Case No. A17-1179

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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.,

Plaintiffs-Appellants,

v.

STEVEN T. WALTHER, in his official capacity as Chair of the Federal Election Commission; and FEDERAL ELECTION COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the District of Nebraska
Honorable Laurie Smith Camp, Chief United States District Judge

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REPLY BRIEF

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I. INTRODUCTION[1]

The district court did not squarely address the "determinative issue" in this action, but it correctly stated it: "whether the Commission 'established' the penalties schedule in accordance with the law in order to have the legal authority to impose the fines it assessed" (Appx. 147). The Commission initially identified this as McChesney's "principal argument" (Brief at 17-18), but the Commission's recognition inexplicably faded. After a lengthy and plodding discussion of peripheral historical matters, immaterial facts and unremarkable propositions of law, the Commission peculiarly declared the "principal argument" it previously recognized as prominent to now be "buried," and the appeal to be about something else (Brief at 45, 46) ("[McChesney's] arguments regarding the Commission's obligation to establish the schedule of penalties [was] buried among the[] arguments… [T]his case does not concern the Commission's purported 'establishment of a penal code for all federal elections").

The Commission's undulating view of the primary question to be addressed in this appeal is a distraction. The issue has been properly framed and is ready for this Court's decision. McChesney seeks reversal of the district court's order dismissing the complaint and a remand for further proceedings.

[1] Defined terms are the same as in the Brief of Appellants; "Brief" refers to Brief of Appellees.

II. ARGUMENT

A. The District Court Applied the Correct Standard of Review

1. Deference Is Not Appropriate for the Question of Law at Issue

The Commission argues "the 'entire case on review is a question of law, and only a question of law'" and it is "well settled that courts must accord deference, when an agency interprets 'a statute which it administers'" (Brief at 23-24) (citing authorities). The Commission further argues the district court "failed to accord the FEC the deference to which it is entitled" by substituting "its own assessment" of McChesneys' challenge, which "reflected an application of the wrong standard of review" (Brief at 49). The Commission's arguments are in error.

The Commission misapprehends the standard of review and deference to be afforded a federal agency in this circumstance. "[W]hether and when an agency must follow the law is not an area uniquely falling within its own expertise, and thus the agency's decision is less deserving of deference." *Iowa League of Cities v. EPA*, 711 F.3d 844, 872 (8th Cir. 2013) (*quoting Campanale & Sons, Inc. v. Evans*, 311 F.3d 109, 120 n. 14 (1st Cir. 2002)). *Id.* ("We are unaware of any line of cases that allows an agency to make a binding determination that it has complied with specific requirements of the law").

This appeal presents a question of law. It does not invoke the expertise or special domain of a federal election agency. This Court does not need the Commission's guidance or assistance on matters of law. The Commission is not

entitled to deference over whether it complied with the law in establishing the 2014 schedule of penalties. The Court should decide that question alone, unaided by the Commission's predictable appraisal of its own conduct.

2. McChesney Has Stated a Cause of Action

The Commission argues the governing regulations for McChesney's claim specify only "three permissible grounds for challenging an administrative fine," including "factual errors" and "inaccurate calculation of the penalty" (Brief at 47). The Commission further argues the district court improperly construed McChesney's challenge to implicitly assert a factual error (Brief at 48). The Commission's arguments are unavailing.

The Commission fails to acknowledge the statute authorizing the regulation. The statute does not contain any limit or exclusivity with regard to defenses. The Commission is not allowed to expand its reach inconsistent with the statutory structure enacted by Congress. *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988) ("[T]he Executive Branch is not permitted to administer [an] Act in a manner that is inconsistent with the administrative structure that Congress enacted into law").

Section 30109(a) of Title 52 provides a respondent may submit to the Commission any "legal and factual issues" in defense of an alleged violation. 52 U.S.C. 30109(a)(2) and (3). There is no limit in the statute to three supposed

exclusive "permissible grounds." There also is no hint in the phrase "factual and legal issues" demonstrating Congress intended to delegate authority to the Commission to limit defenses. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress").

The Commission's reading of Section 111.35(b) of the regulations also is inconsistent with its language. For example, Section 111.35(b) begins with a question and uses several non-restrictive phrases such as "including, but not limited to," "include, but not limited to" and "at least," belying any intent in the regulation to limit defenses. 11 C.F.R. § 111.35(b).

