UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE, *et al.*,	)	
Plaintiffs,	)	
v.	)	Case No. 1:11-cv-02168-CKK
FEDERAL ELECTION COMMISSION,	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION FOR SUMMARY JUDGMENT

The defendant Federal Election Commission ("Commission") moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. In support thereof, the Commission relies upon the accompanying memorandum of points and authorities, and the certified administrative records in Administrative Fines Matters 2199, 2312, and 2355 previously filed in this litigation. (Docs. 14-16.)

Respectfully submitted,

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July 9, 2012

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DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

Cases

Page

Page

Statutes and Regulations

Page

Page

Page

Congressional Materials

Page

Federal and Local District Court Rules

Other Materials

Plaintiffs Combat Veterans for Congress PAC ("Combat Veterans" or "Committee") and David H. Wiggs, its treasurer (collectively "plaintiffs"), have filed a petition for review of three fines imposed by the Federal Election Commission ("Commission" or "FEC") under 2 U.S.C. § 437g(a)(4)(C)(iii) for late-filed campaign finance reports. Plaintiffs challenge the Commission's assessment of civil penalties totaling $8,690 resulting from plaintiffs' failure to file three campaign finance disclosure reports by the statutory deadlines shortly before and after the November 2010 general election. Plaintiffs do not dispute that they filed these reports after the statutory deadlines and that the Commission correctly calculated the fines in accordance with the formula in the Commission's administrative fines regulations. Instead, plaintiffs attempt to avoid their clear statutory responsibilities by shifting all blame for the late reports to the Committee's own former agent and by raising meritless procedural objections. These arguments are unpersuasive and do not detract from the fact that the Commission lawfully imposed the challenged fines. Accordingly, the Commission moves for summary judgment and opposes plaintiffs' cross-motion for summary judgment.

BACKGROUND

A. The Parties and the Federal Election Campaign Act

The Federal Election Campaign Act of 1971, as amended (codified at 2 U.S.C. §§ 431-457) ("Act" or "FECA"), was enacted by Congress as part of a comprehensive system regulating the financing of federal election campaigns. The Act, among other things, imposes extensive requirements for public disclosure of contributions and expenditures made or received by political committees in connection with federal elections. 2 U.S.C. §§ 432-434.

The Federal Election Commission is an independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil

enforcement of the Act. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. Congress empowered the Commission to "formulate policy with respect to" the Act, 2 U.S.C. § 437c(b)(1), and authorized it to make "such rules . . . as are necessary to carry out the provisions" of the Act. 2 U.S.C. §§ 437d(a)(8), 438(a)(8).

Plaintiff Combat Veterans for Congress PAC is a political committee within the meaning of 2 U.S.C. § 431(4) and is registered with the Commission. (Amended Petition (Doc. 20) ("Am. Pet.") ¶¶ 7,10.) Political committees, through their treasurers, must file periodic reports detailing the committee's receipts and disbursements. 2 U.S.C. §§ 434(a)-(b). "All political committees other than authorized committees of a candidate" — including plaintiff Combat Veterans — have the option of filing their reports on a monthly basis or at certain specified times with a focus on election years. 2 U.S.C. § 434(a)(4). The Commission is authorized under the Act to assess civil penalties for certain violations of the reporting provisions of the Act. 2 U.S.C. §§ 437g(a)(5)(A)-(B).

The Act requires each political committee to have a treasurer, who must be designated on the committee's statement of organization filed with the Commission. 2 U.S.C. §§ 432(a), 433(b)(4). The treasurer keeps and preserves records on behalf of the political committee. 2 U.S.C. §§ 432(c),(d). The committee treasurer also signs and files reports with the Commission on behalf of the committee. 2 U.S.C. § 434(a)(1). Michael Curry was Combat Veterans' initial treasurer. (Am. Pet. ¶ 10.) On November 8, 2010, Dan Backer became assistant treasurer. (Am. Pet. ¶ 32.) On January 12, 2011, plaintiff David H. Wiggs succeeded Mr. Curry as treasurer of the committee. (Am. Pet. ¶ 55.)

B. Commission Compliance Procedures

1. General Provisions

Since the 1970s, the Act has provided a detailed administrative process for Commission

review of alleged violations of the Act. *See* 2 U.S.C. § 437g(a); *see also* 11 C.F.R. §§ 111.3-111.24 (enforcement process regulations). Under the Act, if the Commission finds "reason to believe" that a violation has occurred, the Commission's General Counsel can conduct an investigation that leads to a recommendation as to whether there is "probable cause to believe" a violation has occurred. 2 U.S.C. § 437g(a)(1)-(3). If the Commission finds probable cause, it must attempt to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent involved. 2 U.S.C. § 437g(a)(4)(A)(i). If the Commission is unable to resolve the matter through voluntary conciliation, the Commission may file a *de novo* civil suit to enforce the Act in federal district court. 2 U.S.C. § 437g(a)(6).

2. 1999 Amendments Establishing the Administrative Fines Program

For many years, the Commission was required to address all violations of the Act, even the most straightforward violations involving the failure to file reports in a timely manner, under these general enforcement procedures. In 1999, Congress amended the Act to add a streamlined administrative fines system for straightforward filing and record-keeping violations, amending 2 U.S.C. § 437g(a)(4). Congress authorized the Commission to assess civil money penalties for certain violations — those involving the Act's reporting requirements codified at 2 U.S.C. § 434(a).[1] The administrative fines program "create[d] a simplified procedure for the FEC to administratively handle reporting violations." H.R. Rep. No. 106-295, at 11 (1999). It "create[d] a system of 'administrative fines' — much like traffic tickets, which will let the

[1] *See* Treasury, Postal Service and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 640, 113 Stat. 430, 476-477 (1999). These reporting violations include the failure to file (or file in a timely manner) monthly, quarterly, pre-election, post-election, mid-year, and year-end reports of receipts and disbursements, and 48-hour notices (regarding contributions after the 20th day, but more than 48 hours before the election). *Id.*

agency deal with minor violations of the law in an expeditious manner."[2] As part of the administrative fines program, after the Commission finds reason to believe a committee and its treasurer have failed to file a report (or filed a report late), the Commission may

> require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is established and published by the Commission and 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).

This program also provides for limited judicial review of the Commission's determinations:

> Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

2 U.S.C. § 437g(a)(4)(C)(iii).

3. The Commission's Administrative Fines Regulations

The Commission promulgated regulations, effective July 14, 2000, implementing the 1999 amendments to the Act. *See* Administrative Fines, 65 Fed. Reg. 31,787 (May 19, 2001). These regulations, codified at 11 C.F.R. Part 111 B, established the administrative procedures to be followed in those cases that the Commission determines are appropriate for treatment under the administrative fines provisions, such as Combat Veterans' three late-filed reports. 11 C.F.R.

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[2] 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (Statement of Congresswoman Maloney). *See* 65 Cong. Rec. H8350 (daily ed. September 15, 1999) (Statement of Congresswoman Maloney). *See also* 65 Cong. Rec. E1896 (daily ed. September 17, 1999) (Statement of Congressman William M. Thomas) ("These reforms may not make headlines, but they are the most significant legislative changes in the operation of the FEC we have seen in 20 years").

§ 111.31.

These new regulations also created the schedule of penalties authorized by 2 U.S.C. § 437g(a)(4)(C)(i)(II), which takes into account, *inter alia*, the due date of the report (reports due just before an election are subject to a higher civil penalty), the dollar amount of the activity involved in the disclosure violation, and the existence of prior violations by the respondent. 11 C.F.R. § 111.43. The amount of the penalty rises for each day that the report is late. *See* 11 C.F.R. §§ 111.43(a),(b).[3]

Under the regulations, when the Commission determines that it has "reason to believe" that a respondent has violated 2 U.S.C. § 434(a), the Commission notifies the respondent of the Commission's finding. 11 C.F.R. § 111.32. The notification includes the factual and legal basis for the finding, the proposed civil money penalty, and an explanation of the respondent's right to challenge both the reason-to-believe finding and the proposed penalty. *Id.* Upon receipt of this notification, the respondent can either pay the penalty, 11 C.F.R. §§ 111.33-111.34, or challenge the finding and/or the proposed penalty, 11 C.F.R. § 111.35.

