No. 13-5358

# United States Court of Appeals for the District of Columbia Circuit

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 in Case No. 11-2168 (CKK)**

## PETITION FOR PANEL REHEARING AND REHEARING EN BANC FOR APPELLANTS COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMMITEE AND DAVID H. WIGGS, TREASURER

PAUL D. KAMENAR
(D.C. Bar No. 914200)
COOLIDGE-REAGAN FOUNDATION
1629 K Street NW, Suite 300
Washington, DC 20006
(202) 603-5397
Paul.Kamenar@Gmail.com

DAN BACKER
(D.C. Bar No. 996641)
DB CAPITOL STRATEGIES, PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
(202) 210-5431
DBacker@DBCapitolStrategies.com

October 8, 2015 *Counsel for Appellants*

# TABLE OF CONTENTS

**Page**

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... ii

INTRODUCTION AND RULE 35(B)(1) STATEMENT ..... 1

I. THE PANEL DECISION REJECTING THE VOTING CHALLENGE ON HARMLESS ERROR GROUNDS WAS FACTUALLY ERRONEOUS AND CONFLICTS WITH CASE LAW IN THIS CIRCUIT ..... 3

A. The "Reason to Believe" Votes Were Insufficient ..... 5

B. The Final Tally Votes Were Insufficient ..... 10

II. THE PANEL DECISION WITH RESPECT TO THE TREASURER'S PERSONAL LIABILITY AND THE MITIGATION OF THE FINE CONFLICTS WITH SUPREME COURT RULINGS REQUIRING AGENCIES TO ARTICULATE REASONS FOR THEIR DECISIONS ..... 12

A. Personal Liability of Treasurer ..... 13

B. Mitigation of the Fine ..... 15

CONCLUSION ..... 15

CERTIFICATE OF SERVICE

PANEL DECISION JULY 28, 2015 ..... ADDENDUM-1

CERTIFICATE OF PARTIES ..... ADDENDUM-2

CERTIFICATE OF DISCLOSURE ..... ADDENDUM-2

# TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981) .....14

*Burlington Truck Lines v. United States*, 371 U.S. 156 (1962).....14

**Chamber of Commerce of the United States v. NLRB*,
879 F. Supp. 2d 18 (D.D.C. 2012), appeal dismissed,
2013 U.S. App. LEXIS 25897 (D.C. Cir. Dec. 9, 2013) .....2, 7, 8, 12

*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) .....14

*Combat Veterans for Congress PAC v. FEC*,
983 F. Supp. 2d 1 (D.D.C. 2013).....1, 5, 13, 15

*FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) .....1, 9

*FEC v. Toledano*, 317 F.3d 939 (9th Cir. 2002).....15

**Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012).....1, 8, 9

*Michigan v. EPA*, 268 F.3d 1075 (D.C. Cir. 2001) .....8

**Motor Vehicles Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co.*,
463 U.S. 29 (1983).....3, 14

*Shinseki v. Sanders*, 556 U.S. 396 (2009).....7

**Codes, Regulations and Rules**

52 U.S.C, 30104(a) .....14

52 U.S.C. 30109(a)(2).....3, 6

11 C.F.R. 104.14(d) .....14

* Authorities chiefly relied on.

*11 C.F.R. 111.32 .....3

11 C.F.R. 111.37(a).....3

11 C.F.R. 114.12 .....14

70 Fed. Reg. 5 (Jan. 3, 2005) .....15

Fed. R. App. Proc. 35.....1

Fed. R. App. Proc. 40.....1

D.C. Cir. Rule 35 .....1

Federal Election Commission Directive No. 10 .....5

Federal Election Commission Directive No. 52 .....5, 11

## INTRODUCTION AND RULE 35(B)(1) STATEMENT

Pursuant to Fed. R. App. Proc. 35 and 40, and D.C. Cir. Rule 35, Plaintiffs-Appellants Combat Veterans for Congress Political Action Committee and its Treasurer, David H. Wiggs (collectively referred to as "Combat Veterans"), respectfully file this Petition for Panel Rehearing and Rehearing En Banc of the panel's July 28, 2015 opinion and judgment. *See* Slip Op. (Addendum-1).

The panel decision finding harmless error regarding Combat Veterans' challenge to the validity of the Federal Election Commission's (FEC) voting procedures conflicts with this Court's harmless error decision in *Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012). Moreover, the panel's reliance on *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) for the proposition that in this case, the FEC did similarly ratify the challenged enforcement actions with its subsequent tally vote was misplaced for two reasons: (1) even the FEC did not claim that the challenged enforcement actions were so ratified, and (2) there remained a challenge by Combat Veterans to the validity of four of the six tally votes cast that resulted in the imposition of civil penalty fines. Thus, the statutorily required "four affirmative votes" were themselves lacking. At a minimum, the panel should have remanded the case to the district court for resolution of that factual issue since the district court never addressed it, holding instead that the voting challenge claims "are not properly before this Court and will not be addressed." *Combat*

*Veterans for Congress PAC v. FEC*, 983 F. Supp. 2d 1, 22 (D.D.C. 2013). That clearly erroneous holding was reversed by the panel *sub silentio* although affirmed on harmless error grounds.

