UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT C. MCCHESNEY, in his official, capacity as Treasurer of Bart McLeay for U.S. Senate, Inc., *et al*.,	)	
Plaintiffs,	)	No. 8:16-cv-168-LSC-FG3
v.	)	
MATTHEW S. PETERSEN, in his official capacity as Chair of the Federal Election Commission, *et al*.,	)	REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS
Defendants.	)	

REPLY BRIEF OF DEFENDANTS FEDERAL ELECTION COMMISSION AND MATTHEW S. PETERSEN IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' Opposition to the Motion to Dismiss filed by Defendants Federal Election Commission and its Chairman, Matthew S. Petersen (collectively, the "Commission" or "FEC") confirms that their challenge to the FEC's final determination and administrative fine lacks any merit and should be dismissed. Plaintiffs still do not dispute their failure to file 48-hour notices for the contributions and loans underlying the determination and fine challenged here, nor do they dispute that such notices were required by the Federal Election Campaign Act (the "Act" or "FECA"). Plaintiff also do not dispute that the Commission calculated their $12,122 administrative fine in accordance with the formula set forth in the applicable regulation, 11 C.F.R. § 111.44. Plaintiffs' challenge is instead premised on multiple, fundamental misunderstandings of law and mischaracterizations of the FEC's legal position in this case.

First, plaintiffs misunderstand the standard of review that governs actions like this one for judicial review of a final agency determination. Contrary to plaintiffs' insistence that the Court must defer to their factual allegations, here, the factual issues have already been resolved during the administrative proceedings and the only issue before the Court is whether the Commission's final determination and fine were arbitrary, capricious, or otherwise unlawful. As detailed in the FEC's opening memorandum and below, they were not.

Second, plaintiffs object to the Commission's submission of only the portions of the administrative record specifically referenced in their complaint, ignoring binding precedent explicitly endorsing such an approach.

Third, plaintiffs suggest that the FEC lacked the authority to limit the available grounds for challenging their administrative fine, disregarding FECA's legislative history and case law detailing the purpose and streamlined nature of FECA's Administrative Fines Program.

Fourth, plaintiffs persist in mischaracterizing the Commission's non-discretionary implementation of Congress's extension of FECA's Administrative Fines Program as a substantive "change" to the Commission's regulations. It was not, and plaintiffs' arguments premised on their erroneous characterizations of the regulation are therefore entirely misplaced.

Fifth, plaintiffs misconstrue the Commission's arguments regarding the overbroad scope of their challenge and the relief they purport to seek, while still failing to demonstrate standing to challenge the Commission's supposed "'enormous' power to establish the penal code for all federal elections for the nation,'" (FEC Mem. at 21 n.13 (Doc. No. 21-1) (quoting plaintiffs' Complaint)) or any basis for obtaining a declaratory judgment, injunctive relief, or monetary damages in this judicial review action under FECA.

In addition to making these erroneous arguments, plaintiffs grossly mischaracterize the Commission's position in this matter, falsely claiming that the FEC has asserted it "is entitled to do whatever it wants," "ignore the rules," or to "make up penalties as it goes along" (Opp'n at 3, 7). The Commission has made no such assertions and plaintiffs fail to identify any *legitimate* basis for this court to find that the Commission's administrative fine determination was arbitrary or capricious. It was not. Under the standard of review that *actually* applies here, the agency's determination must be affirmed.

ARGUMENT

I. PLAINTIFFS MISCONSTRUE THE STANDARD OF REVIEW APPLICABLE HERE

In this action, plaintiffs seek judicial review of the Commission's final determination that they violated 52 U.S.C. § 30104(a) by failing to file statutorily required disclosures of certain last-minute campaign contributions, and the Commission's assessment of a $12,122 civil penalty against them for those violations. As the FEC explained in its opening brief (FEC Mem.

at 11-12 (Doc. No. 21-1)), when a party asks a court to determine whether an FEC administrative fine should be "'modified or set aside' under 52 U.S.C. § 30109(a)(4)(C)(iii), courts apply the [well-established] standard of review for final agency" determinations in the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), and evaluate whether the challenged agency decision was arbitrary, capricious, an abuse of the agency's broad discretion, or otherwise contrary to law. *See Combat Veterans for Cong. Political Action Comm. v. FEC*, 983 F. Supp. 2d 1, 10 (D.D.C. 2013), *aff'd* 795 F.3d 151 (D.C. Cir. 2015).

