UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE and DAVID H. WIGGS, TREASURER Plaintiffs, v. FEDERAL ELECTION COMMISSION Defendant.	)	Civil Case No. 1:11-cv-02168 CKK

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs Combat Veterans For Congress PAC and David H. Wiggs in his official capacity as Treasurer respectfully submit this Memorandum of Points and Authorities in Further Support of Plaintiffs Motion for Summary Judgment, and in Opposition to Defendants Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h).

PRELIMINARY STATEMENT

The Defendant Federal Election Commission (FEC or Commission) 's enforcement against Combat Veterans for Congress PAC and its current treasurer (collectively Combat Veterans or Committee) for the former treasurer's reckless failure to file timely three disclosure reports with the FEC in 2010 is a nullity. The FEC purported to make a final determination of liability and assessed fines against the Committee and its current treasurer totaling $8,690.00 for what Congress considered to be a minor reporting violation. But Combat Veterans have recently obtained heretofore secret voting ballots of the Commissioners and have demonstrated that no more than three ballots were cast for each of the three fines, and thus are short of the requisite four affirmative votes required. The number of valid votes cast for the final determination are also questionable and that in any event, the Commissioners did not make the necessary findings at either stage of this enforcement proceeding despite the FEC's unusual and unprecedented argument in their Motion for Summary Judgment that it can count the silence of a Commissioner as casting an affirmative vote based on a Directive that was unlawfully adopted behind closed doors. This jurisdictional issue was not waived and can be reviewed by this Court in this proceeding.

More importantly, the FEC has wrongly sought to impose the fines on Combat Veterans despite an abundance of statutory, regulatory, and administrative guidance materials making it

clear that only the Treasurer of a committee has the duty and responsibility for filing disclosure reports on time and that where, as here, a treasurer who recklessly or intentionally fails to file timely reports shall be personally liable for any fines imposed. The FEC failed to do this despite recommendations from its staff that it should at least consider the matter. The FEC incorrectly asserts that the Treasurer is a mere functionary of the Committee, rather than being the sole statutory officer on whom Congress expressly and intentionally imposed filing and reporting duties and personal liability.

The civil penalties or fines impose this case were excessive and the Fine Schedule from which they derived was based on unreasonable criteria that unfairly harms non-candidate committees like Combat Veterans, threatening them with their very existence, a serious matter to consider in light of the First Amendment rights at stake.

Finally, the Commission's "best efforts" defense regulation is arbitrary, capricious, and contrary to law insofar as it precludes parties like Combat Veterans from demonstrating that the fines should not be imposed or mitigated due to the malfeasance of its former treasurer.

ARGUMENT

I. THE COMMISSION'S ACTION MUST BE SET ASIDE BECAUSE IT WAS THE PRODUCT OF AN UNLAWFUL VOTING PROCEDURE AND THUS NULL AND VOID

As Combat Veterans noted in their Memorandum of Points and Authorities in Support of their Motion for Summary Judgment (Pls' Br.), the FEC cannot initiate an enforcement action under FECA, whether internally generated as here or in response to a complaint filed by an outside party, unless the Commission first determines "by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed" a violation of FECA. 2

U.S.C. § 437g(a)(2). That statutory prerequisite of four affirmative votes (of the six Commissioners) is repeated in the Commission's regulations. *See* 11 C.F.R. §§ 111.9(a), 111.32 ("reason to believe" finding for late filings requires "affirmative vote of at least four (4) of its members").

The requisite four affirmative votes were not cast with respect to any of the three late filings of campaign reports at issue in this case. Rather, based on an examination of the ballots that Combat Veterans obtained from the FEC after the filing of this suit, at most, only three Commissioners executed a so-called "Do Not Object" ballot. *See* chart listing these so-called "votes" in Pls' Br. at 16-17. Plaintiffs have since amended their Complaint by adding a claim that the voting was defective and that the agency action taken ostensibly against Plaintiffs was therefore "without observance of procedure required by law" and should be vacated and set aside as null and void. 5 U.S.C. § 706(2)(D).

The FEC argues in its opposing brief that its voting procedures are outlined in FEC Directive No. 52, which was attached to its brief as Exhibit 1. *See* Exhibit 1 of the FEC's Motion for Summary Judgment. FEC Br. at 28. This Directive purports to allow the Commission to initiate enforcement and investigatory actions without a single Commissioner ever casting any vote or ballot at all under the so-called "24 hour no-objection" basis. The FEC further argues that this unusual non-voting/no-objection method satisfies the statutory requirement and the FEC's own regulations that agency enforcement action must garner at least "four affirmative votes" to find that Plaintiffs violated the law.

As Combat Veterans argued in their Motion for Summary Judgment and will further demonstrate here, this silent non-voting/negative "voting" method outlined in Directive No. 52 does not constitute the statutory requisite "four affirmative votes." Indeed, not only was

Directive No. 52 itself unlawfully promulgated in secret but also its provisions purporting to allow Commissioners have their staff sign their names 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.

The FEC defends the validity of Directive No. 52 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"). *See id.* at 30. 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). 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.

As for the FEC's Sunshine Act regulations, the 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 silent vote.

As for the FEC's Compliance Procedures, 11 C.F.R Part 111, applicable to this case, these rules 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" or relieves the Commissioners of their responsibility to cast at least "four affirmative votes" to initiate enforcement actions.

In addition to these rules of procedure, the FEC lists on its website a number of policy statements and directives not published in its Code of Federal Regulations that describe the procedures of certain other 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 claims 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)."**[1]

Directive No. 10, adopted on December 20, 2007 and published in the Federal Register, 73 Fed. Reg. 5568 (Jan. 30, 2008), 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. Nothing in Directive No. 10 mentions anything about "24 Hour No-Objection" votes or delegating vote-signing authority to staff members.

On September 10, 2008, the FEC held a secret meeting ostensibly authorized under the Sunshine Act to consider several matters, including Directive No. 52. That Directive purports to allow the Commissioners to discharge their statutory duties of finding "reason to believe" by "affirmative votes" by either not casting any vote at all for a 24-hour period or by returning the

[1] It should be noted that on the FEC's website homepage (http://www.fec.gov), the left side of the page has links to useful information for 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." However, none of the FEC's Directives are to be found there. Rather, one has to click on "About the FEC" at the top of the homepage, which lists general matters about the FEC, its budget, and other information, and then scroll down to the very bottom of that page to find the link for the FEC's Directives.