If a respondent wishes to challenge the Commission's reason-to-believe finding or the proposed penalty, the respondent must file a *written* response with supporting documentation within 40 days of the date of the Commission's finding. 11 C.F.R. § 111.35. The administrative fines procedures do not provide for an oral hearing before the Commission. A respondent's

[3] The Commission's regulations define overdue reports as "late" up until a certain number of days after the due date; after that date, the report is defined as "not filed." 11 C.F.R. § 111.43(e)(2). The number of days after the due date for a report to be deemed "not filed" varies depending on the type of report. *Id.* "Election sensitive" reports, including October quarterly reports in an election year and pre-general election reports, are considered "late" if they are filed after their due dates, but prior to four days before the general election. They are considered "not filed" if filed after that date. 11 C.F.R. §§ 111.43(d)(1),(e)(2). Similarly, non-election sensitive reports are "late" if filed within thirty days of their due date, and considered "not filed" if they are filed more than 30 days after their due date. 11 C.F.R. § 111.43(e)(1).

written challenge can be based only upon: (1) factual errors; (2) inaccurate calculation of the penalty; or (3) a showing that the respondent used "best efforts" but "reasonably unforeseen circumstances . . . beyond the control of the respondent" prevented timely filing of the report at issue and the respondent filed the report no later than 24 hours after the end of these circumstances. 11 C.F.R. §§ 111.35(b)(1)-(3). "Respondent's written response must detail the factual basis supporting its challenge and include supporting documentation." 11 C.F.R. § 111.35(e).

The regulations make clear that the unforeseen circumstances beyond a filer's control that would satisfy the third basis for an administrative fines challenge are very limited, and specify that certain circumstances are expressly *not* considered "reasonably unforeseen and beyond the control of the respondent": (1) negligence; (2) delays caused by committee vendors or contractors; (3) illness, inexperience, or unavailability of the treasurer or other staff; (4) committee computer, software, or Internet service provider failures; (5) a committee's failure to know the filing dates; and (6) a committee's failure to use filing software properly. 11 C.F.R. § 111.35(d).[4]

Timely-filed challenges to the Commission's reason-to-believe finding are reviewed by the Commission's "Reviewing Officer," a Commission staff person who is not involved in the Commission's reason-to-believe finding. After considering the respondent's submission, together with the reason-to-believe determination and any supporting documentation, 11 C.F.R. §§ 111.36(a)-(b), the Reviewing Officer submits a written recommendation to the Commission, 11 C.F.R. § 111.36(e), which is also provided to the respondent, 11 C.F.R. § 111.36(f).

[4] The acceptable limited circumstances include Commission computer and software failures, widespread disruption of information transmissions over the Internet not caused by any failure of the Commission's or respondent's computer systems or Internet service provider, and severe weather or other disaster-related incidents. 11 C.F.R. § 111.35(c).

The respondent has ten days to file a written response to the recommendation. That response cannot make any new arguments not made in the respondent's original written response, except in direct response to matters addressed in the Reviewing Officer's recommendation. 11 C.F.R. § 111.35(f).

After receiving the Reviewing Officer's recommendation and any timely-filed additional response by the respondents, the Commission makes a final determination whether a violation of 2 U.S.C. § 434(a) by the respondent has occurred and whether to assess a civil penalty. 11 C.F.R. § 111.37. When the Commission makes a final determination, the statement of reasons for the Commission's actions will, unless otherwise indicated by the Commission, consist of the reasons provided by the Reviewing Officer for the recommendation approved by the Commission. 11 C.F.R. § 111.37(d).

If the Commission makes an adverse determination and imposes a penalty, the respondent has 30 days in which to petition a federal district court for judicial review. 2 U.S.C. § 437g(a)(4)(C)(iii). The Commission's regulations provide that the "respondent's failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. 437g." 11 C.F.R. § 111.38; *see infra* pp. 24-25. Thus, judicial review is limited to the issues and facts raised before the Commission during the administrative proceeding.

C. The Administrative Determinations Challenged in This Case

In 2010, Combat Veterans and its treasurer filed quarterly reports with the Commission, as permitted by 2 U.S.C. § 434(a)(4)(A). The Committee's report for the third calendar quarter (ending September 30, 2010) was due on October 15, 2010. *See* 2 U.S.C. § 434(a)(4)(A)(i). In addition, if the Committee made a contribution or expenditure prior to the November 2010

general election, the Committee was required to file a 12-Day Pre-General Election Report, which was due on October 21, 2010. *See* 2 U.S.C. § 434(a)(4)(A)(ii). Finally, the Committee also was required to file a 30-Day Post-General Election Report, which was due on December 2, 2010. *See* 2 U.S.C. § 434(a)(4)(A)(iii). The treasurer of the Committee was required to file these reports electronically with the Commission before the respective statutory deadlines. *See* 2 U.S.C. § 434(a)(1); 11 C.F.R. §§ 104.1(a), 104.14. Combat Veterans failed to meet these deadlines. [5]

In September 2010, the Commission sent reminder notices to all registered political committees and treasurers, including Combat Veterans, reminding them of the due dates for their October 2010 Quarterly Report, 12-Day Pre-General Election Report, and 30-Day Post-General Election Reports.[6] According to plaintiffs, on October 12, 2010, three days before the Committee's first report — the October 2010 Quarterly Report — was due, the Committee's treasurer, Michael Curry, indicated a desire to resign his position. (Am. Pet. ¶ 20.) Mr. Curry continued taking steps to prepare and file the Committee's October 2010 Quarterly report, however, including initiating several communications with Commission staff, and he ultimately filed that report on November 21, 2010, 37 days late. (Am. Pet. ¶¶ 20, 26, 28, 31, 34, 37.)

The Committee's assistant treasurer, Dan Backer, filed the Committee's 12-Day Pre-General and 30-Day Post-General Election Reports with the Commission on January 11, 2011, 82 and 40 days late respectively. (Am. Pet. ¶ 54.) Mr. Backer amended all three reports on

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[5] The Commission filed separate certified administrative records for each administrative fines ("AF") matter. (Docs. 14-16.) Citations to "AF# ____ at AR___" refer to the sequentially numbered pages in the referenced administrative record.

[6] (AF# 2199 at AR029-AR034, AR050-AR055; AF# 2312 at AR043-AR045, AR060-AR063; AF# 2355 at AR053-55. *See also* AF# 2355 at AR036 (reminder regarding 30-Day Post-General Election Report), AR065 (same).)

January 25, 2011. (Am. Pet. ¶ 56.)[7]

When the three Committee reports — the October 2010 Quarterly Report, 12-Day Pre-General Report, and 30-Day Post General Election Report — were not filed by the deadlines, the Commission sent non-filer notices to the Committee and its treasurer for each report.[8] 2 U.S.C. § 437g(b). The Commission's Reports Analysis Division ("RAD") — the Commission Division responsible for monitoring in the first instance the timeliness of such reports — subsequently prepared recommendations to the Commission.[9]

Each disclosure report by Combat Veterans was the subject of a separate administrative fines matter, designated AF# 2199, AF# 2312, and AF# 2355, respectively. The respondents in each matter were the Committee and its treasurer in his official capacity, in accordance with 2 U.S.C. § 434(a).[10] Pursuant to the Commission's established procedures, these recommendations were circulated to the Commissioners on a no-objection basis, and no

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[7] Full facsimile copies of Combat Veterans' disclosure reports are available on the Commission's web site at http://query.nictusa.com/cgi-bin/fecimg/?C00469239. The summary pages of the relevant reports, showing the coverage and filing dates, are found in the administrative record. (*See* AF# 2199 at AR077 (October Quarterly Report): AF# 2312 at AR091 (12-Day Pre-General Election Report), AF# 2355 at AR085 (30-Day Post- General Election Report).)

