Case No. A17-1179

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ROBERT C. MCCHESNEY, in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc.; and BART MCLEAY FOR U.S. SENATE, INC.,

Plaintiffs-Appellants,

v.

MATTHEW S. PETERSEN, in his official capacity as Chair of the Federal Election Commission; and FEDERAL ELECTION COMMISSION,

Defendants-Appellees.

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

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BRIEF OF APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The Federal Election Commission is mandated by Congress to **both** establish and publish a schedule of penalties for federal elections. It must be established in a public meeting. There is no greater duty of the Commission.

In 2013, Congress enacted a sunset clause in the applicable statute (FECA), requiring the Commission to conduct an evaluative review of the schedule of penalties to "take into account" certain factors identified by Congress.

The penalties schedule expired on December 31, 2013, but the Commission failed to establish the 2014 schedule of penalties as required by law. Instead, the Commission merely published it without the required evaluation or public vote.

In 2015, the Commission assessed a civil money penalty against McChesney[1] for late reporting of a few contributions in the 2014 primary election. McChesney timely challenged the Commission's action in the district court. The district court, however, dismissed the complaint on the ground the Commission had satisfied its legal obligation. McChesney appeals the district court's order granting the motion to dismiss filed by the Commission. McChesney requests ten minutes per side for oral argument.

[1] Appellants, 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. ("BMUSI") are collectively referred to as "McChesney;" Appellees, Matthew S. Petersen, in his official capacity as Chair of the Federal Election Commission ("FEC") and FEC are collectively referred to as "Commission" or "Federal Government."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 8th Circuit Rule 26.1(a), McChesney hereby makes the following disclosures:

a. McChesney is an individual;

b. BMUSI is a political corporation designated as the principal campaign committee pursuant to 52 U.S.C. § 301012(e)(1) (formerly 2 U.S.C. § 432(e)) for Bartholomew L. McLeay ("Candidate").

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I. JURISDICTIONAL STATEMENT

A. Basis for District Court's Subject Matter Jurisdiction

On April 15, 2016, McChesney filed a complaint against the Commission in the United States District Court for the District of Nebraska ("district court") (Appx. at 1). The district court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331(a) because this is a civil action arising under the laws of the United States, namely, The Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30109(a)(4)(C)(iii) ("FECA") and the Administrative Procedure Act, 5 U.S.C. § 701 *et seq*. (Appx. at 2). Subject matter jurisdiction also is founded upon 28 U.S.C. § 1361 for the reason this action is in the nature of mandamus (Appx. at 2-3).

B. Basis for This Court's Jurisdiction

On December 22, 2016, the district court entered final judgment granting a motion to dismiss filed by the Commission and dismissing McChesney's claims against the Commission and the United States of America (Appx. at 138).

C. Filing Dates Establishing Timeliness of Appeal

On January 20, 2017, McChesney timely filed a notice of appeal to this Court (Appx. at 7). *See* Fed. R. App. P. 4(a)(1)(B).

D. Final Judgment Assertion

The present appeal is taken from a final judgment that disposes of each of the claims before the district court.

II. STATEMENT OF THE ISSUES

1. Whether the district court erred under the applicable standard of review in dismissing the third claim for relief in the complaint brought pursuant to 52 U.S.C. § 30109(a)(4)(C)(iii) after the Commission agreed and the district court found McChesney satisfied the requirements for stating a cause of action.

Blomker v. Jewell, 831 F.3d 1051, 1055 (8th Cir. 2016).

Horras v. Am. Capital Strategies, Ltd., 729 F.3d 798, 801 (8th Cir. 2013).

2. Whether the district court erred in ruling the assessment against McChesney based on a 2014 schedule of penalties was valid and enforceable on the ground the Commission's establishment of a penal code for all federal elections for a five year period is a routine matter in which the public could not reasonably be expected to have an interest or is a matter of merely internal significance such that it could be accomplished without a public vote or compliance with Commission rules under a tally vote procedure that requires actual marked ballots.

52 U.S.C. § 30109 (a)(4) (C)(i)(II).

Dep't of the Air Force v. Rose, 425 U.S. 352, 369-70 (1976).

3. Whether the district court erred in granting the Commission's motion to dismiss without a complete administrative record or even a transcript from the Commission meeting allegedly establishing the 2014 schedule of penalties.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985).

III. STATEMENT OF THE CASE

A. Background Facts Summary

The Commission is mandated by Congress every few years to ***both*** establish ***and*** publish a schedule of penalties for federal elections (Appx. at 5). The schedule of penalties must be "established" in a public meeting (Appx. at 6). There is no greater duty or core responsibility of the Commission (Appx. at 3). It is not a routine matter (Appx. at 3-4).

In 2013, as before, Congress established a sunset clause in the applicable statute (FECA) (Appx. at 5). Congress required the Commission to conduct an ***evaluative*** review of the schedule of penalties to "take into account" certain factors identified by Congress before it would be formally established (52 U.S.C. § 30109 (a)(4) (C)(i)(II)).

The penalties schedule under then existing law expired on December 31, 2013, but the Commission failed to establish the 2014 schedule of penalties as required by law (Appx. at 7). Instead, the Commission merely published it without conducting the requisite evaluation or public vote (Appx. at 8-9).

In 2015, the Commission assessed a civil money penalty against McChesney for late-delivery of a few contributions in the 2014 primary election (Appx. at 12). McChesney timely challenged the Commission's action in the district court (Appx. at 1). The district court dismissed the complaint on the ground the Commission

was excused due to its ***publishing*** of the 2014 schedule of penalties, which the district court referred to as "2014 Regulatory Extension" (Appx. at 163).

