No. 19-484

In the Supreme Court of the United States

JOHN DOE 1, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (52 U.S.C. 30101 *et seq.*), as amended, authorizes the Federal Election Commission (FEC or Commission) "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of this Act." 52 U.S.C. 30107(a)(8). An FEC rule states that "[i]f the Commission makes a finding of no reason to believe" that a person has violated the Act "or otherwise terminates its proceedings, it shall make public such action and the basis therefor." 11 C.F.R. 111.20(a). Here, after an investigation into potential violations of the Act, the FEC by a 2-3 vote failed to find reason to believe that petitioners had violated the Act, and the Commission eventually terminated its proceedings. The question presented is as follows:

Whether the court of appeals correctly held that, under those circumstances, the Commission may make public its action and the basis therefor.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 920 F.3d 866. The opinion of the district court (Pet. App. 26-54) is reported at 302 F. Supp. 3d 160.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 2019. A petition for rehearing was denied on July 11, 2019 (Pet. App. 24-25). The petition for a writ of certiorari was filed on September 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following an investigation of several parties alleged to have violated federal campaign-finance laws, the Federal Election Commission (FEC or Commission) declined to find reason to believe that petitioners had

violated those laws, and the agency terminated its proceedings. Petitioners filed suit in the United States District Court for the District of Columbia, seeking to enjoin the Commission from publicly disclosing petitioners' identities. The district court denied injunctive relief and entered judgment against petitioners. Pet. App. 26-54. The court of appeals affirmed. *Id.* at 1-23.

1. a. The FEC is a six-member independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA or Act), Pub. L. No. 92-225, 86 Stat. 3 (52 U.S.C. 30101 *et seq.*), and other federal campaign-finance laws. See 52 U.S.C. 30106. The chair and vice-chair must be from different political parties, and no more than three commissioners may be members of the same political party. 52 U.S.C. 30106(a)(1) and (5). Certain Commission actions, including decisions to pursue enforcement matters, require the affirmative votes of at least four commissioners. 52 U.S.C. 30106(c), and 30107(a)(6) and (9).

An enforcement matter proceeds through several steps, which are set forth in Section 30109(a). A matter ordinarily begins when a third party files a sworn complaint alleging violations of the campaign-finance laws. The Commission generally must notify any person accused in the complaint and must allow that person a chance to respond. 52 U.S.C. 30109(a)(1). If the Commission dismisses the complaint or fails to act on it within 120 days, "[a]ny party aggrieved" by the dismissal or failure to act may file a petition in the United States District Court for the District of Columbia. 52 U.S.C. 30109(a)(8)(A). If the court declares that the dismissal or failure to act "is contrary to law," and the Commission does not "conform [to] such declaration,"

the complainant may bring a civil action in federal district court "to remedy the violation involved in the original complaint." 52 U.S.C. 30109(a)(8)(C).

If the Commission does not dismiss the complaint, it must determine whether there is "reason to believe" that a person violated or is about to violate the campaign-finance laws. 52 U.S.C. 30109(a)(2). The Commission also may make such a determination based on information it learns during the normal course of carrying out its responsibilities, even if no third party has filed a complaint. See *ibid.* If the FEC finds such "reason to believe," it must notify the person (called the "respondent") as to whom such reason to believe exists, and it must investigate the potential violations. *Ibid.*

Following the investigation, the FEC general counsel recommends whether the commissioners should "proceed to a vote on probable cause" and notifies the respondent of that recommendation; the respondent may then submit a brief stating its position. 52 U.S.C. 30109(a)(3). If the Commission determines that there is "probable cause to believe" that the respondent has violated or is about to violate the campaign-finance laws, it must engage in conciliation and other informal attempts "to correct or prevent such violation," 52 U.S.C. 30109(a)(4)(A), and may include civil penalties in a conciliation agreement, 52 U.S.C. 30109(a)(5). If conciliation attempts are unsuccessful, the Commission may "institute a civil action" in federal district court to seek civil penalties and injunctive relief. 52 U.S.C. 30109(a)(6)(A); see 52 U.S.C. 30109(a)(7) and (11). The Act also provides for criminal liability under certain circumstances. See 52 U.S.C. 30109(d).

b. Several statutory and regulatory provisions govern the confidentiality and disclosure of materials related to FEC investigations. The Act protects the confidentiality of conciliation negotiations, providing that "[n]o action" or "information derived" "in connection with any conciliation attempt * * * may be made public by the Commission without the written consent of the respondent and the Commission." 52 U.S.C. 30109(a)(4)(B)(i). Section 30109 also states that "[a]ny notification or investigation made under this section 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." 52 U.S.C. 30109(a)(12)(A). But if at any stage an investigation results in the filing of a civil action—such as by the complainant, the respondent, or the FEC under paragraph (6)(A), (8)(A), or 8(C) of Section 30109(a)—the Act does not impose any sealing or other secrecy requirements in such an action.