Even the incomplete AR before this Court shows McChesney made a legitimate challenge to the Commission on the basis of "factual error" and "miscalculation" of the civil money penalty (App. 32, 86). The district court agreed: "Plaintiffs have satisfied the requirements of § 111.35(b) … Section 111.35(b)(1) does not require the listed items to be the only grounds asserted in

defense" (App. 153).[2]

The district court's conclusion is supported by other decisional law. The right to challenge a federal agency's authority is not limited by the agency's own rules or claimed permissible grounds; not even when the restriction is a time limit. *See Am. Scholastic TV Programming Found. v. F.C.C.*, 46 F.3d 1173, 1178 n.2 (D.C. Cir. 1995) ("[A] party who possesses standing may challenge regulations directly on the ground that the issuing agency acted in excess of its statutory authority in promulgating them, regardless of statutory time limits on challenges") (*quoting NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987)).

The Commission's Office of the General Counsel arrived at the same conclusion (App. 129, 131). It found: "[McChesney's] legal argument about the lawful establishment of the Commission's schedule of penalties … does not fall within one of the three limited defenses that may be raised in administrative fines challenge. ***This argument, however, raises a fundamental question regarding the Commission's authority to assess civil penalties in administrative fine matters***.

[2] McChesney informed the Commission: "I challenge in my official capacity as Treasurer … the proposed civil money penalty … on the … basis of 'factual error' and 'miscalculation'" (App. 32). One factual error and miscalculation occurred as the result of the Commission's improper treatment of two Candidate loans, each of which was a "contribution" in the nature of an "expenditure from personal funds" (52 U.S.C. § 30104(a)(6)(B)(II) and ***not*** a "contribution" (52 U.S.C. § 30104(6)(A)) applicable to third parties for the "purpose of influencing the election" (52 U.S.C. § 30104(8)(A) (App. 81-86). McChesney showed, once corrected, the new amount allegedly owed could not exceed $1,992.00 (App. 85-86).

[McChesney's] defense, therefore, may ***outweigh*** the policy of treating reporting violations as a strict liability offense" (App. 129, 131) (emphasis added).

The district court correctly found McChesney stated a cause of action against the Commission in his complaint.

B. The Commission Admits It Did Not Establish the 2014 Penalties Schedule

1. A Public Meeting is Required

The Commission argues McChesney has not identified any "legal authority requiring the Commission" to hold an "open meeting" to establish the 2014 schedule of penalties (Brief at 35). The Commission's argument is in error. The Commission's own admissions supply the authority.

The Commission acknowledges Congress created sunset clauses under FECA on multiple occasions in voting to "extend" the law (Brief at 9-10). The Commission admits it was required under FECA, 52 U.S.C. 30109(a)(4)(C)(iii), to both "establish[] and publish[]" the 2014 schedule of penalties (Brief at 45). The Commission further admits its regulations "provide generally for the 'disposition of official Commission business' through 'the deliberation of at least four voting members of the Commission in collegia' ***at an open, public meeting*** (Brief at 31-32) (emphasis added).

The Commission concedes there was "no public meeting" or even a "discussion" about establishing the 2014 schedule of penalties (Brief at 30 n. 9;

36). However, a public meeting was required by law, and a time slot for holding a meeting was available for the Commission.

On January 9, 2014, the Clerk issued notice of a public meeting of the Commission to be held on January 16, 2014 (Appx. 5, ¶ 13; 7, ¶ 18; 7, ¶ 19). There was nothing preventing the Commission from placing the issue on the calendar and conducting a public vote on that date, five days ***before*** the Commission published the action on January 21, 2014 (Appx. 8-9, ¶ 3).[3]

The Commission does not, because it cannot, truly dispute there is no greater duty or core responsibility of the Commission in any five year period than establishing the penalty schedule authorizing the Commission to punish individuals for election infractions (Appx. 3). Congress' empowerment of the Commission with authority to devise a penal code and then civilly prosecute American citizens through assessments is not a routine matter under any circumstance.

2. Establishing A Penalties Schedule Requires Evaluative Review

The Commission argues the "2013 legislation authorizing the extension of the administrative fines program did not mandate any particular 'evaluative

[3] The Commission requires only a one week notice for an agenda item (*See* Commission Directive No. 17 (Sept. 11, 2008) ("In order to be placed directly on the Agenda for an Open Session, a document must be received in the Commission Secretary's Office by 4:00 pm one week in advance of the Open Session") (Appx. 146, 164) (http://www.fec.gov/directives/directive_17.pdf).

process' in connection with extensions or revisions to the schedule of penalties" (Brief at 45). The Commission is mistaken.