Under that standard, "'[a]gency action . . . is reviewed, not tried," *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 47 F. Supp. 3d 912, 918-19 (D.S.D. 2014) (quoting *Lodge Tower Condominium Ass'n v. Lodge Properties, Inc.*, 880 F. Supp. 1370, 1374 (D. Colo. 1995)), *aff'd* 812 F.3d 648 (8th Cir. 2016), the "'court sits as an appellate tribunal,'" and the "entire case on review is a question of law, and only a question of law," *Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993) ("*Marshall Cty.*").) "'[B]ecause [the] court can fully resolve any purely legal question on a motion to dismiss, there is no inherent barrier to reaching the merits at the 12(b)(6) stage'" and the district court therefore can apply the APA standard of review and dismiss the complaint. *Mahnomen Cty. v. Bureau of Indian Affairs*, 604 F. Supp. 2d 1252, 1256 (D. Minn. 2009) (quoting *Marshall Cty.*, 988 F.2d at 1226).)

In their opposition brief (Opp'n at 4), plaintiffs "overlook the character of the questions before the district court when an agency action is challenged," *Marshall Cty.*, 988 F.2d at 1226, and repeatedly press (*e.g.*, Opp'n at 4, 9, 26) their erroneous argument that their factual allegations must be "accepted as true and viewed most favorably to" them. In fact, where, as here, a court is reviewing an administrative determination, the "'[f]actual issues have been presented, disputed, and resolved; and the issue is not whether the material facts are disputed, but

whether the agency properly dealt with the facts.'" *Bettor Racing, Inc.*, 47 F. Supp. 3d at 918-19 (quoting *Lodge Tower Condominium Ass'n*, 880 F. Supp. at 1374). Plaintiffs' "complaint, properly read, actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action" and accordingly, "the sufficiency of the complaint is the question on the merits." *Marshall Cty.*, 988 F.2d at 1226. And their reliance on cases applying Federal Rule of Civil Procedure 12(b)(6) in other contexts that do not involve judicial review of agency action under the APA is thus entirely misplaced.

Plaintiffs' insistence that the Court must defer to their factual allegations is also contrary to the well-settled principle, which the Commission previously explained (FEC Mem. at 12), that the arbitrary and capricious standard of review is highly deferential *to the agency* and "presume[s] the validity of agency action." *Global NAPs, Inc. v. FCC*, 247 F.3d 252, 257 (D.C. Cir. 2001) (citation and internal quotation marks omitted). The Supreme Court has recognized that deference to an agency decision is warranted where, as here, an agency interprets a statute it administers. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (explaining that the FEC "is precisely the type of agency to which deference should presumptively be afforded"). And still further deference is required where, as here, an agency interprets its own regulations. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005). Aside from their mistaken reliance on inapposite cases that do not involve judicial review of agency decisions, plaintiffs do not, and cannot, dispute these well-settled principles governing the highly deferential standard that applies to this Court's review of the FEC's administrative fine determination challenged here. Their arguments regarding the applicable standard of review plainly lack merit and should be rejected.

II. THE FEC PROPERLY SUBMITTED THE PORTIONS OF THE ADMINISTRATIVE RECORD "REFERENCED IN THE COMPLAINT"

The FEC also previously explained, both in its opening brief (FEC Mem. at 12-13) and in the correspondence plaintiffs attach to their opposition (Grasz Aff., Exh. A (Doc. No. 27-3)), that in deciding the agency's motion to dismiss, the court may consider the portions of the administrative record expressly referenced in (and thus incorporated into) plaintiffs' complaint, which the Commission attached as FEC Exhibits 1-5 to its dismissal motion.

