UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

APPELLANTS' OPPOSITION TO FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY AFFIRMANCE

Appellants, Combat Veterans for Congress Political Action Committee and David H. Wiggs, Treasurer ("CVFC") oppose the Federal Election Commission's ("FEC") Motion for Summary Affirmance. The FEC has failed to meet its heavy burden to demonstrate that this case is appropriate for summary disposition and no benefit will be gained from further briefing and argument of the issues presented. Thus, the motion should be denied and the case calendared for the merits panel.

STANDARDS OF REVIEW

This Court's review of the district court's ruling is *de novo*. Moreover,

> [i]n a case like the instant one, in which the District Court reviewed an agency action under the APA, we review the administrative action directly, according no particular deference to the judgment of the District Court. *Holland v. Nat'l Mining Ass'n,* 309 F.3d 808, 814, (D.C. Cir. 2002) (citations omitted). In other words, we "do not defer to a district court's review of an agency [action] any more than the Supreme Court defers to a court of appeals' review of such a decision." *Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991) (citation omitted).
>
> *Coburn v. McHugh*, 679 F.3d 924, 928 (D.C Cir. 2012).

The standard for granting a motion for summary disposition and foreclosing plenary review of CVFC's appeal presents a high hurdle for the FEC to overcome. As this Court made clear in *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294 (D.C. Cir. 1987):

> A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified. . . . To summarily affirm an order of the district court, this court must conclude that no benefit will be gained from further briefing and argument of the issues presented. . . . In addition, this court is now obligated to view the record and the inferences to be drawn therefrom "in the light most favorable to [CVFC]." (citing *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962).

Id. at 298 (citation omitted). Moreover, as this Court has stated, "'[p]arties should avoid requesting summary disposition of issues of first impression for the Court,' D.C. Circuit Handbook of Practice and Internal Procedures 35 (2007)." *Patricia Cronauer v. United States*, 2007 U.S. App. LEXIS 7368 *1 (D.C. Cir. Mar. 26, 2007) (denying United States motion for summary affirmance).

ARGUMENT

I. THE DISTRICT COURT ERRED IN NOT REACHING THE MERITS OF CVFC'S CHALLENGE TO FEC'S VOTING PROCEDURES

As noted, in their Amended Petition for Review of Federal Election Commission Determination and Complaint for Declaratory and Injunctive Relief and as extensively briefed below by the parties, 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." *See* 2 U.S.C. 437g(a)(2); 11 C.F.R. 111.32, 111.37(a). Amended Pet. For Review, Count I, at 15; Pls.' Mem. at 14-20; Def's Mem. at 24-25; Pls' Opp. Mem. at 2-12.

The district court improperly declined to consider the merits of CVFC's challenge that the affirmative vote of four Commissioners was lacking, and the agency action was thus a nullity, on the basis that 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. (Mem. Op. at 29-30.) The FEC reiterates those two reasons in its Motion for Summary Affirmance at 15-16. The district court and the FEC are wrong on both counts.

A. 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.'" (Mem. Op. at 29 (quoting *Coburn v. McHugh*, *6*79 F.3d 924, 931 (D.C. Cir. 2012) (quoting *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)).)

First, Appellants 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" there was a violation of 2 U.S.C. 434(a). There was no indication of the actual vote tally. Once this suit was filed and the FEC submitted the Administrative Record, the formal Certifications by the Secretary and Clerk of the Commission were also submitted attesting to the votes cast by the Commissioners at the reason to believe 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*." AF#2199 – AR008 (emphasis added). Similar Certifications were executed for the final determination stage. AF#2199 – AR114. 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."

However, 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 [see Decl. of Dan Backer attached hereto as Exhibit 1] which was received two days before the filing of their Motion for Summary Judgment. Shortly thereafter, CVFC filed an Amended Petition for Review and Complaint on June 19, 2012 *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. 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.

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 does not "cast" any vote at all. According to the unlawful voting procedures described in the questionably promulgated FEC Directive 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 nonaction count as casting an "affirmative vote." Moreover, with respect to the votes that were actually cast at the final determination stage, challenges were raised by CVFC in the district court to the validity of four of the six votes submitted past the FEC self-imposed deadline for voting and/or being signed by someone other than the Commissioner, the latter issue raising factual evidence which the FEC refused to provide to CVFC and which CVFC argued was a material fact in dispute precluding summary judgment. See Pls' Opp. Mem. at 7 n.3; Decl. Dan Backer, Exhibit 1.

