ORAL ARGUMENT SCHEDULED FOR SEPTEMBER 17, 2018

No. 18-5099

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE 1, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR THE FEDERAL ELECTION COMMISSION PUBLIC COPY--SEALED MATERIAL DELETED

Lisa J. Stevenson
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher
Acting Assistant General Counsel
ckitcher@fec.gov

June 18, 2018

Robert W. Bonham III
Senior Attorney
rbonham@fec.gov

Haven G. Ward
Attorney
hward@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), defendant-appellee Federal Election Commission ("Commission" or "FEC") submits its Certificate as to Parties, Rulings, and Related Cases.

(A) Parties and Amici. John Does 1 and 2 are plaintiffs in the district court and appellants in this Court. The FEC is the defendant in the district court and the appellee in this Court. Citizens for Responsibility and Ethics in Washington and Anne Weismann (collectively, "CREW") filed an *amicus* brief in the district court.

(B) Ruling Under Review. Appellants appeal the March 23, 2018 final order and judgment of the United States District Court for the District of Columbia (Jackson, J.), which denied appellants' request to permanently enjoin the FEC from disclosing appellants' identities as part of its release of the public file in Matter Under Review 6920 in accordance with Commission regulations and its disclosure policy. The Memorandum Opinion appears in the Joint Appendix ("J.A.") at J.A. 541-63 and is reported at *Doe v. FEC*, Civ. No. 17-2694 (ABJ), ___ F. Supp. 3d ___, 2018 WL 1461964 (D.D.C. Mar. 23, 2018, as amended May 29, 2018).

(C) Related Cases. On December 22, 2017, CREW filed suit against the FEC in the United States District Court for the District of Columbia. *CREW v. FEC*, Civ. No. 17-2770 (ABJ). CREW designated that case as related case to the underlying case, *Doe v. FEC*, Civ. No. 17-2694 (D.D.C.).

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GLOSSARY

APA	Administrative Procedure Act
CREW	Citizens for Responsibility and Ethics in Washington and Anne L. Weismann
FEC or Commission	Federal Election Commission
FECA or Act	Federal Election Campaign Act
FOIA	Freedom of Information Act
J.A.	Joint Appendix
MUR	Matter Under Review

COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the district court correctly rejected appellants' request to permanently enjoin the FEC from disclosing their identities as part of its intended public release of the file for a closed administrative enforcement matter in which appellants' roles in the underlying unlawful activity were discussed in detail, by concluding that the FEC's intended release is consistent with Commission regulations and its current disclosure policy, and that the disclosure policy and its application to appellants is consistent with the provisions of the Federal Election Campaign Act, the Freedom of Information Act, and the First Amendment.

STATUTES AND REGULATIONS

All applicable statutory provisions and regulations are contained in the Brief of Appellants ("Br.") at pp. A-1 to A-9 of the Addendum.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. The Federal Election Commission

The Federal Election Commission ("FEC" or "Commission") is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA" or "Act"). Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to"

FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id*. §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id*. § 30109(a)(1)-(2). The FEC is required under FECA to make decisions through majority votes and, for certain actions, including enforcement decisions, with the affirmative vote of at least four Commissioners. *Id*. § 30106(c).

B. Disclosure of FEC Enforcement Matters

The FEC exercises its civil enforcement authority under FECA's detailed administrative enforcement procedures. *Id.* § 30109. A new enforcement matter, known as a "Matter Under Review" or "MUR," is initiated by the filing of an administrative complaint with the agency or on the basis of information the Commission ascertains in the normal course of carrying out its supervisory responsibilities. *Id.* § 30109(a)(1)-(2); 11 C.F.R. § 111.3(a). Thereafter, the Commission engages in a series of formal steps, including determining whether there is "reason to believe" regarding the alleged FECA violation, investigating the allegation, determining whether there is "probable cause" regarding the alleged violation, and engaging in conciliation with the alleged violator (the "respondent"). 52 U.S.C. § 30109(a)(2)-(5). Each of these steps requires the affirmative vote of four FEC Commissioners to proceed. *Id.* If the FEC is unable to reach a conciliation agreement with a respondent, FECA authorizes the FEC to institute a

de novo civil enforcement action in federal district court, upon an affirmative vote of at least four Commissioners. *Id.* § 30109(a)(6)(A).

Regardless of how an enforcement matter is resolved, FECA, Commission regulations, and the Freedom of Information Act ("FOIA") require making the Commission's resolution of the matter public. FECA requires the Commission to make public conciliation agreements, as well as any "determination that a person has not violated" FECA. *Id.* § 30109(a)(4)(B)(ii). The Commission has implemented this provision in a regulation requiring publication of any "finding of no reason to believe or no probable cause to believe" or other "terminat[ion of] proceedings" and "the basis therefor." 11 C.F.R. § 111.20(a). Similarly, FOIA requires the agency to affirmatively disclose adjudication opinions and orders, as well as voting records. 5 U.S.C. § 552(a)(2)(A), (a)(5).

The Commission has further implemented FECA's and FOIA's disclosure requirements through promulgation of disclosure policies, including the current one adopted unanimously in 2016. FEC, *Disclosure of Certain Documents in Enf't and Other Matters*, 81 Fed. Reg. 50702, 50703 (Aug. 2, 2016), https://transition.fec.gov/law/cfr/ej_compilation/2016/notice2016-06.pdf ("FEC Disclosure Policy"). The policies were specifically developed in response to *American Federation of Labor & Congress of Industrial Organizations v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) ("*AFL-CIO*"), in which this Court found that the

FEC's disclosure regulation requiring blanket disclosure of entire investigation files was overbroad due to First Amendment concerns. *Id.* at 170-71, 176-78.

After weighing the various interests involved and refining its policy several times, the Commission now limits disclosure to the documents that it determined were "integral to [the FEC's] decisionmaking process." FEC Disclosure Policy, 81 Fed. Reg. at 50703. The categories of documents now disclosed "either do not implicate the [*AFL-CIO*] Court's concerns or, because they 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." *Id.* Such documents include, *inter alia*, FEC General Counsel's Reports that make recommendations regarding whether there is reason to believe or probable cause to believe violations occurred, memoranda and reports from the Office of General Counsel prepared in connection with a specific Matter Under Review and formally circulated for Commission consideration and deliberation, and statements of reasons issued by the Commissioners. *Id.* at 50702. Unlike the policy that was invalidated, the current policy excludes from disclosure "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." *Id.* at 50703.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Administrative Proceedings

This case arises out of an administrative complaint filed with the Commission by Citizens for Responsibility and Ethics in Washington and Anne L. Weismann (collectively, "CREW").[1] CREW alleged that an "unknown respondent" made a $1.7 million contribution in the name of the American Conservative Union to the political committee Now or Never PAC in violation of FECA's prohibition on contributions in the name of another, 52 U.S.C. § 30122. (Admin. Compl., https://www.fec.gov/files/legal/murs/6920/17044434345.pdf.) The FEC designated the matter MUR 6920.