In their opposition, plaintiffs rely (Opp'n at 4-5 & n.2) on several out-of-circuit decisions and an inapplicable procedural rule governing certain proceedings in the federal *courts of appeals* to suggest that the Commission's approach was improper and that the agency was required to submit the *full* administrative record in support of its motion to dismiss here. Once again, plaintiffs are wrong. The Court of Appeals for the Eighth Circuit, the decisions of which are binding on this Court, has explicitly stated that "[o]n a motion to dismiss, . . . matters of . . . administrative record *referenced in the complaint* may . . . be taken into account." *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1102 (8th Cir. 2000) (emphasis added); *see also, e.g.*, *Podraza v. Whiting*, 790 F.3d 828, 833 (8th Cir. 2015) (explaining that in deciding a motion to dismiss, courts "'ordinarily examine . . . *documents incorporated into the complaint by reference*, and matters of which a court may take judicial notice'") (emphasis added; quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)); *Whitney v. Franklin Gen. Hosp.*, 995 F. Supp. 2d 917, 921 (N.D. Iowa 2014) ("The moving defendants have attached to their Motion To Dismiss various documents from the administrative record, which I may also consider on a Rule 12(b)(6) motion to dismiss." (citing *Deerbrook Pavilion, LLC*, 235 F.3d at 1102)); *Mooney v. Federated Mut. Ins. Co.*, No. 8:04CV226, 2005 WL 2044917, at *2 (D. Neb. Aug. 25, 2005) (quoting *Deerbrook Pavilion, LLC*). Neither in their correspondence

attached to their opposition brief nor in the opposition brief itself have plaintiffs identified a single *applicable* procedural rule or binding court decision that contradicts *Deerbrook Pavilion* and requires the Commission to submit the full administrative record at *this stage* of the proceedings.[1]

Plaintiffs' suggestion (Opp'n at 5) that the FEC has omitted "other parts of the Administrative Record 'expressly referenced'" in their complaint is also incorrect. In support of that claim, plaintiffs rely on their own statements in email correspondence attached as an exhibit to their opposition (Grasz Aff., Exh. A) that identify (a) a publicly available Commission Directive, which describes Commission voting procedures in effect since September 2008 and has nothing to do with the March 2016 administrative fine challenged here, and (b) various publicly available documents related to the Commission's January 2014 extension of its Administrative Fines Regulations. Because none of these documents are part of the underlying administrative record in this action for judicial review of plaintiffs' administrative fine, even if the Commission were to submit the full contents of the administrative record here, these documents would not be included.[2] Plaintiffs' contrary assertion (Opp'n at 5) that the

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[1] In the event the Court denies the FEC's motion and the parties must proceed to summary judgment briefing, the Commission will then submit the full administrative record for the Court's review. But the Commission anticipates that such review will not be necessary because the standard of review of the administrative action would be identical, and plaintiffs' challenge provides no basis to avoid the properly calculated fine that applies to their undisputed violations of law.

[2] Although these documents are neither part of the administrative record nor supportive of plaintiffs' challenge to their administrative fine, they are all publicly available. Both the 2008 version of FEC Directive 52, which plaintiffs reference in the correspondence attached as an exhibit to their opposition, and the current version of that Directive, which is materially identical to the portions of the September 2008 version relied on by plaintiffs, are available online. *See* FEC Directive No. 52, http://www.fec.gov/directives/directive_52.pdf (amend. Oct. 28, 2015); *see also* FEC Directive 52 (Sept. 10, 2008) (Internet Archive.Org), http://web.archive.org/web/20101122170014/http://fec.gov/directives/directive_52.pdf (posting 2008 version of Directive No. 52).

