No. 17-1179

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.,

Appellants,
v.

Steven T. Walther, in his official capacity as Chair of the Federal Election Commission, et al.,

Appellees.

Appeal from U.S. District Court for the District of Nebraska – Omaha
(8:16-cv-00168-LSC)

BRIEF OF APPELLEES

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FOR APPELLEES
STEVEN T. WALTHER AND
FEDERAL ELECTION COMMISSION

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SUMMARY OF THE CASE

Appellants Bart McLeay for U.S. Senate and Robert C. McChesney, in his official capacity as its treasurer, challenge the district court's dismissal of their petition for judicial review of an administrative fine imposed by the Federal Election Commission. The Commission imposed the fine as a result of appellants' failure to timely disclose $112,425 in campaign contributions received shortly before a May 2014 election.

Appellants do not contest their failure to make the disclosures required by the Federal Election Campaign Act. Instead, they claim that the penalty schedule upon which the Commission relied was not lawfully established.

The district court concluded that it could properly consider the public and administrative record documents referenced in appellants' complaint, that the challenged rule was lawfully promulgated through notational voting, and that good cause existed to waive certain procedures of the Administrative Procedure Act.

Because the district court's dismissal decision was plainly correct and appellants have failed to identify any basis for this Court to reach a different result, the Commission does not believe oral argument is necessary. If the Court decides to schedule oral argument, the Commission agrees with appellants that ten minutes per side would be appropriate.

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COUNTERSTATEMENT REGARDING JURISDICTION

(A) The district court had jurisdiction to review the Federal Election Commission's final determination pursuant to 52 U.S.C. § 30109(a)(4)(C)(iii).

(B) The district court granted the Commission's motion to dismiss and entered judgment for the Commission with prejudice (J.A. 138, 165).

(C) Appellants filed a timely notice of appeal to this court on January 20, 2017 (J.A. 167-168). *See* Fed. R. App. P. 4(a)(1)(B).

(D) The present appeal is taken from a final judgment that disposes of all of appellants' claims before the district court. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

COUNTERSTATEMENT OF ISSUES PRESENTED

1. Whether the district court correctly decided the FEC's motion to dismiss by considering the portions of the administrative and public record relied on by appellants in their complaint.

Deerbrook Pavilion, LLC v. Shalala, 235 F.3d 1100 (8th Cir. 2000).

2. Whether the district court correctly concluded that the Commission properly exercised its legal authority in extending the expiration date of its administrative fine regulations to implement Congress's extension of the expiration date of the corresponding statutory provision.

5 U.S.C. § 553(b)(B), (d)(3); 11 C.F.R. §§ 2.2(d)(2); *United States v. Brewer*, 766 F.3d 884 (8th Cir. 2014); *United States v. Gavrilovic*, 551 F.2d 1099 (8th Cir. 1977); *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151 (D.C. Cir. 2015); *Commc'ns Sys., Inc. v. FCC*, 595 F.2d 797 (D.C. Cir. 1978).

3. Whether the Commission reasonably determined that appellants failed to bring a proper challenge to the Commission's administrative fine determination.

11 C.F.R. §§ 111.35(b); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790 (8th Cir. 2005).

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Reporting Requirements for Political Committees

The Federal Election Campaign Act ("FECA" or the "Act") requires every "political committee" — including candidate campaigns and other political organizations, *see* 52 U.S.C. § 30101(4)-(6) — to designate a treasurer to maintain the committee's financial records and file periodic reports detailing, among other things, the committee's receipts and disbursements. *See* 52 U.S.C. §§ 30102(a)-(d), 30104(a)-(b). The reports must be filed in compliance with the schedule established in FECA. 11 C.F.R. § 104.14(d).

Most relevant here, principal campaign committees must report any contribution of $1,000 or more received by the committee after the 20th day, but more than 48 hours before, any election. Such notifications, commonly referred to as "48-hour notices," must "be made within 48 hours after the receipt of such contribution." 52 U.S.C. § 30104(a)(6)(A).

As the Supreme Court has held, FECA's reporting requirements further "substantial governmental interests," including, *inter alia*, "provid[ing] the electorate with information as to where political campaign money comes from . . . in order to aid the voters in evaluating those who seek federal office." *Buckley v.*

Valeo, 424 U.S. 1, 66-68 (1976) (per curiam) (citation and internal quotation marks omitted).

B. FECA's Enforcement Procedures

The FEC is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally* 52 U.S.C. §§ 30106(b)(1), 30107(a), 30109. It is comprised of six Commissioners, one of whom is appellee Stephen T. Walther, who currently serves as Chairman of the Commission and is sued in that capacity.

1. General Provisions

FECA establishes a detailed, multi-step administrative process for Commission review of alleged violations of the Act. *See* 52 U.S.C. § 30109(a); *see also* 11 C.F.R. §§ 111.3-111.24 (enforcement process regulations). The process involves, *inter alia*, an initial determination, by at least four Commissioners, of "reason to believe" a violation has occurred, a possible investigation, and a subsequent finding of "probable cause to believe" a violation has occurred, also by a vote of at least four Commissioners. 52 U.S.C. § 30109(a)(1)-(4). If at least four Commissioners find such probable cause, FECA then requires the Commission to attempt to informally resolve the matter through conciliation efforts with the respondent involved. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to resolve the matter through voluntary conciliation,

the Commission may file a *de novo* civil suit to enforce the Act in federal district court. *Id.* § 30109(a)(6).

2. FECA's Administrative Fines Program

For more than 20 years, the Commission was required to employ this mulit-step process for *all* violations of the Act — even the most straightforward violations in which committees simply failed to file their reports on time (or at all). In 1999, however, Congress amended FECA to add a streamlined enforcement system for violations of the periodic filing requirements. *See* Treasury Postal Serv. and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 640, 113 Stat. 430, 476-477 (1999) (codified at 52 U.S.C. § 30109(a)(4)(C)). Specifically, Congress authorized the Commission to directly assess civil money penalties for violations of 52 U.S.C. § 30104(a), which establishes, *inter alia*, the deadlines for political committees' disclosure reports.

Pursuant to this authority, after the Commission finds reason to believe a committee and its treasurer have failed to file a report (or filed a report late), the Commission may directly impose a civil money penalty in an amount determined under a penalty schedule established and published by the Commission which accounts for the amount of the violation involved, the existence of previous violations by the person, and other factors the Commission considers appropriate.

52 U.S.C. § 30109(a)(4)(C)(i)(II). By eliminating steps such as the probable-cause determination and conciliation period that apply to other FEC enforcement matters, this "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). That 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."), *aff'd*, 795 F.3d 151 (D.C. Cir. 2015).

A respondent who objects to the Commission's imposition of an administrative fine may seek judicial review of the Commission's determination in federal district court. 52 U.S.C. § 30109(a)(4)(C)(iii).

3. The Commission's Administrative Fines Regulations

In 2000, the Commission promulgated regulations establishing the procedures that apply in administrative fines matters and the schedules of penalties authorized by 52 U.S.C. § 30109(a)(4)(C)(i)(II). *See* FEC, Administrative Fines, 65 Fed. Reg. 31787 (May 19, 2000) ("May 2000 Administrative Fines Rule"); 11 C.F.R. §§ 111.43(a)-(c), 111.44. The civil penalty schedules 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. *See* 11 C.F.R. § 111.43(a)-(c).

One of the penalty formulas established was specifically for 48-hour notices, 11 C.F.R. § 111.44(a)(1), pursuant to which the civil penalty at the time of appellants' violations was $110 plus ten percent of the amount of the contribution(s) not timely reported.

