ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 17, 2018

NO. 18-5099

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE 1 AND JOHN DOE 2,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from a Final Judgment of the
U.S. District Court for the District of Columbia,
(Honorable Amy Berman Jackson)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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GLOSSARY

APA	Administrative Procedure Act
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FOIA	Freedom of Information Act
MUR	Matter Under Review
OGC	Office of the General Counsel of the Federal Election Commission
PAC	Political Action Committee

INTRODUCTION AND SUMMARY OF THE ARGUMENT

If the Federal Election Commission is right, it can brush with the taint of illegality any person it deems – in its unreviewable discretion – "integral" to its decision-making regarding whether ***someone else*** violated the law. Opp. 16. It can do so by bypassing the basic processes – including notice and a chance to be heard – normally accorded those accused of civil and criminal violations. It can thereby name and shame that person for serious offenses (here, money laundering) without ever bothering to make a finding that the person actually engaged in wrongdoing.

That cannot be the law. The FEC's Opposition can only maintain that it is by ignoring or misconstruing the regulatory, statutory, and constitutional provisions that constrain the Commission's actions and, in this case, prohibit its disclosure of Plaintiffs' names. The Federal Election Campaign Act ("FECA"), 52 U.S.C. § 30101 *et seq*., and its implementing regulations, the FEC regulations and implementing policy, and the First Amendment each independently prohibit disclosure.

First, FECA was enacted against a backdrop presumption that investigatory materials are not disclosed, yet Congress authorized their disclosure in *only* two circumstances, neither present here. The FEC's regulations authorizing disclosure make clear that they apply only when formal adversarial proceedings are terminated by majority vote, and the Commissioners' contemporaneous statements make plain that they voted not to even *commence* proceedings. FEC regulations only authorize

disclosing "the basis" for Commission actions; that Plaintiffs' names were in no way "the basis" for the FEC's actions is confirmed by the fact that the conciliation agreement (which "set forth the basis of the Commission's final determination in MUR 6920," Opp. 35) never mentions Plaintiffs' names.

Second, the FEC has a longstanding policy of not releasing investigatory materials that are exempt from FOIA, consistent with Commission rules requiring nondisclosure. The FEC's unreasoned departure from those rules and its historic practice is the very definition of action that is arbitrary and capricious or contrary to law.

Third, Plaintiffs have a compelling interest in nondisclosure of FEC investigative files that allegedly document political associations, given that the Commission never concluded that Plaintiffs were the source of the funds or made a reportable "contribution" under FECA, and because the disclosure implicates them in unproven allegations that they are money launderers who "got away with" violating the law. JA215.

This Court should reverse.

ARGUMENT

I. Disclosure of Plaintiffs' Identities Is Arbitrary and Capricious and Contrary to FECA.

A. Disclosure Conflicts with FECA's Plain Text.

The FEC contends that Congress "explicitly left a gap for the agency to fill," Opp. 20 (quoting *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984)), arguing that the absence of an explicit prohibition on disclosing investigative information represents "Congressional silence in FECA" about prohibiting disclosures, *id.* at 18, leaving it within the FEC's discretion to decide what information to publish and what to keep confidential. The Commission argues that conclusion is supported by FECA provisions "specifically barring" other disclosures, Opp. 20, together with what it characterizes as Congress's "general philosophy of full agency disclosure" embodied in *another* piece of legislation entirely – the Freedom of Information Act, *see* Opp. 19 (quoting *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989)). That is incorrect. Congress has spoken clearly and directly on the subject of disclosure of investigative information by authorizing only two kinds of disclosures and leaving no gap for the FEC to fill. Br. 32.

The two provisions the FEC cites fall far short of supporting the conclusion that "when Congress intended to prohibit the FEC from disclosing" information, it "did so explicitly." Opp. 19. First, § 30109(a)(4)(B)(i), for example, is simply a

limitation on the disclosure *explicitly authorized* by its neighboring subsection, § 30109(a)(4)(B)(ii), which allows the FEC to disclose two – and only two – items: (1) "any conciliation agreement signed by both the Commission and the respondent" and (2) FEC "determination[s] that a person has not violated [election laws]." Subsection (i) simply underscores the narrowness of that authorization, providing that "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt . . . may be made public . . . without the written consent of the respondent." That limitation, pertaining to a neighboring disclosure provision, falls short of suggesting Congress intended to allow all other disclosures.

