ORAL ARGUMENT NOT YET SCHEDULED

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 13-5358

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

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Harry J. Summers
Assistant General Counsel

Robert W. Bonham III (D.C. Bar No. 397859)
Senior Attorney

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

September 16, 2014

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), the Federal Election Commission ("FEC" or "Commission") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) ***Parties***. Combat Veterans for Congress Political Action Committee ("CVCPAC") and David H. Wiggs, in his official capacity as treasurer (collectively "CVC Parties"), were the plaintiffs in the district court and are the appellants in this Court. The FEC was the defendant in the district court and is the appellee in this Court. No parties intervened or participated as *amici curiae* in the district court, and no parties have asked to intervene or participate as *amici curiae* before this Court.

(B) ***Rulings Under Review***. Plaintiffs appeal the September 30, 2013 order of the United States District Court for the District of Columbia (Kollar-Kotelly, J.). The district court's opinion is reported at 983 F. Supp. 2d 1 (D.D.C. 2013). The district court's order and slip opinion appear in the Joint Appendix ("JA") at JA6 and JA7-JA36, respectively.

(C) ***Related Cases***. This case previously was before the United States District Court for the District of Columbia, captioned as *Combat Veterans for Congress Committee Political Action Committee v. FEC*, No. 1:11-cv-2168-CKK. This case was not previously before this Court. There are no related cases currently pending before this Court.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES[1]

Page

Cases

[1] Authorities upon which the FEC chiefly relies are marked with asterisks.

Statutes and Regulations

Congressional Materials

Federal Rules

Other Materials

GLOSSARY OF ABBREVIATIONS

Abbreviation	Definition
AF	Administrative Fine
CVCPAC	Combat Veterans for Congress Political Action Committee
CVC Parties	CVCPAC and its treasurer David H. Wiggs, in his official capacity
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
Sunshine Act	Government in the Sunshine Act

COUNTERSTATEMENT REGARDING JURISDICTION

The district court had jurisdiction to review the Federal Election Commission's ("Commission" or "FEC") final determinations in Administrative Fine ("AF") matters 2199, 2312, and 2355 pursuant to 52 U.S.C. 30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)).

The district did not have jurisdiction under 52 U.S.C. 30109 (former 2 U.S.C. 437g), 28 U.S.C. 1331, or 5 U.S.C. 701-706 to hear a challenge to the FEC's decision not to take action in these administrative fine matters against the former treasurer of Combat Veterans for Congress Political Action Committee ("CVCPAC"), Michael Curry, or to hear a challenge to the FEC's administrative fines regulations.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court correctly held that the FEC was not required to hold CVCPAC's former treasurer personally liable for CVCPAC's late reports.

2. Whether the district court correctly rejected the CVC Parties' claims that CVCPAC was not liable for its own reporting violations because its former treasurer allegedly was exclusively liable under FECA.

3. Whether the district court correctly rejected the CVC Parties' claims that the administrative fines for these three reporting violations, totaling $8,690, should have been lowered here.

4. Whether the district court correctly rejected the CVC Parties' claims that the FEC's "best efforts" regulation at 11 C.F.R. 111.35 is unlawful facially or as applied to these reporting violations.

5. Whether the district court correctly rejected the CVC Parties' challenges to the FEC's voting procedures that were not presented to the agency.

STATUTES

An addendum contains relevant statutory provisions.

COUNTERSTATEMENT OF THE CASE

This case challenges the FEC's unanimous final determinations in October 2011 that CVCPAC and David H. Wiggs, in his official capacity as treasurer, had violated 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)) by filing three federal campaign finance disclosure reports late, and the assessment of administrative fines totaling $8,690.[1] The CVC Parties timely petitioned the district court pursuant to 52 U.S.C. 30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)) to set aside or modify the FEC's administrative determinations and fines, alleging various substantive and procedural errors.

[1] Until recently, FECA's reporting and enforcement provisions were found in Title 2 of the United States Code. Those provisions, however, have now been moved to new Title 52. Since this appeal involves a challenge to FEC decisions prior to the reclassification and all record citations are to the prior statute, citations to both Title 2 and Title 52 are provided. A full transfer table is available at http://uscode.house.gov/editorialreclassification/t52/Reclassifications_Title_52.html.

The district court rejected all the CVC Parties' claims and granted summary judgment to the FEC. *Combat Veterans for Congress PAC v. FEC*, 983 F. Supp. 2d 1 (D.D.C. 2013) (found in the Joint Appendix ("JA") at JA7-JA36). The district court held that the FEC was not required to hold CVCPAC's former treasurer personally liable for the committee's late reports. The court also rejected the CVC Parties' related claim that CVCPAC was not liable for its own violations because of the former treasurer's conduct. In addition, the court held that the FEC was not required to mitigate the fines and that the "best efforts" standards in the FEC's administrative fines regulation at 11 C.F.R. 111.35 were not unlawful facially or as applied, and the district court rejected the CVC Parties' challenges to the agency's voting procedures that were not presented to the FEC. The CVC Parties timely appealed.

COUNTERSTATEMENT OF THE FACTS

A. The Parties and FECA

FECA provides a comprehensive system for regulation of the financing of federal election campaigns. Among other things, FECA imposes extensive requirements for public disclosure of contributions and expenditures made or received by political committees in connection with federal elections. 52 U.S.C. 30102-30104 (former 2 U.S.C. 432-434).

The FEC is an independent federal agency with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 52 U.S.C. 30106(b)(1), 30107(a), 30109 (former 2 U.S.C. 437c(b)(1), 437d(a), 437g). Congress empowered the FEC to "formulate policy with respect to" FECA, 52 U.S.C. 30106(b)(1) (former 2 U.S.C. 437c(b)(1)), and authorized it to make "such rules . . . as are necessary to carry out the provisions" of FECA. 52 U.S.C. 30107(a)(8), 30111(a)(8) (former 2 U.S.C. 437d(a)(8), 438(a)(8)). The FEC is authorized to make final determinations and assess civil penalties against committees and their treasurers for certain violations of the reporting provisions of FECA. 52 U.S.C. 30109(a)(5)(A)-(B) (former 2 U.S.C. 437g(a)(5)(A)-(B)). Political committees, through their treasurers, must file periodic reports detailing the committee's receipts and disbursements. 52 U.S.C. 30104(a)-(b) (former 2 U.S.C. 434(a)-(b)).

CVCPAC is a political committee under 52 U.S.C. 30101(4) (former 2 U.S.C. 431(4)). FECA requires each political committee to have a treasurer, who must be designated on the committee's statement of organization filed with the FEC. 52 U.S.C. 30102(a), 30103(b)(4) (former 2 U.S.C. 432(a), 433(b)(4)). The treasurer keeps records and files reports with the FEC on behalf of the committee. 52 U.S.C. 30102(c), 30102(d), 30104(a)(1) (former 2 U.S.C. 432(c), 432(d), 434(a)(1)).

B. FEC Compliance Procedures

1. General Provisions

Since the 1970s, FECA has provided a detailed administrative process for FEC review of alleged violations of FECA. *See* 52 U.S.C. 30109(a) (former 2 U.S.C. 437g(a)); *see also* 11 C.F.R. 111.3-111.24 (enforcement process regulations). Under FECA, if the FEC finds "reason to believe" that a violation has occurred, the FEC'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. 52 U.S.C. 30109(a)(1)-(3) (former 2 U.S.C. 437g(a)(1)-(3)). If the FEC 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. 52 U.S.C. 30109(a)(4)(A)(i) (former 2 U.S.C. 437g(a)(4)(A)(i)). If the FEC is unable to resolve the matter through voluntary conciliation, the FEC may file a *de novo* civil suit to enforce FECA in federal district court. 52 U.S.C. 30109(a)(6) (former 2 U.S.C. 437g(a)(6)).

2. 1999 Amendments Establishing the Administrative Fines Program

For many years, the FEC was required to address all violations of FECA under the general enforcement procedures above. In 1999, Congress amended FECA to add a streamlined administrative fines system for routine filing and

record-keeping violations, amending 52 U.S.C. 30109(a)(4) (former 2 U.S.C. 437g(a)(4)). Congress authorized the FEC to assess civil money penalties for violations involving FECA's reporting requirements codified at 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)).[2] 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 agency deal with minor violations of the law in an expeditious manner."[3] As part of the administrative fines program, after the FEC finds reason to believe a committee and its treasurer have failed to file a report (or filed a report late), the FEC may

> require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, 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.

52 U.S.C. 30109(a)(4)(C)(i)(II) (former 2 U.S.C. 437g(a)(4)(C)(i)(II)). This

---

[2] *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, as well as 48-hour notices (regarding contributions made after the 20th day, but more than 48 hours before the election). *Id*.

[3] 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (statement of Rep. Maloney). *See* 65 Cong. Rec. H8350 (daily ed. Sept. 15, 1999) (statement of Rep. Maloney).

program also provides for limited judicial review of the FEC'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.