[8] (AF# 2199 at AR035, AR056; AF# 2312 at AR073; AF# 2355 at AR037, AR066.)

[9] (AF# 2199 at AR002-AR004; AF# 2312 at AR002-AR007, AR009-AR014; AF# 2355 at AR002-AR007.)

[10] Since at least 2005, the Commission's practice has been to also pursue political committee treasurers in their *personal* capacities, at the agency's discretion, when the Commission determines that the treasurer had "knowledge that his or her conduct violated a duty imposed by law, or where the treasurer recklessly failed to fulfill his or her duties under the Act and regulations, or intentionally deprived himself or herself of facts giving rise to the violations." Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3, 5 (Jan. 3, 2005). Even in that situation, however, the committees themselves remain responsible for any FECA violations they commit. *See id.* at 4-6; *see also infra* pp. 18, 21-24.

Commissioners objected.[11]

The Commission's Secretary and Clerk certified that the Commission had found reason to believe that the Committee and its treasurer violated 2 U.S.C. § 434(a) by failing to file each report by the statutory deadline and had made preliminary determinations setting the civil money penalty for each violation.[12] The penalties were assessed in accordance with the Commission's schedule, 11 C.F.R. § 111.43. Thus, plaintiffs were assessed penalties of $4,400 for one election sensitive report with $75,000-99,999.99 of activity; $3,300 for one election sensitive report with $50,000-74,999.99 of activity; and $990 for one non-election sensitive report with $25,000-49,999.99 of activity.[13] The Commission subsequently notified the respondents of its actions.[14]

In all three matters, Combat Veterans' Chairman Joseph R. John submitted written "challenges" to the Commission's initial determinations on behalf of the Committee and its treasurer.[15] Respondents' arguments in all three matters were based on the claim that

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11 *See* FEC Directive 52 (Sept. 10, 2008), available at http://www.fec.gov/directives/directive_52.pdf (attached as FEC Exhibit 1); *see* Plaintiffs' Exhibits 48-50 (Docs 19-1 at 1-11).

12 (AF# 2199 at AR008; AF# 2312 at AR020; AF# 2355 at AR014.)

13 (AF# 2199 at AR004; AF# 2312 at AR005; AF# 2355 at AR004.)

14 (*See* AF# 2199 at AR009-AR012; AF# 2312 at AR026-AR029; AF# 2355 at AR021-AR024.)

When the Commission found reason to believe in AF# 2199 with respect to the Committee's October 2010 Quarterly Report, Michael Curry was the Committee's treasurer. Thus, he was named in the Commission's determination, and the initial notification was sent to him by the Commission. When Mr. Curry was replaced as treasurer by a successor treasurer, plaintiff David Wiggs, Mr. Wiggs was substituted as the named respondent under the Commission's policy regarding successor treasurers. In AF# 2312 and AF# 2355, plaintiff Wiggs was treasurer at the time of the Commission's initial consideration and thus was named in the Commission's reason-to-believe determinations and received the initial notifications. (AF# 2199 at AR041.)

15 (AF# 2199 at AR016-AR018; AF# 2312 at AR030-AR032; AF# 2355 at AR025-AR0027.) Copies of Mr. John's objections later were forwarded to successor treasurer David Wiggs. (AF# 2199 at AR041-AR042; AF# 2312 at AR033-AR034; AF# 2355 at AR028.)

Mr. Curry's "actions were completely out of our control" and that the Committee and its Chairman exercised their "best efforts" to prepare and file the three reports. Respondents claimed that Mr. Curry should be solely responsible in his personal capacity for any fine or penalty, stating that "we are choosing not to pay the fine on Mr. Curry's behalf[;] it is his responsibility."[16]

The Commission's Reviewing Officer subsequently prepared recommendations to the Commission regarding final determinations in all three matters, and those recommendations were also provided to the respondents.[17] Counsel for respondents, Mr. Dan Backer, subsequently submitted a single response on behalf of the Committee and David Wiggs regarding all three matters.[18] The Reviewing Officer then submitted final recommendations in all three matters to the Commission.[19]

On October 27, 2011, the Commission unanimously voted to make final determinations in all three matters, adopting the Reviewing Officer's recommendations and determining that Combat Veterans and David Wiggs, in his official capacity as treasurer, violated 2 U.S.C. § 434(a). The Commission assessed the same civil penalties calculated at the reason-to-believe

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16 (*See* AF# 2199 at AR016-AR017; AF# 2312 at AR030-AR031; AF# 2355 at AR025-AR026.)

17 (AF# 2199 at AR043-AR091; AF# 2312 at AR050-AR095; AF# 2355 at AR0439-AR088.)

18 (AF# 2199 at AR092-095; AF# 2312 at AR096-AR099; AF# 2355 at AR089-AR092.) While the matters were not formally merged or consolidated, most of the subsequent documents prepared by the Commission and respondents addressed all three matters. For clarity, copies of documents addressing multiple administrative fine matters have been included in each certified administrative record.

19 (AF# 2199 at AR101-AR113; AF# 2312 at AR105-AR117; AF# 2355 at AR098-AR110.) Respondents' replies were attached to the Reviewing Officer's memorandum.

stage.[20] On November 4, 2011, respondents were notified of these decisions, including their options to pay the penalties or appeal the final determinations by filing suit pursuant to 2 U.S.C. § 437g(a)(4)(C)(iii). This notification letter was faxed to respondents' counsel on November 7, 2011.[21] Thus, the 30-day period for appeal expired on December 7, 2011. 2 U.S.C. § 437g(a)(4)(C)(iii).

Following the Commission's final determinations, on November 23, 2011, Mr. Backer submitted a letter to the Commission purporting to assert new procedural and constitutional arguments. In this untimely post-final-determination communication to the Commission — not contemplated by the Commission's administrative fines regulations — Mr. Backer requested that the Commission withdraw its final determinations and asked for an oral hearing before the full Commission.[22] The Commission's Chief Compliance Officer, Reviewing Officer, and General Counsel's Office recommended that the Commission deny respondents' unprecedented request to withdraw and reconsider its final determinations against respondents, because there was no basis in the Act or the Commission's regulations.[23] The Commission unanimously approved and adopted these staff recommendations on December 7, 2011, and notified respondents by telephone and letter.[24] Plaintiffs filed with this Court their petition for review of the Commission's final determination on the same day, December 7, 2011. (Doc. 1.)

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[20] (AF# 2199 at AR114-AR115; AF# 2312 at AR118-AR119; AF# 2355 at AR111-AR112.)

[21] (AF# 2199 at AR116-AR122; AF# 2312 at AR120-AR126; AF# 2355 at AR113-AR119.)

[22] (AF# 2199 at AR123-125; AF# 2312 at AR127-AR129; AF# 2355 at AR120-122.)

[23] (AF# 2199 at AR127-AR130; AF# 2312 at AR130-AR137; AF# 2355 at AR123-AR130.)

[24] (AF# 2199 at AR134-AR136; AF# 2312 at AR138-AR140; AF# 2355 at AR131-AR133.)

ARGUMENT

I. STANDARDS AND SCOPE OF REVIEW

A. Summary Judgment Standard

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The Court must view the evidence and the inferences that may reasonably be drawn from the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials, but must provide evidence of specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Liberty Lobby, Inc.*, 477 U.S. at 248; *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

B. Review of Agency Adjudications

"The standard of review for final agency adjudications such as this brought under 2 U.S.C. § 437g(a)(4)(C)(iii) is set out in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706." *Cooksey v. FEC*, No. 04-1152, 2005 WL 1630102, at *2 (W.D. La. June 9, 2005) (citing *Miles for Senate Comm. v. FEC*, No. 01-83, 2002 WL 47008 (D. Minn. Jan. 9, 2002)). A reviewing court can set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. §§ 706(2)(A) and (C). Agency action can be set aside as arbitrary and capricious only if there is no rational basis presented. *American Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009). The arbitrary and capricious standard of review is "highly deferential" and "presumes the validity of agency action." *National Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1228

(D.C. Cir. 2007). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." *San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 37 (D.C. Cir. 1986) (en banc).