The question of the whether the Commission's authority to exercise its enforcement powers was validly exercised by the casting of the minimum "four affirmative votes" required by its organic statute is clearly one of exceptional importance. This is true as to either the statutory validity of an individual Commissioner's vote as it was in *Chamber of Commerce of the United States v. NLRB*, 879 F. Supp. 2d 18, 32 (D.D.C. 2013), *appeal dismissed*, 2013 U.S. App. LEXIS 25897 (D.C. Cir.. Dec. 9, 2013) or the constitutional authority of the person to cast it as in *Legi-Tech*, notwithstanding this panel's suggestion to the contrary.[1]

Finally, in rejecting Combat Veterans' substantive defenses to the imposition of the $8,690 civil penalty -- particularly the FEC's complete disregard of substantial authority imposing the duty and "personal liability" on treasurers to timely file the required disclosure reports and the FEC's failure to mitigate the fine where the culpable treasurer engaged in undisputed willful or reckless conduct -- the panel simply adopted the reasoning of the district court. In doing so, it ignored

[1] *See* Slip op. at 14 ("This case is far easier than *Legi-Tech* [because] the purported infirmity [here] was statutory rather than constitutional").

the substantial arguments presented by Combat Veterans, including the failure of the Commission to provide reasons for its decision.[2]

## I. THE PANEL DECISION REJECTING THE VOTING CHALLENGE ON HARMLESS ERROR GROUNDS WAS FACTUALLY ERRONEOUS AND CONFLICTS WITH CASE LAW IN THIS CIRCUIT

In order for the FEC to initiate any enforcement action for alleged violations of the Federal Election Campaign Act, whether for filing a late disclosure report or other substantive violation of the law, the Commission must make a "reason to believe" determination that such violations occurred "by an affirmative vote of 4 of its members." 52 U.S.C. 30109(a)(2); 11 C.F.R. 111.32; 111.37(a). Slip op. at 6. If a respondent does not reply to the notice of the alleged violation with respect to a late report, or if the FEC rejects the proffered defense, the Commission may impose a "civil money penalty" or fine, but only after a minimum of four affirmative votes have been cast again to make this final determination.

After Combat Veterans filed the instant action challenging the FEC's rejection of, or the failure to address, Combat Veterans' substantive defenses to the fines assessed, the Commission filed the administrative record with the district court. The Commission's Secretary certified that the Commission unanimously voted 6-0 to find "reason to believe" at the first stage of the enforcement process,

---

[2] *See Motor Vehicles Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 43 (1983).

and 6-0 in making a final determination to impose the fines, but included only a single *blank* sample ballot for each of those two actions. Suspecting the actual ballots cast may not reflect the unanimous vote so certified, counsel made what is believed to be an unprecedented request in the annals of FEC enforcement litigation, namely, that the FEC should disgorge the actual ballots. After some resistance, the ballots were eventually provided by FEC attorneys.

After examining the actual ballots for the "reason to believe" votes for each of the three late filed reports, Combat Veterans discovered there were never more than *three* marked ballots, and thus, in all those actions, the requisite "four affirmative votes" were lacking. Moreover, with respect to the final vote that purported to make the determination of liability and the assessment of the $8,690 fine, the validity of four of the six votes were in question. Only two of the final votes were timely signed and submitted by a Commissioner and the other four were in dispute; three were signed by another person (one of which was also submitted after the deadline for voting) and the fourth by a Commissioner but submitted after the deadline.

Combat Veterans promptly amended their complaint adding a count challenging the validity of the enforcement actions, arguing they were void *ab initio* because they were initiated without the requisite four affirmative votes and the requisite four votes for the final determination were similarly lacking. The

district court, however, agreed with the FEC that it should not consider the voting challenge since the ballots, although submitted to the court by Combat Veterans, were not part of the original administrative record, and that the issue should have been raised at the agency level. *Combat Veterans*, 983 F. Supp. 2d at 22.

On appeal, the panel apparently agreed with Combat Veterans' argument that the district court's refusal to consider the voting issue was clearly erroneous, inasmuch as that (1) it was the FEC which failed to include the ballots in the administrative record and (2) it was simply impossible for Combat Veterans to challenge the voting process at the agency level since the ballots were reluctantly released only *after* administrative proceedings were concluded.

**A. The "Reason to Believe" Votes Were Insufficient**

The Commission argued below and in this Court that six "affirmative votes" were cast at the "reason to believe" stage despite only three ballots being marked because of an internal policy FEC Directive No. 52 (Add. 59).[3] Specifically, under what appears to be a novel and unprecedented practice of casting votes on enforcement actions by a multi-member agency, the Commission uses a 24-hour

[3] Remarkably, Directive No. 52, adopted in an improperly closed meeting, was not published in the Federal Register like FEC Directive No. 10, entitled "RULES OF PROCEDURES OF THE FEDERAL ELECTION COMMISSION PURSUANT TO 2 U.S.C. 437c(e)." Nor is the directive found in FEC's Compliance Procedures, 11 C.F.R. Part 111. Rather, Directive No. 52 is deeply buried in the Commission's website and never provided to respondents in enforcement actions. *See* Combat Veterans Opening Br. at 35-40.

no-objection procedure whereby if a ballot is circulated to a Commissioner but is not returned within 24-hours, that non-action constitutes an "affirmative vote" under the statute.

But as the panel correctly observed, "[a] Commissioner could be on vacation, out of the country, in a hospital bed, or her email could be malfunctioning, or simply ignored and unopened." Slip op. at 10. The panel also correctly noted that "The Commission's twenty-four-hour, no-objection procedure must comport with the statutory requirement that the Commission, when it takes action to investigate reports of suspected violations, do so only 'by an affirmative vote of 4 of its members.'" 52 U.S.C. 30109(a)(2). That requirement is a cornerstone of the Commission's governance structure." Slip op. at 9. Yet if left undisturbed, the panel opinion would have the effect of damaging that cornerstone and undermining this important structure.

While the panel recognized that the issue of the validity of the no-objection voting process "may be a substantial one," it declined to reach the issue holding that any error was harmless. Slip op. at 11-14.

First, the panel mistakenly stated that "Combat Veterans has not explained how it was prejudiced" by the no-objection vote. Slip op. at 12. To the contrary, Combat Veterans explained in its Reply Brief at 7-11 why the error was both prejudicial and fundamental. In particular, an agency's failure to comply with the

statutory requirement to invoke its enforcement powers is a fundamental error. *See Chamber v. NLRB*, 879 F. Supp. 2d 18. The panel quotes *Shinseki v. Sanders*, 556 U.S. 396 (2009) listing factors to consider in assessing harmless error, but even there the Supreme Court observed that the harmless error rule is "not . . . a particularly onerous requirement." *Id*. at 410. Here, Combat Veterans was forced to respond to the FEC's charges or else be subject to the fines assessed, a process which is functionally equivalent to being hauled into court by the FEC for violating any other provision of the Campaign Act, an agency action which the panel suggested would constitute prejudice against a party. Slip op. at 14 ("The Commission was preparing a civil suit for damages against Legi-Tech, whereas it merely assessed an administrative fine against Combat Veterans."). A failure to respond to either a civil suit or administrative charges would result in a default judgment and assessment of civil money penalties in both cases. Both kinds of agency process prejudice a party despite their ability to present defenses. Otherwise, by analogy, a defendant indicted by a grand jury for possessing contraband should not be heard to complain that the vote taken by the grand jury was insufficient because he is entitled to a trial for the offense.