B. McChesney's Complaint

On April 15, 2016, McChesney filed a complaint against the Commission alleging, among other things, a claim under 52 U.S.C. § 30109(a)(4)(C)(iii) (Appx. at 17-18, ¶¶ 51- 52). The complaint alleges in pertinent part:

1. Commission Meetings Must Be Open to Public Observation

The Commission "is an independent regulatory agency responsible for, among other things, implementing the law passed by Congress relating to federal elections" (Appx. at 2, ¶ 3). The Commission "is a federal agency with considerable authority and enormous power and is required by Congress, among other things, to implement regulations ('Commission regulations'), including those implementing the Government in the Sunshine Act, 5 U.S.C. 552b ('Sunshine Act'). *See* 11 C.F.R. Part 2 et seq." 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 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" under the Sunshine Act and thus must be conducted in full public view. 11 C.F.R. Part 2

§ 2.2(d)(1). Commission regulations 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) (Appx. at 6, ¶ 14)

2. Tally Vote Procedure for Routine Matters

"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 ("Clerk") (Appx. at 6-7). Commission Directive No. 52 provides the "matters circulated for tally vote" must comply with a strict procedure including delivery "to each Commissioner's office and other recipients" by a specific time, namely "11:00 A.M. daily." Directive No. 52 further requires a copy of any Certification "with the official seal" to be delivered to the Staff Director, the General Counsel and the Chief Financial Officer" of the Commission following the vote. A tally vote requires completion of **actual** ballots and a ballot not properly marked and completed is invalid" (Appx. at 6-7) (emphasis added).

3. The Commission Did Not Establish the 2014 Penalties Schedule

On December 31, 2013, "the penalties schedule under then existing law expired" (Appx. at 7). On January 6, 2014, a Commission staff attorney purportedly distributed to commissioners a draft of a Final Rule for Extension of Administrative Fines Program ("unauthorized final rule"), *without* attaching the

expired penalty schedule, for the purpose of extending the Commission's Administrative Fines Program ("AFP") (Appx. at 7).

The unauthorized final rule for the AFP was circulated on a strictly "72-hour tally vote basis" (Appx. at 7). On January 7, 2014, a ballot relating to the unauthorized final rule was delivered to commissioners with a request that a response be made by January 10, 2014. The delivered ballot stated: "A definite vote is *required.* All ballots *must* be signed and dated. Please return ONLY THE BALLOT to the Commission Secretary. Please return ballot no later than date and time shown above" (emphasis in original).

None of the ballots for establishing the 2014 penalties schedule was returned to the Commission Secretary as required (Appx. at 7, ¶ ¶ 16-17). In fact, no ballot was ever signed, dated or returned by **any** commissioner to the Clerk for establishing the 2014 penalties schedule as required by the tally vote procedure" *Id.* (emphasis added).

4. No Public Vote at January 16, 2014 Commission Meeting

On January 9, 2014, "the Clerk gave public notice of a public meeting of the Commission to be held on January 16, 2014 (Appx. at 7, ¶ 19). The agenda did not include any reference to establishing the 2014 penalties schedule for the next five years despite the mandate for the Commission made only a few weeks earlier by

Congress. (*http://fec.gov/sunshine/2014/open/notice20140116.pdf*) (Appx. at 7-8, ¶ 19).

On January 13, 2014, "despite 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 approving the unauthorized final rule, including a "circulated email" amendment from one of the commissioners. Even though the Commission implores parties before it to present affidavits or declarations (*http://www.fec.gov/pages/brochures/admin_fines.shtml*), the Clerk did not execute either an affidavit or sworn declaration or provide a sworn Certification with date stamp and official seal or represent the vote was face-to-face with each commissioner present *in presentia actuale* (Appx. at 8, ¶ 20).

On January 16, 2014, "the Commission assembled in an open meeting and public session. The subject of establishing the penal code (2014 penalties schedule) for all federal elections in the United States for the next five years as mandated by Congress was not raised or discussed in any way at the meeting" (Appx. at 8, ¶ 1).

On January 21, 2014, "again without public notice placed on any agenda or public vote by the Commission in an open meeting, a Commission staff member published Notice 2014–01 ('January 21 notice') announcing the unauthorized final rule (Appx. at 8-9, ¶ 3). The accompanying notes 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 (Appx. at 9, ¶ 3). The Commission at most only **published** the "expired penalties schedule for the 2014 primary election in which McChesney acted as Treasurer" (Appx. at 10, ¶ 7).

5. 2014 Election and Commission Contact

The 2014 primary election was held and completed on May 13, 2014. More than one year later, "on or about June 29, 2015, the Commission delivered a letter . . . ('June 29 letter') to Robert C. McChesney in his official capacity as Treasurer" (Appx. at 11, ¶ 29).

The June 29 letter "claimed the Commission had 'reason to believe' ('RTB finding') that McChesney . . . had failed to timely 'submit 48-Hour Notices' allegedly required to be given to the Commission with regard to a small group of contributions and two loans from the Candidate. The Commission stated in the June 29 letter that the law required strict compliance and the Commission would not consider any excuse based on 'negligence,' 'inexperience' or a 'failure to know' by McChesney . . . in failing to give the notices" (Appx. at 11, ¶ 29).