"no objection" ballot within 24 hours signed by the Commissioner. *See* FEC Br. at 3, Exhibit 1 of the FEC's Motion for Summary Judgment at 3. According to this Directive, the Commission Secretary thereafter certifies the official vote allegedly taken by the Commissioners. *See id.* Thus, if no Commissioner returns his or her ballot, they are all "deemed" to "approve" the staff recommendation, 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.

In the first place, Directive No. 52, as Plaintiffs recently learned from the FEC after requesting and receiving the Certification of the vote, was approved by a bare majority of 4-2 during the Commission's September 10, 2008 Executive Session, a closed meeting which was in clear violation of the Government in the Sunshine Act. And unlike Directive No. 10, Directive No. 52 was never published in the Federal Register.[2]

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. As noted, in the instant case, there were no more than three "Do Not Object" tally votes in each of the three fine cases and

[2] While Plaintiffs obtained from the FEC the final certified vote approving Directive No. 52, they were denied a copy of the transcript or recording of the meeting. Plaintiffs submit that 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 involving "Internal personnel rules and procedures or matters affecting a particular employee." That exemption under the Sunshine Act is inapplicable regarding important agency voting procedures. 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 recently made clear that this exemption is limited to personnel matters. *See Milner v. Dep't of Navy*, 1341 S.Ct. 1259 (2011).

several of those were signed by the Commissioner's assistant, thereby raising questions about the validity of those so-called "votes."[3]

The FEC's deviation from the required voting procedures in order to ease the Commissioners' workload is not an isolated example of the Commission's disregard of the law. For example, Congress made it clear that "members of the Commission shall not engage in any other business, vocation, or employment" and that if they are so engaged at the time of their appointment to the Commission, they "shall terminate or liquidate such activity no later than 90 days after such appointment." 2 U.S.C. § 437c(a)(3). Similar "no outside employment" provisions are common in the organic statutes of other multi-member agencies such as the Federal Trade Commission. 15 U.S.C. § 41.

Yet, despite this clear and unambiguous command of no outside employment, the Commissioners thought it would suit them better to rewrite the law. Thus, 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" and that if a Commissioner is engaging in such employment when appointed, that person "shall *appropriately limit* such activity no later than 90 days after beginning to serve as such as a member." 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. Moreover, policing the Commission's unlawful revision of the statute is problematic: what is "substantial portion of his or her time"? Is

[3] According to Directive No. 52, such delegation of signing authority is not valid unless the assistant received instructions from the Commissioner about the matter up for a vote and that the Commission's Secretary "shall maintain with the ballot any written authorization, instructions, or after-the-fact ratification provided by the Commissioner." *See* Directive No. 52at 4-5. On July 13, 2012, Plaintiffs' counsel requested the FEC to provide copies of those authorizations or instructions, which are subject to disclosure under the Freedom of Information Act, but the request was rejected by the FEC on July 26, 2012. Plaintiffs should be granted limited discovery to obtain this information should this Court determine that this is a material fact precluding summary judgment.

25 percent "substantial"? Can a Commissioner spend 100 percent of his or her time on non-FEC business for one week in a month and devote the other three weeks only to FEC business?

This provision, like the non-voting "voting" procedures, while convenient for the Commissioners, is contrary to the statute. If the Commissioners were to forego their self-bestowed right to engage in outside remunerative business and instead complied with the "no outside employment" proscription required by Congress, perhaps they could "devote more of their time" to carrying out their duties as the FEC says they need, including casting real votes in enforcement actions as Congress required. *See* FEC Br. at 28.

The FEC's claim that this "voting" procedure comports with the Congress's view that the administrative fine program be "streamlined" rings hallow. *See id.* at 30. In the first place, this "no objection" and silent vote procedure was adopted almost a decade *after* Congress enacted the fine procedures, suggesting that during the interim years, the Commission was quite able to cast real votes as Congress directed and as commonly utilized by other multi-member agencies. Second, neither Congress nor the FEC in its regulations revised the required "affirmative vote" of four Commissioners to initiate enforcement action, and the FEC is not free to radically revise a commonly understood term for the sake of expediency.

The FEC takes Combat Veterans to task for not citing a case where an agency's voting procedure was challenged. In the first place, Plaintiffs have been unable to find any other multi-member agency that uses the FEC's unusual if not unprecedented method of "voting" whereby inaction constitutes a positive vote to initiate official enforcement proceedings. Rather, the typical practice 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] 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, 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 position).

By carefully examining the voting procedures in this case, and as argued in Plaintiffs' Motion for Summary Judgment, the "24-Hour" silent and "Do Not Object" ballots votes are not authorized by the statute. Pls' Br. at 14-19. More importantly, even if these "votes" are "affirmative votes," those votes must be connected to an affirmative "finding" by the Commissioners that there is "reason to believe" a violation occurred as well as connected to a final determination that a violation occurred. Those "findings" were never made in this case. A negative "Do Not Object" or silence simply does not constitute an affirmative approval of a staff recommendation that the Commission should make the requisite finding of "reason to believe,"

and even if it did constitute approval as the FEC maintains, the Commissioners must still carry out that "approved" staff recommendation by actually making the requisite affirmative finding. The Commission staff has not been delegated the authority to make the necessary findings that only the Commissioners could make.

With respect to the voting that took place regarding the final determination that Combat Veterans violated the law and assessing a cumulative fine of $8,690.00 against the PAC, at least there was a so-called written "tally" vote rather than a silent 24-hour "vote" at the reason-to-believe stage. But as Combat Veterans argued in its opening brief and Amended Complaint, those votes are also defective since at best they merely "approve the recommendation" of the staff report but never in fact adopt them as their own or act on them as so recommended. *See* Plaintiffs' Amended Petition for Review of Federal Election Commission Determination and Complaint for Declaratory and Injunctive Relief at 26. Here, the staff recommended that the Commission adopt the Reviewing Officer's recommendation in each of the three cases (a double recommendation) as well as "[m]ake a final determination" that there was in fact a violation of 2 U.S.C. § 434(a) and "assess a civil money penalty" as specified. AF2312-AR118-119. The Commissioners did neither.

