No. 13-5358

ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED

IN THE

United States Court of Appeals for the District of Columbia Circuit

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COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE AND DAVID H. WIGGS, TREASURER

Appellants,

v.

FEDERAL ELECTION COMMISSION

Appellee.

On Appeal From the United States District Court for the District of Columbia in Case No. 11-2168 (CKK)

CORRECTED BRIEF FOR APPELLANTS COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMMITEE AND DAVID H. WIGGS, TREASURER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The following parties appeared before the district court as plaintiffs and now appear before this Court as appellants: Combat Veterans For Congress Political Action Committee and David H. Wiggs, Treasurer. The following party appeared before the district court as the defendant and now appears before this Court as appellee: Federal Election Commission.

B. Rulings Under Review

The ruling under review is contained in the Memorandum Opinion issued on September 30, 2013 by United States District Court Judge Colleen Kollar-Kotelly.

C. Related Cases

This case was originally before the United States District Court for the District of Columbia as Case No. 1:11-cv-02168-CKK. There are no related cases.

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Cases **Page(s)**

[1] Authorities chiefly relied upon marked with asterisk.

Codes, Regulations and Rules

Other Authorities

GLOSSARY OF ABBREVIATIONS

ABBREVIATION	DEFINITION
AF	Administrative Fine
CVFC	Combat Veterans for Congress PAC
FECA	Federal Election Campaign Act
OAR	Office of Administrative Review
OGC	Office of General Counsel
RAD	Reports Analysis Division
RTB	Reason to Believe

STATEMENT OF JURISDICTION

The district court had jurisdiction under 2 U.S.C. 437g(a)(4)(C)(iii) and 28 U.S.C. 1331.

This Court's jurisdiction over the appeal from the district court's order granting Summary Judgment for the FEC and denying Summary Judgment for CVFC rests on 28 U.S.C. 1291. JA7.

The district court order was entered on September 30, 2013 and the Appellants filed a timely notice of appeal on November 26, 2013. JA4

STATUTORY PROVISIONS

The pertinent statutes, regulations, and other authorities are reproduced in the Addendum to this brief.

STATEMENT OF ISSUES

1. Whether the district court erred by failing to even consider Appellants' claim that the Federal Election Commission's "Reason to Believe" findings and Final Determinations that Appellants violated the reporting provisions of the Federal Election Campaign Act (FECA) and fining them a total of $8,690 was "(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; *** (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and/or] without observance of procedure required by law" where FECA, 2 U.S.C. 437g (a)(2) and 11 C.F.R. 111.32 and 11 C.F.R. 111.37 require an

"affirmative vote" of at least four Commissioners to make such findings and determinations but where the number of actual ballots cast by the Commissioners in this case show that the requisite number of affirmative votes cast was less than four.

2. Whether the Federal Election Commission's "Reason to Believe" findings and Final Determinations were "(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; *** (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [and/or] without observance of procedure required by law" where FECA, 2 U.S.C. 437g (a)(2) and 11 C.F.R. 111.32 and 11 C.F.R. 111.37 require an "affirmative vote" of at least four Commissioners to make such findings and determinations but where the number of actual ballots cast by the Commissioners in this case show that the requisite number of affirmative votes cast was less than four.

3. Whether the district court erred by ruling that the Commission's failure to hold the Committee's then-treasurer, who failed to file disclosure reports on time, liable in his personal capacity either solely or jointly where the statute, FEC regulations, and published guidance from the FEC clearly provides for such imposition of liability was "(A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" under 5 U.S.C. 706(2) where the record shows, as here, that the treasurer's failure to do so was knowing, willful, or reckless.

4. Whether the district court erred by ruling that it did not have jurisdiction to consider the Commission's failure to even consider holding the then-treasurer, who acted knowingly, wilfully, or recklessly, liable for failing to file timely disclosure reports where the Commission's own regulations require that it "will consider the treasurer to have acted in a personal capacity and make findings accordingly." 70 Fed. Reg. 3.

5. Whether the district court erred by ruling that the Commission's failure to mitigate or reduce the fine imposed was not arbitrary or capricious, especially where the administrative record does not show that the Commissioners even considered the mitigation arguments raised by Appellants at the administrative level and therefore failed to even exercise their discretion.

6. Whether the district court erred in ruling that the Commission's refusal to consider the Appellants' "best efforts" in "obtain[ing], maintain[ing] and submit[ting] the information" required for the disclosure reports which would otherwise "shall be considered in compliance with the Act" under 11 C.F.R. 111.35 was not arbitrary or capricious.

7. Whether the district court erred in ruling that 11 C.F.R. 111.35 is neither arbitrary nor capricious on its face or as applied.

STANDARD OF REVIEW

This Court's review of the district court's ruling is *de novo*. *See Coburn v. McHugh*, 679 F.3d 924, 928 (D.C. Cir. 2012).

STATEMENT OF THE CASE

A. Proceedings Before the Federal Election Commission

Appellant Combat Veterans For Congress Political Action Committee (CVFC) is a non-partisan, non-connected political action committee registered with the Federal Election Commission. CVFC raises and disburses funds for the purpose of influencing Federal elections. It endorses, contributes to, and otherwise supports the election of carefully vetted candidates who are combat veterans of any active or reserve component of the United States Military, and who meet other ideological and/or policy related standards determined by the organization. Michael Curry was registered then as both the treasurer and custodian of records.

On October 15 2010, the 2010 October Quarterly Report became due, and Mr. Curry did not timely file. On October 21, 2010, less than a week later, the 12-Day Pre-General Election Report became due, and Mr. Curry did not timely file that report either. On November 4, 2010, the FEC sent Mr. Curry a Notice of Failure to File regarding the October 2010 Quarterly Report. JA132. On November 21, 2010, Mr. Curry electronically filed the 2010 October Quarterly Report, thirty

seven (37) days after it became due. On December 2, 2010, the 30-Day Post-General Election Report became due, and Mr. Curry did not timely file that report.

On December 13, 2010, Captain Joseph R. John, Chairman of CVFC, contacted the FEC called Mr. McAllister seeking guidance on changing the treasurer because Mr. Curry, was on his way out as the committee's Treasurer and he wanted to know what he needed to do to change the Treasurer. He was advised that once a new treasurer was selected, the committee needed to submit that person's name. As for the status of the overdue reports, he was advised that while the reports would be late due the absence of the treasurer, but that he should submitted as "soon as possible *in order to mitigate any fines or penalties*." On December 15, 2010, the Commission purportedly found Reason to Believe ("RTB") by an affirmative vote of 6-0 that CVFC and its then-Treasurer Curry violated 2 U.S.C. 434(a) by failing to timely file the October Quarterly Report by October 15, 2010, and transmitted that information to Mr. Curry. JA105.[1]

[1] In fact, as further described the Declaration of the Plaintiffs' counsel, Dan Backer, JA64, CVFC learned only two days prior to filing its Motion for Summary Judgment below that this Certification claiming that six Commissioners affirmatively voted to find RTB appears to be inaccurate. In reality, only three of the six Commissioners affirmatively voted (four being necessary under FECA to find reason to believe), and even those three did not actually "find reason to believe"; rather, they merely "did not object" to the staff report recommending that the Commissioners should find reason to believe. JA80-82. See 2 U.S.C. § 437g(a)(2).

On January 11, 2011, the delinquent Pre-Election Report and Post- Election Reports**,** which were due on October 21, 2010 and December 2, 2010, respectively, were filed due to the best efforts of CFVC due to assistance of the new treasurer David H. Wiggs and other resources used by CFVC to get the reports filed as quickly as possible. See JA272-75..

On March 11, 2011, the FEC purportedly found reason to believe by an affirmative vote of 6-0 that CVFC's Pre-General Election Report was filed after the deadline of October 21, 2010. JA238. However, as with the first reason to believe on December 15, 2010, this Certification also appears to be false. Instead of six affirmative votes, there were only two affirmative votes (four being necessary under FECA) and those two votes were also merely a "do not object" vote to the staff report.

With respect to the late reports, Capt. John sent letters to the FEC asserting that the conduct of the former Treasurer, Mr. Curry, made it impossible for CVFC to timely file and that the CVFC exercised its best efforts to obtain the bank records and other information, retain a bookkeeper to conduct an audit, and take other steps necessary to file the three reports as soon as practicable under the circumstances. JA248. Capt. John specifically identified former Treasurer, Mr. Curry as the only person with access to "ten months of records, bank deposit slips, the bank statements, personal information on Web site donors, the personal records

on each of the estimated 210 donors, the password to make electronic reports, and the knowledge of how to electronically submit FEC Reports." *Id.* Additionally, Capt. John articulated that best efforts were employed to "obtain substantial missing information as quickly as humanely [sic] possible, assembled and audited that information in a timely manner, expending approximately 600 man hours of work, reconstructed the donor information in the proper electronic format, and fully complied with FEC Reporting requirements." JA249.

On March 25, 2011, the FEC purportedly found reason to believe by an affirmative vote of 6-0 that CVFC's 30 Day Post-General Election Report was filed after the deadline of December 2, 2010. JA327. However, as with the reason to believe findings on December 15, 2010 and March 11, 2011, this Certification also appears to be false. Instead of six affirmative votes, there were only three affirmative votes (four being necessary under FECA) and those three votes were also simply a "do not object" vote to the staff report.