If conciliation is successful, "the Commission shall make public any conciliation agreement." 52 U.S.C. 30109(a)(4)(B)(ii). Likewise, "[i]f the Commission makes a determination that a person has *not* violated" the campaign-finance laws, it "shall make public such determination" as well. *Ibid.* (emphasis added). And the Freedom of Information Act (FOIA), 5 U.S.C. 552, generally requires a multimember agency to "make available for public inspection" final adjudication opinions and orders, including any concurring and dissenting opinions, as well as the final votes of each member in any proceeding. 5 U.S.C. 552(a)(2)(A) and (5).

The Act also authorizes the Commission "to make, amend, and repeal such rules * * * as are necessary to

carry out the provisions of this Act." 52 U.S.C. 30107(a)(8). Indeed, Congress *required* the Commission to "transmit to the Congress proposed rules and regulations necessary for the purpose of implementing the provisions of th[e] Act * * * prior to February 29, 1980." Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 303(a), 93 Stat. 1368 (52 U.S.C. 30101 note). On February 28, 1980, in accordance with that congressional directive, the Commission transmitted to Congress for its review a set of proposed rules and regulations to implement the Act. 45 Fed. Reg. 15,080 (Mar. 7, 1980).

Among the proposed rules was one entitled "Public disclosure of Commission action," which provided in relevant part: "If 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." 45 Fed. Reg. at 15,123. Another proposed rule, entitled "Confidentiality," further provided that "no complaint," "notification," "investigation," or "findings" "shall be made public by the Commission or by any person or entity without the written consent" of the target of the investigation, "[e]xcept as provided in" the previously quoted rule. *Ibid.* Congress did not disapprove either proposed rule, and both therefore went into effect. See *id.* at 15,080. The relevant regulatory text remains unchanged today. See 11 C.F.R. 111.20(a), 111.21(a).

Later in 1980, following notice-and-comment rulemaking, the Commission promulgated another regulation that bears on this case. That rule stated that the FEC "shall make * * * available for public inspection and copying" several types of documents, including "[o]pinions of Commissioners rendered in enforcement

cases and General Counsel's report and non-exempt [52 U.S.C. 30109] investigatory materials in enforcement files." 45 Fed. Reg. 31,292, 31,293 (May 13, 1980). That text likewise remains unchanged today, see 11 C.F.R. 5.4(a)(4), although as explained below the Commission has adopted a disclosure policy under which some of the materials listed in that rule are not routinely made public.

c. The FEC has long taken the view that Section 30109(a)(12)(A)'s ban on disclosure of a Commission "investigation" "end[s] with the termination of a case," 81 Fed. Reg. 50,702 (Aug. 2, 2016), and that materials in investigative files may lawfully be disclosed after the investigation is complete. The plaintiffs in *AFL-CIO* v. *FEC*, 333 F.3d 168 (D.C. Cir. 2003), challenged that interpretation. The court of appeals upheld the agency's interpretation of paragraph (12)(A) as a reasonable construction of the governing statute. See *id.* at 174. The court held, however, that the FEC's then-existing disclosure policies concerning the *range* of materials that would be released post-investigation were impermissible because they reflected insufficient attention to the First Amendment interests that disclosure of materials obtained from private parties might entail. See *id.* at 179.

Shortly thereafter, the Commission issued an interim disclosure policy. See 68 Fed. Reg. 70,426 (Dec. 18, 2003). In 2016, the agency adopted a new disclosure policy. See 81 Fed. Reg. at 50,702. The commissioners unanimously adopted the policy "to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates." *Id.* at 50,703.