On January 24, 2017, the Commission found reason to believe that the American Conservative Union and "Unknown Respondent" violated FECA's prohibition on making or accepting contributions in the name of another and authorized an investigation. (Jan. 24, 2017 Certification, https://www.fec.gov/files/legal/murs/6920/17044434423.pdf.) Based on information obtained during the investigation, on July 11, 2017, the Commission substituted the entity Government Integrity, LLC in the place of "Unknown

[1] The administrative complaint, as well as redacted versions of the other documents at issue, are publicly available on the FEC's website at https://www.fec.gov/data/legal/matter-under-review/6920/.

Respondent" into its previous reason-to-believe finding. (July 11, 2017 Certification, https://www.fec.gov/files/legal/murs/6920/17044434511.pdf.)

Discovery obtained from Government Integrity, LLC led the FEC's Office of General Counsel to conclude that John Doe 1, in his capacity as trustee of [redacted] John Doe 2, [redacted] and that John Doe 2 had sent the funds to Government Integrity, LLC that were later used to make the contribution at issue. (J.A. 120-21, 123-24, 543 & n.2.)[2] The FEC's Office of General Counsel served John Doe 2, as well as its trustee, John Doe 1, with a subpoena for information to which they refused to respond. (J.A. 123-24.) The Office of General Counsel subsequently recommended that the Commission find reason to believe that John Doe 1, in his

[2] In response to questions about the source of the contribution at issue, James C. Thomas, III, who was Government Integrity, LLC's attorney at the time and wired the funds at issue from that company to the American Conservative Union, stated that he was "reasonably certain that the funds were provided to [Government Integrity,] LLC by [redacted]." (J.A. 97.) Based on this and other information obtained during the investigation, the Office of General Counsel concluded that the funds Government Integrity, LLC used to make the contribution at issue had come from John Doe 2: "On the morning of October 31, 2012, [Government Integrity,] LLC confirmed receipt of a $2.5 million wire transfer from [redacted]." (J.A. 145.) "Once [Government Integrity,] LLC received the funds from [redacted], Thomas emailed Axiom Strategies consultants Jeff Roe and Sarah Hoeller at 11:11 am, stating '[t]he 2.5 million is here. I am about to wire $1.8 million to American Conservative Union.'" (*Id.*)

official capacity as trustee, and John Doe 2 violated section 30122 and to authorize commencement of a civil suit to enforce the subpoena. (*Id.*) Two Commissioners approved those recommendations and three opposed. (J.A. 135-36.) Subsequently three Commissioners issued statements of reasons explaining their votes, in which they all accepted that John Doe 2 provided the funds that were used to make the contribution at issue. (J.A. 205; J.A. 208-09.) [redacted]

On October 24, 2017, the Commission unanimously approved a global conciliation agreement with American Conservative Union, Government Integrity, LLC, Now or Never PAC, and James C. Thomas, III, in his official capacity as treasurer, as well as in his personal capacity; these respondents agreed to pay a civil penalty of $350,000. (Oct. 24, 2017 Certification, https://www.fec.gov/files/legal/murs/6920/17044434742.pdf; Conciliation Agreement, https://www.fec.gov/files/legal/murs/6920/17044434756.pdf.) The Commission also voted to close the file, thereby concluding the enforcement and subpoena proceedings regarding the Does. (Oct. 24, 2017 Certification.)[3]

[3] CREW has challenged the Commission's resolution of MUR 6920 in a lawsuit, contending that it was contrary to law for the Commission not to find reason to believe that the Does violated FECA, not to enforce the subpoenas issued to the Does, and not to conclusively determine that the Does were the true source

After MUR 6920 was resolved, John Does 1 and 2 requested that their names be redacted from the administrative case materials that the FEC would place on the public record. The Does are identified and discussed in several documents that would be made public in accordance with the Commission's disclosure policy, including: (a) an Office of General Counsel recommendation to seek discovery from the Does and the Commission voting certification approving the recommendation; (b) various General Counsel reports discussing the Does' role in the matter, both regarding their own potential liability and that of Government Integrity, LLC; (c) designation of counsel forms; (d) a response of Government Integrity, LLC to the Commission regarding the allegations that it violated FECA; and (e) two statements of reasons in which Commissioners explained their votes regarding whether there was reason to believe the Does violated FECA. (*See* J.A. 93-211 (redacted versions of documents from the FEC's administrative case file).)

To consider this request, the Commission refrained from publicly releasing the case file beyond the 30 days from closure that ordinarily applies under the disclosure policy. (J.A. 57.) After careful consideration during multiple executive sessions, on December 14, 2017, the Commission determined not to deviate from

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of the contribution at issue. Compl., *Citizens for Responsibility & Ethics in Wash. v. FEC*, Civ. No. 17-2770 (D.D.C. filed Dec. 22, 2017) (Docket No. 1).

its disclosure policy. (*Id.*) That same day, the Commission notified counsel for John Does 1 and 2 of the Commission's decision. (*Id.*)

B. District Court Proceedings

On December 15, 2017, John Does 1 and 2 filed suit seeking a permanent injunction barring the FEC from disclosing their identities, as well as a motion for a temporary restraining order and preliminary injunction. (J.A. 11, 22.) Neither their complaint nor their motion denied that John Doe 2 was the source of the contribution at issue. [redacted]

Accepting the FEC's indication that if the Does' request for injunctive relief was not immediately denied then temporary redactions would be preferable to withholding the relevant portions of the public administrative case file, the court required temporary confidentiality, denied the Does' request for a temporary restraining order, and consolidated the Does' motion for preliminary injunction with the merits. (J.A. 4 (Minute Order (Dec. 18, 2017)).) Shortly thereafter, the Commission published a redacted version of the public case file. (J.A. 61-62.) Although the Does subsequently submitted two more briefs with the court, they did not dispute the FEC's assertions [redacted] that John Doe 2 sent funds to

Government Integrity, LLC that were used to make the contribution at issue. (*Compare, e.g.*, J.A. 312, 316-17; J.A. 511 [redacted], *with* J.A. 351-75, J.A. 246-55 [redacted].)

On March 23, 2018, following the submission of briefs by the parties and CREW, the court issued a merits opinion and final order and judgment denying appellants' request to permanently enjoin the disclosure of their identities as part of the FEC's public release of the administrative case file for MUR 6920. (J.A. 541-63.) The court upheld the FEC's disclosure policy, analyzing it under the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and in light of this Court's decision in *AFL-CIO*, and rejected the Does' arguments concerning the First Amendment, FOIA, and application of the FEC's disclosure policy to them. (J.A. 541-63.) The court noted the FEC's Office of General Counsel's conclusion that John Doe 2 had transmitted funds to Government Integrity, LLC immediately before Government Integrity, LLC wired the funds at issue. (JA 543-44.)

The court first found that the case could not be "resolved at the *Chevron* step one stage, since none of the statutory provision cited by the parties speaks directly to the matter." (JA 548.) The court found that FECA section 30109(a)(4)(B)(ii) did not either "*bar* the agency from making the disclosures plaintiffs seek to enjoin here" or expressly "*require* the agency to disclose the plaintiffs' identit[ies]." (J.A.

