UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

APPELLEE FEDERAL ELECTION COMMISSION'S
REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY AFFIRMANCE

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This Court should summarily affirm the district court's decision granting summary judgment to the Federal Election Commission ("FEC" or "Commission") and rejecting the claims of Combat Veterans for Congress Political Action Committee ("CVCPAC") and its treasurer David H. Wiggs, in his official capacity (collectively "CVC Parties"). As the Commission showed in its opening brief, the district court correctly upheld the agency's administrative determinations that the CVC Parties violated 2 U.S.C. § 434(a) by filing three federal campaign finance reports late and the agency's assessment of penalties totaling $8,690 under the established fine schedule. (FEC's Motion for Summary Affirmance (Jan. 27, 2014) (Doc. # 1476947) ("FEC Mot.").) The CVC Parties' opposition does not show otherwise. (Appellants' Opposition to FEC's Motion for Summary Affirmance (Mar. 4, 2014) (Doc. # 1482170) ("CVC Opp.").) The CVC Parties' claims that the agency was *required* to impose penalties on a former CVCPAC treasurer in his personal capacity and *required* to mitigate the fines assessed here lack merit. Further, the CVC Parties' claim that the district court should have considered their belated challenge to the FEC's voting procedures must fail because the CVC Parties did not exhaust their administrative remedies. The CVC Parties argue that their appeal allegedly presents issues of "first impression" (CVC Opp. at 2, 10), but this Court regularly grants summary affirmance when new claims are frivolous or otherwise foreclosed. *See, e.g.*, *LNC v. FEC*, No. 13-

5094, 2014 WL 590973 (D.C. Cir. Feb. 7, 2014) (Docket # 1478819) (unpublished disposition). Because the parties' positions are clear and further proceedings would provide no benefit, this Court should summarily affirm.

ARGUMENT

A. The District Court Correctly Held That the Commission Was Not Required to Hold the Former Treasurer of CVCPAC Personally Liable for the Committee's Late Reports

The Commission has shown that the district court correctly rejected the CVC Parties' claims that the FEC was *required* to impose *personal* liability for CVCPAC's late reports on its former treasurer. (FEC Mot. at 8-12.) First, this case is not the proper vehicle to make such a claim, and the CVC Parties did not pursue the correct course by filing an administrative complaint with the agency pursuant to 2 U.S.C. § 437g(a). (*See* Memorandum Opinion ("Mem. Op."), Exhibit 1 to FEC Motion, at 18-19.) The CVC Parties admit they "had the option" to file an administrative complaint, but claim that they were not required to do so because they have also pled jurisdiction here under 28 U.S.C. § 1331 and 5 U.S.C. §§ 702-706. (CVC Opp. at 16-17.) However, the CVC Parties do not refute the FEC's showing that the Commission has exclusive jurisdiction over civil enforcement of the Federal Election Campaign Act, 2 U.S.C. §§ 431-57 ("FECA"), and that filing an administrative complaint is a prerequisite to judicial review of Commission enforcement decisions under 2 U.S.C. § 437g(a)(8). (*See* FEC Mot.

at 2, 9 (citing cases).) Thus, the CVC Parties' jurisdictional argument must fail.[1]

The district court also correctly held that the CVC Parties' claim that its former treasurer must be held personally liable would lack merit even if this suit were the proper way to raise the claim. (Mem. Op. at 19-20.) The CVC Parties provide no authority that supports their frivolous claim (*see* CVC Opp. at 16-20), and what little they do cite (*id*. at 18 n.2) pre-dates the Commission's 2005 Statement adopting a general policy of naming committee treasurers only in their

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[1] The CVC Parties also wrongly claim that 28 U.S.C. § 1331 and the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), provide an independent jurisdictional basis for their "best efforts," mitigation, and voting-procedures challenges to the FEC's determinations here (CVC Opp. at 9, 11-12). 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 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). Nor does section 1331 provide independent jurisdiction here. Congress created 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 2 U.S.C. § 437h) (emphasis in original; citation and footnote omitted)). The legislative history of FECA also supports exclusive jurisdiction under section 437g for the claims involved here. Although the FEC was once required to address even the most straightforward FECA violations under the statute's general enforcement procedures, *see* 2 U.S.C. § 437g(a)(1)-(8), in 1999 Congress amended 2 U.S.C. § 434g(a)(4) to add a streamlined administrative fines system for violations involving the reporting requirements at 2 U.S.C. § 434(a). *See* H.R. Rep. No. 106-295, at 11 (1999); 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (Statement of Rep. Maloney). That history indicates that Congress wanted to restrict challenges to decisions like those at issue here to the section 437g(a)(4) procedure.

official capacity. (*See* FEC Mot. at 10-11.) 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, and the CVC Parties have not filed an administrative complaint suggesting that the Commission do so. 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.

