

**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.	)	FEC MOTION FOR
	)	SUMMARY AFFIRMANCE
FEDERAL ELECTION COMMISSION,	)	
	)	
Appellee.	)	
	)	

**APPELLEE FEDERAL ELECTION COMMISSION'S  
MOTION FOR SUMMARY AFFIRMANCE**

Appellee Federal Election Commission (“FEC” or “Commission”) respectfully moves for summary affirmance of the district court’s decision granting summary judgment to the Commission and rejecting the claims of appellants Combat Veterans for Congress Political Action Committee (“CVCPAC”) and its treasurer David H. Wiggs, in his official capacity (collectively “CVC Parties”). (Memorandum Opinion (“Mem. Op.”) and Order, No. 11-cv-2168-CKK (D.D.C. Sept. 30, 2013) (Docket Nos. 30 and 31) (copy attached as Exhibit 1).) The district court correctly upheld the Commission’s administrative determinations that the CVC Parties violated 2 U.S.C. § 434(a) by filing federal campaign finance reports late and the agency’s assessment of penalties totaling \$8,690. The CVC Parties’

numerous complaints about the FEC's straightforward determinations — including their frivolous central claim that the agency was *required* to impose penalties on a former CVCPAC treasurer in his personal capacity — lack merit. Because the parties' positions are so clear as to warrant summary action and no benefit would be gained from further briefing and argument, this Court should summarily affirm the district court's decision.

## LEGAL AND FACTUAL BACKGROUND

### A. The Parties and the Federal Election Campaign Act

The Federal Election Campaign Act, 2 U.S.C. §§ 431-457 (“Act” or “FECA”), provides a comprehensive system for regulation of the financing of federal election campaigns. The Act, among other things, imposes extensive requirements for public disclosure of contributions and expenditures made or received by political committees in connection with federal elections. 2 U.S.C. §§ 432-434.

The Federal Election Commission is an independent federal agency with exclusive jurisdiction over the administration, interpretation, and civil enforcement of FECA. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), 437g. Congress empowered the Commission to “formulate policy with respect to” the Act, 2 U.S.C. § 437c(b)(1), and authorized it to make “such rules . . . as are necessary to carry out the provisions” of the Act. 2 U.S.C. §§ 437d(a)(8), 438(a)(8).

The Commission is authorized to make final determinations and assess civil penalties against committees and their treasurers for certain violations of the reporting provisions of FECA. 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. 2 U.S.C. § 434(a)-(b).

Combat Veterans for Congress PAC is a political committee under 2 U.S.C. § 431(4). The Act requires each political committee to have a treasurer, who must be designated on the committee's statement of organization filed with the FEC. 2 U.S.C. §§ 432(a), 433(b)(4). The treasurer keeps records and files reports with the FEC on behalf of the committee. 2 U.S.C. §§ 432(c), 432(d), 434(a)(1).

**B. The Administrative Determinations Challenged in This Case**

In 2010, CVCPAC and its treasurer filed quarterly reports with the Commission, as permitted by 2 U.S.C. § 434(a)(4)(A). (Mem. Op. at 6.) The CVCPAC report for the third calendar quarter (ending September 30, 2010) was due on October 15, 2010. *See* 2 U.S.C. § 434(a)(4)(A)(i). In addition, if CVCPAC made a contribution or expenditure prior to the November 2010 general election, it was required to file a 12-Day Pre-General Election Report, which was due on October 21, 2010. *See* 2 U.S.C. § 434(a)(4)(A)(ii). Finally, CVCPAC was required to file a 30-Day Post-General Election Report, which was due on December 2, 2010. *See* 2 U.S.C. § 434(a)(4)(A)(iii). The CVCPAC treasurer was

required to file these reports electronically with the FEC before the respective statutory deadlines. *See* 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 Commission sent non-filer notices to CVCPAC and its treasurer for each report, 2 U.S.C. § 437g(b).<sup>1</sup>

(Mem. Op. at 6; AF#2199 at AR035; AF#2312 at AR073; AF#2355 at AR037.)

The FEC's Reports Analysis Division ("RAD"), which monitors the timeliness of such reports, prepared written recommendations to the Commission. (AF#2199 at AR001-AR008; AF#2312 at AR008-AR025; AF#2355 at AR001-AR020.)

