No. 19-484

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

REPLY BRIEF FOR PETITIONERS

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

March 4, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

REPLY BRIEF

The Federal Election Commission investigates political activity, including anonymous activity, at the core of the First Amendment. To read its brief in opposition, that reality seems lost on the Commission. The FEC barely acknowledges that it regulates the exercise of a fundamental constitutional right and is justified in intruding on constitutionally protected activity only to redress violations of constitutionally valid campaign finance laws. Instead, the Commission equates its mission to investigating alleged violations of the securities laws or the like. It should come as little surprise, then, that the FEC thinks it can justify disclosures that undermine First Amendment values with a simple nod to its generic rulemaking power and the public's interest in ensuring the government is regulating "evenhandedly." That is extraordinary and extraordinarily disturbing—especially in this case, where the Commission claims that, despite taking no enforcement action against persons identified in one of its investigations, it may nonetheless name-and-shame those persons by releasing investigative materials containing their identities. The net effect of the FEC's position is to empower, in plain contravention of the election laws, two dissenting commissioners to destroy petitioners' anonymity.

Fortunately, Congress did not leave such a constitutionally sensitive judgment to agency whim. The Federal Election Campaign Act (FECA) expressly prohibits the FEC from disclosing an investigation save in two circumstances that the FEC concedes are not satisfied here. The FEC cannot wish that

prohibition away. Indeed, the FEC itself concedes (with considerable understatement) that its interpretation of that bar as vanishing when the investigation terminates is not "clear" on the face of the statute, and the various "contextual clues" to which it points only undermine its atextual reading.

The FEC is thus left faulting petitioners for protesting only the disclosure of their identities, while allowing other disclosures about the Commission's abandoned investigation. But far from posing any vehicle problem, petitioners' position just underscores the extremity of the Commission's position. Petitioners were perfectly willing to let the FEC disclose the *reasons* for its actions and non-actions, as long as the proverbial operation did not kill the patient by disclosing petitioners' identities. The fact that the Commission sees nothing wrong with disclosing the identities of individuals it decided not to proceed against for, *inter alia*, improperly failing to disclose their identities is inexplicable—or perhaps explicable only by the dissenting commissioners' desire to smear petitioners with unfounded allegations of wrongdoing. Either way, the FEC's insistence that the statute authorizes such name-and-shame tactics is wrong and presents a clear and present danger to First Amendment rights that only this Court can avert.

I. The Decision Below Empowers The FEC To Make Disclosures That FECA Does Not.

As Judge Henderson emphasized, the FEC investigates activity at "'the very heart of the' First Amendment." Pet.App.14. To avoid chilling that constitutionally protected activity, Congress carefully circumscribed what the FEC may and may not

disclose. The Commission may not disclose "[a]ny … investigation" "without the written consent of … the person with respect to whom such investigation is made." 52 U.S.C. §30109(a)(12)(A). FECA makes only two exceptions: The FEC "shall make public" a "conciliation agreement" between the FEC and a respondent, and a "determination that a person has not violated" the election laws. *Id.* §30109(a)(4)(B)(ii). The D.C. Circuit's conclusion that the Commission may engage in far more sweeping disclosure—including disclosing the confidential identities of persons as to whom it *declined* to pursue claims—is deeply flawed, and so is the FEC's effort to defend it.

The FEC begins by invoking its generic authority to develop "policy" and "rules."[1] *See* BIO.13 (citing 52 U.S.C. §§30106(b)(1), 30107(a)(8)). Of course, no one disputes that the FEC generally has the power to make rules. But nor can anyone dispute that the FEC cannot make rules that conflict with FECA, so the relevant question remains what kinds of disclosures FECA permits and prohibits.[2] And the FEC's policy of disclosing all manner of information obtained through an investigation squarely conflicts with FECA's command that the FEC may not disclose "[a]ny …

---

[1] The government also suggests that petitioners have "abandoned" any First Amendment argument. BIO.24. Nonsense. Petitioners do not press a *freestanding* First Amendment claim, but that hardly means that this Court should ignore the First Amendment entirely.