The panel's further suggestion that there was no prejudice because the Commission could have properly voted to find "reason to believe" finds no judicial support and would set a dangerous precedent. The panel cites no case where an

enforcement action which was void *ab initio* and *not* ratified by a subsequent valid agency vote was later upheld by a reviewing court because the agency *could have* acted properly the first time. To the contrary, in *Chamber v. NLRB*, *supra*, the district court vacated the rulemaking because it was the product of a statutorily defective quorum, regardless of whether the NLRB would most certainly have voted for the rule again on remand. The court said the "NLRB is a 'creature of statute' and possesses only that power that has been allocated to it by Congress." *Id*. at 30 (citing *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). To paraphrase the court in *Chamber v. NLRB*, until there is a remand to the FEC for valid voting, "the Court cannot reinstate [an enforcement action] that was [initiated] without the requisite [four affirmative votes] and, accordingly, in excess of the agency's congressionally delegated power." 879 F. Supp. 2d 18 at 35.

Finally, the panel's conclusion that no harmless error occurred because the allegedly inadequate "reason to believe" votes were subsequently "ratified" by the Commission is wrong factually and conflicts with this Court's decision in *Mack Trucks, Inc. v. EPA*, 682 F.3d 87 (D.C. Cir. 2012). In *Mack Trucks*, this Court "strongly reject[ed]" the notion that the EPA's failure to allow for notice and comment on an interim rule was not harmless error even when the agency provided such notice for the pending final rule. 682 F.3d at 95. As this Court explained, "Were that true, agencies would have no use for the APA when promulgating any

interim rules." *Id.* In the same fashion, the failure to cast four affirmative votes at the initial "reason to believe" stage here is similarly not harmless error. If the panel opinion is left undisturbed, the FEC would have no use for complying with the statutory requirement that "four affirmative votes" be cast to undertake enforcement actions.

The panel chiefly relies on this Court's decision in *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) where the party challenged the FEC's "probable cause" finding because it was made by a Commission whose composition included two unconstitutionally appointed *ex officio* members. But as this Court made clear, "[to] be sure, Legi-Tech *was prejudiced*, in the same manner as the NRA, when the FEC brought suit." *Id.* at 708 (emphasis added). The *Legi-Tech* court, however, went on to determine whether the "degree of continuing prejudice now, *after* the FEC's reconstitution *and ratification*" warrants dismissal of the FEC action against Legi-Tech. *Id.* (emphasis added). In the instant case, there has been no ratification by the Commission of the defective vote to initiate the enforcement action. While the FEC suggests it "*could have* ratified" its determinations in this matter using a valid voting procedure, FEC Br. at 52, n.20 (emphasis added), the fact of the matter is they have not done so, as counsel for Combat Veterans reiterated during oral argument in this case. Argument Audio Recording at 11:26-11:34 (Feb. 5, 2015). Moreover, it is far from certain the Commission would ratify the invalid

enforcement action if the case were remanded to the agency. There are two new Commissioners at the FEC since the commencement of the original action in this case, and only one vote is needed to trigger an in-person Commission meeting. Such a meeting could address the personal liability of the treasurer and produce a statement of reasons of its decision that can be judicially reviewed. *See* Combat Veterans' Br. at 9-10 and the discussion in Part II, *infra*.

Accordingly, the panel was mistaken when it stated any prejudice to Combat Veterans "was rendered harmless by the Commission's [alleged] subsequent ratification of its reason-to-believe finds with a concededly valid tally vote." Slip op. at 14. Certainly, Combat Veterans did not "concede" that the final tally vote was valid, nor was there any ratification of the prior "reason to believe" vote even if the final tally votes were valid.

**B. The Final Tally Votes Were Insufficient**

As previously noted, with respect to the tally votes actually cast at the final determination stage, Combat Veterans did challenge below the validity of four of the six votes. Three were signed by a person other than the Commissioner, one of which was also submitted late; and a single tally ballot which was signed by a Commissioner was also submitted late. *See* Combat Veterans' Opening Br. at 30; Reply Br. at 9. Significantly, the panel incorrectly stated that "a dispositive number of [four] ballots the individual Commissioners submitted to ratify the

Commission's ultimate determination . . . were signed by a staff member acting on the Commissioner's instructions. . . ." Slip op. at 14.

However, there were only three ballots signed by another person, one of which was submitted past the voting deadline. As for the validity of all three ballots signed by another person, the panel cited to common law authority for the proposition that an agent may sign certain legal documents on behalf of a principal if the principal provides authorization "verbally" or "by Parol." Slip op. at 15. But this kind of agency authority to sign commercial documents hardly suffices to comport with statutory language directed at government officials in carrying out their duties.

Moreover, even if such authority is permitted, the source and scope of that authority in *this* case is found and circumscribed in FEC Directive No. 52. That directive is quite explicit that there must be written instructions, rather than verbal ones, given by the Commissioner to the staff member "*regarding the matter being acted on* and [stating that] the staff member is acting in accordance with those instructions." Directive No. 52 at 4 (Add. 62). Furthermore, those instructions must be kept with the record of the proceeding. In the court below, the FEC steadfastly refused to provide those alleged authorizations to Combat Veterans to determine their validity. Accordingly, the panel had no basis to conclude "even accepting Combat Veterans' technical objections - - at least four of the

Commission's ballots in its final tally vote were valid. . . ." Slip op. 15 at n.2. In short, this important factual matter was not resolved by the district court. At a minimum, the panel should have remanded the case to the district court for further proceedings where the court could rule, as did the court in *Chamber v. NLRB*, that the staff authorization to vote on behalf of the Commissioner were lacking.