549.) The court also rejected appellants' argument that a FECA provision for confidentiality of enforcement matters, 52 U.S.C. § 30109(a)(12)(A), prohibited disclosure of their identities in this case, citing "binding" precedent, thus concluding *Chevron* step one. (J.A. 551 (citing *AFL-CIO*, 333 F.3d at 174.))

Before proceeding to *Chevron* step two, however, the court found that, in "accordance with the approach outlined in *AFL-CIO*," it first had to "resolve whether the Commission's revised disclosure policy, and its application to the information plaintiffs are seeking to shield here, are constitutional." (J.A. 553.) The court concluded that the FEC's current disclosure policy is constitutional. (J.A. 554-59.) Contrasting the extensive unreviewed materials at issue in *AFL-CIO* containing references to volunteers, members, and employees with no role in the matter being investigated, with the appellants here, who were central to the resolution of a matter, as well as the now carefully tailored disclosure policy with the blanket policy at issue in *AFL-CIO*, the court found *AFL-CIO* distinguishable. (J.A. 554-56.)

The court then examined the First Amendment rights asserted by appellants, finding both that these constitutional concerns were vaguely articulated (J.A. 556-57) and that, "notwithstanding the plaintiffs' highly selective quotations from the case law, the constitutional issue [of contributing anonymously] has already been decided in the agency's favor" (J.A. 558-59 (collecting cases)). The court

concluded that "neither the FEC policy on its face nor its application in this case impinges impermissibly on the plaintiffs' First Amendment right to express themselves through political donations." (J.A. 559.) It further explained that appellants had articulated no grounds to fear that they may be subject to harassment or reprisal. (*Id.*)

Having resolved the First Amendment issue in the FEC's favor, the court turned back to the *Chevron* step two question of whether "disclosure is reasonable under standard [Administrative Procedure Act ("APA")] principles." (*Id.*) Applying *Chevron* deference, the court agreed that the "agency's interpretation of the statute to require the public disclosure set forth in the regulation [(11 C.F.R. § 111.20(a)-(b))] is reasonable." (J.A. 560.) That regulation requires the disclosure of matters when the Commission "otherwise terminates its proceedings," 11 C.F.R. § 111.20(a), which the court agreed applied here regardless of whether appellants were respondents or not. (J.A. 561.) The court found that "the public has an interest in the agency's decision to terminate this proceeding involving Government Integrity without enforcing its own subpoenas and following the money back to its source." (*Id.*) It explained that "[t]his is not a situation where a person's name happened to come up in a wide ranging inquiry," observing that appellants "were integrally involved in a narrow, focused investigation: plaintiff John Doe 2 was a link in the single chain involving a single

contribution, it is related to Government Integrity, a party to the conciliation agreement, and it was the recipient of a subpoena from the agency." (J.A. 561-62)

Finally, the court rejected appellants' attempt to rely on FOIA principles. It explained that John Doe 2, as a trust, does not have privacy rights under FOIA. (J.A. 563 ("[U]nder well-established FOIA principles, an entity has no right to 'personal privacy' under FOIA Exemption 7(C)" (citing *FCC v. AT&T Inc.*, 562 U.S. 397, 409-10 (2011)).) And to the extent John Doe 1 had privacy interests, the court explained that those interests were minimal because his actions "were solely [as trustee] on behalf of the trust, not himself." (*Id.*) "The agency's salutary interest in exposing its decision making to public scrutiny outweighs plaintiffs' insubstantial privacy concerns." (*Id.*)

The Does sought an emergency stay pending appeal. (J.A. 9.) In exchange for the Does' consent to seek expedited review in this Court, the FEC consented to a stay or an injunction pending appeal. (J.A. 290.) The district court entered the parties' agreed-upon proposal to stay the judgment. (J.A. 9-10 (Minute Order (Apr. 10, 2018)).) On April 26, 2018, this Court granted the FEC's consent motion to expedite briefing in this appeal. *Doe v. FEC*, No. 18-5099, Order (D.C. Cir. Apr. 26, 2018) (Document #1728358).

SUMMARY OF THE ARGUMENT

The district court's judgment in the FEC's favor should be sustained. FECA, FEC regulations, and the agency's disclosure policy demonstrate that it is both constitutional and reasonable for the agency to disclose appellants' identities as part of the FEC's public enforcement file for MUR 6920. Disclosure is consistent with the general government policy favoring openness in agency proceedings, and here it undoubtedly furthers the FEC's interests in accountability and deterrence, which this Court recognized as valid in *AFL-CIO*. Appellants feature prominently in the documents reflecting the Commission's handling of MUR 6920 and indeed were themselves the subject of a Commission vote regarding whether there was reason to believe that the Does violated FECA.

Disclosure of appellants' identities is consistent with FECA and the FEC's regulations and should be sustained under the applicable deferential standard of review under *Chevron*. Appellants' argument that FOIA Exemption 7(C) affirmatively bars disclosure here is meritless. Appellants misconceive the nature of FOIA, and the cases they cite do not support their claim that the Commission's intended disclosure is categorically prohibited. Finally, appellants' claimed First Amendment interests are insubstantial, and, to the extent they are cognizable, are clearly outweighed by the agency's interests.

ARGUMENT

I. STANDARD OF REVIEW

Where, as here, the district court considered agency action under the APA, this Court "review[s] the administrative action directly," *Chiquita Brands Int'l Inc. v. S.E.C.*, 805 F.3d 289, 293 (D.C. Cir. 2015), and "must" uphold the FEC's disclosure decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Jurewicz v. U.S. Dept. of Agric.*, 741 F.3d 1326, 1330 (D.C. Cir. 2014) (quoting 5 U.S.C. § 706(2)(A)). "This 'arbitrary and capricious' standard of review is a highly deferential one which presumes the agency's action to be valid. The standard mandates judicial affirmance if a rational basis for the agency's decision is presented even though [the court] might otherwise disagree." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations and footnote omitted).

Deference is also accorded because the FEC here interprets FECA and its own regulations. When considering the agency's interpretation of its organic statute, the familiar two-step framework under *Chevron*, 467 U.S. 837, applies. This requires the Court first to determine "whether Congress has directly spoken to the precise question at issue" and, if not, to defer to the agency's interpretation as long as it is "based on a permissible construction of the statute." *Id.* at 842-43. When the FEC is interpreting its own regulations, deference to the agency is

particularly high. *Consarc Corp. v. U.S. Treasury Dep't*, 71 F.3d 909, 915 (D.C. Cir. 1995) ("[A]n agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard." (internal quotation marks omitted)).