Commission has omitted "other parts of the Administrative Record 'expressly referenced (and thus incorporated into) plaintiffs' complaint'" is thus incorrect.[3]

The Commission has properly submitted the portions of the administrative record referenced in plaintiffs' complaint and its motion to dismiss may be decided — and should be

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The January 6, 2014 memorandum to the Commission from its Office of General Counsel and the January 7, 2014 ballot, both of which plaintiffs referenced in their attached correspondence, are available on the Commission's website. *See* Ballot (Jan. 7, 2014) and Mem. to the Comm. from Lisa J. Stevenson, Deputy General Counsel; Adav Noti, Acting Associate General Counsel; and Robert M. Knop, Assistant General Counsel, Re: Draft Final Rules and Explanation and Justification on Administrative Fines Extension (Jan. 6, 2014), http://sers.fec.gov/fosers/showpdf.htm?docid=304125.

The Sunshine Notice for the FEC's January 16, 2014 Open Meeting, which plaintiffs referenced in their attached correspondence, is also available on the FEC's website, http://www.fec.gov/sunshine/2014/open/notice20140116.pdf.

The official January 13, 2014 Certification of the Commission's unanimous adoption of the Draft Final Rules and Explanation and Justification on Administrative Fines Extension, which plaintiffs reference and misleadingly characterize as "unsworn" in their attached correspondence, is likewise available on the FEC's website, http://sers.fec.gov/fosers/showpdf.htm?docid=304198.

The two Federal Register Notices that plaintiffs reference in their attached correspondence are respectively available on the Federal Register and FEC websites. *See* Notice 2014-11, Extension of Administrative Fines Program: Final Rule, https://www.federalregister.gov/articles/2014/01/21/2014-00960/extension-of-administrative-fines-program (Jan. 21, 2014) (click on "Public Inspection" in the right-hand column, linking to https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-00960.pdf); Extension of Administrative Fines Program, 79 Fed. Reg. 3302 (Jan. 21, 2014), http://sers.fec.gov/fosers/showpdf.htm?docid=304204.

[3] Plaintiffs' correspondence attached to their opposition incorrectly suggested that the Commission "failed to produce th[e] part of the AR relating to" the Commission's "alleged ratification of the 'initial determination and preliminary civil penalty'" in its motion to dismiss. Plaintiffs refer (Grasz Aff., Exh. A at 2) to the Commission's description of that ratification in a footnote in the background section of its opening brief (FEC Mot. to Dismiss at 9 n.6). The Commission included the only document plaintiffs reference in their complaint concerning such ratification (Compl. ¶ 36 & n.7), and a note that the ratification of the FEC's reason-to-believe determination had occurred as part of the procedural history leading to the FEC's final administrative fine determination (*see* FEC Mot. to Dismiss, FEC Exh. 5 at FEC100 n.1).

granted — based on the Court's consideration of those documents and the FEC's arguments in support of dismissal.

III. PLAINTIFFS HAVE NOT PROPERLY CHALLENGED THE MERITS OF THE COMMISSION'S ADMINISTRATIVE FINE DETERMINATION

In the FEC's opening brief (FEC Mem. at 13), the Commission explained that a penalty assessed pursuant to FECA's Administrative Fines Program may only be challenged on one of three permissible grounds: that the Commission's finding was based on a factual error; that the Commission improperly calculated the civil penalty; or that respondents used "best efforts," as defined in FEC regulations, to file in a timely manner. 11 C.F.R. § 111.35(b). The Commission further explained (FEC Mem. at 13) that plaintiffs failed to establish any of the three permissible grounds for challenging the agency's determination and penalty calculation here. (FEC Exh. 5 at FEC102 (citing 11 C.F.R. § 111.35(b)).) And the Commission also explained (FEC Mem. at 13) that plaintiffs' failure to establish any basis upon which this Court could question the "rational[ity]" of the administrative fine required that the Commission's determination be affirmed. *See Atchison, Topeka & S.F. Ry. Co. v. Witchita Bd. of Trade*, 412 U.S. 800, 807 (1973) (explaining that an agency's action must be affirmed if it is "supportable on any rational basis"); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004) (same).