Assuming there were at least four valid "affirmative votes," CVFC further challenged the legal sufficiency of the action resulting from any vote, since the Commissioners did not actually make or issue any final determination or impose

any fine, but at best, did not object to a staff recommendation that they do so. *See* Pls' Mem. 16-20. Thus, this claim raises both factual and legal issues that are unresolved, and thus, is not suitable for summary disposition.

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 notation or tally vote procedures are in full compliance with the statute and regulations, a position which was vigorously disputed and briefed by CFVC in the district court.

In that regard, the district court and FEC's reliance on *Coburn* for the proposition that the court cannot consider the merits of this issue is misplaced. In *Coburn*, the 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. *Coburn v. McHugh*, 679 F.3d at 930-31. In the instant case, however, the claim at issue does *not* relate to 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.

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.*

B. 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 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.

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 votes by the Commissioners. In short, the FEC is in no position to complain that they are prejudiced by the submission of the actual ballots they used.

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 apart from the typical APA review of the merits of the underlying administrative decision and its accompanying administrative record as well as apart from the specific judicial review provisions of FEC enforcement actions provided by statute.

In short, the district court erred in failing to consider the merits of CVFC's challenge to the voting procedure and the evidence supplied supporting that

challenge. Moreover, since this voting issue is one of "first impression" as even the FEC noted below, it is not suitable for summary disposition. See *Cronauer v. United States, supra*.

II. THE DISTRICT COURT ERRED IN REJECTING CVFC'S CLAIMS THAT THE FEC FAILED TO EXERCISE OR ABUSED ITS DISCRETION OR ABUSED IT IN NOT MITIGATING THE FINES IMPOSED AND THE "BEST EFFORTS" REGULATION WAS ARBITRARY AND CAPRICIOUS

As a preliminary matter, if this Court denies the FEC's Motion for Summary Affirmance with respect to CVFC's challenge to the voting procedures, the Court need not address the FEC's other arguments at this time but may properly defer such resolution to the briefing and argument in this case. That is so because if the Court were to then agree with the CVFC's position, the case would be remanded to the district court to reach the merits of CVFC's voting challenge. If, in turn, the district court on remand agreed with CVFC on the merits, the FEC's final determination would be vacated and remanded to the FEC.

On the other hand, if the Court were to agree with the FEC's argument that the merits of the voting issue should not be adjudicated, then and only then would this Court need to consider the other arguments presented by the FEC in its motion. But even in that case, CVFC submits that the FEC has not carried its "heavy

burden" to show that the merits are "so clear" that briefing and argument would have "no benefit" in resolving the issues. *Taxpayers Watchdog,* 819 F.2d at 298.

A. The Mitigation and "Best Efforts" Arguments Were Not Waived

The FEC argues preliminarily that although the district court did reach the merits of CVFC's claim with respect to the mitigation of the fines and the "best efforts" regulation, those claims were waived. FEC Motion at 14 n.5. That argument was ignored by the court below and should be rejected by this Court.

CVFC has always acknowledged that the wilful and reckless failure of the original treasurer, acting in his personal capacity, to file the reports in a timely fashion did not satisfy the unduly narrow definition of the "best efforts" regulation. However, CVFC did *not* concede that the regulation was valid or that the FEC did not have equitable discretion to mitigate the fine. Moreover, the mitigation issue was in fact raised before the agency and the FEC had an opportunity to consider the merits of the claim, thus making it ripe for review.

As a final gambit, the FEC concludes that in any event, CVFC "cannot attack the facial validity of a regulation in a case brought under 2 U.S.C. 437g(a)(4)(C)(iii)." FEC Motion at 14 n.5. But as CVFC noted in the prior section, this lawsuit was filed in the district court not only as a Petition for Review under 2 U.S.C. 437g(a)(4)(C)(iii), but also as a Complaint for Declaratory and

Injunctive Relief under 28 U.S.C. 1331 and 5 U.S.C. 702-706 which grants the district court jurisdiction to hear challenges to an agency's regulations and actions.