The FEC dismisses our argument as "frivolous," stating that the "[staff] recommendation becomes the Commission's official determination," citing 11 C.F.R. § 111.37(d). FEC Br. at 32, n.42. Not so. That regulation clearly states that the staff "reasons" for their recommendations also constitute the *reasons* of the Commission but only if the Commission approves those "recommendations" and only "[w]hen the Commission "makes a final determination under this section." 11 C.F.R. § 111.37(d) (emphasis added). Under "this section," namely 11 C.F.R. § 111.37(a), that final official determination cannot be made until the Commissioners actually

"f[ound] reason to believe" *and* "review[ed]… the reviewing officer's recommendation" after which a final determination of liability and civil penalty must be made by "an affirmative vote of at least four (4) of its members." 11 C.F.R. § 111.37(a). The FEC improperly conflates staff "reasons" given by the staff in their recommendations made to the Commission *with* the Commission's "final determination," which only the Commissioners can make. Those are two are distinct and separate steps.[4]

Moreover, even if Commission's mere "approval" of a staff recommendation were to be accepted by this Court as constituting an official final determination of liability, it is undisputed that there must be at least four affirmative votes. While it appears at first blush that all six Commissioners did cast their tally votes at this stage, only two votes appear on their face to satisfy Directive No. 52, namely, Commissioners Weintraub and Hunter who signed their ballots.

Commissioner Petersen submitted his ballot after the ballot deadline, but the deadline was not extended by the Chair who may do so but only "if it appears that a majority of the Commissioners will not have an adequate opportunity to review the material." Directive No. 52 at 2. Therefore, his ballot should not be counted. Commissioner McGahn did not submit a signed ballot at all, but instead sent an unsigned email delivered electronically stating that he approved the recommendation. That too violates Directive No. 52 which states that votes "*may only be made via a signed ballot delivered* to the Commission Secretary's Office." *See id.* at 4 (emphasis added). The only use of email authorized by Directive No. 52 occurs when a

[4] The FEC further tries to justify the Commission's approval of a staff report by comparing it to this Court's adoption of a Magistrate's Report and Recommendations. FEC Br. at 32, n.42, citing *El-Amin v. George Wash. Univ.*, 626 F. Supp. 2d 1 (D.D.C. 2009). That comparison fails. This Court did not simply adopt the report and proposed recommendations of the Magistrate as the FEC asserts, but affirmatively acted on those recommendations thusly: "[a]accordingly, the Court shall STRIKE Defendant's Motion for an Order to Show Cause and shall disregard Plaintiff's submission via letter to Magistrate Judge Facciola's chambers…." *Id.* at 2 (capitals in original). Here, the FEC stopped short of actually finding reason-to-believe or making a final determination in this case as they were required to do.

Commissioner wishes to withdraw an objection to a document, which if not withdrawn in writing or by email, would otherwise cause that item to be added to the agenda for a meeting. *See id.* at 1. Accordingly, Commissioner McGahn's vote via an email "ballot" is defective.

Commissioners Walther and Bauerly had their assistants sign their names on their respective ballots, but pursuant to Directive No. 52, staff can only sign for the Commissioners if they were given specific instructions and authorization on this particular matter and that such authorization and directions must be kept by the Secretary with those votes. *See id*. at 4. The FEC refused to provide those authorizations to Plaintiffs when recently requested to do so, even though those documents are subject to disclosure under the Freedom of Information Act. That information should also be provided to the Combat Veterans.[5]

To sum up, even assuming this "I-approve-the-staff-recommendation" vote legally constitutes the making of a final determination of liability and assessment of the fine, which Plaintiffs submit they do not, two of the votes are valid, two are not valid, and the remaining two signed by staff are questionable.

II. THE DEFECTIVE VOTING CONSTITUTES PREJUDICIAL ERROR AND WAS NOT WAIVED

The FEC next argues that even if the voting procedure were invalid, Plaintiffs are precluded from raising that argument here since it was not raised below at the agency and that in any event, there was no prejudice to Plaintiffs. 5 U.S.C. § 706. Both arguments are wrong.

[5] It should be noted that at the reason-to-believe stage, there were also questionable ballots signed by staff for their Commissioners. *See* Pls' Br. at 17. But even if those votes were valid, there never was more than three ballots actually submitted for each of the three late filings at issue in this case, and thus, were short of the requisite four affirmative votes required by FECA.

As for waiver, Plaintiffs could not have raised the defective vote argument below because the actual ballots cast (or not cast as the case may be under Directive No. 52) at the reason-to-believe stage were kept secret until Plaintiffs requested and finally received them just two days before they were required to file their Motion for Summary Judgment in this Court. At the administrative stage, all that was provided to Plaintiffs (and to this Court via the Administrative Record) was the Commission's notification that on December 15, 2010, it found "reason to believe" that Plaintiffs violated 2 U.S.C. § 434(a) and a Certification by the Commission's Secretary that for each of the three fines, the vote was 6-0 and that all six Commissioners "voted affirmatively for the decision." *See* Pls' Br. at 15. Thus, at the administrative level, Plaintiffs had no reason to question the representations by the Chair of the Commission or its Secretary that the Commissioners voted 6-0 to find reason to believe. Accordingly, Plaintiffs could not have raised the defective vote issue at the agency; and even if it could have, there is no doubt that it would have been rejected, and hence, such argument would have been a futile exercise.

Likewise, with respect to the votes cast at the final determination stage. Plaintiffs did not receive those actual ballots until after this litigation commenced, although they were informed at the administrative level that the vote was also 6-0. Since that vote was ostensibly for the final determination, by definition, Plaintiffs would not have had an opportunity to raise objections to the votes even if they received the suspect ballots at that time since the administrative proceedings were then closed. All that was then statutorily available to Plaintiffs was the right to seek judicial review in this Court.

