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)

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

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GLOSSARY OF ABBREVIATIONS

ABBREVIATION	DEFINITION
CVFC	Combat Veterans for Congress PAC
FECA	Federal Election Campaign Act
OAR	Office of Administrative Review
OGC	Office of General Counsel

SUMMARY OF ARGUMENT

The district court erred when it ruled that CVFC waived its claim objecting to the FEC's voting procedure because it was not raised at the agency level. But CVFC was not made aware of the defective voting until after the purported final agency action and thus could not raise the claim. The court also erred when it ruled that it could not consider the validity of the defective agency ballots because the FEC failed to include them in the Administrative Record even though CVFC supplied them to the court. The FEC erroneously argues that its novel voting procedure complies with its organic statute and its own regulations requiring "four affirmative votes" to initiate enforcement actions by counting a Commissioner's failure to return a ballot within 24 hours as an "affirmative vote." The defective voting procedure does not constitute "harmless error" because it involves the validity of the agency's exercise of its jurisdiction and is not a minor defect.

The court also erred by concluding that CVFC was not entitled to have its fine mitigated because its conduct did not meet the criteria of FEC's "best efforts" regulation excusing untimely filing of disclosure reports. Alternatively, the regulation was arbitrary and capricious on its face and as applied. Finally, the Commission's failure to find that CVFC's former treasurer was personally liable for the civil penalty because of his willful and reckless conduct in failing to file required disclosure reports was arbitrary, capricious and an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY REJECTED CVFC'S CHALLENGE TO THE VALIDITY OF THE COMMISSION'S VOTING PROCEDURE

The FEC argues that the district court correctly ruled that CVFC waived its claim that the Commissioners' failure to cast the statutorily required "four affirmative votes" to initiate the enforcement actions in this case was defective because CVFC failed to raise that argument at the agency level. FEC Br. at 36. The FEC further argues that the ballots evidencing the lack of sufficient votes in this case were not made part of the administrative record by the FEC and thus their validity could not be considered by a reviewing court. *Id*. at 41-42. The FEC further argues on the merits that this novel voting procedure found in its Directive No. 52 complies with the agency's organic statute and its own regulations requiring "four affirmative votes" to initiate enforcement actions and was lawfully promulgated. *Id.* at 42-46. Finally, the FEC argues that even if the agency's voting procedures were unlawful, it was harmless error. The FEC is wrong on all counts.

A. CVFC Could Not Have Raised The Defective Voting Procedure At the Agency Level Because It Was Not Made Aware of the Defective Votes Cast Until After The Agency Proceedings Were Completed

The FEC claims with a straight face that CVFC should have raised the defective voting procedure at the administrative level even though the agency

misled CVFC at the agency level by simply informing CVFC that "the FEC found that there is reason to believe ("RTB")" that there was a violation of 2 U.S.C 434(a). JA106, 244, 351. Only after this suit was filed did the Secretary and Clerk to the Commission certify in the Administrate Record that the Commission unanimously voted 6-0 to find reason to believe a violation occurred and further certifying that all the Commissioners "voted affirmatively for the decision." JA105. The actual votes cast were not disclosed until well after the administrative proceeding was completed and after this suit was filed below. This argument is frivolous on its face and CVFC refers the Court to its opening brief rather than repeat those arguments here. CVFC Br. at 20-23. The FEC has not shown that it has been prejudiced in any way by CVFC's raising this argument at its earliest opportunity, namely within three days after the FEC reluctantly relinquished the ballots in this case. CVFC Amended Compl. (JA51-52).

The FEC's recitation of cases standing for the general proposition that arguments not raised at the administrative level are generally waived simply do not apply in a situation such as this which goes to the validity of the Commission's voting procedure and the votes cast in this case. See FEC Br. at 36-38 (citing *Coburn v. McHugh*, 670 F.3d 924, 931 (D.C. Cir. 2012) and other cases). As CVFC noted in its opening brief, those cases relate to waiver of arguments relating

to the merits of the underlying proceeding that could have been raised at the agency level. CVFC Br. at 22-23. That is simply not the nature of the case here.