In response, plaintiffs now claim, *without any legal support*, that the Commission lacks authority to limit plaintiffs' permissible defenses to an administrative fine determination. (Opp'n at 16-17.) Plaintiffs are wrong. As the Commission explained in its opening brief (FEC Mem. at 4-5), Congress established FECA's Administrative Fines Program for the specific purpose of streamlining the Commission's enforcement system for violations of the FECA's periodic filing requirements. *See* Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 640, 113 Stat. 430, 476-477 (1999); 52 U.S.C. § 30109(a)(4)(C).

FECA's "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). Its procedure, "much like traffic tickets, . . . let[s] the agency deal with minor violations of the law in an expeditious manner." 65 Cong. Rec. H5622 (daily ed. July 15, 1999) (statement of Rep. Maloney); *see Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 154 (D.C. Cir. 2015) ("*Combat Vets*") ("With those amendments, Congress sought to make it easier for the Commission to enforce [FECA's] deadlines."). Consistent with Congress's express purpose, the Commission has described the "sound policy reasons for limiting the respondents' defenses" in administrative fine matters:

> A key cornerstone of campaign finance law is the full and timely disclosure of the political committee's financial activity. Such disclosure is essential to providing the public with accurate and complete information regarding the financing of federal candidates and political campaigns. Thus, violations of the reporting requirements of [52 U.S.C. § 30104(a)] are strict liability offenses. Political committees are aware or should be aware of their legal duty to file the required reports in a timely manner, and the Commission makes ongoing efforts to remind committees of their duty. Committees are given ample time from the end of the reporting period to the filing deadline to prepare and file their reports. Absent extraordinary circumstances beyond the committees' control, the Commission sees no reason why committees cannot file their reports by the deadline.

FEC, Administrative Fines, 65 Fed. Reg. 31787, 31789-90 (May 19, 2000). As the Court of Appeals for the D.C. Circuit has held, in agreement with a lower court decision reaching the same conclusion, "the Commission's regulation setting forth the circumstances in which it will mitigate damages is not arbitrary or capricious or inconsistent with [FECA]." *Combat Vets*, 795 F.3d at 159. Moreover, plaintiffs' misplaced reliance (Opp'n at 17) on the more detailed enforcement procedures set forth in section 30109(a)(3) ignores that such procedures are inapplicable to administrative fines matters like this one, which are governed by the streamlined procedures set forth in section 30109(a)(4)(C).

IV. THE FEC'S CIVIL PENALTY FORMULA FOR 48-HOUR NOTICES WAS LAWFULLY APPLIED TO PLAINTIFFS' REPORTING VIOLATIONS

A. The 2014 Extension of the Administrative Fines Regulations Did Not Alter the Civil Penalty Formula for Untimely 48-Hour Notices or Any Other Civil Penalty

The Commission's opening brief explained in detail that its implementation of Congress's extension of FECA's Administrative Fines Program in FEC regulations was non-discretionary, involved no substantive changes to the existing administrative fines regulations generally, and, in particular, did not make *any* changes to the already existing civil penalty formula for untimely 48-hour notices. (FEC Mem. at 6-8, 15-17.) The "rule merely extend[ed] the applicability of the existing [Administrative Fines Program] and delete[ed] one administrative provision; the final rule ma[de] no substantive changes to the [Administrative Fines Program]." Extension of Administrative Fines Program, 79 Fed. Reg. 3302, 3302 (Jan. 21, 2014) ("2014 Extension of Administrative Fines Regulation").