Under the FEC's 2016 disclosure policy, when the Commission terminates a matter, it makes public "several categories of documents integral to its decision-making process" and "to its administrative functions." 81 Fed. Reg. at 50,703. Those documents include the commissioners' respective votes and statements of reasons; the FEC general counsel's reports and recommendations; and the complaint, response, and other briefs filed by the parties to the proceeding. *Ibid.* In the FEC's view, because those documents "play a critical role in the resolution of a matter, the balance tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information." *Ibid.* By contrast, the policy exempts from disclosure "certain other materials from [the FEC's] investigative files," including "subpoenaed records, deposition transcripts, and other records produced in discovery, even if those evidentiary documents are referenced in, or attached to, documents specifically subject to release under this policy." *Ibid.*

2. a. This case arises out of an administrative complaint alleging that an "unknown respondent" had donated $1.71 million in the name of a nonprofit to a political action committee (PAC), in violation of the Act's prohibition on "mak[ing] a contribution in the name of another person," 52 U.S.C. 30122. See Pet. App. 2. By a 6-0 vote, the Commission found "reason to believe" that the nonprofit and unknown respondent had violated the Act, and it authorized an investigation. *Id.* at 3.

The investigation revealed that the unknown respondent was a Delaware limited liability corporation (LLC) that had been "formed * * * for the purpose of making political contributions." Pet. App. 3. The LLC had wired $1.8 million to the nonprofit, which then had

wired the $1.71 million contribution to the PAC. See *id.* at 3-4. The PAC's treasurer, who also was the LLC's lawyer, filed a report with the Commission that identified the nonprofit as the source of the donation. See *id.* at 4. After the FEC unanimously found probable cause to believe that the nonprofit had violated the Act, the Commission ultimately entered into a conciliation agreement with the LLC, the nonprofit, the PAC, and the treasurer. See *ibid.* Those four parties agreed not to contest that they had violated the Act by disguising the source of the $1.71 million contribution, and to pay $350,000 in civil penalties. See *id.* at 4-5.

The Commission's investigation also uncovered petitioners' involvement in the $1.71 million contribution. Petitioners are a trust and its trustee. The investigation revealed that the "trust, presumably at the direction of its trustee, wired $2.5 million to" the LLC just "[m]inutes" before the LLC wired the $1.8 million to the nonprofit. Pet. App. 3. The FEC general counsel "concluded that this nearly simultaneous three-step transaction—from the trust to [the LLC], from [the LLC] to [the nonprofit], and from [the nonprofit] to the PAC—'suggests that the parties went through significant lengths to disguise the true source of the funds.'" *Id.* at 4 (citation omitted). Petitioners refused, however, to respond to a subpoena issued by the FEC. See C.A. App. 123-124. The FEC general counsel subsequently recommended that the Commission find reason to believe that petitioners had violated the Act, and to commence a civil action to enforce the subpoena. *Id.* at 133.

By a 2-3 vote, the Commission failed to find reason to believe that petitioners had violated the Act and failed to authorize enforcement of the subpoena. C.A. App. 135. After unanimously approving the conciliation

agreement with the other respondents, the Commission voted to close the matter, and the documents from its investigation were prepared for release in accordance with the agency's disclosure policy and regulations. Pet. App. 5. Petitioners were neither parties to nor identified in the conciliation agreement. *Ibid.* But some of the documents in the Commission's files from the investigation identified petitioners. See *ibid.*

Seeking to prevent disclosure of their identities and certain other facts, and unable to obtain the FEC's agreement to deviate from its disclosure policy and standard practice, petitioners filed this suit for injunctive relief. See Pet. App. 5. The Commission released the files but redacted "the disputed identifying information * * * pending the outcome of this lawsuit." *Ibid.* One of the commissioners released a redacted version of her statement of reasons why she would have enforced the subpoenas against petitioners and found reason to believe that petitioners had violated the Act. C.A. App. 203-206. Two other commissioners then released their own statement of reasons for their votes not to pursue further action against petitioners. *Id.* at 207-211.

b. The district court denied petitioners' request for injunctive relief and entered judgment in favor of the FEC. Pet. App. 26-54.

As relevant here, the district court first observed that paragraph (4)(B)(i) of Section 30109(a) did not *prohibit* disclosing petitioners' identities because that provision applies only to actions or information derived "in connection with any *conciliation attempt* by the Commission." Pet. App. 36 (citation omitted). Conversely, the court concluded that paragraph (4)(B)(ii), which requires making public any conciliation agreement or no-

violation determination, did not *require* disclosure because "the Commission did not make any 'determination' that [petitioners] had not violated the Act; it simply did not vote to find reason to believe that they had." *Ibid.*

The district court rejected petitioners' argument that paragraph (12)(A), which prohibits making public "[a]ny notification or investigation made under this section" without written consent, 52 U.S.C. 30109(a)(12)(A), prohibited disclosure of their identities here. The court observed that in *AFL-CIO*, the court of appeals had found that provision to be silent on whether it applied only to *ongoing* investigations, as the government had contended, or to *completed* investigations as well. Pet. App. 37-39. The district court also observed that 11 C.F.R. 111.20(a) requires disclosure of certain materials whenever the Commission "otherwise terminates its proceedings," as it had done here. Pet. App. 51 (citation omitted).