## II. THE PANEL DECISION WITH RESPECT TO THE TREASURER'S PERSONAL LIABILITY AND THE MITIGATION OF THE FINE CONFLICTS WITH SUPREME COURT RULINGS REQUIRING AGENCIES TO ARTICULATE REASONS FOR THEIR DECISIONS

Combat Veterans challenged the failure of the FEC to hold its former treasurer, Michael Curry, personally liable[4] due to his "reckless and willful" misconduct, or to mitigate the fine imposed by what the panel properly recounted as the havoc wreaked upon the committee by his malfeasance and abrupt departure, which "made it impossible for Combat Veterans to file its reports on time." Slip op. at 15.[5] However, the panel merely adopted the district court's reasons for rejecting those challenges and ignored altogether the substantial arguments

[4] The panel mistakenly stated that Combat Veterans argued that the FEC should have held Curry "and only Curry" liable for the missed deadlines. Slip op. at 16. Combat Veterans instead argued that the FEC abused its discretion for failure to hold him personally liable "either solely or jointly." Statement of Issues, No. 3; Opening Br. at 2.

[5] "With Curry went all of the Committee's institutional knowledge: passwords, awareness of the contents of its records, bank deposit slips, bank statements, donor lists, and the expertise to submit reports to the Commission electronically." Slip op. at 15.

presented by Combat Veterans in their briefs as to why those reasons were reversible error. *See* Opening Br. at 40-58; Reply Br. at 15-24. Accordingly, Combat Veterans will focus its discussion on the district court's decision.

**A. Personal Liability of Treasurer**

Significantly, in rejecting Combat Veterans' claims that the FEC's failure to exercise its discretion to hold Curry personally liable either solely or jointly, or its arbitrary decision not to mitigate the fines, the district court repeatedly relied on what the court thought were the Commission's *purported* reasons for doing so. For example, the district court mistakenly observed that the "Commission *considered* Mr. Curry's potential liability, and *has supplied reasonable grounds* for its failure to prosecute him in his personal capacity" and that the Commission made a "*decision*[] . . . not to pursue Mr. Curry in his personal capacity for willful or reckless failure to file the reports." 983 F.Supp. 2d at 15 (emphasis added). But nothing in the record shows the Commissioners *actually* considered the issue of Mr. Curry's personal liability, despite the FEC's Reviewing Officer and Acting General Counsel expressly raising the issue to the Commission of "pursuing [Curry] personally" and that his reckless conduct could be considered "as possible mitigating factors in determining the civil penalty" for the committee. Opening Br. at 47-48.

It is black letter law that the Commission must articulate the reasons for its

actions at the time the decision took place[6] and not "post hoc rationalizations of the agency or the parties to [later] litigation." *Am. Textile Mfrs. Inst. v. Donovan,* 452 U.S. 490, 539 (1981) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971). Thus, with respect to Combat Veterans' argument that the staff recommended that the Commission consider the personal liability of the treasurer, the FEC asserts that "[t]he Commissioners *unanimously decided* . . . not to pursue the former treasurer in these matters." FEC Br. at 34, n.15. But we have no way of knowing if the Commissioners even considered this issue since there is no statement of reasons explaining this purported "decision" not to pursue the former treasurer personally -- an especially concerning omission in light of ample authority imposing such liability.[7] In such a circumstance, the district court should

---

[6] An agency must supply a "satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.'" *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)." *Motor Vehicles Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[7] *See* Opening Br. at 44-46. Under the Campaign Act, "[e]ach treasurer of a political committee shall file reports of receipts and disbursements in accordance with the provisions of this subsection." 52 U.S.C, 30104(a); 11 C.F.R. 104.14(d) ("Each treasurer of a political committee . . . *shall be personally responsible* for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained in it.") (emphasis added); 11 C.F.R. 114.12 ("Notwithstanding the corporate status of the political committee, *the treasurer remains personally responsible* for carrying out their respective duties under the Act") (emphasis added). As the FEC made clear: "[i]ndeed, if FECA were construed to impose liability on treasurers only in their official capacities, it would effectively mean that only committees are liable for violations under the statute--which would have been easy enough for Congress to accomplish by writing the Act to impose reporting, recordkeeping, and other duties on 'committees' *rather*

have remanded the matter to the agency to reconsider its decisions and to supply its reasons in order that a reviewing court can properly determine whether those reasons are arbitrary, capricious, or an abuse of discretion.

**B. Mitigation of the Fine**

As for the mitigation of the fine and Combat Veterans' related "best efforts" defense, the district court (and the panel by adoption) found the Commission "bas[ed] their decision not to mitigate on [the FEC's "best efforts"] regulation, rather than on any equitable considerations . . . ." 983 F. Supp.2d at 17. Yet the record does not show what the Commission based its decision on and whether the FEC was even aware it had equitable discretion to reduce the fine.

In short, at a minimum, the panel should have remanded the case to the district court with instructions to further remand to the Commission to supply the necessary reasons for its decision.

## CONCLUSION

For all the foregoing reasons and those provided in Combat Veterans' Opening and Reply Briefs, petitioners urge this Court to grant their Petition for Rehearing or Rehearing En Banc.

---

*than 'treasurers.'"* 70 Fed. Reg. 5, n.8 (Jan. 3, 2005). Add. 49 (emphasis added). *See also FEC v. Toledano*, 317 F.3d 939, 947 (9th Cir. 2002) (the Act "holds [the treasurer] *personally responsible* for the committee's recordkeeping and reporting duties.") (emphasis added).