The FEC weakly responds that the validity of Directive No. 52, which allowed the "no-show, no-vote" procedure to count as an affirmative vote, could have been raised since it was a public document and could "easily be located" on the FEC's website. FEC Br. at 41. In the first place, Directive No. 52 is hardly "easy" to find on the FEC's website. As CVFC pointed out in its brief, which included screen shots of the FEC's website in its Addendum, Directive No. 52 is buried in the FEC website and not found under the "Law, Regulations and Procedures" heading in the left margin, where the public would naturally expect the FEC's procedures to be located. Nor does the link to "Directives" have a sub-heading in the "About the FEC" drop down menu where the FEC says Directive No. 52 can be "easily" found. CVFC Br. at 45, n.6; Add. 64-67. The FEC's further assertion, FEC Br. at 41, that Directive No. 52 can be found by "simply using the site's search function" is absurd. Inserting the words "voting procedures" in the search window produces some 140 documents, none of which is Directive No. 52. Admittedly the 19th document is the OGC Enforcement Manual released in June 2013, promulgated after this case was initiated, which does have a reference Directive No. 52.

Nor does the FEC believe it is necessary to provide a respondent charged with violating the Act with information about Directive No. 52's unusual voting procedure, leaving the public to falsely believe that the Commission actually meets and casts votes on these matters. Secondly, as discussed *infra*, this "public" document was not noticed in the Federal Register as were the FEC's general rules of agency procedure. In any event, even if CVFC were aware of the existence of this directive, it had no reason to believe that the ballots cast in its case were not all affirmative ballots, as the Commission Secretary certified, as opposed to the 24-Hour no show, no vote procedure.

B. Sufficiency of the Administrative Record

The FEC's argument that the district court correctly rejected reviewing the defective balloting because the FEC failed to include those ballots in the administrative record is also frivolous on its face. FEC Br. at 42. 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 and the exercise of its jurisdiction and authority. In short, the FEC is in no position to complain that they are prejudiced by the submission and consideration of the actual ballots the Commissioners used in this enforcement action. The FEC Secretary

"certified" that six affirmative votes were cast in each of these three administrative fine cases, yet only supplied a blank ballot sheet for each 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.

The FEC simply has no answer to any of CVFC's case authority that stand for the proposition that the administrative record is not sacrosanct, but can be supplemented if need be and that non-record evidence may be considered when a challenge is brought, such as in the instant case, to "the procedural validity of [an agency's] action." *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989). *See also* CVFC Br. at 25-27 (citing cases).

The FEC does not dispute CVFC's assertion that those ballots were solely in the hands of the FEC and were purposely not made part of the record by the FEC nor made available to CVFC until after this lawsuit was filed. Yet the FEC claimed below that these ballots should not be used to supplement the administrative record anyway because the ballots "are ministerial in nature and duplicative of the certifications." *See* Backer Declaration, para. 10 (quoting email from FEC attorneys, June 5, 2012); JA67. The FEC cannot have it both ways. According to the FEC, the validity and lawfulness of the Commissioners' vote on

any enforcement matter can never be challenged because the certification is dispositive and unrebuttable. This self-serving position should be soundly rejected.

C. Prejudicial and Fundamental Error

The FEC erroneously argues that CVFC "failed to demonstrate *any* prejudice or harm." FEC Br. at 50 (emphasis in original). In the first place, it can never be harmless error for an agency to purport to exercise its jurisdiction and initiate enforcement actions against parties without complying with the statutorily required casting of "four affirmative votes" to do so. 52 U.S.C. 30109(a)(2) [former 2 U.S.C. 437g(a)(2)]. The failure to comply with this statutory requirement for the exercise of an agency's power is a fundamental error and requires remand. *See Chamber of Commerce of U.S. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2013). This jurisdictional defect is not some "mere technical procedural error" as the FEC would have this Court believe. FEC Br. at 50 citing *Milas v. United States*, 42 Fed. Cl. 704, 712 (1999).