The Supreme Court has held that the Commission "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*"). *Accord, e.g., FEC v. Nat'l Rifle Ass'n. of Am.*, 254 F.3d 173, 182, 185-186 (D.C. Cir. 2001). Thus, "in determining whether the Commission's action was 'contrary to law,' the task for the [Court is] not to interpret the statute as it [thinks] best but rather a narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court." *DSCC*, 454 U.S. at 39 (citations omitted).

This case, moreover, involves application of the Commission's own regulations rather than the statute itself, and "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965). "[T]he agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted).

"'[W]hen a party seeks review of agency action under the APA [before a district court], the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1710 (2010) (quoting *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). In this context, "summary judgment is simply the procedural vehicle for asking the court to decide, on the basis of the administrative record, the legal question of whether an agency reasonably could have found the facts as it did." *Cunningham v. FEC*, No. IP-01-0897-C-B/S, 2002 WL

31431557, at *3 (S.D. Ind. Oct. 28, 2002) (citations omitted). It is well established that a court reviewing an agency decision may not go outside the administrative record, and likewise, plaintiffs are precluded from raising before a reviewing court any arguments not presented to an agency in the administrative proceeding. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985); *Dakota Underground, Inc. v. Sec'y of Labor*, 200 F.3d 564, 567 (8th Cir. 2000).

II. THE COMMISSION IS ENTITLED TO SUMMARY JUDGMENT

A. Combat Veterans *Concedes* That the Violations at Issue Occurred, That the Civil Penalties Were Correctly Calculated, and That the Commission's "Best Efforts" Regulation Does Not Excuse the Unlawful Conduct Here

In this action, plaintiffs challenge the Commission's decisions in three separate administrative fines matters that Combat Veterans and its treasurer violated 2 U.S.C. § 434(a) and the Commission's assessment of $8,960 in civil money penalties. Yet plaintiffs do not dispute that the violations occurred or that the penalties were correctly calculated, and they conceded at the administrative stage that they did not satisfy the requirements for the "best efforts" defense in the administrative fines context. 11 C.F.R. § 111.35. The Commission's final determinations in these matters were correct and fully supported by the administrative records. The Reviewing Officer's recommendations described the factual background, correctly analyzed the violations, and applied the Commission's administrative fines regulations.

Plaintiffs' combined written response to the Reviewing Officer's recommendations in all three matters "concedes," at least with respect to the Committee, that the violations occurred, that the penalties were corrected calculated, and that no "best efforts" defense excused the late filings:

> CVFC PAC concedes that the late submissions of the three subject reports violated the provisions set forth in 2 U.S.C. § 434(a) and that such violation is not excused by a best efforts defense pursuant to 111 C.F.R. § 111.35(b)(3).

> Additionally, CVFC PAC concedes the calculation of the cumulative civil penalty pursuant to 11 C.F.R. § 111.43.

(AF# 2199 at AR0093; AF# 2312 at AR097; AF# 2355 at AR090.) This concession is dispositive. It addresses all three factors which respondents can raise as defenses in administrative fines cases, *see* 11 C.F.R. § 111.35(b). "Since the record is clear that the relevant factors were considered and the applicable regulations were strictly applied to Plaintiffs' violations," the Court should conclude that the Commission's final determination and assessment of civil penalties against plaintiffs is "supported by a rational basis and does not indicate a clear error of judgment. In light of that conclusion, further analysis is neither required, nor permitted." *Cox for U.S. Senate Comm. Inc. v. FEC*, No. 03C3715, 2004 WL 783435, at *5 (N.D. Ill. Jan. 22, 2004).[25]

B. Plaintiffs Cannot Evade Responsibility for Their Reporting Violations by Shifting the Blame to Combat Veterans' Former Treasurer

Plaintiffs now seek, as they did in the administrative proceeding, to escape liability for Combat Veterans' three late reports by shifting responsibility to a former treasurer; they ask this Court to declare that Mr. Curry is *solely* responsible for plaintiffs' own FECA violations. This stratagem is no more than a baseless attempt to abdicate the Committee's reporting obligations under the Act. It misunderstands the Commission's policy regarding the liability of committee treasurers and disavows the Committee's own authority over its agent. Combat Veterans remains responsible for its own reporting and for the actions of its own treasurer — whom it had the right and duty to supervise as a matter of law. And the Commission's decision not to pursue

[25] Plaintiffs now attempt to challenge the definition of "best efforts" in 11 C.F.R. § 111.35(b) because it generally prevents respondents from presenting other defenses in administrative fine matters. (Pls.' Mem. (Doc. 18-1) at 33-34.) However, this claim has been waived, and in any event, plaintiffs cannot attack the facial validity of a regulation in a case brought under 2 U.S.C. § 437g(a)(4)(C)(iii).

the former treasurer in his personal capacity is not reviewable in this challenge to administrative fines brought under 2 U.S.C. § 437g(a)(4)(C)(iii).

1. The Commission's Treasurer Policy

During the administrative proceedings, plaintiffs' only argument was that Mr. Curry, the Committee's treasurer at the time the three late reports were due, was solely responsible for the violations and any civil money penalties, and so the FEC was required to pursue Mr. Curry in his personal capacity and not the Committee or its current treasurer.[26] Plaintiffs claimed that Mr. Curry willfully refused to timely file the reports or to permit the Committee to comply with the reporting requirements, and that his actions therefore met the requirements in the Commission's treasurer policy for pursuing a treasurer in his personal capacity. But plaintiffs' arguments are based on a fundamental misunderstanding of the statute and the Commission's treasurer policy, and they were correctly rejected by the Commission when it adopted the October 2011 final recommendation of the Reviewing Officer.

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 . . .").

In view of the treasurer's role, when the Commission makes a determination in an enforcement matter under 2 U.S.C. § 437g(a), including a reason-to-believe finding and final determination for an administrative fine, it has been the Commission's practice to name both the political committee and its current treasurer as respondents. As the Commission explained:

[26] *(See* AF# 2199 at AR016-AR017, AR093-AR095; AF# 2312 at AR030-AR032, AR097-AR099; AF# 2355 at AR025-AR027, AR090-AR092.)

> [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 that may exist for all practical purposes for a limited period, such as during a single election cycle. Due to these characteristics, identifying a live person who is responsible for representing the committee in an enforcement action is particularly important. 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. By virtue of their authority to disburse funds and file disclosure reports and to amend those reports, treasurers of committees are in the best position to carry out the requirements of a conciliation agreement such as paying a civil penalty, refunding or disgorging contributions, and amending reports.

Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings ("Treasurer Policy"), 70 Fed. Reg. 3 (Jan. 3, 2005).

Since 2005, when the Commission issued its Treasurer Policy, the Commission has explicitly named the current treasurer in his or her official or representative capacity. Treasurer Policy, 70 Fed. Reg. at 6.[27] In April 2010, the Commission extended this practice to administrative fines cases. *See* Memorandum to the Commission re: New Procedures for Successor Treasurers in Administrative Fines Matters (April 2, 2010) (FEC Exhibit 2); Certification (April 16, 2010) (FEC Exhibit 3). The practice of naming the current treasurer in his or her official capacity emphasizes that "the Commission is pursuing the official position (and therefore, the entity), not the individual holding the position." Treasurer Policy, 70 Fed. Reg. at 6 (citing *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989)). It "ensures that a named individual . . . is the one empowered by law to disburse committee funds to pay a civil penalty" and perform other remedial actions required by the Commission. *Id.*, 70 Fed. Reg. at 4.