Applying *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the district court found that the FEC's regulation reflects a reasonable interpretation of the Act. See Pet. App. 50-54. The court observed that, since "even the names of those who are investigated and *exonerated* are publicly revealed" pursuant to 52 U.S.C. 30109(a)(4)(B)(ii), "it would not be unreasonable to release [petitioners'] names here." Pet. App. 51-52. The court explained that "the public has an interest in the agency's decision to terminate this proceeding involving [the LLC] without enforcing its own subpoenas and following the money back to its source." *Id.* at 52. The court also held that disclosing petitioners' identities here would not violate the First Amendment under this Court's decision in *Citizens United* v. *FEC*, 558 U.S. 310

(2010), in light of the important governmental interests in disclosure. Pet. App. 48. Accordingly, the court concluded that the "agency's salutary interest in exposing its decision making to public scrutiny outweighs [petitioners'] insubstantial privacy concerns." *Id.* at 54.

3. The court of appeals affirmed. Pet. App. 1-23.

a. As relevant here, the court of appeals rejected petitioners' argument that the Commission lacked statutory authority to disclose their identities and that such disclosure therefore would be "not in accordance with law," 5 U.S.C. 706(2)(A). See Pet. App. 6-8. The court explained that "'properly promulgated, substantive agency regulations'"—such as 11 C.F.R. 111.20(a)—also constitute governing "law," and that petitioners "ha[d] not argued that § 111.20(a) is anything other than a 'properly promulgated' regulation." Pet. App. 7 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295 (1979)).

The court of appeals also observed that FECA authorizes the Commission to promulgate rules as "necessary to carry out the provisions of this Act" and to "formulate policy with respect to" the Act. Pet. App. 8 (citations omitted). The court explained that "grants of agency authority comparable in scope * * * have been held to authorize public disclosure of information, as the agency may determine to be proper upon a balancing of the public interests involved." *Ibid.* (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 291-292 (1965)) (brackets and ellipsis omitted). Applying those principles here, the court of appeals concluded that "[t]he Commission's 2016 Disclosure Policy, adopted in response to *AFL-CIO*, considered the public and private interests involved and reasonably concluded that disclosure of the contemplated documents 'tilts decidedly in favor of pub-

lic disclosure, even if the documents reveal some confidential information.'" *Id.* at 9 (quoting 81 Fed. Reg. at 50,703). The court did not specifically address whether disclosing petitioners' names would violate Section 30109(a)(12)(A), finding that petitioners "ha[d] abandoned this argument" on appeal. *Id.* at 6 n.4.

The court of appeals further held that disclosing petitioners' identities would not violate the First Amendment. Pet. App. 9-10. The court observed that, under this Court's decision in *Citizens United*, *supra*, the disclosure provision is "plainly constitutional." Pet. App. 9. The court of appeals noted that a donor could bring an as-applied challenge if it showed "that revealing its identity would probably bring about threats or reprisals," but that petitioners had "provided no such evidence" or allegation. *Id.* at 10.

Finally, the court of appeals rejected petitioners' argument that FOIA prohibited disclosing their identities. Pet. App. 10-13. The court explained that "FOIA is a disclosure statute," and that "if an agency discloses information pursuant to other statutory provisions or regulations, the agency cannot possibly violate FOIA." *Id.* at 11 (citing *Chrysler*, 441 U.S. at 292). The court further explained that, "under Exemption 7(C)" of FOIA, 5 U.S.C. 552(b)(7)(C), "the Commission would not have had discretion to withhold information identifying the trust in response to a FOIA request" because that exemption covers only "'individuals,' not 'corporations or other artificial entities'" like the trust. Pet. App. 12 (quoting *FCC* v. *AT&T Inc.*, 562 U.S. 397, 403 (2011)).

b. Judge Henderson dissented. Pet. App. 14-23. Observing that Section 30109(a)(4)(B)(ii) requires the Commission to disclose only conciliation agreements

and no-violation determinations, she concluded that the Act must by implication forbid the FEC from disclosing anything else. *Id.* at 17-19.