The FEC's argument that Plaintiffs were not prejudiced by the defective voting at the reason-to-believe stage because they had an opportunity to raise any objection to the fines imposed should also be rejected. That would be akin to saying that a defendant was not

prejudiced by a defective indictment delivered by a grand jury that did not receive the requisite number of grand juror votes because after all, the defendant subsequently had a trial. And to take the analogy further, the FEC seems to suggest that a guilty verdict ostensibly imposed by all 12 jurors after a trial would not prejudice the defendant even if several jurors did not actually vote to find the defendant "guilty" but only expressed their approval in the jury room of the prosecutor's recommendation made at closing argument that they *should* find the defendant guilty. Even if the facts were to clearly show that the defendant did in fact commit the offense, a reviewing court would order a retrial due to the absence of a unanimous guilty verdict as a matter of due process. In any event, Combat Veterans suffered great harm at both the reason-to-believe stage and thereafter by expending considerable resources defending itself from an enforcement action that was never properly authorized to begin with.

More importantly, the kind of "harmless error" in the administrative cases cited by the FEC in their brief dealt with collateral or procedural issues such as the sufficiency of a notice rather than whether the agency itself had lawfully exercised its power and officially taken the requisite action. *See* FEC Br. at 31. Moreover, the FEC essentially concedes that if the final determination votes were invalid, then Plaintiffs would have suffered harmed. *See* FEC Br. at 31 (while reason-to-believe vote was not a determination of liability, "the Commission's ultimate vote to approve the final determination was…approved unanimously by all six Commissioners"). The final determination clearly imposed harm on Plaintiffs by finding liability and levying a fine of $8,690.00. But that final determination was invalid because 1) it was not an official Commission determination at all as a matter of law, 2) it may not have garnered at least four validly executed tally votes as required by the agency's own Directive No. 52, and 3) even if the votes were sufficient, the final determination could not be made until "after having found reason

to believe" by four affirmative votes, which we demonstrated, did not occur. Thus, the validity of the two findings – reason to believe and final determination - is inextricably linked.

For all these reasons, the ostensible finding of liability and assessment of fines was null and void and must be vacated.

III. THE FORMER TREASURER OF CVFC PAC IS SOLELY LIABLE IN HIS PERSONAL CAPACITY FOR HIS KNOWING, WILLFUL, AND/OR RECKLESS FAILURE TO TIMELY FILE REPORTS, NOT THE COMMITTEE OR THE CURRENT TREASURER

A. The Commission Misstates Combat Veterans' Position Presented To The Agency During the Enforcement Proceedings.

At the outset, the Commission grossly misrepresents Combat Veterans' position at the agency level in its brief. The FEC suggests that Combat Veterans "conceded" that "at least with respect to the Committee, that the violation occurred, that the penalties were correctly calculated, and that no 'best efforts' defense excused the late filing." FEC Br. at 15. The FEC misses the whole point: of course the reports were filed late, but the *Committee* was not responsible for filing them and thus did not violate the law, its former treasurer did; that no penalties whatsoever should be imposed on the Committee; and that only the former treasurer would not be able to satisfy the "best efforts" defense. If Combat Veterans had been provided a hearing, they would have been able to clarify their position to the FEC staff, precisely demonstrating why an oral hearing should have been granted. But even if Combat Veterans were liable for the late reports, as will be discussed *infra*, the "best efforts" defense regulation arbitrarily precluded the Plaintiffs from reducing or eliminating what is otherwise an excessive and unreasonable fine.

The Commission further argues that raising the personal liability of the former Treasurer is "a baseless attempt to abdicate the Committee's reporting obligations under the Act." FEC Br.

at 16. Further, the Commission claims the Committee "misunderstands the Commission's policy regarding the liability of committee treasurers." FEC Br. at 16.

The Commission misunderstands the extensive statutory and regulatory structure regarding the liability and duties of committee treasurers as opposed to questionable "policy" that the FEC has developed behind closed doors that it submitted to the Court as Exhibit 2 to Defendants' Motion for Summary Judgment rather than place on the public record where the public could learn about this "policy."

In April 2010, the Commission decided in an undisclosed executive session without any public notice and purportedly by a 6-0 vote by the Commissioners, to direct its Reports Analysis Division (RAD) and OAR to "name treasures as respondents in Administrative Fines matters solely" in their official capacities and to "substitute successor treasurers for predecessor treasurers." *See* Certification attached as Exhibit 3 to FEC Br. 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 Committees. In ignoring Congressional direction, the Commission's policy to refrain from holding Treasurers personally liable, and to always substitute new Treasurers for old, contravenes clear, black letter law and regulations, and was approved in a secret meeting in violation of the Government in Sunshine Act, 5 U.S.C. § 552b(g). Disturbingly, the FEC withheld this internal policy on treasurer liability not only from the public but from Congress this past May when the FEC turned over more than 1,250 pages to lawmakers of heretofore undisclosed FEC enforcement materials and internal documents.

In short, this policy automatically substitutes a successor Treasurer for a prior treasurer without any consideration of the conduct of the former Treasurer, even if as here that conduct was expressly highlighted and such consideration requested. As a result, the FEC "policy" eliminates any consideration as to personal liability of the former Treasurer, in contravention of the statute and regulatory scheme.

Indeed, the FEC buries its head in the sand and completely ignores the thick forest of statutory, regulatory, administrative, and judicial authority, policy, and guidance that Plaintiffs extensively presented in its Motion for Summary Judgment demonstrating the clear duty and responsibility of *only* the Treasurer to file campaign reports. Pls' Br. at 20-23. In the interests of judicial economy, Plaintiffs will not repeat all those sources, but one item succinctly sums up the issue of whether the Committee is liable for failing to file reports:

> 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) (emphasis added).

B. The Commission Grossly Misstates The Applicable Law.

Ignoring all of the plethora of authority regarding the duties and liabilities of treasurers for filing reports, the FEC cites only to a fragment of 2 U.S.C. § 434(a)(4) by stating:

> Under the Act, political committees like Combat Veterans are required to file periodic reports disclosing their receipts and disbursements, and committee treasurers are required, among other responsibilities, to file and sign the disclosure reports. 2 U.S.C. § 434(a)(4) ("All political committees other than

> authorized committees of a candidate shall file . . .”); 2 U.S.C. § 434(a)(1) (“Each treasurer of a political committee shall file reports . . .”).

FEC Br. at 17. This snippet from the law is grossly out of context. 2 U.S.C. § 434(a) is actually titled “Receipts and disbursements by ***treasurers*** of political committees; filing requirements.” (emphasis added). Moreover, 2 U.S.C. § 434(a)(1) actually reads in full: “Each 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.”