II. DISCLOSURE OF APPELLANTS' IDENTITIES IS REASONABLE UNDER FECA, FEC REGULATIONS, AND THE COMMISSION'S DISCLOSURE POLICY

Under the applicable standard of deferential review, the FEC should be permitted to disclose appellants' identities in connection with its file for MUR 6920. Appellants' names are included in documents the disclosure of which the agency has deemed "integral to its decisionmaking process." FEC Disclosure Policy, 81 Fed. Reg. at 50703. Appellants were referenced in documents addressing whether there was reason to believe they violated FECA, whether discovery should be sought from them and pursued in litigation, and whether there was probable cause to believe that others committed FECA violations.

Making public appellants' identities allows the public to understand the Commission's applications of federal campaign finance law and promotes accountability, consistent with FECA's requirement that the Commission make public any "determination that a person has not violated" the Act. 52 U.S.C. § 30109(a)(4)(B)(ii). The FEC's regulation interpreting section 30109(a)(4)(B)(ii) to apply to any no reason to believe or probable cause to believe finding or other

termination of FEC proceedings and "the basis therefor," 11 C.F.R. § 111.20(a), and disclosure policy making public certain enforcement documents naming appellants "because they play a critical role in the resolution" of such matters, FEC Disclosure Policy, 81 Fed. Reg. at 50703, are reasonable and appropriate. Such disclosure also ensures that challenges to the FEC's decisions brought under section 30109(a)(8)'s provision for judicial review of agency enforcement matters can be litigated in open court, as they have been for decades. And because it takes judicial guidance, including *AFL-CIO*, 333 F.3d 168, into account, disclosure is permissible. Release of appellants' identities thus is reasonable and not arbitrary or capricious.

A. The Commission Has the Authority to Adopt Its Disclosure Policy, as Well as 11 C.F.R. § 111.20

When Congress delegates rule-making authority to an agency to implement a statute, that statute's silence or ambiguity as to a specific issue demonstrates Congress's intent, express or implied, to authorize that agency to reasonably interpret the statute it administers as to that issue. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion."); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) ("[A]s a general rule, agencies have authority to fill gaps where the statutes are silent.").

Congressional silence in FECA, as well as the ambiguities therein, demonstrate that Congress entrusted the FEC to reasonably interpret and implement FECA and achieve the goals set forth therein. As the Court has held, the Commission's "express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC . . . to resolve any ambiguities in statutory language,'" and so "'the FEC's interpretation of the Act should be accorded considerable deference.'" *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (citation omitted); *see also Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986).

1. The FEC Has Authority to Establish Its Disclosure Policy

Appellants claim that, merely because 52 U.S.C. § 30109(a)(4)(B)(ii) affirmatively requires disclosure of conciliation agreements and determinations of non-violation, the Commission is prohibited from disclosing anything else under its current disclosure policy. (Br. at 30, 32-34.) This claim is meritless.

The plain language of section 30109(a)(4)(B)(ii) and its context demonstrate that Congress did not unambiguously forbid disclosure of the information at issue here. The provision itself includes no such prohibition. Crucially, and contrary to appellants' claim (Br. at 32), while section 30109(a)(4)(B)(ii) specifies that a conciliation agreement or a determination that a person has not violated FECA "shall" be made public by the Commission, it nowhere says that these are these are

only things that may be disclosed upon the completion of a MUR. 52 U.S.C. § 30109(a)(4)(B)(ii).

Furthermore, FECA sections 30109(a)(4)(B)(i) and 30109(a)(12)(A)[4] demonstrate that, when Congress intended to prohibit the FEC from disclosing certain information, it did so explicitly. For this reason, *Albany Engineering v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008), which appellants rely upon (Br. at 34), actually undercuts their argument. In that case, this Court held that, because "the certainty of other costs was as plain as plain could be, Congress's express provision for [reimbursement of] three types [of costs] could hardly leave room" for the agency to require reimbursement of an unspecified type of cost. *Albany Eng'g*, 548 F.3d at 1075. Here, when Congress founded the FEC in 1974, it was well-established that Congress required all agencies "to adhere to a general philosophy of full agency disclosure." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989) (internal quotation marks omitted). It thus was "as plain as plain could be" that information not specifically prohibited from disclosure by Congress would be — as Congress intended — presumptively disclosable.

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[4] The district court soundly rejected appellants' argument below that the disclosures at issue fell within section 30109(a)(12)(A), as contrary to binding D.C. Circuit precedent. (J.A. 551 (citing *AFL-CIO*, 333 F.3d at 174).) Appellants have now abandoned this argument on appeal. *Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015) (issues not raised on appeal are forfeited).

Congress's failure to specifically prohibit disclosure of the information at issue here thus indicates that Congress intended that information to be presumptively disclosable, not prohibited from disclosure as appellants contend.

The FEC, like most agencies, must determine the procedures for the maintenance of its records. 52 U.S.C. §§ 30106(e), 30107(a)(8); 5 U.S.C. §§ 301, 552. By requiring the FEC to affirmatively disclose certain information and specifically barring certain other information from disclosure in FECA — while at the same time mandating a presumption of agency openness generally — Congress left the quintessential "gap" for the FEC to fill regarding any information falling outside of these categories. *Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). The cases appellants cite do not demonstrate otherwise. (Br. at 27 (citing *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1163 (10th Cir. 2017) (recognizing that an agency has discretionary authority when it has a duty to act but there are "gaps in the instructions" on how to do so)).) Indeed, this Court confirmed in *AFL-CIO* that the FEC may make disclosures of exactly the type at issue here, observing that the governmental interests in deterrence and promoting accountability "may well justify releasing more information than the minimum disclosures required by section [30109](a)." 333 F.3d at 179. As this Court noted, the Commission's

construction of FECA to permit the agency to disclose more than the items specifically addressed in the statute was a longstanding procedural policy predating even its original disclosure regulations, and "Congress took no action to disapprove the regulation when the agency submitted it for review pursuant to [52 U.S.C. § 30111(d)]." *Id.* at 175.[5]

Appellants argue that Congress did not give the FEC the express or implied authority to make disclosure decisions (Br. at 34), but this is plainly incorrect. Congress gave the agency the "primary and substantial responsibility for administering and enforcing [FECA]," "extensive rulemaking and adjudicative powers," and the authority to "formulate general policy with respect to the administration of [the] Act." *Buckley v. Valeo*, 424 U.S. 1, 109, 110 (1976) (per curiam). And when Congress did so, it was well-established that "[g]rants 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 and private interests involved." *F.C.C. v. Schreiber*, 381 U.S. 279, 291-92 (1965); *see also F.T.C. v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) ("The agency's discretion in regard to procedural rules includes discretion in

[5] *Accord EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981) ("In the 15 years during which the [EEOC] has consistently allowed limited disclosure to the charging party, Congress has never expressed its disapproval, and its silence in this regard suggests its consent to the Commission's practice.").

such matters as publicity and disclosure."). Section 30109(a)(4)(B)(ii) and the larger context of FECA itself thus reveal that Congress intended to commit the public disclosure of information not explicitly required or forbidden to the agency's sound discretion.

