No. _____

In the
# Supreme Court of the United States

JOHN DOE, 1 and JOHN DOE, 2,
*Petitioners*,

v.

FEDERAL ELECTION COMMISSION,
*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## REDACTED PETITION FOR WRIT OF CERTIORARI


WILLIAM W. TAYLOR, III
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

MICHAEL DRY
VINSON & ELKINS
2200 Pennsylvania Ave., NW
Suite 500 West
Washington, DC 20037

*Counsel for Petitioners*


September 16, 2019

## QUESTION PRESENTED

In recognition of the highly sensitive First Amendment realm in which it operates, the Federal Election Campaign Act (FECA) imposes strict limits on the disclosure of administrative enforcement proceedings conducted by the Federal Election Commission (FEC). The FEC is expressly prohibited from disclosing "[a]ny … investigation" it conducts, or any information obtained in the course of attempting to negotiate a resolution to an investigation without the permission of the target, subject to the narrow exceptions for any "conciliation agreement" with a "respondent" and any "determination that a person has not violated" a federal election law. 52 U.S.C. §30109(a)(12), (a)(4)(B)(i)-(ii).

Petitioners are a trust and trustee whose confidential election-related actions the FEC staff briefly investigated in the course of an investigation into four other entities. The FEC neither reached a conciliation agreement with petitioners nor reached a definitive no-violation determination with respect to them. Instead, three of the five voting commissioners voted not to pursue the investigation further given the novelty of the liability theory. Nonetheless, the Commission now seeks to disclose petitioners' identities and link them to highly inflammatory accusations by the two commissioners who were outvoted, even though those accusations were never pursued, let alone found warranted.

The question presented is:

Whether, notwithstanding FECA's express bar on prohibiting the disclosure of any investigation, and its careful constraints on the FEC's disclosure powers,

the FEC may invoke its general rulemaking power to disclose records, including confidential identities, of an investigation that it ultimately declined to pursue.

## PARTIES TO THE PROCEEDING

Petitioners [redacted] (John Doe 1) and [redacted] (John Doe 2) were plaintiffs in the district court and appellants in the court of appeals. Respondent Federal Election Commission was defendant in the district court and appellee in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

John Doe 2 is a closely held trust, and John Doe 1 is John Doe 2's trustee. John Doe 2 has no parent corporation, and no publicly held corporation has a 10 percent or greater ownership interest in John Doe 2. John Doe 1 is an individual.

## STATEMENT OF RELATED PROCEEDINGS

United States District Court (D.D.C.):

*Doe, 1 v. FEC*, No. 17-2694 (Mar. 23, 2018)

*Citizens for Responsibility & Ethics in Washington v. FEC*, No. 17-2770 (Dec. 28, 2018)

United States Court of Appeals (D.C. Cir.):

*Doe, 1 v. FEC*, No. 18-5099 (Apr. 12, 2019), pet'n for rehearing en banc denied, July 11, 2019

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Rules and Regulations**



**Other Authorities**

## PETITION FOR WRIT OF CERTIORARI

Unlike every other federal agency, or even a grand jury, everything the Federal Election Commission (FEC or Commission) investigates implicates activities that lie at the core of the First Amendment. That is particularly true when the Commission polices the line between constitutionally valid disclosure obligations and the constitutional right to anonymity when it comes to speech and elections.

In light of the constitutional sensitivities associated with FEC investigations, Congress has carefully circumscribed the circumstances in which the Commission may publicly disclose investigatory records from administrative enforcement proceedings conducted by FEC staff. As a general matter, the Federal Election Campaign Act (FECA) precludes the disclosure of "any … investigation." 52 U.S.C. §30109(a)(12)(A). Thus, when the FEC investigates an alleged violation of the campaign finance laws, neither the staff nor the Commission is free to disclose the identities of those being investigated. A contrary rule would plainly chill core First Amendment activity. That prohibition is subject to only two exceptions: The Commission must disclose any "conciliation agreement" that it reaches with a respondent, and it must disclose a "determination that a person has not violated" FECA or other federal election laws. *Id.* §30109(a)(4)(b)(ii). Even in those circumstances, the exceptions are narrow and do not mandate disclosure of the FEC's entire investigatory file.

It is common ground that neither of those statutory exceptions is applicable here. By a 3-2 vote,

the Commission voted not to pursue further investigation of the novel allegations against petitioners, noting that they relied on an unprecedented legal theory. Throughout those proceedings, the Commission maintained the confidentiality of petitioners' identities. Nonetheless, despite the statutory prohibition on disclosing investigations and the obvious chilling effect that such disclosures would have on First Amendment activity, the Commission has relied on its general rulemaking authority to assert the power to disclose its investigatory file, including the identities of petitioners, and link them to the inflammatory statements of the two dissenting commissioners, who champion that result as a victory for transparency.

The court of appeals approved that anomalous result by applying a combination of *Chevron* deference to FEC regulations and a reading of FECA that provides zero protection for petitioners or First Amendment values once an FEC investigation is abandoned. That decision ignores the plain statutory text and the obvious constitutional values at stake when the FEC investigates activity that, if not prohibited by statute, is affirmatively constitutionally protected. When Congress prohibited the disclosure of FEC investigations subject to two narrow exceptions not applicable here, it plainly did not authorize the FEC to use its general rulemaking authority to mandate the disclosure of all manner of investigatory materials, including confidential identities. The D.C. Circuit's decision sanctioning that regulatory regime is profoundly wrong.

Because that decision arises out of the D.C. Circuit, it will govern all future FEC investigations unless reviewed by this Court. Moreover, the alternative here to this Court's review is the immediate disclosure of petitioners' identities, with an attendant chilling effect on First Amendment activity. While the First Amendment permits certain disclosure requirements, neither the First Amendment nor FECA tolerates the naming and shaming of individuals who have exercised their rights to anonymity in ways that implicate the federal election laws only under novel theories that the Commission was unwilling to pursue. When a majority of the voting commissioners decided not to pursue entirely novel theories implicating petitioners, that should have been the end of the matter. The Commission's belated endeavor to shame petitioners and chill others by naming and linking petitioners to the dissenters' criticisms is an effort unworthy of the Commission, but well worthy of this Court's plenary review.