When the Commission determines that it has "reason to believe" that a respondent has violated 52 U.S.C. § 30104(a), the Commission notifies the respondent of the Commission's finding, including the proposed civil money penalty. 11 C.F.R. § 111.32. Upon receipt of this notification, the respondent may either pay the penalty, *id.* §§ 111.33-111.34, or challenge the finding and/or the penalty by filing a written response within 40 days of the date of the Commission's finding. 11 C.F.R. § 111.35(a), (e). The response must assert at least one of three permissible grounds for such a challenge: (1) factual errors in the Commission's finding (such as if the report was, in fact, timely filed); (2) inaccurate calculation of the penalty; or (3) a showing that the respondent used "best efforts" to file in a timely manner but was prevented from doing so by "reasonably unforeseen circumstances . . . and the respondent filed [the report] no later than 24 hours after" such circumstances ended. 11 C.F.R. § 111.35(b)(1)-(3); *see, e.g.*, *Combat Vets*,

983 F. Supp. 2d at 6, 16-18 (listing the three permissible bases for challenging an administrative fine); *Kuhn for Cong. v. FEC*, No. 2:13-CV-3337-PMD, 2014 WL 7146910, at *6 (D.S.C. Dec. 15, 2014) (same); *Lovely v. FEC*, 307 F. Supp. 2d 294, 300 (D. Mass. 2004) (same); *Cox for U.S. Senate Comm., Inc. v. FEC*, No. 03 C 3715, 2004 WL 783435, at *5 (N.D. Ill. Jan. 22, 2004) (same).

Timely filed challenges to the Commission's reason-to-believe finding are reviewed by a Commission "Reviewing Officer," who submits a written recommendation to the Commission, *id.* § 111.36(a), (e). A copy of the recommendation is also provided to the respondent, *id.* § 111.36(f), who may file a written response within ten days, but generally may not raise new arguments beyond those in the original written response. *Id.* § 111.35(f).

After receiving the Reviewing Officer's recommendation and any timely response from the respondents, the Commission makes a final determination by an affirmative vote of at least four Commissioners as to whether the respondent violated 52 U.S.C. § 30104(a), and, if so, the amount of the civil penalty. 11 C.F.R. § 111.37. The reasons provided by the Reviewing Officer for her recommendation serve as the reasons for the Commission's action, unless otherwise indicated by the Commission. *Id.* § 111.37(d).

The respondent then has 30 days to petition for judicial review in federal district court in accordance with 52 U.S.C. § 30109(a)(4)(C)(iii), but any such

judicial review is limited to the issues and facts raised before the Commission during the administrative proceeding. 11 C.F.R. § 111.38.

4. Modifications to the Commission's Administrative Fines Regulations

The 1999 FECA Amendments establishing the Act's Administrative Fines Program initially applied to violations occurring between January 1, 2000 and December 31, 2001. Extension of Administrative Fines Program, 79 Fed. Reg. 3302, 3302 (Jan. 21, 2014) ("2014 Extension of Administrative Fines Regulations"). Congress subsequently extended the FEC's statutory authority for that program several times, including, most recently, in a December 2013 amendment extending it through December 31, 2018. J.A. 143; *see* Act of Dec. 26, 2013, Pub. L. No. 113–72, sec. 1.[1]

The Commission has updated its implementing regulations each time Congress has extended the expiration date of FECA's Administrative Fines

[1] *See also* Act of Oct. 16, 2008, Pub. L. No. 110–433, sec. 1(a), 122 Stat. 4971 (extending authorization through Dec. 31, 2013); Transportation, Treasury, Housing and Urban Development, The Judiciary, The District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109–115, sec. 721, 119 Stat. 2396, 2493–94 (2005) (extending authorization through Dec, 31, 2008); Consolidated Appropriations Act, 2004, Pub. L. No. 108–199, sec. 639, 118 Stat. 3, 359 (2004) (extending authorization through Dec. 31, 2005); Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107–67, sec. 642, 115 Stat. 514, 555 (2001) (extending authorization through Dec. 31, 2003).

Program to reflect the statutory extension. (J.A. 143-44.)[2] When the Commission implemented Congress's most recent extension of the program in January 2014, rather than specifying the latest statutory expiration date, the revised regulation simply provided that the Commission's regulations apply to reporting periods that "end on or before the date specified in [52 U.S.C. 30109(a)(4)(C)(v)]." 2014 Extension of Administrative Fines Regulations, 79 Fed. Reg. at 3302. This non-substantive modification, the Commission explained, would implement Congress's latest extension while obviating the need to making conforming amendments to the Commission's regulations each time Congress extends the statute in the future. 2014 Extension of Administrative Fines Regulations, 79 Fed. Reg. at 3302. This minor change, along with the Commission's deletion of an administrative provision, 11 C.F.R. § 111.41, requiring that fines be paid by check or money order, "were the only changes made to the implementing regulations in the 2014 Regulatory Extension," as the district court recognized. (J.A. 144.)

Because Congress did not enact the most recent extension until late December 2013, there was a short gap between the end date of the 2008 Extension

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[2] *See* Extension to Administrative Fines, 66 Fed. Reg. 59680 (Nov. 30, 2001) (extending administrative fines regulations to December 31, 2003); Extension of Administrative Fines Program, 69 Fed. Reg. 6525 (Feb. 11, 2004) (extending to December 31, 2005); Notice 2005-30, Extension of Administrative Fines Program, 70 Fed. Reg. 75717 (Dec. 21, 2005) (extending to December 31, 2008); Extension of Administrative Fines Program, 73 Fed. Reg. 72687 (Dec. 1, 2008) (extending to December 31, 2013).

of Administrative Fines Regulations and the effective date of the 2014 rule. 2014 Extension of Administrative Fines Regulations, 79 Fed. Reg. at 3302. The Commission thus clarified that the FEC's regular enforcement procedures, rather than the Administrative Fines Program, would apply to violations occurring during the gap. (J.A. 144.)

The Commission further explained that it was implementing the statutory extension of FECA's Administrative Fines Program "without advance notice or an opportunity for comment because it falls under the 'good cause' exemption of the Administrative Procedure Act," which "allows agencies to dispense with notice and comment when 'impracticable, unnecessary, or contrary to the public interest.'" 2014 Extension of Administrative Fines Regulations, 79 Fed. Reg. at 3302 (quoting 5 U.S.C. § 553(b)(B)). The Commission had determined that "notice and comment [we]re unnecessary," it explained, because the "final 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 FEC's administrative fines regulations. *Id.* The Commission further explained that the 2014 Extension of Administrative Fines Regulations also "falls within the 'good cause' exception to the delayed effective date provisions of the Administrative Procedure Act and the Congressional Review Act," and that the

final rule "[a]ccordingly, [would be] effective upon publication in the Federal Register." *Id.* (citing 5 U.S.C. §§ 553(d), 808(2)).[3]

II. THE ADMINISTRATIVE FINE AT ISSUE IN THIS APPEAL

Appellant Bart McLeay for U.S. Senate ("McLeay Committee") is the principal campaign committee of Bartholomew L. McLeay, who was a candidate in the United States Senate primary election in Nebraska on May 13, 2014. (J.A. 1 (Compl. ¶ 2).) Appellant Robert C. McChesney is the Treasurer of the McLeay Committee. (*Id*. (Compl. ¶¶ 1, 2).)

In connection with that election, appellants were required to file 48-hour notices for contributions and loans of $1,000 or more received between April 24 and May 10, 2014. (J.A. 145 (citing 52 U.S.C. § 30104(a)(6)(A)); 11 C.F.R. § 104.5(f)).) The Commission concluded that appellants failed to do so for fourteen contributions received between April 24, and May 9, 2014, totaling $112,425.06. (J.A. 11, 25, 29; *see* J.A. 145 (citing Compl. ¶ 29).)

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[3] In contrast to the Commission's actions implementing the extended end date of FECA's Administrative Fines Program, the Commission's *substantive* revisions to its administrative fines regulations, in March 2003 and March 2007, were made pursuant to the Administrative Procedure Act's notice and comment procedures. *See* Administrative Fines, 67 Fed. Reg. 20461 (Apr. 25, 2002) (notice of proposed rulemaking); Administrative Fines, 68 Fed. Reg. 12572 (Mar. 17, 2003) (final rules); Best Efforts in Administrative Fines Challenges, 71 Fed. Reg. 71093 (Dec. 8, 2006) (notice of proposed rulemaking); Best Efforts in Administrative Fines Challenges, 72 Fed. Reg. 14662 (Mar. 29, 2007) (final rule).

