UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
BOSTON DIVISION

ROBINSON COMMITTEE, LLC and JACK E. ROBINSON, Petitioners, v. FEDERAL ELECTION COMMISSION, Respondent.	Case Number: 1:10-cv-11335-GAO District Judge George A. O'Toole, Jr. MEMORANDUM OF LAW IN SUPPORT OF RENEWED MOTION TO DISMISS

RESPONDENT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF LAW IN SUPPORT OF ITS RENEWED MOTION TO DISMISS

Petitioners Robinson Committee, LLC and Jack E. Robinson do not dispute that they filed a Year End Report concerning the Committee's 2009 campaign finance activity 81 days later than required by law. Consistent with its regulations and delegated authority from Congress, the Federal Election Commission ("FEC" or "Commission") assessed a civil money penalty against petitioners. Pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court should dismiss petitioners' action seeking review of the FEC's final determination, because they cannot demonstrate that the Commission's decision — which is entitled to great deference — was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Commission correctly rejected petitioners' meritless argument that they were prevented from filing on time because Robinson first had to file his tax return and respond to an FEC notice regarding a separate matter.

I. BACKGROUND

A. The Parties

Respondent FEC is an independent agency of the United States government with exclusive civil jurisdiction over the administration, interpretation, and enforcement of the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431-57. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g.

Petitioner Jack E. Robinson, a resident of Massachusetts, was a candidate in the December 8, 2009 Republican primary election for U.S. Senate in Massachusetts. (*See* Pet. ¶ 1.) Robinson, who paid for his campaign exclusively with his own funds, lost the primary to Scott Brown, the eventual winner of the general election. (*See id.* ¶¶ 1, 14.) Robinson is the treasurer of his principal federal campaign committee, petitioner Robinson Committee, LLC. (*See id.* ¶ 2.)

B. Statutory and Regulatory Background

1. FECA's Reporting Requirements

Congress enacted FECA as part of a comprehensive system of regulating the financing of federal election campaigns. Among other things, FECA requires detailed public disclosure of the finances of political committees — including the campaign committees of House and Senate candidates. *See* 2 U.S.C. §§ 432-34. The Supreme Court has explained that FECA's reporting requirements "curb[] the evils of campaign ignorance and corruption that Congress found to exist" by directly serving at least three substantial government interests: First, they "provide[] the electorate with information" on the flow of campaign money "in order to aid the voters in evaluating those who seek federal office"; second, they "deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity"; and third, the reporting requirements "are an essential means of gathering the data

necessary to detect violations of [FECA's] contributions limitations." *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

To those ends, the FECA reporting requirements relevant here require each federal candidate to have a principal campaign committee, *see* 2 U.S.C. § 432(e)(1), and the treasurer of each committee is required to file with the FEC periodic reports that disclose the committee's finances, *see id.* § 434(a)-(b). The principal campaign committees of Senate candidates must file their disclosure reports with the Secretary of the Senate, who must promptly forward copies of the reports to the FEC. *See id.* § 432(g). The FEC places these reports on the public record within 48 hours of receipt. *See id.* § 438(a)(4).

2. Administrative Fines Program

"The administrative fines program was established by Congress in 1999, and 'creates a simplified procedure for the FEC to administratively handle reporting violations.'" *Lovely v. FEC*, 307 F. Supp. 2d 294, 299 (D. Mass. 2004) (quoting H.R. Rep. No. 106-295, at 11 (1999)). The Commission may assess civil money penalties against principal campaign committees whose treasurers fail to file timely reports required by 2 U.S.C. § 434(a). *See* 2 U.S.C. § 437g(a)(4)(C)(i). When a vote of the six-member Commission determines that there is reason to believe ("RTB") a respondent has violated 2 U.S.C. § 434(a), the FEC notifies the respondent of the RTB finding, the factual and legal basis underlying the finding, the proposed civil penalty, and the respondent's right to challenge the decision. *See* 11 C.F.R. § 111.32. The proposed civil penalty is calculated pursuant to a schedule, which takes account of whether the untimely report was election sensitive, how late the untimely report was filed (if filed at all), the level of monetary activity in the untimely report, and the respondent's number of previous reporting violations. *See id.* § 111.43.

