMMISSION'S ENFORCEMENT OF ELECTION LAW

A. The FEC's Structure And Record Of Enforcement Demonstrate The Need For Public Access To Investigative Information

A growing body of evidence confirms the wisdom of Congress' view that the Commission, as the primary guardian of elections, should be subject to public oversight. As allegations of campaign finance abuses have

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[10] In that case, *Alliance for Democracy, et al. v. FEC,* No. 02-0527 (EGS) (D.D.C. filed March 19, 2002), Plaintiffs' counsel first considered a list of approximately 450 federal entities, found within the web page "A-Z Index of All Federal Agencies" in the website www.firstgov.gov. Plaintiffs then removed duplicate entries, cabinet departments, defense and diplomacy-related entities, ceremonial offices, judicial entities, and public corporations (like Voice of America). They then examined the websites of the remaining agencies to determine whether the agencies appeared likely to accept public complaints; if so, further website and statutory research was done.

Plaintiffs finally undertook an investigation of 33 agencies culled from the initial list to determine whether any were subject to procedures comparable to 437g(a)(8). Those agencies were Administration on Aging; Administration for Children and Families; Agricultural Marketing Service; Architectural & Transportation Barriers Compliance Board; Census Bureau; Bureau of Indian Affairs; Bureau of Land Management; United States Commission on Civil Rights; Commodities Futures Trading Commission; Consumer Product Safety Commission; Office of Fair Housing & Equal Opportunity; Federal Bureau of Prisons; Federal Communications Commission; Federal Consumer Information Center; Federal Deposit Insurance Corporation; Federal Maritime Commission; Food & Drug Administration; Food Safety & Inspection Service; Grain Inspection, Packers, & Stockyards Administration; Health Resources & Services Administration; Mine Safety & Health Administration; National Highway Transportation Safety Administration; National Labor Relations Board; National Transportation Safety Board; Occupational Safety & Health Administration; Office of Surface Mining Reclamation and Enforcement; Patent & Trademark Office; Pension & Welfare Benefits Administration; Securities & Exchange Commission; and Small Business Administration.

Counsel also conducted searches of the U.S. Code on Westlaw and of all leading administrative law treatises for variations on the language in the relevant statute, 2 U.S.C. § 437g(a)(8) and failed to find any analogous reference other than 30 U.S.C. § 1281(g). That provision confers a right of citizens to appeal the Secretary of Labor's failure to act in certain surface mine reclamation proceedings.

escalated, the agency's enforcement activity has not. To the contrary, the campaign scandals of the late 1990s have cast the agency's structural and self-imposed shortcomings into sharp relief. An examination of the problems plaguing the agency highlights the need for public scrutiny. The decision below is incompatible with that goal.

When Congress created the FEC in 1974, its efforts to create a bipartisan agency resulted in a structure that has hindered strong enforcement of the election laws. Whether this structure was intended to impose a legitimate check on the agency's discretion or to shield officeholders from legitimate oversight, the modern result is an agency often unable or unwilling to pursue enforcement of serious violations of the law. Under FECA, the commission is composed of six members, no more than three of whom may be members of the same political party.[11] In practice, this has meant that three Democrats and three Republicans have always occupied these seats. Four commissioners must agree to any investigation. Unfortunately, the Commission often deadlocks on three-to-three votes along party lines on enforcement matters. Or, worse, a majority of commissioners vote to block investigations that would implicate both parties.

[11] *See* 2 U.S.C. § 437c(a)(1).

This tendency toward partisan voting by commissioners is made much more serious by the highly politicized process through which commissioners are appointed. The process of nominating commissioners, while superficially resembling the normal nomination process for executive branch officials, has become a cynical game in which political party leaders can, and do, select commissioners they anticipate will protect party interests at the agency. Indeed, in most instances, at the recommendation of congressional leaders, the president has nominated party loyalists who either come from, or have strong ties to, the regulated community.[12] As campaign finance experts have noted, "[t]he FEC is a classic example of a 'captured' agency – one that has become attuned to serving the interests of the community it is supposed to be regulating. In this instance, the 'regulated community' comprises those elected officials and party leaders who have the power to appoint the FEC commissioners in the first instance."[13]

The Commission has deadlocked or failed to garner a majority vote for tough enforcement action, resulting in the dismissal of complaints on

[12] Of the 20 commissioners in the agency's history, 16 have been former members of Congress, worked as staff for an elected official or political party or were otherwise employed by major campaign finance players. Not surprisingly, commissioners have often acted to protect their own political party rather than to enforce the law as independent actors. *See No Bark, No Bite, No Point,* Project FEC ed., at 60, 61 (2002).
[13] *See No Bark, No Bite, No Point, supra* note 12, at 8.