Respectfully submitted,

/s/Dan Backer

Dan Backer
DB Capital Strategies PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
(202) 210-5431
dbacker@dbcapitolstrategies.com

Paul D. Kamenar
Coolidge Reagan Foundation
1612 K Street, N.W., Suite 300
Washington, DC 20006
(202) 603-5397
paul.kamenar@gmail.com

*Counsel for Appellants-Petitioners*

Date: October 8, 2015

**UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

| | | |
|---|---|---|
| COMBAT VETERANS FOR CONGRESS POLITICAL ACTION COMMITTEE AND DAVID H. WIGGS, TREASURER<br><br>Appellants,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Appellee. | ) | No. 13-5358<br><br>CERTIFICATE OF SERVICE |

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on October 8, 2015, I electronically filed the Appellants' Petition for Panel Rehearing and Rehearing En Banc with the Clerk of the Court of the 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 Appellee through the CM/ECF system:

Harry J. Summers
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463
(202) 694-1650
hsummers@fec.gov

/s/ Dan Backer

Dan Backer (D.C. Bar No. 996641)
DB Capital Strategies PLLC
203 South Union Street, Suite 300
Alexandria, VA 22314
(202) 210-5431
dbacker@dbcapitolstrategies.com

# ADDENDUM - 1

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

Argued February 5, 2015 Decided July 28, 2015

No. 13-5358

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

v.

FEDERAL ELECTION COMMISSION,
APPELLEE

---

Appeal from the United States District Court
for the District of Columbia
(No. 1:11-cv-02168)

---

*Paul D. Kamenar* argued the cause for appellants. With him on the briefs was *Dan Backer*.

*Harry J. Summers*, Assistant General Counsel, Federal Election Commission, argued the cause for appellee. With him on the brief were *Kevin A. Deeley*, Acting Associate General Counsel, and *Robert W. Bonham III*, Senior Attorney.

Before: HENDERSON, PILLARD and WILKINS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* PILLARD.

PILLARD, *Circuit Judge*: The basic facts are few and not in dispute. The Federal Election Commission in October of 2011 imposed an $8,690 fine on the Combat Veterans for Congress Political Action Committee and its treasurer, David Wiggs, in his official capacity. Combat Veterans incurred the fine for failing to meet three required reporting deadlines under the Federal Election Campaign Act. Combat Veterans sued the Commission, contesting the fine and charging that the Commission's procedural errors deprived it of the power to act.

Only one of Combat Veterans' claims gives us pause. It emerged during litigation that the Commission's voting procedures may contravene the Campaign Act. The Commission must secure "an affirmative vote of" four of its six Commissioners to initiate an enforcement action against a person who misses a filing deadline under the Act. 52 U.S.C. § 30109(a)(2). In polling its Commissioners to learn how they vote on an enforcement action, the Commission currently uses a voting procedure that counts as "affirmative votes" ballots that it distributes to the Commissioners but that Commissioners do not mark and return. There is a question whether it is lawful for the Commission to treat unmarked, unreturned ballots as affirmative votes.

Disposition of this case does not, however, require that we resolve the precise meaning of "affirmative votes" under the statute, and, in particular, whether the Commissioners' silent acquiescence may be treated as such votes. Combat Veterans has failed to show that the Commission's use of its allegedly flawed voting procedure caused it any prejudice. The challenged votes did not result in an investigation of Combat Veterans because the filings' lateness was readily apparent from information already in the Commission's possession. Moreover, the Commission's ultimate liability

determinations on the late filing charges were made by unanimous tally votes on marked ballots. Because we conclude that the Commission's use of its voting procedure was harmless even if it was in error, we affirm the decision of the district court.

## I.

### A.

The Federal Election Commission administers the Federal Election Campaign Act, the statute that regulates campaign fundraising and financing for federal elections. *See* 52 U.S.C. §§ 30101 *et seq.*[1] The Campaign Act requires that political committees file periodic reports detailing their receipts and disbursements. *Id.* § 30104(a)-(b). The Federal Election Commission is authorized to fine political committees that fail to meet the Act's reporting deadlines. *Id.* § 30109(a)(5)(A)-(B).

Deadlines are not all that the Commission superintends, however. The Commission's mandate is broad and its authority considerable. *See id.* § 30107. Substantively, the Act charges the Commission to enforce laws governing required public disclosures of campaign finance information, as well as limits on contributions to, and public funding of, federal election campaigns. As a procedural matter, the Act authorizes the Commission to conduct investigations, authorize subpoenas, administer oaths, receive evidence, and initiate civil actions. *See id.* Such an independent

[1] Until recently, the Federal Election Campaign Act was codified at 2 U.S.C. §§ 431-457. The Act has since been recodified and renumbered. *See* 52 U.S.C. §§ 30101-46. In this opinion, we cite to the current codification.

Commission holds potentially enormous power. It must decide "issues charged with the dynamics of party politics, often under the pressure of an impending election." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

Congress sought to limit the Commission's powers through two safeguards. First, Congress tempered the Commission's powers through structure. *See* H.R. Rep. No. 94-917, at 3 (1976); *see also* Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 Admin. L. Rev. 575, 590-93 (2000). Congress designed the Commission to ensure that every important action it takes is bipartisan. *See Democratic Senatorial Campaign Comm.*, 454 U.S. at 37; *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988). The Commission is comprised of six Commissioners. 52 U.S.C. § 30106(a)(1); *see FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826-28 (D.C. Cir. 1993) (holding unconstitutional statutory provision permitting two congressional officers to serve as *ex-officio* members). Of the six Commissioners, "[n]o more than [three] . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1) Many Commission actions require "the affirmative vote of 4 members of the Commission." *See id.* § 30106(c) (cross-citing 52 U.S.C. §§ 30107(a)(6), (7), (8), (9)). No Commissioner may "delegate to any person his or her vote or any decisionmaking authority or duty." *Id.* The Commission cannot sub-delegate its central powers to committees of its members. *See id.* The four-affirmative-vote, non-delegation, and bipartisanship requirements reduce the risk that the Commission will abuse its powers. As the Committee Report accompanying the creation of the four-vote language explains: "[t]he four-vote requirement serves to assure that enforcement actions, as to which Congress has no continuing voice, will be the product

of a mature and considered judgment." H.R. Rep. No. 94-917, at 3 (1976).

