

25-10830

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

TONY MCDONALD,
Plaintiff-Appellant

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee

Appeal from the United States District Court for the Northern District of
Texas, Fort Worth Division,

District Court No. 4:25-CV-153-P

APPELLEE'S RESPONSE TO PETITION FOR REHEARING EN BANC

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May 4, 2026

CERTIFICATE OF INTERESTED PARTIES

Tony McDonald v. FEC, No. 25-10830

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Tony McDonald, Plaintiff-Appellant,
2. The Federal Election Commission, Defendant-Appellee.

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INTRODUCTION

Appellant Tony McDonald's ("McDonald") petition for rehearing en banc fails to identify any conflict with decisions of this Court or the Supreme Court. It should be denied. McDonald asks every active judge on this Court to consider a case dismissed not on the merits of his lawsuit, but for failing to meet the first requirement of Article III standing that all plaintiffs must show to proceed in a federal court lawsuit: injury in fact. Rather than attempting to amend his Complaint that was dismissed without prejudice in the district court, McDonald appealed the judgment, only for a unanimous Panel to affirm in an unpublished, *per curiam* opinion because he failed at this fundamental step.

The Complaint centers on a simple set of allegations. McDonald alleged that he made two contributions years ago that were processed through conduit platforms: A 2019 contribution of \$1 to Marianne Williamson that was processed through ActBlue, and a 2023 contribution of \$50 to an unnamed federal candidate that was processed through WinRed. He claimed that the conduit disclosure provision in the Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30116(a)(8), was unconstitutional for requiring conduits or intermediaries to disclose the contributions made through their platforms. Nowhere in his Complaint, however, did McDonald allege any concrete and particularized injury resulting from the disclosure of his two past contributions. As the Panel correctly

concluded, the absence of any actual injury flowing from the disclosure of these contributions is fatal to his Complaint. The Panel’s opinion presents nothing more than a straightforward application of conventional standing jurisprudence by this Circuit and the Supreme Court.

Rather than explaining how the allegations in his Complaint fit under the established standing framework, McDonald’s petition raises arguments that did not appear in the Complaint at all, namely the theory that the disclosure of a campaign contribution is an injury sufficient to confer standing on its own, purportedly under the Supreme Court’s decision in *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595 (2021) (“*AFP*”). *AFP* made no such holding, and the Panel’s opinion does not conflict with that case, which is factually distinct from McDonald’s Complaint here. *AFP* was not decided on standing and, in any event, concerned a complaint containing detailed allegations that disclosure of an association’s donor information would lead to reprisals, harassment, or future enforcement action against the plaintiffs. Furthermore, the “chilled-speech” line of cases upon which McDonald seeks to rely is inapplicable because this is not a pre-enforcement challenge, McDonald has not raised any allegations of the kind set forth in those cases, and there is no threatened enforcement of § 30116(a)(8) against McDonald.

McDonald's arguments fail for the same reason they have twice before: McDonald cannot satisfy the injury component of Article III standing. Thus, he falls far short of the high bar for a rehearing en banc.

BACKGROUND

I. FECA'S DISCLOSURE PROVISIONS

FECA requires certain entities meeting the definition of a political committee to file reports disclosing their receipts and disbursements. *See* 52 U.S.C. § 30101(4)-(6); 52 U.S.C. § 30104(a), (b); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam). FECA contains two disclosure provisions relevant to this case. The first is for contributions made directly to political committees. 52 U.S.C. § 30104. Subsection (b)(3)(A) requires political committees to identify each "person (other than a political committee)" whose contribution or contributions have an aggregate amount or value exceeding \$200 within the calendar year. *Id.* § 30104(b)(3)(A). The second concerns "earmarked" contributions on behalf of a particular candidate sent to a "conduit" or "intermediary," such as ActBlue and WinRed. 52 U.S.C. § 30116(a)(8). Section 30116 treats those earmarked contributions as contributions to a candidate. 52 U.S.C. § 30116(a)(8). Section 30116 states that the conduit "shall report the original source and the intended recipient of such contribution to the Commission

and to the intended recipient[,]” *i.e.*, the candidate. *Id.* Unlike § 30104(b)(3), § 30116 does not limit disclosures to contributions above \$200.¹