6. Complaint - Third Claim for Relief

On April 15, 2016, McChesney filed a complaint against the Commission in the district court (Appx. at 1). In the third claim for relief, McChesney alleged he "is a person against whom an adverse determination was made by the Commission

in the Commission's final determination and . . . is entitled to obtain a review of the Commission's final determination" (Appx. at 17, ¶ 51). McChesney alleged the complaint was "timely filed . . . pursuant to 52 U.S.C. § 30109(a)(4)(C)(iii)" and sought, among other things, to set aside or modify the Commission's final determination assessing a civil money penalty" (Appx. at 18, ¶ 52).

C. McChesney Arguments in the District Court

McChensey argued "[t]he 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)" (Filing No. 27 at 6). McChesney further argued "Congress requires more from the Commission than merely 'publishing' the 2014 schedule of penalties" (Filing No. 27 at 7).

McChesney still further argued "The Commission is not given *carte blanche* authority to make up penalties as it goes along during a given Commission term . . . [and] is not authorized to impose a civil money penalty **unless** it was included on

a schedule of penalties **established** by the Commission" (Filing No. 27 at 7) (emphasis in original).[2]

Finally, McChesney argued "the Commission provided . . . only a small fraction of the Administrative Record ('AR')" and, "[i]f appealed, the Eighth Circuit would appreciate the full administrative record . . . [and,] [f]or that failure alone, the Commission's motion to dismiss should be denied" (Filing No. 27 at 3).

D. The District Court Order

The district court found McChesney and the Commission "agree that the Court has subject matter jurisdiction over [McChesney's] Third Claim for Relief under FECA, 52 U.S.C. § 30109(a)(4)(C)(iii)" and the district court further found McChesney "satisfied the requirements" of § 111.35(b)(1) in stating a cause of action (Appx. at 151-152). The district nevertheless granted the Commission's motion to dismiss the complaint (Appx. at 163).

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[2] The Commission cited *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 158 (D.C. Cir. 2015) to suggest McChesney's claims were merely "routine filing and record-keeping violations" (Filing No. 21-1 at 25). The complaint anticipated and directly addressed this contention: "By analogy, the Department of Treasury's exercise of power to establish all . . . tax regulations is enormous in comparison to . . . a small penalty on . . . a late return. The latter is a routine matter; the former is not. . . . The Commission's exercise of power to establish the penal code for all federal elections . . . is enormous while . . . the authority of the Commission to assess a single campaign for late filing of reports may be routine" (Filing No. 27 at 24). McChesney's contentions are not routine matters.

The district court found the 2014 schedule of penalties (2014 Regulatory Extension) was published on January 21, 2014, "in response to [a] 2013 Congressional Extension" (Appx. at 144). The district court found the Commission "explained that it implemented the 2014 Regulatory Extension . . . 'without advance notice . . . under the 'good cause' exemption of the Administrative Procedure Act" and the district court concluded the final rule would be "effective upon ***publication*** in the Federal Register"(Appx. at 144-145) (emphasis added).

The district court focused on a secondary McChesney argument that the Commission promulgated the 2014 Regulatory Extension of the Administrative Fines Program "without proper notice" (Appx. at 155). In that regard, the district court found "[t]he Commission has shown that pre-adoption ***publication*** and notice and comment for the 2014 Regulatory Extension [2014 schedule of penalties] were unnecessary" and further impliedly found the amendments were "minor or merely technical'" (Appx. at 157) (emphasis added).

The district court found the "2014 Regulatory Extension [2014 schedule of penalties] did not make any substantive changes" and noted it "did not alter or even mention the civil penalty [McChesney] challenge[s] in this case" and thus the changes allegedly "were mere technical changes and were not an exercise of substantive agency decision-making," rendering "pre-adoption ***publication*** and notice and comment" to be "unnecessary" (Appx. at 158) (emphasis added).

The district court ultimately concluded: "The Commission has demonstrated . . . good cause [and McChesney's] allegations of procedural deficiencies, if found to be true, would not invalidate the 2014 Regulatory Extension [2014 schedule of penalties]" (Appx. at 163).

Even though it did not answer the "determinative question," the district court acknowledged the primary legal issue raised by the complaint: "[McChesney] allege[s] that the Commission could not impose the monetary fine because the Commission failed to **establish** a valid penalties schedule. According to [McChesney], 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[McChesney]" (Appx. at 147) (emphasis added). The district court did not decide the determinative issue.

IV. SUMMARY OF THE ARGUMENT

Congress mandates the Commission every several years to **both** establish **and** publish a new schedule of penalties for federal elections. This delegated power enables the Commission, by statute, to punish citizens involved in the federal election process. Establishing civil prosecutorial power is not a routine matter.

In 2013, as before, Congress created a sunset clause in the applicable statute (FECA). The sunset clause exists for a reason. Congress requires the Commission to engage in a statutory **evaluative** review of the schedule of penalties that "takes into account" certain factors identified by Congress when establishing the new schedule of penalties.

The penalties schedule under then existing law expired on December 31, 2013. The Commission did not establish the 2014 schedule of penalties as required by law. Instead, the Commission merely published it without conducting the requisite evaluative review of factors specified by Congress or even holding a public vote of commissioners in full public view.

In 2015, the Commission assessed a civil money penalty on McChesney for alleged late-delivery to the Commission of a report of a handful of contributions received in the final days of the 2014 primary election. The Commission acknowledges McChesney, one year **before** he was contacted by the Commission, already had provided all necessary information required by law to be disclosed.

Indeed, the Commission used McChesney's voluntary disclosure to make its assessment.