Even procedural errors such as the failure to give notice do not constitute "harmless error." For example, in *Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012), this Court "strongly reject[ed]" the notion that the EPA's failure to allow for notice and comment on an interim rule was not harmless error even when the agency provided such notice for the pending final rule. 682 F.3d at 95. "Were

that true, agencies would have no use for the APA when promulgating any interim rules." *Id.* In the same fashion, the failure to cast four affirmative votes at the interim "reason to believe" stage here is similarly not harmless error.

The FEC chiefly relies on *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) where the party challenged the FEC's "probable cause" finding because it was made by a Commission whose composition included two unconstitutionally appointed *ex officio* members. But as this Court made clear, "[to] be sure, Legi-Tech *was* prejudiced, in the same manner as the NRA, when the FEC brought suit." *Id*. at 708 (emphasis added). This Court, however, went on to determine whether the "degree of continuing prejudice now, *after* the FEC's reconstitution and ratification" warrants dismissal of the FEC action against Legi-Tech. In the instant case, there has been no ratification by the Commission of the defective vote to initiate the enforcement action. While the FEC suggests that it "could have ratified" its determinations in this matter using a valid voting procedure, FEC Br. at 52, n.20, the fact of the matter is that they have not done so, despite the pendency of this action for over two years.[1]

[1] As the FEC notes, CVFC did file a motion for reconsideration with the FEC after the Commission purported to make a final determination of the violations and that the FEC "did not reopen the matter." FEC Br. at 52, n.20. But nothing should be read into the FEC's failure to reopen the matter, let alone as constituting some sort of ratification of the Commission's defective votes in the case. The thrust of the staff recommendation was that the Commission does not have any procedure for reconsidering a final determination as CVFC had requested, and that alternatively

Moreover, it is far from certain that the FEC would ratify the invalid enforcement action.[2] While it is true that four of the current members of the FEC were members three years ago when the defective votes were cast to initiate the enforcement proceedings, the outcome is not "clear" as the FEC suggests that the Commissioners would reach the same result. FEC Br. at 52. For example, even assuming the FEC retains its questionable Directive 52, only one member need object to the proposed findings (whether it be one of the two new members or even one of the older ones), which in turn triggers an in-person meeting of the Commissioners where the matter can be discussed and deliberated. The Commission may thus decide to take up the staff's earlier recommendation that it consider that the treasurer may have been personally liable for the late reports and direct its General Counsel to initiate appropriate proceedings. JA 316. The

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CVFC's request for an oral hearing was not required by the statute in any event. *See* JA17-20.

[2] The FEC erroneously states that there is no reason to believe that the outcome of the final determinations would be different since they were made "using the CVC Parties' preferred voting procedure and were unanimous." FEC Br. at 51. These final determination votes are not "preferred" by CVFC since there are still questions about the validity of those votes with respect to whether some of them were lawfully signed by persons other than the Commissioner pursuant to Directive No. 52. Moreover, in any event, the "I approve the recommendation" tally vote does not constitute a final determination or order to assess liability and a fine but simply approves a staff recommendation that the Commissioners *should* make such a final determination. In short, on its face, the Commission never did actually issue any order as do other agencies in their respective enforcement actions. *See* CVFC Br. at 35-36.

Commission may also decide to exercise its equitable discretion to mitigate the fine on the grounds that CVFC did use its "best efforts" to comply with the reporting requirements, since the Commission was under the wrong impression that the willful and reckless conduct of a committee's treasurer could never constitute "best efforts" under 11 C.F.R. 111.35(d), or decide that the aggregate fine of $8,360 was unreasonably high under the circumstances and reduce it.

The FEC cites no case where an enforcement action which was void *ab initio* but *not* ratified by a valid agency vote was later upheld by a reviewing court. To the contrary, in *Chamber v. NLRB, supra*, the district court vacated the rulemaking because it was the product of a statutorily defective quorum, regardless of whether the NLRB would most certainly have voted for the rule again on remand. To paraphrase the court in *Chamber*, until there is a remand to the FEC for valid voting, "the Court cannot reinstate [an enforcement action] that was [initiated] without the requisite [four affirmative votes] and, accordingly, in excess of the agency's congressionally delegated power." 879 F. Supp. 2d 18 at 35 (D.D.C. 2012).