Nor does § 30109(a)(12)(A) support the FEC's argument. That provision does not just "prohibit the FEC from disclosing certain information." Opp. 19. Rather, it prohibits "*any person*" from making public "[a]ny notification or investigation made under this section" without the permission of the person who is the subject of the notification or investigation. 52 U.S.C. § 30109(a)(12)(A) (emphasis added). The section's narrow focus thus does not support the proposition that Congress specified all instances in which the FEC would be prohibited from making disclosures. While § 30109(a)(12)(A) prohibits the Commission from making disclosures in the investigatory context, that is understandable to avoid giving rise by negative implication to the conclusion that such disclosures are permitted.

Nor can it be inferred from FOIA that Congress intended investigatory materials to be freely disclosable. Congress broadly exempted from disclosure "records or information compiled for law enforcement purposes" whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). It has long been understood that "disclosure of the *identities* of private citizens mentioned in law enforcement files constitutes an unwarranted invasion of privacy and is thus exempt" from disclosure. *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). Thus, far from considering the statute against a "philosophy of full agency disclosure," Opp. 19, the more appropriate background rule is that FOIA generally *does not* authorize disclosure of investigative material. The FEC fails to acknowledge that "disclosure of records regarding private citizens" compiled for law-enforcement investigations, "identifiable by name, is not what the framers of the FOIA had in mind." *U.S. Dep't of Justice v. Reporters Comm.*, 489 U.S. 749, 765 (1989). "It is reasonable to presume that Congress legislated with an understanding of this . . . point of view." *Id.* at 767. Nothing in the text of FECA – which authorizes disclosure in only two circumstances, irrelevant here – reflects an intent to depart from that background understanding of nondisclosure. *See* Br. 34 (collecting authorities). Courts cannot "*presume* a delegation of power absent an

express *withholding* of power." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc).

The FEC's contention that "this Court confirmed in *AFL-CIO [v. FEC]* that the FEC may make disclosures of exactly the type at issue here," Opp. 20, does not survive even cursory review. As explained in Plaintiffs' brief, Br. 34 n.8, that passage addressed a *First Amendment* argument and simply explained that "deterring future violations and promoting Commission accountability" were governmental interests that "may well justify releasing more information than" the disclosures authorized by § 30109(a)(4)(B). *AFL-CIO v. FEC*, 333 F.3d 168, 179 (D.C. Cir. 2003). The decision invalidated an FEC regulation authorizing broad disclosure of investigative materials, *id.* at 170; it did not address, or decide, whether the FEC has authority to read the statute to permit more disclosure than is specifically authorized.

The FEC further contends that disclosure of Plaintiffs' names is authorized by FECA's language providing that "[i]f the Commission makes a determination that a person has not violated this Act . . . the Commission shall make public such determination." 52 U.S.C. § 30109(a)(4)(B)(ii). The FEC contends that language is ambiguous, encompassing both situations in which the Commission simply fails to act, as well as entirely different agency actions, such as dismissing "case[s] for a variety of reasons, such as prosecutorial discretion." Opp. 23-24.

There is no basis for concluding that the phrase "The *Commission makes a determination*" encompasses mere failures to act. As the District Court explained, "the record reflects that the Commission did not make any 'determination' that plaintiffs had not violated [FECA]; it simply did not vote to find reason to believe that they had." JA266-67. "[W]ords of statutes or regulations must be given their ordinary, contemporary, common meaning." *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009) (internal quotation marks and citation omitted). In the legal context, a "determination" is "[t]he act of deciding something officially; esp. a final decision by . . . [an] administrative agency." *Black's Law Dictionary* 544 (10th ed. 2014); *Webster's Third New Int'l Dictionary* 616 (3d ed. 1971) ("resolving of a question by argument or reasoning"). Tellingly, *every other* appearance of a form of the word "determination" in § 30109 involves formal Commission action – typically by majority vote.[1] Indeed, the immediately preceding *subparagraph* uses the word "determination" to mean a Commission decision "by an affirmative vote of 4 of its members." 52 U.S.C. § 30109(a)(4)(A)(ii), (i). The established "presumption that a given term is used to mean the same thing throughout a statute" is especially compelling where, as here, the word is given that meaning in the very same *subsection*. *Cf. Sherley v. Sebelius*, 644 F.3d 388, 402 (D.C. Cir. 2011) (Henderson,

[1] *See* 52 U.S.C. § 30109(a)(2); § 30109(a)(4)(A)(i); § 30109(a)(4)(A)(ii); § 30109(a)(4)(C)(i)(II); § 30109(a)(4)(C)(ii)-(iii); § 30109(a)(5)(C); § 30109(a)(6)(C); § 30109(a)(11).

J., dissenting) (presumption "at its most vigorous when a term is repeated within a given sentence"). That conclusion is reinforced by the fact the statute specifies it is "the Commission" that acts, and the verb "makes" suggests purposeful, concerted action.