## OPINIONS BELOW

The D.C. Circuit's opinion is reported at 920 F.3d 866 and reproduced at App.1-23. The district court's opinion is reported at 302 F. Supp. 3d 160 and reproduced at App.26-54.

## JURISDICTION

The D.C. Circuit issued its opinion on April 12, 2019, and denied a timely petition for rehearing en banc on July 11, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment and pertinent provisions of FECA are reproduced at App.55-76.

## STATEMENT OF THE CASE

### A. Legal Background

1. Congress established the FEC in 1974 as an independent agency and empowered it to enforce FECA and certain other federal election laws. *See, e.g.*, *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 91 (1994). The FEC has six members, and "[n]o more than 3 members of the Commission appointed … may be affiliated with the same political party." 52 U.S.C. §30106(a)(1). The Commission has "exclusive jurisdiction with respect to the civil enforcement" of FECA and other federal election laws, *id.* §30106(b)(1), and it is authorized to investigate violations of those laws alleged in administrative complaints filed by private citizens, *id.* §30109.

The FEC is "[u]nique among federal administrative agencies," in that it "has as its sole purpose the regulation of core constitutionally protected activity." *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003). That raises particular concerns when it comes to the Commission's investigatory powers, for FEC "'investigations into alleged election law violations frequently involve subpoenaing materials of a delicate nature,' materials regarding 'political expression and association' that go to 'the very heart of the' First Amendment." App.14 (quoting *AFL-CIO*, 333 F.3d at 170). Moreover, the mandated "release of such [sensitive] information to the [FEC] carries with it a real potential for chilling the free

exercise of political speech and association guarded by the first amendment." *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981). That concern is at its zenith when speakers pursue their First Amendment rights to participate in elections anonymously, a tradition that traces back to the Federalist Papers and beyond. *See, e.g.*, *Talley v. California*, 362 U.S. 60, 64-65 (1960). In that context, disclosure of identities by the FEC can defeat the right to anonymous speech and chill vital First Amendment activity.

2. To guard against those concerns, FECA carefully cabins the FEC's investigatory and enforcement powers and limits disclosures. Upon receiving a sworn complaint alleging an election-law violation, the FEC must notify the alleged violator and provide that person with an opportunity to respond. *See* 52 U.S.C. §30109(a)(1). If four members of the Commission determine by an affirmative vote that there is "reason to believe that a person has committed, or is about to commit, a violation of" the election laws, the FEC must provide the person with the "factual basis for such alleged violation" and then must conduct an investigation. *Id.* §30109(a)(2). After the investigation, the Commission may proceed to determine whether there is "probable cause" to believe that a violation has occurred. *Id.* §30109(a)(3)-(4)(A)(i).

The probable-cause stage is a critical dividing line. If, by an affirmative vote, four members of the Commission find probable cause to believe that a violation has occurred, the FEC must attempt to reach a "conciliation agreement" with the alleged violator

through "informal methods"; that process may last 90 days. *Id.* §30109(a)(4)(A)(i). If the parties tentatively agree to a conciliation agreement, four members of the Commission must approve the agreement by an affirmative vote before it becomes final; once final, a conciliation agreement operates as "a complete bar to any further action by the Commission." *Id.* If the parties do not reach a conciliation agreement after the Commission makes a probable-cause finding, the Commission—again upon the affirmative vote of four members—may "institute a civil action for relief" in federal district court. *Id.* §30109(a)(6). If the Commission elects to dismiss an administrative complaint at any stage of the proceedings, the party who filed the complaint may challenge that dismissal in federal district court. *Id.* §30109(a)(8).

Given the sensitivities surrounding FEC proceedings, FECA expressly addresses when the Commission may and may not publicly disclose investigatory records from those proceedings. As a default rule, "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission … may be made public by the Commission without the written consent of the respondent and the Commission." *Id.* §30109(a)(4)(B)(i). Likewise, "[a]ny notification or investigation … shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." *Id.* §30109(a)(12)(A).

The Commission may deviate from those prohibitions in only two instances: "If a conciliation

agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent." *Id.* §30109(a)(4)(B)(ii). And "[i]f the Commission makes a determination that a person has not violated [the federal election laws], the Commission shall make public such determination." *Id.* Even in those circumstances, FECA does not mandate disclosure of the entire investigatory file.[1] Moreover, when those two exceptions do not apply, such as when a conciliation attempt is *not* successful, or the FEC reaches no conclusion about whether someone violated the federal election laws, FECA prohibits the disclosure of information derived from those administrative proceedings.

3. Notwithstanding the detailed disclosure regime that Congress crafted for FEC administrative proceedings, the Commission—pursuant to its general power "to make … such rules … as are necessary to carry out the provisions of this Act," *id.* §30107(a)(8)—has promulgated regulations and adopted policies that empower it to make much broader disclosures. As relevant here, one FEC regulation provides that, "[i]f

[1] The statute expressly provides that the Commission shall make its no-violation determination public, but it does not expressly address whether that determination must disclose the otherwise-confidential identity of the subject in a case where the investigation concerned an alleged disclosure violation and the subject's identity remained confidential throughout the proceedings. Forced disclosure of the identity in that circumstance would seem perverse. At a minimum, under the statute, respondents would have the option of preserving confidentiality by agreeing to a resolution short of a no-violation determination.

the Commission makes a finding of no reason to believe or no probable cause to believe *or otherwise terminates its proceedings*, it shall make public such action and the basis therefor." 11 C.F.R. §111.20(a) (emphasis added). In other words, the FEC claims the power to disclose its investigatory files, including confidential identities, even when an investigation terminates with a decision by the Commission simply to drop and investigation and not to pursue a complaint any further.