[2] The Commission's nod to the Freedom of Information Act (FOIA) fails for the same reason, as FOIA makes clear that it does not authorize any disclosures that another statute prohibits: "An agency shall withhold information … if … disclosure is prohibited by law." 5 U.S.C. §552(a)(8)(A)(i)(II).

investigation" "without the written consent of … the person with respect to whom such investigation is made." 52 U.S.C. §30109(a)(12)(A). Whether the SEC or the FCC has the power to decide whether "to conduct an investigation publicly or in private," BIO.13 (quoting *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744-45 (1984), in turn quoting *FCC v. Schreiber*, 381 U.S. 279, 292 (1965)), is therefore beside the point. When it came to the commission "[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), Congress made a very different judgment.

The FEC offers two responses, neither of which has merit. It first suggests in a footnote that subsection (a)(12)(A) only "bars disclosure of the *fact* of the investigation—not of particular documents or information the agency uncovers during that investigation." BIO.16 n.2. But the FEC cannot seriously be suggesting it can disclose reams of documents concerning an investigation as long as it never formally discloses the fact of the investigation that is the *raison d'etre* for all the documents. That would be like disclosing the appellate briefs, but not the fact of an appeal. "[A]t a minimum," subsection (a)(12)(A) must bar disclosure of all "information that would confirm the existence of an investigation." Pet.App.18 (Henderson, J., dissenting in part). And here, the FEC very much seeks to disclose that it investigated petitioners by name. Accordingly, even if there were some case in which the FEC's professed fact/information dichotomy might work, this is not it.

The FEC alternatively defends the D.C. Circuit's view that subsection (a)(12)(A) is irrelevant because it ceases to apply once an investigation "terminat[es]." BIO.16.[3] The FEC concedes (with considerable understatement) that it is not "clear" from the text whether that reading of the statute is correct. BIO.17. In fact, the text points decidedly in the other direction, as it prohibits the disclosure of "[a]ny … investigation," not of any "ongoing" investigation. 52 U.S.C. §30109(a)(12)(A). It also provides an exception to the prohibition upon "written consent." *Id.* That written-consent requirement is doubly problematic for the FEC, as it confirms (like subsection (a)(12(B), which imposes fines for violations) that the prohibition is serious, not fleeting, and exists for the protection of the target of the investigation, not of the investigation itself. All of that counsels even more strongly than in the ordinary case against reading additional exceptions into the statute. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions" generally "are not to be implied.").

---

[3] Like the majority below, the FEC half-heartedly suggests that petitioners failed to "adequately preserve[]" reliance on §30109(a)(12)(A). BIO.17. But as the majority acknowledged, petitioners argued that FECA "provides for disclosure of two—and *only* two—items," Pet.App.6, because §30109(a)(12)(A) prohibits all others. Moreover, while petitioners were bound before the panel by D.C. Circuit precedent holding that §30109(a)(12)(A) ceases to apply once an investigation terminates, they challenged that precedent at the first opportunity. Pet.27 n.7.

The FEC nonetheless gamely contends that "[v]arious contextual clues indicate" that its reading is the better one. BIO.17. While one would think that the First Amendment and common sense would provide the more relevant context, even the FEC's favored "clues" undermine its cause. For instance, the FEC notes that FECA "requires the FEC to make public [a] conciliation agreement" and "a determination that a person has not violated [FECA]." BIO.18. But disclosure of a voluntarily reached "conciliation agreement" guarantees the investigated party the ability to control what is disclosed, *i.e.,* the agreement. Where the investigated party's identity is otherwise confidential, there is no requirement that the agreement disclose the identity.

The disclosure of a complete vindication likewise will generally foreclose name-and-shame tactics. And in the rare circumstance where a fully vindicated party wants to preserve the anonymity of its campaign activity, nothing in the statute mandates a disclosure-in-vindication that might frustrate constitutional values. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 343 (1995). Of course, if the FEC proved so oblivious to common sense and constitutional values that it viewed itself as duty-bound to disclose the identity of someone who engaged in anonymous campaign activity that it concluded is *not* prohibited by statute, then the courts, and if necessary this Court, would and should intervene. The absurdity of the FEC's position here is just one step removed.