some of the major campaign finance issues of the day.[14] Situations like these led the *Washington Post* to note that "[i]ntense partisanship envelops almost every major decision the FEC's six commissioners make. . . . Time and again partisan standoffs have prevented the Commission from pursuing enforcement actions against major politicians and powerful interest groups, even when the FEC's general counsel recommends going forward."[15]

Prior to the decision below, two mechanisms helped ensure that the Commission's actions were subject to scrutiny. First, when the FEC resolved a matter under its review, it routinely made public all information within its investigative files on that matter. The practice, by revealing the factual record for FEC decisions, allowed the public (including watchdog groups) to assess whether FEC decisions "not to enforce" FECA (by dismissing complaints) were reasonable, and whether the terms of FEC "conciliation agreements" were sufficient to act as deterrents to future unlawful conduct.[16] This disclosure practice enhanced agency accountability in the same way FECA disclosure laws dissuade political actors from violating the law in the first place: by subjecting agency action

[14] The Project FEC Task Force, a blue-ribbon panel of 14 top campaign finance experts, chronicled some of those cases in its 2002 report, including cases involving presidential candidates, national party committees and third party groups. *See supra,* note 12.
[15] B. Weiser and B. McAllister, "The Little Agency that Can't," *The Washington Post,* Feb. 12, 1997.
[16] *See* 2 U.S.C. § 437g(a)(4) (defining procedure for conciliation). In short, if the Commission has "probable cause to believe," after investigation, that an accused has violated FECA, it attempts "conciliation," which may include a civil penalty and remedial action.

and decisions to public scrutiny. Because release of investigative files is now prohibited, the public will be denied the necessary information to make informed decisions about how – indeed, whether – the FEC is enforcing the law.

The second – and only other – accountability mechanism is the unique, but narrow, citizen enforcement provision found in FECA at 2 U.S.C. § 437g(a)(8). Under that provision, plaintiffs may seek district court review of the Commission's decision to dismiss the plaintiff's administrative complaint.

By eliminating the first method of accountability, the court below has left the citizen enforcement provision standing alone as the sole check on FEC discretion. That provision, however, is not always available and its usefulness has been dramatically undermined by the decision below.

B. If The Decision Below Is Upheld, The Citizen Enforcement Provision Will Be Fatally Undermined

If this Court affirms the decision below, leaving 437g(a)(8) the sole check on FEC discretion, it is difficult to imagine how the public, or *amici*, could meaningfully effectuate the right to bring such a suit. In short, plaintiffs will lack sufficient information to bring one.

Courts accord great deference in reviewing FEC dismissals of administrative complaints.[17] As a result, plaintiffs challenging such decisions must satisfy an exacting standard of proof.[18] It is well-established that a reviewing court "may not disturb a FEC decision to dismiss a complaint unless the dismissal was based on an impermissible interpretation of the FECA or was arbitrary or capricious, or an abuse of discretion."[19]

In deciding whether to bring a suit seeking court review of an FEC dismissal of a complaint, the complaining party must make a judgment as to the reasonableness of the agency's decision. This, in turn, requires access to the underlying investigative file. Without such access, the complainant will be left to guess as to whether the FEC's actions are actually supported by the record that was before the agency. Because the FEC is the only agency with authority to investigate potential violations of election law, the Commission is necessarily the sole repository of a complete library of the information necessary to challenge the agency's action. If FECA is construed to forbid release of FEC investigative files, plaintiffs will have lost their only sure source of relevant information.

Affirmance of the District Court decision will therefore impose an information blackout on potential plaintiffs, including *amici*, by shutting off

[17] *See, e.g., Buchanan v. FEC,* 112 F. Supp.2d 58 (D.D.C. 2000).
[18] ***See, e.g., id.* at 70-73.**
[19] *Id.* at 70 (citations and quotations omitted); *see also* 2 U.S.C. § 437g(a)(8)(C).

their only practical means of scrutinizing the Commission. Prior to a suit, this new judicial confidentiality rule will shield all FEC investigative material from plaintiffs. It strains credulity to believe a plaintiff could obtain the information necessary to decide whether to allege that the Commission acted "contrary to law" without access to basic information about the case and the agency's investigation. Indeed, it would not be surprising to find potential challengers deterred by the terms of Rule 11 of the Federal Rules of Civil Procedure, which requires, at pain of sanctions, that a party must have evidentiary support for its every allegation and factual contention.[20] The confidentiality rule imposed by the court below would therefore effectively foreclose judicial review of FEC action.

C. The Lower Court Decision, Combined With Already Stringent Standing Requirements, Would Render 437g(a)(8) A Nullity And Ignore Congress' Will

As discussed *supra,* Congress made its strong interest in FEC accountability plain by including 437g(a)(8), which allows for judicial review of Commission decisions, within FECA. The application of the standing doctrine to 437g(a)(8), however, often renders the statute unavailable to potential plaintiffs. If the decision below is affirmed, the resulting information blackout, combined with the doctrinal limits of the

[20] FED. R. CIV. P. 11(B)(3).

judicial review provision, would vitiate 437g(a)(8) and make it impossible to effectuate the statutory scheme Congress created.