ARGUMENT

Petitioners argue (Pet. 20-32) that FECA precludes the Commission from making public its termination of the proceedings here and the reasons for its decision, including petitioners' identities. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. FECA grants the Commission broad authority to "administer" and "formulate policy with respect to" the Act, 52 U.S.C. 30106(b)(1), and "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of this Act," 52 U.S.C. 30107(a)(8). That grant of rulemaking authority "is broad enough to empower an agency to 'establish standards for determining whether to conduct an investigation publicly or in private.'" *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744-745 (1984) (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 292 (1965)).

The Commission has established such standards here. One of its rules, which took effect in 1980 after a statutorily mandated period for review by Congress, see p. 5, *supra*, states that, "[i]f the Commission makes a finding of no reason to believe [that a violation occurred] * * * or otherwise terminates its proceedings, it shall make public such action and the basis therefor." 11 C.F.R. 111.20(a). Another rule, promulgated in 1980 after notice-and-comment rulemaking, states that "[o]pinions of Commissioners rendered in enforcement cases and General Counsel's Reports and non-exempt

52 U.S.C. 30109 investigatory materials shall be placed on the public record." 11 C.F.R. 5.4(a)(4).

That "neither House expressed disapproval" of those regulations is an "indication that Congress d[id] not look unfavorably upon" them. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 34 (1981) (discussing 11 C.F.R. 110.7, which was promulgated at the same time as 11 C.F.R. 111.20(a)). Since that time, Congress has not acted to disturb the regulatory framework that governs FEC disclosures, even though it has substantially amended the campaign-finance laws in other respects, including through the enactment of new disclosure requirements. See, *e.g.*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 103, 116 Stat. 87 (additional disclosure requirements for political committees); § 201, 116 Stat. 88 (new disclosure requirements for electioneering communications); § 311, 116 Stat. 105 (new requirements for identifying the sponsors of election-related advertising).

To be sure, the precise *range* of investigation-related information that the Commission chooses to disclose has changed over time. The FEC's most recent disclosure policy, adopted unanimously in 2016 in response to the D.C. Circuit's decision in *AFL-CIO* v. *FEC*, 333 F.3d 168 (2003), identified various materials in investigative files that the FEC would thereafter refrain from disclosing in order "to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates." 81 Fed. Reg. at 50,703. Under that policy, however, after an investigation is complete, the Commission has continued to make public "documents integral to its decisionmaking process," including commissioner votes and statements of reasons; general

counsel reports and recommendations; and the complaint, response, and other briefs filed by the parties to the proceeding. *Ibid.* The 2016 policy reflects the Commission's view that disclosure of certain investigation-related information serves sufficiently important interests in agency transparency and accountability as to justify any intrusion on privacy that disclosure might entail.

The FEC's disclosure practices reflect "the general policy favoring disclosure of administrative agency proceedings," *Schreiber*, 381 U.S. at 293. Those practices are also consistent with FOIA's requirements that agencies "make available for public inspection" "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," 5 U.S.C. 552(a)(2)(A), along with "the final votes of each member in every agency proceeding," 5 U.S.C. 552(a)(5). The disclosures contemplated by the 2016 policy assist the public and Congress in assessing the performance of the FEC as a body, and of individual commissioners, in their performance of their sensitive duties. Patterns of enforcement and non-enforcement over time, including the votes of individual commissioners, could be critical information for Congress and the public to have in evaluating whether the FEC—whose sole function is to regulate the federal electoral process—is performing its duties in a responsible and evenhanded manner. See Pet. App. 52 (concluding that "the public has an interest in the agency's decision to terminate the proceeding involving [the LLC] without enforcing its own subpoenas and following the money back to its source").

2. Petitioners argue that, in the circumstances of this case, disclosure of information concerning the

FEC's investigation here is prohibited by paragraph (12)(A) of Section 30109(a). That provision states, with exceptions that are not relevant here, that "[a]ny notification or investigation made under this section shall not be made public by the Commission or by any person." 52 U.S.C. 30109(a)(12)(A).[1] Since at least 1980, the FEC has "viewed th[is] confidentiality requirement as ending with the termination of a case," 81 Fed. Reg. at 50,702, so that the disclosure bar ceases to apply once a matter is complete. Petitioners, by contrast, view the ban on public disclosure of an FEC "investigation" as applying in perpetuity. See Pet. 28.