Congress further tempered the Commission's power by requiring a series of steps before the Commission takes enforcement action. *See* 52 U.S.C. § 30109(a); *see also* 11 C.F.R. § 111.3-111.24 (enforcement process regulations); Thomas & Bowman, *supra* at 584-90. Before it may act, the Commission must find "reason to believe" that a violation of the Act has occurred. 52 U.S.C. § 30109(a)(2). Following such a determination, the Commission's General Counsel may then conduct an investigation. *Id.* If the outcome of the investigation warrants it, the Commission may then proceed to the next stage of the enforcement process by finding "probable cause to believe" a violation has occurred. *Id.* § 30109(a)(1)-(4). Following a finding of probable cause, the Commission "shall attempt" to resolve a matter by "informal methods of conference, conciliation, and persuasion, and . . . enter into a conciliation agreement" with the respondent involved. *Id.* § 30109(a)(4)(A)(i). If informal measures are ineffective, the Commission may vote to file a de novo civil suit in federal district court to enforce the Campaign Act. *Id.* § 30109(a)(6). Notably, each of those three procedural stages—(1) a reason to believe determination, (2) a probable cause determination, and (3) the filing of a civil suit—requires "an affirmative vote of 4 of [the Commission's] members" before the Commission may proceed. *Id.* §§ 30109(a)(2), 30109(a)(4)(A)(i), 30109(a)(6).

**B.**

In 1999, Congress amended the Campaign Act to create a special, streamlined set of procedures for efficiently imposing fines on covered persons for routine filing and record-keeping violations, such as the late filings at issue here. *See id.* §

30109(a)(4)(C); 145 Cong. Rec. 16,260 (July 15, 1999) (statement of Rep. Maloney) (noting that the bill "contains several provisions that will help the agency operate more efficiently," by mandating some electronic filing and creating "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"); 145 Cong. Rec. 21,725 (Sept. 15, 1999) (statement of Rep. Maloney). With those amendments, Congress sought to make it easier for the Commission to enforce the Campaign Act's deadlines. As the Committee Report accompanying the amendments to the Act explains, 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).

An administrative fines proceeding under the amended Act thus involves fewer hurdles than other Commission enforcement proceedings. *See* 52 U.S.C. § 30109(a)(4)(C). To impose an administrative fine, the Commission makes a reason-to-believe determination just as it would in any potential enforcement proceeding. *See id.* § 30109(a)(2). The Commission then furnishes a person with "written notice and an opportunity to be heard before the Commission." *Id.* § 30109(a)(4)(C)(ii). Once that notice and opportunity has been afforded, however, the streamlined administrative fines authority permits the Commission to find—without making a probable cause determination and without filing an action in district court—that the person violated the Act and require that she or he "pay a civil money penalty." *Id.* §§ 30109(a)(4)(C)(i)(I), (II). In administrative fines proceedings, Congress shifted the burden of seeking judicial review in federal district court to the party against whom the Commission makes an adverse determination. *Id.* § 30109(a)(4)(C)(iii).

**C.**

The Commission uses a twenty-four-hour, no-objection procedure to make reason-to-believe determinations in administrative fines cases. The no-objection vote is one of two "circulation vote" procedures that the Commission set forth in Directive 52, *FEC Directive 52* (Sept. 10, 2008), http://www.fec.gov/directives/directive_52.pdf, pursuant to its statutory authority to promulgate "rules for the conduct of its activities," 52 U.S.C. § 30106(e). The other procedure is a tally vote. *FEC Directive 52*, *supra* at 2. The no-objection and tally vote procedures enable the Commission to conduct votes when the six Commissioners are not physically present together at a meeting.

A twenty-four-hour "no objection" vote refers to the practice of circulating paper ballots to each Commissioner's office, receiving and counting marked ballots, and counting as "yes" votes any ballots not marked and returned within twenty-four hours. *Id.* at 3. A tally vote, by contrast, refers to the practice of circulating paper ballots, receiving and counting marked ballots, and deeming ballots not returned by the deadline (within a week) to be abstentions, i.e., to *not* count as "yes" or "affirmative" votes. *Id.* at 2. In both cases, the Commission Secretary certifies the results of balloting promptly after the voting deadline has passed. Any single Commissioner's objection to making a particular decision by no-objection vote, however, has the effect of placing the matter on the agenda for an in-person vote at a Commissioners' meeting. *Id*. at 3. If, in an administrative fines proceeding, a respondent challenges a reason-to-believe determination, the Commission will use a tally vote to make the final determination as to whether to impose a fine. *Id*.

**D.**

In late 2010, the Combat Veterans for Congress PAC missed three deadlines for filing election reports under the Campaign Act. Over the next four months, pursuant to staff recommendations, the Commission used its no-objection procedure to make three separate determinations that there was "reason to believe" that Combat Veterans had missed a reporting deadline. In the vote regarding the first late-filed report, only three Commissioners marked and returned their ballots; in the second, only two; and in the third, again, only three Commissioners returned marked ballots. In each instance, the Commission Secretary certified that the Commission had "[d]ecided by a vote of 6-0." J.A. 105, 238, 344. The Secretary further certified that, in each case, all six Commissioners "voted affirmatively for the decision." J.A. 105, 238, 344.

Combat Veterans challenged each of the Commission's reason-to-believe determinations. It admitted that the reports were filed late, but disclaimed liability because it believed that Combat Veterans' former treasurer, Michael Curry, was solely responsible for missing the deadlines. In October of 2011, the Commission unanimously found that Combat Veterans and its current treasurer (in his official capacity) were liable for $8,690 in civil penalties. The Commission made that unanimous finding by a tally vote of the Commissioners, after Combat Veterans and its treasurer had been provided written notice and had taken advantage of their opportunity to respond.