On June 26, 2015, the Commission therefore found reason to believe that appellants violated FECA by failing to file 48-hour notices for those fourteen contributions. (J.A. 145-146 (citing J.A. 11 (Compl. ¶ 29), 25-26 (notification letter)).) Also on that date, the Commission made a preliminary determination that a civil penalty of $12,122 should be assessed for such violations, based on the penalty formula set forth at 11 C.F.R. § 111.44. (J.A. 145 (citing J.A. 25 (notification letter)).) The matter was designated as Administrative Fine 3011 and the Commission notified appellants on June 29, 2015. (J.A. 145 (citing J.A. 11 (Compl. ¶ 29), 25 (notification letter)).)[4]

On July 31, 2015, the Commission received appellants' responses, in which they principally contended that the proposed civil penalty was not based on an authorized schedule of penalties lawfully established by the FEC. (J.A. 146.) Appellants also argued that the reporting requirements for 48-hour notices did not apply to the candidate loans at issue, and that an alternative method of calculating the proposed civil penalty would have been preferable. (J.A. 30-38.)

[4] At that time, the Commission voted on reason to believe determinations in administrative fine cases using a "no-objection" procedure. *Combat Vets*, 795 F.3d at 154 (explaining procedure). After that practice was called into question because FECA requires that such determinations occur by an "affirmative" vote of four Commissioners, *id.* at 155-56, the Commission ratified the initial determination and preliminary civil penalty in the underlying matter at issue here on February 4, 2016. (J.A. 14 (Compl. ¶ 36 n.7), 124 at n.1 (Memorandum to the Commission (Mar. 8, 2016)).) The Commission used an alternative tally-vote method with marked ballots. *Combat Vets*, 795 F.3d at 155 (describing tally voting); *see infra* pp. 31-36.

The Commission's Reviewing Officer, Rhiannon Magruder, reviewed appellants' responses and made her recommendation to the Commission on September 29, 2015. (J.A. 146.) Ms. Magruder explained that appellants had failed to comply with eight separate 48-hour notice deadlines and that the candidate's unreported loans were appropriately included in calculating appellants' civil penalty. (*Id.*; *see id.* at 40-44 (Reviewing Officer Recommendation (Sept. 29, 2015)).) She concluded that the Commission's preliminary civil penalty calculation of $12,122 was correct, and that appellants had failed to successfully challenge the Commission's reason-to-believe determination and preliminary civil penalty calculation on the basis of any of the permissible grounds identified in the Commission's regulations, 11 C.F.R. § 111.35(b). (*Id.* at 146.) The Reviewing Officer accordingly recommended a final determination of plaintiffs' reporting violation and assessment of that civil penalty amount. (*Id.* (citing J.A. 44 (Reviewing Officer Recommendation)).)

On October 9, 2015, appellants filed a response and reiterated, *inter alia*, their view that the schedule of penalties at 11 C.F.R. § 111.44 had not been "lawfully established by the Commission." (J.A. 147.)

On March 21, 2016, the Commission adopted the Reviewing Officer's Final Determination Recommendation, concluding that plaintiffs had failed to demonstrate that a factual error had been made in the reason-to-believe finding,

that the penalty was miscalculated, or that they used best efforts to file on time. J.A. 147; *see* 11 C.F.R. § 111.35(b). The Commission also concluded, based upon guidance from its Office of General Counsel incorporated by reference in the Final Determination Recommendation, that the schedule of penalties was lawfully established. (J.A. 147.) The Commission thus made a final determination that plaintiffs violated 52 U.S.C. § 30104(a) and assessed a $12,122 civil penalty. *Id.*

III. PROCEEDINGS IN THE DISTRICT COURT

On April 15, 2016, appellants filed a complaint against the Commission, FEC Commissioner Matthew S. Petersen in his then-capacity as chairman of the Commission, and the United States, in which they petitioned the district court to set aside or modify the FEC's administrative determination and fine. (J.A. 1-20.)[5] The Commission moved to dismiss the complaint on June 20, 2016, and the United States moved to dismiss the allegations against it on the same date. Appellants moved to voluntarily dismiss the United States "without prejudice," but opposed the motion filed by the Commission. (*Id.* at 138.)

[5] Appellants' petition for review named then-Chairman Matthew S. Petersen as a defendant in his official capacity as chairman of the Commission. (J.A. 1, 2.) Since that time, the Commission elected a new chairperson and on March 14, this Court granted appellees' motion to substitute current FEC Chairman Steven T. Walther as the FEC Chairperson named in his official capacity as a party in this litigation. (Order (Doc. # 4512272).)

IV. THE DISTRICT COURT'S REJECTION OF APPELLANTS' CHALLENGE TO THEIR ADMINISTRATIVE FINE

On December 22, 2016, the district court issued a memorandum opinion and order granting the motion to dismiss filed by the FEC and Commissioner Petersen and dismissing each of appellants' claims against them with prejudice, and approving appellants' notice of dismissal of the United States. (J.A. 138, 163-164.)

First, the court rejected appellants' claims for relief under the Declaratory Judgment Act and the Administrative Procedure Act ("APA"). (J.A. 150-51.) The court held that neither of those statutes provides it with jurisdiction over this case, because "FECA provides its own framework for judicial review of agency action," and appellants failed to identify "any reason that review under FECA presents an inadequate remedy." (*Id.* at 151 (citing 52 U.S.C. § 30109(a)(4)(C)(iii)).) Appellants do not appeal those aspects of the decision below. (*See* Appellants' Br. at 2.)

The court next addressed appellants' claim for judicial review pursuant to FECA's judicial review provision, 52 U.S.C. § 30109(a)(4)(C)(iii). Initially, the court recognized that FEC regulations specify three grounds upon which an administrative fine may be challenged, and acknowledged that appellants have "not directly pursue[d] those grounds in this case." (J.A. 153 (citing 11 C.F.R. § 111.35(b)(1)).) The court nevertheless found that appellants' "response to the

Commission can reasonably be read to assert an objection on the basis of factual error," and concluded that the permissible grounds for challenging an administrative fine set forth in the Commission's regulations are not exclusive. (*Id.*) The court accordingly concluded that plaintiffs could pursue their claim for judicial review under section 30109(a)(4)(C)(iii).

In conducting that review, the court first rejected appellants' argument that the district court lacked a sufficient record upon which to evaluate appellants' claims. (J.A. 153-54.) The court observed that consistent with this Circuit's precedent, the Commission had supported its motion with portions of the administrative record, and also directed the court to other publicly available documents that were expressly referenced in appellants' complaint. (*Id.* at 154 (citing *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1102 (8th Cir. 2000)).) And it rejected appellants' "incomplete" reliance on an out-of-Circuit decision construing the APA's judicial review provision, which similarly recognizes the propriety of reviewing agency action based on "'the whole record *or those parts of it cited by a party*'." (*Id.* (quoting 5 U.S.C. § 706; emphasis added by court).) The court thus concluded that the record before it was sufficient to consider the Commission's motion. (*Id.*)

The court then proceeded to reject appellants' "principal argument," namely, that the FEC failed to establish the applicable penalty schedule in accordance with

FEC regulations and the APA. (J.A. 155.) It explained that although the APA "[g]enerally" requires an agency to provide advance notice of a proposed rule, a hearing or receipt and consideration of public comments, and publication of the rule for a period before it becomes effective, agencies may waive these requirements for "good cause." (*Id*.) The court found that the Commission had demonstrated such "good cause" here. In particular, the court agreed with the Commission that pre-adoption publication and notice and comment for the 2014 Extension of Administrative Fines Regulations were "unnecessary" here, where the rule in question "ma[de] no substantive changes to the [Administrative Fines Program]," but "'merely extend[ed] the applicability of the existing [Administrative Fines Program] and delet[ed] one administrative provision.'" (J.A. 157-58 (quoting 2014 Extension of Administrative Fines Regulation, 79 Fed. Reg. at 3302).) It further agreed with the FEC that notice and comment "in these narrow circumstances" would have been contrary to the public interest, because they would have "further delay[ed] [the FEC] in implementing the Congressionally approved extension" of FECA's Administrative Fines Program, in "contravene[tion of] the purposes of th[at] . . . Program." (*Id.* at 158-60.)