B. The FEC Either Failed To Exercise Its Discretion Whether To Mitigate the Fine Or Its Decision Not To Mitigate Was Arbitrary, Capricious, or an Abuse of Discretion

FEC staff conceded that the treasurer's wilful and reckless conduct in not filing the disclosure reports in a timely fashion "could be considered as possible mitigating factors in determining the civil penalty for the Committee's violation." *See* Mem. Op. at 20. Nevertheless, the district court could not conclude that the "Commission's decision lacked a rational basis and constituted an abuse of discretion." Mem. Op. 23.

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. This alone presents a question that by its nature is not amenable to summary disposition.

Second, the FEC argues that mitigation of the fine was unwarranted because the circumstances of the late filings did not fall within the narrow "unforeseen circumstances" specified in the "best efforts" regulation of 11 C.F.R. 111.35(c). The FEC's facile conclusion that "knowing, wilful, and reckless" conduct by

CVFC's treasurer was "akin" to simple "negligence," (FEC Motion at 14) and not a circumstance warranting mitigation 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 qualify for a "best efforts" defense are spelled out in 11 C.F.R. 111.35(c) to include failure of Commission computer equipment, internet failures, or severe weather or other disaster-related incident. The circumstances that do *not* qualify are spelled out in 11 C.F.R. 111.35(d) to include simple negligence, a Committee's computer crashing or disruption caused by the Internet service provider failure due to no fault of the Committee, or illness, inexperience, or unavailability of the treasurer. *Id*. *See* Mem. Op. at 22.

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 "knowing, wilful or reckless" conduct of the treasurer and not simple negligence. Thus, CVFC was not foreclosed by the regulation from requesting or being considered for mitigation. Despite this apparent flexibility of the regulation, the district court erred when it cited the FEC staff report noting that the defense is precluded "if it based on any of the circumstances *listed* at 11 C.F.R. 111.35d." Mem. Op. at 23, (emphasis added)

citing AF2355-AR046. But CVFC's defense of "reckless and wilful misconduct of the treasurer" is 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."

In short, it appears that the FEC either did not fully understand or chose to ignore the discretion it possessed to consider the circumstances in this case as being eligible for mitigation under their 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 other defenses. See Statement of Issues Nos. 4, 5 at 2-3. [1]

[1] In that regard, CVFC made other equitable arguments below as to why the fine should be mitigated based on its excessiveness and the hardship imposed on small political committees such as CVFC that would have to rely on a great many small donations to pay excessive fines. This is particularly so where the governmental interests in disclosure of such small committee's contributions and expenses are relatively minor as opposed to the interest in disclosure of the finances of candidates who are running for office. In other words, contributions made by CVFC to candidates were timely disclosed by those candidates which more fully served the governmental interest sought by the disclosure rules. *See* Pls' Opp. Mem. at 26-32 (discussing the exercise of equitable discretion to mitigate fines and for reviewing courts to consider their excessiveness). *See, e.g., Cox for United States Senate Comm., Inc. v. FEC*, 2004 U.S. Dist. LEXIS 6939, 2004 WL 78345 (N.D. Ill. Jan. 21, 2004).

C. 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. As CVFC argued below, the regulation is both over-inclusive and under-inclusive because it excuses "unforeseeable" events like severe weather (which in fact is often foreseeable), but does *not* excuse so-called "foreseeable" events such as a computer virus attack on a committee's computer, or the "illness" or "unavailability" of the treasurer due to, for example, a sudden attack of food poisoning requiring hospitalization, events which one would normally regard as "unforeseeable." *See* Pls' Mem at 33-34; Mem. Op. at 23. On its face, this regulation is not rational.

The district court and FEC suggest that if "recklessness and negligence on the part of the treasurer - of the sort here - were to qualify for 'best efforts' then the exception would swallow the rule and almost all late filings would be excusable." FEC Motion at 15 (citation omitted) (*citing* Mem. Op. at 23-24). Yet the conduct of the "sort at issue here" was not simple negligence but "knowing, wilful and reckless." 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, 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 that CVFC was negligent in managing its treasurer that would estop CVFC from asserting a "best efforts" defense.