The plain reading of this statute, along with many other related statutory and regulatory provisions, is clear and unambiguous: treasurers shall perform the duties listed within 2 U.S.C. § 434(a), and specifically that the Treasurer, not the Committee, shall file such reports Further, 2 U.S.C. § 434(a)(4) proceeds to delineate the specific reports that Treasurers of political committees, pursuant to 2 U.S.C. § 434(a)(1) shall file. The Commission’s attempt to selectively quote the statute to minimize the role of the Treasurer is misleading. In short, the statute on its face lays the responsibility squarely and solely on the Treasurer, and specifies what that responsibility shall entail.

C. There Is No Committee But For The Treasurer.

The Commission’s whole argument is predicated on an attempt to frame the Treasurer of political committees as a mere agent or functionary, devoid of any of the statutory responsibility. This argument fails because Congress expressly placed the Treasurer as the only statutory actor or alter ego of political committees, supported by decades of regulations and public guidance from the Commission. Congress’s intent is plain on the face of the statute. The Treasurer is not an agent of the Committee, but rather there is no committee but for the Treasurer, and the

responsibilities of the Treasurer are at the center of campaign finance regulation. To permit the FEC to abandon this statutory construct would impermissibly allow an administrative agency to nullify clearly stated Congressional intent.

The Federal Election Campaign Act is codified at Title 2 of the United States Code, Chapter 14 (Federal Election Campaigns). It opens with § 431, Definitions, and the first substantive section is § 432, Organization of Political Committees, which reads:

> "*Treasurer* . . . Every Political committee shall have a Treasurer. No contribution or expenditure shall be accepted or made by or on behalf of a political committee during any period in which the office of treasurer is vacant. No expenditure shall be made for or on behalf of a political committee without the authorizations of the Treasurer . . ."

2 U.S.C. § 432(a). Subsection (b) briefly notes contributor information is required, while subsection (c) expressly charges the treasurer of a political committee with record keeping duties with respect to receipts, contributions, and expenditures – in essence all the activity of the committee. Subsection (d) expressly charges the Treasurer with the preservation of records and reports. In sum, a Treasurer is expressly responsible for maintaining all records, filing all reports, and operating the Committee. Without a treasurer, a committee is prohibited by statute from either receiving or expending funds. 2 U.S.C. § 432(a). This is not some mere functionary or agent as the FEC would now claim, but that of the principal or master that black letter law squarely places at the center of the campaign finance and political committee system. The rationale is simple, and repeated by the Commission in numerous public guides and statements. *See, e.g.,* Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings ("FEC Treasurer Policy"), 70 Fed. Reg. 1 (Jan. 3, 2005); *see also* Federal Election Commission Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters, 69 Fed. Reg. 4092 (Jan. 28, 2004). But for the presence of an actual human responsible for such duties,

there could be no accountability in campaign finance, and this would create an open invitation to unchecked fraud. The Commission's own Motion for Summary Judgment makes this very point:

> [P]olitical committees are artificial entities that can act only through their agents, such as their treasurers, and often can be, by their very nature, ephemeral entities . . . Without a live person to provide notice to and/or to attach liability to, the Commission may find itself at a significant disadvantage in protecting the public interest and in ensuring compliance with the laws it is responsible for enforcing.

FEC Br. at 18, citing FEC Treasurer Policy. The Defendant proceeds to establish its justification for naming Treasurers in their *official* capacity, rather than as individuals, because of the administrative practicality of such a policy. The FEC uses the term "policy" and not "law" or "regulation" because the policy is merely an administrative convenience and not a properly promulgated law or regulation. The FEC further notes:

> In some limited circumstances, the Commission may decide to pursue treasurers as respondents in their *personal* capacities. This may occur when the treasurer has knowingly and willfully committed violations, recklessly failed to fulfill duties specifically imposed upon treasurers by the Act, or intentionally deprived himself or herself of the operative facts giving rise to the violation.

FEC Br. at 19, citing FEC Treasurer Policy, 70 Fed. Reg. at 6. The Commission has, by its own clear admission, created a policy – not a regulation - that takes the express liability of the Treasurer and assigns it not to the person committing the act, but to the person wearing the hat. Unless the Treasurer has knowingly and willfully committed the violations, as the Administrative record clearly shows with respect to Mr. Curry. This is merely an administrative convenience based on the fact that Committees almost always pay the fines incurred by their Treasurer and it would be the new, substitute Treasurer agreeing to, and authorizing, the expenditure. FEC Br. at 18. That common practice in no way obviates the law enacted by Congress or the regulations properly promulgated by the Commission where, as here, a Committee chooses not to bear the liability of its malfeasant Treasurer. The Commission claims

to extend personal liability in those circumstances where warranted – subject to its own prosecutorial discretion. Here, however, the Commission failed to even consider exercising its discretion despite the request by the Reviewing Officer and its General Counsel that it should consider doing so. Discretion not exercised, or exercised so arbitrarily in the face of such clear and unambiguous evidence on the record is by its very nature arbitrary, capricious, and an abuse of discretion.

The Commission argues that its prosecutorial discretion allows it to pursue the Committee and its current Treasurer rather than the malfeasant past Treasurer. The Commission is wrong. The law clearly lays liability upon the Treasurer, not the Committee. *See, e.g.*, 2 U.S.C. § 434(a)(1) ("treasurer shall sign each such report"); 11 C.F.R. § 104.14(d) (treasurers "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. § 114.12 ("Notwithstanding the corporate status of the political committee, the treasurer remains personally responsible for carrying out their respective duties under the Act"). So whatever discretion may exist as to whether to pursue a malfeasant former Treasurer does not extend to substituting a party not itself charged with that liability by Congress. The Committee never had any liability with respect to the knowing and or willful violations committed by the malfeasant Treasurer, and the Commission may not simply declare that "its practice" is to name Committees and therefore it may shift liability to a party where none is placed by Congress.

At a minimum, if the former Treasurer is liable in his personal capacity, the statute necessarily precludes any transfer of liability to the Committee or the substitute Treasurer, and so the Commission must <u>first</u> determine whether the malfeasant Treasurer was liable. If so, then that liability by statute rests solely upon the malfeasant Treasurer; Congress did not empower the

FEC to *substitute* liability, nor do the regulations support this "policy" of administrative expediency. Only if the former Treasurer were not liable in his personal capacity, but rather in some official capacity, could the Commission arguably extend the finding to the substitute Treasurer.