As for the remaining provisions the FEC invokes, all three concern *judicial* proceedings, which the FEC itself can initiate only with the politically accountable

step of a majority vote, and where the courts have independent power to preserve confidentiality (as evidenced by the sealing orders that govern these proceedings). BIO.18-19 (citing 52 U.S.C. §§30109(a)(6)(A), (8)(A), (8)(C)). Moreover, whatever the import of those provisions in other circumstances, they cannot justify the FEC's actions here. The FEC voted *not* to pursue an enforcement action against petitioners. BIO.8. The complainants also had no legal basis to pursue a citizen suit against petitioners because they never asked the FEC to investigate petitioners; their complaint was only against the entities as to whom the FEC *did* pursue their allegations—all the way to a conciliation agreement. *See Citizens for Responsibility & Ethics in Wash. v. FEC*, 363 F. Supp. 3d 33 (D.D.C. 2018). And the complainants could not have sued petitioners for the more basic reason that petitioners' identities were known only to the FEC, by virtue of its investigation into completely different entities. FECA's judicial review provisions thus do not aid the FEC here.

The FEC also claims that subsection (a)(12)(A) must be confined to ongoing investigations, lest the prohibition on disclosing "'information derived[] in connection with a[] conciliation attempt'" be rendered "superfluous." BIO.20 (quoting 52 U.S.C. §30109(a)(4)(B)(i)). But the FEC need only consult its first "contextual clue" to make sense of that constraint: FECA requires the FEC to disclose any "conciliation agreement." 52 U.S.C. §30109(a)(4)(B)(ii). Section 30109(a)(4)(B)(i) plays the complementary role of clarifying that when the parties try to conciliate and fail to reach a conciliation agreement, the FEC is not free to disclose the failed

effort. *Cf.* Fed. R. Evid. 408. Nothing supports the view that the prohibition on the disclosure of failed conciliation attempts ends with the termination of the case, which would be an odd result. Thus, that provision reinforces that where the statute does not permit disclosure, it applies in perpetuity, not just while the investigation is pending.

With nothing in the statute to support its position, the FEC resorts to the claim that Congress has "ratified" its capacious view of its disclosure powers by declining to "express[] disapproval" of two administrative rules that hinted that the FEC intended to make disclosures in circumstances that FECA does not authorize. *See* BIO.13-14 (discussing 11 C.F.R. §111.20(a) and 11 C.F.R. §5.4(a)(4)). But this Court has repeatedly made clear that "congressional silence lacks persuasive significance," "particularly where administrative regulations are inconsistent with the controlling statute." *Brown v. Gardner*, 513 U.S. 115, 121 (1994); *see also, e.g.*, *Rapanos v. United States*, 547 U.S. 715, 750-51 (2006) (plurality op.); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 168-70 (2001); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). Simply put, "Congressional inaction cannot amend a duly enacted statute." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

The FEC suggests that accepting petitioners' position would mean that "FECA precludes the Commission from making public its termination of the proceedings here and the reasons for its decision." BIO.13. But that all depends on which "proceedings"

the FEC has in mind. The proceeding that led to this litigation was an investigation into four other persons who entered into a conciliation agreement with the FEC. *Cf.* Pet.App.9 n.9. Petitioners have never questioned the Commission's authority to make that conciliation agreement public, as FECA requires. Petitioners' argument is far more modest: The Commission may not disclose what FECA does not allow. And FECA does not allow the FEC to disclose its entirely separate investigation into petitioners just so the dissenting commissioners can name-and-shame parties that a majority of the Commission found no reason to believe did anything wrong.

The Commission's half-hearted policy arguments do nothing to undermine that conclusion. The FEC suggests that disclosing the identities of everyone it investigates "furthers an important public interest" by allowing the public to assess whether it is "performing[] its enforcement responsibilities in an evenhanded way." BIO.21. But the Commission never even acknowledges that it is dealing with a burden on activity *protected by the First Amendment*, which demands a justification far more compelling than that. The Commission not only essentially ignores the First Amendment, but even goes so far as to make the remarkable claim that "[p]etitioners identify no policy rationale that might have led Congress to adopt … a … ban on disclosure of [FEC] records." BIO.22. That policy is called the First Amendment, and it seems the Commission could use a reminder that "every action [it] takes implicates [the] fundamental rights" it protects. *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016).