The Commission admits "FECA establishes a detailed, multi-step administrative process," requiring the Commission to "take into account whether the untimely (or not filed) report was election sensitive, how late it was filed, the dollar amount of the receipts and disbursements involved, and the number of prior violations by the respondent" (Brief at 7) (*quoting* 11 C.F.R. § 111.43(a)-(c)). The Commission describes its duty of establishing the schedule of penalties as requiring the Commission to take into "account[] … the amount of the violation involved, the existence of previous violations by the person, and other factors…" (Brief at 5-6).

The Commission's requirement to establish and publish a schedule of penalties has occurred every few years as a result of sunset clauses in the law (Brief at 9-10). The Commission fails to explain how the Commission can "take into account" factors Congress required by law to be evaluated without doing an evaluation. There is no explanation.

Unfortunately, however, there is more to the story. Not only did the Commission fail to meet in collegia at an open, public meeting, and not only did it not perform an evaluative determination of the 2014 schedule of penalties, the Commission did not even provide commissioners with the 2014 schedule of

penalties they allegedly were to supposed to approve. The Commission has never represented the commissioners actually voted on the 2014 schedule of penalties at any time.[4]

C. The Commission's Action Did Not Constitute Use of Tally-Vote Procedure Because There Were Not Any Marked Ballots

The Commission argues its action in establishing the 2014 penalties schedule "could be addressed pursuant to the agency's tally vote procedure" and the Commission is entitled to deference if it chooses this method (Brief at 33-34). The Commission's arguments are academic. The Commission has a formal tally vote procedure under Directive 52, but the Commission did not use it.

The complaint alleges the Commission violated the tally vote procedure identified in Directive 52 (*FEC Directive 52* (Sept. 10, 2008) (http://www.fec.gov/directives/directive_52.pdf) (App.at 6)). Directive 52 requires matters "circulated for tally vote" to comply with very strict procedures including use of actual written ballots, both signed and dated, that show a "definite vote" (App. at 6-7). The complaint alleges, based on written documentation provided to McChesney pre-suit by the Commission (but not included by the Commission in

[4] McChesney noted in his complaint and Brief of Appellants that a Commission staff attorney distributed to commissioners ***only*** a draft of the unauthorized final rule "***without*** **attaching** the expired penalty schedule" (Appx. 7; Brief of Appellants at 5-6) (emphasis added). The Commission does not dispute this contention (Brief at 1-50). The Commission in fact agrees the commissioners only received the "rulemaking document" (Brief at 45).

the AR) that, on January 7, 2014, a ballot relating to the unauthorized final rule (not the 2014 schedule of penalties) was delivered to commissioners stating: "A definite vote is *required.* All ballots *must* be signed and dated. Please return ONLY THE BALLOT to the Commission Secretary. Please return ballot no later than date and time shown above" (emphasis in original) (App. at 7). No ballot was ever signed, dated or returned by any commissioner pursuant to the requirements of the Commission's tally vote procedure (App. at 7).

The tally vote procedure in Directive 52 is not an anachronistic or meaningless formality. It was the subject of a recent ruling by the United States Court of Appeals for the District of Columbia Circuit ("DC Court of Appeals") in *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 154 (D.C. Cir. 2015), relied upon by the Commission. The DC Court of Appeals in *Combat Veterans* explicitly discussed the Commission's tally vote procedure: "Routine matters can be addressed by the Commission by using a ***formal*** 'tally vote' procedure adopted by the Commission ***that involves written ballots marked by each of the commissioners*** and returned to the Commission Secretary and Clerk" (Brief at 32-33) (emphasis added).

Combat Veterans renders the Commission's argument that it should be afforded deference moot. The Commission did not use Directive 52. The

commissioners did not sign or date any ballot. They also did not mark any written ballot with a definite vote to establish the 2014 schedule of penalties.

The failure of the Commission to comply with Directive 52 is not inconsequential. *Combat Veterans* is a big reason why. In *Combat Veterans*, the DC Court of Appeals discussed the Commission's two "paper ballot" practices and expressed approval of the tally vote procedure used in Directive 52 ***because*** it required use of actual written ballots with a definite vote before it would be deemed valid and counted. 795 F. 3d at 155; (Appx. 7).