In each matter, the staff recommendation was that the Commission find "reason to believe" that CVCPAC and its treasurer had violated 2 U.S.C. § 434(a) by not filing the report by the respective statutory deadline and make a preliminary determination that the fine for the violation would be assessed at a specific amount in accord with the FEC's fine schedule at 11 C.F.R. § 111.43. (Mem. Op. at 7-8; AF#2199 at AR001-AR008; AF#2312 at AR008-AR025; AF#2355 at AR001-AR020.) Pursuant to established procedures, the recommendations were circulated to the Commission on a no-objection basis (*see* FEC Directive 52 (Sept. 10, 2008), available at [http://www.fec.gov/directives/directive\\_52.pdf](http://www.fec.gov/directives/directive_52.pdf)), no Commissioners

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<sup>1</sup> Each report was the subject of a separate administrative fines matter, designated AF#2199, AF#2312, and AF#2355, and the Commission filed separate certified administrative records for each matter. (Docs. 14-16.) Citations "AF#\_\_\_" refer to the referenced administrative record. Citations "AR\_\_\_" refer to the sequentially numbered pages in that record.

objected, and the FEC Secretary and Clerk certified that the Commission had found reason to believe that CVCPAC and its treasurer violated 2 U.S.C. § 434(a) and had made preliminary determinations setting the penalty for each violation. (Mem. Op. at 7.)

When the Commission found reason to believe in AF#2199 in December 2010, Michael Curry was the CVCPAC treasurer. (Mem. Op. at 7, 14-16.) Thus, he was named in the Commission's determination. (*Id.*) On January 12, 2011, David H. Wiggs became treasurer, and so he was substituted as a named respondent under the Commission's policy on successor treasurers. (*Id.*) In AF#2312 and AF#2355, Wiggs was treasurer at the time of the Commission's initial consideration and thus was named in the Commission's March 2011 reason-to-believe determinations. (*Id.*)

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. (Mem. Op. at 8-9.) The Commission's Reviewing Officer subsequently prepared recommendations to the Commission regarding final determinations in all three matters, and those recommendations also were provided to the respondents. (*Id.*) The respondents submitted a combined response, and the Reviewing Officer then submitted final recommendations to the Commission. (*Id.*)

On October 27, 2011, the Commission 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 2 U.S.C. § 434(a). (Mem. Op. at 8-9.) 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 2 U.S.C. § 437g(a)(4)(C)(iii). (*Id.*)

Instead, the CVC Parties submitted a letter to the Commission asserting new procedural and constitutional arguments and requesting an oral hearing.

(Mem. Op. at 9.) The Commission's staff recommended that the agency deny respondents' requests for reconsideration. (*Id.*) The Commission unanimously adopted these recommendations and then notified respondents. (*Id.*)

On December 7, 2011, the CVC Parties filed a timely petition for review of the Commission's final determination. (*Id.*)

### **C. Proceedings Before the District Court**

The CVC Parties petitioned the district court to set aside or modify the Commission's three final administrative determinations and the fines totaling \$8,690. (Mem. Op. at 1, 9.) The Commission filed certified administrative records, and the parties filed motions for summary judgment. (*Id.* at 1, 5 n.2, 9.) On September 30, 2013, the district court rejected all the CVC

Parties' claims, denied the CVC Parties' motion for summary judgment, and granted summary judgment to the Commission. (Mem. Op. and Order.) 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).)

#### **D. Standards of Review**

This 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) (citing *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 507 (D.C. Cir. 2010) (other citation omitted)); *Inv. Co. Instit. v. CFTC*, 720 F.3d 370, 376 (D.C. Cir. 2013). Summary affirmance is appropriate where "[t]he merits of the parties' positions are so clear as to warrant summary action," *Hassan v. FEC*, No. 12-5335, 2013 WL 1164506, at \*1 (D.C. Cir. Mar. 11, 2013) (*per curiam*), and "no benefit will be gained from further briefing and argument of the issues presented," *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (granting summary affirmance).