Here, the Commission never considered any evidence as to whether Mr. Curry was liable in his personal capacity or not as it staff suggested that it do. The Commission simply stated, pursuant to its heretofore secret policy statement, that successor treasurers are to always be substituted as that is the more administratively convenient *policy*, not law or regulation. Even if substitution of successor treasurers was a properly enacted policy with respect to official capacity liability, it would only operate *after* the condition precedent of determining the Treasurers liability was not, in fact, incurred in his personal capacity.

D. The Commission Misrepresents The OAR And OGC Staff Recommendations

In its brief, the FEC cites its Office of General Counsel's ("OGC") report as evidence that the Commission "scrupulously followed the Treasury Policy." FEC Br. at 19-20. Defendant asserts the Reviewing Officer "expressly addressed and rejected plaintiffs' argument" after relying on advice from the OGC. FEC Br. at 20. Defendant is wrong.

The FEC selectively quotes from its Office of Administrative Review ("OAR") memorandum by offering two passages from the OAR Report followed by this quotation: "The Reviewing Officer's analysis *then* concluded: …'the Committee was responsible for filing the reports timely and failed to do so.'" FEC Br. at 20-21. That was not the conclusion but rather a statement that preceded the quoted passage. The real conclusion reads as follows:

> **Pursuant to OGC's guidance, the Reviewing Officer requests that the Commission consider the issue of the Treasurer's personal responsibility in these matters.** However, in keeping with current Commission procedures to substitute successor treasurers, in their official capacity, in administrative fine matters, the Reviewing Officer, recommends that the Commission make final determinations to **include** the current Treasurer, David H. Wiggs, and the Committee.

AF2199-AR104 (emphasis added). The Reviewing Officer did not, as Defendant avers, "ultimately [recommend] that the Commission make final determination only as to the Committee and the current treasurer in his official capacity." FEC Br. at 21.

Rather, as noted above, the Reviewing Officer recommended the Commission **include** the current Treasurer and the Committee. "Include" does not mean to replace or to exclude. Rather, it connotes an addition, indicating the former Treasurer's personal liability was still to be considered -- as the Reviewing Officer specifically requested -- by the Commission. The Commission simply chose not to follow the Reviewing Officer's guidance, which was based on advice from the OGC. Instead, it flouted the existing regulations regarding the personal liability of Treasurers. The Commission's flagrant disregard of guidance provided by the Reviewing Officer followed by its attempt to misinform the Court about that guidance is arbitrary, capricious, an abuse of discretion, and contrary to law.

As stated in our opening brief, in the OGC Memorandum to Dayna Brown, the reviewing officer, the Acting General Counsel not only stated in a bold heading that our allegations of recklessness against the former treasurer "**MIGHT JUSTIFY PURSUING [THE FORMER] TREASURER PERSONALLY**" but that if the Commission referred this matter to the OGC for pursuing personal liability against Mr. Curry in the enforcement context, the Commission "could

consider Mr. Curry's actions as possible mitigating factors in determining the civil penalty" for the Committee. Pls' Br. at 11. The OGC concluded as follows:

> Therefore, we recommend that OAR raise this issue for the Commission's consideration in the memorandum recommending final determinations in this matter.

AF2312-AR104. The OAR, as noted, did indeed raise and specifically request the Commission consider the issue of personal liability in its report to the Commission. But due to the questionable voting procedures, it does not appear that the Commission exercised its discretion to consider the issue of personal liability. There is no separate "statement of reasons" for their final decision, except we are told that the "reasons" for the recommendation by the staff are deemed to be the "reasons" for the Commission's decision. 11 C.F.R. § 111.37(d). Yet those "reasons" in the staff report included a specific request to the Commission to consider the personal liability of the treasurer. So did the Commission, by adopting the staff reasons also adopt her request that the Commission consider the treasurer's personal liability? Did the Commission consider their OGC's suggestion that the Commission consider this issue as well? The Commission's failure to exercise its discretion here is itself reviewable since it involves a failure to act where the agency's own organic statute and regulations call for at least an investigation of whether the former treasurer violated the reporting provisions of the law and should be held accountable. *See Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 1 (2007) for a good discussion of the reviewability of agency inaction under 5 U.S.C. §§ 706(1), 706(2); *id.* at 9 (the court had jurisdiction under 5 U.S.C. § 706(2) where agency "wrongly failed to exercise discretion in [plaintiffs'] favor," which failure the "APA views as final, notwithstanding the fact that the agency 'did' nothing").

E. Traffic Ticket Justice

The Commission twice refers to its Administrative fine program as the equivalent of a traffic-ticket system. FEC Br. at 3, 30. Plaintiffs wholeheartedly concur in this analogy as traffic tickets are issued to drivers, not vehicles.

Here, the PAC is merely the vehicle that has been operated in a manner outside the established rules or in failure of compliance with some administrative requirement. And when the car is pulled over, it is the driver who receives the ticket, not the vehicle owner. There can be no driver with respect to political committees other than the treasurer. The Commission, however, would welcome drivers and passengers switching seats before the officer comes to the car door or even bailing out – something Plaintiffs would not encourage the Commissioners do in the real world any more than they should allow parties to do so in the world of campaign finance. Why? Because tickets punish the transgressor for his transgression and dissuade him, and others, from further transgressing – if wrongdoers can simply switch seats, they experience no penalty, and are free to continue on their malfeasant ways.

It is worth noting even traffic tickets are contestable in court. The vast majority never are, precisely because of the likely guilt of the transgressor and the small penalty involved. But where the ticket is unwarranted or applied to the wrong person, the availability of a remedy, when needed to assess the appropriate place for guilt, exists. Traffic tickets burden no fundamental right; 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 due process protection is afforded to bad drivers than to those who would participate in core First Amendment political activity.