In this case, petitioners have requested that their names be redacted from the relevant records, but have not objected to the records' release in redacted form. Acceptance of their legal theory, however, would have far more sweeping practical implications. Under petitioners' reading of paragraph (12)(A), the Commission would be prohibited from making public *any* reference to an investigation that results in a deadlock, including the reasons individual commissioners gave for their votes. See Pet. 29 (asserting that, "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") (emphasis added).[2]

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[1] Petitioners also invoke Section 30109(a)(4)(B)(i), which prohibits disclosure (absent written consent) of "action" and "information derived[] in connection with a[] conciliation attempt." 52 U.S.C. 30109(a)(4)(B)(i). Because the information at issue in this case lacks the requisite connection to any "conciliation attempt," that provision is inapplicable here. See Pet. App. 36.

[2] When it applies, paragraph (12)(A) bars disclosure of the *fact* of the investigation—not of particular documents or information the

Viewed in isolation, paragraph (12)(A) does not make clear whether the bar to disclosing an FEC investigation continues to apply after the investigation ends. Various contextual clues indicate, however, that the provision cannot reasonably be read to impose the open-ended prohibition that petitioners advocate. Thus, even if petitioners had adequately preserved their argument that paragraph (12)(A) prohibits the disclosures at issue here, but see Pet. App. 6 n.4 (finding that petitioners had "abandoned" the argument on appeal after having raised it in the district court), that argument lacks merit.

a. Other provisions within Section 30109(a) ensure that, regardless of an investigation's outcome, both the fact of the "notification or investigation" and specified

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agency uncovers during that investigation. That reading reflects the ordinary meaning of "investigation," which is a process for discovering facts, and not the facts themselves. See *The American Heritage Dictionary of the English Language* 689 (1969) ("[t]he act, process or an instance of investigating; inquiry"); *Black's Law Dictionary* 825 (6th ed. 1990) ("process of inquiring into or tracking down through inquiry"). Consistent with that ordinary meaning, the term "investigation" appears in three other provisions in Section 30109(a), each time to refer to a process. See 52 U.S.C. 30109(a)(1) (providing that the "Commission may not conduct any investigation" based on an anonymous complaint), (2) (requiring the Commission to "make an investigation," including a "field investigation or audit," of violations it has reason to believe occurred or will occur), and (11) (authorizing the Commission to seek a civil contempt order if it "determines after an investigation that any person has violated an order of the court"). Paragraph (4)(B)(i), by contrast, prohibits disclosure of "information derived" "in connection with any conciliation attempt." 52 U.S.C. 30109(a)(4)(B)(i). Congress presumably would have used similar language in paragraph (12)(A) if it had intended to prohibit public disclosure of particular investigation-related information, such as the identity of the person being investigated.

information relating to it will be made public once the Commission terminates a proceeding. If a case is resolved in conciliation, paragraph (4)(B)(ii) requires the FEC to make public the conciliation agreement. 52 U.S.C. 30109(a)(4)(B)(ii). Public disclosure of a conciliation agreement reveals the activities that were alleged to be unlawful in the Commission's "reason to believe" notification under paragraph (a)(2), which in turn were the subject of the ensuing investigation. See 52 U.S.C. 30109(a)(2).

If a case is not resolved in conciliation, paragraph (6)(A) authorizes the Commission to "institute a civil action for relief" in federal district court. 52 U.S.C. 30109(a)(6)(A). The complaint in such an action obviously would describe the activities that are alleged to violate the Act, as well as the factual bases for those allegations. And because the Act does not authorize enforcement litigation until all of the administrative procedures have been completed, the filing of a complaint necessarily would reveal that the Commission had previously notified the defendant of its "reason to believe" and "probable cause" findings, conducted an investigation, and unsuccessfully attempted conciliation.

The kind of information petitioners seek to conceal (Pet. 30-31) must be revealed even in circumstances where the Commission does not find reason to believe or probable cause that a violation has occurred. For example, paragraph (4)(B)(ii) requires the Commission to make public "a determination that a person has not violated this Act." 52 U.S.C. 30109(a)(4)(B)(ii). A public disclosure under that provision also would reveal that at some point the Commission had sent a notification to the person about potential FECA violations.