While the FEC argues that a "determination" encompasses deadlocks, *see* Opp. 23-24, its authorities do not hold that failure to decide constitutes a "determination" under § 30109, much less under its disclosure provisions. Instead, they stand for the very different proposition that a Commission deadlock is subject to judicial review.[2] Those cases *undercut* the FEC's argument. Rather than relying on any ambiguity in the word "determination," those cases relied on a specific provision authorizing judicial review for those aggrieved by an order "*dismissing a complaint . . . or by a failure of the Commission to act.*" *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016) (quoting 52 U.S.C. § 30109(a)(8)(A)); *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) (same).

More outlandish still is the FEC's argument, Opp. 24, that § 30109(a)(4)(B)(ii) authorizes the Commission to disclose a host of other

[2] Indeed, this Court has emphasized the narrowness of its decisions, writing that FECA "clearly requires that for any *official* Commission decision there must be at least a 4-2 majority vote." *Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988).

determinations and case dispositions having nothing to do with whether a "person has not violated" the law. The Commission's argument is devoid of reasoning; it simply notes that "[t]he Commission may not proceed for a variety of reasons" besides determining that a person did not violate the law, and therefore posits that the law *must* authorize such disclosures. *Id.* But the FEC identifies nothing ambiguous about the phrase "a person has not violated [federal election law]." And "an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

Put simply, FECA's use of "determination" is not ambiguous and does not even colorably encompass the FEC's *failure* to find Plaintiffs violated FECA. This Court should not countenance the FEC's attempts to manufacture ambiguity, as "*Chevron* does not suggest that courts are to search statutes, overturning linguistic rocks and brush, in the hope of discovering some arguable ambiguity . . . ." *Abbott Labs. v. Young*, 920 F.2d 984, 994–95 (D.C. Cir. 1990) (Edwards, J., dissenting). To the contrary, "it is only when a court cannot discern" congressional intent using ordinary tools of statutory construction that "the Chevron inquiry moves into its second stage." *Strickland v. Comm'r, Maine Dep't of Human Servs.*, 48 F.3d 12, 17 (1st Cir. 1995).

B. The FEC's Regulations Do Not Authorize Disclosure.

Plaintiffs' opening brief identified "at least three reasons" – each independent – that "no reasonable reading of § 111.20(a) could authorize the disclosure of Plaintiffs' names." Br. 36. Although the FEC offers a welter of arguments, none survives scrutiny.

1. As Plaintiffs' argued, § 111.20(a) only applies when the "proceedings" the Commission "otherwise terminates" are formal adversarial proceedings, and the regulation does not authorize disclosure because the FEC never *initiated* such proceedings. *See* Br. 36. The FEC argues it actually initiated such proceedings, because Plaintiffs' case was an internally-generated matter which, it claims, did not require adversary process before a reason-to-believe vote, and the inconclusive vote terminated Plaintiffs' "proceedings." Opp. 37-38. The FEC's argument is hard to square with the regulations themselves, which provide that "internally-generated" matters are contemplated for "information ascertained by the Commission *in the normal course of carrying out its supervisory responsibilities*," Opp. 37 (quoting 11 C.F.R. § 111.3(a)) (emphasis added), and this information was not obtained in that way (i.e., by examining regularly filed reports), but through investigation of a complaint-generated MUR. The Office of General Counsel's ("OGC") own enforcement manual explicitly says that if parties "are not named in the complaint or submission, but other sources make it apparent that they should be named as

respondents, [OGC] will send a pre-RTB letter that encloses the complaint or submission and details the respondent's potential liability." OGC Enforcement Manual 32 § 3.2.3 (June 2013).

But the Court need not take Plaintiffs' word for it that the FEC's current position is a post-hoc rationalization; it simply has to review how *the Commissioners* characterized matters. Commissioners Hunter and Goodman make clear that the Commission did not contemplate nonadversarial proceedings; their contemporaneous Statement of Reasons makes clear that the Commission "voted to proceed to enforce the Act against . . . ACU, Now or Never PAC, and GI, LLC – but" because of the inconclusive vote did not "add the fourth organization, [John Doe 2], as a Respondent." JA207 [SOR1] (emphasis added). The FEC is simply wrong that Plaintiffs were already subject to "proceedings." Had the Commissioners commenced proceedings, the Commission would have "provided [a John Doe] notice of the Complaint and notice that it had been substituted as a named Respondent, and afforded . . . an opportunity to respond," including a statutory 15-day-period to prepare a response to the General Counsel's recommendation, and thirty days for conciliation efforts. *Id.* at 209 & n.10; *id.* at 210. The fact Plaintiffs never received that process represents compelling proof the inconclusive vote kept the Commission from *ever commencing* "proceedings" against Plaintiffs as part of MUR 6920. This understanding is confirmed by the fact the FEC never "advise[d]

. . . [the Does] by letter" of the vote, as would be required had the Commission actually "terminate[d] its proceedings." 11 C.F.R. § 111.9(b); *see* Br. 38.