The respondent may challenge the Commission's RTB finding in writing within 40 days of being notified, but only on three grounds specified in the FEC's regulations: (1) if the RTB finding was based on a factual error; (2) if the FEC improperly calculated the civil money penalty; or (3) if the committee and its treasurer used "best efforts to file in a timely manner." *See* 11 C.F.R. § 111.35(b). An FEC Reviewing Officer reviews the respondent's challenge and the administrative record, and submits a written recommendation to the Commission. *See id.* § 111.36(b), (e). The respondent has 10 days to respond to the reviewing officer recommendation, but cannot raise any new arguments. *See id.* § 111.36(f). The Commission then proceeds to a final determination of whether the respondent violated 2 U.S.C. § 434(a), and whether to assess a civil penalty. *See* 11 C.F.R. § 111.37.

If the Commission makes a final determination finding a violation and assessing a penalty, the respondent may petition a federal district court for judicial review. *See* 2 U.S.C. § 437g(a)(4)(C)(iii).

C. Factual and Administrative Background

Petitioners' 2009 Year End Report of Receipts and Disbursements ("Report"), covering their campaign finance activity from November 19, 2009, through December 31, 2009, was due to be filed by January 31, 2010. *See* 2 U.S.C. § 434(a)(2)(A)(iii); Pet. ¶ 6. On December 28, 2009, the FEC e-mailed a notice to petitioners reminding them of this upcoming deadline. (*See* Exh. A at 8-10 (FEC Year-End Report Notice, Dec. 28, 2009); *see also id.* at 3 (AF # 2122, FEC Reviewing Officer Recommendation, Jun. 4, 2010 ("ROR")).)[1] Nevertheless, the FEC did not

[1] On a motion to dismiss under Rule 12(b)(6), the court may consider documents sufficiently referred to in the complaint. *Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 47 n.1 (1st Cir. 2009). Each of the documents attached as exhibits to this motion were referenced in the Petition. In addition, each of the documents attached as exhibits are official public records, which the Court may also consider on a motion to dismiss. *See id.*

receive the Report from petitioners by January 31, 2010. (*See* Pet. ¶ 7.) On February 17, 2010, the FEC mailed petitioners a notice informing them the Report was overdue. (*See* Exh. A at 11 (Letter from FEC to Jack E. Robinson, Feb. 17, 2010); *see also* Pet. ¶ 15; Exh. A at 3 (ROR).) The notice also stated that there was no grace period for filing, and that the FEC may assess civil money penalties starting on the day following the due date for the Report. (*See* Exh. A at 11.) Petitioners did not respond to this notice. (*See id.* at 3.)

On March 25, 2010, the Commission voted unanimously to find RTB that petitioners violated 2 U.S.C. § 434(a), and to preliminarily assess a civil money penalty of $6,050. (*See* Pet. ¶ 8; Exh. A at 12 (Letter from FEC to Jack E. Robinson, Mar. 29, 2010 ("RTB Notice").) The FEC informed petitioners of the RTB finding by letter dated March 29, 2010. (*See* Exh. A at 12-29 (RTB Notice); Pet. ¶ 8.) As explained in the RTB Notice, the amount of the civil penalty was computed through application of the Commission's schedule of penalties, including respondents' lack of previous reporting violations. (*See* Exh. A at 12 (citing 11 C.F.R. § 111.43).) The RTB Notice also informed petitioners that they could challenge the Commission's RTB finding based on the three defenses specified in the regulations. (*See id.* at 13 (citing 11 C.F.R. § 111.35(b)).) Moreover, the RTB Notice warned that the failure to raise an argument in a timely fashion would result in a waiver of the right to assert that argument in a later petition to a federal district court. (*See id.* at 13 (citing 11 C.F.R. § 111.38).)

