IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT C. MCCHESNEY, et al,

Plaintiffs,

v.

MATTHEW S. PETERSEN, et al,

Defendants.

No. 8:16-CV-168 LSC-FG3

PLAINTIFFS' BRIEF IN OPPOSITION TO THE MOTION OF DEFENDANTS FEDERAL ELECTION COMMISSION AND MATTHEW S. PETERSEN TO DISMISS COMPLAINT

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I. INTRODUCTION[1]

The brief submitted by the Commission renders the issues for decision by the Court to be limited and straight-forward. The Commission admits this Court has jurisdiction over this action (Filing No. 21-7 at 14 n. 7). The Commission also admits plaintiffs are entitled to have judicial review of the Commission's "imposition of an administrative fine" and for plaintiffs to request the Commission's action to be "set aside" (Filing No. 21-1 at 5). The Commission further acknowledges its failure to establish the schedule of penalties in a lawful manner can negate any liability plaintiffs might have for an alleged reporting violation (Filing No. 1 at 12).

It is beyond dispute the Commission cannot impose a monetary fine on plaintiffs if the Commission never established a penalties schedule. The Commission admits Congress assigned that job to the Commission (Filing No. 21-1 at 4). The Commission also does not deny it is a vital Commission job to establish the penalties schedule – it is certainly not a routine matter – and further does not deny there are regulations requiring "every portion" of Commission meetings involving non-routine matters be open to public observation (Filing No. 21-1 at 6 ¶ 14; at 27). The determinative issue in this action is 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 on plaintiffs. It did not.

The Commission dismisses as unimportant its significant failure to establish the penalties schedule in an open and public forum as required by law. It also shrugs off its multiple failures to follow its own rules, even for routine matters, which mandate the use of actual ballots, specific

[1] Definitions in the Complaint (Filing No. 1) are used herein except, for consistency with the Commission's Points and Authorities, the term "Plaintiffs" is used instead of "Corporation." The spelling of Defendant Matthew S. Petersen's name also has been corrected in the caption (Filing No. 21-1 at 1 n. 1).

tally vote procedures and delivery of the subject matter of the vote, the penalties schedule itself, to commissioners. None of that occurred.

The Commission's defense in this action can be stated simply: it is entitled to do whatever it wants. The Commission believes it can decide whether or not to follow the rules, modify the rules, make up new rules, ignore the rules and ultimately to decide whether it was in compliance with its rules. Plaintiffs have a different perspective. The Commission is not above the law and cannot dictate to this Court what the law requires.

The Commission is a powerful government agency that Congress charged with establishing – not merely publishing – the penal code for all federal elections for a multi-year period. Because the American people expect powerful government agencies to vote in public meetings, Congress created laws to ensure it was done that way with rare exception. The Commission failed to follow the law.

Despite its 32-page brief, the Commission provided the Court with only a small fraction of the Administrative Record ("AR") and refused plaintiffs' written request for the complete record to be submitted to the Court. The Court should have the entire record to decide this case. If appealed, the Eighth Circuit would appreciate the full administrative record as well. For that failure alone, the Commission's motion to dismiss should be denied.

II. ARGUMENT

A. The Motion to Dismiss Should Be Denied Under the Applicable Standard of Review and Also for the Commission's Failure to Include the Entire Administrative Record.

The Commission argues, "In deciding the Commission's motion to dismiss, the court may review the portions of the administrative record expressly referenced (and thus incorporated into) plaintiffs' complaint, which are attached as FEC Exhibits 1-5 to this motion" (Filing No.

21-1 at 12-13). The Commission's argument is incomplete in that it fails to identify the applicable standard of review and, unfortunately, is also misleading in its representation regarding the AR.

"Under Federal Rule of Civil Procedure 12(b)(6), the factual allegations in the complaint are accepted as true and viewed most favorably to the plaintiff." *Barton v. Taber County, Arkansas*, 820 F. 3d 958 (8th Cir. 2016). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Horras v. Am. Capital Strategies, Ltd*., 729 F.3d 798, 801 (8th Cir. 2013) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). "Dismissal 'is appropriate only when there is no dispute as to any material facts and the moving party is entitled to judgment as a matter of law.'" *Wolfchild et al v. Redwood Cty.*, No. 15-1580, 2016 WL 3082341 (8th Cir. June 1, 2016).

Plaintiffs have made a facially plausible claim against the Commission. Plaintiffs' allegations in the complaint contain factual content that allows the court to draw the reasonable inference the Commission is liable for the misconduct alleged, namely, its failure to establish the penalties schedule in the manner prescribed by law. The Commission is not is entitled to judgment as a matter of law.

The Court has at least two other grounds for denying the motion to dismiss: a defective record and judicial economy. The Commission represents to the Court portions of the AR "expressly referenced" in the complaint "are attached" (Filing No. 21-1 at 12-13). That representation is not accurate. Plaintiffs reminded the Commission shortly after it filed its

motion to dismiss it was obliged to file the complete AR with the Court and further that its representation to the Court regarding the AR was misleading. Plaintiffs specifically stated:

> Defendants claim they have attached those 'portions of the administrative record ***expressly referenced*** (and thus incorporated into) plaintiffs' complaint,' when in fact they did not do so (Filing No. 21-1 at 12) … There are several other parts of the Administrative Record 'expressly referenced (and thus incorporated into) plaintiffs' complaint' that were not 'attached' [Plaintiffs listed the items here].