IV. THE FINES SHOULD BE REDUCED OR REMITTED BECAUSE THEY WERE ARBITRARY, CAPRICIOUS AND RAISE SERIOUS CONSTITUTIONAL CONCERNS

As Combat Veterans argued in their Motion for Summary Judgment, the unlawful finding of liability and assessment of fines totaling $8,690.00 for three minor reporting violations that were caused by the reckless conduct of their former treasurer violates Combat Veterans' exercise of its political speech under the First Amendment and is unconstitutionally excessive under the Due Process Clause and the Eighth Amendment. *See United States v. Bajakajian*, 524 U.S. 321 (1998). Pls' Br. at 35. The combined fines here of $8,690.00 would force Combat Veterans, with a bank balance of only $3,764.29 as of June 30, 2012, to shut down for exercising its First Amendment rights in support of military veterans as candidates for political office. In addition, Combat Veterans argued that the fines and the Fine Schedule arbitrarily punish non-affiliated committees like Combat Veterans the same as campaign committees for filing late reports where the governmental interest in disclosure are substantially different between the two types of committees. Pls' Br. at 31-33.

In its brief, the FEC baldly states that "the civil money penalties plaintiffs must pay 'in no way' limit their speech," citing *Cox for United States Senate Comm., Inc. v. FEC*, 2004 U.S. Dist. LEXIS 6939, 2004 WL 783435, 13-14 (N.D. Ill. Jan. 21, 2004 for that proposition. FEC Br. at 27. But an examination of the full quote from *Cox* is not so categorical. What the court in fact stated was that John Cox, the Senatorial candidate, and his campaign committee's "campaign activities and/or ability to run for public office *were in no way limited*" by the fines imposed. *Id*. at *12 (emphasis added). In Cox, the wealthy candidate made two loans to his committee totaling almost $220,000.00 which were not timely reported to the FEC in the critical 48-hour pre-election report and was later fined $22,150.00. Thus, the court made a factual

determination that the fine imposed on the wealthy candidate did not in fact limit his campaign activities. In stark contrast, Combat Veterans' political activities are and will definitely be limited to a severe degree, an assertion that has not been disputed by the FEC, and for purposes of this motion for summary judgment, must be taken as true.

As for our Constitutional arguments on excessiveness, the FEC does not respond on the merits but simply asserts that if we prevail on this issue, "it would call into question" the imposition of fines "against anyone with limited means." FEC Br. at 28. But that kind of question has already been asked by litigants in other courts where the ability to pay a fine is one of several factors courts use to determine a fines' excessiveness. Indeed, numerous regulatory statutes and regulations have codified these due process concerns by specifying that the ability to pay is one valid criteria that should be considered in assessing the amount of the fine in the interests of justice. *See, e.g.*, 15 U.S.C. § 45(m)(1)(C) ("ability to pay" considered in determining size of penalty for violating Federal Trade Commission Act). *See also, United States v. J.B. Williams Co., Inc.*, 354 F. Supp. 521, 548 (S.D.N.Y. 1973) ("The court believes it appropriate to consider the financial ability of defendants to pay the penalties demanded by the Government. . . . While imposition of maximum penalties against a large [campaign committee] may amount to little more than a slap on the wrist, the same penalties may throw a small [committee] out of business. The severity of the sanction imposed necessarily depends on the ability of each particular defendant to pay whatever fines are assessed.").

The fact that FECA did not expressly provide ability to pay criteria in the Administrative Fine section of FECA does not mean that whatever fines that Congress or the agency sets is precluded from judicial review on due process and excessiveness grounds. To use an extreme example, a fine of $10,000 a day for each day a report is overdue for a committee with only

$5,000 in its account, whether fixed by Congress or the FEC, is clearly excessive. Here, Congress directed the FEC to establish a schedule of penalties which takes into account the "amount of the violation involved, the existence of previous violations by the person and such other factors as the Commission considers appropriate." 2 U.S.C. § 437g(a)(4)(C)(i)(II). These "appropriate factors" should include the ability to pay for Constitutional purposes and in the interest of justice. Many political committees are very small operations that can ill afford to pay steep fines for filing late reports, and many others are not even established precisely because of the red tape and strict liability imposed for exercising core political speech. Plaintiffs assert that the analysis in *Cox* for determining the excessiveness of the fines is instructive and that properly applied to this case, the fine here should be remitted in whole or in part.

The first criterion is "Gravity of Plaintiffs' Violations." Id. at *14. In *Cox*, the court noted that the report in question was the critical 48-Hour report failing to report the two loans totaling almost $220,000 to his campaign and that the public was deprived of this important pre-election information. Voters should know and would want to know before they vote for a candidate, where he or she is getting their funds, especially very large sums at issue in *Cox*. By sharp contrast, Combat Veterans is *not* a campaign committee and does not run for office. They receive contributions in very small amounts, typically $50 or less, and any money contributed to a candidate is limited in size and reported anyway by the candidate for all the voters to see. Combat Veterans submit that the only persons having an interest in examining our reports are the FEC auditors. Moreover, as even the FEC points out, Congress considered these to be "minor"

violations akin to "traffic tickets." FEC Br. at 3-4, citing H.R. Rep. 106-295, at 11 (1999). In sum, the gravity of the offense here was very low at best.[6]

The second criterion in *Cox* was "Plaintiffs' Level of Culpability." *Id.* at *14. The court noted that the violation was inadvertent and thus "somewhat lowers Plaintiffs' level of culpability" and that simple negligence is excluded from the FEC's narrow list of defenses for failing to file reports. *Id. See* 11 C.F.R. § 111.35(d)(1). Here, however, the record is clear that Plaintiffs were not the culpable parties from an equitable sense; rather, their former treasurer was at a minimum reckless, not simply negligent, in failing to file the reports on time. Moreover, Combat Veterans expended considerable resources to secure the financial information and file the reports as soon as it could after the former treasurer left, although it was not able to do so in 24 hours after the malfeasant treasurer resigned, the unreasonably short time period the FEC requires to satisfy their "best efforts" defense. 11 C.F.R. § 111.35(b)(3)(ii). Accordingly, Combat Veterans' level of culpability in this case is very low at best.

The third *Cox* criterion is the "Harm Caused by Plaintiffs' Violations." *Id*. This criterion is very similar to the first one, namely the "Gravity of Plaintiffs' Violations." Therefore, the harm caused by Plaintiffs' late filed reports in this case was at best minimal.