On April 15, 2010, petitioners mailed the Report to the Secretary of the Senate, who received it on April 22, 2010 — 81 days after the January 31, 2010 deadline. (*See* Pet. ¶ 7.) Petitioners challenged the Commission's RTB finding by letter dated April 16, 2010 ("RTB Challenge"). (*See* Exh. A at 6; Pet. ¶ 9.) Petitioners' RTB Challenge made three assertions. First, it claimed that the deadline for filing the Report was effectively delayed because the FEC

had, in the interim, requested that petitioners submit additional information relating to reports they had previously filed. (*See* Exh. A at 6.) Second, it alleged that the FEC had improperly calculated the proposed civil money penalty. (*See id.*) Third, petitioners argued that the Report was delayed by the "reasonably unforeseen circumstance[]" that Robinson was unable to determine the total amount of loans he used to self-fund his campaign until he had calculated his 2009 tax liability on April 15, 2010. (*See id.*)

An FEC reviewing officer reviewed petitioners' RTB Challenge and issued a recommendation, dated June 4, 2010, finding that none of petitioners' arguments satisfied the three defenses of 11 C.F.R. § 111.35(b), and recommending that the Commission make a final determination that petitioners violated 2 U.S.C. § 434(a) and assess a $6,050 penalty. (*See* Exh. A at 2-5 (ROR).) Petitioners submitted a letter to the FEC objecting to the ROR on June 18, 2010 ("ROR Objection"). (*See* Exh. B; Pet. ¶¶ 10-11.)

On July 22, 2010, the Commission unanimously adopted the ROR, and made a final determination that the Robinson Committee and Robinson, in his official capacity as treasurer, violated 2 U.S.C. § 434(a), and assessed a civil money penalty of $6,050. (*See* Exh. C at 1 (Letter from FEC to Jack E. Robinson, July 23, 2010); Pet. ¶ 12.)

On August 9, 2010, petitioners filed this action seeking review of the FEC's final determination pursuant to 2 U.S.C. § 437g(a)(4)(C)(iii) and 11 C.F.R. § 111.38. On October 8, 2010, the FEC filed a Motion to Dismiss the Petition (Docket No. 5), which the Court, on May 13, 2011, denied without prejudice to renewal with a certification of consultation in accordance with Local Rule 7.1(a)(2). On May 20, 2011 and May 23, 2011, counsel for the FEC conferred with counsel for petitioners regarding this Renewed Motion to Dismiss the Petition pursuant to Local Rule 7.1(a)(2). Counsel advised that petitioners will oppose this motion.

II. ARGUMENT

A. The Petition Should Be Dismissed Because the FEC's Final Determination Was Not Arbitrary or Capricious

This Court's review of the Commission's final determination is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq*. *See Lovely*, 307 F. Supp. 2d at 297-98. The APA states that a district court may only set aside agency decisions that are "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 114 (1st Cir. 2009) (quoting 5 U.S.C. § 706(2)). Under this "highly deferential" standard, agency actions "are presumed to be valid," and as a result, the Court "may not substitute its judgment for that of the agency, even if it disagrees with the agency's conclusions." *Id.* The Court is only "required to determine whether the agency's decision is supported by a rational basis, and if so, [it] must affirm." *Id.*

The Supreme Court has held that the FEC "is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). In addition, "[w]here Congress has entrusted rulemaking and administrative authority to an agency," such as the FEC, "courts normally accord the agency particular deference in respect to the interpretation of regulations promulgated under that authority." *South Shore Hosp., Inc. v. Thompson*, 308 F.3d 91, 97 (1st Cir. 2002). Petitioners bear the burden of proving that the FEC's action was arbitrary or capricious. *See, e.g.*, *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 794 (1st Cir. 1984).

