Case No. 17-1179

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.

CAROLINE C. HUNTER, in her official capacity as Chair of the Federal Election Commission,
Defendants-Appellees.

PETITION FOR PANEL REHEARING

Prepared and Submitted by

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I. INTRODUCTION[1]

McChesney accepts the panel's decision on the merits for purposes of his petition for panel rehearing (Op. 1-11). McChesney seeks rehearing only to respectfully ask the panel to address the important and interrelated, but not yet decided, issue of whether the district court erred in excusing the Commission from adhering to notice-and-comment procedures for the 2014 final rule, in light of the significant impact on a sunset provision in the applicable statute (Op. at 11 n.3).

The Commission admits the notice-and-comment question is inextricably tied and bound with the issue of establishing the penalty schedule in this appeal. McChesney presented substantial argument in his Opening Brief relating to the Commission's misuse of notice-and-comment procedures to ***avoid*** the sunset provision in the law, and the Commission provided a full response, acknowledging there is no "distinction" between the issues raised by McChesney as shown by the arguments made in the district court (Commission Brief at 44-45).

The Commission's exhaustive, multi-page argument concludes by claiming the district court did not err in finding the penalty assessment on McChesney to be valid on the basis that notice-and-comment procedures for establishing the penalty schedule were "unnecessary" for this type of "routine" matter that is "inconsequential . . . to the public'" (Commission Brief at 37-40). Significantly,

[1] "Op." is the panel opinion. "Opening Brief" and "Reply Brief" are appellants' briefs; "Commission Brief" is appellees' brief. Defined terms are as used therein.

the "Statement of Issues" in McChesney's Opening Brief includes: "Whether the district court erred in ruling the assessment . . . was invalid … on the ground the Commission's [penalty] establishment . . . is a routine matter in which the public could not reasonably be expected to have an interest . . . ." (Opening Brief at 2).

The panel is not limited to considering only the "meaningful argument" principle that the Commission argued to this Court (Commission Brief at 43). Because this appeal involves an issue of public importance and the government expended multiple pages of argument in opposition, the question of whether the panel should consider the argument is more appropriately guided by the "devoted" brief rule stated in *United States v. Head*, 340 F.3d 628, 630 n.4 (8th Cir. 2003).

The panel should rule on the notice-and-comment procedures in this appeal for even more imperative reasons, including preventing the panel opinion from becoming diminished by the 2014 final rule. Stated another way, the panel made clear, over McChesney's objection, the Commission must be given wide latitude in selecting the ***method*** for voting on a penalty schedule, whether by ballot, email or notation (Op. at 10-11). The 2014 final rule, however, goes much farther than providing flexibility in voting procedure; it creates an automatic reauthorization mechanism that ***eliminates*** the Commission's need to ever vote again.

The panel opinion shows the panel seeks to balance competing interests, namely, efficiency in agency voting procedure with agency accountability to the

public, the latter through requiring ***some form*** of voting by the Commission. The 2014 final rule extirpates any such objective made by the panel.

Even if the final rule is deemed wise or desirable, the public should have been given notice and an opportunity to consider the new regulatory protocol. The Commission had no need to hurry. As this panel signaled in its opinion, the Commission easily could have inserted a simple date, i.e.; "December 31, 2018," in Section 111.30, exactly as Congress had done in the corresponding statute, and taken as much as five years to receive public comment (Op. at 7, 9). It did not.

The 2014 final rule was made in direct violation of established notice-and-comment procedures in an effort to eviscerate the sunset provision in the law. It should be vacated under this Court's authority in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013), a decision cited by McChesney in both his Opening Brief and Reply Brief (Opening Brief at 24 n.4) (Reply Brief at 21). *Iowa League* also is clear McChesney is ***not*** required to show prejudice.

McChesney does not seek by this petition to change the views expressed by the panel, only to expand upon them, to address an important, final issue in this appeal. Even beyond McChesney, this appeal presents an opportunity for the panel to provide needed guidance to federal agencies regarding proper rule-making procedure, especially when sunset provisions created by Congress are involved. McChesney respectfully requests the panel grant his petition for panel rehearing.