More significantly, a showing by a committee that its treasurer was "wilful and reckless" in not complying with the reporting requirements will not preclude the FEC from sanctioning and imposing appropriate fines on the guilty party – the treasurer himself – which provides the only measure of proper accountability within the regulatory scheme.

III. THE DISTRICT COURT ERRED IN RULING THAT THE FEC'S FAILURE TO IMPOSE PERSONAL LIABILITY ON CVFC's TREASURER AS PROVIDED BY STATUTE AND NUMEROUS FEC REGULATIONS WAS WITHIN THE FEC'S DISCRETION

The FEC initially argues that the district court was correct in ruling that it lacked jurisdiction to consider CVFC's claim that its treasurer should be held personally liable for the fines imposed in the context of a Petition for Review under 2 U.S.C. 437g(a)(4)(C)(iii). FEC Motion at 8-9; Mem. Op. at 18-19. However, as previously noted, 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 the claim. While CVFC had the option to file a formal complaint against its errant treasurer with the FEC under 437g(a)(8)(A), it was not required to do so to seek judicial review of the FEC's failure to hold him personally liable, either solely or

jointly. The statutory provisions and FEC's regulations make clear that the treasurer is personally 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 law to consider taking enforcement action against individuals when, in the course of their carrying out their duties, they learn of possible violations of the law as the administrative record clearly show what happened here. 2 U.S.C. 437g(a)(2).

Ruling on the merits in the alternative, the district court held that the FEC "has broad discretionary power whether to investigate a claim, and whether to pursue civil enforcement under [FECA]" and that it 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." Mem. Op. at 19. However, a close examination of the plethora of statutory provisions, regulations, and policies expressly imposing personal liability on treasurers to file committee reports, coupled with the FEC enforcement staff recommendations to the FEC that the treasurer's personal liability be pursued, demonstrates that the Commissioners either did not consider these points, and therefore failed to exercise their discretion, or arbitrarily ignored their enforcement duties without articulating "*reasonable grounds*" for their decision as even the FEC acknowledges the agency must do.

See Pls' Mem. at 20-27; Pls' Opp. 15-24; FEC Motion at 10 (emphasis in original) (citing *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2010)).

A. Personal Liability of the Treasurer

Under FECA, "Each treasurer 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). 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 clearly intended through FECA to impose personal liability 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. "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." 11 C.F.R. § 104.14(d) (emphasis added).[2]

[2] *See also* 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). The Act "holds [the

In addition to the express personal liability of Treasurers, the rules and regulations of the FEC impose affirmative legal duties upon Treasurers of political committees, "the violation of which makes them *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). 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.

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 that personal liability 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

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treasurer] personally responsible for the committee's recordkeeping and reporting duties." *FEC v. Toledano*, 317 F.3d 939, 947 (9th Cir. 2002) (emphasis added). *See also* FEC Advisory Opinion 1995-10 ("[T]reasurer's liability [is] distinct from liability of committee for FECA violations, and since Congress chose to hold an individual, the treasurer, responsible for compliance with FECA it follows that 'an individual *will also stand responsible* for his indiscretions as a treasurer'") (emphasis added) (quoting *FEC v. Dramesi for Congress Comm.*, No. 85-4039 (MHC) (D.N.J. Sept. 5, 1990) (unpublished opinion).

the issue of the Treasurer's personal responsibility in these matters." AF2312-AR104. 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 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. Pls' Mem. at 11. The OGC concluded as follows: "[t]herefore, we recommend that OAR raise this issue for the Commission's consideration in the memorandum recommending final determinations in this matter." AF312-AR104. *See* Section II, *supra*. The OAR, as noted, did indeed raise and specifically request the FEC consider the issue of personal liability in its report to the FEC. But due to the questionable and cryptic voting procedures, the FEC has not clearly demonstrated that the Commissioners actually exercised discretion or considered personal liability in those matters.

CONCLUSION

For the foregoing reasons, the FEC's Motion should be denied.

Respectfully submitted,

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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 SERVICE

I hereby certify that on March 4, 2014, I electronically filed the Appellants' Opposition TO Federal Election Commission's Motion for Summary Affirmance 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.

Service was made on the following counsel for Appellee through the CM/ECF system:

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