2. Because each of the other actions whose disclosure § 111.20(a) authorizes all require the affirmative vote of at least four Commissioners, its "otherwise terminates" language can only be read to apply to situations where the Commission acts by majority vote, not when it fails to proceed through inaction. That reading is confirmed by a neighboring provision addressing notice requirements that applies when "the Commission finds no probable cause to believe or otherwise *orders a termination* of Commission proceedings." 11 C.F.R. § 111.17(b) (emphasis added). The FEC barely addresses the issue, saying in a footnote only that this "reasoning has been squarely rejected by this Court." Opp. 38 n.9. This Court has done nothing of the sort; as noted above, the FEC relies on cases addressing whether deadlocked matters are subject to judicial review. Reading the disclosure provision not to extend to identifying information about those who are the subject of inconclusive votes protects the privacy interests of those investigated for violations who are neither found to have committed a violation nor have been affirmatively cleared of wrongdoing; for those charged or cleared, there is both a strong interest in letting the public know about the Commission's actions and a reduced legitimate expectation of privacy in the information. But persons who are the subject of inconclusive votes have a justifiable interest in nondisclosure of

information implicating them in an investigation when the Commission has not concluded they have done anything wrong, and the Commission has a diminished accountability interest when it has not acted. While those aggrieved can sue to challenge inaction, under the Commission's own regulations, they are not entitled to release of the names of those about whom the Commission has reached no conclusions.

3. There is no basis for reading § 111.20 to authorize disclosure of Plaintiffs' *names* in connection with MUR 6920. As noted in Plaintiffs' brief, Br. 39, § 111.20(a) authorizes the Commission, if it finds no reason to believe or no probable cause or "otherwise terminates its proceedings," only to "make public such action and the basis therefor." 11 C.F.R. § 111.20(a). The FEC makes little effort to argue that the regulatory text itself permits disclosing the Plaintiffs' identities, and never attempts to establish that Plaintiffs' names were part of "the basis" of the FEC's action in MUR 6920. Indeed, the FEC states that "the conciliation agreement set forth the basis of the Commission's final determination in MUR 6920." Opp. 35. Because it is undisputed that plaintiffs were "not named in the conciliation agreement," *id.* at 36, the FEC can hardly maintain that Plaintiffs' names were "the basis" for the FEC's action.

The best the FEC can manage is stating that "disclosure of these individuals' roles . . . furthers the public's knowledge of, and ability to assess the agency's actions

taken, on MUR 6920," *id.* at 35, because Plaintiffs allegedly played a role "in the factual circumstances" underlying MUR 6920, *id.* at 36. Because that expansive interpretation far exceeds § 111.20(a)'s targeted provision for disclosure of the agency's termination of proceedings and "basis therefor," that "atextual interpretation[] . . . deserve[s] no judicial deference." *Huerta v. Ducote*, 792 F.3d 144, 154 (D.C. Cir. 2015); *Kaiser Found. Hosps. v. Sebelius*, 708 F.3d 226, 231 (D.C. Cir. 2013) (similar).

II. Disclosure of Plaintiffs' Identities Is Prohibited Under the FEC's FOIA Regulations and Policy.

Disclosure of Plaintiffs' identities also would violate the Administrative Procedure Act ("APA") (Br. 20-30). Because the FEC has adopted FOIA exemptions as mandatory bars to disclosure in its regulations and Disclosure Policy, because the Commission has historically withheld FOIA-exempt investigative materials from disclosure, and because *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991), determined that the balancing of public and private interests always favors non-disclosure, the disclosure of Plaintiffs' identities violates the APA.

A. Plaintiffs Properly State a "Reverse-FOIA" Claim Under the APA.

The FEC first observes, Opp. 38-40, that under *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), FOIA exemptions are not themselves mandatory bars to disclosure, *id.* at 293, and allow agencies to voluntarily withhold materials from disclosure, *id.*

at 292-94. While true, that is irrelevant. Plaintiffs are not pursuing a freestanding claim under FOIA, but a "claim under the APA for agency action that is arbitrary and capricious or contrary to law." Br. 23. *Chrysler* reaffirms an agency "decision to disclose [information] is reviewable agency action" under the APA. 441 U.S. at 318. As plaintiffs have explained, the FEC's action is "arbitrary and capricious or contrary to law" because the Commission's action contravenes its own regulations, inexplicably departs from historical practice, and strikes a balance that conflicts with this Court's precedents.