The FEC vainly attempts to distinguish the *Chamber* case because there, the FEC notes, the absent Board Member was not contacted "for his response, as is the *agency's usual practice*" and thus, all the more so the reviewing court believed his silence cannot be equivalent to being "present" at the meeting, even virtually, to

constitute a quorum. FEC Br. at 47 citing *Chamber* at 28-29. In the case at bar, the FEC says that its "usual practice" is to have a 24-hour no objection vote and therefore *Chamber* is inapposite. FEC Br. at 48. But that assertion simply begs the question whether the FEC's "usual practice" is a lawful one to begin with and whether it violates the statutory and regulatory requirement that the Commissioners cast at least "four affirmative votes" to begin an enforcement action. 52 U.S.C. 30109(a)(2) [former 2U.S.C. 437g(a)(2)]; 11 C.F.R. 111.32.

D. The 24-Hour No-Show, No-Vote Ballots Do Not Constitute Affirmative Votes

As noted in CVFC's opening brief, there are a number of reasons why a Commissioner may not return his or her ballot within 24 hours, ranging from not receiving it in the first place, to being on vacation, or otherwise indisposed during that short time period. CVFC Br. at 30-31. Silence simply cannot constitute an "affirmative vote" to initiate enforcement action. Rather, a vote is defined as "1. The expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication . . . 4. The act of voting, usu. by a deliberative assembly." Black's Law Dictionary 1606-07 (8th ed. 2004). The failure of a Commissioner to return his or her ballot (assuming they received it and reviewed it) cannot be reasonably be characterized as an "expression" of one's preference on a proposal or motion that is made manifest by casting a tangible "ballot," raising one's "hand," or other type of demonstrable "communication"

such as a voice vote. In normal practice, the failure to cast a vote does not even constitute an abstention which usually requires some form of communication that the person is indeed present but prefers to abstain from the matter, due to a conflict or some other reason. Failure to make any expression on a proposal, such as was the case here, is usually regarded as "not present" or "not voting."

The FEC's claim that its "voting" procedure comports with Congress's view that the administrative fine program be "streamlined" rings hallow. FEC Br. at 46. In the first place, the "24-Hour no objection" or silent vote procedure in Directive No. 52 was adopted in 2008 almost a *decade* after Congress enacted the fine procedures, suggesting that during the interim years, the Commission was quite capable of casting actual votes as Congress directed and as commonly utilized by other multi-member agencies. Second, neither Congress nor the FEC in its regulations, 11 C.F.R. 111.32 revised the required "affirmative vote" of four Commissioners to initiate enforcement action to comport with Directive No. 52. While as a general matter an agency is allowed to "fashion [its] own rules of procedure," *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 542-43 (1978), it is not free to radically revise a commonly understood term "four affirmative votes" for the sake of expediency, let alone to do so in a directive that was not noticed in the Federal Register.

E. Directive No. 52 Was Not Properly Promulgated

In its opening brief, CVFC argued that Directive No. 52, which purports to authorize the use of 24-Hour no-objection voting at the reason to believe stage, was itself unlawful both with respect to its compliance with the statute requiring "four affirmative votes" as well as with respect to its promulgation under the Sunshine Act. CVFC Br. at 41-42. The FEC argues that since CVFC's Sunshine Act challenge was not alleged in its amended complaint but in CVFC's opposition to the FEC's motion for summary judgment, CVFC was therefore precluded from raising it below. FEC Br. at 54. But the FEC first raised the validity of Directive No. 52 in its motion for summary judgment defending its challenged voting procedure. FEC Mot. for Summary Judgment at 28. CVFC was certainly entitled to rebut the validity of Directive No. 52 on both substantive and procedural grounds. Thus, the merits of that challenge were properly before the district court which did not reach the issue. Alternatively, since the parties litigated the issue below, it could be considered as a constructive amendment of CVFC's complaint under Fed. R. Civ. Proc. 15(b) (2). *See Turner v. Shinseki*, 824 F. Supp. 2d 99, 122 n. 23 (D.D.C. 2011) (constructive amendments are permitted at the summary judgment stage).

The CVFC all but concedes that the adoption of Directive No. 52 during a closed session of its public meeting violated *Milner v. Dep't of the Navy*, 131 S. Ct.