Plaintiffs' unfounded contention that the Commission failed to "establish" the applicable penalty schedule appears to be premised on their total disregard of the actual content of the 2014 Extension of Administrative Fines Regulation, and their repeated, erroneous assertion that "the Commission *changed* the rule (without notice) in January 2014." (Opp'n at 6-7 (emphasis added); *see id* at 15 (emphasizing "importance of public input on rule *changes*" (emphasis added); *id.* at 16 (citing inapposite case discussing importance of informing public "'before any rules that have a substantial impact on the rights of persons who are subject to them are promulgated'") (citation omitted).) But it is well settled that even under the broader standard of review plaintiffs seek to rely on, courts need not accept plaintiffs' erroneous *characterizations* of law. *See, e.g., Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (explaining, in context of ordinary civil action, that a court deciding a motion to dismiss must "reject conclusory

allegations of law and unwarranted inferences").[4]

Plaintiffs similarly fail to identify any basis for their inference that "Congress expects the Commission to conduct an evaluative process" each time the Commission implements the statutory extension of the Administrative Fines Program. (Opp'n at 7.) Congress could have added such a requirement when it reauthorized the program in 2013, but it did not do so. *See* Act of Dec. 26, 2013, Pub. L. No. 113-72, sec. 1. In any event, plaintiffs fail to explain how the vague "evaluative process" they would have preferred could have altered the Commission's obligation to implement Congress's extension of the end date of the statutory program. Indeed, plaintiffs' desire for "an opportunity to change the rule" (Opp'n at 16) fundamentally ignores that the Commission lacked the discretion to "change" the extension that Congress had already enacted.

Plaintiffs' related attempt to identify flaws in the 2014 Extension of Administrative Fines Regulations by questioning the Commission's need to act quickly is itself fundamentally flawed. Plaintiffs repeatedly contend that "the Commission had no looming deadline" to implement the extension and that the regulatory extension "would not have any impact for five years." (Opp'n at 14, 15, 16.) In making such erroneous claims, plaintiffs ignore the fact that the prior administrative fines regulations expired on December 31, 2013, *i.e.*, less than one month before the Commission implemented Congress's latest extension in its regulations. Extension of Administrative Fines Program, 73 Fed. Reg. 72687 (Dec. 1, 2008) (extending administrative fines regulations to December 31, 2013); *see* FEC Mem. at 7-8 (describing circumstances

[4] For these reasons, *Sokol v. Kennedy*, 210 F.3d 876 (8th Cir. 2000), upon which plaintiffs purport to rely, is entirely inapposite. Unlike in *Sokol*, here, the FEC merely extended its regulations so that they correspond to the statutory extension that Congress enacted. Far from "'express[ing] . . . contempt for the terms of the statute'" (Opp'n at 13 (quoting *Sokol*, 210 F.3d at 880)), the Commission demonstrated respect for the statute by implementing Congress's command in the agency's regulations.

surrounding FEC's implementation of Congress's latest extension of the Administrative Fines Program). To the extent plaintiffs are objecting to the Commission's substitution of a cross-reference to the expiration date specified in the statutory provision, 52 U.S.C. § 30109(a)(4)(C)(v), to obviate the agency's need to making conforming amendments to the expiration date in the Commission's regulations *in the future* when Congress extends the expiration date of the statute *in the future*, plaintiffs fail to offer any explanation of how that non-substantive modification renders their current administrative fine arbitrary or capricious, let alone demonstrate how it has caused them any actual or imminent harm. *See* FEC Mem. at 7 (describing FEC's implementation of Congress's most recent extension of FECA's Administrative Fines Program in January 2014); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (explaining standing requirements).

B. Plaintiffs' Other Objections to the FEC's Procedures for Implementing Congress's Extension of FECA's Administrative Fines Program Do Not Provide a Legal Basis for Setting Aside the Commission's Final Determination and Civil Penalty Assessment

The Commission's opening brief also demonstrated that the FEC's regulatory implementation of the statutory extension of the Administrative Fines Program pursuant to a tally vote procedure was permissible and certainly did not invalidate the civil penalty schedule. (*See* FEC Mem. at 18-19; FEC Exh. 5 at FEC108 (citing *Commc'ns Sys., Inc. v. FCC*, 595 F.2d 797, 800-01 (D.C. Cir. 1978) (explaining that agency members may act on agency business using notation, or tally, procedure consistent with the Sunshine Act, 5 U.S.C. § 552b)).) The Commission has statutory authority to promulgate its own "rules for the conduct of its activities," 52 U.S.C. § 30106(e), and has adopted streamlined notational or "circulation" voting procedures for the six FEC Commissioners to vote on routine matters, thereby freeing them to devote more of their time to their other responsibilities. (*See* FEC Mem. at 18 (citing *Combat*