(Grasz Aff. ¶ 1 Ex. A).(emphasis added)[2]

The Commission's misleading statement regarding the AR is not inconsequential. "An incomplete record must be viewed as a 'fictional account of the actual decision-making process.'" *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993). "To review less than the full administrative record might allow a party to withhold evidence unfavorable to its case, and so the APA requires review of 'the whole record.'" *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) (*quoting* 5 U.S.C. § 706 (1982)). An adverse presumption may apply to documents withheld by the federal government when it is "shown that the party had notice that the documents were relevant." *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1308 (W.D. Wash. 1994). This is particularly true in the context of a motion to dismiss.

Plaintiffs have brought this administrative appeal of a federal agency action. An AR exists. The Court should have the benefit of the entire administrative record before it rules on this matter. This proceeding should be decided by a properly presented motion for summary

[2] "Grasz Aff." refers to the Affidavit of L. Steven Grasz included in Plaintiffs' Index of Evidence in Opposition to Defendants' Motion to Dismiss. Plaintiff filed their complaint "in the nature of a petition" (Filing No. 1 at 1). Rule 17 of the Federal Rules of Appellate Procedure requires a federal agency to file the administrative record "within 40 days after being served with a petition for review," unless shortened or extended by the court. Fed. R. App. Pro. 17. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560,1580 n.1 (10th Cir. 1994) ("Reviews of agency action in the district courts must be processed *as appeals.* In such circumstances, the district court should govern itself by referring to the Federal Rules of Appellate Procedure") (emphasis in original).

judgment. *Bloch v.Powell*, 227 F. Supp. 2d 25, 30–31 (D.D.C. 2002) (quoting *Fund for Animals v. Babbitt*, 903 F.Supp. 96, 105 (D.D.C. 1995)) ("Summary judgment is an appropriate procedure for resolving a challenge to a federal agency's administrative decision when review is based upon the administrative record"). The Commission's motion to dismiss should be denied.

B. The Commission's Substantive Arguments are Without Merit.

1. The Commission Is Required to "Establish" the Schedule of Penalties by Law.

The Commission argues, "Plaintiffs assert … that Congress 'required' that the Commission 'reevaluate' the penalties schedule … after a designated number of years [but] [n]owhere does the Act require that the FEC [do so] …, nor does it 'designate[]' a specified 'number of years' after which any such reevaluation must occur" (Filing No. 21-1 at 17-18). The Commission concludes plaintiffs' arguments are "cut from whole cloth" (Filing No. 21-1 at 2). The Commissions' arguments are surprising - and in error.

The Commission admits to the operative facts, but conflates two separate statutory obligations imposed by Congress requiring the Commission ***both*** to "establish" ***and*** "publish" the penalties schedule for a designated number of years. *See* 52 U.S.C. § 30109 (a)(4) (C)(i)(II).

Before the Commission changed the rule (without notice) in January 2014, the Commission admits "Congress … extended the FEC's statutory authority for the [AFP] ***several times***" (Filing No. 21-1 at 7) (emphasis added). The Commission also admits that, since 2000, Congress has created four deadlines (sunset provisions) on the AFP with "expiration date[s]" occurring, for example, in 2003, 2005, 2008 and 2013 (*see* Filing No. 21-1 at 7n.2). The Commission still further admits it was required to take action in response to Congress ***each time*** the prior law expired ("The Commission … updated its implementing regulations each time

Congress has extended the expiration date …") (Filing No. 21-1 at 7) (emphasis added). *See also* (Filing No. 21-1 at 7 n.3).

Congress requires more from the Commission than merely "publishing" the penalties schedule. It has time and again directed the Commission to formally establish it. Congress did not establish it and it would not exist without legally proper action of the Commission. The statutory language conclusively shows Congress imposed a sunset provision calling for the Commission to "establish" the penalties schedule anew each time the former one expired. *See* 52 U.S.C. § 30109 (a)(4) (C)(i)(II).

Contrary to the Commission's suggestion, the statute also shows Congress expects the Commission to conduct an evaluative process each time the penalties schedule is established. Congress instructed the Commission, for example, that it must "take into account" the "amount" of the violation and any "prior violations" when establishing the penalties schedule. *See* 52 U.S.C. § 30109 (a)(4) (C)(i)(II).

The Commission is not given *carte blanche* authority to make up penalties as it goes along during a given Commission term. The Commission plainly is not authorized to impose a civil money penalty *unless* it was included on a schedule of penalties *established* by the Commission. *See* 52 U.S.C. § 30109 (a)(4) (C)(i)(II). Plaintiffs have given sufficient notice to the Commission of plaintiffs' claims by the specific allegations in the complaint (Filing No. 1 at 10). The Commission's argument for dismissal on this ground should be rejected.

2. The Commission's Action in Establishing the Penalties Schedule Requires a Public Vote.

The Commission argues its "determination, based on [its] application of FECA and its own regulations, is entitled to 'substantial' deference" (Filing No. 21-1 at 13). The Commission

provides a lengthy explanation of various "promulgated" and "implementing" regulations including those detailing its "affirmative vote" procedure (Filing No. 21-1 at 5, 6). At the same time, the Commission acknowledges it failed to follow those very procedures it outlined and argues such failures and plaintiffs' "miscellaneous objections to the Commission's voting" process should be disregarded by the Court (Filing No. 21-1 at 19). The Commission's arguments disrespect the rule of law and otherwise are without merit.