52 U.S.C. 30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)).

3. The FEC's Administrative Fines Regulations

The FEC promulgated regulations implementing the 1999 amendments to FECA. *See* Administrative Fines, 65 Fed. Reg. 31,787 (May 19, 2000). The regulations created the schedule of penalties authorized by 52 U.S.C. 30109(a)(4)(C)(i)(II) (former 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). The FEC'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).[4] The FEC's Reports

[4] The number of days after the due date for a report to be deemed "not filed" varies depending on the type of report. 11 C.F.R. 111.43(e)(2). "Election

Analysis Division monitors the timeliness of these reports and, when necessary, makes written recommendations to the FEC regarding potential violations.

When the FEC determines, based on these recommendations, that it has "reason to believe" that a respondent has violated 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)), the FEC notifies the respondent of the FEC'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*.

If a respondent wishes make such a challenge, the respondent must file a written response with supporting documentation within 40 days of the date of the FEC's finding. 11 C.F.R. 111.35. A respondent's 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).

---

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. Otherwise, they are considered "not filed." 11 C.F.R. 111.43(d)(1),(e)(2). Similarly, non-election sensitive reports are considered "late" if filed within thirty days of their due date and "not filed" if filed more than 30 days after their due date. 11 C.F.R. 111.43(e)(1).

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 limited. The rules provide that certain specific circumstances are *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). Circumstances that are acceptable include severe weather or other disaster-related incidents, FEC computer and software failures, and certain widespread Internet disruptions. *Id*.

Timely-filed challenges to the FEC's reason-to-believe finding are reviewed by the FEC's Reviewing Officer. 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 FEC, 11 C.F.R. 111.36(e), which is also provided to the respondent, 11 C.F.R. 111.36(f). 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 FEC makes a final determination whether a violation of 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)) has occurred and whether to assess a civil penalty. 11 C.F.R. 111.37. When the FEC makes a final determination, the statement of reasons for the FEC's actions will, unless otherwise indicated by the FEC, consist of the reasons provided by the Reviewing Officer for the recommendation approved by the FEC. 11 C.F.R. 111.37(d).

If the FEC makes an adverse determination and imposes a penalty, the respondent has 30 days in which to petition a federal district court for judicial review. 52 U.S.C. 30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)). The FEC'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. Thus, judicial review is limited to the issues and facts raised before the FEC during the administrative proceeding. *See infra* pp. 36-42.

C. The Administrative Determinations in This Case

In 2010, CVCPAC and its treasurer opted to file quarterly – rather than monthly – reports with the FEC, as permitted by 52 U.S.C. 30104(a)(4)(A)

(former 2 U.S.C. 434(a)(4)(A)). (JA12.) The CVCPAC report for the third calendar quarter (ending September 30, 2010) was due on October 15, 2010. *See* 52 U.S.C. (30104(a)(4)(A)(i) (former 2 U.S.C. 434(a)(4)(A)(i)). In addition, CVCPAC was required to file a 12-Day Pre-General Election Report by October 21, 2010 because it met the legal standard of making either a contribution to or an expenditure on behalf of a candidate in the November 2010 general election. *See* 52 U.S.C. (30104(a)(4)(A)(ii) (former 2 U.S.C. 434(a)(4)(A)(ii)). Finally, CVCPAC was required to file a 30-Day Post-General Election Report, which was due on December 2, 2010. *See* 52 U.S.C. 30104(a)(4)(A)(iii) (former 2 U.S.C. 434(a)(4)(A)(iii)). The CVCPAC treasurer was required to file these reports electronically with the FEC before the respective statutory deadlines. *See* 52 U.S.C. 30104(a)(1) (former 2 U.S.C. 434(a)(1)); 11 C.F.R. 104.1(a), 104.14.

CVCPAC failed to meet these three deadlines, so the FEC's Reports Analysis Division sent non-filer notices to CVCPAC and its treasurer, 52 U.S.C. 30109(b) (former 2 U.S.C. 437g(b)).[5] (JA12; *see* JA132, JA290, JA367.) That division also prepared written recommendations to the FEC. (*See* JA98-JA101, JA226-JA232, JA331-JA337.) In each matter, the Reports Analysis Division's recommendation was that the FEC find "reason to believe" that CVCPAC and its

[5] Each report was the subject of a separate administrative fines matter, designated AF#2199, AF#2312, and AF#2355.

treasurer had violated 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)) by not filing the report by the respective statutory deadline and make a preliminary determination that the fine would be assessed at a specific amount in accord with the FEC's fine schedule at 11 C.F.R. 111.43. (JA13-JA14; *see* JA98-JA101, JA226-JA232, JA331-JA337.) Pursuant to established procedures, the recommendations were circulated to the Commission on a no-objection basis and no Commissioners objected. (FEC Directive 52 (Sept. 10, 2008) (CVC Parties' Corrected Addendum ("CVC Parties Add.") at 59); *see* JA98-JA105, JA226-JA243, JA331-350) The FEC Secretary and Clerk certified that the FEC had found reason to believe that CVCPAC and its treasurer violated 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)) and had made preliminary determinations setting the penalty for each violation. (JA13; *see* JA105, JA238, JA344.)

When the FEC found reason to believe in AF#2199 in December 2010, Michael Curry was CVCPAC's treasurer. (JA13, JA20-JA22.) Thus, he was named in the FEC's determination in his official capacity as treasurer. (JA13; *see* JA105, JA106.) On January 12, 2011, David H. Wiggs became treasurer, and so he was substituted as a named respondent in his official capacity under the FEC's policy on successor treasurers. (JA13; *see* FEC Directive 52 (CVC Parties' Add. 59).) In AF#2312 and AF#2355, Wiggs was treasurer at the time of the FEC's initial consideration and thus was named in the FEC's March

2011 reason-to-believe determinations, also in his official capacity as treasurer. (JA13; *see* JA238, JA244, JA344, JA351.)

In all three matters, CVCPAC's Chairman Joseph R. John submitted written "challenges" to the FEC's initial determinations on behalf of CVCPAC and its treasurer. (JA14-JA15; *see* JA110-JA115, JA248-JA250; JA355-JA357.) The Reviewing Officer subsequently prepared recommendations to the FEC regarding final determinations in all three matters, and those recommendations were also provided to the respondents. (JA14-JA15; *see* JA139-JA184, JA267-JA309.) The respondents submitted a combined response, and the Reviewing Officer then submitted final recommendations to the FEC. (JA14-JA15; *see* JA186-JA189.)

On October 27, 2011, the FEC unanimously adopted the Reviewing Officer's recommendations and made final determinations that CVCPAC and David H. Wiggs, in his official capacity as treasurer, had violated 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)). (JA14-JA15; *see* JA208-JA209.) The FEC assessed civil penalties in the amounts calculated at the reason-to-believe stage totaling $8,690. (*Id.*) Respondents were notified of these decisions as well as their options to pay the penalties or appeal the final determinations by filing suit pursuant to 52 U.S.C. 30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)). (JA14-JA15; *see* JA210-JA212, JA324-JA326, JA376-JA378.)

Instead, CVCPAC and its treasurer ("CVC Parties") submitted a letter to the FEC asserting new procedural and constitutional arguments and requesting an oral hearing. (JA15; *see* JA213-JA215.) The FEC's staff recommended that the agency deny respondents' requests for reconsideration. (JA15; *see* JA216-JA228.) The FEC unanimously adopted these recommendations and notified respondents. (JA15; *see* JA224.) On December 7, 2011, the CVC Parties filed a timely petition for review of the FEC's final determination. (JA15.)

D. Proceedings Before the District Court

The CVC Parties petitioned the district court to set aside or modify the FEC's three final administrative determinations and the fines totaling $8,690. (JA7, JA15.) The parties filed motions for summary judgment. (JA7, JA11, JA15.) On September 30, 2013, the district court rejected all the CVC Parties' claims and granted summary judgment to the FEC. (JA6, JA7-JA36) The CVC Parties appealed. (Notice of Appeal and Amended Notice of Appeal, No. 11-cv-2168-CKK (D.D.C. Nov. 26 and 29, 2013) (Docket Nos. 32 and 34).)

SUMMARY OF ARGUMENT

The district court correctly upheld the FEC's administrative determinations that the CVC Parties violated 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)) by filing three federal campaign finance reports late and the agency's assessment of penalties totaling $8,690. The CVC Parties' numerous complaints about the FEC's

determinations under the streamlined administrative fines procedures – including their frivolous central claim that the agency was *required* to impose penalties for the late reports *solely* on the former CVCPAC treasurer in his personal capacity – lack merit. Congress established the FEC's administrative fines program to handle routine reporting violations in a fair but efficient way, and that is what happened here.

The district court correctly rejected CVC Parties' claims regarding the former treasurer. 52 U.S.C. 30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)) provides jurisdiction for review only of the FEC's administrative fines determinations against CVCPAC and the current treasurer in his official capacity. None of the other jurisdictional provisions the CVC Parties cite provides jurisdiction for claims against the former treasurer. Even if jurisdiction existed for such claims, the FEC has broad prosecutorial discretion and is not required to take the unusual step of pursuing personal liability where the agency deems it unwarranted. The district court also correctly rejected CVC Parties' related claim that committees like CVCPAC cannot be liable for the late filing of their own reports because the treasurers' supposed personal liability is exclusive. There is simply no support for that position. CVCPAC is an independent legal entity with the responsibility to supervise its treasurers, who are its agents.