To complement this regulation, the Commission initially adopted another rule expansively declaring the "basis" for its action to include *all* of the investigatory records that pertained to a particular matter, except for the narrow category of materials exempt from disclosure under FECA or the Freedom of Information Act. *See id.* §5.4(a)(4). But the D.C. Circuit invalidated that rule for "fail[ure] to account for the substantial First Amendment interests" at stake. *AFL-CIO*, 333 F.3d at 170. In reaching that conclusion, the court found the statute's express prohibition on making "[a]ny … investigation" public without the permission of the target, 52 U.S.C. §30109(a)(12)(A), "ambiguous" as to whether it applies to materials derived from an investigation, or just to the bare existence of an investigation, and also found it ambiguous as to whether it applies once an investigation concludes. *AFL-CIO*, 333 F.3d at 173-75. But the court nonetheless found the FEC's rule mandating disclosure of *all* investigatory materials vastly overbroad given the constitutional concerns at issue. *Id.* at 179.

Well more than a decade after that decision, the FEC tried again. This time, invoking its general power to "formulate policy," *see* 52 U.S.C. §30106(b)(1), the FEC issued a policy statement enshrining a new disclosure policy that is more limited, but only marginally so. *See Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Under that new policy, while the Commission will not release *all* of its investigatory records, it will still release at least 21 categories of investigatory records when it "otherwise terminates" a proceeding, and it reserves the power to "place on the public record other documents that edify public understanding of a closed matter." *Id.* at 50,703.

Among the records subject to disclosure under this broad policy are "General Counsel's Reports … that recommend … reason to believe" and "Statements of Reasons issued by one or more Commissioners," even if those views are rejected by a majority of the Commission. *Id.* In other words, the Commission claims the power to disclose files related to investigations that it ultimately chose not to pursue, including the dissenting views of members who disagreed with the Commission's decision not to pursue them. In addition, the Commission asserts the power to make these disclosures without regard to whether doing so will destroy the anonymity of the subject of its investigation even when charges are not ultimately pursued.

### B. Factual Background

1. In February 2015, two private persons—Citizens for Responsibility and Ethics in Washington

(CREW) and Anne L. Weismann—filed an administrative complaint with the FEC alleging that, during the 2012 election cycle, a $1.71 million contribution had been made to a political action committee (Now or Never PAC) in the name of someone other than the true donor, in violation of FECA. App.2, 28; *see* 52 U.S.C. §30122 ("No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution[.]"). That complaint named as respondents the American Conservative Union, Now or Never PAC, James C. Thomas, III, and an "Unknown Respondent." *See* Admin. Compl., *In re of Am. Conservative Union*, MUR 6920, (FEC Feb. 27, 2015), https://bit.ly/2OXoSuZ. The FEC later identified the "Unknown Respondent" as Government Integrity, LLC. JA47.[2]

Acting on the allegations in the complaint, the Commission (by an affirmative 6-0 vote) found reason to believe that a violation of FECA had occurred, and it authorized an investigation under the file name Matter Under Review 6920 (MUR 6920). App.3. The Commission's general counsel conducted the investigation, which purportedly revealed that the contribution to Now or Never PAC passed through various entities in October 2012. App.3-4. More specifically, the general counsel found that while Thomas simultaneously served as the lawyer for Government Integrity and the treasurer for Now or Never PAC, Government Integrity wired $1.8 million to the American Conservative Union; and the American Conservative Union then wired $1.71

[2] "JA" refers to the Joint Appendix filed with the D.C. Circuit.

million to Now or Never PAC. App.3. After Now or Never PAC received the $1.71 million contribution, Thomas filed a report with the FEC stating that the American Conservative Union (as opposed to Government Integrity) had been the source of the funds. App.4.

Although John Doe 2 was not named as a respondent to the complaint, the general counsel identified it as an entity allegedly involved in the sequential transaction, in that it allegedly wired $2.5 million to Government Integrity before the latter wired the $1.8 million to the American Conservative Union. In August 2017, the general counsel served a subpoena on both John Doe 2 and its trustee, John Doe 1, App.29, but the subpoena stated that "the Commission does not consider [either petitioner] a respondent in this matter, but rather a witness only." JA213. Petitioners did not respond to the subpoena, but soon thereafter, the general counsel recommended that the Commission find reason to believe that *petitioners* had violated FECA and that it authorize a civil action to enforce the subpoena. App.29-30. The Commission rejected those recommendations in September 2017 by a 3-2 vote. App.30; JA135-36. Accordingly, petitioners were never respondents in MUR 6920.

At the same time, the Commission voted to move forward with respect to the four parties that *were* respondents to the complaint. By an affirmative vote of 5-0, the Commission found probable cause to believe that the American Conservative Union had violated FECA, and it invited the general counsel to file briefs addressing whether probable cause existed with

respect to Government Integrity, Now or Never PAC, and Thomas. JA136-37. The Commission also authorized the general counsel to pursue conciliation with the American Conservative Union and "pre-probable cause" conciliation with the other respondents. JA136-37.

2. In October 2017, the Commission entered into a conciliation agreement with all four respondents. App.4. The respondents agreed not to contest the Commission's allegations that they violated FECA, and they paid a collective civil penalty of $350,000. App.4-5. The Commission therefore closed the investigation. Upon doing so, it made clear that, in December 2017 and pursuant to its disclosure policy, it intended to publicly disclose without redaction numerous records from MUR 6920, including records such as the general counsel's recommendation identifying petitioners by name and accusing them of violations that the Commission declined to pursue. App.5. Petitioners objected to the proposed disclosure, but the Commission nonetheless concluded that it would release its investigatory records in unredacted form on December 18, 2017. App.32.

### C. District Court Proceedings

1. Petitioners filed suit against the Commission in the U.S. District Court for the District of Columbia just before the release of the unredacted records, seeking an injunction barring the Commission from revealing their identities. App.32. Among other things, petitioners asserted that "[t]he release of [their] identities is contrary to law under the Federal Election Campaign Act." JA12; 5 U.S.C. §706(2)(A). The Commission agreed to redact petitioners' names

from its publicly available investigatory records pending the outcome of the litigation. JA4.