As the Commission admits, the DC Court of Appeals "called into question" the Commission's other no-objection ballot procedure ***because*** it did ***not require*** an actual marked ballot with a definite vote. The no-objection ballot was found to run afoul of the Commission's requirement to have an "'affirmative' vote of four commissioners" when assessing civil money penalties (Brief at 13 n. 4).

The Commission may have read the words of *Combat Veterans*, but it has not yet learned the lesson. The DC Court of Appeals made clear the Commission must use written ballots with an actual written vote to be an acceptable ballot method for policy reasons: "The four-affirmative-vote requirement prevents partisan misuse of the Commission's powers and safeguards individuals from erroneous deprivations of rights." *Id.*

Combat Veterans is important because it shows the Commission will be properly "called into question" when its practices do not demonstrate accountability of each commissioner. Accountability can only truly be assured when there is a public vote in an open meeting or use of individually marked, signed and dated written ballots. Just as *Combat Veterans* found, the requirement for written ballots "prevents partisan misuse of the Commission's powers and safeguards individuals from erroneous deprivations of rights." This logic applies here.[5]

D. Even if the Commission Complied with the Formal Tally Vote Procedure, It Was Not a Routine Matter

The Commission argues that establishing the 2014 penalties schedule was a serious matter, requiring it to act "expeditiously" to avoid the "harm to public interest" (Brief at 33). On the other hand, the Commission argues it "was reasonable" to treat the act of establishing the 2014 penalties schedule as a "routine

[5] Aware of its obvious failure to comply, the Commission has attempted to re-name and reinvent its own formal tally vote procedure to be "notational voting" (Brief at 13 n.4). The Commission's maneuver should be rejected. This Court long ago showed it does not accept this type of revisionist thinking by a federal agency charged with meeting specific legal requirements. *Sokol v. Kennedy*, 210 F.3d 876, 880 (8th Cir. 2000) ("[A] few sentences were added [to the document] noting that 'significant' and 'important' were to be understood to mean outstandingly remarkable. These post hoc re-definitions, however, were not sufficient to correct past errors upon which the … Decision [was] based").

matter" because it would allow the Commission to deal with "more serious issues" (Brief at 33) (quoting authorities). The Commission cannot have it both ways.

The Commission admits its regulations provide only a "narrow exception" to the statutory mandate of conducting Commission business in an "open, public meeting," and the exception occurs only with regard to "routine matters" (Brief at 32-33). McChesney quoted the United States Supreme Court decision in *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976) and two sister federal courts of appeals which discussed the definition and meaning of "routine" in this context (Brief of Appellants at 21). The Commission failed to address any of these decisions.

The Commission's inconsistency and lapses can be reconciled. Its arguments are a pretext. This is shown in startling form by the Commission's assertion that its ***proof*** that it established the 2014 schedule of penalties is ***shown*** by the fact it imposed a punishment on McChesney: "The Commission has without doubt established a schedule of penalties, as application of the schedule to appellants' reporting violations attests" (Brief at 45).

The Commission's belief, or hubris, in claiming it is empowered on its own authority is disconcerting by itself. It is made worse by the Commission's newly divined and exaggerated claim ***it felt*** the need to act "expeditiously" when its own conduct at the time demonstrated otherwise. The establishment of the 2014 schedule of penalties was a critical subject requiring a public vote, but the

Commission did not even mention it at its first open meeting on January 16, 2014, and it planned, and did, merely continue the "FEC's regular enforcement procedures" in the interim without incident (Appx. 8) (Brief at 11).

D. The Commission Seeks Inconsistent and Unfair Treatment

The Commission argues there is "no connection whatsoever between the Commission's extension of its administrative fines regulations and appellants' FECA violations, which occurred over four months after publication of the extension" (Brief at 36). The Commission also argues, citing the district court, the Commission "did not alter or even mention the civil penalty [appellants] challenge in this case" (Brief at 39-40). The Commission's arguments are in error.

There is a direct connection between the Commission's action and McChesney's claim. The governing statute authorizes the Commission to "require the person" to "pay a civil money penalty" ***only*** if it is found in "a schedule of penalties" established by the Commission and further that "[a]ny person against whom an adverse determination is made may … fil[e] … a written petition requesting that the determination be modified or set aside." *See* 52 U.S.C. § 30109(a)(4)(C)(i)(II) and (iii). The "person" who is "require[d] … to pay a civil

money penalty" and the "schedule of penalties" upon which the "adverse determination" is made are inextricably bound. *Id*.[6]

This Court's precedent also directly supports McChesney's right to make a challenge based on the Commission's failure to lawfully establish the schedule of penalties. *See Florilli Corp. v. Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997) ("[Plaintiff] asserts that such a party would not have standing to bring a procedural challenge until the rule has applied to it. On the contrary, this court considers a party 'aggrieved,' giving the party standing to appeal an agency decision where, as here, the agency provided no forum for the party to participate in the proceedings through which the agency created the contested provisions'").