2. Because Section 30109(a)(4)(B)(ii) Is Ambiguous, Congress Authorized the FEC to Reasonably Interpret It

Appellants nevertheless argue that FECA's mandatory disclosure requirement of "a determination that a person has not violated this Act," 52 U.S.C. § 30109(a)(4)(B)(ii), unambiguously applies only to a decision made by four or more Commissioners that a person is actually innocent. (Br. at 32-33.) And that, therefore, the FEC does not have the authority to reasonably interpret this provision. (*Id.*) In so arguing, however, appellants impermissibly ignore this provision's broader position within FECA.

As the Supreme Court has explained, "when deciding whether [statutory] language is plain, we must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (internal quotation marks omitted). The Court's "duty, after all, is to construe statutes, not isolated provisions." *Id.* (internal quotation marks omitted). When determining whether section 30109(a)(4)(B)(ii) is ambiguous, the Court thus must consider that provision's context within FECA's larger statutory scheme.

In context, what precisely constitutes a "determination that a person has not violated the Act," 52 U.S.C. § 30109(a)(4)(B)(ii), is ambiguous. As this Court has recognized, "unlike other agencies — where deadlocks are rather atypical — [the] FEC will regularly deadlock as part of its *modus operandi*." *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016). Because the "FEC cannot investigate complaints absent majority vote," "the statute compels [the] FEC to dismiss complaints in deadlock situations." *Id.* at 1170. Accordingly, this Court has rejected the argument that Commission action caused by the lack of a majority vote "decides nothing." *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*"); *see also Public Citizen*, 839 F.3d at 1170-71 (distinguishing FECA from other organic statutes because Commission "decisions" resulting from a split vote of Commissioners fully and finally resolve an FEC enforcement matter); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). Reading section 30109(a)(4)(B)(ii) in context, it thus is ambiguous whether a "determination" encompasses agency action resulting from an absence of four votes to proceed. *Cf. Navistar, Inc. v. Jackson*, 840 F. Supp. 2d 357, 364 (D.D.C. 2012) (deferring to an agency's interpretation of what constitutes a "determination" under a statute it enforces).

Nor can section 30109(a)(4)(B)(ii) be read, in context, to be unambiguously limited to only determinations of actual innocence, as appellants argue. (Br. at 33,

40-41.) Appellants' view depends upon an improper effort to interpret "determination" in isolation and a refusal to "look at the word's function within the broader statutory context." *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014). Section 30109(a)(4)(B)(ii) is part of a broader enforcement regime whereby by *all* dismissal decisions, regardless of whether that dismissal results from a split decision and regardless of the Commission's dismissal rationale, are subject to judicial review. 52 U.S.C. § 30109(a)(8); *DCCC*, 831 F.2d at 1132.

Appellants nonetheless argue that section 30109(a)(4)(B)(ii) is unambiguously limited to determinations of actual innocence because a Commission decision against finding reason-to-believe or probable-cause "clear[s]" a respondent of wrongdoing. (Br. at 41.) Appellants are incorrect. The Commission may not proceed for a variety of reasons, and some unanimous Commission rejections of a recommendation to find reason-to-believe are not strictly speaking the same as "a determination that a person has not violated" FECA, 52 U.S.C. § 30109(a)(4)(B)(ii). To the contrary, the Commission may explain that, while there is reason to believe or probable cause to believe a violation occurred, it is nonetheless dismissing the case for a variety of reasons, such as prosecutorial discretion. *E.g.*, MURs 4317 & 4323, *Huckabee Election Comm.*, Statement of Reasons, http://eqs.fec.gov/eqsdocsMUR/00003A0A.pdf

(unanimously voting to find probable cause but exercising prosecutorial discretion to take no further action).

Nor are appellants correct that the purpose of section 30109(a)(4)(B)(ii) is to "lift[] a cloud of suspicion over the respondent" because "administrative complainants routinely publicize their claims." (Br. at 40.) To the contrary, that provision applies equally to complaint-generated matters and internally-generated matters, and respondents in internally-generated matters cannot be publicly identified prior to resolution under section 30109(a)(12)(A). There is no cloud to lift in internally-generated matters. Appellants' interpretation is thus not unambiguously compelled by the statute's language. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" (quoting 2A N. Singer, Statutes and Statutory Constr. § 46.06, pp. 181-86 (rev. 6th ed. 2000))). Further, while CREW, the administrative complainant in the underlying matter here, may have publicly announced the filing of its complaint (Br. at 40 n.9), the happenstance of such occurrences should not, and does not, affect the agency's disclosure obligations and policies.

Because section 30109(a)(4)(B)(ii) is ambiguous, the Commission has the authority to reasonably interpret it, which it has done in its disclosure policy and 11 C.F.R. § 111.20.

B. Disclosure of Appellants' Identities Pursuant to the Commission's Carefully Tailored Disclosure Policy Is Reasonable

As the district court found (J.A. 560-63), the FEC's intended disclosure of appellants' identities under its disclosure policy is reasonable and should be sustained. Appellants do not contest that the documents containing their identities are required to be disclosed under the FEC's current disclosure policy. This policy has been tailored in light of the agency's experience and judicial guidance. After careful consideration, the Commission reasonably identified "several categories of documents integral to its decisionmaking process that will be disclosed upon termination of an enforcement matter." FEC Disclosure Policy, 81 Fed. Reg. at 50703. Disclosure of appellants' identities, under that disclosure policy, readily satisfies the highly deferential standard of review that applies here. It is reasonable for the Commission to conclude that the public has a right to know the identities of the persons who not only undisputedly participated in the events that were the subject of a Commission investigation, but also who themselves were the subject of a Commission vote regarding whether there was reason to believe that they violated FECA. The Commission has considered the public and private interests involved and reasonably concluded that disclosure of documents including their names "tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information." *Id.*

An important part of FECA's regime is its detailed statutory framework for enforcement — one which permits more disclosure and openness to scrutiny of legal determinations when enforcement matters are resolved than for other agencies. Congress ensured that the FEC's constructions of FECA during the enforcement process would be open to public and judicial review. FECA's judicial review provision for dismissal decisions is "unusual" in that it permits a private party to challenge legal interpretations when the Commission dismisses administrative complaints. *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995). A decision not to enforce is normally unreviewable, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), but the only FEC decisions not to enforce that are unreviewable are those based on the agency's prosecutorial discretion. *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 17-5049, -- F.3d --, 2018 WL 2993249, at *3 (D.C. Cir. June 15, 2018). Although "[t]ypically, the decision not to prosecute insulates individuals who have been investigated but not charged from th[e] rather significant intrusion into their lives" occasioned by public scrutiny, *Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 864 (D.C. Cir. 1981), Congress made a different policy choice regarding some such decisions in the area of campaign finance, *AFL-CIO*, 333 F.3d at 175.[6]

[6] This principle of openness relates generally to judicial review under 52 U.S.C. § 30109(a)(8), but that provision establishes review only for Commission

In *AFL-CIO*, for example, the Court compared Congress's approach to confidentiality in FEC investigations to that in grand jury proceedings. The Court found that, while targets of an ongoing FEC investigation may have "a strong confidentiality interest analogous to the interests of targets of grand jury investigations," this "analogy breaks down once a Commission investigation closes." 333 F.3d at 175 (internal quotation marks omitted). The Court reasoned that, while Congress decided to continue to protect the identity of "suspects exonerated by a grand jury," "FECA expressly requires disclosure of 'no violation' findings." *Id.* (citing Fed. R. Crim. P. 6(e)(6); 52 U.S.C. § 30109(a)(4)(B)(ii)). Thus, "*[c]essante ratione legis cessat ipse lex* (the rationale of a legal rule no longer being applicable, that rule itself no longer applies)." *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001) (internal quotation marks omitted).