Petitioners' lawsuit generated backlash from some members of the Commission. Although the Commission had declined to advance the investigation of petitioners beyond the first step of the investigatory process, and therefore never added them as respondents to MUR 6920, one member of the Commission—now the FEC Chair—posted a "tweet" almost immediately after petitioners filed suit with a link to her redacted "Statement of Reasons" in this matter. *See* JA215. Among other things, her Statement of Reasons accused petitioners of "engineering an intricate plot to defeat the public's interest in knowing who was actually behind a $1.7 million political contribution." JA202. The tweet itself added: "BREAKING New #campaignfinance scandal: How far will dark-money donors go to stay in the shadows? These guys laundered their millions through 4 orgs, got away with keeping the name of the true donor secret, & are STILL suing @FEC to censor our reports. I've *never* seen this before." JA215.

Two other commissioners responded to these incendiary charges with their own Statement of Reasons, which asserted, *inter alia*, that proceeding with an investigation against petitioners would have required reliance on an "unprecedented" and "novel theor[y]," and took their colleague to task for "publicly prejudg[ing] [petitioners'] guilt." JA208-09 & n.8. They further explained that "[s]uch prejudgment raises serious due process concerns, heightened in this matter where the non-respondent has challenged Commission action in a pending lawsuit." JA209 n.8.

2. The district court held that the Commission may proceed with the disclosure of petitioners' names. App.27. In reaching that conclusion, the court acknowledged that the disclosure falls within neither of FECA's two categories of mandatory disclosure. As to the first, the conciliation agreement "involved Government Integrity, American Conservative Union, Now or Never PAC, and James C. Thomas III"—but not petitioners. App.30. As to the second, "the Commission did not make any 'determination' that plaintiffs had not violated the Act; it simply did not vote to find reason to believe that they had." App.36.

The court also acknowledged that FECA *prohibits* the disclosure of any "notification or investigation," and in light of that provision, admitted that the question whether disclosure of petitioners' names would violate FECA "is not an easy one to resolve." App.37. Nonetheless, the court deemed itself bound by the D.C. Circuit's decision in *AFL-CIO* to treat FECA as ambiguous as to the scope of the FEC's power to disclose investigatory materials after an investigation has terminated, and therefore "concluded that the issue cannot be resolved at the *Chevron* step one stage." App.35. Invoking *Citizens United v. FEC,* 558 U.S. 310, 371 (2010), the court further concluded that disclosing petitioners' identities as part of an effort to accuse them of unsubstantiated violations of federal election law implicates "no constitutional issues" because there is no First Amendment "right to contribute anonymously." App.48, 51. The court therefore concluded that "*Chevron* deference applies." App.51.

The court then deferred to the FEC's regulation stating that "[i]f the Commission makes a finding of no reason to believe or no probable cause to believe or *otherwise terminates its proceedings*, it shall make public such action and the basis therefor." App.50 (citing 11 C.F.R. §111.20(a)). In the district court's view, because "[t]he investigation as a whole was otherwise terminated, including the aspect of the matter that involved [petitioners]," the FEC could lawfully disclose records identifying petitioners and accusing them of campaign finance violations, even though petitioners were not named or added as respondents in the administrative complaint and FEC did not pursue any action against them. App.51.

3. Recognizing the serious interests at stake and that disclosure of petitioners' identities would work an immediate and irreparable injury, the district court granted a stay pending appeal. JA9-10.

**D. The D.C. Circuit's Divided Decision**

1. The D.C. Circuit affirmed in a divided decision. The majority framed the question before it as whether the FEC "would be acting 'not in accordance with law' under the Administrative Procedure Act" by "publicly releas[ing]" the "material" from the MUR 6920 investigatory file identifying petitioners. App.6-7. According to the majority, this question turned not on whether FECA itself authorizes that disclosure, but rather on whether the FEC's *regulation* authorizing more disclosure than the statute authorizes "constitute[s] 'law.'" App.7. While petitioners had never disputed that the FEC's regulation qualifies as "law" for APA purposes, the court nonetheless proceeded to analyze that issue, finding (as no one

disputed) that the regulation was "properly promulgated" and therefore, if valid, carries the force of law. App.7.

Rather than then turn to the question whether the regulation is consistent with FECA's disclosure provisions, especially given the First Amendment concerns at stake in this delicate area, the court next asked only whether the regulation is "reasonably related" to FECA's "purposes." App.8. While the court acknowledged that the regulation "requires more disclosure than the governing statute," it summarily declared that "no reason for rejecting it," citing as authority cases that do not involve disclosures in the highly sensitive realm of core political activities. App.8. The court also found that conclusion supported by its earlier decision in *AFL-CIO*, which had embraced the proposition that FECA is ambiguous on the extent to which the FEC may disclose materials from an investigatory file. App.9. The court further agreed with the district court that the proposed disclosures do not even implicate the First Amendment, citing as authority for that proposition the constitutionality of FECA's "provision requiring contributions to be made in the name of the source of the funding." App.9 (citing 52 U.S.C. §30122). The court made no mention of the problems that: (1) the FEC *never concluded* that petitioners were the "source" of the contribution within the meaning of the statute, and (2) anonymous participation in electoral activities to the extent permitted by existing disclosure provisions is protected First Amendment activity.

2. Judge Henderson dissented in relevant part. At the outset, Judge Henderson emphasized that the FEC "has as its sole purpose the regulation of core constitutionally protected activity," and that "[i]ts investigations … go to the very heart of the First Amendment." App.14. "These serious privacy and First Amendment interests," she explained, "make holding the statutory line even more critical." App.14.

Turning to that statutory line, Judge Henderson faulted the majority for concluding that FECA authorizes the disclosure of petitioners' identities "without discussing FECA's disclosure provisions." App.20. As she explained, "FECA's disclosure scheme is comprehensive and sets forth precisely when the Commission can and cannot make its records public" in the context of administrative proceedings. App.19. While "[t]he Commission *must* make limited disclosures in two … cases," "the Commission must keep its investigatory information confidential" "[i]n all other cases." App.19. And in this instance, Judge Henderson explained, all agree that the two categories of mandated disclosure are not implicated: The FEC entered into a conciliation agreement with parties other than petitioners, and "the Commission declined to pursue enforcement against the two [petitioners] as a matter of prosecutorial discretion." App.20.