Similarly, if the Commission dismisses a third-party complaint under paragraph (8)(A), it necessarily must make public the reasons for its dismissal. After all, the Act allows a complainant "aggrieved" by a dismissal to seek judicial review of that dismissal. 52 U.S.C. 30109(a)(8)(A); see *FEC* v. *Akins*, 524 U.S. 11 (1998). Judicial review *presupposes* that the Commission will disclose the reasons for its decision to dismiss; otherwise, the court would have no meaningful record to review. Cf. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983); *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947). For that reason, the D.C. Circuit has held that, even when the Commission dismisses a case because there are not four affirmative votes to continue, it must make public its "statement of reasons * * * to allow meaningful judicial review" and to ensure "reasoned decisionmaking by the agency." *Common Cause* v. *FEC*, 842 F.2d 436, 449 (1988).

Finally, if a court determines that a dismissal was not contrary to law, or if the Commission does not "conform with" a court's contrary declaration within 30 days, the complainant may bring "a civil action to remedy the violation involved in the original complaint." 52 U.S.C. 30109(a)(8)(C). The original complaint, and any ensuing proceedings, obviously will reveal precisely the sorts of details that petitioners seek to conceal here.

The statutory scheme thus contemplates that, once an administrative proceeding under Section 30109(a) is complete, the FEC often will be required to disclose to the public the identities of those investigated, the activities investigated, the allegations of unlawful conduct that led to the investigation, and the relevant acts unearthed during the investigation. Paragraph (12)(A)

should not be construed to forbid what other paragraphs in Section 30109(a) require. Although such conflicts could in theory be resolved by applying various tools of statutory interpretation, statutes should not be read to produce needless contradictions of that sort if a reasonable alternative construction is available. See *Shapiro* v. *McManus*, 136 S. Ct. 450, 454 (2015).

To be sure, the statutory provisions described above did not require disclosure here, where a Commission deadlock prevented the agency from making any of the determinations that would have triggered an express disclosure mandate. Explicit statutory disclosure requirements apply both when the FEC concludes that the respondent has violated the campaign-finance laws, and when it determines that no violation has occurred. Because the FEC terminated its investigation into petitioners' activities without making either of those determinations, no FECA provision specifically *required* disclosure of the investigative materials at issue here. But in light of the general thrust of FECA's disclosure provisions, it would be highly anomalous to construe the Act to *prohibit* disclosure in the circumstances presented here, simply because neither of the proposed dispositions of the matter was supported by a majority of commissioners.

b. Petitioners' interpretation of paragraph (12)(A) would also render paragraph (4)(B)(i) superfluous. That provision bars disclosure (absent written consent) of "action * * * and information derived[] in connection with a[] conciliation attempt." 52 U.S.C. 30109(a)(4)(B)(i); see note 2, *supra*. If paragraph (12)(A) permanently barred disclosure of all investigation-related information ex-

cept where another FECA provision required disclosure, that ban on disclosure of conciliation discussions would be unnecessary.

3. Petitioners' contrary arguments lack merit.

a. Petitioners contend that disclosure of their identities under the agency's longstanding regulations and 2016 disclosure policy will in effect "name and shame" them, see Pet. 19, 21, 26, 31, thereby impairing their privacy interests in a manner that Congress could not have intended. But the Act requires the Commission to make public its determination that a particular investigated person did *not* violate the campaign-finance laws. 52 U.S.C. 30109(a)(4)(B)(ii). Petitioners identify no reason to view their own privacy interests here, where the Commission simply failed to find reason to believe that petitioners had committed a violation, as greater than those of persons for whom the FEC has made an affirmative no-violation finding.

Contrary to petitioners' suggestion (Pet. 25-26 & n.5, 31), public identification of petitioners and persons like them furthers an important public interest. Particularly in the sensitive field of campaign-finance regulation, it is crucial that the responsible government agency perform (and be seen as performing) its enforcement responsibilities in an evenhanded way, applying the same substantive standards to entities of diverse political orientations. Identifying the investigated parties as to whom the FEC has declined to take enforcement action gives the public and Congress information that is directly relevant to that assessment.[3]

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[3] Petitioners assert (Pet. 34) that, under the court of appeals' decision, "nothing save the FEC's own grace would prevent it from revealing politically motivated investigations that the full Commission terminated at the first opportunity." Petitioners state (*ibid.*)