II. PROCEDURAL BACKGROUND

A. The District Court Dismisses McDonald’s Complaint

McDonald based his Complaint on two contributions that conduits reported to the FEC.² ROA.12-13. First, in June 2019, McDonald contributed \$1 to Marianne Williamson for President through ActBlue. ROA.13. Second, in June

¹ FECA’s disclosure provisions “provide[] the electorate with information as to where political money comes from . . . in order to aid the voters in evaluating those who seek federal office.” *Buckley*, 424 U.S. at 66-68 (footnote and internal quotation marks omitted). Conduit disclosure provisions also help disclose fraudulent straw donors that seek to hide their true source and unlawful foreign contributions that can be made through conduits. *See, e.g., United States v. Boender*, 649 F.3d 650, 661 (7th Cir. 2011) (provision “unambiguously criminalized both straw man and false name contributions”); *United States v. O’Donnell*, 608 F.3d 546, 549 (9th Cir. 2010) (disclosure prevents circumvention of FECA’s contribution limits); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (en banc) (concluding “[p]roscription of conduit contributions (with the concomitant requirement that the true source of contributions be disclosed) would seem to be at the very core of the [*Buckley*] Court’s analysis”); *Cf.* Comm. on House Admin., *ActBlue Investigation Timeline*, <https://cha.house.gov/actblue-investigation-timeline> (last visited May 2, 2026) (outlining Congressional investigation into straw donor and foreign contributions made through conduit platforms).

² The Complaint referenced an additional \$1 contribution to an unnamed “republican presidential contender” that, for reasons unclear to McDonald, was not reported, and therefore irrelevant for determining any alleged harm stemming from it. ROA.13; ROA.147.

2023, he contributed \$50 to “support a federal candidate” through WinRed ROA.12. McDonald alleged that he “does not want to explain or justify such contributions[,]” and that the disclosures would “adversely impact [his] political activities, including his future giving.” ROA.12-13. As general counsel for the Tarrant County Republican Party, McDonald claimed that he “would not want his personal support for a candidate to imply that the Tarrant County Republican Party as an institution supports the candidate[,]” ROA.13, or prompt “demands for similar donations[,]” or “misunderstandings regarding the intent and implications” of his prior contributions. ROA.14.

The Commission moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1), asserting that McDonald did not allege an injury in fact. ROA.80-109, 146, 148. The Commission explained that McDonald’s allegations of adverse consequences from his past contributions were speculative and did not set forth any concrete injury, and many concerned a third party (the Tarrant County Republican Party). ROA.99-104. Furthermore, McDonald’s alleged subjective chill of his speech did not confer standing. ROA.105-106.

The district court granted the FEC’s motion and dismissed the Complaint without prejudice. ROA.146-151, 152. The district court concluded that the Article III standing requirements under the Supreme Court’s seminal decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), applied to cases

concerning the disclosure of campaign contributions. ROA.149-150 (citing *FEC v. Akins*, 524 U.S. 11, 21 (1998)). Applying *Lujan*, the district court found that McDonald's allegations plainly did not confer standing. ROA.150-151. McDonald expressed only speculative concerns about having to explain his two past contributions or that someone would mistake his contributions for the views of the Tarrant County Republican Party. ROA.150.

The district court also held that the public disclosure of contributions, standing alone, is not an Article III injury. ROA 149-151. McDonald's claim was not a "pre-enforcement" First Amendment challenge where he risked "the threat of an enforcement action for violating FECA"; instead, McDonald's allegation of subjective chilling of his speech did not constitute an injury in fact. *Id.*

B. The Panel Affirms the Dismissal of McDonald's Complaint

The Panel affirmed the dismissal of the Complaint in an unpublished, *per curiam* decision. Opinion, ECF No. 65-1 ("Op."). The Panel reasoned that McDonald cited no decision holding that the disclosure of contributions is a *per se* injury or that courts apply a relaxed standing inquiry in cases where the challenged law does not regulate the plaintiff. *Id.* at 4-6. The Panel distinguished the Complaint from pre-enforcement challenges where plaintiffs alleged the imminent enforcement of a law against *them*. *Id.* at 3-6.