Despite multiple citations in its 32-page brief to Commission regulations, the Commission ignored several key regulations identified in the complaint (11 C.F.R. §§ 2.2, 2.3). The complaint alleges, for example:

> One key Commission regulation provides 'Commissioners shall not . . . dispose of Commission business other than in accordance with' Commission regulations. 11 C.F.R. § 2.3(a) Commission regulations further provide 'the deliberation of at least four voting members of the Commission in collegia where such deliberations determine or result in . . . disposition of official Commission business' constitutes a 'meeting' … and thus must be conducted in full public view. 11 C.F.R. Part 2 § 2.2(d)(1). Commission regulations still further provide, with exceptions not applicable here, 'every portion of every Commission meeting shall be open to public observation.' *See* 11 C.F.R. § 2.3(b).

(Filing No. 1 at 6)

The Commission acknowledges that establishing a schedule of penalties constitutes Commission business (Filing No. 21-1 at 13). The Commission does not deny that regulations requiring deliberations involving official Commission business also must be conducted in full public view and "every portion of every Commission meeting" must be "open to public observation" (Filing No. 1 at 6) (Filing No. 21-1 at 1-31).

The complaint alleges the Commission was required to conduct a public vote in open session and did not do so (Filing No. 1 at 13 ¶¶ 34-35) ("The Commission admits it never

established the 2014 penalties schedule in an open public meeting … The Commission's final determination did not address the Commission regulations that require 'every portion of every Commission meeting' to be 'open to public observation.' … "). The Commission does not deny these allegations (Filing No. 21-1 at 1-31). The Court must accept these allegations as true at this juncture in the proceedings. *See Barton v. Taber County, Arkansas*, *supra*. The Commission's motion to dismiss should be denied on this ground alone.

3. The Commission Does Not Deny It Failed to Comply With Its Tally Vote Procedures.

The Commission argues "plaintiffs … fail to identify any law precluding the Commission from implementing … extension of … FECA's Administrative Fines Program through a tally-vote procedure …[and] [p]ursuant to this authority, the Commission has adopted streamlined notational or 'circulation' voting procedures for … routine matters" (Filing No. 21-1 at 27). *See also* (Filing No. 21-1 at 27) ("[T]he Commission's action in adopting the extension on tally was legally permissible…."). The Commission's argument makes plaintiffs' case. Even assuming the tally vote procedures are allowed in this circumstance (which plaintiffs do not concede), despite having adopted specific procedures pursuant to legal authority, the Commission inexplicably did not comply with those procedures to establish the penalties schedule as required by law.

The Complaint acknowledges, "Commission regulations grant a very narrow exception to the requirement a meeting must be 'open to public observation' when the Commission disposes of 'routine matters' ... 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" (Filing No. 1 at 6). The complaint further recognizes Commission

"Directive No. 52 outlin[es] specific procedures for 'Certifications of tally votes' … when addressing routine matters … [that requires] … completion of actual ballots and a ballot not properly marked and completed is invalid" (Filing No. 1 at 6-7).

The complaint alleges – and the Commission does not deny – beyond "the absence of any record showing the presence of commissioners or a meeting of the Commission, and without a single returned ballot, the Clerk dated an unsworn Certification claiming a 'vote' was decided 'on' January 13, 2014 … [but] the Clerk did not execute either an affidavit or sworn declaration … [n]or did the Clerk provide a sworn Certification with a date stamp and official seal or represent the vote on this critical topic was face-to-face with each commissioner" (Filing No. 1 ¶ 20 at 8).

The complaint further alleges, and the Commission again does not deny in its motion to dismiss, deep flaws in the Commission's procedures:

> The tally vote procedure actually employed by the Commission for complying with its vital duty of establishing the federal election penalties schedule for the nation for the next five years was an abject failure. The procedure was fraught with internal violations of the Commission's own governing rules, including wholesale disregard for the written ballot process, failure to deliver to commissioners the expired penalty schedule for review, execution of an unsworn certification without a date stamp or seal by the Clerk based on votes not made in person or marked on a written ballot or otherwise in writing beyond an 'email' amendment directed at the unauthorized final rule. The Commission's failure to even mention the action taken on the penalties schedule at the next Commission open meeting three days after its secret 'vote' on the unauthorized final rule is telling and only proves the Commission's apparent intention was to impermissibly avoid ('obviate') *forever* the discomfort of discussing and having to vote in an open and public forum about the penal code used for all federal elections.

(Filing No. 1 at 13-14).

The complaint still further alleges the Commissions' tally vote procedure is an "operational mess" and the Commission's failings "so frequent there is now 'precedent'" for ratifying the many corrections made by the agency:

> The Commission's tally vote procedure is an operational mess, employed more in the breach than in the observance. *Combat Veterans* [cited by the Commission] noted it 'gives us pause' and explained the Commission's failings are so frequent there is now 'precedent' for the Commission's ratification to overcome the defects. *Id*. at 152. The Commission claimed a need to ratify an earlier botched vote involving [plaintiffs]. See March 8, 2016 memorandum at 1 n.1. The Commission wisely did not claim it could or did ratify a non-routine matter like establishing the 2014 penalties schedule

(Filing No. 1 at 13-14).