1. FEC Regulations Preclude Disclosure of FOIA-Exempt Materials.

The FEC regulation governing "[a]vailability of records," 11 C.F.R. § 5.4, expressly provides for disclosure of "*non-exempt* . . . investigatory materials," *id.* § 5.4(a)(4) (emphasis added). This regulation, on its face, therefore contemplates non-disclosure of *exempt* investigatory materials. *Accord* 11 C.F.R. § 4.5(a)(7)(iii) (no request shall be denied under FOIA unless record contains, *inter alia*, information subject to Exemption (7)(C)). The FEC's regulations establish that the FEC will not disclose information exempted under FOIA. Because the FEC's action "fails to comply with its own regulations," it must "be set aside as arbitrary and capricious." *Nat'l Envtl. Dev. Ass'ns' Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014); *AT&T v. FCC*, 582 F.3d 490, 495 n.2 (3d Cir. 2009) (recognizing agency can make FOIA exemption mandatory through

regulation, which makes disclosure of FOIA-exempt materials APA violation), *rev'd on other grounds*, 562 U.S. 397 (2011).

The FEC's efforts to dismiss the impact of its own regulations, Opp. 41, fail. First, it asserts that § 5.4(a)(4) is entitled to no weight because this Court found the agency's implementation of it insufficiently protective of First Amendment interests in *AFL-CIO*, 333 F.3d at 179. The regulation, however, has not been repealed. And it cannot be that *AFL-CIO*'s directive that the FEC *increase* protections against unwarranted disclosures *reduced* protections found on the face of the FEC's regulations. Lastly, while the FEC points to the current disclosure policy adopted in response to *AFL-CIO*, that very policy "does not alter any existing regulation or policy requiring or permitting the Commission to redact documents." Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,704 (Aug. 2, 2016).

Second, the FEC claims § 5.4(a)(4) protects only "non-exempt 52 U.S.C. § 30109 investigatory materials," Opp. 41, but does not use the "non-exempt" modifier for "Opinions of Commissioners" or "General Counsel Reports." But while the FEC asserts FOIA has a "mandatory disclosure requirement" for opinions, Opp. 43, it concedes that FOIA permits redaction of "identifying details" from opinions to prevent an "unwarranted invasion of personal privacy," Opp. 44 (quoting 5 U.S.C. § 552(a)(2)) – which this Court has held results "categorically" from disclosing

identifying information in law-enforcement files. *See Nation Magazine*, 71 F.3d at 896 ("*SafeCard* directs . . . redact[ion]"). Moreover, the FEC identifies no basis for concluding that identifying information ceases to be "52 U.S.C. § 30109 investigatory material[]" the minute it is incorporated in a General Counsel report or Commissioner statement. Otherwise, protections against disclosure of exempted materials would be easily circumvented.

2. Disclosure Here Would Be An Unexplained Break from Historic Practice.

The FEC's Disclosure Policy confirms that its historic – and current – practice is *not* to disclose FOIA-exempted materials. The Policy, which the FEC concedes "govern[s]" its affirmative disclosure obligations, Opp. 41, makes clear the Commission's consistent historical practice has been to disclose certain records related to a case "minus those materials exempt from disclosure under the FECA or under [FOIA]." 81 Fed. Reg. at 50,702 (citing 11 C.F.R. § 5.4(a)(4)). The FEC took pains to explain that the Policy in no way "alter[ed] any existing regulation or policy requiring or permitting the Commission to redact documents, including those covered by this policy, to comply with," *inter alia*, FOIA. *Id.* at 50,704. Though Plaintiffs highlighted that the FEC's proposed disclosure inexplicably departs from that longstanding practice, *see* Br. 23, the FEC fails to justify its departure. "'[G]loss[ing] over or swerv[ing] from prior precedents without discussion,'" is "the

very essence of unreasoned and arbitrary decisionmaking." *W. Deptford Energy, LLC v. FERC.*, 766 F.3d 10, 22 (D.C. Cir. 2014) (alterations in original).

B. The FEC's Planned Disclosure Is Manifestly Unreasonable.

The FEC's disclosure of Plaintiffs' identities would violate the APA for the additional reason that the FEC cannot provide any "coherent explanation for [this] decision" and is therefore "arbitrary and capricious for want of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 69 (D.C. Cir. 2012). The Disclosure Policy, as mandated by *AFL-CIO*, requires it to balance "consideration of the Commission's interest in promoting its own accountability and in deterring future violations" against "consideration of the respondent's interest in the privacy of association and belief guaranteed by the First Amendment." 81 Fed. Reg. at 50,703.