II. STATEMENT OF FACTS

A. Background

"The Commission promulgated the penalty schedule and regulations . . . in May 2000 . . . . In keeping with a [congressional] sunset provision . . . , the Commission set the program to end on December 31, 2001. . . . Congress amended the sunset provision several times, including most recently in December 2013" (Op. at 3).

"At that time, Congress extended authority . . . to include violations through December 31, 2018" (Op. at 3). "As it did for each previous extension, the Commission updated its regulations to correspond to the new expiration ***date***" (Op. at 3) (emphasis added); *see also* Op. at 9 (noting Commission "updating the expiration ***date . . . to match*** Congress's 2013 amendment") (emphasis added).

B. Commission Did *Not* Merely Substitute Date

This panel recognized ***Congress*** in the "2013 amendment of the sunset provision ***merely substituted*** 'December 31, 2018' for 'December 31, 2013,' . . . [which] allowed the Commission to continue the regulations" (Op. at 7) (emphasis added). The panel found even an "email . . . vote" is permissible for the Commission to reestablish a schedule of penalties after a sunset provision in the law (Op. at 10-11).

C. 2014 Amendment - Final Rule

The 2014 final rule creates an automatic reauthorization mechanism that will continue the existing penalty schedule ***indefinitely*** without the need for the Commission to vote, despite the sunset provision in the law (79 Fed. Reg. at 3302) (cited Op. at 3). This substantial change was accomplished by inserting only a few words in the 2014 amendment. Section 111.30, as amended, reads: "Subpart B applies to violations . . . by . . . treasurers that relate to the reporting periods . . . that end on or before the date specified by 52 U.S.C. § 30109(a)(4)(C)(v)." (11 C.F.R. § 111.30) (cited Op. at 3).[2]

The Commission admits the change was intended to "obviate" the need to ever vote again on the penalty schedule after a sunset provision in the law expires and thus declared "notice and comment are unnecessary" (79 Fed. Reg. 3302, 3302-03) (cited Op. at 3).

D. Appeal of Commission Action

1. Administrative Review in District Court

McChesney alleges two closely related violations in his complaint: "Congress' directive to establish the penalties schedule . . . is not a routine matter . . . [and] the Commission . . . secretly adopted a new rule . . . ." (App'x. at 3-4 ¶¶ 9-10). McChesney specifically links his objection to the Commission's

[2] *See* "Extension of Administrative Fines Program, 79 Fed. Reg. 3302, 3302-03 (Jan. 21, 2014) (codified at 11 C.F.R. § 111.30)") (Op. at 3).

"adoption of a new rule . . . without giving proper notice and an opportunity for public comment" with the sunset provision in the law: "On January 21, 2014, . . . [the] unauthorized final rule. . . . [was] made to avoid the mandatory sunset provision Congress created for the Commission to reevaluate the penalties schedule" (D. Ct. No. 27 at 14) (Fed. R. App. P. 30(a)(3)).

2. McChesney's Opening Brief and Commission's Response

a. Opening Brief

The Opening Brief expresses arguments the "district court is mistaken" and the "decisional law upon which the district court relies does not support its conclusion" to dismiss the complaint, including "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***" (Opening Brief at 14) (emphasis added). Like the complaint, the Opening Brief repeats the 2014 final rule was made "to avoid the mandatory sunset provision Congress created for the Commission" (Opening Brief at 7-8).

McChesney also argues in the Opening Brief "the mere existence of deadlines for agency action . . . does not in itself constitute good cause. . . . [and] the agency must still show the impracticability of affording notice and comment." (quoting *United States Steel Corp. v. United States Envtl. Prot. Agency*, 595 F.2d 207, 213 (5th Cir. 1979)) (Opening Brief at 34 n.7) (citations omitted).

b. Commission Brief

The Commission Brief includes a comprehensive response to McChesney's argument in the Opening Brief on notice-and-comment procedures, as shown by the ***Table of Contents*** alone:

> 2. The FEC Had Good Cause to Exempt the 2014 Extension of Administrative Fines Regulations from the APA's Pre-Adoption Notice and Comment Requirement
>
> a. Pre-Adoption Notice and Comment Were Unnecessary
>
> b. Pre-Adoption Notice and Comment Would Have Been Contrary to the Public Interest

(Commission Brief at ii) (emphasis added).