[27] Thus, if a violation occurs but the committee's treasurer changes before the Commission makes its initial reason-to-believe finding, the current treasurer is named in his or her official capacity. *Id.* When the committee treasurer changes after the initial reason-to-believe finding, the Commission substitutes the new, successor treasurer in his or her official capacity, much as courts substitute government officials as parties in litigation. *See id*.

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. *Id.* at 6. The decision to pursue a committee treasurer in an official or personal capacity is part of the Commission's law enforcement discretion. *Id.* at 3 and n.2. But regardless, it does not, by itself, absolve a committee of responsibility for its own FECA violations. *Id.* at 4-6.

2. The Commission Properly Adopted the Reviewing Officer's Analysis and Recommendations in the Administrative Fines Matters Under Review

In the three administrative fines challenged by plaintiffs, the Commission scrupulously followed the Treasurer Policy. In AF# 2199, the Commission found reason to believe in December 2010 that both the Committee and Mr. Curry had violated 2 U.S.C. § 434(a). This finding was against Mr. Curry in his official capacity, not in his personal capacity. (AF# 2199 at AR008, AR009.) After the Committee filed an amended statement of organization in January 2011 naming David Wiggs as treasurer, Mr. Wiggs became the official representative of the Committee. And, accordingly, the Commission thereafter named Mr. Wiggs as the individual respondent in his official capacity in AF# 2199. Similarly, when the Commission made its initial reason-to-believe findings in AF## 2312 and 2355 in March 2011, it named Mr. Wiggs as a respondent in his official capacity. (AF# 2312 at AR020, AR026; AF# 2355 at AR014, AR021.)

Plaintiffs claim (Pls.' Mem. (Doc. 18-1) at 20-27) that the Commission should have made its determination and assessed penalties against only Mr. Curry, and that doing so would have precluded action against either the Committee or its current treasurer. Plaintiffs are wrong.

The Reviewing Officer's recommendation expressly addressed and rejected plaintiffs' argument, relying on advice from the Commission's Office of General Counsel ("OGC"), who explained that pursuing Mr. Curry in his personal capacity

> would be a *departure from the Commission's usual practice* in administrative fine matters, wherein the Commission names Treasurers solely in their official capacity and substitutes successor treasurers for predecessor Treasurers. . . . Although a treasurer may be pursued in personal capacity under the enforcement policy, the Commission would only do so when information indicates that the treasurer "knowingly and willfully" violated a provision of the Act or regulations, or has recklessly failed to fulfill duties specifically imposed on treasurers by the Act, or intentionally deprived himself or herself of the operative facts giving rise to a violation.

(AF# 2199 at AR103 (emphasis added); AF# 2312 at AR107 (same); AF# 2355 at AR100 (same).)[28] After correctly describing the limited circumstances when the Commission would pursue a treasurer personally, the Reviewing Officer directly addressed — and again rejected — plaintiffs' contention that Mr. Curry should be held liable for these violations:

> OGC notes that accepting the Committee's allegations as accurate would not be sufficient to support findings that Mr. Curry knowingly and willfully acted to prevent the Committee from timely filing and that available information is incomplete without Mr. Curry's side of the story. If the Commission determines that the Committee has raised questions of recklessness, on Mr. Curry's part, that are sufficient to explore pursuing, the matter should be transferred to OGC for processing in the enforcement context. . . .
>
> OGC concludes that the Committee's allegations against Mr. Curry are consistent with an individual who has resigned or is transitioning out of office. They note that Mr. Curry did not prevent the Committee from filing its reports or appointing a new treasurer and that his contacts with RAD asking questions about the reports were not consistent with a deliberate effort to prevent the timely filing of the reports.

(AF# 2199 at AR103-104; AF# 2312 at AR107-AR108; AF# 2355 at AR100-AR101.)

The Reviewing Officer's analysis then concluded:

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[28] The OGC memorandum was attached to the Reviewing Officer's final recommendation to the Commission. **(***See* AF# 2199 at AR096-AR100; AF# 2312 at AR113-AR117; AF# 2355 at AR106-AR110.)

> Whether or not the Commission pursues Mr. Curry in his personal capacity, *the Committee would not be legally absolved of the reporting violations or civil money penalties in these cases, as the Committee was responsible for filing the reports timely and failed to do so*. 2 U.S.C. § 434(a) and 11 C.F.R. § 104.5.

(AF# 2199 at AR103-AR104 (emphasis added); AF# 2312 at AR107-AR108 (same); AF# 2355 at AR100-AR101 (same).)

Thus, as the Reviewing Officer noted, there is no basis to conclude as a matter of law or fact that Mr. Curry prevented Combat Veterans from filing its reports or that an enforcement action against him would relieve Combat Veterans of responsibility for its own late reports.[29]

Although the Reviewing Officer suggested that the Commission consider Mr. Curry's "personal responsibility" in these matters, she ultimately recommended that the Commission make final determinations only as to the Committee and the current treasurer in his official capacity.[31] The Commission voted 6-0 to adopt the Reviewing Officer's recommendations in all three matters, made final determinations, and assessed civil penalties against both the Committee and Mr. Wiggs in his official capacity as treasurer.[32]

3. Plaintiffs' Claims That the Committee's Former Treasurer Should Be Held Solely Liable for the Committee's Late Reports Are Without Merit

Before this Court, plaintiffs raise essentially the same arguments regarding the former treasurer's liability that the Commission correctly rejected in the administrative proceeding.

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29 Combat Veterans, like any other principal, has a duty to supervise its agent and is responsible for the agent's actions within the scope of his authority. *See* Restatement (Third) of Agency sec. 1.01 (agency is a fiduciary relationship in which an agent "shall act on a principal's behalf and subject to the principal's control"); sec. 7.05(1) (a principal is subject to liability for harm caused by an agent to a third party if that harm "was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent") (2006).

31 (AF# 2312 at AR108; AF# 2355 at AR101.)

32 (AF# 2199 at AR114-AR115; AF# 2312 at AR118-AR119; AF# 2355 at AR111-112.)

Plaintiffs' claims that treasurers alone are required to file FECA reports and that "Congress did not impose reporting obligations on political committees themselves" (Pls.' Mem. at 20) are contrary to the plain language of the Act, which states that "[a]ll *political committees* other than authorized committees of a candidate shall file" periodic reports of their financial activities. 2 U.S.C. § 434(a)(4) (emphasis added). Plaintiffs cite no legal authority that contradicts the plain language of section 434(a), which, along with 11 C.F.R. § 104.5, places responsibility upon both political committees and their treasurers, as the Reviewing Officer noted. Nothing in the FEC's Treasurer Policy or the court decisions upon which plaintiffs rely (Pls.' Mem. at 20-22) preclude the Commission from proceeding against both a committee and its treasurer for a violation — even in the unusual case in which the Commission decides that a treasurer should also be held personally liable. *See* Treasurer Policy, 70 Fed. Reg. at 3.

Plaintiffs' reliance (Pls.' Mem. at 22) on FEC Advisory Opinion 1995-10 (Helms for Senate Committee), *available at* 1995 WL 385463 (FEC April 27, 1995), is misplaced. That opinion, although it predates the Commission's 2005 Treasurer Policy, is consistent with that Policy and the Commission's determinations here. In that advisory opinion, the Commission recognized that "[t]he Act and Commission regulations impose [recordkeeping and reporting] duties and obligations upon every political committee[,] and the committee's treasurer has the primary and personal duty to perform them." In evaluating that matter, the Commission concluded that regardless of whether the

> [Helms] Committee prevails in its further efforts to obtain the records held by [its] former treasurer, the Committee's obligations (and those of its current treasurer) to comply with all the disclosure requirements, contribution limits and prohibitions and all other provisions of the Act and Commission regulations remain unaffected by the dispute. In short, the Committee and its [current] treasurer are in the same position regarding those obligations as would be the case if there was no dispute. This means, for example, that the

> [current] treasurer is personally responsible for the timely filing of complete and accurate reports.