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

"The government does not dispute the general importance of the federal campaign-finance laws, including the statutes and regulations that govern public disclosure of campaign-related information." BIO.24. It also does not dispute that, were this Court to deny review, sitting FEC commissioners will issue statements on social media reprimanding petitioners for purportedly "laundering their millions" in violation of those laws, even though the FEC declined to advance its investigation of petitioners beyond the first step. *See* Pet.33. Nor does it dispute petitioners' argument that "nothing save the FEC's own grace" will stop the FEC from making such unsubstantiated accusations against others in the future. *See* BIO.21 n.3.

The FEC nonetheless believes that it is still too early for plenary review. It first points to the absence of a circuit split and the remote possibility that persons in petitioners' unenviable position in the future may file suit in their home districts instead of in the District of Columbia. BIO.23. But the FEC never explains why litigants desperately trying to *avoid* disclosures about themselves will voluntarily disclose their whereabouts and make it that much easier for parties like the complainants here to identify them. It also ignores that the D.C. Circuit has proven divided on the FEC's disclosure powers, rejecting the FEC's earlier disclosure theory as insufficiently protective of First Amendment interests, *see AFL-CIO*, 333 F.3d at 179, and then

sharply dividing here. In all events, the question presented is deserving of certiorari in its own right. *See* Sup. Ct. R. 10(c). At bottom, this case concerns whether FECA empowers the FEC to chill political activity that, if not prohibited by statute, is affirmatively protected by the First Amendment, by letting commissioners who failed to muster the votes for an enforcement action nonetheless to publicly tar people with allegations of wrongdoing. This Court should not let that grave threat to free speech loom a moment longer.

Hinting at a vehicle problem, the FEC faults petitioners for challenging only the release of their identities, even though their argument might have precluded the FEC from disclosing broader aspects of its investigation into petitioners. BIO.24. But the FEC forgets not only that most of the documents that it seeks to release pertain to an investigation of other persons, but also that investigated persons may authorize the FEC to make otherwise-impermissible disclosures. *See* 52 U.S.C. §30109(a)(12)(A). There is accordingly no mismatch between petitioners' legal argument and their requested relief. BIO.24. All the FEC accomplishes by emphasizing the narrowness of what petitioners seek to protect is to underscore the extremity of its view. The public still has a basis to examine much about the FEC's operations. Petitioners seek only to ensure that the patient survives the operation, and that a decision not to proceed against petitioners for their anonymous activity does not have the perverse consequence of destroying their anonymity. Put differently, petitioners' modest insistence on retaining their anonymity allows the Commission to achieve its

legitimate interests in disclosure, and would frustrate only the dissenting commissioners' illegitimate interests in engaging in name-and-shame tactics that would destroy petitioners' interests in anonymity while undermining the basic judgment of a majority of the Commission.

Finally, the Commission closes with the rather remarkable suggestion that the real problem is that disclosing petitioners' identities here would be arbitrary and capricious. BIO.24. That is certainly true, but it is hardly a reason to deny review and inflict irreparable injury on petitioners. Both the statutory limits on disclosure and the First Amendment protect against the arbitrary and capricious disclosure of the identities of those who engage in anonymous campaign-related activity and then are not prosecuted for it. The statute, in fact, precludes this kind of disclosure even when disclosure might not be arbitrary or capricious, for "[w]here the First Amendment is implicated, the tie goes to the speaker." *FEC v. Wis. Right to Life*, 551 U.S. 449, 474 (2007) (plurality op.). The Court should grant certiorari and reject the FEC's capacious conception of its power to permit capricious disclosures by dissenting commissioners intent on having the last word at the expense of statutory limits and First Amendment values.

CONCLUSION

The Court should grant the petition.

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

March 4, 2020