The court separately concluded that the same considerations supported the Commission's determination that it had good cause "to dispense with the post-adoption notice requirement under [5 U.S.C.] § 553(d)." (J.A. 160-61.)

Lastly, the district court considered appellants' argument that the 2014 Extension of Administrative Fines Regulation failed to comply with Commission procedures and the Sunshine Act, 5 U.S.C. § 552b(g), and it rejected that argument as well. (J.A. 161-63.) Having reviewed the record and appellants' arguments, the court found "no evidence that the Commission violated [its] tally vote procedure or the Sunshine Act that would invalidate the 2014 Regulatory Extension." (*Id.* at 162.) And the court clarified further that "[e]ven if the Commission's voting procedures did not expressly follow the requirements of the Sunshine Act, the remedy for such violations is increased transparency, not invalidation of agency action." (*Id.* at 162-63 (collecting cases); *see id.* (explaining that "[a]lthough an agency action may be set aside when it is intentional, prejudicial to the party making the claim, and 'of a serious nature,' Plaintiffs have not alleged any facts suggesting that the FEC's alleged Sunshine Act violations meet those criteria") (citation omitted).)

SUMMARY OF THE ARGUMENT

The district court correctly granted the FEC's motion to dismiss appellants' administrative review petition and its decision should be affirmed.

Appellants purport to challenge an administrative fine that the Commission imposed for their failure to timely disclose $112,425 in campaign contributions. But appellants have never disputed their failure to timely report such contributions,

or that such failures violated FECA's reporting requirements. Instead, they have asserted a meritless challenge to the validity of the penalty schedule upon which the Commission relied in imposing their fine.

In granting the Commission's motion to dismiss appellants' petition for judicial review, the district court correctly rejected all of appellants' arguments in support of that challenge. As a preliminary matter, the court correctly concluded that the Commission had acted in accordance with this Court's precedent when it supported its motion to dismiss with only those portions of the public and administrative record referenced in appellants' complaint. And the lower court was thus right to reject appellants' erroneous insistence that the Commission was required to submit the full administrative record for the district court's review at the motion-to-dismiss stage.

None of the procedural deficiencies appellants allege about the issuance of the penalty schedule provide a basis for finding the regulatory extension invalid, or otherwise invalidating their administrative fine. As the district court recognized, the regulatory extension was a time-sensitive, routine implementation of an expiration date to conform the regulations to the expiration date of the statutory program the rules were created to administer. The district court correctly concluded that the Commission's use of a tally vote procedure to promulgate the regulatory extension was proper. The Commission acted consistently with its

Sunshine Act regulations by handling the matter via notational voting rather than at a public meeting. Moreover, not only have appellants failed to allege any actions by the FEC that were intentional and prejudicial to them such that there is cause to overturn their administrative fines, there is no connection whatsoever between the Commission's extension of its administrative fines regulations and appellants' reporting violations, which occurred months after the FEC's publication of the extension.

The court was also correct in concluding in these circumstances that the Commission had the requisite "good cause" to exempt the regulatory extension from the Administrative Procedure Act's general pre-adoption notice and comment requirements, and post-adoption requirement to publish the rule for 30 days before it takes effect. The APA and cases interpreting it make clear that pre-adoption notice and comment are "unnecessary" and would not further the public interest under such circumstances. Permitting delay in implementation of the reauthorized schedule of penalties would have subjected more violations to the Commission's full-blown enforcement procedures, thereby frustrating the Congressional purpose of streamlining the processing of violations of certain reporting provisions. These same considerations also amply support the determination that the Commission had good cause waive the APA's post-adoption 30-day grace period and make the regulatory extension effective immediately upon publication.

The findings of good cause in these circumstances are clear, and appellants do not seriously dispute them in this Court. Instead, appellants contend that the district court failed to address a purported requirement that the Commission "establish" its schedule of penalties in some independent process that is separate from its publication of the schedule. Appellants did not sufficiently articulate any distinct challenge to that purported requirement separate from their Sunshine Act arguments, and from the APA arguments they made below, and the district court thus had no cause to conduct any additional analysis. In any event, the statute authorizing the extension of the administrative fines penalties imposes no requirement of separation between establishment and publication procedures.

Finally, the FEC's administrative fine determination should be affirmed for the independent reason that appellants failed to challenge their fine on the basis of any of the limited grounds permitted by FEC regulations, 11 C.F.R. § 111.35(b). That reasonable determination by the Commission, which was based on the agency's interpretation of its own regulations, is entitled to substantial deference.

The district court's dismissal decision should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This appeal was taken from an order granting the Commission's motion to dismiss appellants' action to modify or set aside the FEC's administrative fine determination. This Court's review of a decision granting a motion to dismiss for

failure to state a claim is *de novo*. *H & Q Props., Inc. v. Doll*, 793 F.3d 852, 855 (8th Cir. 2015) (citing *Grand River Enters. Six Nations, Ltd. v. Beebe* 574 F.3d 929, 935 (8th Cir. 2009)).

In reviewing agency action, 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, 1226 (D.C. Cir. 1993); *see id.* at 1226 (explaining that "because a 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").

In reviewing the district court's decision under 52 U.S.C. § 30109(a)(4)(C)(iii) not to modify or set aside the FEC's administrative fine determination, this Court applies the standard of review for final agency adjudications in the APA, 5 U.S.C. § 706, which is "'the identical standard of review'" employed by the district court. *Brown v. United States Dep't of Interior*, 679 F.2d 747, 749 (8th Cir. 1982) (quoting *First Nat'l Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1374 (8th Cir. 1974)). Under that standard, a court may set aside agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

This Court has explained that a decision is arbitrary and capricious where an agency has improperly relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or has offered an explanation that is "'implausible'" or otherwise contrary to the evidence before the agency. *Bettor Racing, Inc. v. Nat'l Indian Gaming Comm'n*, 812 F.3d 648, 651 (8th Cir. 2016) (quoting *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The Court has further explained that it "will not substitute its own judgment so long as the agency has examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id*. (citation and internal quotation marks omitted) If an agency's action is "supportable on any rational basis," it must be affirmed. *Atchison, T. & S.F. Ry. Co. v. Witchita Bd. of Trade*, 412 U.S. 800, 807 (1973); *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 763 (8th Cir. 2004); *see Global NAPs, Inc. v. FCC*, 247 F.3d 252, 257 (D.C. Cir. 2001) (explaining that the arbitrary and capricious standard of review is highly "deferential" and "presume[s] the validity of agency action" (internal quotation marks omitted)).

Moreover, it is well settled that courts must accord deference, when an agency interprets "a statute which it administers." *Chevron, U.S.A., Inc. v. Nat.l 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 when an agency interprets its own regulations. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 799 (8th Cir. 2005).

II. THE DISTRICT COURT CORRECTLY REJECTED APPELLANTS' CHALLENGE TO THE COMMISSION'S ADMINISTRATIVE FINE DETERMINATION

A. The District Court Properly Considered the Portions of the Administrative Record Relied Upon by Appellants

In deciding this appeal, the Court "'must render an independent decision on the basis of the same administrative record as that before the district court.'" *Brown*, 679 F.2d at 748-49 (quoting *First Nat'l Bank of Fayetteville*, 508 F.2d at 1374). Here, because the decision below resolved a motion to dismiss, the district court "'primarily consider[ed] the allegations contained in the complaint,'" while also reviewing "matters of public and administrative record referenced in the complaint.'" (J.A. 153-54 (citation omitted).) That approach clearly was correct and directly followed this Court's unambiguous instructions in *Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1102 (8th Cir. 2000) ("*Deerbrook Pavilion*").

In *Deerbrook Pavilion*, this Court explained that "[o]n 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 . . . be taken into account." 235 F.3d at 1102; *see 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'" (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007))).[6]

Here, the district court correctly found that "following the Eighth Circuit's reasoning in *Deerbrook*, the Commission has submitted and/or identified 'matters of public and administrative record referenced in the Complaint.'" (J.A. 153-54 (quoting *Deerbrook Pavilion*, 235 F.3d at 1102).)[7]

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[6] Lower courts routinely invoke this Court's direction in *Deerbrook Pavilion* when discussing the proper scope of the record before a district court on a motion to dismiss. *See, e.g., Johnson v. Sec'y of Dep't of Veterans Affairs*, No. 15-CV-1869 CAS, 2016 WL 3997072, at *2 (E.D. Mo. July 26, 2016) (following *Deerbrook Pavilion* and limiting the record on a motion to dismiss to "the complaint and exhibits thereto" and "matters of public record"); *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)); *Almoghrabi v. GoJet Airlines, LLC*, No. 14-CV-00507-AGF, 2015 WL 2177374, at *3 (E.D. Mo. May 8, 2015) (quoting *Deerbrook Pavilion* standard for scope of record that may be considered on a motion to dismiss).