1259 (2011) but demurs because that decision came three years after the adoption of the directive. FEC. Br. at 57, n.22. More importantly, these rules of voting procedure were not noticed in the Federal Register as was Directive No. 10 entitled "RULES OF PROCEDURES OF THE FEDERAL ELECTION COMMISSION PURSUANT TO 2 U.S.C. 437c(e)." Federal Register, 73 Fed. Reg. 5568 (Jan. 30, 2008); Add. 52. *See* CVFC Br. at 42-44. Members of the public and regulated community should have had the opportunity to offer comments about the FEC's proposal to short circuit the statutory and regulatory voting requirements, or at least should have been made aware of them. Even if this Court does not reach the merits of CVFC's arguments challenging the pedigree of Directive No. 52, those arguments nevertheless further undermine the legitimacy of the directive.

* * * * *

If this Court finds that the Commission "votes" in this case did not constitute the requisite "four affirmative votes" to find reason to believe, or that the voting procedures and ballots cast were otherwise invalid, the Court should not nor need not reach CVFC's other claims regarding the personal liability of the treasurer or the challenge to the FEC's "best efforts" regulation and the failure to mitigate the fine. The Court should simply vacate the judgment below since there was no valid agency action to begin with. 5 U.S.C. 706(2)(D). The Court may also conclude that there are certain facts regarding the validity of the votes, either at the reason to

believe stage or the final determination stage, such as whether those votes signed by persons other than the Commissioner were authorized to do so under the narrowly proscribed procedures in Directive No. 52 or were submitted late, and remand to the district court to further litigate the matter.

II. "BEST EFFORTS" DEFENSE AND MITIGATION OF FINES

The lower court rejected CVFC's claim that it was entitled to raise the "best efforts" defense to the finding of liability under 11 C.F.R. 111.35(b)(3), ruling that "the Commission concluded that, pursuant to [the best efforts] regulation, [CVFC] did not qualify for mitigation or reduction of their fines" JA29. The district court found that the Commission "bas[ed] their decision not to mitigate on this regulation, rather than any equitable considerations. . . ." *Id.* Yet the record does not show that the Commission "concluded" one way or another about whether CVFC could raise the best efforts defense and whether the Commission was aware it had equitable discretion to reduce the fine and decided not to exercise such discretion.

In that regard, there are numerous instances in the district court's opinion and the FEC's brief which asserts that the Commission considered and based their various decisions at the administrative level on certain factors and reasons. However, it is black letter law that agency actions and adjudications can only be upheld based on the justifications given by the agency at the time it reached its

decision, and not the "the post hoc rationalizations of the agency or the parties to [later] litigation." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962) ("The courts may not accept appellate counsel's post hoc rationalizations for agency action; [Chenery II] requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself")). In that regard, there is little if any reason given by the Commissioners, as opposed to their counsel, as to why they failed to take certain actions, such as mitigating the fine or consider finding the treasurer personally liable. As CVFC argued in its opening brief, the failure of the FEC to exercise its discretion should not be construed as a considered decision of the FEC to affirmatively withhold relief, and that failure to act can itself be regarded as arbitrary and capricious.

At the outset, the Commission misrepresents CVFC's position at the agency level in its brief on the issue of mitigation. The FEC asserts that CVFC "conceded" that its treasurer's willful and reckless conduct did not satisfy the "best efforts" rule. FEC Br. at 30. Of course the reports were filed late, but the CVFC conceded only the former treasurer's reckless conduct would not be able to satisfy the "best efforts" defense with respect to that treasurer's personal liability. The record clearly shows that the Chairman of CVFC and its Assistant Treasurer went

to great lengths to compile the information needed for the reports and to submit them as promptly as possible and used its "best efforts" to comply with the reporting requirements. CVFC Br. at 7-8.

The FEC also argues that the lower court should not have reached the merits of CVFC's "best efforts" and mitigation of fine argument because they were not raised at the agency level and that it is prohibited from attacking the facial validity of the regulation under a petition for review filed under 52 U.S.C. 30109(a)(4)(C)(iii) [former 2 U.S.C. 437g(a)(4)(C)(iii)]. FEC Br. at 30, n.13. This is in error. Captain Joseph John, the Chairman of CVFC vigorously argued at the agency level that CVFC

> employed [its] best efforts to obtain substantial missing information as quickly as humanly 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.