The Commission's establishment of the 2014 schedule of penalties (to the extent it occurred at all) did not take place in an open, public meeting and there was "no forum for [McChesney or any other citizen] to participate in the proceedings ***through which*** the [Commission] created the contested provisions." *Id.* (emphasis added). *See also Union Pac. R. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 900 (8th Cir. 2013) ("Because the penalties are 'unlawful,' they must be "set aside") (quoting 5 U.S.C. § 706(2)). McChesney is an aggrieved

[6]The Commission made a similar argument in the district court while conceding McChesney's standing. The district court found: "[T]he Parties agree that the Court has … jurisdiction … under FECA, 52 U.S.C. § 30109(a)(4)(C)(iii)" (App. 151). McChesney meets standing requirements of this Court. *Demien Constr. Co. v. O'Fallon Fire Prot. Dist.,* 812 F. 3d 654, 656 (8th Cir. 2016) ("We have no problem concluding [plaintiff] has standing under Article III").

party entitled to seek relief under 52 U.S.C. § 30109(a)(4)(C)(iii) by virtue of the Commission's failure to establish the 2014 schedule of penalties in accordance with the law.

The decision in *City of Ozark, Ark. v. Union Pac. R.R. Co.*, 149 F. Supp. 3d 1107, 1116 (W.D. Ark. 2015) *rev'd on other grounds*, 843 F. 3d 1167 (8th Cir. Dec. 19, 2016) is instructive on this point. In *City of Ozark*, a city mayor received informal approval from city council members to approach defendant railroad (Union Pacific) to remove a railroad crossing, which Union Pacific did. *Id*. The city later asked Union Pacific to reinstall the crossing and, after it refused, the city filed a lawsuit claiming the informal procedure on which Union Pacific relied to remove the crossing was unlawful and invalid because it did not occur by vote in an open, public meeting. *Id*. Under applicable law, before a railroad crossing could be closed, there had to be a "majority vote" of the city council, which required a "public meeting" (Ark. Code Ann. §§ 14-301-304 (a) and 25-19-106(a)).

On cross-motions for summary judgment, the district court found in favor of the city on the question of whether the informal procedure was legally sufficient. *Id.* The district court found there was no showing "the Council voted during a regular, ***public session***" to close the Crossing." *City of Ozark, 149 F. Supp. 3d at 1119* (emphasis added); *See also id*. at 1118 ("It is undisputed that no ***public vote*** of the City Council was taken") (emphasis added). The district court found:

> [T]he question [is] whether the Crossing was closed according to the procedures set forth in [statutory law]. … [T]he Court will assume … [the] Mayor … received permission from the Council … [and] asked Union Pacific to remove the crossing: [and the Mayor] informed the Council, and no one made any objections …
>
> . . .
>
> The Mayor's oral permission—even if premised on a genuine, but erroneous, belief of his authority, and otherwise well intended—is simply not a substitute for proper compliance with [statutory] law. ***[The law] required an affirmative vote and passage***…. It is undisputed that none of this occurred. Judgment will enter … in Ozark's favor.

Id. at 1115 (emphasis added)

The district court's decision in *City of Ozark* on this issue is useful. The government was able to invalidate an action taken years earlier because it had been approved only through an informal procedure and the law required a formal vote to be taken in a public meeting. The same rule should apply when it involves the shoe of the government on the other foot.

The Commission should not be able to validate an action through a secretive, informal procedure when the law requires a formal vote to be taken in an open, public meeting. The government should not be treated differently than a citizen in the same circumstance. The Commission's action against McChesney was without legal authority.[7]

[7] The district court in *City of Ozark* was reversed on the basis of preemption because Union Pacific is a "rail carrier" under federal law. *Id*. at 1170,1172.

If the Commission can conduct vital government business such as establishing the penalty schedule for all federal elections across the nation for a five year period in a backroom or by telephone consent when voting on a related but different topic (and despite a scheduled public meeting) and fail to use a required and available formal tally vote procedure in which its rules and precedent of a federal court of appeals dictate the use of actual written ballots, and further withhold critical aspects of the administrative record (AR) on its own authority when its action is challenged by affected citizens, there is simply no real restriction on the Federal Government in terms of accountability to the public.