On March 31, 2011, Capt. John responded as he did before explaining that the late filing was due to the wilful and reckless conduct of its former treasurer JA338.

On June 15, 2011, Dayna C. Brown, Reviewing Officer for the Office of Administrative Review (OAR), while not disputing Capt. John's statement of reasons for the late filings, sent CVFC the Recommendation of the Reviewing

Officer regarding the RTB for the October 2010 Quarterly Report affording the respondents only 10 days to file a written response to the Recommendation. JA140-42. On June 17, 2011, Ms. Brown sent CVFC the Recommendation of the Reviewing Officer regarding the RTB for both the Pre- and Post-General Election Reports. JA268-71.

On June 24, 2011, counsel for CVFC filed a written response to the Reviewing Officer Recommendation regarding the October 2010 report, the Pre-General Election Report and the Post-General Election Report that clearly established the factual and legal basis why Mr. Curry was solely liable, in his personal capacity, for the knowing, willful, and reckless conduct that precipitated these fines. JA311-13.

On August 18, 2011, the Office of General Counsel ("OGC") submitted a Memorandum to Dayna Brown providing legal guidance on the disposition of these actions. JA314-18. Notably, the OGC in Part III heading of its memorandum concluded that CVFC allegations with respect to the reckless conduct of their former treasurer "**MIGHT JUSTIFY PURSUING [THE FORMER] TREASURER PERSONALLY.**" *Id.* at 3 (emphasis added). The memorandum also noted that the "Commission could conclude that [Mr. Curry's] actions constituted a reckless failure to fulfill his duties as treasurer." *Id.* at 4. More significantly, the OGC noted that the Commission "could consider Mr.

Curry's actions as possible mitigating factors in determining the civil penalty for the Committee's violations." *Id*. at 5.

On October 12, 2011, the FEC's Chief Compliance Officer, Patricia Carmona and Reviewing Officer Dayna Brown, made a Final Determination Recommendation to the Commission for all three late filings AF#s 2199, 2312, and 2355 that CVFC and its *new* Treasurer David Wiggs violated 2 U.S.C. § 434(a) and to assess respective penalties of $4,400, $3,300, and $990 against them for an aggregate of $8,690. JA319-21. Notably, Ms. Brown requested that "the Commission consider the issue of the [former] Treasurer's personal responsibility in these matters." *Id*. at 3.

On October 27, 2011, the Commission without meeting and without providing the CVFC or its counsel with an opportunity to be heard, summarily "approved" by a vote of 6-0 the Reviewing Officer's recommendation that the Commissioners should make a Final Determination. However, the Commissioners did not themselves act on that recommendation and did not explicitly make a finding or Final Determination that CVFC in fact violated 2 U.S.C. § 434(a) for filing late the three reports in question: October Quarterly Report, the 12-Day Pre-Election, and the 30-Day Post-Election Report. JA86-91. The Commissioners further purported to asses a civil fines against the committee and it current treasurer instead of the former treasurer in his personal capacity for each such late

filing in the amount of $4,400, $3,300, and $990, respectively, for an aggregate amount of $8,690. JA322-23. The Commission failed to exercise its discretion and address the request by its Reviewing Officer that the Commission consider the issue of the former Treasurer's personal liability or whether his actions would be a mitigating factor in determining the civil penalties against CVFC. The Commission also did not give CVFC an opportunity to be heard in person before the full Commission before making its Final Determination.

On November 4, 2011, notice of the alleged Final Determination was sent to CVFC by certified mail and received by certified mail on November 10. On November 23, 2011, CVFC counsel sent a letter by courier to the Chair of the Commission requesting expedited action that the Commission vacate its Final Determination as being premature inasmuch as it did not give the respondents a hearing before the full Commission under 2 U.S.C. § 437g(a)(4)(C)(ii). JA327-329. Alternatively, the Commission was asked to reconsider the matter since it neglected to consider the personal liability of the former Treasurer as being solely liable for the fine or at a minimum to mitigate the penalty on CVFC and its current Treasurer, and preserving its procedural and substantive rights, including its claim that its Due Process and First Amendment rights were violated. *Id.*

On December 9, 2011, the FEC denied CVFC's request for reconsideration, a hearing, and mitigation of the fine. JA330.

B. Proceedings Before The District Court

On December 7, 2011, CVFC and its current treasurer filed a timely Petition for Review of the FEC's Determination and Complaint for Declaratory and Injunctive Relief challenging the FEC's enforcement action as authorized by 2 U.S.C. 437g(a)(4)(C)(iii) and 28 U.S.C. 1331 seeking to modify or set aside the agency determination. Per the scheduling order, on June 7, 2012 CVFC filed their motion for summary judgment. On June 25, 2012, CVFC filed an Amended Petition and Complaint raising the additional claim that the FEC's voting procedures were invalid.

Cross motions were filed by the FEC and the case was submitted to the court. On September 30, 2013, the district court granted the FEC's motion and denied the plaintiffs and entered an order to that effect. The plaintiffs filed a timely notice of appeal to this Court on November 26, 2013.

C. Proceedings In The Court of Appeals

On January 27, 2014, the FEC filed a Motion for Summary Affirmance. On March 3, 2014, Appellants filed their Opposition to the motion. On March 25, 2014, the FEC filed its reply. On May 13, 2014, this Court denied the FEC's motion and set the case for plenary briefing and argument.

SUMMARY OF ARGUMENT

In this case, the fundamental locus of accountability embedded by statute, regulation, and rule within the entire campaign finance regime – the personal liability of Committee Treasurers for knowing, wilful, or reckless malfeasance – has been ignored wholesale by the Federal Election Commission, the very agency charged with enforcing the law as it is clearly written. More disturbing, the agency itself engaged in a series of unlawful practices to remove accountability of the Commissioners from their own decision making processes. If the decision below were to stand, the result would be an agency whose exercise of its powers conferred by Congress would be openly violative of its organic statute and promulgated regulations, the Administrative Procedure Act, and the Sunshine Act, and would erode the only measure of integrity from campaign finance law.

1. The district court erred by refusing to consider CVFC's claim that the FEC's "reason to believe" finding and "Final Determination" against CVFC and its current treasurer were invalid and void ab initio because the Commission never cast at least four "affirmative votes" as required by FEC's organic statute for either action. 2 U.S.C. 437g(a)(2); 11 C.F.R. 111.32. The court, reasoning the claim should have first been presented to the Commission for consideration at the agency level, was in error because CVFC was not and could not have been aware of the defective procedures at the agency level. Moreover, CVFC does not raise this

issue to attack the merits of the underlying enforcement action, but rather to challenge the adequacy of the agency's voting procedure; thus, the rules of exhaustion of remedies do not apply in such circumstances.

The court's second reason for not adjudicating CVFC's voting claim was equally flawed. The court concluded that because the documentary evidence supporting that claim, namely, the actual ballots used by the Commissioners, were not provided by the FEC in the Administrative Record, they would be not be considered. However, CVFC was not aware of the existence of the questionable ballots until after litigation commenced, requested them from the FEC, and promptly submitted them to the court for its consideration since the FEC had only submitted a blank sample ballot with the Administrative Record. Because the ballots themselves were generated and maintained exclusively by the FEC, and since they relate to the validity of the voting procedure, there was no prejudice to the agency if the court were to consider them.

As to the merits of CVFC's voting procedure claim, the ballots show that the Commissioners did not cast "four affirmative" votes in any of the three administrative fine proceedings in this case, as required by 2 U.S.C. 437g(a)(2). Rather, the Commission has devised a novel procedure whereby if a Commissioner does not return his or her ballot on the matter within 24 hours after being provided a copy, that silence and non-action would be deemed to constitute an "affirmative

vote" authorizing enforcement action to be taken against CVFC and similar respondents. In this case, at the "reason to believe" stage, there never were the requisite four votes submitted in any of the three administrative fines proceedings in this case. Therefore, the enforcement action was void ab initio. The subsequent Final Determination of liability and the imposition of penalties were tainted since the predicate "reason to believe" finding was not lawfully made, and additional apparent errors, such as the Commissioner's ballots being signed by persons other than the Commissioners who may not have been properly authorized to do so. Finally, FEC Directive No. 52, which purports to give the FEC the authority to utilize this novel "no show-no vote" procedure is itself defective since it was secretly promulgated in violation of the Sunshine Act.

2. The district court further erred in upholding the FEC's failure to impose – or even consider – personal liability on CVFC's former treasurer and the Commissions creation from whole cloth of a new species of prosecutorial discretion to substitute parties into enforcement actions in direct contravention of Congress's express mandate. Notwithstanding the mountain of clear statutory and regulatory provisions that provide that the "treasurer," rather the committee, is personally responsible for filing the reports and will be personally liable when they are knowing, wilful, or reckless in failing to fulfill his or her duties, the court erroneously held that the statute "clearly imposes reporting responsibility on

committees." JA22. Alternatively, the court's *Chevron* deference to the agency was misplaced, since there was no ambiguity as to who is responsible for filing the reports nor as to the scope of the former Treasurer's knowing, willful or reckless conduct. CVFC also argues that it was arbitrary, capricious, contrary to law, and an abuse of discretion for the FEC not to impose any liability, even jointly, on the Treasurer due to his wilful and reckless conduct in failing to file the required reports.