McChesney timely challenged the Commission's action by filing a complaint in the district court. McChesney's third claim for relief alleges a violation under FECA. The Commission concedes the district court has jurisdiction over this action under FECA. The direct court also independently found it has subject matter jurisdiction under FECA, and further found McChesney satisfied the requirements for stating a cause of action in the third claim for relief.

The district court identified the primary legal issue raised by McChesney, namely, whether the Commission "established" as opposed to "published" the 2014 schedule of penalties, but the district court never fully answered the question.

The district court dismissed the complaint on the ground the Commission's action was excused due to its **publishing** of the 2014 schedule of penalties (2014 Regulatory Extension), even without notice or opportunity for the public to comment. The district court also found the Commission's action, even if in violation of the law, was not shown to be intentional, prejudicial or of a serious nature. The district court is mistaken. The decisional law upon which the district court relies does not support its conclusion.

The district court erred under the applicable standard of review in dismissing the third claim for relief in the complaint. McChesney made a facially plausible

claim against the Commission. The third claim for relief contains factual content that allows this Court to draw the reasonable inference the Commission is liable for the misconduct alleged, namely, its failure to establish – as opposed to merely publish – the 2014 penalties schedule as required by law, and thus unlawfully assess McChesney under an unauthorized, expired penalties schedule.

The district court further erred in granting the Commission's motion to dismiss without a complete administrative record or even a transcript of the secret conference at which the Commission claims the 2014 schedule of penalties was authorized.

McChesney respectfully requests this Court vacate the judgment and reverse the Order of the district court granting the Commission's motion to dismiss and remand this action to the district court for further proceedings, including an order to the Commission to produce the full administrative record (AR) for this action.

V. ARGUMENT

A. The District Court Erred in Dismissing the Complaint Under the Applicable Standard of Review

The district court found McChesney and the Commission "agree that the Court has subject matter jurisdiction over [McChesney's] Third Claim for Relief under FECA, 52 U.S.C. § 30109(a)(4)(C)(iii)" and the district court further found McChesney "satisfied the requirements" of § 111.35(b)(1) in stating a cause of action (Appx. at 153-154). The district nevertheless dismissed the complaint. McChesney seeks review on appeal only of the district court's order dismissing the third claim for relief in the complaint.

The applicable standard of review for this appeal is well-established. "We review a district court's grant of a motion to dismiss under Rule 12(b)(6) *de novo* and take the facts alleged in the complaint to be true. *See Blomker v. Jewell*, 831 F.3d 1051, 1055 (8th Cir. 2016). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face' and include 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.' *Elmore v. Harbor Freight Tools USA, Inc*., 844 F.3d 764, 766 (8th Cir. 2016) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[T]his court reviews *de novo* a district court's decision on whether an agency action violates the Administrative

Procedure Act." *Bettor Racing, Inc. v. Nat'l India Gaming Comm'n*, 812 F.3d 648, 651 (8th Cir. 2016).

"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.*, 824 F.3d 761, 767 (8th Cir. 2016).

McChesney has made a facially plausible claim against the Commission in the third claim for relief. The Commission agrees the district court has subject matter jurisdiction. The district court found McChesney also has satisfied requirements for stating a cause of action.

McChesney's allegations contain factual content that allows the court to draw the reasonable inference the Commission is liable for the misconduct alleged, namely, the Commission's failure to **establish** the 2014 schedule of penalties as required by law and the resulting unlawful assessment. The district court erred in

dismissing the third claim for relief and for concluding the Commission is entitled to judgment as a matter of law.

B. The District Court Erred in Effectively Ruling the Commission's Establishment of the 2014 Schedule of Penalties was a Routine Matter That Could Be Accomplished Without Public Vote or Compliance with Commission Rules for a Private Tally Vote that Require Marked Ballots.

The district court concluded, "[t]he Court has reviewed the record and [McChesney's]' arguments and finds no evidence that the Commission violated the tally vote procedure or the Sunshine Act that would invalidate the 2014 Regulatory Extension" (Appx. at 162). The district court, while acknowledging a court is authorized to vacate the Commission's action under the Sunshine Act, concluded that generally "the remedy for such violations is increased transparency" through "release of transcripts" that memorializes the secret government meeting (Appx. at 162-163). The district court's conclusions are in error.

1. Commission Evaluative Process

The Commission is a federal agency with enormous power and is required by Congress to promulgate regulations implementing the Government in the Sunshine Act, 5 U.S.C. 552b ("Sunshine Act"). *See* 11 C.F.R. Part 2 et seq. 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" under the Sunshine Act and 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).

McChesney argued in the district court the Commission "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. McChesney also argued "Congress requires more from the Commission than merely 'publishing' the penalties schedule [; it] has time and again directed the Commission to formally establish it" (Filing No. 27 at 6-7).

McChesney further argued "[t]he 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" (Filing No. 27 at 7). Finally, McChesney argued **proof** of "establishing" the schedule of penalties is separate from "publishing": "Congress expects the Commission to conduct an evaluative process each time the penalties schedule is established [and] 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 (Filing No. 27 at 7).

The district court did not truly address any of these arguments.

Congress established a five year sunset clause in the statute for a reason. It ordered the Commission to conduct an **evaluation** of the then existing penalties schedule when the prior schedule expired, instructing the Commission to "take into account" specific factors identified by Congress during the Commission's evaluative process. *Id.*

This Court has made clear agency officials in the Executive Branch cannot ignore or minimize a statutory command of Congress merely because they have a different view of the appropriate procedure. *Sokol v. Kennedy*, 210 F.3d 876 (8th Cir. 2000) ("Officials of the Executive Branch . . . are not free to put [their private] views into practice. A statute is the command of the sovereign").