The FEC was not required to lower these fines below the amounts called for in its regulatory schedule of penalties. Although the FEC carefully considered the CVC Parties' responses and arguments in the administrative proceeding, the agency ultimately determined that those parties did not meet the limited "best efforts" standards at 11 C.F.R. 111.35, which is lawful facially and as applied here. The agency reasonably concluded that the former treasurer's conduct was consistent with negligence, which is not an acceptable basis to evade responsibility under the administrative fines regulations.

Finally, the district court correctly rejected the CVC Parties' many technical challenges to the FEC's voting procedures because they were not presented to the agency and were based upon documents outside of the administrative records. In any event, the FEC's voting procedures are consistent with FECA, and the CVC Parties cannot show they were harmed, since they had full notice of the allegations against them and took full advantage of the procedures available to defend themselves. Even if there were a technical defect with the no-objection voting procedure at the reason-to-believe stage, the FEC's later votes to make final determinations and assess the administrative fines were conducted by tally votes and unanimously approved by all six Commissioners. Thus, any error was plainly harmless and any remand would be futile. The CVC Parties' related Sunshine Act claims were waived, and they too lack merit.

Thus, the district court's decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

The Court's review of the district court's ruling is *de novo*. *WildEarth Guardians v. Jewell*, 738 F.3d 298, 305 (D.C. Cir. 2013)).

II. THE DISTRICT COURT CORRECTLY HELD THAT THE FEC WAS NOT REQUIRED TO HOLD THE FORMER TREASURER OF CVCPAC PERSONALLY LIABLE FOR THE COMMITTEE'S LATE REPORTS

The district court correctly rejected the CVC Parties' claim that the FEC was *required* to impose *personal* liability for CVCPAC's late reports on former treasurer Michael Curry. (JA24-JA26.) There is no jurisdiction to consider the claim as part of this challenge to the administrative fines imposed on CVCPAC and its current treasurer in his official capacity. And even if jurisdiction existed, the claim would be frivolous because the FEC has broad prosecutorial discretion and is not required to pursue personal liability where it is unwarranted.

A. There Is No Jurisdiction for the CVC Parties' Claim That CVCPAC's Former Treasurer Must Be Held Personally Liable

The district court first held that "this suit is not the proper vehicle for [the CVC Parties] to challenge the [FEC's] failure to take action against Mr. Curry." (JA24.) In particular, while "'[j]udicial review is available under FECA to complainants dissatisfied with the FEC's decisions not to investigate,' such review is pursuant to [former] 2 U.S.C. 437g(a)(8)(A)) [52 U.S.C. 30109(a)(8)(A)] which

sets out a specific process for challenging FEC failures to act on a complaint." (JA24 (quoting *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011) *appeal dismissed*, 725 F.3d 226 (D.C. Cir. 2013)).) But here, the district court explained, the CVC Parties "'do not contend that they filed a complaint against Mr. Curry pursuant to 2 U.S.C. 437g(a)(1) [52 U.S.C. 30109(a)(1)], which would entitle them to judicial review of FEC inaction on such complaint in this Court.'" (JA24-JA25; *see* 52 U.S.C. 30109(a)(8) (former 2 U.S.C. 437g(a)(8)) (suits limited to "part[ies] aggrieved by an order of the Commission dismissing a complaint filed by such party under [former 2 U.S.C. 437g(a)(1)]"); *Perot v. FEC*, 97 F.3d 553, 558-559 (D.C. Cir. 1996).)

The CVC Parties claim that they were not required to file an administrative complaint because they have also pled jurisdiction here under 28 U.S.C. 1331 and 5 U.S.C. 702-706. (CVC Parties' Corrected Brief ("Corrected Br.") at 41-42.) However, the FEC has exclusive jurisdiction over civil enforcement of FECA, and filing an administrative complaint is a prerequisite to judicial review of FEC enforcement decisions under 52 U.S.C. 30109(a)(8) (former 2 U.S.C. 437g(a)(8)). Thus, the CVC Parties' jurisdictional argument must fail.[6]

[6] The CVC Parties' claim that the Administrative Procedure Act, 5 U.S.C. 701-706 ("APA") also provides an independent jurisdictional basis for their voting-procedures challenges to the FEC's determinations here is also without merit. The APA does not confer jurisdiction, but only serves as a waiver of sovereign immunity to allow a private party to sue when jurisdiction already exists

B. The FEC Has Broad Prosecutorial Discretion and It Permissibly Decided Not to Take the Unusual Step of Pursuing CVCPAC's Former Treasurer in His Personal Capacity

As the district court held, "'*even if* this suit were the proper vehicle to challenge the Commission's failure to pursue Mr. Curry in his personal capacity[, the CVC Parties'] claims still lack merit. 'The FEC has broad discretionary power in determining whether to investigate a claim, and whether to pursue civil enforcement under [FECA].'" (JA25 (emphasis in original) (quoting *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010); citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).) Indeed, "the FEC enjoys 'considerable prosecutorial discretion' and 'its decisions to dismiss complaints are entitled to great deference . . . as long as it supplies *reasonable grounds*.'" (JA25 (quoting *Nader v. FEC*, 823 F. Supp. at 65)).) *See also Citizens for Responsibility and Ethics in Washington v. FEC*, 475 F.3d 337, 340 (D.C. Cir. 2007) (noting that "the Commission, like other Executive agencies, retains prosecutorial discretion"

---

under 28 U.S.C. 1331. *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *Stockman v. FEC*, 138 F.3d 144, 151 n.13 (5th Cir. 1998). Congress created 52 U.S.C.30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)) for challenges to final FEC administrative fine determinations. When "there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be *the exclusive means* of obtaining judicial review in those cases to which it applies." *Wagner v. FEC*, 717 F.3d 1007, 1011 (D.C. Cir. 2013) (certain parties may bring challenges to the constitutionality of FECA only under 52 U.S.C. 30110 (former 2 U.S.C. 437h)) (emphasis in original; quotations, citation and footnote omitted)).

(citing *FEC v. Akins*, 524 U.S. 11, 25 (1998))).

Since 2005, the FEC's policy in most circumstances is to impose liability for late reports on a committee and its treasurer, in his or her official capacity only. *See* FEC Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings ("Treasurer Policy"), 70 Fed. Reg. 3 (Jan. 3, 2005) (CVC Parties' Add. at 47). The CVC Parties rely upon language from the FEC policy statement suggesting that in certain circumstances the FEC "'will consider the treasurer to have acted in a personal capacity and make findings accordingly,'" but that is plainly a determination within the FEC's broad prosecutorial discretion. (CVC Parties' Br. 3 (quoting FEC Treasurer Policy, 70 Fed. Reg. at 3).) The district court correctly found that "the Commission considered Mr. Curry's potential liability, and has supplied reasonable grounds for its failure to prosecute him in his personal capacity." (JA25.) The FEC's General Counsel concluded that the facts did not warrant pursuing Curry because his actions were consistent with someone resigning from office: He had not prevented the filing of reports or the appointment of a new treasurer, and his contacts with the Reports Analysis Division's office did not reflect a deliberate effort to obstruct the filings. (JA25-JA26.)[7] Although the Reviewing Officer suggested that the Commission consider

[7] According to the CVC Parties, on October 12, 2010, three days before the first CVCPAC report at issue — the October 2010 Quarterly Report — was due, Mr. Curry indicated a desire to resign his position. (Amended Petition and

Mr. Curry's "personal responsibility" in these matters, she ultimately recommended that the Commission make final determinations only as to CVCPAC and the current treasurer in his official capacity. (JA321.) The district court therefore held that "[i]n light of the great deference accorded to the FEC's decisions not to prosecute, the Court cannot conclude the agency abused its discretion in choosing not to pursue Mr. Curry in his personal capacity for willful or reckless failure to file reports." (JA26 (quoting *Nader*, 823 F. Supp. 2d at 65 ("'The FEC is in a better position than [plaintiffs] to evaluate the strength of [plaintiffs'] complaint, its own enforcement priorities, the difficulties it expects to encounter in investigating [plaintiffs'] allegation, and its own resources'")).) In any event, as the district court noted, "such an action would not have absolved the [CVC Parties] of their own liability." (JA26 n.4.)

The CVC Parties provide no authority to support their claim that their former treasurer *must* be held personally liable, and what little they do cite pre-dates the FEC's 2005 Statement adopting a general policy of naming committee

---

Complaint, No. 11-cv-2168-CKK (D.D.C. June 25, 2012) ¶ 20 (JA41).) The record shows that Mr. Curry continued taking steps to prepare CVCPAC's October 2010 Quarterly report, however, including initiating several communications with FEC staff, and he ultimately filed that report on November 21, 2010, thirty-seven days late. (JA12.) CVCPAC's attorney Dan Backer, designated on November 8, 2010 as assistant treasurer, filed the 12-Day Pre-General Election and 30-Day Post-General Election reports on January 11, 2011, eighty-two and forty days late respectively. (JA12.)

treasurers only in their official capacity.[8] One FEC staff report in this matter did note that the FEC could pursue the former treasurer under FECA's general enforcement procedures, but the report did *not* recommend that course.[9] In any case, staff views expressed prior to an agency decision that is under review by a court are irrelevant to the court's analysis. *See Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002). The CVC Parties' arguments regarding CVCPAC's former treasurer should be rejected.