The Commission's Brief further includes detailed argument about why the Commission should be excused for failing to give notice and comment regarding the 2014 final rule (*see* Commission Brief at 11, 18, 21, 36 and 37-43; *see*, *e.g.*, Commission Brief at 11) ("The Commission had determined that 'notice and comment [we]re unnecessary' . . . .").

The Commission Brief merges the Commission's notice-and-comment argument with the question of whether the Commission's action in establishing the penalties schedule was "routine," "unnecessary" or otherwise "inconsequential" to the public (Commission Brief at 39) ("Pre-adoption notice and public comment are likewise 'unnecessary' for 'a routine determination' that is 'insignificant in nature and impact, and inconsequential . . . to the public'") (Commission Brief at 40)

("utilizing pre-adoption notice and comment procedures . . . would have been contrary to the public interest").[3]

In answering the Commission's extensive argument about the failure to comply with notice-and-comment procedures, McChesney, citing *Iowa League,* supplemented his earlier argument from the Opening Brief, stating:

> This Court has explained the basis for notice and comment procedures. '"An agency potentially can avoid judicial review through the tyranny of small decisions. Notice and comment procedures secure the values of government transparency and public participation, compelling us to agree with the suggestion that "[t]he APA's notice and comment exemptions must be narrowly construed.' *[Iowa League* at 873(citation omitted)] . . . .
>
> The Commission failed to give proper notice of the unauthorized final rule, not to mention establishment of the 2014 schedule of penalties. The district court's ruling on this ground also should be reversed.

(Reply Brief at 21); *see also* Reply Brief at 24 ("It is undisputed the result of the Commission's action was to avoid having to conduct a public vote on the schedule of penalties ***ever again***") (emphasis added).

III. ARGUMENT

A. McChesney Made Argument in Opening Brief and Commission Delivered Opposition Brief "Devoted" to the Issue

This Court recognizes an exception to the meaningful argument principle when an appellee has "devoted" multiple pages of its opposition brief to an issue,

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[3] Even the Commission admits the McChesney Opening Brief "respond[ed] to the findings of good cause . . . [citing] a . . . decision explaining that 'the mere existence of deadlines for agency action . . . ***does not in itself constitute good cause'***" (Appellants' Br. at 34 n.7 (citation omitted) (emphasis in original).

particularly in the context of a government response to an issue of public interest. *United States v. Head*, 340 F.3d 628, 630 n.4 (8th Cir. 2003). In *Head*, this Court explained the reason behind the meaningful argument rule is "out of concern that the opposing party would be prejudiced by an advocate arguing an issue without an opportunity for the opponent to respond," concluding: "That is not the case here, where the government devoted four pages of its brief to [the argument]." *Id*.

Likewise, this Court recognizes it is "not precluded from" considering an argument raised in a reply brief that "supplements an argument raised in a party's initial brief." *Barham v. Reliance Standard Life Ins. Co*., 441 F.3d 581, 584 (8th Cir. 2006). Other courts of appeals have stated the same. *See Obduskey v. Wells Fargo*, 879 F.3d 1216, 1220 (10th Cir. 2018) ("McCarthy also claimed . . . Obduskey had waived the FDCPA claim . . . by failing to raise it in the opening brief. We disagree."); *Anderson v. U.S. Dep't of Labor*, 422 F.3d 1155, 1175 (10th Cir. 2005) (issue arising from administrative appeal was "adequately briefed" by government and the court had "the benefit of both parties' position on the issue," even though appellant had failed "to present any argument" in the opening brief).