There is no greater power or responsibility of the Commission – likely at any point in the six year term of any commissioner – than establishing the Commission's authority to punish citizens in the federal election process. That exercise of power is directed by Congress to be performed by the Commission as part of a specific evaluative process that cannot be viewed as inconsequential or otherwise taken lightly. It is not a routine matter.

2. Public Interest in Evaluation

The United States Supreme Court 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.").

At least two sister courts of appeal to this Court have reinforced this view expressed by the Supreme Court. *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 the definitions of routine matters used by the Supreme Court and sister courts of appeal come close in description to the immense role and responsibility of the Commission in establishing the penal code for the entire nation for all federal elections over a five year period. The Commission's action cannot be viewed as a matter in which the "public could not reasonably be expected to have an interest" or one of "merely internal significance" (or a largely non-discretionary, ministerial activity to be performed by mid-or-low-level functionaries).

The public has a keen and substantial interest in the Commission's exercise of power authorized by Congress directing the Commission to establish the punishment levels to be applied to citizens during the federal election process over a multi-year period. This is particularly evident in light of the fact the Commission's regulating authority over political speech under the First Amendment is predicated on the principle that regulations must be narrowly tailored to further a compelling government interest. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007).

The public also has a right by statute to observe, in full view, precisely how the Commission evaluates and "takes into account" the specific factors Congress identified in the required evaluative process under FECA. The Commission's determination is not a matter of "merely internal significance" and should not be

assumed to be a tedious administrative task that can be accomplished by ministerial action of staff functionaries. The First Amendment alone requires more deference than that. The Commission's determination is not a routine matter.

The Commission's action in allegedly establishing the 2014 schedule of penalties – without actual distribution of the schedule of penalties to be adopted – through telephone and email contacts coordinated by a Commission clerk cannot be countenanced. It violates statutory requirements for formal Commission action (which mandate a meeting "open to public observation") as well as the prerequisites even for routine matters (formal "tally vote"), the latter which at least provides verification and accountability by commissioners to the general public through **actual**, marked ballots (and not mere guesswork or interpretation of votes by a Commission staff member via an unsworn certificate).

3. The Commission Violated the Tally Vote Procedure

Even if the Commission was authorized to treat the Congressionally-instructed and constitutionally sensitive duty of establishing the 2014 schedule of penalties for a five year period as a routine matter, the Commission failed to comply with the law for handling even routine matters.

Routine matters by the Commission must employ a formal "tally vote" procedure that involves written ballots marked by each of the commissioners.[3]

The Commission's Directive No. 52 provides the "matters circulated for tally vote" must comply with a strict procedure using actual ballots with a notice stating a ballot not properly marked and completed will be invalid and include a certification process employing the Commission's "official seal" and identifying the actual votes taken.[4]

There is no reason the Commission could not have taken proper public action in establishing the 2014 schedule of penalties. The Commission gave notice of a public meeting to be held on January 16, 2014, nearly one week before it published notice of the 2014 schedule of penalties. 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,

[3] "A tally vote . . . refers to the [Commission's] practice of circulating paper ballots, receiving and counting marked ballots, and deeming ballots not returned by the deadline (within a week) to be abstentions, i.e., to *not* count as 'yes' or 'affirmative' votes." *Combat Veterans* at 158. It is one of two circulation vote methods under FEC Directive 52 (*http://www.fec.gov/directives/directive_52.pdf*), rules adopted by the Commission for its activities. 52 U.S.C. § 30106(e). *Id*.

[4] The Commission is not authorized to create new rules in violation of it current ones. *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").

2014 meeting (i.e. by 4:00 pm on Thursday, January 9, 2016). The Commission failed to do so.[5]

4. McChesney Does Not Seek a Remedy Under the Sunshine Act

a. The FECA is Not the Sunshine Act

The district court concluded, "Although an agency action may be set aside when it is intentional, prejudicial to the party making the claim, and 'of a serious nature,' . . . [McChesney has] not alleged any facts suggesting that the [Commission's] alleged Sunshine Act violations meet those criteria," citing *Pan Am World Airways, Inc. v. Civil Aeronautics Bd.*, 684 F.2d 31, 36 (D.C. Cir. 1982) (Appx. at 163). The district court's conclusion is mistaken and its reliance on *Pan Am* is particularly misplaced.

The district court's own findings leave no doubt the Commission violated the substantive provisions of the Sunshine Act. The Order notes the Commission's action of establishing the 2014 schedule of penalties was directed by Congress (Appx. at 140) ("Congress authorized the Commission to directly assess civil money penalties . . . in an amount determined under a schedule of penalties . . .

[5] Congress renewed the *authority* for the Commission to establish the penalties schedule on December 26, 2013 (Appx. at 5, ¶ 13). The Commission made a request to commissioners on January 7, 2014, asking for a response by January 10, 2014 (Appx. at 5, ¶ 13; at 7, ¶ 18). The Commission thus was not prevented or hindered from timely placing the 2014 schedule of penalties on the Open Meeting Agenda for vote on January 16, 2014. The Commission has never explained its failure, and the district court did not order a full AR to allow objective determination of why it did not occur in accordance with the law.

established and published by the Commission") (emphasis added). The district court's findings also show such action constituted "disposition of official Commission business" (Appx. at 143) ("Congress . . . extended the Commission's statutory authority . . . in December 2013 . . . [I]n response, . . . the Commission revised . . . the Administrative Fines Program . . . *See* . . . '2014 Regulatory Extension'").