The Panel distinguished McDonald’s Complaint from *NAACP v. Alabama ex rel. Patterson*, where disclosure of an organization’s membership list amounted to concrete harm, because that organization had shown that prior disclosures had resulted in “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.” *Id.* at 4 (citing 357 U.S. 449, 462 (1958)). Here, the Panel held, the Complaint only speculated that disclosure would affect McDonald. *Id.* at 4-5.

The Panel differentiated the Complaint from *AFP* on multiple grounds. *Id.* at 4-5 n.1. First, the *AFP* plaintiffs introduced evidence that disclosure of their association’s donor lists had subjected them and their supporters to threats. *Id.* Second, McDonald did not bring a facial challenge based on the immediately impending chill of potential harassment or reprisal. *Id.* Third, McDonald was not challenging a law that required *him* to disclose information, because the provision at issue applies to conduits, *not* to McDonald. *Id.* (“Thus, McDonald is at two removes from [*AFP*].”). The Panel ultimately deemed *AFP* inapposite to McDonald’s case. *Id.* (“In sum, [*AFP*] is not about any alleged harm from a prior disclosure, and, without discussing standing, only addresses a challenge based on particular required disclosures that were at the time certainly impending, [and] not merely a product of . . . fear.”) (internal quotation marks omitted).

ARGUMENT

The Panel correctly applied established principles of standing to determine that McDonald failed to allege a cognizable Article III injury in fact. That ruling is not in conflict with Circuit or Supreme Court precedent. Rehearing en banc “is not favored” and “ordinarily will be allowed only if” the petitioner satisfies one of four criteria. Fed. R. App. P. 40(c). Those criteria are (a) the Panel decision conflicts with a decision of the Court; (b) the Panel decision conflicts with a decision of the Supreme Court; (c) the Panel decision conflicts with an authoritative decision of another United States Court of appeals; or (d) the proceeding involves one or more questions of exceptional importance. Fed. R. App. P. 40(b)(2)(A)-(D). McDonald brings his petition under Fed. R. App. P. 40(b)(2)(B), arguing that the Panel’s opinion conflicts with the Supreme Court’s opinion in *AFP*. Appellant’s Pet. for Reh’g En Banc, ECF No. 69 (“Pet.”) at ii, 9. It does not. McDonald identifies no case—*AFP* or any others—where speculative and hypothetical allegations of injury are sufficient to confer standing, nor any case holding that disclosures of contributions on their own are sufficient for an Article III injury. Because the Panel decision did not conflict with any prior decisions of this Court or the Supreme Court, McDonald has failed to meet the standards for en banc review and his petition for rehearing should properly be denied.

I. MCDONALD DOES NOT SATISFY RULE 40(b)(2)(B) BECAUSE THE PANEL’S DECISION FOLLOWED CIRCUIT PRECEDENT AND DOES NOT CONFLICT WITH SUPREME COURT AUTHORITY

McDonald’s argument that en banc review here is appropriate under Fed. R. App. P. 40(b)(2)(B) because “the panel decision conflicts with a decision of the United Supreme Court” is logically flawed. Pet. at ii. *AFP* is inapposite to this case. As an initial matter, the Supreme Court decision in *AFP* was not decided on standing, and thus there is no standing analysis on which the Panel decision can conflict. Op. at 4-5 n.1. The Panel here engaged in a threshold injury-in-fact analysis, concluding that McDonald’s Complaint only speculates that the disclosure of his two prior conduit contributions would affect him, and therefore McDonald did not satisfy the imminent concrete injury requirement. *Id.* at 4-5 (citing *Lujan*, 504 U.S. at 564); *see also id.* at 6 (citing cases).