However, where, as here, the information to be disclosed is the identity of persons named in FEC enforcement files, this Court has *already decided* in cases such as *SafeCard* that the balance conclusively tips in favor of the "substantial" privacy interest of targets and witnesses in law enforcement investigations, while the Commission's interest in disclosure is "insubstantial"; accordingly, disclosure is "categorical[ly]" barred absent "compelling evidence" (which does not exist here) that disclosure would confirm or refute allegations of illegal agency activity. *SafeCard*, 926 F.2d at 1205-06. This assessment applies no less to the FEC's

Disclosure Policy, which expressly adopts and adheres to FOIA principles, than to determinations under FOIA itself.

The FEC's "conclusory [and] unsupported" statements fall far short of what is necessary to support the FEC's policy. *Jurewicz v. Dep't of Agric.*, 741 F.3d 1326, 1331 (D.C. Cir. 2014). To begin with, the FEC overstates its interests, repeating *ad nauseum* that disclosure supports interests in "accountability and deterrence." Opp. 53; *accord id.* at 55, 56, 57. But the Commission offers no explanation of the deterrence interest served when it never found Plaintiffs engaged in any wrongdoing. *See* Br. 54 (noting *AFL-CIO*, 333 F.3d at 178, questioned "how releasing investigatory files will deter future violations in cases where . . . the respondents have been cleared of wrongdoing").

The FEC's stated "accountability" interest is wildly overbroad; its claim that "the public must have access to the identities of persons" "to confirm the FEC's nonpartisan enforcement of FECA," Opp. 29, would justify disclosing the name of *every person* even tangentially involved in any investigation, to confirm that the Commissioners did not favor them in enforcement decisions.[3] In the past, this Court has not permitted those seeking disclosure of identifying information to invoke

[3] To the extent the FEC asserts that its judicial review provision supports its accountability interest, Opp. 27-29, that interest is not applicable here as the FEC concedes that such review is not available with respect to Plaintiffs. Opp. 27 n.6; *see Citizens for Responsibility & Ethics in Wash. v. FEC*, __ F.3d __, No. 17-5049, 2018 WL 2993249, at *5 (D.C. Cir. June 15, 2018).

accountability interests in the absence of compelling evidence to assume improper favoritism. *SafeCard*, 926 F.3d at 1206 (exception to categorical rule where disclosure necessary to address "compelling evidence" of illegal activity). The vast majority of the cases the FEC cites, Opp. at 30-31, involve the very different situation where individuals affirmatively attempted to influence government action, rather than simply being the subjects of investigation. The FEC's own authorities say that the privacy interests of those who "voluntarily choose" to interface with the government "differ[] substantially from" those who became involved "in law enforcement investigations due to forces beyond their control." *Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001). In the sole case the FEC cites involving the subject of an investigation, the subject *himself* had already publicly disclosed the fact of the investigation, and this Court nevertheless held that it was appropriate to redact "the names and identifying information of private citizens mentioned in law enforcement files." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1091-92, 1094 (D.C. Cir. 2014).

The Commission's attempt to minimize Plaintiffs' privacy interests is likewise wanting, foreclosed by *SafeCard*'s unambiguous determination that disclosure of the *very information at issue here* – identifying information in law enforcement files – implicates "substantial" privacy interests for both the Trust and Trustee. The FEC's principal response with respect to the Trust is not to dispute the

legal validity of its arguments, but to state that it has not introduced evidence to demonstrate "that disclosing John Doe 2's name would cause 'a substantial risk of identifying its trustee.'" Opp. 46. But given how utterly dismissive the FEC and District Court were of the idea that disclosure of a Trust's name could implicate *any* privacy interests, which precluded Plaintiffs from presenting facts before the Commission and District Court as to this connection, Plaintiffs should be allowed the opportunity to present evidence under a legal rule that recognizes the privacy interests of persons who might be implicated in disclosing the Trust's name. *Cf. NLRB v. Local Union No. 638*, 429 U.S. 507, 522 n.9 (1977) ("When an administrative agency has made an error of law, the duty of the Court is to correct the error of law . . . , and, after doing so to remand the case to the (agency) so as to afford it the opportunity of examining the evidence and finding the facts . . . ." (internal quotation marks omitted)).

More baseless still is the FEC's effort to characterize the Trustee's identity – quintessential personal information – as insubstantial because it is mere "[i]nformation relating to business judgments and relationships." Opp. 47. It is nothing of the sort. Information revealing that a person has been identified in a law enforcement investigation does not become less sensitive or damaging simply because the individual was acting as the agent of another person (or company). Indeed, the very case the Commission relies on, *Washington Post Co. v. United*

States Department of Justice, in discussing *the privacy interests of company employees*, wrote that "the protection accorded reputation would generally shield material when disclosure would show that an individual was the target of a law enforcement investigation." 863 F.2d 96, 101 (D.C. Cir. 1988). The notion that the Trustee's privacy interests are diminished because he was acting as the agent for another, Opp. 48-49, if anything, *supports* the conclusion that the FEC's interests in discussing a mere "agent" could fully be met by referring to Doe 1 as "the Trustee" or pseudonymously.