E. This Court Should Require a Complete AR

1. Deerbrooke Does Not Dictate a Different Result

The Commission argues in animated fashion the district court followed this Court's "unambiguous instructions" in *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1102 (8th Cir. 2000) in ruling on the adequacy of the AR (Brief at 25). The Commission's argument is overheated. *Deerbrook* should be followed of course, but its guidance on this point is very limited.[8]

The Commission claimed the district court "admonished" McChesney's argument relating to the AR for its reliance on an "out-of-Circuit decision" and

[8] *Deerbrooke only* said this about the AR: "On a motion to dismiss, a court must primarily consider the allegations contained in the complaint, although matters of public and administrative record referenced in the complaint may also be taken into account" (citations omitted). *Id.*

further criticized McChesney for citing a "stray quote" of the United States Supreme Court (Brief at 27-28). The Commission misreads the record and case authority.

As an initial matter, McChesney will choose not to refer to language in a Supreme Court opinion as a "stray quote" (Brief at 17, 29). McChesney also finds curious the Commission's criticism of McChesney for relying on an "out-of-Circuit" decision when it extensively relies, over two pages in its Brief, on a three decade-old out-of-circuit decision in *Walter O. Boswell Memorial Hospital v. Heckler*, 749 F.2d 788 (D.C. Cir. 1984) (App. 28-29).

The Commission misapprehends the authority it cites and McChesney's objection. The Commission's authority, including *Walter O. Boswell Memorial Hospital*, merely provides for "'review [of] the whole record or those parts of it ***cited by a party.***'" *Id*. (emphasis added) (quoting 5 U.S.C. § 706). McChesney objected in the district court to the Commission's failure to include those parts of the record McChesney ***cited***.

The Commission represented to the district court it "attached those 'portions of the administrative record ***expressly referenced*** (and thus incorporated into) [McChesney's] complaint,' when in fact [it] did not do so" (Filing No. 27-2 ¶

1 Ex. A). "There are several other parts … that were not 'attached'" and they should have been (Filing No. 27-2 ¶ 1 Ex. A).[9]

2. The Absence of a Transcript is Telling

The Commission argues McChesney "now, for the first time, purport[s] to fault the Commission for not identifying a 'transcript' of any Commission meeting concerning the agency's extension of the Commission's administrative fine regulations" (Brief at 30 n. 9). The Commission misstates the facts and misleads the Court regarding the sequence of events.

The ***district court*** in the Order, not McChesney, first identified "release of transcripts," along with "invalidation" of the agency action," as available remedies under the Sunshine Act (App. 162-63). McChesney never sought or suggested a transcript as the remedy for the Commission's violation of law. He merely noted that, at minimum, this Court "should not resolve the issue of what a transcript might say, if extant, without at least ordering a complete AR that will show whether a transcript even exists" (Brief at 37).

The Commission's argument regarding the AR is odd. The Commission cites statutory and caselaw authority governing its conduct, including FECA and the Sunshine Act, noting they are designed to provide "increased transparency" (Brief at 35). The Commission then shrugs off its secret telephone and email

[9] *See* Fed. R. App. P. 10(a)(1) (all original exhibits in the district court constitute the record on appeal)

exchange in January 2014 regarding the unauthorized final rule, conducted without any audio or video recording, transcript or minutes for public review, all the while exhorting this was important Commission business necessary to avoid "harm to public interest" (Brief at 19, 30 n.9, 33).[10]

F. The Commission Did Not Comply With Notice and Comment Requirements

This Court has explained the basis for notice and comment procedures. "An agency potentially can avoid judicial review through the tyranny of small decisions. Notice and comment procedures secure the values of government transparency and public participation, compelling us to agree with the suggestion that "[t]he APA's notice and comment exemptions must be narrowly construed." *Iowa League of Cities v. EPA*, 711 F.3d at 873 (*quoting Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995)).

McChesney already has presented arguments about improper notice in the Brief of Appellants and they will not be repeated in light of *Iowa League of Cities* (Brief of Appellants at 24, 37 n. 8). The Commission failed to give proper notice of the unauthorized final rule, not to mention establishment of the 2014 schedule of penalties. The district court's ruling on this ground also should be reversed.