Vets, 795 F.3d at 154).) As the Commission previously explained, absent notation voting, "consideration of the more serious issues that require joint face-to-face deliberation" would be delayed and "the entire administrative process would be slowed perhaps to a standstill." *Commc'ns Sys., Inc.*, 595 F.2d at 801; *see also Common Cause v. NRC*, 674 F.2d 921, 935 n.42 (D.C. Cir. 1982); *Pac. Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1266 (D.C. Cir. 1980). The Commission utilized these tally-vote procedures when it extended the administrative fines regulations in an expedited manner in 2014, and neither plaintiffs' complaint nor their opposition brief identifies any legal authority requiring the Commission to implement the statutory extension of the Administrative Fines Program in the manner they would have preferred. In particular, plaintiffs emphasize the fact that the Commission held an Open Meeting on January 16, 2014 (*e.g.*, Compl. ¶¶ 21, 36; Opp'n at 10, 15 & n.6), five days before the Commission adopted the 2014 Extension of Administrative Fines Regulations. But that fact is irrelevant: even if, as plaintiffs assume, the Commission "*could have*" considered implementation of the statutory extension of the Administrative Fines Program at that meeting (Opp'n at 15 (emphasis added)), that factual possibility is not even close to legal authority *requiring* the Commission to do so, and it certainly does not demonstrate that plaintiffs' administrative fine was arbitrary or capricious.

Nor do any of plaintiffs' various alternative attempts to identify supposed technical deficiencies in the Commission's implementation of the statutory extension of the Administrative Fines Program (Opp. at 9-11) demonstrate any actual impropriety or that the Commissioners did not actually vote to implement the extension. Plaintiffs concede that the Sunshine Act, 5 U.S.C. § 552(b), does not provide jurisdiction in this case, while still purporting to rely on that statute (Opp'n at 24-26) as authority for their claim to set aside the Commission's

administrative fine here. But as the Commission previously explained (FEC Mem. at 19 n.11), even if plaintiffs could demonstrate that the Commission had violated the Sunshine Act, the remedy for such violations is increased transparency, not invalidation of agency action. *See Braniff Master Exec. Council of Air Line Pilots Ass'n Int'l v. Civil Aeronautics Bd.*, 693 F.2d 220, 226 (D.C. Cir. 1982)*; Pan Am. World Airways, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 36 (D.C. Cir. 1982) (per curiam); *see* S. Rep. No. 94-354, at 34 (1975) ("It is expected that a court will reverse an agency action solely on [the ground that it was taken at an improperly closed meeting] only in rare instances where the agency's violation is intentional and repeated, and the public interest clearly lies in reversing the agency action.").

Thus, regardless of whether plaintiffs "assert ***jurisdiction*** in this Court solely or . . . at all, on the basis of [the the Sunshine Act]," (Opp'n at 25; emphasis in original), neither the Sunshine Act nor FECA provides a legal basis for setting aside the Commission's administrative fine determination here. The Commission expedited implementation of Congress's extension of the Administrative Fines Program more than four months before plaintiffs committed their reporting violations. Whereas the Sunshine Act may permit agency action to be set aside when it is intentional, prejudicial to the party making the claim, and "of a serious nature," *see Pan Am*, 684 F.2d at 36-37, this Court may set aside the FEC's application of FECA's administrative fines provisions only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A), (C); *see, e.g.*, *Combat Vets*, 795 F.3d at 159 (applying arbitrary and capricious standard to appeal of action for judicial review of FEC administrative fine and affirming decision upholding the fine). Plaintiffs do not come close to meeting either standard here. Indeed, and as the Commission explained *supra* p. 4 and in its opening brief (FEC Mem. at 12), review of the administrative fine challenged here is subject to

the highest agency deference because the determination involved the Commission's application of its own regulations, *see South Dakota*, 423 F.3d at 799, and the FEC "is precisely the type of agency to which deference should presumptively be afforded," *Democratic Senatorial Campaign Comm.*, 454 U.S. at 37.