In *AFP*, standing was never challenged. It is a merits-based decision in a First Amendment challenge.³ In that case, the Supreme Court invalidated a state

³ Despite the petition appearing to suggest otherwise, McDonald’s case is not a decision on the merits of a constitutional question. The only issue that was presented in this appeal is whether McDonald has demonstrated an injury in fact for Article III standing. Yet, the petition incorrectly conflates an analysis of the type of scrutiny and balancing of interests applied in First Amendment cases on the merits, with threshold standing requirements. *See* Pet. at 6. The Panel made clear that it was applying Circuit and Supreme Court law in its standing determination, which *AFP* does not refute in any event. Op. at 4-5.

law requiring charitable organizations to disclose to the Attorney General’s Office the identity of major donors. 594 U.S. at 601. After the plaintiffs refused to comply, the Attorney General “threatened to suspend their registrations and fine their directors and officers.” *Id.* at 603. The Supreme Court held that this disclosure requirement imposed a burden on the donors’ associational rights and thus was “facially unconstitutional.” *Id.* at 618. As such, the Panel did not “refuse to follow” *AFP*. Pet. at 8. They are decisions rooted in different facts and law that do not present a conflict under Fed. R. App. P. 40(b)(2)(B).

To the extent that *AFP* explained the justification for the plaintiffs’ standing in that case, *AFP* does not contradict the panel’s conclusion under established Circuit precedent that a speculative claim of injury alone is sufficient to confer standing. Op. at 4-5. If anything, the detailed injuries alleged in *AFP* illustrate McDonald’s shortcomings here. The complaint in *AFP* detailed the plaintiffs’ injuries in five lengthy paragraphs. *See* Compl. ¶¶ 14-19, *AFP v. Harris*, No. 14-9448 (E.D. Cal. Dec. 9, 2014) (ECF 1) (alleging that “donors of the Foundation encounter concerted harassment, often with violent overtones [and that donors] faced unrelenting threats and attacks via social media, phone calls, email, and

protests outside their homes and places of business, due in part to their work with, or perceived ties to, the Foundation”); *Id.* ¶ 14.⁴

Likewise, in *NAACP v. Alabama ex. rel. Patterson*, the Supreme Court provided a First Amendment predicate for an exemption from disclosure when an organization would face a reasonable probability of threats, harassment, and reprisals of its members. 357 U.S. at 462. But McDonald’s unarticulated injury here is not comparable to the allegations in the complaint or record in *NAACP*, which included evidence of systematic violence and repression faced by the NAACP for years, including a “[y]ear-long series of bombings and shootings;” “major acts of violence,” “physical[] attack[s],” and “Ku Klux Klan activity, demonstrations, and cross burnings.” Brief for Petitioner, *NAACP*, 357 U.S. 449 (No. 91), 1957 WL 55387, at *16 n.12. The same is true for *Brown v. Socialist*

⁴ Similarly, just this term, the Supreme Court analyzed standing in a suit challenging a subpoena issued by the New Jersey attorney general demanding documents and donor information from a nonprofit. *See First Choice Women’s Res. Ctrs., Inc. v. Davenport*, No. 24-781 (“Slip Op.”) at 11 (Apr. 29, 2026), https://www.supremecourt.gov/opinions/25pdf/24-781_pok0.pdf. The Court relied on allegations in the complaint that members of the organization were threatened with contempt and declarations from donors that feared retaliation to find that the plaintiff had adequately alleged standing. *Id.* at 9 (citing *AFP*, 594 U.S. at 602-03). McDonald’s Complaint contained no such allegations. Furthermore, if McDonald’s theory that disclosure alone is enough was an accurate statement of law, there would have been no need for that detailed analysis by the Court. *See also* FEC’s Response to McDonald’s Rule 28(j) Notice of Supplemental Authority, *McDonald v. FEC*, No. 25-10830 (May 4, 2026).