Finally, the complaint asserts that if the Commission's view on establishing the penalties schedule, a critically important government function of the Commission, was adopted, every action of the Commission would be deemed routine:

> Nor did the Commission explain how the duty of establishing the penal code for all federal elections over a five year period following a specific Congressional mandate could be a 'routine' matter (11 C.F.R. § 2.2(d)(2)). If the Commission is correct, then *every* action of the Commission is a routine matter….

(Filing No. 1 at 13 ¶ 35).[3]

The Commission fails to address any of these allegations in its brief regarding the non-routine nature of the Commission's job to establish the penalties schedule.

[3] The Complaint also noted the Commission's citation to inapposite authority on this point: "The Commission cited *Communications Systems, Inc. v. FCC*, 595 F. 2d 797 (D.C. Cir. 1978) in support of its actions. *Communications Systems* does not require any discussion since it is a nearly forty-old decision involving a separate federal agency operating under a different regulatory scheme and was not controlled by the specific 'routine matters' rule governing the Commission's action here" (11 C.F.R. § 2.2(d)(2))" (Filing No. 1¶ 37 at 14).

Plaintiffs' interpretation of the term "routine" is strongly supported by caselaw authority, including the United States Supreme Court, which refers to "routine" matters as those in "which the public could not reasonably be expected to have an interest" and is of "merely internal significance." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 369-70 (1976) ("[T]he [law] is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest. The case summaries plainly do not fit that description. They are not matter with merely internal significance. They do not concern only ***routine*** matters."). *See also United States v. Duperval*, 777 F.3d 1324, 1334 (11th Cir. 2015) (*quoting United States v. Kay*, 359 F.3d 738, 750-51 (5th Cir. 2004)) ("[Defendant] argues that he performed a routine governmental action when he administered the contracts, but he misunderstands this exception to the Act. As the Fifth Circuit explained, '[a] brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the . . . exception[]'. These actions are '***largely non-discretionary, ministerial activities*** performed by mid- or low-level foreign functionaries…'") (emphasis added).

None of these definitions of routine matters come close to fitting with the responsibility of the Commission to establish the monetary penalties schedule for the entire nation for all federal elections over a five year period. That action by the Commission simply cannot be described as a matter the "public could not reasonably be expected to have an interest" or one of "merely internal significance" (or, by analogy, viewed as a largely non-discretionary, ministerial activit[y] performed by mid-or-low-level …functionaries"). The public has a keen interest and it

is of enormous external importance, not "merely internal significance." This action also could only be taken by the Commission itself, not mid-or-low level functionaries. It is not routine.

Finally, plaintiffs' arguments questioning the actions of the Commission are supported by controlling law of the United States Court of Appeals for the Eighth Circuit. *Sokol v. Kennedy*, 210 F.3d 876 (8th Cir. 2000). In *Sokol*, the Eighth Circuit was highly critical of a federal government agency (National Park Service) and its officials responsible for designating land along a river corridor for suggesting they did not have to strictly follow statutory requirements and could decide themselves the standards to be employed:

> The Park Service did not evaluate the land … in terms of [the statutory words] 'outstandingly remarkable' values. Instead, … the planning team … [used the terms] 'significant' and 'important' ….
>
> Mr. Conrod, the team captain, … went so far as to express what almost amounted to contempt for the terms of the statute. Officials of the Executive Branch, like judges, are free to have their own private view of what Congress has said and done. But they are not free to put these views into practice. A statute is the command of the sovereign. The Park Service must follow it. Instead, Park Service officials applied the standard with which they were more familiar …, ignoring the outstandingly-remarkable-values standard required under the … Act.

The Eighth Circuit in *Sokol* properly rejected the federal agency's action and vacated its ruling against the landowner. *Id*. This Court should do the same. The Commission's motion to dismiss should be denied.

4. The Commission Improperly Combines Two Separate Issues: (1) Public Vote on Establishing the Penalties Schedule; and (2) Rule Change to Be Effective Five Years Later.

The Commission argues it "plainly had good cause to expeditiously implement Congress's extension of FECA's Administrative Fines Program in the Commission's regulations

and to avoid the delays that would have resulted from an unnecessary notice and comment period" (Filing No. 21-1 at 26). The Commission's arguments are misplaced. It improperly conjoins two separate contentions made by plaintiffs.

The complaint alleges two separate violations of law by the Commission: (1) failure to conduct an open and public vote for establishing the 2014 penalties schedule at a public meeting of the Commission and (2) adoption of a new rule, which would not have a direct impact for ***five years***, without giving proper notice and an opportunity for public comment. The complaint alleges both:

> 21. On January 16, 2014, the Commission assembled in an open meeting and public session. The subject of establishing the penal code (2014 penalties schedule) … was not raised or discussed in any way at the meeting….
>
> 23. On January 21, 2014, … a Commission staff member published … the unauthorized final rule. ... The notes accompanying the unauthorized final rule show it was made to avoid the mandatory sunset provision Congress created for the Commission to reevaluate the penalties schedule in a public meeting ***in five years***….

(Filing No. 1 at 8-9) (emphasis added)[4]

Each of these allegations will be further discussed in turn.