3. Finally, the court erred by rejecting CVFC's claim that the FEC arbitrarily failed to exercise its discretion or abused it by not mitigating the fine imposed on CVFC due to the malfeasance of the treasurer, especially where the Office of General Counsel and Reports Analysis Division made the recommendation that it consider such mitigation. Despite CVFC using its best efforts to compile and submit the disclosure reports as promptly as possible, with full knowledge by the FEC of the exact nature of the delay, the court below also erred in ruling that the FEC did not abuse its discretion in precluding CVFC from invoking FEC's "best efforts" defense found in 11 C.F.R. 111.35. By its own terms, the "best efforts" regulation does not and cannot preclude raising "reckless or wilful" conduct of the treasurer to mitigate the fine imposed on the committee; consequently, the FEC's failure to even exercise its discretion was arbitrary and capricious, and the regulation is arbitrary and capricious as applied. Secondly, to

the extent that the defenses are limited to those only listed in the regulation, the regulation is over- and under inclusive as to the circumstances that can be used as a defense, and is otherwise arbitrary and capricious on its face.

ARGUMENT

I. THE DISTRICT COURT ERRED BY NOT CONSIDERING CVFC'S CLAIM THAT THE PURPORTED FINDING OF LIABILITY AND IMPOSITION OF FINES ARE NULL AND VOID BECAUSE THE COMMISSIONERS FAILED TO CAST THE REQUISITE NUMBER OF "AFFIRMATIVE VOTES"

In their Amended Petition for Review and Complaint, CVFC challenged the validity of the FEC's enforcement action alleging that the FEC failed to comply with the statutory requirements that the Commissioners' findings at both the "reason to believe" stage and the final determination stage that a violation occurred must be made "by an affirmative vote of 4 of its members" as required by statute and the FEC's own regulations. 2 U.S.C. 437g(a)(2); 11 C.F.R. 111.32; 111.37(a). *See* Amend. Pet. For Review, JA51-52. Consequently, the FEC's enforcement action was "in excess of statutory jurisdiction" and "without observance of procedure required by law" and thus null and void. 5 U.S.C. 706(2)(C)-(D). Accordingly, this Court need not reach any of the other issues in this appeal and should remand this case to the district court to adjudicate this preliminary issue. Alternatively, this Court may decide that based on the uncontroverted evidence that the requisite four affirmative votes were not cast, the case should be remanded

with instructions to vacate the FEC's purported finding of liability and imposition of the $8,690 fine.

A. The District Court Erred In Not Reaching The Merits Of CVFCs Challenge To FEC's Voting Procedures

The district court improperly declined to consider the merits of CVFC's challenge that the requisite "affirmative votes" of four Commissioners were lacking, and the agency action was thus a nullity because (1) CVFC did not first raise the issue with the FEC at the administrative level, and (2) the actual ballots which evidence the improper voting procedure were not part of the administrative record filed by the agency, and thus, should not be considered by the court. JA35-36. The FEC reiterated those two reasons in its unsuccessful Motion for Summary Affirmance. The district court and FEC are wrong on both counts.

1. CVFC Was Not Required To First Present The FEC's Defective Voting Procedure To The Commission

The district court declined to adjudicate the voting procedure claim citing the general rule that the court should not "'usurp[] an agency's function if it sets aside an administrative determination upon a ground not theretofore presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its actions.'" JA35 (quoting *Coburn v. McHugh*, 679 F.3d 924, 931 (D.C. Cir. 2012) (quoting *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)).

First, CVFC had no reason to raise the unlawful voting issue before the FEC. The December 21, 2010 letter sent by the FEC to the treasurer notifying him about the reason to believe finding simply stated that "the FEC found that there is reason to believe ("RTB")" that a violation of 2 U.S.C. 434(a) occurred. JA106. There was no indication of the actual vote tally. Once this suit was filed and the FEC submitted the Administrative Record to the district court below, the formal Certifications by the FEC's Secretary and Clerk were also submitted attesting to the votes cast by the Commissioners at the RTB stage and the final determination stage. The Certification by the Commission Secretary certified that the FEC on December 15, 2010, "[d]ecided by a vote of 6-0 to: (1) find reason to believe that COMBAT VETERANS FOR CONGRESS PAC, and CURRY, MICHAEL MR. as treasurer violated 2 U.S.C. § 434(a) and make a preliminary determination that the civil money penalty would be the amount indicated on the report . . . . Commissioners Bauerly, Hunter, McGahn II, Peterson, Walther, and Weintraub *voted affirmatively* for the decision." JA105 (emphasis added). Similar Certifications were executed for the final determination stage. JA208. From all appearances and representations, it would seem that the FEC complied with the statutory requirement that any enforcement action at both the "reason to believe" stage and the "final determination" stage must be approved by at least "four affirmative votes." These "certifications" were false and misleading.

It was only after examining the Administrative Record that included only the "blank" voting sheets used by the Commissioners as part of the record did CVFC suspect that the Certifications of the votes did not accurately reflect the actual "affirmative votes" cast by the Commissioners. Accordingly, counsel for CVFC pressed the FEC attorneys to disclose the actual ballots. JA66. Despite some reluctance on the part of the FEC, those ballots were provided two days before the filing of CVFC's Motion for Summary Judgment. As demonstrated *supra*, there were at best only three votes cast to find reason to believe.

Shortly thereafter, CVFC filed an Amended Petition for Review and Complaint on June 19, 2012, notably with the consent of the Commission, raising an additional and dispositive claim that the entire agency enforcement action was null and void since the Commissioners did not comply with the statute's voting procedures of casting at least four "affirmative votes" to initiate this enforcement action and make a final determination of liability and assessing a fine. JA51-52. Under these circumstances, CVFC can hardly be faulted for not raising the voting issue at the agency level since they had no reason to believe the voting was questionable at the time. Nor should the FEC be heard to complain that CVFC is raising the issue in this litigation inasmuch as the FEC consented to the filing of the Amended Complaint for the purpose of challenging the validity of the voting procedure.

Second, even if CVFC had access to the voting ballots or suspected that the voting procedures did not comply with the statutory requirement at the administrative level, bringing that issue before the agency would have been a futile exercise. As evidenced by the FEC's submissions on the merits in the district court, the FEC maintains that its "no show-no vote" procedures fully satisfy the "affirmative vote" requirements of the statute and regulations because the FEC adopted Directive No. 52, which purports to authorize such voting procedure, a position which was vigorously disputed and briefed by CFVC in the district court.

In that regard, the district court's reliance on *Coburn v. McHugh*, 679 F.3d 924, 930 (D.C. Cir. 2012) for the proposition that the court cannot consider the merits of this issue is misplaced. JA35 (Op. at 29). In *Coburn*, this Court upheld that portion of the district court's decision not to consider certain of the plaintiff's arguments regarding his involuntary separation from the United States Army, on the ground that these claims had not been raised during plaintiff's initial challenge of the separation decision. *Id*. at 930-31. In the instant case, however, the claim at issue does not relate to merits of the underlying facts that were the basis for the FEC's staff investigation, but instead goes to the validity of whether a decision itself was lawful. Moreover, the plaintiff in *Coburn* could have raised the issue but chose not to; CVFC had no such opportunity.

The general rule of exhaustion of administrative remedies does not apply in situation such as this where the agency has already predetermined the issue, and hence, it would have been futile to challenge the FEC's voting procedures before the agency. *See McCarthy v. Madigan*, 503 U.S. 140, 148 (1992). Exhaustion is also not required where, as here, "the challenge is to the adequacy of the agency procedure itself. . . ." *Id*. Moreover, as noted *supra*, CVFC simply could not have exhausted any administrative remedy here because it had no reason to believe then that less than four "affirmative votes" were cast in this case.

2. The District Court Erred In Concluding That It Could Not Review The Actual Ballots Used By The FEC Because The FEC Failed To Submit Them As Part of the Administrative Record

The district court's related holding that it could not reach the merits of CVFC's voting procedure claim because the voting ballots themselves were not part of the administrative record is clearly erroneous. The general rule that a reviewing court should focus on the administrative record made at the agency is only applicable where the material sought to be presented for the first time to the reviewing court by an aggrieved party relates to the *merits* of the underlying facts or dispute that was before the agency. That is why, for example, the district court in *Cunningham v. FEC*, 2002 U.S. Dist. LEXIS 20935 (S.D. Ind. Oct. 28, 2002) -- relied upon by the FEC below and which also involves the assessment of a fine for filing a campaign finance report late -- correctly refused to consider an Affidavit

by the candidate swearing the disclosure report was timely filed. That Affidavit was signed more than a year *after* the FEC's decision and the filing of his lawsuit. Id. at *15 n.3.