The Sunshine Act requires official Commission business to be "open to public observation." 11 C.F.R. § 2.3(b). The district court acknowledges, and does not attempt to refute, McChesney's allegations there was no open meeting held under public observation for this purpose (Appx. at 162) ("[McChesney] allege[s] there was no record of a vote of commissioners or a meeting of the Commission").

Nor does the district court in the Order identify any fact challenging McChesney's allegations the Commission's action was not a "routine" matter and that it did not otherwise comply with the Commission's own "tally vote" procedure (*see* Appx. at 161-162) ("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 . . . . The Complaint asserts the Commission violated the tally vote procedure . . . .").

The district court misapplied McChesney's legal argument under the Sunshine Act. McChesney has not alleged the Sunshine Act, 5 U.S.C. § 552b, as a

jurisdictional basis for the third claim for relief in the complaint. McChesney alleges subject matter jurisdiction under 52 U.S.C. § 30109(a)(4)(C)(i)(II) (Appx. at 2-3). Under the latter section, a penalty assessed by the Commission constitutes an "adverse determination" and it is undisputed McChesney is a "person against whom an adverse determination is made." *Id.* Congress specifically authorizes McChesney under FECA to "obtain a review" in the district court and "request[] that the [adverse] determination be . . . set aside." 52 U.S.C. 30109(a)(4)(C)(iii).

FECA is not the Sunshine Act. The Sunshine Act applies in this action ***only*** to show the Commission did not "establish" the 2014 schedule of penalties (2014 Regulatory Extension) in accordance with the law. McChesney's jurisdictional claim and the specific relief sought are separate matters. *See* 52 U.S.C. 30109(a)(4)(C)(iii) ("request[] that the determination be . . . set aside"); *Davis v. Passman*, 442 U.S. 228, 239, (1979) ("*jurisdiction* is a question of whether a federal court has the power . . . to hear a case . . . ; and *relief* is a question of the various remedies a federal court may make available") (emphasis in original).[6]

[6] The Sunshine Act is often invoked by journalists, and the law logically 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"). McChesney does not assert jurisdiction solely – or even at all – on the basis of 5 U.S.C. § 552b. McChesney's jurisdictional basis is under FECA and it does **not** contain any similar prohibition or limitation about setting aside agency action or showing prejudicial or intentional conduct. *See* 52 U.S.C. § (a)(4)(C)(iii).

b. *Pan Am is Helpful to McChesney*

The district court relied on *Pan Am* to conclude "Even 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" and "an agency action may 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, [and McChesney has] not alleged any facts suggesting that the [Commission's] alleged Sunshine Act violations meet those criteria" (Appx. at 162-163). The district court's conclusion is in error.

The district court's reliance on *Pan Am* is curious. Because of the substantial aid *Pan Am* provides this court in analyzing the issues on appeal, and further in light of the district court's reliance, a detailed discussion of *Pan Am* is warranted.

In *Pan Am*, Braniff Airline abruptly "shut down all its operations" and hurriedly filed a bankruptcy with "no advance warning" on Thursday, May 13, 1982, *Id.* at 33. On the same day, at a "morning press conference, the Civil Aeronautics Board (CAB) announced that it would accept emergency applications" from other airlines willing to provide emergency replacement air service for "international routes" to England and Venezuela "abandoned by Braniff." *Id.* "At some later time on [the same day] May 13 the CAB announced that it would hold a closed meeting at 2:00 P.M. on May 14 to consider the applications received." *Id*.

Pan Am and TWA "did not file oppositions within the severely limited timeframe available [but] [a]ll . . . parties . . . specifically requested emergency treatment, and American specifically requested that the CAB . . . not await responses before acting." *Id.* at 33. The CAB "did meet from 2:00 to 4:00 P.M. in closed session, and at approximately 6:40 P.M." on May 14 and, on that date CAB staff released an emergency order which designated American and Continental" for the England Venezuela routes. *Id*. The emergency order "explained that the unprecedented Braniff bankruptcy, brought on without advance notice, had created an emergency requiring the CAB to act." *Id*. at 34. The CAB further "said it had directed its staff to prepare an order containing its detailed findings and conclusions, to be released at some unspecified future time." *Id*.

"By 5:00 P.M. the next day (Saturday, May 15) Pan Am and Delta had prepared petitions for review and emergency stay motions, which they lodged at the guard's desk" at the courthouse (D.C. circuit). *Id.* Three days later, "[o]n Tuesday, May 18, "the D.C. circuit denied all stay motions but expedited the case." *Id*. On May 27, 1982 the CAB issued [its final] Order . . . , which contained the promised detailed findings and conclusions" *Id*. Pan Am, Delta, and TWA in extensive filings attacked the final Order "as both a post hoc rationalization and arbitrary considered on its own merit. *Id*. None of the parties raised the Sunshine Act in their written filings. *Id.* at 34.