### **ARGUMENT**

The district court properly upheld the Commission's final determinations that Combat Veterans and David H. Wiggs, in his official capacity as treasurer, violated 2 U.S.C. § 434(a) by filing three disclosure reports late, rejecting appellants' claims that the FEC decisions were contrary to law under 5 U.S.C.

§ 706(2). The CVC Parties have now abandoned some of the objections made below, but they still raise six issues on appeal. None has merit and this Court should summarily affirm the district court's grant of summary judgment to the FEC.

**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 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. On appeal, the CVC Parties renew that claim. (CVC Parties' Statement of Issues to be Raised on Appeal ("Statement of Issues") (Doc. #1474725) at 2 (issues 2 and 3).) But 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 take the unusual step of pursuing personal liability where the agency deems it unwarranted.<sup>2</sup>

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<sup>2</sup> The district court also correctly rejected the CVC Parties' related claim that committees like CVCPAC could not be liable for their own late reports because the treasurers' personal liability was allegedly *exclusive*. (Mem. Op. at 13-18.) The 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 17 (footnote omitted).) The CVC Parties have not raised that claim on appeal.

The district court first held that “this suit is not the proper vehicle for [the CVC Parties] to challenge the Commission’s failure to take action against Mr. Curry.” (Mem. Op. at 18.) In particular, while “[j]udicial review is available under FECA to complainants dissatisfied with the FEC’s decision not to investigate . . . ,’ such review is pursuant to 2 U.S.C. § 437g(a)(8)(A) which sets out a specific process for challenging FEC failures to act on a complaint.” (*Id.* (quoting *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2010).) 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), which would entitle them to judicial review of FEC inaction on such complaint in this Court.” (*Id.* at 18-19.) The CVC Parties indeed have not filed a written administrative complaint with the Commission, and filing such a complaint is a prerequisite to filing suit under section 437g(a)(8) to challenge the Commission’s failure to take enforcement action. 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 [2 U.S.C. § 437g(a)(1)]”); *Perot v. FEC*, 97 F.3d 553, 558-559 (D.C. Cir. 1996); *see Nat’l Republican Cong. Comm. v. Legi-Tech Corp.*, 795 F.2d 190, 193-194 (D.C. Cir. 1986). The CVC Parties have alleged no other jurisdictional basis for judicial review of the Commission’s decision not to pursue Mr. Curry personally. This claim is thus frivolous.

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].’*” (Mem. Op. at 19 (quoting *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (2010); citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (emphasis in original)).) 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*.’” (Mem. Op at 19 (quoting *Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2010) (emphasis in original)).) *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” (quoting *FEC v. Akins*, 524 U.S. 11, 25 (1998))).

The Commission'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, 70 Fed. Reg. 3 (Jan. 3, 2005). The CVC Parties rely upon language from the Commission policy statement suggesting that in certain circumstances the Commission “will consider the treasurer to have acted in a personal capacity and

make findings accordingly” (Statement of Issues at 2 (issue 3) (quoting FEC Statement of Policy, 70 Fed. Reg. at 3), but that is plainly a determination within the FEC’s broad prosecutorial discretion. 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.” (Mem. Op. at 19.) 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 FEC’s RAD office did not reflect a deliberate effort to obstruct the filings. (*Id.* at 19-20.)<sup>3</sup> 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

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<sup>3</sup> According to Appellants, on October 12, 2010, three days before CVCPAC’s first report — the October 2010 Quarterly Report — was due, Mr. Curry indicated a desire to resign his position. (Amended Petition for Review of Federal Election Commission Determination and Complaint for Declaratory and Injunctive Relief, No. 11-cv-2168-CKK (D.D.C. June 25, 2012) (Doc. No. 20) ¶ 20.) The record shows that Mr. Curry continued taking steps to prepare CVCPAC’s October 2010 Quarterly report, however, including initiating several communications with Commission staff, and he ultimately filed that report on November 21, 2010, thirty-seven days late. (Mem. Op. at 6.) 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. (*Id.*)

or reckless failure to file reports.” (*Id.* at 20 (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”))).<sup>4</sup>

Thus, the Commission articulated a reasonable basis for its decision not to pursue Mr. Curry personally, and the CVC Parties’ claims have no merit.