Here, the voting ballots and documents submitted by CVFC were documents generated by the agency itself *during* the enforcement proceedings. Those voting ballots do not relate to the circumstances of, or factual defenses to the late filing of the campaign finance reports; rather, they go to the validity of the Commissioners' votes. In short, the FEC is in no position to complain that they are prejudiced by the submission and consideration of the actual ballots they used in this enforcement action. They "certified" that six affirmative votes were cast yet only supplied a *blank* ballot sheet in the Administrative Record. If in fact the ballots reflecting the Commissioners' votes were required to be part of the Administrative Record and not just a blank ballot, it was the FEC's fault for not submitting the actual ballots to the district court along with the Administrative Record.

Normally, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). "The task of the reviewing court is to apply the appropriate APA standard of review to the agency decision based on the record the agency presents to the reviewing court." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (internal citations omitted). "But of

course, it is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792, 242 U.S. App. D.C. 110 (D.C. Cir. 1984). This Court has recognized a small class of cases where district courts may consult extra-record evidence when "*the procedural validity* of the [agency]'s action . . . remains in serious question." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) (emphasis added).

In this case, the FEC's jurisdictional infirmity could not have been known until (1) the administrative record was filed with the court, (2) plaintiffs inquired about the omission from the administrative record, and (3) the FEC produced from its own records the actual ballots that illuminated the infirmity. The FEC's own documents that formed the basis for its Secretary's certification that the district court declined to consider illustrate just such a serious question. This is a case in which the district court should have considered the FEC's documents because "'it may sometimes be appropriate to resort to extra-record information' to determine whether an administrative record is deficient." *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (quoting *Esch v. Yeutter*, 876 F.2d at 991)).

The infirmity in the completeness of the administrative record is manifest. This court has held that an agency enjoys a presumption that it properly designated the administrative record absent clear evidence to the contrary, but the agency does *not* unilaterally determine what constitutes the administrative record. *Bar MK Ranches* v. *Yuetter*, 994 F.2d 735, 739-40 (10th Cir. 1993). In this instance, the FEC's own documents that CVFC wished the district court to consider show that the agency deliberately or at best negligently excluded documents that may have been adverse to it by demonstrating that the agency failed to comply with statutory requirements and its own regulations, and thus frustrated judicial review of that agency action. See *City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010); *American Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996). The district court's refusal to consider such clear concrete evidence that the FEC failed to include documents that cast serious doubt on the authority of the FEC's action was in error and warrants reversal of the district court's judgment.

Moreover, the issue here does not go to the substance of the agency's decision, but to its validity *ab initio* because the question is whether the agency followed required procedures in voting to take enforcement action against CVFC. The restrictions on completing or supplementing an administrative record are not implicated and other evidence may be considered when a challenge is brought to

"the procedural validity of [an agency's] action." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989); see also *Franks v. Salazar*, 751 F. Supp. 2d 62, 68 (D.D.C. 2010); *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 115 (D.D.C. 2009).[2]

Finally, it should be noted that CVFC filed a combined Petition for Review of the FEC's enforcement action as provided for by 2 U.S.C. 437g(a)(4)(C)(iii) *and* Complaint for Declaratory and Injunctive Relief under 28 U.S.C. 1331, 2201, and 5 U.S.C. 701-706. Thus, the claim challenging the validity and sufficiency of the votes, and the voting ballots submitted as evidence in support of that claim, can also be considered as a separate challenge to agency action under 28 U.S.C. 1331 under typical APA review provisions that an agency's action was "in excess of statutory jurisdiction, authority, or limitations" or "without observance of procedure required by law." 5 U.S.C. 706(2)(C)-(D). This jurisdictional basis stands apart from the specific judicial review provisions of FEC enforcement actions provided by statute, 2 U.S.C. 437g(a)(4)(C)(iii).

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[2] Cf. *D.C. Circuit Handbook on Internal Practices and Procedures* at 22 ("The record on review [in cases from administrative agencies] consists of the order sought to be reviewed or enforced; the findings or report on which it is based; and the pleadings, evidence, and proceedings before the agency. The record may later be corrected or *supplemented* by stipulation *or by order of this Court*, as in the case of an appeal from the district court". (emphasis added). The record on review does not appear to comprise the votes cast by a multi-member agencies, but if it must, the record could be easily supplemented by the court as CVFC suggested to the court below.

In short, the district court's conclusion that CVFC's challenge to the sufficiency and validity of the votes "are not properly before th[e] Court and will not be addressed" because the issue was not first raised by CVFC at the administrative level and that the ballots used by the Commissioners were not part of the Administrative Record compiled by the FEC is clearly erroneous and should be reversed.

B. The Commissioners Did Not Cast At Least Four Affirmative Votes In This Case And Thus The Enforcement Action Is Null And Void And Should Be Vacated.

Because the record is clear that the Commission failed to cast the required four "affirmative votes" in this enforcement action, this Court, instead of vacating the judgment and remanding to the district court to consider this issue, may conclude that the FEC's action was "in excess of statutory jurisdiction, authority, or limitation" or "without observance of procedure required by law" under 5 U.S.C. 706(2)(C)-(D). In that case, this Court could remand with instructions to vacate the FEC's determinations. At a minimum, a discussion of the merits of CVFC's claim will inform this Court of the fatal defects in the voting procedures used in this case.

As noted in the Statement of Facts, the three enforcement actions for the three reports in question were each purportedly initiated by an affirmative vote of at least four Commissioners as required by law. Indeed, the Commission's

Secretary and Clerk certified in each of the three enforcement matters on three separate occasions that the Commission "Decided by a vote of 6-0 to (1) find reason to believe that COMBAT VETERANS FOR CONGRESS PAC, and WIGGS, DAVID H. MR. as treasurer violated 2 U.S.C. § 434(a) and make a preliminary determination that the civil money penalty would be the amount indicated on the report. . . ." "Commissioners Bauerly, Hunter, McGahn II, Peterson, Walther, and Weintraub *voted affirmatively* for the decision." See JA105, JA238, JA344. On its face, these Certifications indicate that the Commission's six "affirmative votes" satisfied the statutory requirement of a minimum of four affirmative votes necessary for Commission action.

1. *Voting at the "Reason to Believe" Stage*

As the evidence before the district court demonstrated, the FEC considers a Commissioner as casting an "affirmative vote" at the reason to believe stage when that Commissioner simply does not "cast" any vote at all. According to the unlawful voting procedures described in the questionably promulgated FEC Directive No. 52 which the FEC relied upon below, a Commissioner need do nothing at all for 24 hours after being sent a staff memo to have this *failure to act* count as casting an "affirmative vote" to initiate enforcement action. "Matters circulated on a 24-hour no-objection basis *shall be deemed approved* unless an objection is received in the Commission Secretary's Office by the voting

deadline." Directive No. 52 at 3 (Add. 61). Under this voting system, a Commissioner could be on vacation, out of the country, sick, or his or her email may be malfunctioning or simply ignored or not opened. Silence will be counted as casting an "affirmative vote."

The actual breakdown of all the votes at the "reason to believe" stage in these three proceedings provided by the Commission is as follows:

Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2199: Dated December 15, 2010:

Commissioner Bauerly: Do Not Object

Commissioner Walther: Do Not Object (signed by another)

Commissioner Weintraub: Do Not Object

Summary: 3-0 Missing are three "no shows- no votes" and one questionable vote signed by another. Four "affirmative votes" lacking.

Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2312: Dated March 11, 2011

Commissioner Walther: Do Not Object (signed by another)

Commissioner Weintraub: Do Not Object (signed by another)

Four "no show-no votes." Two questionable ballots signed by another.

Summary: **2-0**: Missing are four "no show-no votes". Two questionable ballots signed by another. Four "affirmative votes" lacking.

Signed 24-Hour No-Objection Ballot Votes for Reason to Believe on AF# 2355 Dated March 25, 2011

Commissioner Bauerly: Do Not Object

Commissioner Walther: Do Not Object (signed by another)

Commissioner Weintraub: Do Not Object

Summary: **3-0**: Missing are three "no show-no votes". One questionable ballot signed by another. Four "affirmative votes" lacking.

Clearly, in all three proceedings, there were never the requisite four "affirmative votes" to find reason to believe, and several that were cast and signed by someone other than the Commissioner may be invalid even under the terms of the FEC's Directive No. 52, the validity of which will be discussed, *infra*. Indeed, even by the very terms of Directive No. 52, the FEC itself does not consider silence by a Commissioner to constitute an "affirmative vote." Section II C of that Directive states with Commission's authorization and approval of the publication of the names of non-filers, that publication "will occur immediately after the vote deadline *or as soon as there are four affirmative votes.*" *Id.* at 3; Add. 61 (emphasis added). This statement is a clear admission by the FEC that even they do not regard mere silence as constituting an "affirmative vote."