On the flip side, she explained, FECA "includes confidentiality provisions that expressly *forbid* the Commission from making its investigative files public unless disclosure is otherwise authorized." App.18 (emphasis added). For example, FECA generally prohibits the disclosure of any "investigation," and "nearly any disclosure of an investigatory file will

reveal the existence of an investigation." App.18. As a result, she found "no *textual* basis for concluding that additional discretionary disclosure authority exists." App.18.

3. Petitioners filed a petition for rehearing en banc, which the court denied. App.24-25. Soon thereafter, however, the court granted a stay of the mandate provided that petitioners file a petition for certiorari by September 16, 2019.

## REASONS FOR GRANTING THE PETITION

The decision below allows the Commission to chill vital First Amendment activity by naming and shaming individuals whom it declines to prosecute. Such agency action is antithetical to constitutional values and wholly unauthorized by Congress. Rather than authorizing an agency empowered to investigate sensitive First Amendment activity to employ this bull-in-a-china-shop approach, Congress prohibited the disclosure of investigatory files and the identities of those investigated by the FEC. Congress created only two exceptions—neither applicable here—and those exceptions provide for only limited disclosure when the FEC reaches a conciliation agreement or an exoneration. The agency's effort to rely on its general rulemaking authority to dictate far broader disclosure is ultra vires and unconstitutional.

The decision below authorized these massively chilling disclosures by ignoring the default statutory prohibition on disclosing investigations and downplaying the First Amendment concerns with disclosure. But just because some statutory disclosure obligations survive First Amendment scrutiny does not mean that forcing the disclosure of confidential

identities of individuals whose actions implicate FECA, if at all, only under novel theories is free from First Amendment consequences. To the contrary, absent valid disclosure requirements, the First Amendment positively protects the rights of individuals to engage in speech and election-related activities anonymously. By ignoring those First Amendment interests and bedrock principles of statutory construction, the decision below erred.

The consequences of that error are dramatic, both for petitioners and for First Amendment values. Unless this Court grants review, the confidential identities of petitioners will be immediately disclosed, notwithstanding the decision of a majority of voting commissioners that bringing charges under a wholly novel theory would be inappropriate. Worse still, petitioners will be linked immediately to the highly critical views of the two dissenting commissioners. The chilling effect on petitioners and others whose conduct complies with existing non-novel election laws will be immediate. This is no way for an agency tasked with the sensitive mission of investigating conduct that, if not unlawful, is constitutionally protected to proceed. Congress did not authorize such name-and-shame tactics, and neither should this Court.

## I. The Decision Below Empowers The FEC To Make Disclosures That FECA Does Not, In Plain Contravention Of Settled Principles Of Statutory Interpretation And The Canon Of Constitutional Avoidance.

### A. FECA Bars the FEC From Disclosing Its Investigatory Records Except in Two Circumstances Not Implicated Here.

"Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity." *AFL-CIO*, 333 F.3d at 170; *see also, e.g.*, *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) ("more than other agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights"). Indeed, "[t]here is no right more basic in our democracy than the right to participate in electing our political leaders"—including by contributing to candidates and political action committees. *McCutcheon v. FEC*, 572 U.S. 185, 191 (2014) (plurality op.). And, subject to the metes and bounds of constitutionally valid disclosure provisions, the vital right to participate in elections includes the right to do so anonymously. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995); *see also Citizens United*, 558 U.S. at 366-71. Yet the FEC's core charge is to regulate "the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *Machinists,* 655 F.2d at 387.

The concerns that arise as a result of that constitutionally sensitive mandate are nowhere more

acute than when it comes to the Commission's investigatory powers. The FEC's "'investigations into alleged election law violations frequently involve subpoenaing materials of a "delicate nature,"' materials regarding 'political expression and association' that go to 'the very heart of the' First Amendment." App.14 (quoting *AFL-CIO*, 333 F.3d at 170). And the mandated "release of such [sensitive] information to the [FEC] carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment." *Machinists*, 655 F.2d at 388. Such concerns are at their zenith when it comes to the disclosure of the names of individuals or entities who intended to keep their political participation nonpublic and are permitted by disclosure obligations to do so.

That chilling effect would become all the more pronounced if the FEC had sweeping power to release to the public all the information it obtains during the course of an investigation into an allegation that an exercise of First Amendment rights was prohibited by federal law. It is one thing for the FEC to reveal such information when it finds that someone in fact violated the law. But it is another thing entirely for the FEC to gather First Amendment-sensitive information as part of its process of deciding whether a violation of the campaign finance laws has occurred, and then release information accusing parties of wrongdoing even if it ultimately declines to pursue any kind of enforcement action. Such name-and-shame tactics would serve no apparent purpose other than to chill First Amendment activity that the Commission has *not* found ran afoul of the law.

To guard against those concerns, Congress carefully circumscribed the FEC's power to disclose its investigatory and conciliatory acts. FECA expressly commands that "[a]ny notification or investigation [may] not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." 52 U.S.C. §30109(a)(12)(A). And it further provides that "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission … may be made public by the Commission without the written consent of the respondent and the Commission." *Id.* §30109(a)(4)(B)(i).

The Commission may deviate from those prohibitions in only two instances: "If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent." *Id.* §30109(a)(4)(B)(ii). And "[i]f the Commission makes a determination that a person has not violated [the federal election laws], the Commission shall make public such determination." *Id.* In short, FECA generally prohibits disclosure of investigations and attempts to resolve them, subject to the caveat that "[t]he Commission *must* make limited disclosures in two—and only two—cases," and it "does not authorize any *discretionary* disclosure" in other circumstances. App.19; *see Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be

implied, in the absence of evidence of a contrary legislative intent.").