JA144. Moreover, CVFC filed an Amended Petition for Review and Complaint for Declaratory and Injunctive Relief and asserted jurisdiction under 28 U.S.C. 1331, which gave the lower court jurisdiction to hear the challenge to the "best efforts" regulation. *See* JA39. But even if CVFC were liable for the late reports, the "best efforts" defense regulation arbitrarily precluded CVFC from reducing or eliminating what is otherwise an excessive and unreasonable fine.

The FEC concedes that the "FEC's 'best efforts' regulations do not explicitly address [CVFC's] situation." FEC Br. at 32-33. Yet the FEC claims that CVFC is somehow not entitled to raise the best efforts defense because its alleged failure to manage its own treasurer was "consistent with negligence, which is addressed [in the "best efforts" regulation] and does not qualify." FEC Br. at 33. But CVFC's alleged "negligence" was not a reason articulated in the October 12, 2011 memo from Patricia Carmona to the Commission in assessing the fines against CVFC and its current treasurer. JA196-98. In any event, the FEC is wrong to claim, as the lower court did, that CVFC was asking the courts to exercise their own judgment and reduce the fine. *See* FEC Br. at 33 (citing *Cox for U.S. Senate Comm., Inc. v. FEC*, No. 03-C-3715, 2004 WL 783435 (N.D. Ill. Jan. 22, 2004)). Rather, all that CVFC is asking is that, assuming arguendo that this Court rejects CVFC's challenge to the voting procedures, the case be remanded to the agency for the Commission to consider and exercise its discretion as to whether or not it should mitigate the fine under the legal or equitable authority which it has, and to give reasons for its decision.

As for the merits of CVFC's challenge to the regulation on its face, CVFC refers the Court to its opening brief where it argued why the regulation is both under-inclusive and over-inclusive and produces irrational results, as in the case concluding that a female treasurer going into premature labor was foreseeable

and thus did not excuse the committee's late filing. *Kuhn for Congress v. FEC*, C.A. No. 2:13-3337-PMD-WWD (S.D.S.C. Aug. 22, 2014) (FEC Add. at 71). As the lower court noted, Congress provided in 52 U.S.C. 30102(i) [former 2 U.S.C. 432(i)] that "[w]hen the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act." Yet the FEC's "best efforts" regulation unreasonably restricts this safety valve that provides for a showing of "good faith" efforts to comply in particular circumstances. Contrary to the FEC's assertion, CVFC is not placing the burden on the FEC to show the committee was entitled to the defense. Rather, CVFC made a compelling case demonstrating that it did use its "best efforts" to comply in light of the willful, reckless, and unforeseen conduct of its treasurer. Accordingly, CVFC submits that the FEC's "best efforts" regulation was arbitrary and capricious on its face and as applied.

III. TREASURER'S PERSONAL LIABILITY

The essence of the FEC's argument is that it has broad prosecutorial discretion in deciding to pursue civil enforcement under FECA and that it exercised it here by not pursuing Mr. Curry, the former treasurer. FEC Br. at 19. However, CVFC takes strong exception to the FEC's position that the lower court "correctly found that 'the Commission considered Mr. Curry's personal liability,

and has supplied reasonable grounds for its failure to prosecute him in his personal capacity.'" FEC Br. at 20; JA25. Nothing in the record shows that the Commissioners actually considered the issue of Mr. Curry's personal liability or supplied "reasonable grounds" – or any grounds - for failing to prosecute him personally. As previously discussed, the agency must articulate the reasons for its actions at the time the decision took place and not "the post hoc rationalizations of the agency or the parties to [later] litigation." *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 539 (1981) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971)).

Thus, with respect to CVFC's argument that the FEC Office of General Counsel recommended that Commission consider the personal liability of the treasurer, the FEC asserts that "The Commissioners unanimously decided . . . not to pursue the former treasurer in these matters." FEC Br. at 34, n.15. But we have no way of knowing if the Commissioners even considered this issue since there is no statement of reasons explaining this purported "decision" not to pursue the former treasurer.