2. *Voting at the Final Determination Stage*

Moreover, with respect to the votes that were actually cast at the final determination stage, challenges were raised by CVFC below to the validity of four of the six votes that were submitted by some Commissioners *after* the FEC self-imposed deadline for voting and/or were signed by someone other than the Commissioner. This latter issue also raises a factual question regarding the existence and validity of staff authorization,[3] and is material evidence which the FEC refused to provide to CVFC below and thus precluding summary judgment for the FEC. See JA68-91. The breakdown of the votes at the Final Determination stage were as follows:

> **Signed Ballot Votes for Final Determination Recommendation on AF#'s 2199, 2312, and 2355 Dated October 26, 2011**
>
> Commissioner Bauerly: I approve the recommendation(s) (signed by another)
>
> Commissioner McGahn: I approve the recommendation(s)
>
> Commissioner Petersen: I approve the recommendation(s) (signed by another) (submitted after stated ballot deadline)

[3] Directive No. 52 purports to allow Commissioners have their staff sign their names but with certain restrictions which may not have been followed in this case, thereby possibly voiding even those questionable "Do Not Object" ballots cast both at the reason to believe stage and the "I approve the recommendations" ballots cast at the final determination stage. See *Id.* at 4. Add. 62.

Commissioner Hunter: I approve the recommendation(s) (submitted after stated ballot deadline)

Commissioner Walther: I approve the recommendation(s) (signed by another)

Commissioner Weintraub: I approve the recommendation(s)

Summary: Six signed ballots but four are disputed: three questionable ballots signed by another with one of those submitted after the deadline and one questionable ballot submitted after the deadline.

Assuming there were at least four valid "affirmative votes," CVFC further challenged the legal sufficiency of the action resulting from any such vote, since the Commissioners did not actually make any final determination as such, issue any order, or impose any fine; at best, they merely did not object to a staff recommendation that they *should* make a final determination. Thus, this claim raises both factual and legal issues that are unresolved as to the validity and impact of these final determination votes, already tainted by the clear failure of the Commission to cast four "affirmative votes" at the reason to believe stage.

This is not the first instance in which a multi-member agency has acted without statutory authority as shown by its own voting records. The National Labor Relations Board, required by statute to conduct actions by a quorum of three of its five members, adopted an electronic voting mechanism under which

members may "participate" in agency action. In that case, the third member needed to constitute a quorum had expressed his dissenting views on earlier iterations of the proposal under consideration but did not vote on the final version. The NLRB asserted that he was a member of the Board when the final rule was circulated and was sent a notification that it had been called for a vote, even though not voting would constitute an abstention but still constitute being present for purposes of a quorum.

In a well-reasoned opinion, the district court found that a quorum was not present, although had the member "affirmatively expressed his intent to abstain or even acknowledged receipt of the notification [of the meeting], he may well have been legally 'present' to constitute a quorum." *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 25 (D.D.C. 2012) (summary judgment granted to plaintiffs), *appeal dismissed*, 2013 U.S. App. LEXIS 25897 (D.C. Cir. Dec. 9, 2013). The court said that the "NLRB is a 'creature of statute' and possesses only that power that has been allocated to it by Congress." *Id*. at 30 (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001).

After considering a supplemental affidavit submitted by the NLRB on a motion to reconsider that the member's deputy chief counsel had opened the electronic agenda item when the meeting began, and argued that the Member was therefore virtually "present" for the meeting, the court denied the motion for being

too little and too late, and further noted that there was "no indication that [the Member's employees] were authorized to vote or abstain on his behalf . . . ." *Id.* at 32. In the same fashion, there was no "affirmative vote" or even acknowledgement that the Commissioner received the "no-objection" ballot. The FEC acted in violation of its organic statute by failing to act with a minimum of "four affirmative votes," notwithstanding Directive No. 52's purported authorization for them to do so.[4] In both cases, the agencies acted in violation of their organic statutes; the results should not be different based on the party submitting the agency's evidence of that failure.

Unlike the FEC's novel argument that a "no show-no vote" constitutes an "affirmative vote" to take agency enforcement action, the typical practice for multi-member agencies for is for agency commissioners to cast their vote at a public meeting or submit their written vote for those matters that may be disposed of without a meeting. *See, e.g.*, 16 C.F.R. 4.14(c) ("Any [Federal Trade]

[4] As noted, several of the 24-Hour ballots in this case show that they were signed by someone other than the Commissioner to whom it was sent, and purportedly on their behalf. JA78-85. Even if Directive No. 52 were lawfully promulgated and valid, it specifies that the ballot can be signed by staff "provided the Commissioner has given instructions to the staff member *regarding the matter being acted on* and the staff member is acting in accordance with those instructions." Directive No. 52 at 4 (App. 62) (emphasis added). While those instructions are to be kept with the record, the FEC has refused to provide those alleged authorizations to CVFC. Just as in the *NLRB* case, those staff authorizations may be found wanting should this Court remand this case to the district court for further proceedings.

Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule. . . .") (emphasis added). Moreover, such votes are made a matter of public record. *See, e.g.*, 16 C.F.R. 4.9(b)(ii) ("final votes of each member of the Commission in all matters of public record, including matters of public record decided by notational voting").

More importantly, unlike the district court below, other courts carefully examine the facts in cases where there are challenges to the validity of a Commissioner's vote in agency enforcement and other administrative actions. See *Braniff Airways, Inc. v. Civil Aeronautics Board*, 379 F.2d 453, 462 (D.C. Cir. 1967) (concluding the notational vote cast was valid and that the evidence supports the conclusion that the "signature of the Chairman was affixed to the opinion while he was still competent to vote."); *Federal Trade Comm'n v. Flotill Products, Inc.*, 389 U.S. 179 (1967) (Court determines that sufficient quorum of FTC Commissioners validly acted on matter despite resignation of two Commissioners); *Corus Group PLC v. Bush*, 217 Supp. 2d 1347 (C.I.T. 2002) (Commissioner made valid "affirmative . . . findings" and express "determinations" and was properly appointed to his position).

C. FEC Directive No. 52 Is Invalid Because It Was Promulgated In Secret In Violation of the Sunshine Act

The FEC defended the validity of Directive No. 52 that purportedly authorized "No-Objection" voting by arguing that it has the authority to promulgate their own "rules for the conduct of its activities," citing 2 U.S.C. § 437c (e) and *Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 542-43 (1978) (agency can devise "their own rules of procedure"). While an agency can certainly promulgate its own rules of procedure, it is axiomatic that those rules cannot deviate from the requirements of the agency's organic statute or the agency's own regulations published in the Code of Federal Regulations. See *Doe v. United States Dep't of Justice,* 753 F.2d 1092, 1098 (D.C. Cir. 1985).

While the district court did not reach the voting issue, this Court may wish to decide the issue because the voting procedures in this case were defective as a matter of law, and remand this case to the district court with instructions to vacate the FEC's action. Thus, the question of the validity of Directive No. 52 which purported to authorize such voting is also implicated. In that regard, the FEC has promulgated a number of rules of procedure for conducting their affairs published in the Code of Federal Regulations, including the procedures for conducting its meetings under the Government in the Sunshine Act, 5 U.S.C. 552b. *See* 11 C.F.R. Part 2; *see also* 11 C.F.R. Part 111. Add. 20, 28. The provenance of

Directive No. 52, however, suggests it was unlawfully promulgated under these procedures.

As for the FEC's Sunshine Act regulations, FEC rules state that the Commission need not hold a meeting to decide whether a future meeting should be closed to the public under the exemptions allowed under the Sunshine Act, but that the vote to close all or part of such future meeting may be cast by using the FEC's "notation vote procedures." 11 C.F.R. 2.5(c). That "notation vote" is in the form of a *written* vote rather than a voice vote or a no-objection or silent vote. Presumably, these "notation votes" are equivalent to what the FEC calls "tally votes" in Directive No. 52 where, in contrast to "no objection" matters, in order to be counted, an actual vote must be physically cast. *Id.* at 2. Add. 60

In addition, FEC's Compliance Procedures, 11 C.F.R Part 111, applicable to this case, provide for various procedures that the FEC has chosen to establish, such as how complaints are to be filed, the use of written questions and subpoenas during investigations, conciliation procedures, and the like, but there is nothing in those provisions that mentions "notation vote procedures," "tally votes," or 'no-objection" voting that relieves the Commissioners of their responsibility as expressly mandated by statute to cast at least "four affirmative votes" to initiate enforcement actions. Add. 28.

In addition to these rules of procedure, there are a number of policy statements and directives not published in Code of Federal Regulations that describe the procedures of certain other FEC enforcement activities and the issuance of advisory opinions. However, there is only *one* document that purports to be a rule of procedure pursuant to 2 U.S.C. 437c(e) as the FEC claimed below it has the authority to issue: Directive No. 10, appropriately entitled "**RULES OF PROCEDURES OF THE FEDERAL ELECTION COMMISSION PURSUANT TO 2 U.S.C. 437c(e)**."