[7] In the underlying proceedings, appellants complained that the administrative record exhibits attached to the Commission's motion to dismiss did not include certain documents referenced in their complaint. Pls.' Br. in Opp'n to FEC's Mot. to Dismiss at 4-5, & Exh. A, *McChesney v. FEC*, No. 16-168 (D. Neb. July 28, 2016) (Docket Nos. 27, 27-3). The FEC explained in its reply brief that the documents referenced by appellants in their opposition to the agency's motion to

Appellants do not even acknowledge, let alone discuss or attempt to distinguish, this Circuit's controlling precedent. Instead, they argue, as they did in the district court, that "the APA requires review of 'the whole record.'" (Appellants' Br. at 38 (citations omitted).) But as the district court admonished when it rejected the same argument, appellants' description of the APA's requirement "is incomplete." (J.A. 154.) In fact, and as the district court correctly clarified, what the APA actually states is that "when reviewing agency action, 'the court shall review the whole record *or those parts of it cited by a party*, and due account shall be taken of the rule of prejudicial error.'" (*Id.* (quoting 5 U.S.C. § 706, emphasis added by district court).)

Appellants quote from inapposite and out-of-circuit decisions and cite an inapplicable procedural rule governing agency review proceedings that *originate* in the Court of Appeals. (Appellants' Br. at 37-38 & n.9.) But none of their

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dismiss were not part of the administrative record for the administrative fine challenged here, but it nevertheless directed the court and appellants to websites where each of the non-record documents identified by appellants is publicly available. FEC Reply Br. at 6-7 n.2, *McChesney v. FEC*, No. 16-168 (D. Neb. Aug. 22, 2016) (Docket No. 31). The district court recognized the Commission's identification of these "'matters of public . . . record'" in its dismissal decision. (J.A. 154; *see id.* ("The Commission has submitted those parts of the [administrative record] cited by the Plaintiffs, and has directed the Court to other publicly available documents cited in the Complaint.").)

inapplicable authorities demonstrates that the district court erred by applying this Court's controlling holding in *Deerbrook Pavilion*.

The stray quote appellants lift from *Florida Power & Light Co. v. Lorion*, (Appellants' Br. at 37-38), clarifies that even "informal agency action in which a hearing has not occurred" is subject to direct judicial review in the court of appeals when provided for under the Hobbs Act. 470 U.S. 729, 744 (1985). In that case, the Supreme Court held that the court of appeals had erred in determining *sua sponte* that it lacked initial subject matter jurisdiction under the Hobbs Act to review an informal agency decision. *Id.* at 746. The decision in no way addresses the propriety of a district court reviewing only the portions of an administrative record materials referenced in a plaintiff's complaint in deciding a motion to dismiss.

The D.C. Circuit's decision in *Walter O. Boswell Memorial Hospital v.* Heckler, 749 F.2d 788 (D.C. Cir. 1984), and the Washington district court's decision in *Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994), likewise do not concern the proper scope of the administrative record *at the motion to dismiss stage*. Both cases involve merits determinations at the summary judgment stage, *see Walter O. Boswell Mem'l Hosp. v. Heckler*, 573 F. Supp. 884, 886 (D.D.C. 1983); *Seattle Audubon Soc'y*, 871 F. Supp. at 1300, and the Commission expressly acknowledged below that the full administrative record

would be submitted in the event this case proceeded to that stage of district court proceedings. *See* FEC Reply Br. at 6 n.1, *McChesney v. FEC*, No. 16-168 (D. Neb. Aug. 22, 2016) (Docket No. 31).

In *Walter O. Boswell Memorial Hospital*, moreover, the D.C. Circuit explicitly recognized that the APA provides for "'review [of] the whole record *or those parts of it cited by a party*.'" 749 F.2d at 792 (quoting 5 U.S.C. § 706) (emphasis added). The court's specific determination that "the circumstances of th[at] case" would render consideration of a partial record "fundamentally unfair," *id.* at 793, have no bearing on the propriety of the district court's application of the APA and *Deerbrook Pavilion* in deciding the FEC's motion to dismiss here. The district court's reliance on the portions of the record plaintiffs chose to reference in their complaint works no unfairness.

Appellants' reliance on Federal Rule of Appellate Procedure 17 is likewise misplaced. That Rule is part of Title IV of the Federal Rules of Appellate Procedure, which pertains to *direct* review in the courts of appeals of "an Order of an Administrative Agency, Board, Commission, or Officer." Fed. R. App. P. 17, Title IV (Rules 15-20); *see also, e.g.*, 28 U.S.C. § 2342 (providing exclusive jurisdiction in the federal courts of appeals "to enjoin, set aside, suspend . . . or to determine the validity of," *inter alia*, final orders and other final agency actions by certain specified federal agencies); *Cunningham v. R.R. Bd.*, 392 F.3d 567, 570 n.2

(3d Cir. 2004) (noting application of Rule 17 in an action filed directly in the Court of Appeals for review of an agency administrative order). The procedural requirements for that special category of cases do not purport to apply to an *appeal of a district court decision* on a motion to dismiss, and appellants have failed to identify any authority interpreting Rule 17 as superseding this Court's controlling holding in *Deerbrook Pavilion*.[8]

Appellants have thus failed to identify any applicable rule or controlling decision that contradicts this Court's explicit instructions in *Deerbrook Pavilion* and supports their claim that the record before the court below was insufficient. And they do not even attempt to identify any record regarding the administrative fine determination or any other administrative document identified in their complaint that was not made available for review by the district court.[9] They have

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[8] In any event, even in cases in which Rule 17 applies, courts of appeals have permitted agencies to defer filing a complete administrative record (or a certified index of such a record) in cases where the agency has filed a motion to dismiss. *See, e.g.*, *Dynegy Power Mktg, Inc. v. FERC*, Nos. 04-1034, 04-1041, 04-1055, 04-1085, 04-1088, 04-1089, 04-1091, 04-1120, 04-1193, 04-1194, 04-1195, 2004 WL 1920775, at *1 (D.C. Cir. Aug. 26, 2004) (per curiam) (granting motion to defer filing the certified index after appellants moved to dismiss).

[9] Appellants now, for the first time, purport 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 (Appellants' Br. at 38-39). But, as discussed *infra* pp. 31-36, appellants themselves acknowledge that the regulations were extended pursuant to a tally vote of the Commissioners following circulation of the Reviewing Officer's final recommendations. There was thus no public meeting at which the regulatory extension was discussed. Had there been such a discussion, appellants would be free to listen to it via the audio

thus failed to provide any basis upon which this Court could find that the decision below was based on an insufficient record.

The Commission followed this Court's precedent when it submitted the portions of the administrative record referenced in appellants' complaint and its motion to dismiss was properly decided based upon that record. The district court correctly rejected appellants' challenge to the sufficiency of the administrative record and this Court should do the same.

B. The District Court's Conclusion that the Commission Complied With the Sunshine Act When Extending the Administrative Fine Regulations Was Sound

The district court correctly held that the Commission's 2014 Extension of Administrative Fines Regulations was consistent with the Sunshine Act and the Commission's regulations implementing that Act, including the tally vote procedures spelled out in the regulations.