Public Vote Agenda Item. To be placed on the Commission's Open Session Agenda, the Commission requires only a one week notice by a commissioner (*See* Commission Directive No. 17 (Sept. 11, 2008) ("In order to be placed directly on the Agenda for an Open Session, a

[4] *See also* (Filing No. 1 ¶ ¶ 9-10 at 3-4) ("…Congress' directive to establish the penalties schedule for every federal campaign across the nation for five years is not a routine matter…. The Commission failed in the … task ... [T]he Commission ***also*** secretly adopted a new rule …") (emphasis added).

document must be received in the Commission Secretary's Office by 4:00 pm one week in advance of the Open Session") (http://www.fec.gov/directives/directive_17.pdf).[5]

The Commission does not dispute it could have circulated an agenda item to have a public vote on establishing the penalties schedule one week before the Commission's January 16, 2014 meeting (i.e. by 4:00 pm on Thursday, January 9, 2016). The Commission failed to do so.[6]

Rule Change Effective December 31, 2018. The Commission admits "Congress … extended the FEC's statutory authority for [AFP] … most recently, in a December 2013 amendment … through December 31, 2018" (Filing No. 21-1 at 16). Plaintiffs objected to the Commission's action because "the unauthorized final rule show[s] it was made to avoid the mandatory sunset provision … to reevaluate the penalties schedule … ***in five years*** (Filing No. 1 ¶ 23 at 9) (emphasis added).

These facts prove the Commission had no looming deadline with regard to the rule requiring emergency action. The Commission had no reason ***not*** to give notice and receive comments from the public since the rule would not have any impact for five years (11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3303/Tuesday, January 21, 2014).

The importance of public input on rule changes, however, cannot be overstated. The courts have made that point clear. "Under Section 4 of the APA, before adopting a rule, a federal

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[5] *See Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100, 1102 (8th Cir. 2000) ("On a motion to dismiss, . . . matters of public and administrative record referenced in the complaint may . . . be taken into account.") (cited by the Commission (Filing No. 21-1 at 22)).

[6] Congress renewed the *authority* for the Commission to establish the penalties schedule on December 26, 2013 (Filing No. 1 ¶ 13). The Commission made a request to commissioners on January 7, 2014, asking for a response by January 10, 2014 (Filing No. 1 ¶ 13 at 5; ¶ 18 at 7). The Commission thus was not prevented or hindered from timely placing this matter on the Open Meeting Agenda for vote on January 16, 2014.

agency is required to publish notice of the proposed rule in the Federal Register… Congress' purpose in enacting Section 4 was that the interested public be given an opportunity to participate, and the federal agency be fully informed, before any rules that have a substantial impact on the rights of persons who are subject to them are promulgated'" *S.E.C. v. Feminella*, 947 F.Supp. 722 (S.D. N.Y. 1996).

The Commission has no excuse for not conducting a public vote in January 2014 or another appropriate time to establish the vital penalties schedule for the 2014 election and beyond in the manner the law requires. The Commission also had no reason not to provide notice and an opportunity to change the rule it proposed. It had plenty of time since the rule's impact would not be felt for five years. *See NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) ("A decision made without adequate notice and comment is arbitrary or an abuse of discretion").[7]

5. The Commission Cannot Arbitrarily Limit a Statute, and the Regulations Cited By the Commission Do Not Limit Plaintiffs' Claims.

The Commission argues "[P]laintiffs 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)" (emphasis added). The Commission's argument is in error. The Commission fails

[7]Even if time was short, that is not a valid excuse. *See United States Steel Corp. v. United States Envtl. Prot. Agency*, 595 F.2d 207, 213 (5th Cir. 1979) ("The Agency was under pressure, since the time allowed by Congress was short. But the mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause… The deadline is a factor to be considered, but the agency must still show the impracticability of affording notice and comment. Here, for example, the EPA gives no explanation of why it could not at least have published the AAPCC's initial list … and accepted comments during the time it was reviewing the list. This would have afforded petitioners some … opportunity to influence the agency's action").

to give full recognition to the statute authorizing the regulation, which does not contain any such limit on plaintiffs' defenses.

Section 30109(a) of Title 52 provides a respondent may submit to the Commission any "legal and factual issues" in defense to an alleged violation. 52 U.S.C. 30109(a)(2) and (3). There is no limit in the statute to any specified "permissible grounds." Section 111.35(b) of the regulations likewise is not so confined. 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" demonstrating there is not the limitation the Commission claims 11 C.F.R. § 111.35(b).[8]

C. This Court Has Authority to Enter Mandatory Relief to Plaintiffs.

The Commission argues, "[i]f successful, plaintiffs' FECA cause of action authorizes the Court only to modify or set aside the final determination, not "[e]nter[] a mandatory injunction" or "[o]rder[] the Commission to pay [plaintiffs] any losses or damages," as plaintiffs seek (Compl. requested relief (c) – (d)). *See* 52 U.S.C. § 30109(a)(4)(C)(iii)" (Filing No. 21-1 at 14 n.7). The Commission is in error.