When reviewing agency action, "[t]he district court sits as an appellate tribunal," and the "entire case on review is a question of law, and only a question of law." *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1225-26 (D.C. Cir. 1993). As a result, even though this action is before the Court on the FEC's Rule 12(b)(6) renewed motion to dismiss, the Court can

reach the merits of whether the FEC's action was arbitrary or capricious. *See id.* at 1225-26. "[P]roperly read," the Petition "actually presents no factual allegations, but rather only arguments about the legal conclusion to be drawn about the agency action." *See id.* at 1226. Accordingly, "the sufficiency of the [Petition] is the question on the merits, and there is no real distinction in this context between the question presented on a 12(b)(6) motion and a motion for summary judgment." *Id.*

Under the applicable regulations, there are only three bases for challenging the FEC's ruling: (1) factual error; (2) improper calculation of the civil money penalty; or (3) the committee and its treasurer used "best efforts to file in a timely manner." 11 C.F.R. § 111.35(b)(1)-(3). Before this Court, petitioners do not argue that the RTB finding was based on a factual error or that the civil money penalty was improperly calculated.[2] Thus, the only challenge before this Court concerns petitioners' assertion that they used "best efforts" to file their Report 81 days late.

1. The FEC Reasonably Found That Petitioners Did Not Use Best Efforts to File the Report in a Timely Manner

Petitioners do not contend that the Report was filed on time under FECA and the Commission's regulations. (*See* Pet. ¶¶ 7, 14.) Nor do petitioners challenge the validity of those regulations. Petitioners are admittedly experienced filers (*see id.* ¶ 20) who had filed previous reports as recently as December 4, 2009. (*See* Exh. A at 43; *see also id.* at 4 (ROR).) The FEC gave petitioners notice of the Report's deadline over a month ahead of time, and on February 17, 2010, notified petitioners that they had missed the deadline. (*See* Exh. A at 3.) Despite these efforts by the Commission, Robinson did not respond to the FEC regarding the late Report until

[2] Petitioners argued in their RTB Challenge that the Commission improperly calculated the proposed civil money penalty (Exh. A at 6), but have waived this argument by not asserting it here.

April 15, 2010 (*see id.*) — the same day he mailed the Report to the Secretary of the Senate (*see* Pet. ¶¶ 7, 14), 75 days after the due date. Nevertheless, petitioners claim they used "best efforts" to file the Report, and therefore should not have been penalized. (*See id.* ¶ 21.) The FEC reasonably rejected this argument.

A party claiming that it used "best efforts to file in a timely manner" must prove that (1) it was "prevented from filing in a timely manner by reasonably unforeseen circumstances that were beyond [its] control," and (2) the untimely report was "filed no later than 24 hours after the end of these circumstances." 11 C.F.R. § 111.35(b)(3)(i)-(ii). "[R]easonably unforeseen circumstances" include, but are not limited to: (1) a failure of FEC computers or FEC software; (2) a "widespread disruption" of the Internet; or (3) a "[s]evere weather or other disaster-related incident." *Id.* § 111.35(c). They do not include circumstances such as a failure to know filing dates, inexperience, negligence, illness, or delays caused by committee vendors or contractors. *See id.* § 111.35(d).

The Petition asserts two alleged bases for a "best efforts" finding, both of which the Commission correctly found did not constitute a circumstance that prevented petitioners from filing on time.

a. The FEC Reasonably Found That Robinson's Alleged Need to Complete His Tax Return First Did Not Prevent Him from Timely Filing the Report

First, petitioners claim that Robinson filed the Report late because he could not accurately complete the Report until he had determined the amount of personal funds he had spent on his campaign, which he allegedly could not do until completing his 2009 tax return on April 15, 2010. (*See* Pet. ¶ 14; *see also* Exh. A at 6 (RTB Challenge).)

The Commission considered this argument and reasonably concluded that petitioners had "failed to prove that [Robinson's] need to prepare his taxes prevented them from filing the Year End Report on time." (Exh. A at 4 (ROR).) As the Commission explained in the ROR, Robinson should have had access to all of the financial records necessary to complete the Report regardless of whether his 2009 tax return had been completed and filed. (*See id.* at 3-4.) As treasurer of the Committee, Robinson was required, on an ongoing basis, to keep track of and report loans he made, guaranteed, or endorsed to his Committee, including any derived from loans he received from third parties. (*See id.* at 4 (ROR) (citing 11 C.F.R. § 104.3(a)(3)(vii)(B)).) As the candidate and the custodian of records for the Committee, Robinson had access to his own financial records and to the Committee's financial records. (*See id.*) Petitioners did not dispute these facts before the Commission, and do not dispute them now.