Directive No. 10 was adopted on December 20, 2007 and, unlike other directives, *was* published in the Federal Register, 73 Fed. Reg. 5568 (Jan. 30, 2008), Add. 52. Directive No. 10 revised the Commission's 1978 Rules of Procedure for the conduct of its meetings, specifically to address the situation where the Commission has less than four members due to vacancies. On September 10, 2008, however, the FEC held a secret meeting ostensibly authorized under the Sunshine Act to consider several matters, including the proposed Directive No. 52.[5] That Directive purported to allow the Commissioners to

[5] While CVFC obtained from the FEC the final certified vote of that meeting approving Directive No. 52, they were denied a copy of any transcript or recording of the meeting. This portion of the meeting should *not* have been closed to the public under the Government in the Sunshine Act. There was no notice of the September 10, 2008 meeting in the Federal Register that this agenda item was going to be discussed, and even if it were specifically listed, the ostensible boilerplate in the notice for closing that part of the meeting only covers items

discharge their statutory duties of finding "reason to believe" by "affirmative votes" on so-called "No-Objection Matters" by either not casting any vote at all for a 24-hour period or by returning the "no objection" ballot within 24 hours signed by the Commissioner. As previously noted, if none of the Commissioners returned his or her ballot, they are all "deemed" to "approve" the staff recommendation to launch certain enforcement actions, and this non-voting will be certified by the Commission Secretary as a 6-0 affirmative vote of finding of "reason to believe" that a respondent has violated the law.

CVFC learned from the FEC after this litigation commenced that Directive No. 52 was approved by a bare majority of 4-2 during the Commission's September 10, 2008 Executive Session, a closed meeting that was in clear violation of the Government in the Sunshine Act. And unlike Directive No. 10 governing the agency procedures, Directive No. 52, which by its own terms was designed to "supplement other Commission documents" including Directive No. 10 (see *id*. at 1, n.1, Add. 59), was never published in the Federal Register.[6]

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involving "Internal personnel rules and procedures or matters affecting a particular employee." That exemption under the Sunshine Act, however, is inapplicable regarding important agency voting procedures such as this. Lest there be any doubt about the narrow reading of that exemption under the Sunshine Act and its analog in the Freedom of Information Act, the Supreme Court made clear that this exemption is limited to personnel matters. See *Milner v. Dep't of Navy*, 131 S. Ct. 1259 (2011).

[6] Directive No. 52 is also buried on the Commission's website where it would be difficult for the public to find. The left side of FEC's homepage

Secondly, whatever authority the FEC may have to devise its "rules for the conduct of its activities," that authority does not permit the FEC to contravene the statutory command requiring the Commission to "find" reason to believe a violation occurred and that such finding must garner at least "four affirmative votes" not the "votes" of silent Commissioners who, for all we know, did not even receive a copy of the staff recommendation since not even acknowledgement of receipt is required. As noted, in the instant case, there were no more than three "Do Not Object" votes in each of the three fine cases and even several of those were signed by the Commissioner's assistant, thereby raising questions about the validity of those so-called "votes."

The FEC's deviation from the statutory required voting procedures is not an isolated example of the Commission's blatant disregard of the law. For example,

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(http://www.fec.gov) has links to useful information for political committees and the public, including the link for "Law, Regulations, & Procedures" which in turn has a drop down menu for additional documents under several categories, including "Policy Statements & Other Procedures" and "Procedural Materials." Remarkably, neither Directive No. 52 nor any of the other FEC's Directives are to be found there where one would expect them to be. After searching around, one has to access "About the FEC" at the top of the homepage, which lists general matters about the FEC, its budget, and similar information, and even then, the drop down menu does *not* list the FEC's Directives as one of the items. But if one happens to scroll down to the very bottom of that page, there is a link FEC's Directives. See Add. 64-67. In short, CVFC and others regulated by the FEC could be forgiven for not knowing about the FEC's unusual voting procedures found in the secretly considered and secretly promulgated Directive No. 52 with which the FEC seems to playing "hide the ball."

Congress made it clear that "members of the Commission *shall not* engage in any other business, vocation, or employment" 2 U.S.C. 437c(a)(3) (emphasis added); Add. 3. Yet, despite this clear and unambiguous command of no outside employment, the Commissioners promulgated a regulation that states a "member of the Commission shall not devote a substantial portion of his or her time to any other business, vocation, or employment." 11 C.F.R. 7.9(a) (emphasis added). This "substantial portion" qualification to outside employment is in direct defiance of Congress's command that Commissioners devote *all* of their professional time to FEC business with no exceptions. This provision, like the non-voting "voting" procedures, while certainly convenient for the Commissioners, is contrary to the statute.

In sum, Directive No. 52's "No-Objection" voting procedure allowing silence by a Commissioner to constitute an affirmative vote to take enforcement action violates the FEC's organic statute and was promulgated in violation of the Sunshine Act.

II. THE DISTRICT COURT ERRED IN RULING THAT THE FEC'S FAILURE TO IMPOSE PERSONAL LIABILITY ON CVFC's TREASURER WAS A CONSIDERED DECISION BY THE COMMISSION AND NOT AN ABUSE OF DISCRETION OR OTHERWISE ARBITRARY

The district court ruled that it lacked jurisdiction to consider CVFC's claim that its treasurer should be held personally liable for the fines because such claims

are not permitted in the context of a Petition for Review filed under 2 U.S.C. 437g(a)(4)(C)(iii). JA24-25. The lower court erred for two reasons.

First, nothing in section 437g(a)(4)(C)(iii) limits the arguments that a person may make in its "written petition requesting that the determination be modified or set aside." *See also* 11 C.F.R. 111.38 (respondent may request "that the final determination be modified or set aside."). The only exception in the FEC regulation is that a "failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. 437g." *Id.* There is certainly no dispute that CVFC raised the argument of treasurer personal liability during the administrative process; hence, that argument was clearly preserved.

Secondly, CVFC brought this action under 28 U.S.C. 1331 and 5 U.S.C. 702-706 as well, and therefore, the court had jurisdiction to consider CVCF's treasurer liability claim under those provisions. JA39. While CVFC did not file a formal complaint against its errant treasurer with the FEC under 2 U.S.C. 437g(a)(8)(A) for violating FECA's reporting provisions as the district court noted, JA24-25, it was not required to do so in order to seek judicial review of the FEC's failure to hold the treasurer personally liable, either solely or jointly, given the detailed record in the FEC's possession as to the treasurer's malfeasance. As

discussed further, *infra*, the statutory provisions and FEC's own regulations make clear that the treasurer is personally responsible and liable for filing timely reports. Accordingly, the failure of the agency to impose sanctions on the guilty party caused injury to CVFC for which it can seek judicial review. Moreover, the FEC is required by 2 U.S.C. 437g(a)(2) to consider investigating and taking enforcement action against individuals "on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities" without requiring the filing of a formal complaint. Such information was clearly provided by CVFC to the FEC here and, as will be shown, even the FEC's Office of General Counsel recommended the Commissioners to consider the issue of the treasurer's personal liability.

Reaching the merits of the treasurer's personal liability, the district court alternatively held that the FEC "has broad discretionary power whether to investigate a claim, and whether to pursue civil enforcement under [FECA]" and, therefore, the court could not conclude that the agency "abused its discretion in choosing not to pursue Mr. Curry in his personal capacity for wilful or reckless failure to file reports." JA26. The court erred for two reasons. First, the Court mistakenly observed that the "*Commission considered* Mr. Curry's potential liability, and has supplied reasonable grounds for its failure to prosecute him in his personal capacity" and that the Commission made a "*decision*[] . . . not to pursue

Mr. Curry in his personal capacity for willful or reckless failure to file the reports." JA26 (emphasis added). Putting aside CVFC's argument regarding defective voting as to whether the Commissioners made any legally valid decision at all, the record does *not* reflect that the Commissioners "considered" or "decided" anything regarding the treasurer's personal liability, let alone supplying "reasonable grounds" for its failure to investigate and prosecute Mr. Curry personally, as the district court erroneously claimed it had. JA25. Moreover, the failure to pursue Mr. Curry does not give the FEC prosecutorial discretion to name a party not considered to be responsible by the relevant statute.

A. Treasurers, Not Committees, Are Required Under FECA and FEC Regulations and Policies to File Reports and Are Personally Liable For Failure to Comply With Their Responsibilities Under the Act.

A close examination of the plethora of FEC statutory provisions, regulations, and policies expressly imposing personal liability on treasurers to file committee reports -- coupled with the FEC's enforcement staff recommendations to the Commissioners that the treasurer's personal liability be pursued in this case -- further demonstrates that the Commissioners either did not consider these authorities, and therefore failed to exercise their discretion, *or* arbitrarily ignored these authorities and enforcement duties without articulating "reasonable grounds" for their alleged decision, as the agency was required to do. See *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2010).

Under FECA, "[e]ach *treasurer of a political committee shall file* reports of receipts and disbursements in accordance with the provisions of this subsection. The treasurer shall sign each such report." 2 U.S.C. § 434(a)(1) (emphasis added). Congress placed the responsibility to file reports squarely on treasurers, not on committees. *See also* 2 U.S.C. 432(c) (requiring treasurers to keep account of committee records); 432(d) (requiring treasurers to maintain records for three years). Congress intended through these FECA provisions to impose personal responsibility on treasurers as the only statutory officer required for the formation and operation of political committees. Congress did not impose reporting obligations on political committees themselves, or committee chairmen or other committee officers since the treasurer is the only statutory officer of a committee.