AO 1995-10 (citing former 11 C.F.R. § 104.14(d) (1995)). Thus, plaintiffs' assertion (Pls.' Mem. at 23) that former treasurers are *solely* liable for late-reporting violations finds no support in AO 1995-10.

In any event, the record contradicts plaintiffs' claim that the Commission failed to consider whether to pursue Mr. Curry personally. In fact, as detailed above, the FEC Reviewing Officer explicitly raised that issue, and ultimately recommended that the Commission instead make final determinations against the Committee and Mr. Wiggs in his official capacity. *See supra* pp. 19-21. As the Reviewing Officer's December 2, 2011, analysis regarding plaintiffs' request for withdrawal and reconsideration noted, "[b]y making the final determinations as recommended in that memorandum, the Commission considered all the issues raised in the memorandum, including the liability of the Committee's former Treasurer and the Committee's liability."[33] The Commission weighed the factors involved and decided not to pursue Mr. Curry in his personal capacity. Plaintiffs have provided no basis for the Court to overturn the Commission's decision, which is entitled to considerable deference. *DSCC*, 454 U.S. at 37; *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986).[34]

Finally, judicial review here is limited to the Commission's final determinations and civil penalties against plaintiffs, not whether the FEC should have pursued a third party like Mr. Curry. Any prosecutorial decision *not* to pursue enforcement against a particular person could

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[33] (AF# 2199 at AR128 n.1; AF# 2312 at AR132 n.1; AF# 2355 at AR125 n.1.)

[34] Plaintiffs advance policy arguments for pursuing Mr. Curry personally (Pls.' Mem. at 27-31), but such policy decisions are the prerogative of Congress and the Commission. Moreover, plaintiffs' argument that political committees should not be responsible for the actions of their own treasurers is out of step with the purpose of the Act and Commission regulations since there would be less incentive for committees to select responsible people as treasurers or to supervise or replace faulty treasurers.

only be challenged, if at all, in a suit brought pursuant to 2 U.S.C. § 437g(a)(8) following the dismissal of an administrative complaint. Neither of those preconditions are satisfied here, nor do plaintiffs attempt to invoke the jurisdiction of this Court pursuant to section 437g(a)(8)(A). Without such facts and allegations, this Court has no basis to review the Commission's decision not to pursue Mr. Curry personally.

C. Plaintiffs' Newly-Raised Challenges to the Commission's Actions Are Waived, and in Any Event, Are Without Merit

Apparently recognizing that their efforts to avoid liability for the late-filed reports and resulting administrative fines are without merit, plaintiffs assert several new legal arguments here that were never properly raised before the Commission and are therefore waived. Even if the Court were to consider these new arguments, they are without merit and should be rejected.

1. Plaintiffs' Additional Arguments Were Not Presented During the Administrative Proceedings and Are Waived

It is well settled that plaintiffs are precluded from raising before a reviewing court any arguments not presented to an agency in the administrative proceedings under review. *See Dakota Underground, Inc.*, 200 F.3d at 567. Judicial review of an agency determination, like the Commission's final determinations in administrative fines matters, may be based solely upon the administrative record that was before the agency at the time of the decision. *Florida Power & Light Co.*, 470 U.S. at 743.

This principle is explicitly set out in the Commission's regulations governing the administrative fines program. *See* 11 C.F.R. § 111.35; *supra* pp 5-7. Indeed, the regulations specify that responses to the Reviewing Officer's recommendation to the Commission regarding making final determinations "*may not raise any arguments not raised in the respondent's original written response or not directly responsive to the reviewing officer's recommendation*." 11 C.F.R. § 111.36(f) (emphasis added). Finally, the regulations make clear that arguments not

timely raised are waived in a later court challenge: "The respondent's failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. 437g." 11 C.F.R. § 111.38. "'Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.'" *Cunningham*, 2002 WL 31431557, at *4 (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)). "Thus, any objections not made before the administrative agency are subsequently waived before the courts." *Id.* (citation and footnote omitted).[35]

2. The Commission Was Not Required to Mitigate or Reduce the Civil Money Penalties Assessed Against the Committee and Its Treasurer

Plaintiffs argue — for the first time — that the civil money penalties assessed by the Commission are unlawful because the Commission did not reduce or mitigate the penalties to reflect the alleged "misconduct and personal liability of the former treasurer" (Pls.' Mem. at 32) and because the penalty amounts purportedly are unfair. This new contention also fails.

First, plaintiffs' arguments regarding the dollar amounts of the final civil money penalties are foreclosed because plaintiffs did not raise them in a timely manner before the Commission. Although plaintiffs argued in both their initial challenges and responses to the Reviewing Officer's recommendations that Mr. Curry was solely liable for the penalties, respondents never

[35] Similarly, plaintiffs challenging FEC final determinations and civil money penalties cannot rely upon documents that are not submitted to the agency during the administrative fines proceeding. "The Supreme Court has repeatedly made clear that, when reviewing the decision of an administrative agency, a court may only consider the evidence that was before the agency." *Cunningham*, 2002 WL 31431557, at *5 n.3 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973); other citation omitted).

suggested prior to the Commission's final determinations that, if the Committee and Mr. Wiggs were liable for the penalties, the dollar amounts of the penalties assessed against them should be reduced or mitigated.[36]

Second, civil money penalties in administrative fines matters are fixed by the penalty schedule in the Commission's regulations, 11 C.F.R. § 111.43, and "[t]he Commission will modify the proposed civil money penalty only if the respondent is able to demonstrate that the amount of the proposed civil money penalty was calculated on an incorrect basis." 11 C.F.R. § 111.37(c). Plaintiffs claim (Pls.' Mem. at 31) that the OGC's memorandum and the Reviewing Officer's subsequent recommendation indicate that the Commission has authority to mitigate penalties in the administrative fines proceedings for other reasons, but those discussions referred to the Act's more elaborate enforcement procedures typically reserved for more serious and complex matters, not the administrative fines matters at issue here. *See* 2 U.S.C. §§ 437g(a)(3)-(6).[37] The Commission — the decision-maker under the Act — properly followed its regulation to calculate the penalties, and plaintiffs can point to no error in those calculations.[38]

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[36] While the Committee and Mr. Wiggs did request mitigation in a communication to the Commission several weeks *after* the final determinations had been made (AF# 2199 at AR132; AF# 2312 at AR128; AF# 2355 at AR121), that is insufficient to preserve the issue when, as here, the Commission declined respondents' invitation to reconsider its final determinations. As the Reviewing Officer explained, "[t]he Commission's administrative fines procedures do not contemplate any reconsideration or rehearing of an administrative fines matter after the Commission's final determination." (AF# 2199 at AR128; AF# 2312 at AR132; AF# 2355 at AR125.)

[37] (*See* AF# 2199 at AR103-AR104, AR113; AF# 2312 at AR107-AR108, AR117; AF# 2355 at AR100-AR101, AR110.).