Taken together, all of these provisions compel the conclusion that the FEC lacks the authority to supplement Congress' carefully circumscribed disclosure regime with broad rules or policies that purport to authorize disclosures that the statute does not.[3] Indeed, "[t]he plain language of these provisions and the overall purpose and structure of the statutory scheme create a strong confidentiality interest analogous to that protected by Federal Rule of Criminal Procedure 6(e)(6)." *In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001). "[I]n both contexts, secrecy is vital" to ensure that those involved in a government investigation are not dragged into the public spotlight in a prejudicial—and potentially unconstitutional—manner. *Id.*

That makes the rule governing disclosure of grand jury information a helpful guide in interpreting

---

[3] FECA separately authorizes the Commission to bring a civil action in federal court after a failed conciliation attempt, *see* 52 U.S.C. §30109(a)(6), and the private party that files an administrative complaint with the FEC may seek judicial review if the Commission "dismiss[es]" the complaint or fails to act on it in a timely manner, *id.* §30109(a)(8). This case does not concern what may or may not be disclosed in the context of such judicial proceedings, for the complainants did not name petitioners as respondents, and the Commission voted against pursuing any enforcement action against petitioners. Notably, when the complainants attempted to seek judicial review of the Commission's decision not to pursue any action against petitioners, their complaint was dismissed for lack of jurisdiction (at the FEC's urging) because they never filed a complaint against petitioners. *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 363 F. Supp. 3d 33 (D.D.C. 2018).

FECA's disclosure provisions. Similar to FECA §30109, Federal Rule of Criminal Procedure 6(e) provides a general rule of nondisclosure with respect to grand jury information, and then lists certain exceptions to that rule. *Compare* Fed. R. Crim. P. 6(e)(2)(B) ("Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury …."), *and* Fed. R. Crim. P. 6(e)(3) (listing "[e]xceptions"), *with* App.18 (explaining that FECA prohibits disclosure of investigatory materials "unless disclosure is otherwise authorized").

In cases interpreting Rule 6, this Court has repeatedly indicated that the rule creates an *exclusive* list of exceptions, and that courts may not recognize other exceptions absent "a clear indication" from "Congress [or] this Court." *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 425 (1983); *see also United States v. Williams*, 504 U.S. 36, 46 (1992); *Illinois v. Abbott & Assocs., Inc.*, 460 U.S. 557, 567 (1983); *United States v. Baggot*, 463 U.S. 476, 479-80 (1983); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 398-99 (1959).[4] The same concerns underlying

[4] Several courts of appeals have been even more direct, explicitly concluding—in some instances at the federal government's urging, no less—that the exceptions to grand jury secrecy are only those enumerated in Rule 6(e). *See, e.g.*, *McKeever v. Barr*, 920 F.3d 842, 843 (D.C. Cir. 2019); *United States v. McDougal*, 559 F.3d 837, 840 (8th Cir. 2009); *In re Grand Jury 89-4-72*, 932 F.2d 481, 488 (6th Cir. 1991). Some other courts have reached the opposite conclusion, and in light of that circuit conflict, there is a pending petition for certiorari asking this Court to resolve the issue. *See McKeever v. Barr*, No. 19-307 (U.S. pet. for cert. filed Sept. 5, 2019). This Court therefore may wish to consider this case on the merits alongside *McKeever*.

that narrow-construction approach to grand jury investigations apply *a fortiori* to FEC investigations, given that everything that the FEC investigates implicates the First Amendment. In short, any suggestion that the FEC is free to supplement the two narrow disclosure exceptions created by Congress in this sensitive context is not just mistaken, but profoundly troubling given the First Amendment interests at stake.

### B. The D.C. Circuit's Contrary Conclusion Flouts the Plain Text of the Statute and Raises Grave Constitutional Concerns.

Notwithstanding the serious constitutional concerns that FEC disclosure implicates, especially where otherwise undisclosed identities are at stake, the majority below blithely concluded that the FEC may utilize its generic power "to make … such rules … as are necessary to carry out the provisions of this Act," 52 U.S.C. §30107(a)(8), to authorize disclosures that not only sweep far beyond what the statute expressly permits, but fall squarely within what the statute expressly forbids. According to the majority, the FEC may disclose all manner of information in an investigatory file, including otherwise-nonpublic identities, whenever an investigation "terminates," with or without the permission of the individuals or entities it investigated. 11 C.F.R. §111.20(a). In the majority's view, the FEC may rely on that sweeping claim of authority to disclose its investigation of petitioners, for no apparent reason other than to make public the fact that the general counsel and two commissioners accused petitioners of claims that the

majority of the Commission declined to pursue.[5] Such name-and-shame tactics cannot be reconciled with Congress' careful efforts to cabin the Commission's disclosure powers in light of the constitutionally sensitive domain in which it operates.

Indeed, far from empowering the FEC to make such a disclosure, FECA expressly *prohibits* the FEC from disclosing "[a]ny … investigation" unless the person under investigation consents. 52 U.S.C. §30109(a)(12)(A). And the statute expressly prohibits the FEC from disclosing any "information derived[] in connection with any conciliation attempt by the Commission … without the written consent of the respondent and the Commission." *Id.* §30109(a)(4)(B)(i). The notion that the FEC can disclose anything it wants, including otherwise-nonpublic identities, once it closes an investigation because a majority of the Commission was not persuaded to proceed beggars belief. These carefully circumscribed limits on disclosure foreclose any claim that the FEC may rely on its generic rulemaking power to empower itself to release information obtained (let alone inflammatory accusations made) in the course of an investigation. Instead, the FEC may disclose two—and only two—things: a conciliation agreement, and no-violation determination. *Id.* §30109(a)(4)(B)(ii). The FEC concedes that its

[5] Indeed, revealing petitioners' identities does nothing whatsoever to edify the public's understanding of the sort of conduct that violates the federal election laws.

intended disclosure is covered by neither of those provisions. That should be the end of the matter.[6]

The majority concluded otherwise only because, as the dissent emphasized, it analyzed the question "without discussing FECA's disclosure provisions" at all. App.20. The majority literally did not even mention §30109(a)(4)(B)(i), and it addressed §30109(a)(12)(A) only to drop a footnote misleadingly claiming that petitioners "abandoned" any argument that the FEC's proposed disclosure would violate that provision. App.6 n.4.[7] Instead, the majority focused only on the undisputed and irrelevant point that the FEC has the power to promulgate regulations that carry the force of law, and the fact that the D.C. Circuit had previously embraced the untenable proposition that FECA is somehow "ambiguous" as to

---

[6] That the FEC has attempted to disclose its supposed investigation into petitioners as part of the disclosure of its files from its broader investigation into other entities and individuals makes no difference. As the majority acknowledged, the FEC seeks to disclose that petitioners *themselves* were under investigation. App.9 n.9. Setting aside the problem that the FEC did not have the power to disclose files from the investigation that led it to investigate petitioners, it obviously cannot circumvent the bar on disclosing an investigation without the target's permission by burying that investigation inside the files of a separate investigation.