Workers '74 Campaign Committee (Ohio), in which the Socialist Workers Party detailed “a past history of government harassment,” including “massive” FBI surveillance and a concerted effort to interfere with an organization’s political activities, and that “in the 12-month period before trial 22 SWP members . . . were fired because of their party membership.” 459 U.S. 87, 99 (1982). McDonald’s allegations are categorically different than the allegations in these cases.

NAACP and *Brown* on their own terms required allegations, at the pleading stage, showing a reasonable probability of threats, harassment, and reprisals. McDonald’s Complaint contains no such allegations and thus falls far short of meeting this standard. And even if he had made such a showing, that would allow McDonald or the entity to which he contributed to seek an exemption from the disclosure provision (of which McDonald never alleged that he sought), not its constitutional invalidation. *See NAACP*, 357 U.S. at 463 (finding “no right to absolute immunity” from having to produce information required under state law); *Brown*, 459 U.S. at 97 (explaining narrow carveout for minor political party with history of harassment by government officials). McDonald remains free to replead, but on the Complaint, as filed, merely assuming an injury is inadequate.⁵

⁵ The amicus brief similarly skips ahead, referencing several out-of-circuit cases that considered the merits of First Amendment claims, suggesting McDonald, too, must have an injury sufficient to establish standing. *See Br. for Amicus Curiae of People United for Privacy Found. in Supp. of Appellant’s Pet. for Reh’g En Banc*, Doc. 74-2, at 7-11 (filed Apr. 23, 2026). This appeal, in

Unable to demonstrate a conflict between the panel’s opinion and applicable Supreme Court precedent, McDonald again attempts to manufacture one by inserting his Complaint into the subset of First Amendment cases in which “chilling a plaintiff’s speech” (i.e., self-censorship) “is a constitutional harm adequate to satisfy the injury-in-fact requirement.” *See Pool v. City of Houston*, 978 F.3d 307, 311 (5th Cir. 2020), *aff’d*, 163 F.4th 284 (5th Cir. 2026); *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021). For these plaintiffs, the injury is the anticipated enforcement of the statute against *them* in the future, and therefore they bring a pre-enforcement lawsuit challenging the law. This type of challenge, as distinct from McDonald’s claim, involves specific warnings or threats to initiate proceedings against plaintiffs that are necessary for a pre-

contrast, solely consists of a ruling on the first prong of Article III standing. Furthermore, it is also well-established that the Court is not bound by a prior decision’s *sub silentio* treatment of a jurisdictional question. “The failure of the earlier panels to discuss jurisdiction does not lead to the conclusion that there was jurisdiction; “we are not bound by any *sub silentio* determinations there.” *Free Speech Coal., Inc. v. Paxton*, 95 F.4th 263, 275 (5th Cir. 2024) *aff’d*, 606 U.S. 461, (2025) (quoting *United States v. Garcia-Ruiz*, 546 F.3d 716, 718 n.1 (5th Cir. 2008)). It is axiomatic that “an opinion is not binding precedent on an issue ‘never squarely addressed’ even if the opinion ‘assumed’ one resolution of the issue.” *Gahagan v. United States Citizenship & Immigr. Servs.*, 911 F.3d 298, 302 (5th Cir. 2018) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 631, (1993)). The brief also cites several chilled-speech cases, but they either concern a party who was the regulated entity (where McDonald is not), or concern threats of enforcement that are not comparable to the allegations here.

enforcement challenge. For this reason, they are “best understood as an exception to the ordinary way standing works.” Op. at 5 n.1. As the Panel correctly noted, this Court has never held that the standing requirements “may be so relaxed as to permit a challenge to a law that does not even arguably proscribe any conduct of the plaintiff, and McDonald points us to no case where another court has done so.” *Id.* at 6; *see also id.* at 5 (“McDonald does not challenge a law that directly requires *him* to disclose anything”). McDonald is not the subject of the conduit reporting requirement; the conduits are.⁶ There is thus, no “threatened enforcement” against McDonald, and the cases he cites are inapposite to McDonald’s Complaint, which contained no such allegations.