Combat Veterans petitioned the Commission for reconsideration, a hearing, and mitigation of the fine, all of which the Commission denied. Combat Veterans and its current treasurer filed a timely petition for review in the

district court. *Combat Veterans for Cong. Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 9 (D.D.C. 2013). On cross-motions for summary judgment, the district court rejected all of Combat Veterans' claims and granted judgment to the Commission. *Id.* at 5, 11-21. This appeal followed.

**II.**

**A.**

The Commission's twenty-four-hour, no-objection voting procedure must comport with the statutory requirement that the Commission, when it takes action to investigate reports of suspected violations, do so only "by an affirmative vote of 4 of its members." 52 U.S.C. § 30109(a)(2). That requirement is a cornerstone of the Commission's governance structure. *See id.* §§ 30106(c), 30109(a)(2), 30109(a)(4)(A)(i), 30109(a)(6). The four-affirmative-vote requirement prevents partisan misuse of the Commission's powers and safeguards individuals from erroneous deprivations of rights.

This matter, which the Commission pursued through its streamlined Administrative Fines Program, involved a straightforward determination that Combat Veterans' filings were late. The Commission did not exercise here any of the important powers—including the powers to make "field investigation[s] or audit[s]," issue interrogatories, conduct depositions, and issue subpoenas—that it may bring to bear in more complex cases once it has found a reason to believe a statutory violation has occurred. *See id.* §§ 30106(c), 30109(a)(2); *see also id.* § 30107(a)(1)-(4). The statutory provision that governs voting in the streamlined Administrative Fines Program, however, equally applies to other, more serious and sensitive Commission enforcement actions. *See id.* § 30109(a)(2). At least in theory, then, the Commission's interpretation of section 30109(a)(2) to permit

it to use no-objection voting might equally authorize the Commission to initiate investigations in complex, sensitive, or major cases by no-objection voting. In those cases, any voting inadequacy could have significant effects because the reason-to-believe determination opens the door to the Commission's use of powerful and intrusive investigative techniques.

Petitioners contend that, even in this simple case, no-objection voting violates the statutory command that reason-to-believe determinations be decided by an "affirmative vote" of four Commissioners. They read the statutory reference to "affirmative" voting to mean voting by positively taking action, i.e., doing more than acquiescing by doing nothing. Yet, they observe, the no-objection voting the Commission uses in its Administrative Fines Program fails to require that the Commissioners mark ballots, nor even that Commissioners' offices keep any record of Commissioners' votes on such matters.

Petitioners claim that no-objection voting creates the unacceptable risks (a) that a Commissioner's view might be recorded mistakenly, or (b) that the Commissioner might not even develop a view before the deadline. A Commissioner could be on vacation, out of the country, in a hospital bed, or her email could be malfunctioning, or simply ignored and unopened. If a Commissioner failed to learn of a ballot, her silence could inadvertently cast "yes" votes even on issues she opposes. Petitioners note that Congress's purpose of requiring four affirmative votes was to "assure that enforcement actions, as to which Congress has no continuing voice, will be the product of a mature and considered judgment." H.R. Rep. No. 94-917, at 3 (1976). The no-objection procedure, however, arguably makes it easier for Commissioners to give their blanket assent despite Congress's

intention that each matter receive individualized consideration.

The question whether no-objection voting complies with the statutory requirement to act by "four affirmative votes" may be a substantial one but, for the reasons that follow, we need not decide it in this case.

**B.**

Even assuming the Commission's use of its no-objection procedure was in error, Combat Veterans has failed to show any likelihood that any material Commission action or decision would have been different had a tally voting procedure been used for the reason-to-believe decisions. We therefore hold that any error was harmless.

"In 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) (quoting *PDK Labs, Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004)). That 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 omitted). The party claiming injury bears the burden of demonstrating harm; the agency need not prove its absence. *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010); *see Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009). In discussing harmless error in the context of the Administrative Procedure Act, the Supreme Court has counseled:

> [T]he factors that inform a reviewing court's "harmless-error" determination are various, potentially involving, among other case-specific factors, an estimation of the likelihood that the result

> would have been different, an awareness of what body (jury, lower court, administrative agency) has the authority to reach that result, a consideration of the error's likely effects on the perceived fairness, integrity, or public reputation of judicial proceedings, and a hesitancy to generalize too broadly about particular kinds of errors when the specific factual circumstances in which the error arises may well make all the difference.

*Shinseki*, 556 U.S. at 411-12.

The Commission's use of its twenty-four-hour, no-objection voting procedure was harmless for three reasons. First, even if a reason-to-believe determination had been erroneously made, Combat Veterans has not explained how it was prejudiced. A reason-to-believe determination, without more, is a mere allegation of wrongdoing. All the Commission did as a result of that step was, in each case, to notify Combat Veterans of the allegations against it and give it an opportunity to respond. The Commission did not use any of its reason-to-believe determinations as grounds to subpoena, depose, or otherwise investigate Combat Veterans. Combat Veterans responded to the Commission's allegations by admitting that the reports were filed late, advancing arguments as to why it nonetheless should not be held liable, and requesting reductions in the proposed fine. Combat Veterans has failed to carry its burden to show how an erroneous reason-to-believe determination in this case, if indeed an error occurred, caused it any prejudice.

Second, there is no hint of any suggestion that the Commission would have made any different determination even if it had used a tally voting procedure at the reason-to-believe stage. The Commission staff recommended that the

Commissioners find reason to believe the deadlines had been missed, and the dates on the reports showed they had in fact been filed late. No evidence has been introduced to show that there was any irregularity in the votes undertaken by the Commission in this case. Combat Veterans' sole assignment of error is the Commission's use of the no-objection procedure itself.

Third, under our precedent, the Commission's ratification of a defect in a reason-to-believe finding by a subsequent, valid tally vote is sufficient to remedy the earlier error. In *Federal Election Commission v. Legi-Tech, Inc.*, we considered a case involving three separate votes—to find reason to believe, to find probable cause, and to institute an enforcement action against a party—that the Commission took while it was unconstitutionally composed. 75 F.3d 704, 705-06 (D.C. Cir. 1996). After the Commission voted but before the *Legi-Tech* litigation was over, the decision of another case in our court held unconstitutional that portion of the Campaign Act that included on the Commission two *ex-officio* congressional officers not appointed by the President, and accordingly voided enforcement actions the Commission had initiated while it was unlawfully constituted. *See NRA Political Victory Fund*, 6 F.3d at 828.