III. The FEC's Insistence on Naming and Shaming Alleged Participants in the Political Process Offends the First Amendment.

The District Court's order must be reversed because the First Amendment interest Plaintiffs assert is no different than the one this Court recognized in *AFL-CIO*: the right not to be identified in connection with the disclosure of the FEC's file involving its investigation into protected First Amendment activity where there has been no finding of any FECA violation. That privacy interest is especially acute where, as here, an FEC Commissioner has publicly alleged Plaintiffs engaged in unlawful conduct, specifically that "these guys laundered their millions thru 4 orgs" and "got away with [it]." JA215. The FEC's intended disclosure of Plaintiffs' identities not only exceeds its lawful authority; its efforts to name and shame Plaintiffs in connection with alleged political activity contravene vital First Amendment interests. Like the District Court, the FEC tries to portray these

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fundamental interests as a supposed "right []to make an anonymous political contribution."[4] Opp. 51. Plaintiffs have never asserted any such right.[5] Because the FEC both failed to determine that Plaintiffs were the "original source" of the funds, *and* failed to determine whether any such transfer constituted a reportable event, Plaintiffs are situated no differently than the challengers in *AFL-CIO*. This Court recognized in *AFL-CIO* that the First Amendment is implicated when the FEC seeks to identify persons and disclose alleged political activity, because such disclosure

[4] Amicus makes the same error. Much of amicus's brief merely rehashes points already raised by the FEC. *But see* Cir. R. 29(a). Amicus's only other point stems from a faulty legal premise: the entity that transferred funds to Government Integrity, LLC was required to be reported to the FEC, even if that entity was a mere conduit. The sole authority amicus cites for this proposition is the instructions to FEC Form 3X. Amicus Br. 4 n.2. Even if the instructions for a form can create legal obligations in addition to those imposed by statute and regulation (and amicus cites no authority supporting this dubious proposition), the portion of the form amicus cites pertains to "earmarked contributions." Tellingly, amicus fails to cite the section of FECA and the regulation that govern earmarking, because these provisions are clear that earmarking rules only apply to contributions to authorized candidate committees, not Super PACs. *See* 52 U.S.C. § 30116(a)(8); 11 C.F.R. § 110.6; First General Counsel's Report at 6 n.20, MUR 6930 (Michel) (Nov. 19, 2015), https://tinyurl.com/y997rc9a (recognizing that "neither the earmarking provision of the Act nor the Commission's implementing regulation reaches contributions made to independent-expenditure-only political committees," *i.e.*, Super PACs). Accordingly, there is no provision in FECA or the FEC's regulations that requires reporting a mere conduit, and the entire legal premise of amicus's argument (which notably does not apply to the Trustee) is baseless.

[5] [redacted]

chills the political participation of those named, who were not found to have committed any FECA violation. 333 F.3d at 176-78. This is precisely the right at issue here: the FEC seeks to disclose Plaintiffs' identities in order to reveal their alleged involvement in what the FEC acknowledges was political activity,[6] without any finding that FECA would have required Plaintiffs to be identified or that Plaintiffs had violated the law. Thus, as in *AFL-CIO*, the disclosure here implicates Plaintiffs' right to privacy of political association and belief, which is protected by the First Amendment.

The FEC is simply incorrect in apparently assuming that the First Amendment only protects disclosure where "political giving is not at issue." Opp. 51. Political giving is at issue. The entire point of the FEC's intended disclosure is so it can make public the allegation that Plaintiffs were involved or participated in a contribution, even though it has not found that Plaintiffs themselves were "contributors" within the meaning of FECA.