With access to these records, petitioners were able to file three reports with the FEC in October and December of 2009 disclosing that Robinson made loans to his Committee in 2009, despite the fact that he had yet to file his 2009 tax return. (*See id.*) The loans disclosed in these three prior reports totaled $365,000, which constitute 97% of the total amount of 2009 candidate loans petitioners eventually disclosed in the untimely Report. (*See id.*) And yet, petitioners offered the Commission, and now offer this Court, no reason why their ability to tally the personal funds Robinson spent suddenly became dependent on Robinson's 2009 tax return. Rather, Robinson merely asserted (Exh. B at 1) that

> [b]ecause the Committee's operations were entirely self-funded by Robinson, and because Robinson could not calculate the total amount of candidate loans provided to the Committee until his 2009 taxes were prepared, in order to ensure accuracy Robinson simply was unable to file the Report until those tax returns were prepared and filed.

This is *ipse dixit*: Robinson never explained what the purported causal relationship was between calculating his income taxes and calculating the total amount of loans provided to the Committee. The loans were in fact made to the Committee at the time the money was transferred, regardless of the total income or deductions Robinson may have had in 2009. Accordingly, the Commission's rejection of petitioners' tax return argument is supported by a rational basis.

b. The FEC Reasonably Found That Robinson's Need to Comply with Other FEC Notices Did Not Prevent Him from Timely Filing the Report

Second, petitioners argue that their untimely filing should have been excused because allegedly they first had to respond to four notices the FEC sent to them: (1) a January 7, 2010, request for additional information ("RFAI"); (2) the February 17, 2010, notice of failure to file the Report; (3) a February 23, 2010, RFAI; and (4) a March 23, 2010, RFAI. (*See* Pet. ¶ 15; *see also* Exh. A at 6 (RTB Challenge).)

The Commission considered this argument and reasonably concluded that it also failed to excuse petitioners' late filing or otherwise justify a "best efforts" finding. (*See* Exh. A at 3 (ROR).) As explained in the Commission's ROR, petitioners received only one of these notices — the January 7, 2010, RFAI — before the Report's January 31, 2010, due date. (*See id.*) Thus, the other three notices could not have caused petitioners to miss the deadline. (*See id.*) In particular, the February 17, 2010, notice did not request additional information but was simply a reminder that the Report was late, and it urged petitioners to file the Report immediately. (*See* Exh. A at 11.)

The January 7, 2010, RFAI requested that petitioners correct certain errors found in their previously filed October Quarterly Report by February 11, 2010. (*See* Exh. A at 44-47; *see also*

Exh. A at 3 (ROR).) As the Commission explained, petitioners received this RFAI more than three weeks before the Report was due, giving adequate time to complete both tasks. (*See* Exh. A at 3.) And, in any event, Robinson's duty to comply with the January 7, 2010, RFAI did not relieve him of his responsibility to file the Report on time. (*See id.*)

Accordingly, the Commission's rejection of petitioner's argument is supported by a rational basis.

2. Petitioners Have Waived Their Other Meritless Arguments

The Petition raises two additional arguments, which the Court should deem waived and not consider: first, that the late filing should be overlooked because it allegedly caused no harm to the public interest (*see* Pet. ¶¶ 18-19), and second, that petitioners' lack of previous reporting violations should have "weigh[ed] in favor" of a "best efforts" determination (*see id.* ¶ 20).

A "respondent's failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondent's right to present such argument in a petition to the district court under 2 U.S.C. § 437g." 11 C.F.R. § 111.38. In order to raise an argument in a timely fashion during the administrative process, a party must raise the argument in its written response challenging RTB under 11 C.F.R. § 111.35, and not later in its objections to the ROR (unless the argument is "directly" responsive to the ROR). *See id.* § 111.36(f).