The fourth and final criterion is "Comparison of Fine to Gravity of Plaintiff's Violations." *Id.* In *Cox*, the court again noted the important governmental interest in disclosing "large contributions and/or significant indebtedness" become more important to the electorate as the "size increases." By sharp contrast, Combat Veterans was *not* a campaign committee, their incoming funds were small amounts, and the contributions to candidates were reported by the candidates. There was little, if any, public interest in the timely reporting of Combat Veterans

[6] The $8,690.00 fine imposed here for these minor violations are very expensive traffic tickets. As noted in our opening brief, Pls' Br. at 41, even here in the District of Columbia and other jurisdictions, $25 parking tickets can be challenged before a hearing examiner.

finances. Yet, the FEC's fine schedule unreasonably treats candidate reports the same as unaffiliated committee reports.

The *Cox* court, however, was mistaken in ruling that just because the fine was properly calculated from the FEC's Schedule of fines, does not mean that those fines cannot be challenged. Regardless, the court felt that the fines, while substantial, were tied to the important 48-Hour Reporting Period. As previously discussed, Combat Veterans was not required to file any 48-hour report with the FEC. In addition to the failure of the FEC's fine schedule to differentiate between important candidate reports and less important unaffiliated committee reports, the schedule also does not differentiate between the sizes of the contributions being reported. While the FEC uses a very simple formula for basing the fines on the total amount of contributions and expenditures disclosed in the report, that is a poor proxy for measuring the governmental interest at stake. The public would be more interested in knowing that a candidate received $100,000 in campaign contributions from 20 PACs at $5,000 apiece than an unaffiliated committee like Combat Veterans receiving $100,000 from 2,000 individuals at $50 apiece. Yet, both committees are treated the same under FEC's Fine Schedule.

Finally, the ability to pay the fine, while not specifically addressed in *Cox*, is nevertheless a valid criterion to be used in determining the excessiveness of the fine, both in relationship to the injustice a large fine would have on a person with limited means, but also because such a large fine would gratuitously over-deter the unlawful conduct in question.

The fines imposed on Combat Veterans for minor reporting violations, of negligible interest to the public, are greater than the fines the FEC assesses on persons for committing more serious violations. *See* Pls' Br. at 32, n.1 (citing sampling of enforcement cases where, for example, only $500 was imposed for illegal corporate contributions). The FEC responds by

stating the fines were properly computed from its Fine Schedule and that the reason there are lower fines imposed for more serious violations is that those more serious violators are able to enter into negotiated conciliation agreements. FEC Br. at 38. But that feature only underscores the perverse unfairness of the inflexible Fine Schedule where respondents cannot have their fines reduced or mitigated due in large part to the unreasonably narrow "best efforts" defense that the FEC allows. Indeed, as will be discussed, the FEC's "best efforts" defense regulation itself is arbitrary, capricious, and contrary to law.

V. THE FEC'S "BEST EFFORTS" DEFENSE REGULATION IS UNREASONABLE, ARBITRARY AND CAPRICIOUS

Plaintiffs argue in their opening brief that the FEC's "best efforts" regulation , 11 C.F.R. § 111.35(b)(3), provides a very limited defense for the imposition of fines for filing late reports and was unreasonably narrow, arbitrary, capricious, and violative of due process. See Pls' Br. at 33-34. That regulation precludes Plaintiffs from presenting substantial legal and equitable reasons why the fine should be reduced or set aside, and is so narrowly drawn, that even the death of the treasurer on the day before a campaign finance report is due will not count as a defense for a late filing.

The FEC does not dispute the narrowness of its regulation nor does it even try defend it on the merits. Rather, the Commission argues that this Court cannot review a challenge to the "best efforts" regulation because the FEC also has another regulation that provides that any argument not raised at the administrative level is "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," FEC Br. at 25 citing 11 C.F.R. § 111.38, and that challenges to the "facial validity" of this regulation cannot be brought under 2 U.S.C. § 437g(a)(4)(C)(iii). *Id*. at 15, n.25. The FEC also cites to *Cox for Senate*, where the district court stated that as a general rule the reviewing court should not set

aside "administrative decisions" unless the objection was made at the agency level. *Cox for United States Senate Comm., Inc. v. FEC*, 13-14. The FEC is wrong.

In the first place, Plaintiffs complained loud and clear at the administrative level that they should not be saddled with the fines because they did not cause the problem and that they used what a reasonable person would characterize as best efforts to remedy the malfeasance and recklessness of the former treasurer and submitted the reports. *See* Pls' Br. at 8-9. The "best efforts" defense as noted does not permit simple negligence as a defense. However here, Plaintiffs raised the issue of recklessness which should be allowed to be raised as a defense but that defense was rejected by the FEC. And even if it were accepted, the regulation precludes any defense if the reports were not filed "within 24 hours after the end of these circumstances." 11 C.F.R. § 111.35(b)(3). That too is an unreasonable restriction on the use of the already unreasonably limited "best efforts" defense.

Second, there can be no doubt that any objection to the facial validity of the "best efforts" defense would be rejected by the FEC, and thus, it would be futile to raise it there. The purpose of the waiver rule is to preclude unnecessary judicial review where the objection could be favorably addressed at the agency level. That is not the situation in this case.

Moreover, 2 U.S.C. § 437g(a)(4)(C)(ii) allows any person who was fined to challenge the determination in this Court. That determination was made by unlawfully excluding Plaintiffs' reasons for the delay in submitting the reports, which included the application of the narrowly drawn "best efforts" regulation. Finally, this suit was also brought under the Administrative Procedure Act, which clearly allows litigants to challenge the facial validity of agency regulations that adversely affect them. *See, e.g., Bennet v. Spear*, 520 U.S. 154 (1997) (judicial review provision of Endangered Species Act does not preclude review under the APA).

Accordingly, this Court has ample jurisdiction to review the validity of the "best efforts" defense regulation.

Because the "best efforts" regulation is so unreasonably and narrowly drawn as Plaintiffs argued in its opening brief, it should be set aside. This is especially true in this case where the reason for the filing of the late reports is due to the reckless conduct of the former treasurer who left the committee scrambling to comply with the reporting requirements. See *U.S. Chamber of Commerce v. Securities and Exchange Comm'n,* 412 F.3d 133 (D.C. Cir. 20005).

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted, and Defendants Motion for Summary Judgment should be denied.

Respectfully submitted,

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/s/

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