The FEC, through its implementing regulations, has further underscored Congress's imposition of personal liability on the treasurer. See 11 C.F.R. 104.14(d) ("*Each treasurer* of a political committee, and any other person required to file any report or statement under these regulations and under the Act, *shall be personally responsible* for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it.") (emphasis added); 11 C.F.R. 114.12 ("Notwithstanding the corporate status of the political committee, *the treasurer remains personally responsible* for carrying out their respective duties under the Act") (emphasis added); 11 C.F.R. 104.1(a) ("*Who*

must report. Each treasurer of a political committee…shall report in accordance with 11 C.F.R. Part 104.").

In addition to the statutory provisions and the FEC's rules and regulations that impose affirmative legal duties upon Treasurers of political committees, FEC policy guidance also confirm that "the violation of [reporting requirements] makes [Treasurers] *personally liable*." See *Federal Election Commission Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings*, 70 Fed. Reg. 1, 5 (Jan. 3, 2005) (emphasis added); Add. 49. The law consistently tasks treasurers with affirmative legal obligations and duties, the violation of which subjects treasurers, and only treasurers, to personal liability. Congress did not empower the FEC to transfer this personal responsibility and pass it off to the committee or a blameless successor treasurer.

As the FEC has recognized:

> Indeed, if FECA were construed to impose liability on treasurers only in their official capacities, it would effectively mean that only committees are liable for violations under the statute--which would have been easy enough for Congress to accomplish *by writing the Act to impose reporting, recordkeeping, and other duties on 'committees' rather than 'treasurers.*'

Federal Election Commission Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters, 69 Fed. Reg. 4092, 4093, n.6 (Jan. 28, 2004), Add. 44 (emphasis added).

In addition to the statutory provisions and FEC rules, regulations, and policy guidances, federal courts have recognized the personal liability of political committee treasurers. *See FEC v. Toledano*, 317 F.3d 939, 947 (9th Cir. 2002) (the Act "holds [the treasurer] personally responsible for the committee's recordkeeping and reporting duties.") (emphasis added); *FEC v. Gus Savage for Congress '82 Comm. and Thomas J. Savage, Treasurer*, 606 F. Supp. 541, 547 (N.D. Ill. 1985) ("Liability . . . filters through the candidate to his amorphous campaign committee, or, more precisely, to the committee's treasurer, who is legally responsible for any violation of the Act. It is the treasurer, and not the candidate, who becomes the named defendant in federal court, and subjected to the imposition of penalties ranging from substantial fines to imprisonment."); *FEC v. Dramesi for Congress Comm., 640 F. Supp. 985; 1986 U.S. Dist. LEXIS 22269* (treasurer assessed fine); *FEC v. Dramesi for Congress Comm.*, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion 3) ("[A]n individual will also stand responsible for his indiscretions as a treasurer. It is because of the ephemeral nature of such political committees that *Congress chose to place this burden upon treasurers.*") (emphasis added).[7]

[7] Against the thick forest of statutory provisions and regulations imposing personal liability on treasurers for reporting, the court below cites only one provision, 2 U.S.C. 434(a)(4), which states "All political committees *other than authorized committees of a candidate* shall file [the required reports."] (emphasis added) . JA20. But it is significant to note that Congress required that with respect to these

B. FEC Staff Recommendation on Treasurer's Personal Liability

The wealth of authority providing that the treasurer is personally liable circumscribes the FEC's discretion to ignore that body of law. Moreover, FEC staff recommended in this case that the personal liability of Mr. Curry should be considered.

For example, the Reviewing Officer in this case, pursuant to guidance from the Office of General Counsel ("OGC") "request[ed] that the Commission consider the issue of the Treasurer's personal responsibility in these matters." JA321. In a Memorandum to the Reviewing Officer, the Acting General Counsel not only stated in a bold heading that the allegations of recklessness against the former treasurer "**MIGHT JUSTIFY PURSUING [THE FORMER] TREASURER**

"authorized committees of a candidate," the "*treasurer* shall file" reports of a House or Senate candidate, 2 U.S.C. 434(a)(2)(A) (emphasis added) and that the "*treasurer* shall file" the reports for a Presidential candidate, 2 U.S.C. 434(a)(3) (emphasis added). Add. 2. Thus, as for committees "other than [candidate] committees," it is reasonable and consistent to construe congressional intent as requiring the "treasurer" of those committees to file the required reports. In other words, since Congress was listing the filing duties of *all* political committees, candidate and non-candidate alike, Congress intended for 2 U.S.C. 434(a)(4) to be read as follows: "[The treasurer of] [a]ll political committees other than authorized committees of a candidate shall file either. . . ." This reading comports with the general mandate by Congress at the beginning of this section, 2 USC 434(a)(1), that "[e]ach treasurer of a political committee shall file reports . . . in accordance with this subsection," which covers reporting by candidate and non-candidate committees. Therefore, the court erred by giving deference to the FEC's incongruous reading of the law. JA22. Indeed, the FEC interprets this provision in it regulations as requiring only treasurers to report. 11 C.F.R. 104.1(a).

PERSONALLY" but that if the FEC referred this matter to the OGC for pursuing personal liability against Mr. Curry in the enforcement context, the FEC "could consider Mr. Curry's actions as possible *mitigating factors* in determining the civil penalty" for the Committee. JA318 (emphasis added). The OGC concluded thusly: "[t]herefore, *we recommend that OAR raise this issue for the Commission's consideration* in the memorandum recommending final determinations in this matter." JA318 (emphasis added). The OAR, as noted, did indeed raise and specifically request the FEC consider the issue of personal liability in its report to the FEC. JA321. But due to the questionable and cryptic voting procedures, the FEC has not clearly demonstrated that the Commissioners actually exercised their discretion or considered personal liability in this matter, let alone articulate the requisite "reasonable grounds" for not pursuing the treasurer personally. The district court erred by concluding otherwise.

III. THE DISTRICT COURT ERRED IN REJECTING CVFC'S CLAIMS THAT THE FEC FAILED TO EXERCISE ITS DISCRETION OR THAT ITS DECISION NOT TO MITIGATE THE FINES WAS ARBITARY AND CAPRICIOUS

Both the Office of General Counsel and the Reviewing Officer made it clear that the personal liability of the former treasurer, based on the substantial FEC record of his malfeasance, could serve to mitigate the fine against CVFC and its current Treasurer, presumably in whole or in part. See OGC Memorandum,

August 18, 2011 ("In the enforcement context [the Commission] could consider Mr. Curry's actions as possible mitigating factors in determining the civil penalty"), JA372; Reviewing Officer Final Determination Recommendation to the Commission , October 12, 2011 ("Mr. Curry's actions could be considered as possible mitigating factors in determining the civil penalty for the Committee's violations."). JA374.

Nevertheless, the district court accepted the argument by FEC's attorneys in this litigation that the Commission's alleged reasons for rejecting any mitigation of the fine imposed on CVFC was based on the FEC's so-called "best efforts" regulation, 11 C.F.R. 11.35(b)(3)-(d), that severely and unreasonably limits the circumstances which can constitute "best efforts." JA28-30. The court therefore "[could not] conclude that the" Commission's decision lacked a rational basis and constituted an abuse of discretion." JA29.

In the first place, it is not clear based on the FEC's cryptic and unlawful voting procedures that the Commissioners actually considered CVFC's argument for mitigation at all or made any deliberative decision to reject it. Even if they did, they gave no reasons for the alleged decision not to mitigate the penalty imposed on CVFC. Nevertheless, the court below assumed that the alleged decision not to mitigate the penalty was based on the rigid "best efforts" regulation, and that it was not based on "any equitable considerations." JA29. In particular, the court

accepted the FEC's argument that mitigation of the fine was unwarranted because the circumstances of the late filings in this case did not fall within the narrow "unforeseen circumstances" specified in the "best efforts" regulation of 11 C.F.R. 111.35(c). The FEC argued in its unsuccessful Motion for Summary Affirmance in this Court that the "knowing, wilful, and reckless" conduct by CVFC's treasurer was "akin" to simple "negligence," (FEC Motion at 14) and therefore not a circumstance warranting mitigation as the district court suggested. This was clearly erroneous.

The FEC's "best efforts" regulation provides for two categories of circumstances that either qualify or disqualify for mitigation consideration. Those circumstances that *do* qualify for a "best efforts" defense are spelled out in 11 C.F.R. 111.35(c) to include such things as the failure of Commission computer equipment, internet failures, or severe weather or other disaster-related incident. Add. 36. The circumstances that do *not* qualify, and thus are considered not "unreasonably foreseen" and "beyond the control of the respondent" are spelled out in 11 C.F.R. 111.35(d) to include simple "negligence," 111.35(d)(1); "illness, inexperience, or unavailability of the treasurer," 111.35(d)(3); or a Committee's computer crashing or disruption caused by the Internet service provider failure even though due to no fault of the Committee. Add. 36. See JA28.