Petitioners failed to raise the above two arguments in their submission challenging RTB (*see* Exh. A at 6), and only raised them for the first time in their objections to the ROR (*see* Exh. B). The new arguments, however, were not responsive to the ROR's discussion and were thus untimely under 11 C.F.R. § 111.36(f). Petitioners have therefore waived their ability to raise these new arguments before this Court. *See* 11 C.F.R. § 111.38; *see also NLRB v. Saint-Gobain Abrasives, Inc.*, 426 F.3d 455, 458-59 (1st Cir. 2005) ("The general exhaustion requirement that

prevails in administrative matters is a bedrock principle: 'as a general rule[,] courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the [appropriate] time.'" (alterations in original) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952))); *accord Cunningham v. FEC*, No. IP-01-0897-C-B/S, 2002 WL 31431557, at *4 (S.D. Ind. Oct. 28, 2002). Judicial adherence to the raise-or-waive rule "simultaneously enhances the efficacy of the agency, fosters judicial efficiency, and safeguards the integrity of the inter-branch review relationship." *Saint-Gobain Abrasives*, 426 F.3d at 459 (internal quotation marks omitted).

In any event, neither waived argument is a valid ground for challenging the Commission's decision, *see* 11 C.F.R. § 111.35(b)(1)-(3), and both are meritless on their own terms. First, it is untrue that petitioners' violation did not harm the public interest. As discussed *supra* pp. 2-3, FECA's disclosure and reporting requirements further at least three substantial government interests: (1) providing the electorate with information on campaign spending; (2) deterring corruption by exposing large contributions and expenditures; and (3) allowing the FEC to gather the data necessary to detect violations of the contribution limitations. *See Buckley*, 424 U.S. at 66-68. Given these substantial interests, public harm is presumed from a violation of the reporting requirements. *See FEC v. Furgatch*, 869 F.2d 1256, 1259 (9th Cir. 1989). Contrary to petitioners' assertions (*see* Pet. ¶¶ 18-19), a failure to report causes public harm even where the candidate is self-funded, *see, e.g.*, *Cox for U.S. Senate Comm., Inc. v. FEC*, No. 03-3715, 2004 WL 783435, at *6 (N.D. Ill. Jan. 22, 2004) (pointing out that reporting by self-funded candidates allows the public to "ascertain prior to an election which candidates are incurring sizable obligations that may be discharged with the generosity of unidentified parties after the election"), and where the candidate lost the election, *see, e.g.*, *FEC v. Toledano*, 317

F.3d 939, 953 (9th Cir. 2002) ("That [defendant] lost anyway, and the violation thus had no effect on the outcome of the election, does not change the fact that the public was harmed by the [FECA violation]."). This analysis is not changed by the fact that the election at issue was a special election.

Second, petitioners' lack of previous reporting violations was properly considered by the Commission in determining the *amount* of their civil money penalty under the administrative fine schedule under 11 C.F.R. § 111.43. (*See* Exh. A at 3 (ROR).) Petitioners' fine of $6,050 is less than it would have been had they previously violated 2 U.S.C. § 434(a). *See* 11 C.F.R. § 111.43(a). Nothing in the FEC's regulations requires a lack of previous reporting violations to also "weigh in favor" of a "best efforts" determination under 11 C.F.R. § 111.35(b)(3), as petitioners erroneously claim. (*See* Pet. ¶ 20.)

B. This Case Should Not Be Referred to the FEC's Alternative Dispute Resolution Program

In their Opposition to the Commission's original Motion to Dismiss (Docket No. 6), petitioners requested that the Court stay the case and refer it to the FEC's Alternative Dispute Resolution Program ("ADR"). The Court should reject any renewed request by petitioners for such relief because the Court lacks the authority to refer the case to ADR, and even if it had such authority, ADR is inappropriate at this stage of the proceedings.