The Commission seeks to impose a limit on the authority of this Court to "set aside" an "adverse determination" made under Section 30109(a)(4)(C)(iii) when no such limit exists. The Court's authority to "set aside" a Commission action would certainly include at minimum the

[8] Even assuming some unknown limited "permissible grounds," Plaintiffs met the condition. Section 111.35(b)(1) provides plaintiffs' only have to allege "one of the … grounds" listed in the regulation, which includes a claim the Commission's "finding is based on a factual error" (11 C.F.R. § 111.35(b)(1)). Plaintiffs response to the Commission includes that ground (*see e.g.* Filing No. 21-7 at Page ID# 139) (Plaintiffs: "For the reasons shown below, ***these facts*** conclusively prove the civil monetary penalty … must be vacated and stricken"); *see also* (Filing No. 21- 4 Page ID #89) ("[Plaintiffs] challenge … the proposed civil money penalty … on the … basis of 'actual error' and 'miscalculation of the calculated civil money penalty'…"). There is nothing in Section 111.35(b)(1) requiring the listed items to be the ***only*** grounds plaintiffs can raise in defense; at most, it merely requires the existence of one of the listed grounds before other grounds can be considered. Plaintiffs satisfied that condition.

ability to order the Commission to strike or remove any reference from the Commission's official records of any unlawful action taken against plaintiffs found by the Court.

The Commission cannot withhold taking the corrective measures requested by plaintiffs assuming the Court finds an invalid agency action. "When an agency action is held to be invalid," the court has the power to "compel[ ] agency action that has been unlawfully withheld" *Sierra Club v. U.S. E.P.A.*, 162 F. Supp. 2d 406, 411 (D. Md. 2001). *See also* 5 U.S.C. § 706(1) ("The reviewing court shall—compel agency action unlawfully withheld … "). A "mandatory or injunctive decree" ordering compliance is permitted by statute. 5 U.S.C. § 702.

It is too early in this action to rule on the monetary aspects of the relief to be afforded. The Commission admits the complaint seeks declaratory and injunctive relief in the first and second claims for relief (Filing No. 21-1 at 23 n.7). The complaint - only in the final prayer – *conditionally* asks for recompense for losses or damages to the extent "recovery is permitted by law or in equity" (Filing No. 1 at 19).

Such claims against a government agency are allowed in certain circumstances. *Bowen v. Massachusetts*, 487 U.S. 879 (1988) ("Our cases have long recognized the distinction between an action at law for damages … and an equitable action for specific relief … The fact that a judicial remedy may require one party to pay money to another is not a sufficient reason to characterize the relief as 'money damages.' … [I]nsofar as the complaint sought declaratory and injunctive relief, it was certainly not an action for money damages. Second, and most importantly, even the monetary aspects of the relief sought by the State are not 'money damages' as that term is used in § 702. … Here, the … suit is in the nature of an equitable action…").

At bottom, this Court need not confront this argument at this juncture in the proceedings. The Commission's motion to dismiss should be denied.

D. Plaintiffs Have Authority to Obtain the Relief Sought.

1. This Court has Jurisdiction Under the APA and Declaratory Judgment Act.

The Commission admits "the Court has jurisdiction to consider plaintiffs' Third Claim for Relief under FECA, 52 U.S.C. § 30109(a)(4)(C)(iii)" (Filing No. 21-1 at 23 n.7). The Commission argues, however, "neither the Declaratory Judgment Act nor the APA— plaintiffs' First and Second Claims for Relief — provide independent sources of federal jurisdiction here" (Filing No. 21-1 at 23 n.7). The Commission's argument is misplaced.

"The APA does not create federal subject matter jurisdiction … ***Rather***, a federal court has federal question jurisdiction under 28 U.S.C. § 1331 over challenges to federal agency action." *Iowa League of Cities v. EPA,* 711 F.3d 844 (8th Cir. 2013) (emphasis added). *See also Sokol*, 210 F.3d at 876 ("Under the Administrative Procedure Act, we limit our review of the [federal agency's] administrative action to a determination of whether the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"). "An order may not stand [under the APA] if the agency has misconceived the law." *See Teva Pharm. v FDA*, 441 F.3d 1 (D.C. Cir. 2006) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)).

The Commission admits, "Under APA review, courts may set aside agency action …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)" (Filing No. 21-1 at 21). The Eighth Circuit has found federal agency action may be struck down under the APA as "ultra vires" when the action was not validly established under law. *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) ("5 U.S.C. § 706(2)(C) … of

the APA authorizes courts to strike down as ultra vires agency rules promulgated without valid statutory authority").

Plaintiffs allege federal question jurisdiction under FECA in the Second Claim for Relief under the APA: "[Plaintiffs] seek[], pursuant to 5 U.S. Code § 706 (2) (A)(B)(C) and (D) [of the APA], for the Court to hold unlawful … the Commission's final determination on the ground they …were not in accordance with law … ***under FECA***" (Filing No. 1 ¶ 46 at 16) (emphasis added). See *Chrysler Corp. v. Brown*, 441 U.S. 281, 317 n.47 (1979) (Rehnquist, J.) ("[J]urisdiction to review agency action under the APA is found in 28 U.S.C. § 1331"). [9]

The same rule under the APA applies to plaintiffs' request for declaratory relief in the First Claim for Relief. The complaint alleges a federal statute, FECA, in support of its claim for declaratory relief: "[Plaintiffs] … seek[] a declaratory judgment finding the Commission has no authority to impose a civil money penalty against the Corporation on the ground the Commission had not lawfully established the penalties schedule for the 2014 primary election under which the civil money penalty against [plaintiffs were] assessed. ***The Commission at minimum exceeded***

[9] Plaintiffs claim under the APA here is far different than, for example, a complaint filed exclusively in the U.S. District Court for the District of Columbia by a third party objecting to the Commission's decision not to require an entity to register as a political action committee. *See e.g. Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, No. 1:14-CV-01419 (CRC), 2015 WL 10354778 (D.D.C. Aug. 13, 2015). In such action, the D.C. court is exclusively charged with reviewing individual "rationale of the Commissioners who voted against taking further action" on a political matter. *Id.* Understandably, in that circumstance, the D.C. district court has held "comprehensive judicial review provision precludes review of FEC enforcement decisions under the APA." *Id.* That statutory regimen is not implicated in this case.

its statutory duty in administering and enforcing FECA" (Filing No. 1 ¶41 at 15) (emphasis added).