Importantly, however, the regulation specifies that both these categories of circumstances "include, but are not limited to" the examples listed. Here, the failure to file timely reports was due to the well-documented "knowing, wilful or reckless" conduct of the treasurer and not simple negligence. After difficulty obtaining the FEC password and expending days retrieving and compiling financial and contributor information that the former treasurer had left disorganized and inaccessible, CVFC promptly filed the required reports as humanly possible. Thus, CVFC was not foreclosed by the "best efforts" regulation from requesting that it considered for mitigation. While CVFC conceded at the administrative that its former treasurer was not entitled to the "best efforts" defense, it did not concede that it was not entitled to it either, as the FEC erroneously suggested below. Despite this *apparent* flexibility of the regulation, the district court erred when it cited with approval the FEC staff report noting that the defense is precluded "if it is based on any of the circumstances *listed* at 11 C.F.R. 111.35(d)." JA29 (emphasis added) citing AF2355-AR046. But CVFC's defense of "reckless and wilful misconduct of the treasurer" is concededly not "listed" as an excludable category in the "best efforts" regulation. Moreover, with respect to excusable conduct of the treasurer, the regulation specifically excludes "inexperience" as an excuse, but not "knowing, willful or reckless conduct of the treasurer." The fact that the FEC specifically considered treasurer conduct and

only included "inexperience" and simple "negligence" as "reasonably unforeseen" suggests that "knowing, willful, and reckless" conduct is something that a Committee does not reasonably foresee.

In short, it appears that the FEC either did not fully understand or chose to ignore the discretion it possessed even under its "best efforts" regulation to consider the circumstances in this case as being eligible for mitigation under its regulation. Moreover, the FEC failed to consider that even if CVFC did not qualify for a "best efforts" defense, it had equitable discretion to mitigate the fine by considering the reasons such as those here, just as the FEC staff said it could.

In that regard, the district court misconstrued CVFC's arguments when it concluded that CVFC was "'asking this Court to exercise its own judgment and rehear Plaintiffs' [case before the Commission],'" citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). JA29. Rather, CVFC submits that the district court should remand the matter to the Commission to rehear and consider CVFC's mitigation arguments because the agency failed to consider them properly the first time. On remand, the Commission may decide to remit all or part of the fine, particularly because of its excessiveness in comparison to culpability of CVFC when weighed alongside Mr. Curry's "knowing, willful, or reckless" conduct.

For example, the fines imposed on plaintiffs aggregating $8,690.00 for filing its reports late are unreasonable and are substantially greater -- in some cases by eightfold -- than fines that the FEC has imposed on other political and candidate committees which are found to violate far more serious, substantive provisions of FECA, such as receiving and failing to cure excessive contributions, or receiving prohibited contributions from corporations or foreign nationals. After all, while three reports of this small committee may have been filed late, it must be remembered that the overarching purpose of disclosure is to inform the voters of the source of the candidate's funds so they can make an informed decision in casting their ballots. Here, CVFC is an unaffiliated PAC unauthorized by any candidate. Any contributions made by CVFC to a candidate are reported on the receiving candidate's disclosure reports for voters to see what "special interest" funds are being contributed to the candidate. Because the recipient candidates filed their reports, the public interest in disclosure was not as paramount for a timely filing of the reports for CVFC, particularly where CVFC did not even make any campaign contributions or independent expenditures during the reporting periods in question. Yet, for purposes of both liability and the level of the fine, the Commission arbitrarily treats the two kinds of committees effectively the same, as it does all manner of campaign and non-campaign financial activity.

Moreover, the arbitrariness of the $8,690 in fines imposed in this case is further underscored regarding the late filing of the October 2010 Quarterly Report that was originally due on October 15, 2010 but was filed late on November 21, 2010. JA139-41. Since that report was filed just over 30 days late, the FEC treats the report as having never been filed at all in terms of assessing the level of fine which was $4,400. 11 C.F.R. § 111.43(e)(1). This puts a new twist on the old maxim, "better late than never." According to the FEC's arbitrary fine schedule, it is "better *never* than late." Treating a 31-day *late* report the same as one never filed at all is on its face arbitrary and capricious. In addition, the FEC would allow a committee to timely file a wholly deficient disclosure report without any late fines being assessed, and then allow the committee to "amend" its report after-the-fact with the information that was required to be disclosed in the first place. Indeed, in this very case, after the reckless treasurer resigned and best efforts were expended to file the delinquent reports, CVFC undertook on its own initiative to amend earlier April and July Quarterly Reports 2010 that were timely filed but found to be grossly deficient, with no penalty for the deficiencies. The FEC appears to promote an arbitrary message: File your reports on time and worry later about whether they were complete and accurate.

In sum, CVFC's current Treasurer, Assistant Treasurer, and Chairman and other personnel used their best efforts to file the required reports as soon as

practicable following the malfeasance of its former treasurer. The malfeasance of the treasurer was not reasonably foreseeable and was beyond the control of the plaintiffs and, therefore, liability should not have been imposed on the plaintiffs and/or the fines should have been remitted in whole or in part. The failure by the Commission to consider mitigation in this case was an abuse of discretion.

IV. THE FEC'S "BEST EFFORTS" REGULATION IS ARBITRARY AND CAPRICIOUS

If the FEC is correct that it cannot mitigate the fine imposed on CVFC because of the FEC's view of limited applicability of the "best efforts" regulation, then the regulation is arbitrary and capricious on its face. The lower court erred by concluding that it was not. As CVFC argued below, the regulation is both over-inclusive and under-inclusive. It excuses "unforeseeable" events like severe weather (which in fact is often foreseeable due to weather forecasts), but does not excuse what the FEC considers "foreseeable" events and those not "beyond the control" of a respondent (and therefore is not a "best efforts" defense) such as the committee's computers being suddenly attacked by a virus, or the treasurer being suddenly attacked by a virus or falling ill from food poisoning the night before the report is due, falling dead from a heart attack or accident (and thus is "unavailable"

under the regulation), or going into premature labor.[8] 11 C.F.R. § 111.35(d)(3). In such cases, the FEC will not accept these reasons as "best efforts" to comply with the filing deadline. This regulation is clearly arbitrary and capricious and unreasonable on its face because it arbitrarily excludes the opportunity to raise both legal and equitable reasons before the Commission to explain the late filings. On its face, the FEC's "best efforts" regulation is not rational to the extent that it forecloses any consideration of other mitigating circumstances.

The district court, referring to the FEC's argument below, stated that if "recklessness and negligence on the part of the treasurer - of the sort at issue here - were to qualify for 'best efforts' then the exception would swallow the rule and almost all late filings would be excusable." JA29-30. Not so. The conduct of the "sort at issue here" was not simple negligence but "knowing, wilful and reckless" and promptly brought to the attention of the Commission. That kind of conduct would not make "almost all late filings excusable." A Committee would be required by the FEC to submit evidence in such cases, as CVFC did here,

[8] Indeed, the FEC rejected a candidate's failure to timely file a post-election report in a special election which he lost and where the voters' interest in such post-election reports by definition will not inform the electorate in casting their vote, due to the campaign's treasurer going into premature labor just before the election as a reason for filing the report late. The FEC fined the small campaign $8,000. Presumably the FEC believes that the treasurer's premature labor was both "foreseen" and "under [her] control." See *Kuhn for Congress v. FEC*, Civ. No. 2:13-3337 (PMD-BHH) (D.S.C., Charleston Div.), available on FEC's website at http://www.fec.gov/law/litigation/Kuhn.shtml

demonstrating that the treasurer was not simply negligent, but engaged in wilful and reckless conduct that the Committee could not foresee. There was no evidence or claim that CVFC was negligent in managing its treasurer that would estop CVFC from asserting a "best efforts" defense. On the contrary, CVFC made repeated attempts to correct the situation, but was prevented from doing so by the malfeasant Treasurer.

More significantly, a showing by a committee that its treasurer was "wilful and reckless" in not complying with the reporting requirements will not make "almost all late filings excusable" nor preclude the FEC from sanctioning and imposing appropriate fines on the guilty party – the treasurer himself – which procedure provides the only measure of proper accountability within the regulatory scheme and proper deterrence.[9]

To the extent that plaintiffs' best efforts to remedy the malfeasance of its former treasurer are not deemed to satisfy the "best efforts" described in 11 C.F.R. § 111.35, CVFC submit that such regulation is arbitrary, capricious, unreasonably

[9] Most committees are small operations, including many where the only person in the committee is the treasurer. The treasurer is the committee and vice-versa. If such committees filed late reports due to recklessness or wilfulness, and any fine were imposed on only the committee and treasurer "in their official capacities," those fines could easily be avoided by the committee going defunct, with the treasurer paying him or herself additional compensation, or contributing the committee's funds to other committees, thereby leaving the committee judgment proof or terminated, with no individual personally accountable.

narrow, contrary to law, on its face and as applied. See *U.S. Chamber of Commerce v. Securities and Exchange Commission*, 412 F.3d 133 (D.C. Cir. 2005); *Public Citizen v. Federal Motor Carrier Safety Administration*, 374 F.3d 1209 (D.C. Cir. 2004); 5 U.S.C. § 706(2)(A), (2)(D).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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Date: August 19, 2014

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Dated: August 19, 2014

/s/ Dan Backer
Counsel for Appellants

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE AND DAVID H. WIGGS, TREASURER Appellants, v. FEDERAL ELECTION COMMISSION, Appellee.	)	No. 13-5358 CERTIFICATE OF SERVICE

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 19, 2014, I electronically filed the Corrected Appellants' Brief with the Clerk of the Court of the United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

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