[7] While petitioners were bound before the panel by the D.C. Circuit's highly suspect past interpretation of that provision as unambiguously prohibiting disclosure only while an investigation is ongoing, *see AFL-CIO*, 333 F.3d at 174, petitioners challenged that decision at the first opportunity in their petition for rehearing en banc, *see* Pet. for Rehearing En Banc at 10, *Doe 1 v. FEC*, No. 18-5099 (D.C. Cir. filed May 28 2019).

whether its express prohibitions continue to apply once an investigation has concluded. *See* App.9 (citing *AFL-CIO*, 330 F.3d at 179).

That mistaken conclusion may have bound the panel, but it certainly does not bind this Court. As this Court just reiterated, "a court must exhaust all the 'traditional tools' of construction" before throwing up its hands and declaring legal text ambiguous. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it" has been left to the agency to decide. *Id.* It does not take a deep dive into that toolkit to conclude that Congress meant what it said when it prohibited the FEC from disclosing "[a]ny … investigation … without the written consent of … the person with respect to whom such investigation is made." *Id.* §30109(a)(12)(A). That prohibition contains no "expiration date[]." App.19. The FEC thus cannot decline to abide by it and vitiate the congressional policies underlying it, by releasing whatever investigatory files it chooses (which, as Judge Henderson noted, will obviously "reveal the existence of an investigation," App.18), just because its investigation has "terminate[d]." 11 C.F.R. §111.20(a).

That conclusion is plain enough on the face of the statute, but is reinforced by the constitutional backdrop against which FECA operates. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). As the D.C. Circuit itself has acknowledged, "every action the FEC takes implicates fundamental rights." *Van*

*Hollen*, 811 F.3d at 499. And those fundamental rights include the right to anonymity subject to the limits of constitutionally valid disclosure limits. *See, e.g.*, *McIntyre*, 514 U.S. at 348, 357. That impact on fundamental rights does not disappear simply because the agency has concluded an investigation without bringing charges. To be sure, when the investigation concludes with a finding that someone *did* violate the campaign finance laws, then the First Amendment calculus alters dramatically. Moreover, when an investigation definitively concludes that there was not a violation, Congress has authorized the disclosure of that determination, without disclosure of the underlying investigatory files or the views of dissenting commissioners. *See* 52 U.S.C. §30109(a)(4)(B)(ii). But in a case where someone is merely accused of a violation, the Commission may not disclose the identity of the accused or the fact of the investigation when it does not even pursue the investigation.

Having concluded its investigation without a conciliation agreement with petitioners or a definitive no-violation determination, the Commission was not free to vitiate petitioners' right to confidentiality or smear them with the views of dissenting commissioners. To do so under any circumstances would be ultra vires and would raise serious due process concerns. But to do so in this sensitive context of anonymous political participation where allegations of disclosure violations were not pursued, let alone substantiated, would chill election-related activity that is not just lawful but constitutionally protected by the First Amendment.

The majority's effort to deny those First Amendment concerns is unavailing. According to the majority, the First Amendment has no role to play here because, under *Citizens United*, the provision of FECA "requiring contributions to be made in the name of the source of the funding—52 U.S.C. §30122—is … plainly constitutional." App.9. But while that observation may explain why disclosure is appropriate when the Commission *pursues* an enforcement action, it does nothing to justify the disclosure of identities where the Commission does not pursue a disclosure violation. Certainly nothing in *Citizens United* suggested that disclosure obligations do not even implicate the First Amendment. To the contrary, disclosure obligations plainly trigger First Amendment analysis, *see, e.g.*, *Davis v. FEC*, 554 U.S. 724, 744 (2008), and the disclosure of nonpublic identities where the Commission declines to find and pursue a disclosure violation plainly threatens First Amendment values, *cf. McIntyre*, 514 U.S. at 357.

Indeed, the idea that disclosing otherwise-nonpublic identities and the critical views of dissenting commissioners and staffers when the full Commission never finds a violation does not implicate the First Amendment is profoundly misguided. But make no mistake; that is what is at issue here. What FEC wants to disclose here is the fact that certain commissioners *accused* petitioners of making a contribution in the name of another in violation of 52 U.S.C. §30122—even though the Commission voted *not* to pursue that accusation because to do so would have required reliance on "unprecedented" and "novel theor[y]." JA208-09 & n.8. Having declined to pursue that accusation, the FEC cannot now escape the

obvious First Amendment implications of its proposed disclosure by invoking interests that might have outweighed petitioners' constitutional interest in maintaining confidentiality had the FEC actually found a violation of 52 U.S.C. §30122. *See, e.g.*, *McIntyre*, 514 U.S. at 357 ("Anonymity is a shield from the tyranny of the majority."). The First Amendment concerns are even more palpable given that the FEC is trying to disclose petitioners' identities for no other apparent reason than to connect their constitutionally protected activity to accusations of wrongdoing. The notion that empowering the FEC to engage in such name-and-shame tactics would have no chilling effect on First Amendment activity is dumbfounding.