The courts have tightly limited the category of citizens with standing to seek review under 437g(a)(8). This Circuit's application of the Supreme Court's decision in *Lujan v. Defenders of Wildlife*[21] has limited the ability of "watchdog" organizations, which are often the only entities willing and able to bring 437g(a)(8) cases, to seek such review. In particular, a plaintiff who alleges a non-reporting violation of FECA and the FEC's failure to enforce FECA does not allege a concrete and particularized injury, and consequently does not have standing.[22] And, although voters and watchdog groups can generally establish standing in cases involving reporting violations,[23] even that cannot be assured if they cannot show that they or their members have been deprived of information, or that the result they seek will lead to the disclosure of additional factual information.[24]

As a result, the class of plaintiffs who are most often able to satisfy the standing test consists of two small categories of individuals who have little incentive to pursue enforcement matters: candidates who have lost

[21] 504 U.S. 555 (1992).
[22] *Common Cause v. FEC,* 108 F.3d 413, 418 (1997).
[23] *Akins*, 524 U.S. at 21-22, 24-25 (1998).
[24] *Wertheimer v. FEC,* 268 F.3d 1070, 1074 (D.C. Cir. 2001).

elections, and candidates who have won them.[25] In both cases, it is easy to understand why few such plaintiffs ever bring complaints at all, much less request court review of an FEC decision to dismiss the complaint. If a candidate wins her race, she has little or no incentive to pursue a complaint against a defeated opponent. And if a candidate loses a race, experience suggests that most defeated candidates would prefer to simply move on.

The combined effect of the information blackout imposed by the district court and the limited availability of the 437g(a)(8) remedy is a near-total lack of judicial review, contrary to the clear intent of Congress. It is difficult to imagine how the District Court's decision allows much legal room for a plaintiff to challenge the FEC's dismissal of a complaint alleging a campaign violation. And, as discussed *supra,* the Commission is generally inclined to dismiss complaints. Affirmance of the decision below therefore will leave a key federal agency largely unchecked by the public, the press or the judiciary.

CONCLUSION

Under the rule proposed by the District Court, the information underlying Commission decisions not to pursue potential violators, as well

[25] Such candidates, who presumably would complain about violations committed by their opponents, have competitor standing. *See, e.g., Citizens for Percy '84 v. FEC*, No. 84-2653, 1984 WL 6601 (D.D.C. Nov. 19, 1984) (Senator challenged FEC's failure to act on administrative complaint alleging excessive contributions to campaign committee of Senator's primary opponent); *see generally Buchanan*, 112 F.Supp.2d at 63-66 (D.D.C. 2000) (discussing competitor standing); *Natural Law Party of the U.S.A. v. FEC*, 111 F.Supp.2d 33 (D.D.C. 2000) (same).

as the information underlying Commission conciliations with actual violators, would be completely shielded from public view. Without the disclosure of the investigative files, the public and *amici* would simply have no way of knowing the facts behind these cases, the strength or weaknesses of the investigation or the merits of the final action. If the judicial rule imposed below becomes the law, the agency charged with protecting our democracy's most sacred function will do so in the dark, when it does so at all.

The FEC's interpretation of 2 U.S.C. § 437g as allowing public release of its investigative files is indispensable to public efforts to hold the agency accountable. *Amici* urge that this Court reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for *amici* hereby states that the foregoing brief has been prepared in Word® format using a Times New Roman 14-point font, and that said program's word count function counted 3,344 words, beginning at the Interest of the *Amici* and ending prior to any certificates of counsel. See FED. R. APP. P. 32(a)(5), 32(a)(7)(B) and (C), 32(a)(7)(B)iii and D.C. CIR. RULES 29 and 32.

Counsel for *amici* further states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than the *amici* made a financial contribution to the preparation or submission of this brief.

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Trevor Potter

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* make the following disclosure regarding their corporate status:

The Campaign and Media Legal Center is a nonprofit, nonpartisan 501(c)(3) corporation established in January 2002 to represent the public interest in strong enforcement of campaign finance and campaign media law through participation in legal and administrative proceedings.

National Voting Rights Institute is a nonprofit, nonpartisan 501(c)(3) corporation dedicated to protecting the constitutional right of all citizens, regardless of economic status, to equal and meaningful participation in every phase of electoral politics.

The Center for Responsive Politics is a nonprofit, nonpartisan 501(c)(3) research group based in Washington, D.C. which tracks money in politics and its effect on elections and public policy.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion have been served by hand on the following counsel of record on this 6th day of December, 2002.

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