FECA grants the Commission statutory authority to promulgate its own "rules for the conduct of its activities." 52 U.S.C. § 30106(e). As the district court explained, Commission regulations promulgated consistent with that discretion and pursuant to the Government in the Sunshine Act ("Sunshine Act"), 5 U.S.C. 552b(g), provide generally for the "disposition of official Commission business" through "the deliberation of at least four voting members of the Commission in

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recordings publicly available on the FEC's website. *See* Archived Recordings of FEC Open Meetings, http://www.fec.gov/audio/audio.shtml.

collegia" at an open, public meeting. (J.A. 161 (internal quotation marks omitted) (citing 11 C.F.R. §§ 2.2(d)(1), 2.3(a), (b)).) As the court below further explained, Commission regulations also provide a "narrow exception to the . . . requirement [that four or more Commissioners engage in deliberations on Commission business via a meeting] when the Commission disposes of 'routine matters.'" (*Id.* (citing 11 C.F.R. §§ 2.2(d)(2)).) Commission regulations provide that such matters may be addressed pursuant to a streamlined, notational or "circulation" voting procedure, which frees the Commissioners to devote more of their time to the many complex tasks involved in enforcing and administering federal campaign finance statutes. *See Combat Vets*, 795 F.3d at 154; J.A. 161-62 ("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." (citing *Commc'ns Sys., Inc. v. FCC*, 595 F.2d 797, 800-01 (D.C. Cir. 1978))). Such a procedure is consistent with the Sunshine Act, 5 U.S.C. § 552b. *See Commc'ns Sys., Inc.*, 595 F.2d at 800-01; *R.R. Comm'n of Tex. v. United States*, 765 F.2d 221, 230 (D.C. Cir. 1985) ("The Sunshine Act does not require that meetings be held in order to conduct agency business; rather, that statute requires only that, if meetings are held, they be open to the public (subject to various enumerated exceptions . . . ." (citations omitted)).

It was reasonable for the Commission to conclude that extending the expiration of its administrative fines regulations was a "routine matter" that could be addressed pursuant to the agency's tally vote procedure. Without notational 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 800-01.[10] This voting procedure was a lawful and appropriate method for completing Commission action as promptly as possible in order to avoid the harm to public interest that would have been occasioned by further delay. As described *supra*, p. 10 & n.2, Congress did not enact legislation extending the end date of the statutory Administrative Fines Program until just days before it was scheduled to expire. The Commission acted as expeditiously as possible to implement Congress's extension in its regulations and minimize the gap during which the expiration of the regulations precluded it from administering FECA's Administrative Fines Program. (J.A. 158-60.) Prolonging the Commission's inability to administer FECA's Administrative Fines Program for an extended period of time could have caused delays and confusion, and would have frustrated Congress's purpose in establishing the Administrative Fines Program. As the district court recognized,

[10] Even if the routine periodic extension or regulations at issue here had been controversial for some reason, "the applicability of notational, sequential voting" under the Sunshine Act is not limited "to non-controversial cases." *R.R. Comm'n of Tex.*, 765 F.2d at 230.

that purpose was "'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.'" J.A. 159 (quoting *Combat Vets*, 795 F.3d at 154)); *see also* 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," including by 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").

In order to accommodate the need for efficiency and expedition, "[t]he Sunshine Act does not require an agency to hold a meeting in order to function." *Id.* (citing *Commc'ns Sys., Inc.*, 595 F.2d at 800-01). A government agency like the Commission has "broad discretion to determine the procedures by which it conducts its business." *Pacific Legal Found. v. Council on Envtl. Quality*, 636 F.2d 1259, 1266 (D.C. Cir. 1980). The Commission's reasonable determination that extending the expiration of its administrative fines regulations on an expedited basis and pursuant to a tally vote is entitled to deference. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d at 799.

Appellants have not identified any legal authority prohibiting the Commission from implementing the statutory extension of the Administrative Fines Program through a tally-vote procedure. They emphasize (Appellants' Br. 6-

7) that the Commission held an open meeting on January 16, 2014, three days after the Commission adopted the 2014 Extension of Administrative Fines Regulations. But that fact is irrelevant: even if, as appellants assume, the Commission *could have* deferred voting to implement the statutory extension at that meeting, that possibility is not even close to legal authority *requiring* the Commission to do so, and it certainly does not demonstrate that appellants' administrative fine was arbitrary or capricious.

Appellants 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 as authority for their claim to set aside the Commission's administrative fine here. But as the district court correctly concluded, "[e]ven if the Commission's voting procedures did not expressly follow the requirements of the Sunshine Act, the remedy for such violations is increased transparency, not invalidation of agency action." J.A. 162-63 (citing *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.").

Although agency action might 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, appellants "have not alleged any facts suggesting that the FEC's alleged Sunshine Act violations meet those criteria," as the district court explained. (J.A. 163 (citing S. Rep. No. 94-354, at 34).) There was no improperly closed meeting here. 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. *See supra* pp. 10, 12. Thus, neither the Sunshine Act, nor the Commission's regulations implementing that Act, nor FECA provides a legal basis for setting aside the Commission's administrative fine determination here.

C. The District Court Rightly Held That the Commission's Regulatory Extension Was Consistent With the APA and FECA

The district court correctly concluded that the Commission's promulgation of the 2014 Extension of Administrative Fines Regulations was fully consistent with the authorizing statute and the APA. Given that the regulations had lapsed after a last-minute reauthorization from Congress and were being reissued with little change, the Commission concluded there was good cause to waive the APA requirements of pre-adoption notice and comment and post-adoption publication. Despite the Commission's promulgation of the Administrative Fines regulations, including a schedule of penalties, through the Federal Register, appellants

erroneously contend that the agency did not "establish[]" that schedule. The Commission did; and it was not required to do so through a process completely separate from its publication of the schedule. Congress's reauthorization of the administrative fines program imposed no procedural requirements on the rulemaking it necessitated, and the district court was right to conclude that the Commission's establishment of the schedule of penalties complied with the APA.

1. The APA's Pre-Adoption Notice and Comment Requirements May Be Waived

As the district court accurately observed, agencies generally are required to conduct substantive rulemakings in accordance with certain notice and comment procedures set forth in the APA. J.A. 155; *see Iowa League of Cities v. EPA*, 711 F.3d 844, 855 (8th Cir. 2013) (citing 5 U.S.C. § 553(b)(c)). Those procedures are: providing notice of the proposed rule, conducting a hearing or receiving and considering public comments on the proposal, and publishing the new rule at least 30 days in advance of its effective date. *Id*.; *see also United States v. Brewer*, 766 F.3d 884, 888 (8th Cir. 2014). As the district court also recognized, however, the APA includes an important caveat: "[a]n agency may waive the requirements of a notice and comment period and the 30-day grace period before publication if the agency finds 'good cause' to do so." *Id.* (quoting *Brewer*, 766 F.3d at 888 (citing 5 U.S.C. §553(b)(B), (d)(3))).

2. The FEC Had Good Cause to Exempt the 2014 Extension of Administrative Fines Regulations from the APA's Pre-Adoption Notice and Comment Requirement

This Court applies a deferential standard when evaluating an agency's reliance on the "good cause" exception to the APA's notice and comment requirements. *Brewer*, 766 F.3d at 888; *see* J.A. 156 (citing *Brewer*). In evaluating an agency's claim of good cause under section 553(b)(B), this Court considers "only . . . 'whether the agency's determination of good cause complies with the congressional intent' [manifested in 5 U.S.C. §] 553(d)." *Brewer*, 766 F.3d at 888 (quoting *Gavrilovic*, 551 F.2d at 1105); *see* J.A. 156.[11] An agency may establish good cause by showing that notice and comment are "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). Here, the Commission and the court below correctly concluded that pre-adoption notice and comment were both unnecessary and contrary to the public interest.

a. Pre-Adoption Notice and Comment Were Unnecessary

The "unnecessary" prong of section 553(b)(B) includes circumstances where amendments to an existing regulation "are minor or merely technical." J.A. 157(quoting *Hedge v. Lyng*, 689 F. Supp. 884, 892 (D. Minn. 1987)); *see also*

[11] As the district court noted, some other courts of appeals have reviewed an agency's good cause determination *de novo*, (*see* J.A. 156 (citing *United States v. Gould*, 568 F.3d 459, 469-70 (4th Cir. 2009); *United States v. Cain*, 583 F.3d 408, 420-21 (6th Cir. 2009))), while still other courts have suggested that "'good cause should be narrowly construed,'" (*id.* (citing *United States v. Reynolds*, 710 F.3d 498, 507 (3d Cir. 2013))).