III. THE DISTRICT COURT CORRECTLY REJECTED CLAIMS THAT CVCPAC WAS NOT LIABLE FOR ITS OWN VIOLATIONS BECAUSE TREASURERS ARE EXCLUSIVELY LIABLE UNDER FECA

The district court also correctly rejected the CVC Parties' claim that political committees like CVCPAC could not be liable for their own late reports because the

---

[8] All three district court decisions relied upon by the CVC Parties (CVC Parties' Br. 46) predate the Commission's 2005 Treasurer Policy.

[9] The Reviewing Officer provided a written analysis to the Commission that explicitly suggested that the Commission might consider Mr. Curry's personal liability, but noted that *if* the Commission wished to do so, it would need to bifurcate the matter and refer Mr. Curry to the Office of General Counsel. A separate enforcement action, known as a "Matter Under Review," would then be opened under 52 U.S.C. 30109(a)(1) (former 2 U.S.C. 437g(a)(1)) to consider the issue. The analysis also explained that the Office of General Counsel did *not* believe the facts warranted such a course of action. (*See* JA197-JA198.) In any event, the Reviewing Officer's ultimate written recommendation did not advocate pursuing Mr. Curry in his personal capacity. (*Id.*). Rather, the Reviewing Officer recommended that the Commission determine that plaintiffs had violated FECA, and all six Commissioners voted to adopt the recommendation, effectively rejecting the option to pursue Mr. Curry in his personal capacity. (JA198.)

former treasurers' personal liability was allegedly *exclusive*. (JA19-JA24.) The district court noted that CVCPAC "appointed Curry, and had the responsibility to supervise him, as its agent. It cannot now escape its statutory responsibilities when it failed to ensure that he was carrying out his duties." (*Id.* at 23 (footnote omitted).) Although it is not clearly raised in their statement of issues, the CVC Parties now appear to argue again that only treasurers, not committees, are liable for FECA reporting violations as a matter of law. (*See* CVC Parties' Br. 3, 43-46.) However, that claim is a baseless attempt to abdicate CVCPAC's own reporting obligations under FECA.

A. The Commission's Treasurer Policy

Under FECA, political committees like CVCPAC 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. 52 U.S.C. 30104(a)(4) (former 2 U.S.C. 434(a)(4)) ("All political committees other than authorized committees of a candidate shall file . . ."); 52 U.S.C. 30104(a)(1) (former 2 U.S.C. 434(a)(1)) ("Each treasurer of a political committee shall file reports . . ."). Neither the Commission nor any court has ever interpreted FECA to impose liability for reporting violations solely on a treasurer and not on the committee.

In view of the treasurer's role, when the Commission makes a determination in an enforcement matter under 52 U.S.C. 30109(a) (former 2 U.S.C. 437g(a)), the Commission's practice is to name both the political committee and its current treasurer as respondents. As the Commission explained:

> [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.

Treasurer Policy, 70 Fed. Reg. at 3 (CVC Parties' Add. at 47). Thus, the Commission explicitly names the current treasurer in his or her official or representative capacity. *Id*. at 6 (JA47).

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 Addendum ("FEC Add.") at 56); Certification (April 16, 2010) (FEC Add. at 70). 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 (CVC Parties' Add. at 50) (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 (JA44). The Commission's interpretation of FECA and its regulations, including the agency's [application of its] policy regarding when it is appropriate to name treasurers as personally liable [in particular cases], is entitled to deference. "As a general matter, an agency's interpretation of the statute which that agency administers is entitled to *Chevron* deference." *Fox v. Clinton*, 684 F.3d 67, 75 (D.C. Cir. 2012) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

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. Treasurer Policy, 70 Fed. Reg. at 6 (CVC Parties' Add. at 50. That decision is part of the Commission's law enforcement discretion, but it does not absolve a committee of responsibility for its own FECA violations. *Id.* at 3 & n.2, 4-6.[10]

[10] Plaintiffs cite a footnote from a *draft* of the Commission's Treasurer Policy (CVC Parties' Br. 45 (quoting Proposed Statement of Policy Regarding Naming of Treasurers in Enforcement Matters, 69 Fed. Reg. 4092, 4093 n.8 (Jan. 28, 2004)), but this statement merely explains that the treasurer *could also be named in her personal capacity* when the statute or regulations impose a legal obligation "specifically on committee treasurers and when a reasonable inference from the

B. The FEC Correctly Followed Its Treasurer Policy in These Administrative Fine Matters

In the three administrative fines CVCPAC challenges, the Commission followed the Treasurer Policy. Thus, the Commission named Mr. Curry as treasurer in his official capacity while he was treasurer, then named David Wiggs in his official capacity as treasurer after he assumed that role. (JA105-JA106, JA238, JA244, JA344, JA351.) The CVC Parties claim that the Commission should have made its determination and assessed penalties only against Mr. Curry, and that doing so would have precluded action against either the Committee or its current treasurer. (CVC Parties' Br. 43-46.) The Reviewing Officer's recommendation properly rejected that argument, however, relying on advice from the Commission's Office of General Counsel:

> 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) [52 U.S.C. 30104(a)] and 11 C.F.R. 104.5.

(JA197-JA198 (emphasis added).) Indeed, CVCPAC, 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 §§ 1.01, 7.05(1) (2006).

The CVC Parties' claims that CVCPAC is absolved of liability would turn

---

alleged violation is that the treasurer knew, or should have known, about the facts constituting a violation." 69 Fed. Reg. at 4093.

FECA on its head. FECA establishes political committees as specially defined, independent legal entities, not merely the alter ego of a treasurer. In particular, FECA defines the term "political committee" to mean "any committee, club, association, or other group of persons" which either receives contributions or makes expenditures aggregating more than $1,000 during a calendar year. 52 U.S.C. 30101(4)(A) (former 2 U.S.C. 431(4)(A)); *see also* 52 U.S.C. 30101(8),(9) (former 2 U.S.C. 431(8), (9)) (defining "contribution" and "expenditure"). Thus, a political committee must be *more* than a single person, such as the treasurer; in fact, the primary actors in political committees often are persons other than the treasurer, as may well be the case with CVCPAC itself.[11] In addition, under FECA, it is the *committee* that must designate a treasurer and report any change in treasurer status. 52 U.S.C. 30103(a), (b)(4) (former 2 U.S.C. 433(a), (b)(4)); *see also* 11 C.F.R. 102.2(a)(1)(iv). Thus, the political committee designates the treasurer, not the other way around. CVCPAC's own filings reflect this requirement, which refutes the CVC Parties' claims.[12]

---

[11] Political committees sometimes retain an outside professional to serve as treasurer. For example, CVCPAC's lead counsel has served as the Committee's assistant treasurer.

[12] (Statement of Organization (Oct. 26, 2009) (JA168); Amended Statements of Organization (Nov. 8, 2010 and Jan. 12, 2011) (JA170, JAJA174).)

Although 52 U.S.C. 30104(a)(4) (former 2 U.S.C. 434(a)(4)) clearly specifies that "[a]ll political committees other than authorized committees of a candidate shall file" periodic reports of the committee's receipts and disbursements, the CVC Parties rely upon stray language from the statute and elsewhere that does nothing to alter the basic statutory scheme in which committees and their treasurers are both responsible for filing reports. (CVC Parties' Br. 43-44.) The CVC Parties cite court decisions (CVC Parties' Br. 46) noting that treasurers are liable for FECA violations, but no decisions or legislative history to support their radical re-interpretation of FECA in which the treasurer is the *sole* legally responsible actor. The provisions upon which plaintiffs rely merely specify that it is the treasurer, a human being, who must of necessity review and file reports on behalf of the committee, which exists only as legal entity. *See* 52 U.S.C. 30104(a)(1), (11)(C) (former 2 U.S.C. 434(a)(1), (11)(C); 11 C.F.R. 104.14(d), 104.18(g). Despite FECA's clear language and structure, plaintiffs invent a legal interpretation that would write out of the statute a political committee's independent obligation to file disclosure reports. That interpretation would also eliminate any incentive for committees to ensure that their own treasurers are competent, diligent, and honest.

The CVC Parties' claims that they should escape liability because of the potential liability of CVCPAC's former treasurer must fail.

IV. THE DISTRICT COURT CORRECTLY REJECTED THE CVC PARTIES' CLAIMS THAT THE ADMINISTRATIVE FINES SET BY SCHEDULE SHOULD HAVE BEEN LOWERED HERE

The CVC Parties also appeal (Br. 48-58) the district court's rejection of their mitigation and "best efforts" defenses. But those claims are completely without merit because the FEC simply followed its own administrative fines regulations and applied the published fines schedule. The CVC Parties' fall-back argument that the FEC's "best efforts" regulation is arbitrary and capricious is not properly before the Court, and also lacks merit.

The FEC's administrative fine regulations require that, to establish a "best efforts" defense, respondents must show that they were "prevented from filing in a timely manner by reasonably unforeseen circumstances that were beyond the control of the respondent" and that "respondent filed no later than 24 hours after the end of these circumstances." 11 C.F.R. 111.35(b)(3). Qualifying circumstances include certain widespread Internet disruptions and disaster-related incidents. 11 C.F.R. 111.35(c). But situations that do *not* qualify include "[n]egligence" and "[i]llness, inexperience, or unavailability of the treasurer or other staff." 11 C.F.R. 111.35(d).