**B. The District Court Correctly Rejected the CVC Parties’ Claims That the Administrative Fines Should Have Been Mitigated**

The CVC Parties also appeal the district court’s decisions regarding their mitigation and “best efforts” defenses (Statement of Issues at 2-3 (issues 4 and 5)). But those claims are frivolous because the Commission simply followed its own administrative fines regulations and applied the published fines schedule. The CVC Parties’ fall-back argument that the Commission’s “best efforts” regulation is arbitrary and capricious (*id.* at 3 (issue 6)) 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). The regulation lists

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<sup>4</sup> In any event, as the district court noted, “such an action would not have absolved the [CVC Parties] of their own liability.” (Mem. Op. at 20 n.4.)

circumstances that are considered “reasonably unforeseen and beyond the control of respondent,” including certain widespread Internet disruptions and disaster-related incidents. 11 C.F.R. § 111.35(c). But the regulation states that 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 Commission 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. (AF#2199 at AR0093; AF#2312 at AR097; AF#2355 at AR090.) 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. (Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion for Summary Judgment, No. 11-cv-2168-CKK (D.D.C. June 7, 2012) (“Plaintiffs’ Supporting Memorandum”))

(Docket No. 18-1) at 32; *see generally id.* at 31-42.)<sup>5</sup>

The district court rejected the CVC Parties' claims and held that the Commission's decision not to mitigate the administrative fines was not arbitrary and capricious. (Mem. Op. at 22-24.) Agency action must be upheld as long as it has some rational basis. *Id.* at 22; *see Verizon v. FCC*, \_\_\_ F.3d \_\_\_, Nos. 11-1355 and 11-1356, 2014 WL 113946, at \*16 (D.C. Cir. Jan. 14, 2014); *LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 737 (D.C. Cir. 2006). The district court correctly concluded that the Commission's decision not to mitigate the penalties "easily satisfies" the "rational basis" standard since the Commission 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. (Mem. Op. at 23 ("Here, the Commission concluded that, pursuant to this regulation, [the CVC

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<sup>5</sup> Although the district court did not address this issue, 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 Commission 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). (Mem. Op. at 9; Plaintiffs' Supporting Memorandum at 31-42.) Thus, these claims have been waived. *See* 11 C.F.R. §§ 111.35(e), 111.38; *Dakota Underground, Inc. v. Sec. 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 2 U.S.C. § 437g(a)(4)(C)(iii).

Parties] did not qualify for mitigation or reduction of their fines.”.)

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.” (Mem. Op. at 23.) The district court explained that “[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 ‘best efforts’, then the exception would swallow the rule, and almost all late filings would be excusable.” (*Id.* at 23-24 (citation omitted).) The court below also correctly 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.*)

In sum, the CVCPAC Parties cannot demonstrate that the district court erred when it rejected their mitigation and “best efforts” claims.

**C. The District Court Correctly Rejected the CVC Parties’ Challenges That Were Not Presented to the Commission**

Finally, the CVC Parties appeal the district court’s rejection of their complaints about the FEC’s voting procedures due to a failure to exhaust administrative remedies. (Statement of Issues at 1-2 (issue 1).) The CVC Parties claimed 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 2 U.S.C. § 437g(a)(2), and they also questioned the signatures and wording on the ballots at the final determination stage.

Plaintiffs' Supporting Memorandum (Docket No. 18-1) at 14-20.

The district court properly declined to consider these claims because they never were presented to the agency and were based upon documents not part of the administrative records. (Mem. Op. at 29-30.) The CVC Parties now appear to challenge the district court's decision only with respect to the votes at the final determination stage (*see* Statement of Issues at 1), but in any event, the district court's decision was correct. 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.’” (Mem. Op. at 29 (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)).) And as the district court noted, the documents the CVC Parties relied upon were not part of the administrative records. (*Id.* at 29-30.) “[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.” (*Id.* (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).) Thus, the district court correctly declined to reach the CVC Parties’

voting procedure claims.

## 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,

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January 27, 2014

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	)	
Appellee.	)	

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 27, 2014, I electronically filed 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.

Service was made on the following counsel for Appellants through the CM/ECF system:

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