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[10] McChesney is without words to respond to the Commission's argument McChesney "would be free to listen" to a hypothetical "audio" recording of a hypothetical "meeting" of the Commission taken on a hypothetical date (Brief at 30 n.9) ("Had there been such a discussion, appellants would be free to listen to it via the audio recordings publicly available on the FEC's website").

G. McChesneys' Claim is Merit-Based and the Commission's Unlawful Action Should Not Be Deemed Acceptable Government Conduct

The Commission argues McChesney has a "meritless challenge" to the $12,122 assessment made by the Commission (Brief at 18, 20). The Commission's argument is false and unfair.

There is nothing about the Treasurer, the Candidate, the campaign committee (BMUSI) or the activities involved in this case, especially considering the small amount at issue in comparison with the enormous legal effort and expense in prosecuting this action, to suggest this litigation is *anything* but a sincere and principled objection to the conduct of the Federal Government.[11]

This case involves "fourteen contributions," the two largest of which were Candidate loans, out of literally hundreds of campaign contributions.[12] The Commission does not deny McChesney brought *all* fourteen contributions to the Commission's attention nearly ***one year before*** he was asked by the Commission

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[11] Robert C. McChesney is a CPA from North Platte, Nebraska, with a long and distinguished career (https://thecpt.org/2013/12/10/respected-nebraska-accountant-receives-being-a-difference-award-3/). The Candidate is Nebraska lawyer who has practiced for 32 years and whose standing can be independently evaluated (www.kutakrock.com).

[12] *See* (http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do) (Bart McLeay 2014) McChesney recognizes matters of public record may be used on a motion to dismiss. *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d at 1102. McChesney cites to "websites" with "non-record documents" relating to the parties ***only*** in reply to the Commission's use of same (Brief at 26-27 n. 7). McChesney does not waive his right to a complete AR (Brief of Appellants at 2, 39).

and, indeed, his disclosure served as the basis for the Commission's assessment (App. 85) (Brief of Appellants 13-14) (Brief at 1-50).[13]

McChesney's challenge is valid and sincere. Robert McChesney informed the Commission during his first contact, even before counsel was involved, he immediately knew the "penalty was overstated" (App. 71-72). McChesney also showed the Commission, even if he accepted the Commission's general views, after he adjusted for their factual errors and miscalculations, the assessment could not possibly exceed $1,992.00 (App. 85-86) (Brief at 13).

It took McCheseny only a brief period of time later to determine the penalty was not authorized at all, since the penalty schedule on which the assessment was based had not been established in accordance with the law (App. 32). Even the Office of the General Counsel of the Commission found McChesney's argument to be genuine: "[It] raises a fundamental question regarding the Commission's authority to assess civil penalties in administrative fine matters" (App. 131). McCheseny's claim is far from meritless.

The pejorative term has a better fit for arguments made by the Federal Government in this action. The Commission's defense of its unlawful action is worrisome. The schedule of penalties ***ended*** on December 31, 2013. There was an undeniable "gap" and no program to "extend" at that point (Brief at 10-11). The

[13] The Commission also does not challenge or deny McChesney's assertion that any error, if it occurred, was solely due to inadvertence (Appx. at 11, ¶ 29; App. 31).

Commission was required to start anew by "establishing" the 2014 schedule of penalties, regardless of whether the Commission seeks today to (unjustly) blame Congress for a late authorization of the law the Commission was fully aware was in the works.

The Commission did not vote in an open, public meeting or comply with its own regulations requiring strict compliance with its tally vote procedure. It ignored or failed to comprehend the reason the DC Court of Appeals in *Combat Veterans* "called into question" its voting practice, namely, because the Commission did not have actual written ballots with a definite vote, the precise circumstance here. The Commission also changed its own rule to eschew the sunset clause that Congress enacted to ***force*** the Commission to periodically re-evaluate the penalties schedule under factors Congress dictated. It is undisputed the result of the Commission's action was to avoid having to conduct a public vote on the schedule of penalties ever again (Appx. 9, ¶ 3).

The Commission's manipulative action relating to the AR also should give this Court pause. The Commission's process relating to the 2014 schedule of penalties was dark and clandestine and without a trace of transparency from the outset. For the Commission to then self-select in this proceeding only those documents the Commission wants the Court to view and, unspeakably, rebuke

McChesney for requesting disclosure of the other documents ***he cited*** is indefensible.