During the pendency of *Legi-Tech*, the Commission responded to *NRA Political Victory Fund* by voting to reconstitute itself as a six-member body and exclude the *ex-officio*, non-voting members from all proceedings, thus correcting the constitutional defect in its composition. *See Legi-Tech, Inc.*, 75 F.3d at 706. The recomposed Commission then voted, *inter alia*, to ratify the prior votes Legi-Tech had challenged. *Id.* We held that the Commission's ratification remedied the constitutional infirmity in the prior votes—even though we were willing to

assume that the Commission's unconstitutional structure had prejudiced Legi-Tech. *Id*. at 708-09.

This case is far easier than *Legi-Tech*. The purported infirmity in the Commission's procedure here was statutory rather than constitutional. And, as noted above, there was no prejudice to Combat Veterans. The Commission was preparing a civil suit for damages against Legi-Tech, whereas it merely assessed an administrative fine against Combat Veterans. None of the potentially intrusive investigative powers that a reason-to-believe determination generally authorizes were deployed against Combat Veterans, where prima facie liability for the fines followed from the fact that the reports were filed later than they were due.

We are confident both that the reason-to-believe determinations in this case caused Combat Veterans no prejudice and that the same determinations would have been made even if the Commission had taken a tally vote. In any event, any prejudice Combat Veterans might have suffered was rendered harmless by the Commission's subsequent ratification of its reason-to-believe finding with a concededly valid tally vote. We therefore conclude that the Commission's use of its allegedly flawed procedure was harmless.

**C.**

Finally, because a dispositive number of the ballots the individual Commissioners submitted to ratify the Commission's ultimate determination to fine Combat Veterans were signed by a staff member acting on the Commissioner's instructions, we must address whether such a ballot is validly cast. We hold that it is. The practice is reasonable, not proscribed by statute, and rooted in longstanding principles of agency. *See, e.g.*, *Nisi prius coram*

*Holt*, 12 Mod. Rep. 564, 564 (1701) (Holt, C.J.) ("[I]f a Man has a Bill of Exchange, he may authorize another to indorse his Name upon it by Parol; and when that is done, it is the same as if he had done it himself."); Joseph Story, Commentaries on the Law of Agency § 50, 56-57 (4th ed. 1851) (explaining that agents may be verbally authorized to sign unsealed documents on behalf of principals).[2]

**III.**

Combat Veterans' other challenges to the Commission's fines require little discussion. In addition to its voting procedure claims, Combat Veterans argued to the Commission, the district court, and this court that its former treasurer, Michael Curry, made it impossible for Combat Veterans to file its reports on time. In the days immediately preceding mandatory deadlines for several filings under the Campaign Act, Curry suddenly, and for reasons never clarified, left his post as Combat Veterans' treasurer. With Curry went all of the Committee's institutional knowledge: passwords, awareness of the contents of its records, bank deposit slips, bank statements, donor lists, and the expertise to submit reports to the Commission electronically. Combat

[2] Combat Veterans makes additional, technical objections to the Commission's voting procedures, including (1) that Directive 52 is void because, Combat Veterans assert, it was promulgated in secret in violation of the Sunshine Act, and that many of the Commissioners' votes are invalid because (2) the ballots were not tendered in strict compliance with Directive 52, or (3) were received after a ballot deadline but counted anyway. The Court's resolution of this case on harmless error grounds, coupled with the fact that—even accepting Combat Veterans' technical objections—at least four of the Commission's ballots in its final tally vote were valid, means that those claims need not be addressed.

Veterans' view is that Curry's "reckless and willful misconduct"—his "malfeasance"—was akin to a natural disaster, impossible for the organization to have anticipated, and impossible to rectify in time to meet the relevant statutory deadlines. Appellant Br. 48-55. Combat Veterans maintains that both law and reason dictate that the Commission should have held Curry, and only Curry, liable for the missed deadlines and, short of that, should have mitigated the fine in light of Combat Veterans' alleged use of its best efforts to overcome Curry's obstruction.

Denial of Combat Veteran's claims requires no explanation beyond what the district court provided. *See Combat Veterans*, 983 F. Supp. 2d at 11-18. We affirm for the reasons given by that court. The district court held, and we agree, that: (1) the Commission reasonably interpreted the Campaign Act to permit it to fine both Combat Veterans and its treasurer in his official capacity for missing filing deadlines, *id.*, at 11-14; (2) disagreement with a Commission decision not to take action against someone else is not grounds for a petition seeking reversal of an administrative fine against oneself, *id.* at 14-15; (3) the Commission's decision not to mitigate penalties against Combat Veterans because of Curry's misconduct was not arbitrary and capricious, *id.* at 16-17; and (4) the Commission's regulation setting forth the circumstances in which it will mitigate damages is not arbitrary or capricious or inconsistent with the Campaign Act, *id.* at 17-18.

* * *

For the foregoing reasons, we affirm the decision of the district court.

*So ordered.*

# ADDENDUM - 2

## CERTIFICATE AS TO PARTIES

Pursuant to Circuit Rule 28(a)(1)(A), the following parties appeared before this Court:

**Plaintiffs/Appellants**

Combat Veterans for Congress Political Action Committee (CVFC)

David H. Wiggs, Treasurer

**Defendant/Appellee**

Federal Election Commission (FEC)

No parties intervened or participated as *amici curiae* before this Court.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, Appellants hereby state that CVFC is an unincorporated political committee that receives and makes contributions with respect to federal elections and is registered with the FEC. CVFC has no members and has no parent company, stock, or partnership shares.

DATED: October 8, 2015.

Respectfully submitted,

/s/ DAN BACKER
DAN BACKER

*Counsel for Plaintiffs/Appellants*