The Court has jurisdiction and authority to consider plaintiffs' First and Second Claims for Relief. It should do so. The Commission's motion to dismiss on this basis should be denied.

2. **Plaintiffs Have Standing to Bring Their Claims Against the Commission.**

a. Section 30109 Provides a Statutory Basis.

The Commission argues in the final footnote of its 32-page brief that, "Despite plaintiffs' overbroad characterization of their claims, this case does not concern the Commission's alleged 'enormous' 'power to establish the *penal* code for all federal elections for the nation …. The Commission has only *civil* enforcement jurisdiction …. Moreover, even if plaintiffs attempted to challenge all civil penalties … rather than the single penalty formula pursuant to which they were fined, they would lack standing to do so" (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (Filing No. 21-1 at 21 n. 13). The Commission's arguments are in error and unfortunately, in a phrase, amount to misdirection.

The Commission does not deny the authority granted to the Commission by Congress - to establish the penalties schedule for all federal elections for a five year period - is an enormous power (Filing No. 1 ¶ 9 at 3). The Commission seeks, however, to re-characterize plaintiffs' claims in an effort to convince the Court "this case does not concern" that power (Filing No. 21-1 at 21 n. 13). That is not the case.

Penalties are not self-generating. The Commission is not authorized to impose a fine on any person unless the penalty amount was fixed "under a schedule of penalties… **established** … by the Commission." *See* 52 U.S.C. § 30109 (a)(4) (C)(i)(II) (emphasis added). That proposition

is not disputed by the Commission. Plaintiffs have made this allegation throughout the complaint including in the prayer, which provides:

> WHEREFORE, [Plaintiffs] …pray[] that the Court enter judgment in their favor …with regard to the First, Second and Third Claim for Relief as applicable, as follows:
> (a) Declaring the Commission did not have authority to impose a civil money penalty on [plaintiffs] since the Commission had not properly established under law the penalties schedule for the 2014 primary election in which [plaintiffs were] assessed a civil money penalty …

(Filing No. 1 at 18).

The Commission admits plaintiffs have standing to "challenge … the single penalty formula pursuant to which they were fined" (Filing No. 21-1 at 21 n. 13). Evaluation of the statutory underpinnings shows plaintiffs' rights are not limited to that challenge. The governing statute empowers the Commission to "require the person" to "pay a civil money penalty" only if 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" was made by the Commission are inextricably tied. Plaintiffs have standing to make a challenge in this Court for the Commission's failure to lawfully establish the schedule of penalties, upon which, the penalties assessed against plaintiffs were purportedly based. The motion to dismiss on standing grounds should be denied.[10]

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[10] Plaintiffs also satisfy general legal standing requirements. "The basic requirements of Article III standing, the 'irreducible constitutional minimum,' are that a plaintiff must demonstrate: (1) 'an injury in fact,' that is 'concrete and actual or imminent,' (2) that the injury be 'fairly traceable' to the 'conduct of the defendant,' and (3) 'a

b. The Commission's Office of General Counsel Acknowledges Plaintiffs' Legal Standing.

The Commission regularly relies on the Commission's Office of General Counsel to make, for example, a "recommendation as to whether there is 'probable cause to believe' a violation has occurred" (Filing No. 21-1 at 3). The Commission admits it specifically sought "guidance from the Commission's Office of General Counsel" regarding whether "the schedule of penalties was lawfully established" (Filing No. 21-1 at 20).

As the Complaint alleges, and the Commission admits in its motion to dismiss, "the Commission's Office of the General Counsel … expressly acknowledged [plaintiffs'] 'legal argument about the establishment of the Commission's schedule of penalties . . . may outweigh the policy of treating reporting violations as a strict liability offense'" (Filing No. 1 at 12). The Commission specifically admits plaintiffs' argument "raises a *fundamental question* regarding the Commission's authority to assess civil penalties in administrative fine matters" that may override the Commission's policy regarding reporting violations:

> [Plaintiffs'] legal argument about the lawful establishment of the Commission's schedule of penalties … docs 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***. [Plaintiffs'] defense, therefore, may ***outweigh*** the policy of treating reporting violations as a strict liability offense.

(Filing No. 21-8 at Page ID #188).

The Office of the General Counsel is undoubtedly aware a person assessed a penalty or fine by the federal government can successfully challenge same if the government's authority

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likelihood that the requested relief will redress the alleged injury.'… We have no problem concluding [plaintiff] has standing under Article III." *Demien Const. Co. v. O'Fallon Fire Prot. Dist.,* 812 F. 3d 654 (8th Cir. 2016).

rests on an invalidly adopted penal code. *United States v. Detwiler*, 338 F. Supp. 2d 1166, 1181 (D. Or. 2004) ("This also disposes of the Government's contention that Defendant has sustained no injury because he can't point to any newly enacted [Sentencing] Guideline provision that adversely impacts him ….'Being sentenced pursuant to an invalid system . . . presents an actual, concrete invasion of a legally protected interest' in every meaningful sense of the phrase'").