The CVC Parties have never disputed that CVCPAC's three disclosure reports were filed late or that the civil penalties assessed by the FEC were correctly calculated under the administrative fine schedule. 11 C.F.R. 111.43. Instead, the

CVC Parties claimed that the committee's former treasurer, Mr. Curry, willfully refused to timely file the reports or permit CVCPAC to comply with the reporting requirements. At the administrative stage, however, the CVC Parties initially *conceded* that this did not satisfy the requirements for the "best efforts" defense in the administrative fines context. (JA187) Later, the CVC Parties claimed that the fines should be mitigated due to the alleged "misconduct and personal liability of the former treasurer," and they challenged the FEC regulation directly. (Mem. in Support of Pls.' Mot. for Summ. J., No. 11-cv-2168-CKK (D.D.C. June 7, 2012) at 32 (Docket No. 18-1); *id*. at 31-42.)[13]

The district court rejected the CVC Parties' claims and held that the FEC's decision not to assess administrative fines at amounts lower than provided for in the regulatory schedule was not arbitrary and capricious. (JA28-JA30.) Agency action must be upheld as long as it has some rational basis. *Id*. at 22; *see Verizon v. FCC*, 740 F.3d 623, 644-645 (D.C. Cir. 2014); *LaRouche's Comm. for a New*

[13] The CVC Parties' mitigation and "best efforts" claims also fail because they were waived. In addition to the administrative stage concession that their conduct did not qualify for the "best efforts" defense, the CVC Parties did not raise their mitigation claim until after the FEC had already made its final determinations, and they did not challenge until this litigation the definition of "best efforts" in 11 C.F.R. 111.35(b). (JA15.) Thus, though the district court did not address this issue, these claims have been waived. *See* 11 C.F.R. 111.35(e), 111.38; *Dakota Underground, Inc. v. Sec'y. of Labor*, 200 F.3d 564, 567 (8th Cir. 2000). In any event, the CVC Parties cannot attack the facial validity of a regulation in a case brought under 52 U.S.C. 30109(a)(4)(C)(iii) (former 2 U.S.C. 437g(a)(4)(C)(iii)). *See supra* pp. 17-18 and n.6.

Bretton Woods v. FEC, 439 F.3d 733, 737 (D.C. Cir. 2006). The district court correctly concluded that the FEC's decision not to mitigate the penalties "easily satisfies" the "rational basis" standard since the FEC permissibly concluded that the CVC Parties' claim did not establish unforeseen circumstances beyond the control of respondents as required by 11 C.F.R. 111.35(c). Instead, the CVC Parties' arguments were based upon circumstances akin to those listed in 11 C.F.R. 111.35(d), such as negligence. (JA29 ("Here, the Commission concluded that, pursuant to this regulation, [the CVC Parties] did not qualify for mitigation or reduction of their fines.").)

The CVC Parties' unsupported new assertion (Br. 53) that the administrative fines here (totaling $8,690) are significantly higher than penalties paid by other political committees for excessive or prohibited contributions mistakenly compares administrative fines with civil penalties for violations that are not eligible for streamlined processing and therefore proceed through the FEC's regular enforcement process, where the agency does not have authority to unilaterally set the penalty. Instead, in those cases the FEC attempts to negotiate a mutually acceptable civil penalty or, if it cannot do so, may file suit in federal court asking for judicial relief. 52 U.S.C. 30109(a)(4)(A), (5)-(6) (former 2 U.S.C. 437g(a)(4)(A), (5)-(6)). In any event, the Commission has obtained substantially greater civil penalties for violations involving prohibited and excessive violations.

(*See, e.g.*, Conciliation Agreement in Matter Under Review 6129 (American Resort Development Association Resort Owners Coalition PAC) ($300,000 civil penalty), available at http://eqs.fec.gov/eqsdocsMUR/10044273912.pdf.)

The CVC Parties also claim (CVC Parties' Br. 54) that the administrative fine regulations arbitrarily treat reports "better *never* than late,", but of course the fines increase when reports are so late they are in the "not filed" portion of the regulatory schedule. *See supra* p. 7 and n.4. In addition, the CVC Parties' contention that FEC regulations emphasize timeliness at the expense of accuracy is itself inaccurate, as incomplete or inaccurate reports also can lead to FEC enforcement action and political committees do pay penalties for inaccurate reports. *See, e.g.* Conciliation Agreement, In the Matter of Colorado Democratic Party, Matter Under Review 5702, http://eqs.fec.gov/eqsdocsMUR/00005C08.pdf ($105,000 civil penalty). And the CVC Parties further suggest (Br. 53) that disclosure was less important here since the recipients of contributions made by CVCPAC also were required to report their receipts to the FEC. But that does not excuse committees that make contributions from filing disclosure reports. Indeed, the fact that both the contributor and recipient must disclose provides additional safeguards that contributions are correctly reported.

The CVC Parties also argue (Br. 48-55) that their fines should have been mitigated because the FEC's "best efforts" regulations do not explicitly address

CVCPAC's situation. *See* 11 C.F.R. 111.35(c)-(d). But CVCPAC's conduct in failing to manage its own treasurer is consistent with negligence, which is addressed and does not qualify, and the CVC Parties' claim ignores Congress' intent to streamline the handling of straightforward late-filing violations like those in this case. *See supra* pp. 5-7. In fact, a very similar claim that mitigation was required was rejected in *Cox for U.S. Senate Comm., Inc. v. FEC*, No. 03-C-3715, 2004 WL 783435 (N.D. Ill. Jan. 22, 2004). In *Cox*, the district court concluded that "[p]laintiffs, in effect, are asking this Court to exercise its own judgment and rehear Plaintiffs' administrative appeal. This is precisely the type of second-guessing that this Court must avoid." 2004 WL 783435, at *5 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)).[14]

The district court also rightly rejected the CVC Parties' facial challenge to the regulation, concluding that "[u]nder the highly deferential standard required here, the Court cannot conclude that the best efforts regulation is arbitrary and capricious on its face." (JA29.) The district court explained that

[14] The CVC Parties also suggest (Br. 48-49) that FEC staff indicated that the Commission might consider mitigating the liability of the CVC Parties based on the former treasurer's alleged conduct, but that possibility was mentioned only in the context of a potential regular enforcement matter involving the former treasurer opened pursuant to 52 U.S.C. 30109(a)(1) (former 2 U.S.C. 437g(a)(1)), not the administrative fines program. *See supra* p. 25 n.10.

"[t]he Commission has put forth a reasonable explanation for the narrowness of the rule," namely that "if recklessness and negligence on the part of the treasurer – of the sort at issue here – were to qualify as [committee] 'best efforts', then the exception would swallow the rule, and almost all late filings would be excusable." (*Id*. at 29-30 (citation omitted).) The court below also found reasonable the FEC's rationale "that[] a committee's negligence in managing its agent – its treasurer – should not entitle it to claim it used its 'best efforts' to file its reports." (*Id.* at 30)[15]

The CVC Parties' attack on the "best efforts" regulation relies mainly on subjective, unsupported assertions about what is "foreseeable." (CVC Parties' Br. 55-56.) But the only case they cite for that point is a recent FEC matter in which a magistrate judge has indicated that he has reached "the inexorable conclusion that the Commission's argument in support of [its] motion to dismiss is correct" and will reject the petition of a committee that attempted to excuse its late filing on the basis of its treasurer's premature labor. (Letter from Wallace W.

---

[15] The CVC Parties claim (Br. 43) that FEC enforcement staff recommended "that the treasurer's personal liability be pursued in this case," but that is false. FEC legal staff recommended that the Reviewing Officer "raise this issue for the Commission's consideration in the memorandum recommending final determinations in these matters" (JA194), and the Reviewing Officer explicitly did so but did not recommend taking such action against the former treasurer. Instead, the Reviewing Officer only recommended that the FEC make final determinations of violations and assess fines against the CVC Parties. (JA197-JA198). The Commissioners unanimously decided to follow these recommendations and not to pursue the former treasurer in these matters. (JA208-209.)

Dixon, United States Magistrate Judge, to counsel in *Kuhn for Congress v. FEC*, Civil Action No. 2:13-3337-PMD-WWD (S.D.S.C. Aug. 22, 2014) (FEC Add. at 71).) In a similar effort to avoid responsibility, the CVC Parties claim that "[t]here was no evidence or claim (Br. 57.)that [CVCPAC] was negligent in managing its treasurer that would estop [CVCPAC] from asserting a 'best efforts' defense." But that would shift the burden to establish a defense for late reports to the FEC. As the district court concluded, "despite the important responsibilities of the committee treasurer, he or she is still a committee designee who carries out actions on behalf of the committee." (JA23 n.3.) The CVC Parties' challenge to the "best efforts" regulation lack merit.