V. PLAINTIFFS MISUNDERSTAND THE COMMISSION'S JURISDICTION AND STANDING ARGUMENTS

Finally, plaintiffs' opposition reflects a misunderstanding of the Commission's jurisdiction and standing arguments. The parties agree that this is an action under FECA, 52 U.S.C. § 30109(a)(4)(C)(iii), for judicial review of the Commission's specific administrative determination and civil penalty assessment against plaintiffs. (*E.g.* Opp'n at 5 ("Plaintiffs have brought this administrative appeal of a federal agency action.") The Commission does not dispute that plaintiffs have standing to challenge *that* particular determination and penalty, including by asserting the meritless arguments plaintiffs have made regarding the Commission's implementation of Congress's extension of FECA's Administrative Fines Program (*compare* FEC Mem. at 14 n.7, *with* Opp'n at 23-24). But as the Commission previously explained (*see* FEC Mem. at 21 n.13), plaintiffs lack standing to challenge other unspecified applications of the FEC's administrative fines regulations, including any penalties assessed for other violations of FECA. In particular, plaintiffs have never identified any concrete, actual "'injury in fact'" that is fairly traceable to the Commission's promulgation of any administrative fines penalties aside from the particular penalties imposed on them. *See Lujan*, 504 U.S. at 560-61.

Plaintiffs' attempts to support their improper request for a declaratory judgment (Opp'n at 19-20) are similarly misguided. As the FEC previously explained (FEC Mem. at 14 n.7), neither the Declaratory Judgment Act nor the Administrative Procedure Act — plaintiffs' First and Second Claims for Relief — provide independent sources of federal jurisdiction here. *See,*

e.g., *Bowen v. Mass.*, 487 U.S. 879, 903 (1988) ("Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action."). Another district court thus recently held that FECA's analogous grant of jurisdiction to review "an order of the Commission dismissing a[n administrative] complaint" precludes review and remedies under other statutes, such as the APA. *Citizens for Responsibility and Ethics in Washington* ("*CREW*") *v. FEC*, No. 1:14-cv-1419, 2015 WL 10354778, at *4 (D.D.C. Aug. 13, 2015) (explaining that APA review is not available when Congress has created another specific, "adequate remedy").

Plaintiffs do not even try to explain why the specific remedy available to them under FECA is inadequate such that plaintiffs must be permitted to seek a declaratory judgment, injunctive relief, or damages where FECA does not provide for such remedies. And plaintiffs' attempt to distinguish the district court decision in *CREW* (Opp'n at 20 n.9) is entirely unavailing. That case, just like this one, involved an action for judicial review of an FEC administrative decision and the court held that the availability of judicial review under section 30109(a) of FECA was adequate and precluded review of such decisions under other statutes. *CREW*, 2015 WL 10354778, at *4-*5.

CONCLUSION

For the foregoing reasons and those detailed in the Commission's memorandum in support of its motion to dismiss, the Court should grant the Commission's motion and plaintiffs' action for judicial review should be dismissed.

Respectfully submitted,

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August 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sends notification of such filing to the following CM/ECF participant in this case:

L. Steven Grasz, Esq., Husch Blackwell LLP, 13330 California Street, Suite 200, Omaha, NE 68154 (attorney for plaintiffs Robert C. McChesney, in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc., and Bart McLeay for U.S. Senate, Inc.).

I also hereby certify that a copy of the same has been served by regular mail, postage prepaid, to the following non-CM/ECF participants: None.

/s/ Robert W. Bonham III
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