Plaintiffs' reliance on *U.S. Department of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749 (1989), involving the disclosure of rap-sheet information is inapt for the same reason. (Br. at 21-22.) In contrast to FECA's enforcement regime, there is a "web of federal statutory and regulatory provisions that limit[] the disclosure of rap-sheet information." *Reporters Comm. For*

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failures to act or "an order of the Commission dismissing a[n administrative] complaint." The Commission has moved to dismiss CREW's related lawsuit against the FEC, *see supra* pp. 7-8 n.3, because MUR 6920 resulted in a multiparty conciliation agreement, not an outright dismissal of the complaint.

Freedom of Press, 489 U.S. at 764-65. Under FECA, however, mandatory affirmative public disclosure of persons found to not have violated FECA is part of the statutory scheme. Thus, even if appellants are correct that the identity of an alleged criminal in a rap sheet may be "more about 'one private citizen seeking information about another" (Br. at 22 (quoting *Reporters Comm. For Freedom of Press*, 489 U.S. at 773)), knowing the identity of those materially involved in investigated activity is appropriate and consistent with FECA's accountability purpose.

FECA's judicial review provision demonstrates that public confidence in the Commission's performance of its enforcement duties in a fair, consistent, and nonpartisan manner is necessary to FECA's goal of preserving public faith in our electoral system. The FEC is nonpartisan inherently "in that no more than three of its six voting members may be of the same political party, § [30106](a)(1), and it must decide issues charged with the dynamics of party politics." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). To promote accountability of Commission investigations, the public must have access to the identities of persons who have been the subject of substantive dismissals of administrative complaints in order to confirm the FEC's nonpartisan enforcement of FECA. Screening for partisanship is not permissible without identities. It is reasonable here for the Commission to conclude that the public has a right to know

the identities of persons found to be involved in a chain of events that led to a multiparty conciliation agreement and six-figure penalty, in which it was agreed that the respondents would no longer contest that their actions amounted to a violation of FECA's straw donor provision.

In arguing that their names add "nothing" to the public record (Br. at 29), appellants "hinge[] [their] argument on the mistaken premise that publicly releasing [their] names . . . would not shed light on how the government operates." *Edelman v. S.E.C.*, 239 F. Supp. 3d 45, 55 (D.D.C. 2017) (citation and internal quotation marks omitted); *compare Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1092-93 (D.C. Cir. 2014) (holding that there was "a weighty public interest in shining a light on . . . the DOJ's ultimate decision not to prosecute a prominent member of the Congress for any involvement he may have had" with public corruption for which others had been convicted); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 306 (D.D.C. 2007) (holding that "the public interest in knowing who may be exerting influence on [agency] officials . . . outweighs any privacy interest in one's name"); *Lardner v. U.S. Dep't of Justice*, Civ. No. 03-0180(JDB), 2005 WL 758267, at *18 (D.D.C. Mar. 31, 2005) (holding that "the considerable public interest in identifying the actors who are able to exert influence on the pardon application and selection process" outweighs the privacy interest in the names of individuals supporting

clemency applications); *Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 18 (D.D.C. 2000) ("Depriving the public of knowledge of the writer's identity would deprive the public of a fact which could suggest that their Justice Department had been steered by political pressure rather than by the relevant facts and law."); *see also Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729-30 (D. Md. 2001) (holding that "a valid public interest exists in the names" at issue because this information "would enable the public to assess law enforcement agencies' exercise" of discretion); *cf. also Doe v. Pub. Citizen*, 749 F.3d 246, 273 (4th Cir. 2014) ("The public has an interest in knowing the names of the litigants, and disclosing the parties' identities furthers openness of judicial proceedings." (internal citations omitted)); *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) ("The concealment of a party's name impedes public access to the facts of the case, which include the parties' identity.").

Particularly where a central purpose of FECA is "provid[ing] the electorate with information as to where political campaign money comes from," *Buckley*, 424 U.S. at 66, and here where part of what will be disclosed is the funder of other persons deemed to have used the funds unlawfully, appellants' request for anonymity is misplaced. Whether John Doe 2 was the "true source" for purposes of straw donor liability in 52 U.S.C. § 30122, does not change that John Doe 2's provision of money shortly before the contribution at issue was a critical, closely

examined aspect of the matter.[7] In this context, the FEC reasonably concluded that the public's interest in evaluating the Commission's evenhandedness and diligence outweighs the private interests of appellants whose own activities were alleged to have violated FECA.

As a last ditch effort, appellants argue that it is not reasonable to disclose their identities because they were not provided prior notice of the Commission's reason-to-believe vote and thus "received none of the due process afforded respondents under FECA, FEC regulations, and the Commission's ordinary practice." (Br. at 18.) Fatally to this argument, however, there is no law, regulation, or policy that required the Commission to provide such notice.[8] While FECA and Commission regulations generally require notice for persons alleged to

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[7] While appellants appear to contest whether John Doe 2 provided the funds for the first time on appeal, "[i]t is well settled that issues and legal theories not asserted at the District Court level ordinarily will not be heard on appeal." *District of Columbia v. Air Fla.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). [redacted]

[8] Appellants cite to a Commissioner's statement in another matter that actually recognizes that the Commission can, and has, made reason-to-believe determinations without providing prior notice. (Br. at 5 (citing Statement of FEC Comm'r Weintraub, MUR 5659, *In the Matter of Democratic Party of Haw.* (July 14, 2005)), https://www.fec.gov/data/legal/matter-under-review/5659/).) While that Commissioner criticized the practice, the cited statement notes that *five* other Commissioners voted to find reason to believe despite a potential lack of notice.

have committed violation in administrative complaints, neither requires such notice for considerations of reason to believe the Commission generates from other information such as with appellants here. 52 U.S.C. § 30109(a)(1)-(2); 11 C.F.R. §§ 111.3(b), 111.8(a)-(b). Nor can appellants rely upon a policy that does not apply to situations, like here, where the internal recommendation comes from within the Office of the General Counsel, as opposed to a referral from another division. (Br. at 5 (citing *Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters*, 74 Fed. Reg. 38,617 (Aug. 4, 2009)).) [redacted] Appellants' complaints regarding notice are entirely misplaced.