V. THE DISTRICT COURT CORRECTLY REJECTED THE CVC PARTIES' OTHER CHALLENGES THAT WERE NOT PRESENTED TO THE FEC

The CVC Parties also appeal the district court's rejection of their many claims regarding the FEC's voting procedures due to their failure to exhaust administrative remedies. (CVC Parties' Br. 16-40.) In the district court, the CVC Parties contended that the no-objection voting procedure the FEC employed for its preliminary "reason-to-believe" findings did not result in an affirmative vote of four Commissioners as required by 52 U.S.C. 30109(a)(2) (former 2 U.S.C. 437g(a)(2)), and they questioned the signatures and wording on the Commissioners' ballots at both the reason-to-believe and final determination stages. The district

court properly declined to consider these claims because they were never presented to the agency and were based upon documents not part of the administrative records filed by the FEC. (JA35-JA36.) In any event, the FEC's voting procedures are consistent with FECA, any error here was plainly harmless, and any remand to correct harmless error would be futile. Finally, the CVC Parties' related Sunshine Act claims were waived and they too lack merit.

A. The CVC Parties' Additional Arguments Were Not Presented During the Administrative Proceedings and Are Waived

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. In this case, the CVC Parties did not challenge the FEC's voting procedures until after filing suit in the district court. (CVC Parties' Br. 18.) But as the district court recognized, "[i]t is well understood that 'a reviewing court usurps an agency's function if it sets aside an administrative determination upon a ground not theretofore presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action.'" (JA35 (quoting *Coburn v. McHugh*, 679 F.3d 924, 931 (D.C. Cir. 2012), which internally quotes *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946)).) Moreover, because judicial review of agency determinations may be based solely upon the administrative record that was before the agency at the time of the decision, *Fla. Power & Light Co.*, 470 U.S. 729,

743-44 (1985), the district court properly declined to consider voting claims based on ballots that were not in the record.

These fundamental administrative law principles are explicitly set out in the FEC's regulations governing the administrative fines program. *See* 11 C.F.R. 111.35; *supra* pp. 7-10. Indeed, the regulations specify that responses to the Reviewing Officer's recommendation to the FEC about 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). And 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.[16]

"'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

[16] 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 v. FEC*, No. IP-01-0897-C-B/S, 2002 WL 31431557, at *5 n.3 (S.D. Ind. Oct. 28, 2002) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973); internal quotation marks and other citation omitted).

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).

"[N]otions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *McKart v. United States*, 395 U.S. 185, 195 (1969). The CVC Parties suggest (CVC Parties' Br. 20.) that the district court's reliance upon *Coburn* for this point (JA35) is misplaced because the CVC Parties' voting claim here involves the legality of FEC procedures, not the determination of "underlying facts" as they contend was involved in *Coburn*. But *Coburn* drew no such distinction (*see* 679 F.3d at 929-931), and the CVC Parties cite no other authority. In fact, procedural objections are subject to the same rules:

> [O]rdinarily, a litigant is not entitled to remain mute and await the outcome of an agency's decision and, if it is unfavorable, attack it on the ground of asserted procedural defects not called to the agency's attention when, if in fact they were defects, they would have been correctable at the administrative level.

First Nat'l Bank of Fairbanks v. Camp, 465 F.2d 586, 603 n.24 (D.C. Cir. 1972) (quoting *First-Citizens Bank and Trust Co. v. Camp*, 409 F.2d 1086, 1088-89 (4th Cir. 1969) (citing cases)).

The CVC Parties' reliance on the narrow futility exception to the exhaustion requirement is also misplaced. The CVC Parties claim that exhaustion of administrative remedies is not required "where the agency has already predetermined the issue, and hence, it would have been futile to challenge the FEC's voting procedures before the agency." (CVC Parties' Br. 21.) But the "futility exception" to exhaustion is "quite restricted" and "limited to situations 'when resort to administrative remedies [would be] 'clearly useless.'" *Tesoro Refining and Mktg. Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (quoting *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co*, 40 F.3d 426, 432 (D.C. Cir. 1994) (other citations omitted)). Futility must be certain:

> In *Communications Workers of America*, we refused a futility exception when ERISA plan administrators had 'consistently interpreted the' relevant text 'to deny . . . claims.' * * * As we said there, '[e]ven if one were to concede that an unfavorable decision . . . was *highly likely*, that does not satisfy our strict futility standard requiring a *certainty* of an adverse decision."

Tesoro, 552 F.3d at 874 (citing *Commc'n Workers*, 40 F.3d at 432, 433).

There is no such certainty here. In fact, the CVC Parties' futility argument rests almost entirely upon the fact that FEC counsel has defended the voting procedures in this litigation. (CVC Parties' Br. 21.) But as this Court has recognized,

> this approach has it backwards. Ordinarily, a party invokes the futility doctrine to prove the worthlessness of an argument before an agency that *has rejected it* in the *past*. [The petitioner] tries to argue that it

> would have been futile to raise an argument because the agency *would reject it* in the *future*. We are aware of no case, and at oral argument [petitioner's] counsel could point us to no case, in which the futility doctrine has been invoked based on a subsequent agency decision.

Tesoro, 552 F.3d at 874. The CVC Parties' futility claim is likewise based on speculation by a litigant about what an agency might do. While the FEC might not decide to change its voting procedures, that outcome is by no means "certain."

The CVC Parties assert that "[e]xhaustion is also not required where, as here, 'the challenge is to the adequacy of the agency procedure itself. . . .'" (CVC Parties' Br. 21 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992)) (ellipsis in original).) But the CVC Parties omit the second half of this sentence, which explains that the exception applies only where "'the question of the adequacy of the administrative remedy . . . [is] for all practical purposes identical with the merits of [the plaintiff's] lawsuit.'" *McCarthy*, 503 U.S. at 148 (quoting *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979) (further internal quotation and other citation omitted)). *McCarthy* addresses situations where "an administrative remedy may be inadequate 'because of some doubt as to whether the agency was empowered to grant effective relief.'" 503 U.S. at 147 (quoting *Gibson v. Berghill*, 411 U.S. 563, 575 (1973)). Thus, the "animating principle" of these cases is merely that "it is 'improper to impose an exhaustion requirement' when the allegation is that the 'administrative remedy furnishes no effective remedy at all.'" *Cohen v. United States*, 650 F.3d 717, 733 (D.C. Cir. 2011) (quoting *McCarthy*,

503 U.S. at 156 (Rehnquist, concurring) (citations omitted)). But that is not the case here; the FEC clearly has the power to change its own procedures.

The CVC Parties also argue (Br. 19) that they had "no reason to believe the voting was questionable" because the FEC notification letters did not describe the agency's voting procedures and the CVC Parties were not aware of them until receiving the administrative records and the ballots in this litigation. But FEC Directive 52, which sets forth the FEC's "no-objection" and "tally" voting procedures, is a public document that has been available on the FEC's web site since before this administrative matter began. *See* FEC Directive 52 (Sept. 10, 2008), http://www.fec.gov/directives/directive_52.pdf. The CVC Parties assert that Directive 52 is hard to find on the Commission's site, but it can be easily located through the "About the FEC" page under the heading "Commission Directives," and then "Circulation Vote Procedures," or by simply using the site's search function. *See* http://www.fec.gov/about.shtml.

As the district court also noted, judicial review is based upon the administrative record, and so the court correctly refused to consider ballots that were not included in the administrative records filed by the FEC.[17] (JA35-JA36

[17] The administrative records the FEC filed included the transmittal cover sheet and blank ballot for each report circulated to the FEC Commissioners and the FEC Secretary's official certification for the FEC determinations, but not the ballots. After the FEC filed the administrative records, the CVC Parties requested and were provided the completed ballots. The CVC Parties did not ask that the FEC to add

(quoting *Fla. Power & Light Co.*, 470 U.S. at 743-44, and *Camp*, 411 U.S. at 142). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." (JA35 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).) The CVC Parties do not dispute this general rule, but they claim (Br. at 21.) that it only applies where the new material "relates to the merits of the underlying facts or dispute that was before the agency." However, the only case the CVC Parties cite, *Cunningham*, 2002 WL 31431557, at *5 n.3, simply applied the general rule that "when reviewing the decision of an administrative agency, a court may only consider the evidence that was before the agency"; thus, the court excluded an affidavit created after the lawsuit began. But the court did not approve the consideration of documents that did not appear in the administrative record.

B. The FEC's Voting Procedures Are Consistent With FECA

The CVC Parties assert that the streamlined voting procedure that the FEC employs in certain routine matters was inadequate in these administrative fines proceedings. However, the wide range of technical objections the CVC Parties make — including challenges to the voting procedures at the reason-to-believe stage, to the format of the staff recommendations and ballots, and even to the

---

the ballots to the administrative records, however, but simply filed the ballots with their motion for summary judgment. (*See* Declaration of Dan Backer, June 7, 2012) (CVC Parties' Add. at 64-67).)

signatures on those ballots at the reason-to-believe and final determination stages — elevate form over substance and are without merit.

The parties agree that 52 U.S.C. 30109(a)(2) (former 2 U.S.C. 437g(a)(2)) requires an "affirmative" vote of four FEC Commissioners for the reason-to-believe findings that initiate FEC administrative fine matters. But FECA does not specify the precise method for Commissioners to indicate approval of any staff recommendations in these matters. Notably, there is no statutory requirement that administrative fine decisions must be made at a formal Commission meeting with all Commissioners present and voting in person, and there is no statutory prohibition or limitation on notational voting following circulation of documents with staff recommendations to the Commissioners.