Petitioners' lawsuit asks this Court to review the FEC's Administrative Fines Program determination under the authority of 2 U.S.C. § 437g(a)(4)(C)(iii), which only allows petitioners to "request[] that the determination be modified or set aside." It does not provide petitioners a chance to second-guess the Commission's decision not to employ its ADR program or to readjudicate their case using a second administrative process — an additional layer of process that would be directly at odds with the purposes of both programs.

The Administrative Fines Program is the FEC's usual method of redressing violations of 2 U.S.C. § 434(a) by registered political committees, such as petitioners' reporting violation. *See* 2 U.S.C. § 437g(a)(4)(C)(i); 11 C.F.R. §§ 111.30-111.31. In 1999, Congress established the Administrative Fines Program to authorize the FEC to assess civil money penalties for reporting violations in lieu of its general investigatory enforcement procedures, which are applicable to all other types of violations. *See* 2 U.S.C. § 437g(a)(4)(C)(i). The Administrative Fines Program was intended to "let the agency deal with minor violations of the law in an expeditious manner" and to "give the FEC more time to investigate serious violations of the law." *See* 145 Cong. Rec. H5622 (daily ed. July 15, 1999) (statement of Congresswoman Maloney).

The FEC's ADR Program was similarly established to "facilitate[] a faster resolution" of certain disputes. *See FEC's Alternative Dispute Resolution Program*, at http://www.fec.gov/em/adr.shtml. Federal agencies were provided with specific authority to establish such programs by the Administrative Dispute Resolution Act, 5 U.S.C. § 572, and parties are not permitted judicial review of an agency's discretionary decision whether to employ ADR in individual cases. *See* 5 U.S.C. § 581(b)(1) ("A decision by an agency to use or not use a dispute resolution proceeding . . . shall be committed to the discretion of the agency and shall not be subject to judicial review . . . ."). Petitioners have thus requested a remedy that this Court lacks authority to provide.

Even if the Court had authority to issue such a remedy, a referral to the ADR Program makes no sense at this juncture. The ADR Program is intended to be used *before* the FEC's traditional enforcement process begins, in hopes of avoiding that process. *See FEC's Alternative Dispute Resolution Program, at* http://www.fec.gov/em/adr.shtml. Here, this matter has already been adjudicated through the administrative fines process; it is thus too late for ADR to obviate

the need for a different process, and the Commission has already made a determination regarding the appropriate remedy. Moreover, adding another layer of process would undercut the Administrative Fines Program's goal of handling matters in an expeditious manner. Petitioners cannot now request a second bite at the apple before the Commission because they are dissatisfied with the result of the administrative proceedings. The FEC adjudicated petitioners' case in a manner consistent with FECA and the Commission's regulations, and the only issue here is whether the FEC's determination was arbitrary or capricious, which it was not.

CONCLUSION

Because the FEC's final determination was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law, and is reasonably supported by the administrative record, the Court should dismiss the Petition with prejudice.[3]

Respectfully submitted,

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Assistant General Counsel

[3] In the alternative, the Court could dismiss the Petition without prejudice for insufficient service of process under Rule 12(b)(5). Petitioners appear to have completed their efforts at service, as they have filed an executed return of service demonstrating that they served the FEC by certified mail on August 16, 2010. (*See* Docket No. 3.) However, petitioners have failed to perfect service of process by also serving the United States as required by Rule 4(i)(2). To serve the United States, petitioners were required to deliver a copy of the summons and complaint to the United States Attorney for the District of Massachusetts and to the Attorney General, in Washington, D.C. *See* Fed. R. Civ. P. 4(i)(1)(A)-(B). As of May 24, 2011 — over nine months after the Petition was filed on August 9, 2010 (Docket No. 1) — Petitioners have served neither.

/s/ Kevin P. Hancock
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Dated: May 25, 2011

Certificate of Service

I, Kevin P. Hancock, certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on May 25, 2011.

Dated: May 25, 2011

Respectfully submitted,

/s/ Kevin P. Hancock
Kevin P. Hancock