FECA's legislative history confirms that Congress never intended to grant the FEC such a constitutionally suspect power. When introducing the 1976 House bill that contained FECA's original disclosure provisions, the Chairman of the House committee reporting the bill explained that the point of the prohibition on disclosing any "notification or investigation" was to prevent the "bad publicity which is attendant" to allegations of election-law violations that may ultimately be rejected by the Commission. 122 Cong. Rec. 8539, 8566 (Mar. 30, 1976) (remarks of Rep. Hays). Consistent with that understanding, the House Conference Report discusses the need to shield investigated persons from unfair "publicity," H.R. Rep. No. 94-1057, at 50 (1976) (Conf. Rep.), and the House Committee Report explained that the proposed amendments to FECA imposed penalties on "any … person who reveals the identity of any person under investigation," H.R. Rep. No. 94-917, at 66 (1976). Those concerns plainly do not evaporate simply

because an investigation has "terminate[d]." 11 C.F.R. §111.20(a).

In sum, particularly when employed against FECA's unique backdrop of constitutionally protected activity, the traditional tools of statutory construction all confirm the same conclusion: FECA prohibits the FEC from disclosing investigatory materials relating to an administrative enforcement matter that does not culminate in the finding of a violation unless it has the permission of the entity that it investigated. Indeed, taken as a whole, FECA plainly denies the FEC the power to make "discretionary" disclosures beyond those expressly authorized by FECA at all, and certainly does not empower the FEC to disclose what FECA expressly prohibits. Because "the Commission cannot use a regulation or policy statement to contravene the plain limits that FECA sets on its disclosure authority," App.16, its effort to disclose petitioners' identities is plainly contrary to law.

## II. This Case Presents An Exceptionally Important Question That Warrants This Court's Review.

The decision below not only is plainly wrong, but will have untenable consequences, both for petitioners and for the exercise of First Amendment rights more broadly. The only alternative to this Court's review is the immediate disclosure of petitioners' identities in conjunction with the dissenting commissioners' highly critical view. The disclosure of their identities in these circumstances plainly violates the statute, and just as plainly threatens constitutional values.

The impact on petitioners is undeniable: Invoking an exceedingly "novel theory" of liability,

App.15, certain commissioners and FEC staff accused petitioners of election-law violations. A majority of the Commission was unwilling to endorse those efforts. Yet those who lost the battle may now be able to claim the spoils of victory by tarring petitioners with the taint of allegedly illegal activity that the Commission itself did not pursue.

Indeed, there is no mystery as to what will happen next if the Court denies review: Petitioners will be publicly reprimanded by federal officials—including the Chair of the FEC—even though the FEC *declined* to charge petitioners with any misconduct. *See, e.g.*, Ellen L Weintraub (@EllenLWeintraub), Twitter (Apr. 12, 2019, 10:54 AM), https://bit.ly/2OS0Mlm (tweet from FEC Chair within hours of the D.C. Circuit's decision: "Great news from the D.C. Circuit this morning in Doe v. @FEC. The court upheld the Commission's right to release the names of key players in a straw-donor scheme. Big win for transparency! Congrats to our litigators for winning this one! I'll be unredacting my statement from last December … as soon as we know this decision won't be reviewed."); JA215 (tweet from FEC Chair on December 19, 2017, almost immediately after petitioners filed suit in district court: "BREAKING New #campaignfinance scandal: How far will dark-money donors go to stay in the shadows? These guys laundered their millions through 4 orgs, got away with keeping the name of the true donor secrete, & are STILL suing @FEC to censor our reports. I've *never* seen this before."). Far from representing a "win for transparency," given the absence of a finding of a disclosure violation by a majority of the Commission, that result will force disclosure where it is not required by law and will chill

the exercise of First Amendment rights. It is no more a "win for transparency" than if Commission staff had leaked petitioners' identities in the middle of the investigation, a course that all agree would have been wholly unlawful.

Making matters worse, the decision below stands as a threat to *everyone* who exercises their core First Amendment rights to participate in the political process by contributing to organizations and candidates they seek to support, for it enables the FEC to disclose accusations of wrongdoing anytime the Commission reviews anyone's conduct, even if it finds those allegations not worth pursuing. The potential for abuse in such a regime is palpable, for nothing save the FEC's own grace would prevent it from revealing politically motivated investigations that the full Commission terminated at the first opportunity, even if they were initiated with the sole goal of smearing their targets with accusations of wrongdoing. None of that could possibly be what Congress envisioned, and none of it is in fact permitted under FECA. To the contrary, FECA flatly precludes such results—not only because of the First Amendment chill they would cause, but because, as some members of the Commission have acknowledged, such a regime would "raise[] serious due process concerns." JA209 n.8.

Indeed, as Judge Sentelle and others have observed, the release of FEC investigatory records raises many of the same concerns as the release of grand jury records. *See, e.g.*, *AFL-CIO*, 333 F.3d at 175; *In re Sealed Case*, 237 F.3d at 667; *Beam v. Gonzales*, 548 F. Supp. 2d 596, 612 (N.D. Ill. 2008). This Court has already recognized the importance of

the latter issue, *see, e.g.*, *Sells Eng'g*, 463 U.S. at 424, and the issue here is at least as important, because unlike a typical grand jury, everything the FEC investigates implicates activities that are "basic in our democracy," *McCutcheon*, 572 U.S. at 191 (plurality op.). Moreover, nothing would be gained from allowing the question presented to percolate further. Not only will the imminent disclosure of petitioners' names cause an immediate chilling effect, but the question here is one that, by its nature, is likely to arise only within the D.C. Circuit. *See, e.g.*, 28 U.S.C. §1391(b)(1)-(2); JA12-13; *AFL-CIO*, 333 F.3d 168. Accordingly, absent this Court's review, the decision below will effectively govern every FEC investigation. If it really is to be the law that the FEC may disclose allegations of wrongdoing that it did not find any basis to pursue, then petitioners and all other parties who may find themselves swept into such investigations at least deserve to have this Court render that extraordinary judgment.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

WILLIAM W. TAYLOR, III
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036

PAUL D. CLEMENT
*Counsel of Record*
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave., NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

MICHAEL DRY
VINSON & ELKINS
2200 Pennsylvania Ave., NW
Suite 500 West
Washington, DC 20037

*Counsel for Petitioners*

September 16, 2019