Congress has authorized the FEC to promulgate its own "rules for the conduct of its activities." 52 U.S.C. 30106(e) (former 2 U.S.C. 437c(e)). Pursuant to this general authority, the FEC 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 FEC's voting procedures are set forth in FEC Directive 52, which provides that each matter to be voted upon generally is circulated to the Commissioners in one of two ways: (1)

by a 24-hour "no-objection" ballot or (2) by a "tally vote." (CVC Parties' Add. at 59-63.)

The preliminary reason-to-believe finding in administrative fine matters involving late-filed disclosure reports generally requires only a straightforward determination of when the report was due, whether it was filed and, if filed, when. The FEC's Reports Analysis Division provides reports containing both this information and that Division's recommendations to the Commissioners for their consideration. These reports are circulated to the Commissioners using the first method above: a 24-hour, no-objection ballot. Appended to each such report is a ballot on which the Commissioners are to vote. 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* JA98, JA226, JA331), or can opt to submit no objection to the recommendation within a 24-hour period. Under Directive 52, which has been in place since 2008, either of these options constitutes a vote to approve the recommendation. *See* FEC Directive 52 at 3. Less routine FEC matters, including final determinations in administrative fine matters, are circulated on a "tally vote," the second method. *See id*. at 2. Under this procedure, each Commissioner ordinarily has a minimum of one week to vote, and 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, Commissioners make the initial reason-to-believe findings via no-objection ballots. 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* 52 U.S.C. 30109(a)(4)(C)(i) (former 2 U.S.C. 437g(a)(4)(C)(i)). Thus, the only meaningful questions presented are when was the report due and when the report was filed. (*See, e.g.*, JA101.) If the report was not filed when it was due, there will almost always be reason to believe that 52 U.S.C. 30104(a) (former 2 U.S.C. 434(a)) was violated. Further inquiry or analysis is rarely required at this stage, which does not involve a final determination in any event. Accordingly, reason-to-believe findings in administrative fines cases are ideal for this streamlined process. These procedures properly balance respondents' interests with agency efficiency.

CVC Parties essentially argue that a reason-to-believe finding in an administrative fines case must be circulated under something akin to the Commission's tally-vote system for the votes to be sufficiently "affirmative" under 52 U.S.C. 30109(a)(2) (former section 437g(a)(2)), but that claim 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." *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. 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). Congress created the FEC's 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. The Commission's decision to implement this "traffic ticket" system through a highly efficient voting process faithfully implements Congress's intent that a separate enforcement mechanism govern such cases.

The CVC Parties question the validity of some votes cast by Commissioners because the ballots were signed by staff members and the FEC has not provided proof of Commissioner authorization. Plaintiffs cite no authority whatsoever for their assertion that the Commissioners' signatures were "improper," and that assertion has no merit since Directive 52 permits signature by Commission staff members. *See* FEC Directive 52 at 4-5 (a Commissioner may direct another person to physically indicate the Commissioner's decision on a ballot "in a purely ministerial capacity"). The CVC Parties have provided no basis for overturning the strong presumption of regularity that agencies, like the FEC, are accorded. *See, e.g.*, *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 221 (D.C. Cir. 2013);

La Ass'n of Indep. Producers and Royalty Owners v. FERC, 958 F.2d 1101, 1111 (D.C. Cir 1992).

The CVC Parties rely upon a district court decision, *Chamber of Commerce of U.S. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012), involving a statutory provision establishing that three members of the five-member National Labor Relations Board constitute a quorum, but that case is inapposite. *See* 29 U.S.C. 153(b). In *Chamber of Commerce*, two seats on the Board were vacant, two sitting members voted to approve a proposed NLRB rule, and the third sitting member did not vote because he had participated in a prior procedural vote and thus wrongly assumed that no further action was required for final agency action to occur. *Id.* at 23-24. The district court held that while the third member "need not have voted in order to be counted toward the quorum, he may not be counted merely because he was a member of the Board at the time the rule was adopted." 879 F. Supp. 2d at 23-24. The third member was sent a notification that the final rule had been circulated for a vote, but he took no action before the rule was sent for publication a few hours later.

> Had he affirmatively expressed his intent to abstain or even acknowledged receipt of the notification, he may well have been legally 'present' for the vote and counted in the quorum. Had someone reached out to him to ask for a response, as is *the agency's usual practice* where a member has not voted, or had a substantial amount of time passed following the rule's circulation, moreover, it would have been a closer case. But none of that happened here.

Id. at 28-29 (emphasis added). The district court therefore held that since "the final rule was promulgated without the requisite quorum and thus in excess of that authority, it must be set aside." *Id.* at 30.

The *Chamber of Commerce* decision is readily distinguishable because the FEC Commissioners have adopted Directive 52, which explicitly authorizes circulation of the Reports Analysis Division's reason-to-believe recommendations in administrative fine matters to the Commissioners on a 24-hour, no-objection basis. That *is* the "agency's usual practice" and there is no evidence here that any Commissioner failed to follow it. And the only Commissioner ballot choice at the reason-to-believe stage that takes matters off the fast track is a timely objection, which results in the matter being placed on the agenda for an upcoming FEC meeting. In any event, in the next stages of the administrative fines process, the Commissioners have another opportunity to consider the matter, including the respondents' challenges and response to the Reviewing Officer's recommendations at the final determination stage. Unlike the situation in *Chamber of Commerce*, the reason-to-believe finding is not a final decision, but merely an interim step in a process with many safeguards.

In sum, the voting procedures applied to these administrative fines matters are lawful.

C. Any Error Here Was Plainly Harmless, and Any Remand to Correct Harmless Error Would Be Futile

The CVC Parties have suffered no prejudice due to the FEC's voting procedures, so any conceivable error was harmless. And remanding to the FEC to correct such a harmless error would be futile and unnecessary.

The initial reason-to-believe findings in administrative fine matters are not reviewable final determinations of liability. Rather, those findings merely mark the point at which respondents are notified of the allegations against them and given an opportunity to respond. The no-objection voting procedure afforded the CVC Parties the same opportunities to respond that they would have had under the tally vote procedure. The CVC Parties do not deny that they received timely notice of the FEC's reason-to-believe findings (JA106-JA109, JA244-JA247, JA351-JA354), and they took full advantage of their opportunity to respond, submitting responses to all three reason-to-believe decisions. They admitted that the three reports at issue were filed late, advanced their arguments, and requested reduction of the proposed fines. (JA110-JA115, JA248-JA250, JA355-JA357). In addition, the CVC Parties submitted timely responses to the Reviewing Officer's recommendations. (JA187-JA189.)

The Supreme Court has explained that "[i]n administrative law, as in federal civil and criminal litigation, there is a harmless error rule." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60 (2007) (citing *PDK Labs*,

Inc. v. U.S. Drug Enforcement Admin., 362 F.3d 786, 799 (D.C. Cir. 2004) (discussing section 706 of the APA)). "[T]he harmless error rule requires the party asserting error to demonstrate prejudice from the error." *First Am. Disc. Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000) (internal quotation marks and citations omitted). Indeed, the allegedly injured party bears the burden of demonstrating harm, rather than the agency having to prove that there was no harm. *See Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009). And courts have consistently found that "[m]ere technical procedural error is insufficient to warrant reversing the agency's administrative decision." *Milas v. United States*, 42 Fed. Cl. 704, 712 (1999); *see Wagner v. United States*, 365 F.3d 1358, 1361 (Fed. Cir. 2004) (strict compliance with procedural requirements "is not required where the error is deemed harmless").

The CVC Parties cannot meet their burden of demonstrating harm because they already received all of the procedural protections to which they were entitled. They had full notice of the allegations against them and took full advantage of the procedures available to try to defend themselves. Indeed, they make no real effort to articulate how any of the alleged irregularities caused them cognizable harm. Thus, they have failed to demonstrate *any* prejudice or harm.[18] *See* 5 U.S.C. 706

[18] The errors alleged here stand in stark contrast to instances in which error *has* been found to be harmful. These include occasions in which the government used an unannounced new method to calculate royalties, depriving a recipient of

(instructing courts to consider whether agencies' procedural errors are prejudicial); *First Am. Disc. Corp.*, 222 F.3d at 1015 ("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)).[19]

Moreover, even if there was a technical defect with the no-objection voting procedure at the reason-to-believe stage, the FEC's later votes to make final determinations and assess the administrative fines were conducted by "tally vote" and unanimously approved by all six Commissioners. It is impossible to see how any procedural error the CVC Parties allege could have caused harm to them, let alone changed the outcome, when the final determinations were made using the CVC Parties' preferred voting procedure and were unanimous.[20]

---

expected revenue, *Jicarilla Apache Nation v. U.S. Dept. of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010), and when an administrator's interpretation of a statute contradicted prevailing agency precedent, *PDK Labs*, 362 F.3d at 799.

[19] *See also Horning v. SEC*, 570 F.3d 337, 347 (D.C. Cir. 2009) (holding that agency's procedural error in adjudication was harmless because plaintiff "had notice from 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).