The panel has the benefit of the Commission's in-depth analysis and specific views about the notice-and-comment procedures at issue in this appeal. The Commission determined McChesney's arguments relating to establishing the

penalty schedule and notice-and-comment procedures were so intertwined in the district court there is no "distinction" between them (App. at 44-45). The Commission's detailed, multi-page argument made under several subheadings in the Commission Brief is the result of its own determination a fulsome response was required (App. at 37-43).

McChesney's argument on notice-and-comment procedures in his Reply Brief closely supplements his argument in the Opening Brief that the 2014 final rule was made "to avoid the mandatory sunset provision Congress created for the Commission" to act (Opening Brief at 6-7).

Despite the Commission's thorough response in the Commission Brief, and later advocacy about notice-and-comment procedure during oral argument,[4] the Commission argued McChesney did not make a "meaningful challenge" on this subject (Commission Brief at 43). McChesney asks the panel to reconsider its acceptance of the Commission's argument on this point and, applying *Head* and other authorities, address the significant notice-and-comment procedures question in this appeal (Opening Brief at 10).

[4] http://media-oa.ca8.uscourts.gov/OAaudio/2018/5/171179.MP3, at 16:35.

B. The District Court Erred in Failing To Give McChesney All Reasonable Doubt in the Complaint That the Commission Failed To Provide Proper Notice and Opportunity To Comment on the 2014 Final Rule

In both his Opening Brief and Reply Brief, McChesney cited this Court's decision in *Iowa League*, which remains the dispositive authority on notice-and-comment procedure for this appeal.

In *Iowa League*, a group of cities sought review of two "letters" sent by the EPA to a U.S. Senator. The EPA did not comply with notice-and-comment procedures, arguing the letters "should be considered general policy statements or, at most, interpretative rules" because they are "not binding," are "[c]onsummation of nothing" and are always "subject to change." 711 F.3d, 855, 864, 865.

This Court determined in *Iowa League* the letters constituted a "legislative rule[]" because they were expected to be "independently legally enforced." *Id.* at 874. This Court also found: "[w]here a challenger is the subject of agency action, 'there is ordinarily little question that the action . . . has caused him injury,' . . . particularly . . . individuals asserting violations of procedural rights." *Id.* at 871 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

Relying on decisional law from the United States Court of Appeals for the District of Columbia, this Court, in *Iowa League*, explained a challenger is ***not*** required to demonstrate prejudice by showing "the agency would alter its rules upon following the proper procedures." *Id.* (quoting *Sugar Cane Growers Co-op.*

of Fla. v. Veneman, 289 F.3d 89, 95 (D.C. Cir. 2002) ("If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter"). After noting the APA's notice and comment exemptions are to be narrowly construed, *id* at 873 (quoting *Prof'ls & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995)), this Court held: "Because the September 2011 letter had the effect of announcing a legislative rule . . . , the EPA violated the APA's procedural requirements by not using notice and comment procedures. ***We . . . vacate this new rule*** because it is "without observance of procedure required by law." 5 U.S.C. § 706(2)(D)." *Id*. at 876 (emphasis added); *see also Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014) ("[D]eficient notice is a 'fundamental flaw' that almost always requires a vacatur") (quoting *Heartland Reg'l Med. Ctr. V. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)).[5]

An agency cannot manufacture urgency to avoid notice-and-comment procedures. *United States v. Brewer*, 766 F.3d 884, 890 (8th Cir. 2014) ("stated

[5] Two decisions after briefs filed in this appeal are instructive. *Missouri Hospital Ass'n v. Hargan*, No. 2:17-cv-04052-BCW, 2018 WL 814589, at *9 (W.D. Mo. Feb. 9, 2018) (applying *Iowa League*, noting, while agency rule "matches" that "set forth by statute," agency violated notice-and-comment procedure as to FAQs); *Nat'l Res. Defense Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) (agency delay on "Civil Penalty Rule" requires notice-and-comment).