This position also is consistent with the Eighth Circuit's proclamation that a federal agency's imposition of civil money penalties must be set aside if they are unlawfully based. *Union Pac. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885 (8th Cir. 2013). In *Union Pacific*, the Eighth Circuit succinctly held:

> We therefore conclude all of the [federal agency] penalties assessed against [plaintiff] are 'not in accordance with law' and 'in excess of statutory authority [and] limitations, or short of statutory right.' 5 U.S.C. § 706(2)…. Because the penalties are 'unlawful,' they must be "set aside."

Id. at 900.[11]

3. The Commission Misapplies the Sunshine Act.

The Commission argues, "even if the Commission had violated the Sunshine Act, the remedy for such violations is increased transparency, not invalidation of agency action" (Filing

[11] The Commission cites *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 158 (D.C. Cir. 2015) to suggest plaintiffs' claims are nothing more than "routine filing and record-keeping violations" for which plaintiffs should not be afforded relief (Filing No. 21-1 at 16). The Commission again misapprehends Plaintiffs' claims. The Complaint specifically addressed this contention: "*Combat Veterans* found the sole objection to the tally vote used for the specific campaign's penalties *alone* did not involve the Commission's 'exercise' of 'important powers'. *Id*. at 156; *see also* 11 C.F.R. 2.4(a)(1). By analogy, the Department of Treasury's exercise of power to establish all of the tax regulations is enormous in comparison to its exercise of power to impose a small penalty on an individual filing a late return. The latter is a routine matter; the former is not. The same distinction applies here. The Commission's exercise of power to establish the penal code for all federal elections for the nation for five years is enormous while, as *Combat Veterans* demonstrates, the authority of the Commission to assess a single campaign for late filing of reports may be routine." (Filing No. 1 at 14 n. 8).

No. 21-1 at 19 n. 11). The Commission is in error. The Commission's argument amounts to holding up a straw man, only to knock it down.

The Commission misconstrues the jurisdictional basis of plaintiffs' claims. Plaintiffs have not alleged the Sunshine Act, 5 U.S. Code § 552b, as the ***jurisdictional*** basis for their claims. The Sunshine Act is a substantive law used to demonstrate the penalties schedule was not procedurally established by the Commission in a lawful manner. The Court's jurisdiction to hear this action is founded upon other statutes.

Plaintiffs allege subject matter jurisdiction in their Complaint, for example, under 52 U.S.C. § 30109(a)(4)(C)(i)(II). Under that section, a penalty assessed by the Commission constitutes an "adverse determination" and plaintiffs are "person[s] against whom an adverse determination is made." *Id*. Congress authorized plaintiffs to "obtain a review*"* in this Court and further to "request[] that the [adverse] determination be … set aside." 52 U.S.C. 30109(a)(4)(C)(iii).

The Sunshine Act, 5 U.S. Code § 552b, is different. The Sunshine Act, which is often invoked by journalists, prohibits "any Federal court having jurisdiction ***solely on the basis of paragraph (1)*** [of the Sunshine Act] to set aside, enjoin, or invalidate any agency action … taken or discussed at any agency meeting out of which the violation of this section arose"). Plaintiffs do not assert ***jurisdiction*** in this Court solely or, indeed, at all, on the basis of 5 U.S. Code § 552b. Plaintiffs instead allege jurisdiction on the basis of Section 30109(a)(4)(C)(iii) of FECA, which does ***not*** contain any similar prohibition or limitation about setting aside agency action or

otherwise require a showing of prejudicial or intentional conduct; in fact, unlike the Sunshine Act, FECA expressly authorizes setting aside agency action without any such requirements.[12]

CONCLUSION

Plaintiffs have made a facially plausible claim against the Commission. Plaintiffs' allegations in the Complaint contain factual content that allows the Court to draw the reasonable inference the Commission is liable for the misconduct alleged, namely, its failure to establish the penalties schedule in the manner required by law.

A penalties schedule did not exist in May 2014. Plaintiffs cannot be fined under a non-existent schedule. The Commission is an executive agency, not a Federal Court. Article III judges derive their power to impose fines and penalties on citizens by virtue of their judicial authority specifically granted by the United States Constitution. The Commission is not entitled to have any part of that same enormous power unless it strictly complies with the implementing authority commanded by Congress. That did not occur here. The Commission regrettably flouted and disrespected the very law it now claims enabled it to act.

The Court should also deny the motion to dismiss on the independent ground the Commission failed to provide the Court with the entire AR. The Court should have the opportunity to review and consider the entire record, not just those parts the Commission wants the Court to review. Plaintiffs respectfully request this Court deny the Commission's motion to dismiss.

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[12] The Commission regularly tells citizens including Plaintiffs any mistake or negligence on their part is not an excuse, but it does not claim the same accountability applies to it or other federal government agencies (Filing No. 1 at 13-14, 28, 29 and 31). Plaintiffs respectfully submit it should.

Dated this 28th day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28th, 2016, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which sends notification of such filing to the following CM/ECF participant in this case:

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