C. 11 C.F.R. § 111.20 Supports the Reasonableness of Disclosure

The disclosure of appellants' identities is even more reasonable when considered in the context of the agency's regulation in 11 C.F.R. § 111.20. Significantly, appellants do not argue that, if the Court finds that the FEC had the authority to promulgate section 111.20, that this regulation is an unreasonable exercise of that authority. (Br. at 35; *see also* J.A. 277 (holding that the FEC's interpretation of FECA "to require the public disclosure set forth in [section

111.20(a)] is reasonable"). Rather, they make the much narrower argument that it cannot be reasonably construed to encompass them, directly or indirectly. (Br. at 35-43.)

Appellants, however, cannot overcome the "exceedingly deferential" standard of review for the Commission's interpretation of its own regulations, which requires affirmance unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (internal quotation marks omitted); Br. at 31. As the district court correctly concluded, this case "fall[s] well within the provision of the regulation requiring disclosure in cases where the Commission 'otherwise terminates proceedings.'" (J.A. 560-61 (quoting 11 C.F.R. § 111.20(a)). Here, section 111.20(a) supports disclosure of appellants' identities both as part of the disclosure of the basis for the decision reached as to the named respondents in MUR 6920 and as to the reason-to-believe proceedings regarding appellants themselves.

Addressing the resolution of MUR 6920 as to the parties who conciliated first, it is neither plainly erroneous nor inconsistent with section 111.20(a) to construe this regulation to permit disclosure of information beyond that pertaining solely to named respondents, as appellants contend. (Br. at 36.) While appellants correctly note that "an agency interpretation . . . [i]s substantively invalid when it conflict[s] with the text of the regulation" (Br. at 31 (alterations in original;

internal quotation marks omitted)), that is not the case here. The district court correctly found that "the language of the regulation is not so narrow." (J.A. 561.) Nor is it inconsistent with the regulation to disclose information pertaining to significant third parties. Even appellants recognize that, at a minimum, the conciliation agreement set forth the basis of the Commission's final determination in MUR 6920. (*See* Br. at 39.) Yet that document discusses not only the role of the named respondents, but also the roles played by American Conservative Union's former executive director Gregg Keller and the former sole manager officer and director of Government Integrity, LLC, Christopher W. Byrd. (Conciliation Agreement, https://www.fec.gov/files/legal/murs/6920/17044434756.pdf.) Particularly because artificial entities cannot act except through individual persons, disclosure of these individuals' roles and the information that was obtained from them undoubtedly furthers the public's knowledge of, and ability to assess the agency's actions taken, on MUR 6920. Accordingly, appellants have not demonstrated that interpreting section 111.20(a) to permit disclosure of information about persons or entities other than the named respondents is itself plainly erroneous or inconsistent with the regulation.

Nor is it plainly erroneous or inconsistent with the regulation to interpret section 111.20(a) to support the disclosure of appellants' identities as part of the

"'basis' for the FEC's disposition of MUR 6920," as appellants assert. (Br. at 39.) Though not named in the conciliation agreement, appellants' provision of the funds to [redacted] shortly before the contribution at issue is discussed in that document under the "[t]he pertinent facts in this matter," as well as the role of those funds. (Conciliation Agreement at 2, Section IV ¶¶ 6-9.) Further, appellants are extensively discussed in several key documents that the Commission has determined are "integral to its decisionmaking process." FEC Disclosure Policy, 81 Fed. Reg. at 50703. For example, the agency's Office of General Counsel asserted that appellants' failure to respond to the subpoena could give rise to an adverse inference for purposes of establishing Government Integrity, LLC's liability, and that it acted knowingly and willfully and thus would potentially be subject to enhanced penalties, which Government Integrity, LLC contested. (J.A. 437-40; J.A. 483-84.) Whatever the legal status of their actions, appellants were undoubtedly central figures in the factual circumstances that led to several persons being found to have violated FECA. *See Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision . . . centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."). Accordingly, due to their roles in the activity at issue in MUR 6920, disclosure of appellants' identities is consistent with 11 C.F.R. § 111.20(a).

Lastly, appellants argue that section 111.20(a) cannot be reasonably interpreted to apply to them directly. (Br. at 36-38.) Not so. First, appellants rely upon inapplicable regulations and policies to argue that, because the Commission never "initiated" proceedings against them, the Commission could not have terminated proceedings against them so as to trigger section 111.20(a)'s disclosure requirement. (Br. at 36-37.) But the Commission's regulations could not be more plain that a new matter can be "initiated" not only "by a complaint," but also based on "information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities." 11 C.F.R. § 111.3(a); *see also* 52 U.S.C. § 30109(a)(2). The agency may thus consider whether there is reason to believe that persons who had not been identified by name as respondents violated FECA during the course of carrying out an investigation of a complaint-generated matter. In MUR 6920, the Office of General Counsel obtained information upon which it recommended finding reason to believe appellants violated FECA and the Commissioners voted on that recommendation and issued statements of reasons. (J.A. 119-33; J.A. 135-37; J.A. 203-11.) Those steps constitute proceedings that were initiated and took place. Furthermore, and in contrast to appellants' arguments (Br. at 5, 11), only "person[s] alleged" in an administrative "complaint to have committed such a violation" require notice prior to a reason-to-believe vote. 52 U.S.C. § 30109(a)(1). Other persons who the Commission generates for a

reason-to-believe vote do not. *Id.* § 30109(a)(2); 11 C.F.R. §§ 111.3(b), 111.8(a)-(b). Proceedings against appellants thus were initiated and terminated,[9] and the Commission's interpretation of its own regulation is reasonable.

Accordingly, appellants have not demonstrated that applying 11 C.F.R. § 111.20(a) to them directly is plainly erroneous or inconsistent with the regulation under the applicable exceedingly deferential standard of review.

III. FOIA EXEMPTION 7(C) DOES NOT PRECLUDE DISCLOSING APPELLANTS' IDENTITIES

A. FOIA Exemption 7(C) Is Not a Categorical Bar to the Commission's Disclosure of the Information Here

Appellants' argument that FOIA exemptions operate as affirmative bars to disclosure was rejected by the Supreme Court in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). There, a private party sought to enjoin the agency from disclosing exempt information for a third party's FOIA request, arguing in that so-called "reverse-FOIA" case that FOIA forbade agencies from releasing exempt information. *Id.* at 291. The Supreme Court rejected this argument, explaining that "the conclusion that [FOIA's] exemptions impose affirmative duties on an agency to withhold information . . . is not supported by the language, logic, or

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[9] As discussed above, appellants also err in arguing that the Commission took no "action" as to them because such reasoning has been squarely rejected by this Court. *Supra* p. 23; *Citizens for Responsibility & Ethics in Wash.*, 2018 WL 2993249, at *1.

history of the Act." *Id.*; *see also id.* at 293 ("Congress did not design the FOIA exemptions to be mandatory bars to disclosure."). The Court thus concluded that "FOIA is exclusively a disclosure statute" and "does not foreclose disclosure." *Id.* at 292; *see also Bartholdi Cable Co. v. F.C.C.*, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information from the public."); *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45, 54 (D.C. Cir. 1981) ("In the typical reverse-FOIA case, we should emphasize, the applicability of [a FOIA exemption] does not give the submitters a right to compel the agency to withhold the requested material.").