In a per curiam decision, the United States Court of Appeals for the District of Columbia opened its lengthy opinion by unleashing a scathing rebuke of the federal agency (CAB) for closing its emergency meeting to the public despite the apparently urgent conditions involved and CAB's expressed concern for potential impacts on foreign policy:

> Our [prior] decision . . . , should have sufficed to put every multi-member agency of the federal government on notice of its duties under the Government in the Sunshine Act, 5 U.S.C. § 552b (1976). Section 552b(b) states the broad requirement that 'every portion of every meeting . . . be open to public observation.' . . .
>
> ***There was absolutely no warrant for the CAB to close its entire May 14 meeting*** because of a belief that some exempt material would be discussed . . . . We also have serious doubts, based on our examination of the full transcript (which the Board filed under seal after oral argument), that exempt foreign policy discussions so pervaded the debate on the Venezuelan route that the agency could not have segregated exempt and nonexempt portions, closing only the former.
>
> Even if a portion of a . . . meeting may lawfully be closed because that part of the discussion is protected by a specific exemption, the (agency) may not close the entire meeting . . . . ***Congress declared that meetings should be opened to the fullest extent possible . . . .*** We therefore reject the Commission's contention that the Sunshine Act does not require an agency to segregate exempt discussions into a closed portion of its meeting.

Id. at 35.

. . .

> ***The Board's closure of its entire May 14 meeting was in patent violation of the law. It is no excuse for the agency's unlawful action that no one asked the agency to hold an open meeting . . .*** [T]he Sunshine Act speaks to agencies, not to the public. Section 552b(b) establishes a broad presumption that meetings shall be open, not a

> mere requirement that the Board accede to requests that it open its meeting. Section 52b(h) (1), moreover, dictates that when and if judicial review takes place the agency has the burden of sustaining its action to close a meeting. Congress has demanded that agencies open their decision-making processes to public scrutiny; no further demand is necessary.

Id. at 35.

. . .

> ***We wish to express in no uncertain terms our condemnation of the Board's failure to comply with the Sunshine Act.***

Id. at 36 (emphasis added).

After its blistering reproach of the CAB for violating the Sunshine Act despite the emergent circumstances, the *Pan Am* court explained CAB came "perilously close" to having its agency action struck down, and it would have been, but for full "release of transcripts" from the closed meeting that were later filed with the court and ultimately justified the CAB's action:

> Simple compliance with the Sunshine Act would have gone far to obviate this problem. With both a transcript of the May 14 meeting and the CAB's Order . . . now before us, we hold today that the agency acted reasonably. But the agency came perilously close, by unlawfully closing its meeting and offering no simultaneous explanation of its action, to forcing us to set aside its action, to the detriment of American, Continental, and the traveling public, none of whom had any complicity in the Board's illegal closure.

Id. at 36.

The CAB in *Pan Am* had vigorously resisted the public release of transcripts on the basis "of the 'considerable give and take in the deliberative process that is

not reflected in the meeting'" *Id*. n. 12. The *Pan Am* court "reject[ed] out of hand" CAB's argument observing: "Meetings 'are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decision-making process, not merely its results, must be exposed to public scrutiny.'" *Id.* at 36 n.12.

There is little doubt how the *Pan Am* court, upon which the district court relied, would have evaluated the Commission's failure to comply with the Sunshine Act in regard to the 2014 schedule of penalties. Comparing the condemnation it gave to the CAB for conducting an emergency meeting on less than 24-hour notice during an undeniably vital circumstance involving international travel in which the CAB believed foreign policy may be implicated, the Commission's conduct in failing to comply with the Sunshine Act in early January 2014 in regard to "establishing" the penal code for all federal elections for a five year period - under far less exigent circumstances - is reprehensible. It is made worse when considering the Commission had the ability to conduct a full public meeting, as shown by the fact it ***did*** have a full public meeting on January 16, 2014, at which deliberations and a public vote ***could have*** occurred. That timetable would not have upset any Commission plans since it occurred nearly one week before the Commission directed the 2014 schedule of penalties to be "published" on January 21, 2016 (Appx. at 146, 164).

The *Pan Am* court found the violation in its action was "of a serious nature," but it did not strike down the CAB awards, however, for reasons that do not exist in this case. Unlike McChesney here, the *Pan Am* court noted the Sunshine Act violation claimed by the objecting parties was a mere after-thought. *Id*. at 37 n.13 ("We note also that, until oral argument, no party had asked that we base our decision in this case on Sunshine Act violations").

The *Pan Am* court further found, while CAB's action "was at one time 'prejudicial'[,] [r]elease of the transcript of the May 14 meeting (of which [the court took] full cognizance) . . . removed the prejudice to the parties." *Id.* at 36-37. Finally, on the question of whether the CAB's action in conducting a closed meeting was "intentional," the *Pan Am* court **only** found the circumstances did not suggest "willfulness." *Id.* The *Pan Am* ultimately ruled against striking down the CAB awards solely because the court was "chary . . . of visiting the *sins* of the CAB on the heads of American and Continental." *Id*. at 37 (emphasis added).

The same considerations cause a drastically different result in this case. As further shown below, the Commission's action is clearly of a serious nature, and prejudice has certainly not been removed by a transcript or otherwise.

Of a Serious Nature. The Commission's action in conducting a secret meeting to perform the critical federal agency function of establishing the schedule of penalties to be imposed on citizens in connection with protected political speech

for the next five years is indisputably of a serious nature. In comparison with the exigent circumstances in *Pan Am*, the Commission's failure to comply with the Sunshine Act is appalling.[7]

Prejudice. It also is clear McChesney suffered prejudice in being assessed under an invalid penal code. *See 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 Court has previously declared "all penalties assessed" by a federal agency "against" a citizen "**must be** set aside" if the penalties were made "not in accordance with the law" or found to be "unlawful." *Union Pac. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 900 (8th Cir. 2013) ("We therefore

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[7] Even if the Commission claims time was short, that is not a valid excuse under the law. *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' 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").

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").