[20] There is no reason to believe the outcome of the administrative proceedings would have changed if the CVC Parties had objected to the procedures. The FEC

Finally, any remand to the FEC to correct any perceived procedural errors would be futile. It would simply require the four (of six) FEC Commissioners who continue to serve (and constitute a majority) to go through the useless formality of casting the same votes again in a slightly different manner, a remedy that would not change the outcome. *See, e.g.*, *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708-09 (D.C. Cir. 1996). Appellants have provided no reason to believe the outcome would change. Indeed, "[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *PDK Labs*, 362 F.3d at 799. Because plaintiffs do not even attempt to show that any of the errors they allege affected the result in this matter, a remand to the Commission would be "an unnecessary formality [since] the outcome is clear." *Legi-Tech*, 75 F.3d at 709.

The decision in *Legi-Tech* is instructive. In that case, this Court rejected Legi-Tech's argument that a constitutional defect in the composition of the FEC at the time the FEC found "probable cause" to believe that Legi-Tech had violated FECA rendered the case invalid from the outset. The FEC had reconstituted itself

---

could have ratified its preliminary and final determinations in these matters. *Cf. FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 51 (D.D.C. 1999) (FEC ratification of enforcement decisions following the reconstitution of the agency after the Supreme Court's decision in *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994)). In fact, the CVC Parties filed a motion for reconsideration with the FEC (JA213-JA215), but the agency did not reopen the matter, let alone change its final determinations. (JA224-JA225.)

and ratified its prior determination, but it had not restarted the entire enforcement process. The Court found it would futile to require the FEC to restart the matter from the beginning: "Even were the Commission to return to square one . . . it is virtually inconceivable that its decisions would differ in any way the second time from that which occurred the first time." 75 F.3d at 707-708 (citations omitted). A remand here would be equally futile because there is no evidence that any Commissioners would vote in a way that would alter the outcome. *See id.*; *FEC v. Club for Growth, Inc.*, 432 F. Supp. 2d 89, 93 (D.D.C. 2006) (declining to remand because it would be futile, and rejecting claim that a showing of futility requires that the same Commissioners would vote on the matter again). *See also, e.g.*, *AFGE, AFL-CIO v. FLRA*, 778 F.2d 850, 862 n.19 (D.C. Cir. 1985) ("remand would be [an] idle and useless formality 'because there is not the slightest doubt that the Board would simply reaffirm its order.'") (quoting *NLRB v. Am. Geri-Care, Inc.*, 697 F.2d 56, 64 (2nd Cir. 1982)).

D. The CVC Parties' Sunshine Act Claims Were Not Properly Raised and in Any Event Lack Merit

Finally, the CVC Parties make arguments regarding application of the Sunshine Act, 5 U.S.C. 552b, to FEC decisions far removed from this case, but like the rest, these contentions miss the mark. Specifically, the CVC Parties challenge both the FEC's adoption of Directive 52 in 2008 and its internal clarification in April 2010 that the FEC policy regarding the naming of treasurers in traditional

enforcement matters would apply to administrative fine matters as well. (CVC Parties' Br. 35-40.) Because these claims were not set forth in their amended complaint, they were not properly raised either below or in this appeal. In any event, the claims lack merit, and any error would plainly have caused no harm to the CVC Parties in the administrative fine matters under review.

"Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks and citation omitted). "[T]he complaint and the evidence of a plaintiff . . . must be sufficient to put defendants on notice of any theory of recovery upon which the plaintiff is relying." *Kelly v. Lahood*, 840 F. Supp. 2d 293, 304 (D.D.C. 2012) (internal quotation marks omitted) (*quoting Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1297 (D.C. Cir. 2010)). But the CVC Parties' early filings in this case provided the FEC with no notice that any of their myriad theories of relief involved alleged violations of the Sunshine Act. The Sunshine Act claims were not raised until the CVC Parties' *opposition* to the FEC's motion for summary judgment. That was too late for the CVC Parties to advance such claims. Indeed, arguments are waived if "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).

In any event, the CVC Parties' Sunshine Act claims are utterly meritless. As previously explained, since 2005 the FEC has explicitly named as a respondent in enforcement matters a committee's current treasurer in his or her official capacity. In April 2010, the FEC clarified that the Treasurer Policy also applied to administrative fine matters. *See generally* Memorandum to the Commission re: New Procedures for Successor Treasurers in Administrative Fines Matters (LRA # 784) (April 2, 2010) (FEC Add. at 56). The CVC Parties claim (Br. 37) that the FEC's adoption of this latter procedure at a "secret meeting" violated the Sunshine Act. But the FEC did not adopt this clarification of its policy in a meeting but by circulation vote, which does not offend the Sunshine Act. *See Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1266 (D.C. Cir. 1980) ("The Sunshine Act does not require an agency to hold meetings in order to function. . . . Congress intended to permit agencies to consider and act on agency business by circulating written proposals for sequential approval by individual agency members without formal meetings."). Indeed, as the CVC Parties recognize (Br. 33-34), the FEC can make decisions by notational voting in lieu of holding meetings regulated by the Sunshine Act. *See Common Cause v. NRC*, 674 F.2d 921, 935 n.42 (D.C. Cir. 1982) ("The Sunshine Act does not . . . prevent

agencies from making decisions by sequential, notational voting rather than by gathering at a meeting for deliberation and decision."). And the CVC Parties make no effort to show that this clarification required public notice.[21]

Even if the FEC had violated the Sunshine Act with respect to either Directive 52 or its extension of the Treasurer Policy to administrative fines matters, no proper remedy would include invalidation of these prior FEC actions, much less setting aside the administrative fines in this case. This Court has explained that "release of transcripts, not invalidation of the agency's substantive action, is the remedy generally appropriate for disregard of the Sunshine Act." *Braniff Master Exec. Council of Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 693 F.2d 220, 226 (D.C. Cir. 1982) (internal quotation marks omitted)*; see also Pan Am World Airlines, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 36 (D.C. Cir. 1982) (the Sunshine Act "strongly indicates a congressional policy that release of transcripts, not invalidation of the agency's substantive action, shall be the normal remedy for Sunshine Act violations").[22] And the CVC Parties fail to show how any Sunshine

---

[21] The CVC Parties assert (Br. 39-40) that the FEC's regulation on outside employment (11 C.F.R. 7.6(a)) is inconsistent with FECA, but this claim is irrelevant to this litigation. The CVC Parties have made no specific allegation that any Commissioners have violated the statute or regulation in this regard, let alone done so in a way that would affect these administrative fines.

[22] Although agency action might be set aside when it is intentional, prejudicial to the party making the claim, and "of a serious nature," *see Pan Am*, 684 F.2d at 36-37, plaintiffs have not adduced anything remotely suggesting that the FEC's

Act violation in these prior FEC actions could have affected the outcome of the administrative fines in this case. In fact, CVCPAC would be liable for its own late-filed reports before and after the clarification regarding substitution of treasurers. The chain of events between the adoption of these FEC actions and these administrative fines is far too attenuated and speculative to demonstrate that the alleged violations of the Sunshine Act had any meaningful connection to the FEC's final determination that the CVC Parties violated FECA.

---

alleged Sunshine Act violations were intentional or prejudiced plaintiffs. *See also* S. Rep. No. 94-354, at 34 (1975) ("It is expected that a court will reverse an agency action solely on [the ground that it was taken at an improperly closed meeting] only in rare instances where the agency's violation is intentional and repeated, and the public interest clearly lies in reversing the agency action."). The same holds true for the FEC's notification regarding the 2008 meeting where it adopted Directive 52. Although the CVC Parties suggest otherwise (Br. 37-38), the FEC's notice prior to that meeting complied with the requirements of the Sunshine Act. On September 3, 2008, one week before the meeting, the FEC provided, as required by section 552b(e)(1) of the Sunshine Act, notice of the time, place, general subject matters of the meeting, and closed status of the meeting. FEC Sunshine Act Notice for September 10, 2008 Closed Meeting (Sept. 3, 2008) (FEC Add. at 72). And even if this 2008 notification did not sufficiently describe the category of matters that were therein discussed pursuant to the Supreme Court's decision three years later, in *Milner v. Department of the Navy*, 131 S. Ct. 1259 (2011), the CVC Parties have offered nothing to show that the purportedly deficient notification was intentional, prejudiced plaintiffs, or amounted to more than harmless error.

CONCLUSION

This Court should affirm the grant of summary judgment to the FEC because, as the district court held, the CVC Parties' claims lack merit.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law

Kevin Deeley
Acting Associate General Counsel

Harry J. Summers
Assistant General Counsel

/s/ Robert W. Bonham III
Robert W. Bonham III
Senior Attorney

FOR THE APPELLEE
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650

September 16, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P 32(a)(6) because the brief uses the proportionally spaced typeface Microsoft Word 14-point Times New Roman.

/s/ Robert W. Bonham III
Robert W. Bonham
Senior Attorney
Federal Election Commission

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 16th day of September 2014, I caused the Federal Election Commission's brief in *Combat Veterans for Congress Political Action Committee v. FEC,* No. 13-5358, to be filed with the Clerk of the Court by the electronic CM/ECF System, thereby effectuating service on the following:

Dan Backer
DB Capital Strategies PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
dbacker@dbcapitalstrategies.com,

and

Paul D. Kamenar
Coolidge Reagan Foundation
1612 K Street, N.W., Suite 300
Washington, D.C. 20006
Paul.kamenar@gmail.com.

/s/ Robert W. Bonham III
Robert W. Bonham
Senior Attorney
Federal Election Commission