Moreover, the FEC cherry picks statements from the General Counsel's August 18, 2011 report to Dayna Brown of OAR, JA314, when it asserted that the General Counsel "concluded that the facts did not warrant pursuing Curry because his actions were consistent with someone resigning from office . . . ." FEC Br. at

20. However, a fair reading of that report shows that the facts were not so one-sided and that even the General Counsel recognized that the "Commission could conclude that if Mr. Curry was still the Committee's treasurer and neglected his duties while still treasurer to the extent alleged by the Committee, his actions constituted a reckless failure to fulfill his duties as treasurer." JA317 (emphasis added). So here, it is plain without any equivocation that if the statements by the Chairman of CVFC to the FEC were true regarding the reckless conduct of the treasurer in failing to provide the password necessary for filing reports with the FEC and withholding records (and no reason has been proffered showing why the CVFC characterization of the treasurer's reckless conduct is not accurate), then such conduct "constituted a reckless failure to fulfill his duties as treasurer." JA317. In this regard, CVFC submits that in light of the facts in this case, it was the Commission itself that "recklessly failed to fulfill its duties" to enforce the law that clearly places personal liability on such a malfeasant treasurer or at least to investigate the matter further. The FEC had actual notice of Mr. Curry's conduct as it was occurring from his own communications with FEC Reports Analysis Division, as well as those of CVFC's chairman, as evidenced and repeatedly cited to by both parties.

CVFC's brief provided a thick forest of statutory and regulatory provisions imposing personal liability on treasurers for such conduct. See CVFC Br. at 51-54

& n.7 (citing provisions). The FEC seems to cast this all aside and hide behind its so-called "Treasurer Policy" that is not grounded in the statute and regulations but conveniently allows it to arbitrarily absolve malfeasant treasurers and place the reputational and fiscal burden on the political committee.

Indeed, the FEC's characterization of the administrative fine procedures as being akin to a "traffic ticket" system (FEC Br. at 46) demonstrates precisely why the FEC's failure to impose personal liability on the treasurer is an abuse of discretion. CVFC wholeheartedly agrees with this analogy inasmuch as traffic tickets, for speeding or failure to yield, are issued to reckless drivers, not to the vehicles nor to their owners who may not be in the automobile, even when they employ the driver. Here, the PAC is merely the vehicle that has been operated in a reckless manner outside the established rules or by failing to comply with some administrative requirement. And when the car is pulled over, it is the driver who receives the ticket, not the vehicle owner. Just as the car cannot (yet) drive itself, so too can a political committee only operate at the hands of its Treasurer, and in this case the Treasurer – as the FEC well knew – was the only one with the keys (password). The Commission would encourage reckless drivers to flee from the cars at the scene of the accident – or in this case, not deter treasurers from acting recklessly and then resigning, leaving the campaign holding the expensive "ticket." Tickets are designed to punish and deter the transgressor for his transgression and

deter others similarly situated from such misconduct. Under the FEC's laissez faire policy, the reckless treasurers experience no penalty and are free to continue on their malfeasant way.

It is worth noting that even minor traffic tickets are contestable in traffic court, where even a $25 parking ticket can be mitigated or abated if it is shown that there were valid reasons to explain the circumstances, such as one's car being boxed in by two other cars, a flat tire, or a broken meter. Here, a small committee with limited funds was hit with an $8,690 ticket. This would require the committee to successfully solicit approximately 175 donors to contribute $50 each – a relatively large sum for a small committee – and thus sharply limit the amount it could otherwise spend on free speech in the political arena. Traffic tickets burden no fundamental right, whereas large fines that would force the closure of an organization would clearly interfere with free association and political speech. It is strange justice indeed that greater fairness and due process protection is afforded bad drivers than those who would participate in core First Amendment political activity.

CONCLUSION

For all the foregoing reasons and those provided in CVFC's Opening Brief, we urge the Court to reverse the judgment below.

Respectfully submitted,

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Dated: September 30, 2014

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