B. The District Court Correctly Rejected the CVC Parties' Claims That the Administrative Fines Assessed Here Should Have Been Mitigated

The Commission also demonstrated that the district court correctly rejected the CVC Parties' mitigation and "best efforts" arguments. (Mem. Op. at 22-24; FEC Mot. at 12-15.) The CVC Parties concede that the actions of the original treasurer to file the CVCPAC reports in a timely manner did not qualify for the "best efforts" defense in the FEC's regulation (CVC Opp. at 11), but they appear to claim that the conduct of CVCPAC here met the "best efforts" standards even though the conduct of its own treasurer did not (*id*. at 11-13). There is no basis for that view.[2] The CVC Parties also argue that their fines should have been mitigated

[2] The CVC Parties wrongly imply that the Commission has conceded that the conduct of CVCPAC's former treasurer was "knowing, wilful, and reckless" (*see, e.g.*, CVC Opp. at 12), but in fact, the agency reasonably concluded that the treasurer's conduct was consistent with negligence (*see* FEC Mot. at 14-15).

because the Commission'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* n.1. 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), the sole decision the CVC Parties cite for their mitigation claim (CVC Opp. at 14 n.1). 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." *Cox*, 2004 WL 783435, at *5 (citing *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)).

The CVC Parties also contend that the "best efforts" regulation is arbitrary and capricious, but their attack relies mainly on subjective, unsupported assertions about what is "foreseeable." (CVC Opp. at 15-16.) In a further effort to avoid responsibility for the treasurer's actions, the CVC Parties argue that "[t]here was no evidence that [CVCPAC] was negligent in managing its treasurer that would estop [CVCPAC] from asserting a 'best efforts' defense." But that would turn the analysis on its head, shifting the burden to establish a defense for CVCPAC's late

reports to the Commission. 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." (Mem. Op. at 17 n.3.) The CVC Parties' challenge to the "best efforts" regulation must fail.

C. The District Court Correctly Rejected the CVC Parties' Challenges That Were Not Presented to the Agency

Finally, the Commission showed that the district court correctly dismissed the CVC Parties' complaints regarding the FEC's voting procedures because the CVC Parties failed to exhaust their administrative remedies and because the challenged ballots were not included in the administrative records filed in this litigation. (FEC Mot. at 15-17; *see* Mem. Op. at 29-30.) The CVC Parties' efforts to counter that showing are off the mark. (*See* CVC Opp. at 3-10.)

1. "[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 that the district court's reliance upon *Coburn v. McHugh*, 679 F.3d 924, 931 (D.C. Cir. 2012), for this point (Mem. Op. at 29) 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*. (CVC Opp. at 7.) 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)).

2. The CVC Parties argue 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. (CVC Opp. at 4-7.) 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 Commission's web site since before this administrative matter began. *See* FEC Directive 52 (Sept. 10, 2008), http://www.fec.gov/directives/directive_52.pdf.

3. The CVC Parties' reliance on the narrow "futility" exception to the exhaustion requirement is misplaced. (CVC Opp. at 7-8.) 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." (*Id*. at 8). 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 have defended the voting procedures in this court case. (CVC Opp. at 7.) 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."[3]

[3] 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. . . .'"

4. As the district court 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 Commission.[4] (Mem. Op. at 29-30 (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), and *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). The CVC Parties do not dispute this general rule, but they claim that it only applies where the new material "relates to the underlying facts or dispute that was before the agency." (CVC Opp. at 8-9.) However, the only case the CVC Parties cite, *Cunningham v. FEC*,

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(CVC Opp. at 8 (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 plaintiffs'] lawsuit.'" *McCarthy*, 503 U.S. at 148 (quoting *Barry v. Barchi*, 443 U.S. 55, 63 n.10 (1979) (quoting *Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (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*, 411 U.S. at 575). 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.

[4] The administrative records the Commission filed included the transmittal cover sheet and ballot for each report circulated to the FEC Commissioners and the Commission Secretary's official certification for the FEC determinations, but not the ballots. After the Commission filed the administrative records, the CVC Parties requested and received the completed ballots. The CVC Parties did not request that the FEC add the ballots to the administrative records. Instead, the CVC Parties filed the ballots with their motion for summary judgment. (*See* CVC Opp. Exhibit 1 (Declaration of Dan Backer, June 7, 2012).)

No. IP-01-0897-C-B/S, 2002 WL 31431557, at *5 n.3 (S.D. Ind. Oct. 28, 2002), 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.[5]

CONCLUSION

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

Respectfully submitted,

[5] Even if properly raised, the CVC Parties' claims about the voting procedures would fail because they elevate formalism over substance and the CVC Parties identify no resulting harm. Pursuant to the FEC's authority to promulgate its own "rules for the conduct of its activities," 2 U.S.C. § 437c(e), the FEC has adopted streamlined voting procedures for routine matters. FEC Directive 52 provides that each matter to be voted upon is circulated to the Commissioners in one of two ways: (1) by a 24-hour "no-objection" ballot or (2) by a "tally vote." *See* http://www.fec.gov/directives/directive_52.pdf. Routine matters – including the non-final reason-to-believe findings in these late-filing matters – are circulated using the first method. More complex matters – including the final determinations in these matters – are circulated on a "tally vote," the second method. These procedures properly balance respondents' interests with agency efficiency. And 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 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)).

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2014, I electronically filed the Commission's Reply in Support of the Commission's Motion for Summary Affirmance with the Clerk of the Court of United States Court of Appeals for the District of Columbia Circuit by using the Court's CM/ECF system.

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