[38] Plaintiffs make several other meritless claims regarding the penalties. Plaintiffs claim that the fines here are unreasonable because they are greater than the penalties paid in several specific enforcement matters for violations involving other FECA provisions. (Pls.' Mem. at 32.) But the penalties for these other violations were part of negotiated conciliation agreements obtained by the Commission in regular enforcement proceedings, *see* 2 U.S.C. § 437g(a)(4), not penalties for late- or non-filing violations calculated under the Commission's administrative fine regulations. Plaintiffs also criticize the regulations' formula because it treats

Third, plaintiffs' First Amendment and Due Process arguments (Pls.' Mem. at 34-36), first raised after the Commission's final determinations, also lack merit. These arguments rest in part upon plaintiffs' claim that the final determinations and penalties stemmed from "conduct they did not commit and for which the underlying law does not hold them responsible" (*id.* at 35), but this is simply incorrect. The treasurer's conduct does not absolve the Committee. *See supra* pp. 19-24. Moreover, plaintiffs' argument (Pls.' Mem. at 35) — that the "mere finding" that the Committee and its treasurer violated 2 U.S.C. § 434(b) "stigmatizes [them] as lawbreakers and would likely discourage donors from making contributions to [the Committee] or otherwise volunteering or association with" the Committee, and would therefore chill their First Amendment rights — finds no support in the case law or the Constitution itself. This breathtaking attack on the Commission's law enforcement role would call into question every attempt by the Commission to redress violations of the Act. In any event, the civil money penalties plaintiffs must pay "in no way" limit their speech. *Cox for U.S. Senate*, 2004 WL 783435, at *11. And more generally, the Supreme Court has repeatedly upheld the Act's disclosure requirements against constitutional challenges because they serve a substantial interest in protecting the democratic process from corruption and its appearance. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 67 (1976); *Citizens United v. FEC*, 130 S. Ct. 876, 914-917 (2010).

Finally, plaintiffs claim (Pls.' Mem. at 35-36) that the financial costs of the penalties and this lawsuit render the Commission's final determination unconstitutional, but that argument is also way off the mark. Plaintiffs have conceded that the penalties are in accord with the Commission's penalty schedule, which reflects in significant part Combat Veterans' own 2010

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reports filed more than a specified number of days late as having not been filed at all (Pls.' Mem. at 32-33; *see* 11 C.F.R. § 111.43(e)), suggesting that this encourages the filing of incomplete reports. However, filing incomplete or inaccurate reports is itself a potential violation of the Act that can lead to penalties.

financial activity, in categories ranging from $25,000 to $99,999. 11 C.F.R. § 111.43(a)-(b). The fact that plaintiffs might incur costs, either to challenge or pay the penalty, makes them no different from the respondent in any other civil enforcement proceeding. Accepting this meritless argument would call into question the government's ability to enforce statutory requirements against anyone with limited means.

3. The Commission's Voting Procedures Are Consistent with FECA

Plaintiffs also assert that the streamlined voting process the Commission employs in certain routine matters — including the *non-final* reason-to-believe findings in the administrative fines matters at issue here — resulted in reason-to-believe findings against plaintiffs without an "affirmative" vote of four Commissioners as required by 2 U.S.C. § 437g(a)(2). But plaintiffs' formalism elevates semantics over FECA's substance, which requires no particular method of determining whether Commissioners approve staff recommendations in these matters. Nor can plaintiffs claim to have suffered any prejudice because of these Commission procedures, which are consistent with the Act and afforded plaintiffs the same opportunity to respond that plaintiffs would have had under the procedures plaintiffs apparently favor.

Pursuant to the Commission's statutory authority to promulgate its own "rules for the conduct of its activities," 2 U.S.C. § 437c(e), the Commission has adopted streamlined voting procedures for the FEC's six Commissioners to vote on routine matters, thereby freeing the Commissioners to devote more of their time to the many complex tasks involved in enforcing and administering federal campaign finance statutes. The Commission's voting procedures are set forth in FEC Directive 52 (FEC Exhibit 1) at 3, which provides that each matter to be voted upon is circulated to the Commissioners in one of two ways: (1) by a 24-hour "no-objection" ballot or (2) by a "tally vote." Routine matters are circulated by FEC staff using the first method, a 24-hour, no-objection ballot. Appended to each such ballot is the recommendation on

which the Commissioners are to vote; for example, the recommendation in this case was that the Commission "[f]ind reason to believe that [plaintiffs] . . . violated 2 U.S.C. 434(a)." (AF# 2199 at AR003; AF# 2312 at AR010; AF# 2355 at AR003.) A Commissioner who agrees with the recommendation being voted upon may vote in favor of that recommendation by submitting a ballot marked "I do not object to the attached report" (*see* AF# 2199 at AR001; AF# 2312 at AR008; AF# 2355 at AR001), or can opt to submit no objection to the recommendation within a 24-hour period. Under Directive 52, either of these options constitutes a vote to approve the recommendation. *See* FEC Directive 52 at 3. More complex matters are circulated on a "tally vote," the second method. *See id*. at 2. Under this procedure, each Commissioner has approximately one week to indicate agreement with or objection to the recommendation being voted upon. Commissioners who do not submit a tally-vote ballot by the deadline are considered not to have voted on the matter.

In administrative fines cases, the FEC's Commissioners make the initial reason-to-believe findings via no-objection ballots.[40] The reason for this is simple: By definition, a matter enters the administrative fines program only if the alleged wrongdoing is a failure to file a timely disclosure report. *See* 2 U.S.C. § 437g(a)(4)(C)(i). Thus, the only meaningful questions presented in a reason-to-believe finding in such cases are (1) when was the report due, and (2) when the report was filed. (*See, e.g.*, AF# 2199 at AR004.) If the report was not filed when it was due, there will almost always be reason to believe that section 434(a) was violated. Further inquiry or analysis on the part of the Commissioners is rarely required at this stage, which does

[40] The other categories of matters circulated to the Commissioners on no-objection ballots are (1) personnel decisions, (2) "items that have no substantive recommendations of first impression," (3) approval of documents to which the Commission has given prior acceptance subject to specified modifications, and (4) final determinations in uncontested administrative fines cases. *See* FEC Directive 52 at 3.

not involve a final determination of the matter in any event. Accordingly, reason-to-believe findings in administrative fines cases are ideal for the streamlined, no-objection process.

Nonetheless, plaintiffs essentially argue — without citation — that a reason-to-believe finding in an administrative fines case must be circulated under something akin to the Commission's tally-vote system — rather than on a no-objection ballot — for the Commissioners' votes to be sufficiently "affirmative" under section 437g(a)(2). Plaintiffs' failure to cite a single case in support of this proposition is hardly surprising; it contravenes the well-established principle that "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." S*ee Vermont Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.*, 435 U.S. 519, 542-543 (1978) (internal quotation marks and citation omitted) (holding that courts cannot require agencies to implement procedures beyond those required by statute).

Neither section 437g(a)(2) nor any other provision of FECA specifies the precise method by which the Commissioners are to indicate whether they approve staff recommendations, and no statute requires the Commission to employ the same voting procedures for all enforcement matters. To the contrary, as discussed *supra* p. 3-4, Congress created the administrative fines process to streamline and procedurally *distinguish* routine reporting violations from more complex matters. Thus, determining administrative fines through the same internal mechanisms as every other enforcement matter would defeat Congress's purpose in creating the program. Far from contradicting FECA, the Commission's decision to implement this "traffic ticket"

system through a highly efficient voting process faithfully implements Congress's intent in creating a separate enforcement mechanism for such cases.[41]

Even if the Court were to find that the Commission's internal procedures are inconsistent with FECA, any error resulting from such inconsistency would cause no harm to plaintiffs. *See* 5 U.S.C. § 706 (instructing courts to consider whether agencies' procedural errors are prejudicial); *First Am. Discount Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) ("As incorporated into [§ 706], the harmless error rule requires the party asserting error to demonstrate prejudice from the error." (internal quotation marks and citations omitted)). The reason-to-believe stage in FECA's enforcement procedures is not a determination of liability; it merely marks the point at which the respondents are notified of the allegations against them and given an opportunity to respond. *See* 2 U.S.C. §§ 437g(a)(2)-(3). Plaintiffs here do not deny that they received timely notice of the Commission's findings, and they took full advantage of their opportunity to respond. And the Commission's ultimate vote to approve the final determination was conducted by a "tally vote," approved unanimously by all six Commissioners. Thus, plaintiffs received all of the procedural protections to which they were entitled after the reason-to-believe findings were made, regardless of the procedure by which those findings were voted upon. Any errors in the Commission's votes to find reason to believe were, accordingly, harmless. *See Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) (holding that agency's procedural error in adjudication against plaintiff was harmless because plaintiff "had notice from