Finally, petitioners' emphasis on the distinct harms that disclosure of their identities purportedly will cause is simply untethered to their legal theory. Although petitioners have not objected to the public release of redacted versions of the documents at issue here, the logical implication of their reading of paragraph (12)(A) of Section 30109(a) is that even those disclosures are unlawful. See pp. 16-17, *supra*. Petitioners identify no policy rationale that might have led Congress to adopt such a sweeping ban on disclosure of agency records.

b. Petitioners' reliance (Pet. 22, 26-27) on paragraph (4)(B)(ii) is misplaced. That provision requires the Commission to disclose conciliation agreements and no-violation determinations. 52 U.S.C. 30109(a)(4)(B)(ii). But Congress's enactment of those express disclosure requirements does not logically imply that the Commission is *forbidden* to make public other items, once proceedings have terminated. Under FOIA, for example, agencies typically possess discretion to release even those agency records that are exempt from FOIA's mandatory disclosure requirements. See *Chrysler*, 441 U.S. at 290-294; Pet. App. 11. The same principle applies here.

c. Petitioners seek (Pet. 23, 34-35) to analogize the FECA provisions governing Commission investigations

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that "[n]one of that could possibly be what Congress envisioned." But if the Commission ultimately concluded that a particular FEC investigation had been commenced for an improper purpose, public disclosure of that conclusion would serve important public interests in agency transparency and accountability. Given those interests, and given FECA's specific directive that the FEC's no-violation determinations be made public, it is scarcely farfetched to suppose that Congress would approve agency disclosure of ill-motivated investigations.

to Federal Rule of Criminal Procedure 6(e), which establishes stringent confidentiality requirements for grand-jury information. As the D.C. Circuit previously recognized, however, "that analogy breaks down once a Commission investigation closes because FECA expressly requires disclosure of 'no violation' findings, whereas [Rule] 6(e)(6) continues to protect suspects exonerated by a grand jury." *AFL-CIO*, 333 F.3d at 175 (citation omitted). As explained above, FECA requires disclosure when the subject of an FEC investigation enters into a conciliation agreement, or when an investigation culminates in a Commission determination that no violation occurred. Those provisions make clear that, although Congress sought to protect the secrecy of *ongoing* FEC investigations, it rejected the broad post-investigation non-disclosure mandate that Rule 6(e) imposes.

4. Petitioners do not contend that the decision below conflicts with any decision of this Court or another court of appeals. That is sufficient reason to deny review. There is no basis for petitioners' suggestion (Pet. 35) that the issue presented here will as a practical matter "arise only within the D.C. Circuit." A civil action against a federal agency generally may "be brought in any judicial district in which * * * the plaintiff resides if no real property is involved." 28 U.S.C. 1391(e)(1). Given FECA's nationwide scope and the extreme unlikelihood that real property would be involved in an FEC investigation, there is no reason to believe that future plaintiffs in petitioners' shoes would be disabled from bringing suit outside the District of Columbia.

Nor, contrary to petitioner's contention (Pet. 34-35), does this case present an issue of such overriding im-

portance as to warrant this Court's review in the absence of a circuit conflict. 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. The particular question presented here, however, does not arise with meaningful frequency. Indeed, although the statutory and regulatory provisions governing the Commission's disclosure obligations and practices have been in place for four decades or more, the only prior federal appellate decision the parties have identified that addresses that issue is the D.C. Circuit's decision in *AFL-CIO* nearly 17 years ago.

As noted above (see pp. 16-17, 22, *supra*), moreover, although the only relief that petitioners seek is an order directing redaction of their names and a limited set of other information, they do not assert any legal argument that is targeted at that purported invasion of their privacy. To the extent petitioners believe (see Pet. 19, 21, 26, 31) that making their identities public would allow the FEC to "name and shame" them without serving any meaningful public interest, they could have argued that the disclosures of their names under the particular circumstances here is arbitrary and capricious or otherwise inconsistent with the agency's disclosure policy. Petitioners have not advanced any such argument in this Court. Indeed, they have abandoned in this Court their prior claim that the disclosure of their names under the circumstances here would violate the First Amendment. Compare Pet. i-ii with Pet. App. 9-10.

Instead, petitioners' legal argument here is that FECA categorically prohibits the Commission from making public (absent consent) any investigation-related materials other than a conciliation agreement or

a no-violation determination. As explained above, that categorical assertion is incorrect. And because petitioners have abandoned any legal theory targeted at the particular disclosures that they seek to prevent here, this case would be a poor vehicle in which to address whether FEC disclosures that identify the entities being investigated raise distinct legal concerns.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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