concern for public safety . . . is undermined by . . . [agency's] own seven-month delay"). "It is well-established that good cause 'cannot arise as a result of the agency's own delay.'" *Nat'l Venture Capital Ass'n, v. Duke*, 291 F. Supp. 3d 5, 16 (D.D.C. 2017) (quoting *Wash. All. Of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 202 F. Supp. 3d 20, 26 (D.D.C. 2016) *aff'd* 857 F.3d 907 (D.D.C. 2017)).[6]

The Commission recognizes the 2014 final rule is a legislative rule. The Commission has ***never*** cited 5 U.S.C. § 553(b)(A) or claimed the 2014 final rule to be a procedural rule (*see* Commission Brief at vii; 37-40). The Commission's position is not surprising since it seeks to legally enforce the 2014 final rule and automatically extend the penalty schedule ***ad continuim***, which is tantamount to amending or revoking a prior rule. *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) ("[Agency's] stay . . . is essentially an order delaying the rule's effective date, and . . . such orders are tantamount to amending or revoking a rule"); *Levesque v. Block*, 723 F.2d 175, 187 (1st Cir. 1983) ("[A]lthough ordinarily . . . an effective date . . . in a statute makes the statute self-executing, that interpretation would be unreasonable [here]").

[6] This point is similar to that raised by the concurring judge in this appeal during argument. *Fed. Election Comm'n v. Swallow*, 304 F. Supp. 3d 1113, 1117, 1118 (D. Utah 2018) ("[T]he Commission claims [its regulation] should be recognized as proper because the Commission has 'consistently and repeatedly enforced' [it] . . . . What is troubling is that the Agency can so easily exercise such improper authority[.]").

As signaled by this panel's opinion, the Commission easily could have "matched" the action taken by Congress, replacing the expiration ***date*** of "December 31, 2013," in Section 111.30, with the new expiration ***date*** of "December 31, 2018," and its response would have been deemed "routine" by this panel (*See* Op. at 9) (updating expiration date to "match" Congress). The Commission failed to take this important and necessary step.

This panel determined, and it is now the law of the case, the Commission was authorized by the 2014 amendment (the final rule in Section 111.30) to extend the schedule of penalties without a public meeting or discussion, and accomplish it even by email vote (Op. at 10-11). But the panel ***never*** conveyed the opinion the Commission was authorized to accomplish the action ***with no vote at all***.

The 2014 final rule creates a new paradigm that automatically reauthorizes the schedule of penalties without any Commission review, involvement or other action. It eliminates ***all*** Commission decision-making about whether to maintain the existing penalty schedule after a legislative sunset period.

The final rule may be wise or desirable, but the public should have been given notice and an opportunity to weigh in. The Commission had no need to be in a hurry. It could have inserted the date of "December 31, 2018," in Section 111.30, and taken five years to consider comments from the public about the new 2014 final rule it sought to implement.

The Commission was empowered to use the schedule of penalties to assess McChesney ***only*** if the 2014 final rule was validly authorized by law. It was not. The Commission failed to give proper notice and opportunity for public comment regarding the 2014 amendment to Section 111.30, as required by law. It should be vacated. *See Union Pac. R. R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 900 (8th Cir. 2013) ("Because the penalties are 'unlawful,' they must be "set aside"); *Florilli Corp. v. Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997) ("agency provided no forum for the party to participate in the proceedings through which the agency created the contested provisions'").[7]

IV. CONCLUSION

McChesney does not seek to change the reasoning in the panel opinion, only to expand it to address an important final issue. McChesney respectfully requests the panel grant his petition for rehearing, reverse the order of the district court granting the Commission's motion to dismiss his complaint and remand this action to the district court for further proceedings consistent with this Court's opinion.

[7] Vacation of the 2014 final rule should not create litigation. The Commission can easily fix the flaw in Section 111.30 by email vote inserting "December 31, 2018" (Op. at 10-11). Any person seeking relief now would have had to file a petition within thirty days of any adverse determination (52 U.S.C. § 30109(a)(4)(C)(iii)).

Respectfully submitted this 27th day of September, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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This petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this petition contains 3,594 words.

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/s/Bartholomew L. McLeay
Bartholomew L. McLeay

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2018, 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/Bartholomew L. McLeay
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