[41] Plaintiffs also state that "there also appears to be some question as to whether some [ballots] were . . . improperly signed by another," and so "this Court can and should summarily set aside the Commission's determinations." (Pls.' Mem. at 17.) Plaintiffs cite no authority whatsoever for their assertion that the Commissioners' signatures were "improper," and that assertion has no merit. *See* FEC Directive 52 at 4-5 (providing that a Commissioner may direct another person to physically indicate the Commissioner's decision on a ballot "in a purely ministerial capacity").

the outset of the nature of the charges against him" and could not "suggest a single thing he would have done differently" absent the error); *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) (holding that possible error in agency's initial public notice was harmless because agency subsequently provided affected entities with full notice and opportunity to be heard); *Air Canada v. Dep't of Transp.*, 148 F.3d 1142, 1156-57 (D.C. Cir. 1998) (holding agency's errors in adjudication harmless where plaintiff was given ample opportunity to present its case).[42]

4. FECA Does Not Require the Commission to Hold Hearings in Administrative Fines Cases

Plaintiffs finally argue that the Commission acted unlawfully by making a final determination of plaintiffs' liability without first giving them an opportunity to plead their case in person before the Commission. This claim fares no better than the others. FECA does not preclude the Commission from assessing an administrative fine in the absence of a hearing at which the respondent can make an oral presentation. In this case, plaintiffs submitted written objections to the Commission's reason-to-believe findings — objections that the Commission considered and ultimately rejected in writing — and thus had ample "opportunity to be heard" before the Commission in compliance with FECA.

[42] Plaintiffs' assertion (Pls.' Mem. at 19; Am. Pet. ¶ 77) that the Commission's vote to approve a staff recommendation does not constitute a "determination" by the Commission itself is frivolous. Plaintiffs identify no functional or legal difference between approving a recommendation to find that plaintiffs violated the law and finding that plaintiffs violated the law. In reality, no such difference exists, for when the Commission votes to approve a staff recommendation, that recommendation becomes the Commission's official determination, 11 C.F.R. § 111.37(d), just as magistrate judges' recommendations are frequently adopted by district judges. *See* Fed. R. Civ. P. 72; LCvR 73.1(c); *El-Amin v. George Wash. Univ.*, 626 F. Supp. 2d 1, 3 (D.D.C. 2009) ("[T]he Court shall adopt [the] Report and Recommendations in its entirety . . . .").

It is an axiomatic principle of administrative law that agencies are not required to adopt procedures beyond those that Congress has mandated by statute. *See Vermont Yankee*, 435 U.S. at 519, 542-543; *Nuclear Info. Res. Serv. v. Nuclear Regulatory Comm'n*, 969 F.2d 1169, 1174 (D.C. Cir. 1992) (citing *Vermont Yankee*); *Halvonik v. Kappos*, 759 F. Supp. 2d 31, 36 (D.D.C. 2011) ("The freedom of agencies to fashion their own procedural rules has been described as the very basic tenet of administrative law, and agencies therefore retain broad discretion in determining and administering their own procedures." (internal quotation marks and citations omitted)).

Here, FECA requires the Commission to provide respondents in administrative fines cases with "an opportunity to be heard before the Commission." 2 U.S.C. § 437g(a)(4)(C)(ii). "Opportunity to be heard" is a common statutory term, appearing dozens of times in the United States Code and the Federal Rules of Civil Procedure: It refers to an opportunity to present evidence or arguments in some form, including through written submission, but not necessarily in an oral hearing. *See, e.g.*, 2 U.S.C. § 1406 ("The parties . . . shall have a reasonable opportunity to be heard, through *written submission* and, in the discretion of the Board, through oral argument." (emphasis added)); 7 U.S.C. § 93 (requiring agency to provide "hearings *or* reasonable opportunities to be heard") (emphasis added); *Cobell v. Norton*, 226 F.R.D. 67, 90 (D.D.C. 2005) ("The Court has afforded the parties the opportunity to be heard through their *written submissions*, which is sufficient to satisfy the [opportunity to be heard] requirement of Rule 37." (emphasis added)). The plain text of the relevant portion of FECA — which requires merely "an opportunity to be heard," with no reference to oral advocacy — therefore does not require the Commission to hold an oral hearing in an administrative fines case.

The only authorities plaintiffs cite for their reading of the statute are two FECA provisions that specifically give respondents a right to file written materials with the Commission. (*See* Pls.' Mem. at 37 (quoting 2 U.S.C. §§ 437g(a)(1), (3).) According to plaintiffs, the references to written materials in these other provisions, when read in combination with the absence of such a reference in section 437g(a)(4)(C)(ii), demonstrates Congress's intent not to limit respondents' opportunity to be heard in administrative fines cases to written presentations. Section 437g(a)(4)(C)(ii) undoubtedly does not *preclude* the Commission from holding oral hearings, but plaintiffs' interpretation is particularly weak given that the contrasting provisions of section 437g(a) plaintiffs rely upon address the Commission's process for remedying *more serious* violations of the Act. It defies logic to think that Congress would have required oral hearings in the new streamlined administrative fines process for fining late filers of reports, while *not* requiring such formal procedures for the most serious violations of the Act.

Instead, because the phrase "opportunity to be heard" can encompass oral or written advocacy, the most logical conclusion to draw from Congress's omission of a format specification in the administrative fines context is that Congress was simply leaving this procedural decision up to the Commission. *See Vermont Yankee*, 435 U.S. at 524 ("[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments."); *Nuclear Info. Resource Serv.*, 969 F.2d at 1174 (holding that requiring agency to implement hearing procedures not specified in statute could "violate the Supreme Court's admonition in [*Vermont Yankee*] against the judicial fashioning of administrative procedures that neither Congress nor the agency has sanctioned"); *see also HolRail, LLC v. Surface Transp. Bd.*, 515 F.3d 1313, 1318 (D.C. Cir. 2008) (same). Indeed, such delegation is

entirely consistent with the congressional intent discussed above to provide the Commission with the ability to process routine reporting violations quickly. *See supra* pp. 3-4. Thus, plaintiffs' attempt to import an oral advocacy requirement into the Commission's administrative fines procedure lacks any basis either in the statutory text or in the congressional intent underlying that text.[43]

CONCLUSION

Plaintiffs conceded during the administrative process that they did not meet any of the criteria for a successful challenge to the fines assessed against them, and they cannot avoid liability by blaming the Committee's own agent for the late filings made on the Committee's behalf. After the Commission's final determinations, plaintiffs raised new arguments, but they were all raised too late and they all lack merit. The Commission's motion for summary judgment should be granted and plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

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[43] Although a heading in plaintiffs' brief states that a hearing is also required by "Due Process," the only textual reference in plaintiffs' brief to constitutional Due Process requirements is an unexplained block quote that says nothing about oral hearings. (*See* Pls.' Mem. at 38 (quoting *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972)).) To the extent plaintiffs nonetheless intend to raise a constitutional claim, it fails. *See Mathews v. Eldridge* 424 U.S. 319, 344 (1976) (holding that Due Process requirements are satisfied by opportunity to submit position to agency in writing for cases adjudicated largely on basis of "'routine, standard . . . reports'" and where requiring oral hearings would place undue burden on agency); *CS-360, LLC v. Dep't of Veteran Affairs*, No. 11-00078__, F. Supp. 2d __, 2012 WL 718374, at *20 (D.D.C. Mar. 6, 2012) (rejecting argument that agency's process was constitutionally insufficient where plaintiff "was advised of the basis for the [agency's] initial determination in a written decision; . . . afforded the opportunity to request reconsideration and to submit additional materials in support of that request; and . . . provided [with] a written explanation for [the agency's] final decision").

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