Plaintiffs do not assert some "generalized constitutional right to informational privacy." Opp. 51. Plaintiffs invoke the very same "privacy of association and belief" interest that was at issue in *AFL-CIO*. And far from being "tenuous at best," *id.* at 50, the Supreme Court recognized in *Buckley v. Valeo* that "compelled

[6] Because Plaintiffs' alleged conduct is unquestionably protected by the First Amendment, *Paul v. Davis*, 424 U.S. 693 (1976) – a case involving disclosure of unprotected activity (shoplifting) – is entirely inapposite.

disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. 1, 64 (1976) (per curiam). The Supreme Court articulated this principle with respect to protected political activity generally, including contributions and expenditures. *Id.*; *cf. FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) ("The subject matter which the FEC oversees . . . relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.") (emphasis omitted); *Albright v. U.S.*, 631 F.2d 915, 919 (D.C. Cir. 1980) ("the penumbra of privacy can be invaded, under certain circumstances, by the mere inquiry of government into an individual's exercise of First Amendment rights"); *Jones v. Unknown Agents of FEC*, 613 F.2d 864, 874 (D.C. Cir. 1979) ("compelled disclosure of an individual's affiliation with an organization may, standing alone, constitute a serious intrusion on the first amendment right to privacy of association"). As these cases recognize, *Buckley* and its progeny stand for the proposition that intruding upon the core interest in privacy of political belief and association triggers exacting First Amendment scrutiny.[7] *See* Br. 46; *accord* Opp. 50.

[7] Plaintiffs need not demonstrate harassment from disclosure of their identities in order to require the FEC to articulate a sufficient justification to overcome their First Amendment rights any more than the persons in *AFL-CIO* did. The chilling effect on political participation resulting from the FEC's compelled disclosure is sufficient.

The parties agree: the FEC must demonstrate a "'substantial relation' between" its accountability and deterrence interests "and the information . . . to be disclosed." *Buckley*, 424 U.S. at 64; *see* Opp. 50 (citing *Doe v. Reed*, 561 U.S. 186, 196 (2010)). As discussed above, disclosing Plaintiffs' names does nothing to further the FEC's interest in its accountability. Nor can it advance any legitimate interest in deterring conduct the FEC never found to be wrongful.

The FEC argues that disclosure is necessary to "provid[e] the regulated community with a full picture of the actions that led to" the conciliation agreement in MUR 6920. Opp. 56. However, the Commission has never explained why disclosure of Plaintiffs' *identities* is necessary to provide "a complete picture of the actions and relationships" in MUR 6920, *id.*, when simply identifying Plaintiffs as "the Trust" and "Trustee" provides "a full picture of the actions" and gives the regulated community the information it needs to conform its conduct to FECA's requirements.[8] In the absence of any such relation, let alone a *substantial* relation, the FEC's asserted deterrence interest is plainly insufficient.

The FEC tries to minimize Plaintiffs' interest in nondisclosure by downplaying the risk of harassment, blandly describing the Commissioner's views

[8] For this reason, the FEC cannot rely on its assertion that its Disclosure Policy requires disclosure of *documents* that played a critical role in the resolution of a matter. Opp. 50. Plaintiffs have never asserted that the FEC is required to withhold any documents, only that, as required by the Disclosure Policy, it redact them to accommodate Plaintiffs' First Amendment rights.

as stating "that appellants appeared to have violated FECA." Opp. 54. It is telling that the FEC's refuses to acknowledge the inflammatory rhetoric the Commissioner actually used and sent to her many thousands of followers, who redistributed it more than seven hundred times: Plaintiffs not only "laundered their millions thru 4 orgs" and "got away with [it]," but "STILL [are] suing @FEC to censor our reports." JA215. The FEC does not deny that, in the absence of any finding of wrongdoing, Plaintiffs have been accused by a government official responsible for regulating political activity of being money launderers who got away with violating the law. The FEC now seeks to ensure that two parties against which it never commenced adversary proceedings, and which it never found to have engaged in wrongdoing, are identified as money launderers. *That* is the Commission's so-called "deterrence" interest: a warning to citizens who are considering participating in the political process that they can be publicly labeled as criminals in the absence of any actual finding of wrongdoing, and without ever being given notice or an opportunity to be heard. This cannot be a sufficient interest to overcome the First Amendment rights Plaintiffs assert.

The FEC's insistence on disclosing Plaintiffs' identities, ostensibly to deter persons from engaging in political activity the FEC never found violated FECA, can only be seen as a punitive measure. The FEC's assertion of its interests must be viewed as an attempt to salvage an admittedly "irregular" enforcement process,

JA207 n.2, which calls into question how substantial its asserted interests are. The FEC should not be permitted to accomplish through disclosures, tweets, and statements what it chose not to do through the congressionally-mandated enforcement process. If the FEC wishes to tar Plaintiffs with the brush of illegality, it should have completed that process, which was entirely within the FEC's control given that two and a half years passed from the time the complaint was filed to its vote in MUR 6920.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully assert that this Court should reverse the judgment of the District Court.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 6,494 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

Pursuant to D.C. Circuit Local Rule 25(c), I hereby certify that on this 2nd day of July, 2018, I electronically filed the foregoing Reply Brief of Plaintiffs-Appellants with the Court by using the CM/ECF system. All parties to the case have been served through the CM/ECF system.

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