Unlike *Pan Am*, the **prejudice** to McChesney has not been "removed," if it ever could be, by release of a full transcript. No transcript has been identified or disclosed, much less released.

Intentional. Similar to *Pan Am*, even if the Commission's violation is not found to be "willful," the factual record supports a finding it was "intentional." (*See* Appx. at 7-11).

On December 26, 2013, Congress renewed *authority* for the Commission to establish the penalties schedule (Appx. at 5, ¶13). On January 7, 2014, Commission staff made an agency request to commissioners asking for a response by January 10, 2014, demonstrating the commissioners' availability at the time (Appx. at 5, ¶ 13; at 7, ¶ 18).

On January 9, 2014, the Clerk issued notice of a public meeting of the Commission to be held on January 16, 2014, including on the distributed agenda a subject for the meeting, "Management and Administrative Matters," but the notice did not include any reference to establishing the 2014 penalties schedule (despite

the recent mandate only a few weeks earlier by Congress and also the Commission's claimed need to act with dispatch) (Appx. at 7, ¶ 19).

On January 13, 2014, without the physical presence of commissioners or a meeting of the Commission, and without a single returned actual ballot, the Clerk dated an unsworn Certification claiming a "vote" was decided "on" January 13, 2014 approving the unauthorized final rule (**not** specifically "establishing" the 2014 penalties schedule) (Appx. at 8, ¶ 20). There is no record the commissioners actually had the 2014 schedule of penalties to review, or any evaluation of the factors Congress required the Commission to "take into account" in establishing the 2014 penalties schedule was performed (52 U.S.C. § 30109 (a)(4) (C)(i)(II)).

The Commission cannot be assumed to have failed to comprehend in early January the magnitude of the power and obligation bestowed by Congress on the Commission to establish the 2014 penalties schedule that would enable the Commission to punish citizens. The commissioners were aware an agenda was distributed for a public meeting in mid-January 2014 and a public meeting of the Commission was in fact held (Appx. at 7-8). The commissioners also were aware, as of January 13, 2014 (when the unsworn Certificate allegedly was prepared), they had not met in a public meeting to address the 2014 schedule of penalties and further that none of them had cast an actual written ballot under the Commission's tally vote procedure (Appx. at 8).

Unlike *Pan Am*, this Court need not be "chary" about evaluating whether the Commission's conduct was intentional on the ground it might "visit[] the sins" of the Commission on third parties. There are no similar third parties affected.

The complaint sufficiently alleges, for purposes of a Rule 12 motion to dismiss, the Commission's action was intentional.[8]

At minimum, the Court should not resolve the issue of what a transcript might say, if extant, without at least ordering a complete AR that will show whether a transcript even exists.

C. The District Court Erred in Granting the Commission's Motion to Dismiss on an Incomplete Record

The district court concluded "[t]he Commission has submitted those parts of the AR cited by [McChesney], and has directed the Court to other publicly available documents cited in the Complaint [and therefore] the AR before the Court is sufficient for review" (Appx. at 154). Applying *Pan Am*, the district court also concluded "the remedy" for McChesney is "release of transcripts" documenting the Commission's secret meeting (Appx. at 162-163). The district court analysis is in error and internally inconsistent.

"The APA specifically contemplates judicial review on the basis of the agency record compiled in the course of informal agency action in which a hearing

[8] The complaint clearly raises the spectrum of intentional conduct (Appx. at 8, ¶ 22; App. at 9, ¶ 24; Appx. at 11, ¶ 28).

has not occurred." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). "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).[9]

McChesney brought this action in response to a federal agency action. An AR exists. The Commission has not produced the full "agency record compiled in the course of informal agency action." *Lorion*, 470 U.S. at 744. The Commission has not identified a "transcript" of the meeting of the Commission "establishing"

[9] 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).

the 2014 schedule of penalties among the "publicly available documents" cited to the district court (Appx. at 162).

The public deserves to know more. So does this Court. At minimum, this Court needs the benefit of the actual and complete agency record for its deliberative process. The challenged action shows the procedure used by the Commission was highly irregular at best and alarming at worst. This Court is entitled to a full understanding of the critical government agency action – performed entirely in secret – before it should be required to rule in this appeal. The district court erred in granting the Commission's motion to dismiss without requiring a complete production of the underlying agency record before the Commission.[10]

VI. CONCLUSION

The district court erred under the applicable standard of review in dismissing the third claim for relief in the complaint.

McChesney respectfully requests this Court vacate the Judgment, reverse the Order of the district court granting the Commission's motion to dismiss and

[10] The Commission represented to the district court the AR "expressly referenced" in the complaint was "attached"(Filing No. 21-1 at 12-13). McChesney pointed out the Commission's representation was inaccurate and requested the complete AR to be filed (Filing No. 27 at 5). The Commission ignored McChesney's request (*Id.*)

remand this action for further proceedings in the district court, including ordering the Commission to make a full production of the AR for this action.[11]

Dated this 27th day of February, 2017.

Respectfully submitted,

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[11] This Court's order requiring a full AR to be produced should include a command for all documents relating to the Commission's purported attempt to establish the 2014 schedule of penalties, including any audio recording or transcript, emails or telephone notes in any way relating to any meeting or vote as well as generally any documents addressing issues raised by McChesney in the third claim for relief.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,609 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 in Time New Roman type style, font size 14.

This brief complies with the formatting requirements of 8th Circuit Rule 28A(h) because the electronic version of the brief is in PDF format, and was generated by printing to Adobe PDF from the original word processing file.

/s/L. Steven Grasz
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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/L. Steven Grasz
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