⁶ The Fifth Circuit case McDonald references, *Houston Chronicle Publishing Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007), only illustrates McDonald’s deficiency here. (Pet. at 11.) In *Houston Chronicle*, the plaintiffs challenged a law that the city defendant affirmatively stated it would enforce against it. The plaintiffs, had “shown imminent future prosecution,” of the challenged law against them, and thus satisfied the injury-in-fact requirement. 488 F.3d at 619. Likewise in *National Rifle Association of America v. Magaw*, 132 F.3d 272, 289-90 (6th Cir. 1997) the Sixth Circuit considered the plaintiff’s fear of prosecution for violating the statute at issue. No such injury finding has or could be made here.

II. MCDONALD'S SPECULATIVE ALLEGATIONS FAIL TO MAKE A SHOWING OF INJURY IN FACT

McDonald's argument as to why extraordinary en banc reconsideration is necessary never cites to his Complaint. *See generally* Pet. at 5-13. But upon review of the actual language in the Complaint, it is easily revealed that McDonald's allegations of adverse consequences from the disclosures of his two past contributions are entirely speculative. He alleged speculative injuries concerning himself (hypothesizing that he might have to "explain or justify" his past contributions, or that they will result in "demands for similar donations"), and non-particularized injuries concerning a non-party (noting "ramifications" for a county political party). ROA.13-14. McDonald also offered hypothetical plans to contribute to campaigns at some unspecified point in the indefinite future, and non-particularized concerns from those hypothetical contributions. ROA.12-14. Indeed, "far from alleging past or impending economic, physical, and other concrete harm," McDonald's speculations are exactly the type of "some day" harm that is inadequate under well-established Supreme Court precedent. *Lujan*, 504 U.S. at 564; *see also* Op. at 4-6. Furthermore, the substance of his alleged future harm is insufficient in any event. McDonald failed to explain how any of these possible outcomes, which essentially amount to amorphous discomfort with his own contributions, are "concrete" to constitute harm for Article III standing

purposes. Instead of establishing a non-speculative basis for standing, McDonald devotes much of his petition to relitigating the “chilled-speech” argument that, as explained above, does not cure the injury-in-fact defect that has pervaded this case.

The Panel rightly rejected McDonald’s related arguments applying the chilled-speech line of First Amendment cases and a relaxed standard for standing, Op. at 5-6. The mere claim of subjective “chill” is not and has never been sufficient to establish an injury in-fact, nor does McDonald provide a case with such a holding. *See Laird v. Tatum*, 408 U.S. 1, 12-14 (1972). The Panel correctly denied McDonald’s claims of future injury as a subjective chill insufficient to confer standing. *Id.* at 6-7. McDonald cannot establish standing simply by claiming that he experienced a “chilling effect” that resulted from a regulation that does not proscribe any action on his part. *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 418-19 (2013); *Speech First, Inc. v. Fenves*, 769 F.3d 319, 332 (5th Cir. 2020); Op. at 5-6.

McDonald’s arguments about a relaxed showing of standing, about injury *per se*, all in the context of a challenge to a statute that does not regulate him, do not only lack credible support from their proponent, but also are readily refuted by Supreme Court and Fifth Circuit precedent. This critical point underscores that reconsideration of the Panel’s decision is not appropriate in this case.

CONCLUSION

Appellant failed to allege a cognizable Article III injury in fact, and the Panel's opinion does not conflict with Supreme Court or Circuit precedent. Accordingly, this case is not the type of extraordinary matter warranting en banc review. The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

I hereby certify, on this 4th day of May 2026, that:

1. This document complies with the type-volume limitation of Rule 40(d)(3) because, excluding the parts of the document exempted by Fed. R. App. 32(f) and Circuit Rule 32(e), this document contains 3,878 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word in a 14-point Times New Roman font.

/s/ Michael D. Contino
Michael D. Contino

CERTIFICATE OF SERVICE

I hereby certify that on this 4th of May, 2026, I electronically filed the Federal Election Commission's Response to Petition for Rehearing En Banc electronically using the Court's CM/ECF system, which thereby electronically served counsel of record.

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