North Carolina Growers Ass'n v. United Farm Workers, 702 F.3d 755, 766 (4th Cir. 2012); *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir 2001); S. Rep. No. 752, 79th Cong., 1st Sess. 14 (1945). Pre-adoption notice and public comment are likewise "unnecessary" for "a routine determination" that is "insignificant in nature and impact, and inconsequential to the industry and to the public." (J.A. 157 (citing *Mack Trucks, Inc. v. EPA*, 682 F.3d 87, 94 (D.C. Cir. 2012); S. Rep., No. 752, 79th Cong. 1st Sess. (1945)).) Even where an agency is re-issuing a former rule *that had been vacated* — which is not the case here — the agency is not "necessarily require[d] . . . to 'start from scratch' and initiate new notice and comment proceedings" if the original rule was subject to notice and comment. *Mobil Oil Corp. v. EPA*, 35 F.3d 579, 584-85 (D.C. Cir. 1994)

The 2014 Extension of Administrative Fines Regulations easily fits within these parameters. As the district court found, the regulation "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]." (J.A. 157-58 (quoting 2014 Extension of Administrative Fines Regulation, 79 Fed. Reg. at 3302).) Indeed, as the court below further explained, "the 2014 Regulatory Extension did not make any substantive changes" and "did not alter or even mention the civil penalty

[appellants] challenge in this case." (*Id.* at 158.)[12] Moreover, because "[n]o extent of notice or commentary could have altered the Commission's obligation to implement" Congress's December 2013 extension of the statutory administrative fines program, the Commission and the district court correctly determined that the 2014 Extension of Administrative Fines Regulations was "not an exercise of substantive agency decision-making." (*Id.*)

b. Pre-Adoption Notice and Comment Would Have Been Contrary to the Public Interest

In addition to being unnecessary, utilizing pre-adoption notice and comment procedures in these circumstances would have been contrary to the public interest. As the court below explained, "[t]he public interest prong 'is appropriately invoked when the timing and disclosure requirements of the usual procedures would defeat the purpose of the proposal — if, for example, 'announcement of a proposed rule would enable the sort of financial manipulation the rule sought to prevent.'" (J.A. 158-59 (quoting *Mack Trucks, Inc.*, 682 F.3d at 95).)

As described *supra*, p. 10 & n.2, Congress's enactment of legislation extending the end date of the statutory Administrative Fines Program just days

[12] In contrast, the civil penalty formula for untimely 48-hour notices was originally established in May 2000, pursuant to a notice-and-comment rulemaking, *see* May 2000 Administrative Fines Rule, 65 Fed. Reg. at 31787, and was adjusted, in 2005, to the amount that formed the basis for appellants' fine. *See* Inflation Adjustments for Civil Monetary Penalties, 70 Fed. Reg. 34633, 34636 (June 15, 2005) (adjusting civil penalty formula for 48-Hour Notices that are not timely filed as "$110 + (.10 x amount of the contribution(s) not timely reported")).

before it was scheduled to expire required the agency to act expeditiously to prevent disclosure violations from being subject to the Commission's more extensive ordinary procedures in contravention to Congressional will. J.A. 159-60 (citing 2014 Extension of Administrative Fines Regulations, 79 Fed. Reg. at 3302); *see Petry v. Block*, 737 F. 2d 1193, 1201-1202 (D.C. Cir. 1984) (holding decision to waive notice-and-procedures "was entirely reasonable" given the "extremely limited time given by Congress").

The FEC and the district court correctly found that pre-adoption notice and public comment were contrary to the public interest.[13]

3. The FEC Also Demonstrated Good Cause to Waive the APA's 30-Day Grace Period Before Publication

The same considerations detailed above, *supra* pp. 38-41, also demonstrate that the Commission had good cause to make the 2014 Extension of Administrative Fines Regulations effective immediately upon publication. "[T]he purpose for deferring the effectiveness of a rule under § 553(d) was to 'afford persons affected a reasonable time to prepare for the effective date of a rule or

[13] Agencies have also concluded that similar circumstances rendered pre-adoption notice and comment "impracticable." *See, e.g.*, *In the Matter of Implementation of Section 1003(B) of the Department of Defense Appropriations Act, 2010*, 24 FCC Rcd. 14487, 14888, 2009 WL 5125386, at *1 (Dec. 28, 2009) (explaining that where Congress had extended a statute's sunset date less than two weeks before its expiration, the Federal Communications Commission had "good cause" to implement the new sunset date in its regulations, *inter alia*, because notice and comment would have been impracticable).

rules or to take other action which the issuance may prompt.'" *Gavrilovic*, 551 F.2d at 1104 (quoting S. Rep. No. 752, 79th Cong., 1st Sess. 15 (1946); H.R. Rep. No. 1980, 79th Cong., 2d Sess. 25 (1946)). "[T]he APA was not[, however,] intended to unduly hamper agencies from making a rule effective immediately or at some time earlier than 30 days," and "an administrative agency is required to balance the necessity for immediate implementation against principles of fundamental fairness which require that all affected persons be afforded a reasonable time to prepare for the effective date of its ruling." *Id*. at 1104-05. Congress indicated that "many rules . . . may be made operative in less than 30 days," *inter alia*, "because of inescapable or unavoidable limitations of time" or "because of the demonstrable urgency of the conditions they are designed to correct." *U.S. Steel Corp. v. EPA*, 605 F.2d 283, 290 (7th Cir. 1979) (quoting S.Doc. No. 248, 79th Cong., 2d Sess. 260 (1946)).

For the same reasons that pre-adoption notice and comment were not appropriate, delaying the effective date of the regulatory extension would similarly have been ill-advised. The rule made no substantive changes to the Commission's administrative fine procedures or penalty schedule, and it did not impose any new reporting obligations on political committees. As the district court explained, "[t]he changes made to the regulations were minor and non-substantive and merely extended the Administrative Fines Program already in place." (J.A. 161.)

Furthermore, and as detailed above, *supra* pp. 40-41, delaying the effective date of the regulatory extension would have "frustrate[d] the purposes of the simplified administrative fines system." (*Id.*)

4. Appellants Do Not Meaningfully Dispute the Findings of Good Cause to Waive Certain APA Requirements Here

Appellants do not pose any meaningful challenge to the district court's conclusion that the Commission possessed good cause to waive the notice-and-comment and post-adoption publication requirements of the APA. Appellants specifically contested the Commission's actions on the grounds of failure to provide notice and accept comments in the district court, Pls.' Br. in Opp'n to FEC Mot. to Dismiss, at 13-16, *McChesney v. FEC*, No. 16-168 (D. Neb. July 28, 2016) (Docket No. 27), but do not make any argument against those findings in this Court. That aspect of the district court's reasoning is thus not properly subject to further review. *See, e.g.*, *Meyers v. Starke*, 420 F.3d 738, 742-43 (8th Cir.2005) (explaining that to be reviewable, an issue must be presented with some specificity, and failure to do so can result in waiver); *Harris v. 575 Folk Constr. Co.*, 138 F.3d 365, 366 n. 1 (8th Cir.1998) (concluding that appellant's failure to assert grounds for challenging certain rulings effectively waived related issues on appeal).

The closest appellants come to responding to the findings of good cause here is a single citation, in a footnote, to a 1979 Fifth Circuit decision explaining that "the mere existence of deadlines for agency action . . . *does not in itself constitute*

good cause." (Appellants' Br. at 34 n.7 (quoting *U.S. Steel Corp. v. EPA*, 595 F.2d 207, 213 (5th Cir. 1979); emphasis added).) But that clarification does not nearly support appellants' suggestion that the Commission acted improperly here, where utilizing general notice and comment procedures and delaying the rule's effective date were both unnecessary and contrary to the public interest, as detailed above.

5. The Authorizing Legislation Imposed No Procedural Requirements Above and Beyond the APA On the Commission's Establishment of A Schedule of Penalties

Rather than contest the district court's APA holdings, appellants instead contend that in making those rulings the court below "focused on a secondary McChesney argument" and "did not truly address" other arguments they had advanced. (Appellants' Br. at 11, 20.) Though the district court addressed the propriety of the Commission's actions under the APA and the Sunshine Act, as described above, appellants appear to contend that some further analysis was required regarding whether the Commission had engaged in a process to establish a schedule of penalties separate and apart from its act of publishing the schedule. No such analysis was required of the district court, and no such separate process was required of the district court.