The Commission claims to be a federal agency that vigilantly demands transparency, yet it conducted a secret meeting without an audio or video recorder, written minutes or a transcript, all on a vitally serious matter *it claims* had to be "expeditiously" addressed to avoid "harm to public interest" (Brief at 33). The Commission then contradicted itself, arguing the issue was routine and a vote could be performed underground using a fictional procedure the Commission calls "notational voting" in order to allow the Commission to deal with "more serious issues" (Brief at 33).

The Commission doubled down on its assertion that the act of establishing the schedule of penalties is routine also by chastising McChesney for suggesting the Commission should establish a schedule of penalties "through a process completely separate from its publication of the schedule" (Brief at 37).

The Commission apparently overlooked its citation to the penalties schedule established in 2005 for a three year period ending in 2008 (Brief at 10). One month before the expiring penalties schedule, Congress passed a bill authorizing the Commission to establish a new penalties schedule through 2008.[14] The

[14] *See* Transportation, Treasury, Housing and Urban Development, the Judiciary, The District of Columbia, and Independent Agencies Appropriations Act of 2006, Public Law 109-115, Sec. 721, 119 Stat. 2396, 2494 (Nov. 30, 2005);

Commission held an open, public meeting and conducted a public vote on December 15, 2005, establishing the penalties schedule through December 31, 2008, and published notice of its action six days later on December 21, 2005. 70 Fed. Reg. 75718; (Brief at 10). That is precisely how it is supposed to work, as the Commission well knows.[15]

The district court heavily relied on *Pan Am World Airways, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 36 (D.C. Cir. 1982) and McChesney cited it eight times and included an extensive discussion of the opinion (Appx. 162-163) (Brief of Appellants at 24, 27, 30, 31, 32, 33, 34, 36). The Commission did not cite it (Brief at 1-50). In addition to the facts here, McChesney explained at length in the Brief of Appellants, applying *Pan Am*, how the unlawful action by the Commission was of a serious nature, prejudicial and intentional (as opposed to willful) (Brief of Appellants at 33-37). McChesney incorporates those arguments.[16]

The Commission throughout its Brief suggests the fourteen contributions at issue are "minor violations" that are "much like traffic tickets" (Brief at 6, 34). That may be true but, unfortunately, the same gravity does not apply to the

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http://www.fec.gov/agenda/2006/approve06-01.pdf(page60);
https://www.gpo.gov/fdsys/pkg/FR-2005-12-21/pdf/05-24296.pdf.

[15] If that were not enough, the minutes for the ***same*** December 15, 2005 meeting identifies the following Agenda item: "Routine Administrative Matters: There were no routine administrative matters to come before the Commission" *(Id*. at 7)

[16] *City of Ozark* also illustrates a citizen should be treated the same as the government.

Commission's unlawful action. Its conduct, continuing the analogy, is the equivalent of an individual impersonating a police officer, having skipped the final step of training and never officially becoming sworn-in as a law enforcement officer. Society may want to encourage a seat belt offender or a person driving with expired license plate tags to take corrective action, but it could ***never*** give recognition to a government sanction by a person claiming to be an officer who in fact never secured official authority. The same applies to the Commission.

There is one final note of irony bearing on the Commission's action in this matter. Near the same time, in early summer 2015, when the Commission communicated with McChesney about the fourteen contributions, the Commission Chair publicly commented on the effectiveness of the Commission, regrettably declaring to the world the Commission was dysfunctional as a government agency: "People think the FEC is dysfunctional. It's worse than dysfunctional."[17]

III. CONCLUSION

The Commission's action against McChesney was not in compliance with the law. The Federal Government cannot be allowed to conduct a secret vote in a back room on a critical government matter and then use that *same vote* as the legal basis for punishing citizens in the name of transparency.

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[17] https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html?_r=0).

The Court needs to provide guidance to the Commission. The Commission may be dysfunctional but, even more, it is not listening. The DC Court of Appeals in *Combat Veterans* "called into question" the Commission's ballot procedures for failing to have signed, dated and written ballots, but the Commission ignored the court, as the defective procedure it employed in establishing the 2014 penalty schedule for all federal elections across the nation for five years abundantly shows. This Court should signal the federal courts are not to be ignored in the future.

McChesney respectfully requests this Court vacate the Judgment, reverse the Order of the district court granting the Commission's motion to dismiss and remand this action for further proceedings in the district court, including ordering the Commission to make a full production of the AR for this action.

Dated this 18th day of April, 2017.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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/s/L. Steven Grasz
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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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