To whatever extent appellants intended to make an argument about an obligation to establish the schedule of penalties that was distinct from their challenges to the Commission's waiver of notice-and-comment requirements and

use of tally voting, they failed to make any such distinction clear in their district court filings. Appellants' arguments regarding the Commission's obligation to establish the schedule of penalties were buried among their arguments regarding a lack of notice and comment, the tally vote procedure, and the lack of a public meeting. *See* Pls.' Br. in Opp'n to FEC Mot. to Dismiss, at 14-16, *McChesney v. FEC*, No. 16-168 (D. Neb. July 28, 2016) (Docket No. 27). Even if the district court had failed to divine purportedly distinct arguments that had been intended, it committed no error.

Moreover, even if appellants had presented an argument about a requirement to establish the schedule of penalties distinct from APA and Sunshine Act requirements, no such requirement exists. The Commission is required by 52 U.S.C. 30109(a)(4)(C)(iii) to "establish[] and publish[]" a schedule of administrative fine penalties, but that provision of FECA does not foreclose the Commission from completing both of those tasks by voting on one rulemaking document and then publishing it. The 2013 legislation authorizing the extension of the administrative fines program did not mandate any particular "evaluative process" in connection with extensions or revisions to the schedule of penalties, as appellants contend. *See* Appellants' Br. at 19; Act of Dec. 26, 2013, Pub. L. No. 113-72, sec. 1. The Commission has without doubt established a schedule of penalties, as application of the schedule to appellants' reporting violations attests.

Given the lack of any specific procedural requirements in the authorizing legislation, there are no relevant procedural requirements imposed on top of the APA, the Sunshine Act, and other similar rules generally applicable to federal agencies.

Appellants also attempt to overcome the heightened deference and "presum[ption of] . . . validity" to which the Commission's determination is entitled through exaggerated characterizations of the scope and nature of the rule at issue in this narrow judicial review action. *Global NAPs, Inc.*, 247 F.3d at 257; *South Dakota v. U.S. Dep't of Interior*, 423 F.3d at 799. Contrary to appellants' description, this case does not concern the Commission's purported "establishment of a penal code for all federal elections." (Appellants' Br. 2, 10 n.2, 32.) Instead, the regulation that appellants challenge as invalid was a straightforward implementation of an expiration date to conform the Commission's administrative fines regulations to the statutory program the rules were created to administer. Its promulgation was manifestly consistent with the authorizing statute and the APA.

D. Appellants' Judicial Review Action Also Warranted Dismissal Based on Appellants' Failure to Bring a Proper Challenge to Their Administrative Fine

In addition to the reasons discussed above, the FEC's administrative fine determination may be affirmed for the independent reason that the Commission

reasonably found that appellants failed to invoke any of the grounds permitted by section 111.35(b). (*See* J.A. 124.)

As described above, *see supra* pp. 7-8, the Commission's administrative fines regulations specify three permissible grounds for challenging an administrative fine: (1) factual errors in the Commission's finding (such as if the report was, in fact, timely filed); (2) inaccurate calculation of the penalty; or (3) a showing that the respondent used "best efforts" to file in a timely manner but was prevented from doing so by "reasonably unforeseen circumstances . . . beyond the [respondent's] control, and [t]he respondent filed [the report] no later than 24 hours after such circumstances ended. 11 C.F.R. § 111.35(b)(1)-(3).

Courts applying the FEC's administrative fines regulations have repeatedly recognized the exclusivity of these specified grounds for challenging an administrative fine. *See, e.g.*, *Combat Vets*, 983 F. Supp. 2d at 6, 16-18 (listing the three permissible bases for challenging an administrative fine and rejecting a challenge to the "best efforts" provision as unreasonably narrow); *Lovely*, 307 F. Supp. 2d at 300 (explaining that FEC regulations "provide that challenges to civil fines may be based on *only* three reason" and listing the three bases set forth in 11 C.F.R. § 111.35(b) (emphasis added)); *Kuhn for Cong.* 2014 WL 7146910, at *6 (observing that "[t]here are three possible grounds for . . . an administrative challenge" to an FEC administrative fine); *Cox for U.S. Senate Comm., Inc.* 2004

WL 783435, at *5 (explaining that 11 C.F.R. § 111.35(b) permits a challenge to a civil money penalty "only on the basis of (i) [t]he existence of factual errors; and/or (ii) [t]he improper calculation of the civil money penalty; and/or (iii) [t]he existence of extraordinary circumstances that were beyond the control of [Plaintiffs] and that were for a duration of at least 48 hours and that prevented [Plaintiffs] from filing the report in a timely manner" (alterations by court)).[14]

In its dismissal decision, the district court correctly recognized that appellants "do not directly pursue those grounds in this case," but nevertheless *construed* appellants challenge to implicitly assert a factual error. (J.A. 153 (stating that appellants' "response to the Commission can reasonably be read to assert an objection on the basis of factual error").) In fact, appellants' failure to

[14] The history of section 111.35 makes clear that subsection (b)(1) is limited to errors regarding the factual basis for the Commission's reason-to-believe finding. As initially promulgated in 2000, section 111.35(b)(1) merely required a written response to contain "[r]eason(s) why the respondent is challenging the reason to believe finding and/or civil money penalty which may consist of . . . [t]he existence of factual errors." May 2000 Administrative Fines Rule, 65 Fed. Reg. at 31795. But, when the regulation was revised in 2007, subsection (b)(1) was explicitly limited to claims that "[t]he Commission's reason to believe finding is based on a factual error," and two illustrative examples were added: "the committee was not required to file the report, or the committee timely filed the report in accordance with 11 CFR 100.19." Notice 2007-7, Final Rules and Transmittal to Congress, 72 Fed. Reg. 14662, 14667 (Mar. 29, 2007). The Commission's Explanation and Justification clarified that "a respondent may not challenge an RTB finding based on factual errors that are irrelevant to the Commission's actual RTB finding. *Id*. at 14664.

establish any *actual* factual error, let alone one that formed the basis for the Commission's determination, *see supra* p. 48 n.14, or that the penalty was miscalculated, or that they used best efforts to file on time, constitute a separate and proper basis for finding that they had not successfully challenged their administrative fine, as the Commission originally concluded,. J.A. 124; *see* 11 C.F.R. § 111.35(b)(1)-(3).

The district court's substitution of its own assessment that appellants' response "can reasonably be read" to assert factual error (J.A. 153), reflected an application of the wrong standard of review. As this Court has recognized, "[i]f an agency's determination is supportable on any rational basis, we must uphold it." *Voyageurs Nat'l Park Ass'n*, 381 F.3d at 763. The district court's recognition that appellants "do not directly pursue" any of the permissible grounds for challenging an administrative fine here (J.A. 153), necessarily confirms that the Commission had a rational basis for determining that appellants failed to pursue any of three permissible grounds for challenging an administrative fine.

The district court's substitution of its own independent assessment of appellants' challenge also failed to accord the FEC the deference to which it is entitled. The Commission's determination was based on its application of FECA, a statute the FEC was created to administer, and the Commission's own regulations, and is thus entitled to "substantial" deference. *Global NAPs, Inc.*, 247

F.3d at 257; *see Chevron, U.S.A., Inc.*, 467 U.S. at 842-43; *South Dakota v. U.S. Dep't of Interior*, 423 F.3d at 799.

The clear reasonableness of the Commission's determination that appellants failed to properly challenge the agency's administrative fine determination is yet another reason why the Commission's determination, and the decision below, must be affirmed.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed and the Commission's administrative fine determination should be sustained.

Respectfully submitted,

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March 31, 2017

CERTIFICATION OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this document complies with the type-volume limitation provided in Rule 27(d)(2)(A) and, relying on the word processor word count feature, contains 11,943 words. This document was created using Microsoft Word 2013.

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March 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, 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 participants in this case:

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