Neither *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197 (D.C. Cir. 1991) ("*Safecard*"), nor *Nation Magazine, Wash. Bureau v. U.S. Customs Service*, 71 F.3d 885 (D.C. Cir. 1995) ("*Nation Magazine*"), upon which appellants principally rely, call *Chrysler Corp*. into question. Unlike *Chrysler Corp.*, which was a reverse-FOIA case, *SafeCard* and *Nation Magazine* were traditional FOIA cases, involving a request for information submitted to an agency by an outside party. In those cases, the Court merely recognized that, when responding to a third party's FOIA request, an agency was permitted to categorically withhold certain names as exempt from FOIA's disclosure requirements, rather than requiring the agency to provide more individualized proof to substantiate its withholding. *Safecard*, 926 F.2d at 1206; *Nation Magazine*, 71 F.3d at 896. In neither case did this Court

consider — much less hold — that FOIA categorically *prohibits* agencies from disclosing such information. Nor could they, as such a holding would contradict binding Supreme Court precedent.[10] Appellants' claim that the Commission is "*categorically*" prohibited (*e.g.*, Br. at 20) from releasing their identities is incorrect.

B. FEC Regulations Do Not Prohibit the Disclosures Here

Appellants next argue that FEC's regulations bar the disclosure of the information here because they "expressly incorporate FOIA Exemption 7(C)." (Br. at 7, 22.) This argument is similarly without basis. Not only is it foundationally flawed with respect to the applicability of Exemption 7(C), for the reasons just discussed, but it is also erroneous even as to the particular FEC regulations appellants identify.

Two of the three provisions appellants rely upon to substantiate their argument unambiguously apply only to the agency's response to FOIA requests — not to the agency's affirmative release of information. 11 C.F.R. § 4.1(c), (d); Br.

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[10] For the same reason, appellants' reliance upon two district court decisions is similarly misplaced. (*See* Br. at 23 (citing *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001), and *Tripp v. U.S. Dep't of Def.*, 193 F. Supp. 2d 229 (D.D.C. 2002)).) The district court in *AFL-CIO* not only misconstrued *Safecard*'s holding, but also failed to address *Chrysler Corp.* In *Tripp*, the district court subsequently relied upon the lower court's opinion in *AFL-CIO*, but did so only in dicta and prior to this Court's *AFL-CIO* decision, which largely overturned it.

at 22-23 (citing 11 C.F.R. § 4.5(a)(7)(iii)); Br. at 7 (citing 11 C.F.R. § 4.4(b)). The information at issue here is being released under the Commission's affirmative disclosure obligations, however, not in response to a FOIA request from a third party. (J.A. 57.) Thus, this is not a FOIA case, or even a true reverse-FOIA case, and sections 4.4(b) and 4.5(a)(7)(iii) do not apply.

The third and final provision appellants point to is 11 C.F.R. § 5.4(a)(4) (*see* Br. at 23), which provides that, under FECA, the Commission shall affirmatively disclose "[o]pinions of Commissioners rendered in enforcement cases and General Counsel's Reports and non-exempt . . . investigatory materials[.]" 11. C.F.R. § 5.4(a)(4). But this is the precise provision that this Court held was invalid in *AFL-CIO*, 333 F.3d at 179. The Commission has since made clear that its affirmative disclosure obligations are governed by its current disclosure policy. FEC Disclosure Policy, 81 Fed. Reg. at 50703.

In any event, the regulation plainly does not limit the disclosure of either Commissioner statements or General Counsel Reports to only those that are non-exempt, as "non-exempt" only modifies the last and separately-referenced category of documents termed "investigatory material." 11 C.F.R. § 5.4(a)(4); *see also Guam Indus. Servs., Inc. v. Rumsfeld*, 383 F. Supp. 2d 112, 119 n.5 (D.D.C. 2005) ("[T]he conjunctive 'and' directs that the item preceding it and that succeeding it be different."). Here, many of the redacted documents at issue are Commissioner

statements, as reflected in the certifications of their votes and their statements of reasons, or General Counsel's Reports.[11] Because these documents may be made public without redaction of appellants' identities, disclosure of the remaining documents at issue in unredacted form is permitted. *See Cottone v. Reno*, 193 F.3d 550, 554 (D.C. Cir. 1999) ("Under our public-domain doctrine, materials normally immunized from disclosure under FOIA lose their protective cloak once disclosed and preserved in a permanent public record.").

C. Because the Commission Has a Rational Basis for Disclosing Appellants' Identities, Appellants' Purported Reverse-FOIA Claim Must Fail.

Appellants cannot satisfy their burden to demonstrate that disclosure of their identities is arbitrary and capricious. "Unlike a typical FOIA case, in which the court would undertake its own analysis of the interests at stake, under th[e] deferential [arbitrary and capricious] standard of review, the court does not substitute its judgement for that of the [FEC]." *Jurewicz*, 741 F.3d at 1330-31 (citations omitted). Instead, "[t]he standard mandates judicial affirmance if a

[11] Of the fourteen documents identified by appellants as containing redactions of their identities, nine are Commissioner statements or General Counsel's Reports. (J.A. 93 (entries 3, 6-11, 13-14).) Of the remaining documents, three are merely Designations of Counsel containing no substantive information (*id.* (entries 1, 4-5)), and the other two do not discuss allegations not already set forth in the opinions and reports (*id.* (entries 2, 12)).

rational basis for the agency's decision is presented even though [the court] might otherwise disagree." *Envtl. Def. Fund, Inc.*, 657 F.2d at 283 (citations omitted).

Under the highly deferential standard of review that governs judicial review in actions seeking to block agency disclosure of information, the FEC's disclosure decision has a rational basis and thus must be affirmed. FOIA's privacy protection is limited to only "personal" privacy and to only "unwarranted" or "clearly unwarranted" invasions of such privacy. 5 U.S.C. § 552(a)(2)(A), (b)(7)(c). As discussed below, as an artificial entity, John Doe 2 does not have any personal privacy rights under FOIA, and because any allegations against John Doe 1 were solely in his official capacity as trustee of John Doe 2, any privacy interests he may have are reduced, at best.

1. The Commissioners' Statement of Reasons and September 20, 2017 Vote Certification Are Subject to FOIA's Mandatory Disclosure Requirements

As a preliminary matter and in direct contravention of appellants' claims, several of the key documents at issue here (J.A. 203-11 (statements of reasons) and J.A. 135-37 (vote certification)) are subject to FOIA's mandatory disclosure requirement for "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases" and "final votes of each member in every agency proceeding." 5 U.S.C. § 552(a)(2)(A), (a)(5); *Bristol-Meyers Co. v. F.T.C.*, 598 F.2d 18, 25 (D.C. Cir. 1978) (holding that the commission's

explanation of its decision "to terminate an adjudicatory proceeding or not to include a proposed charge in a complaint" qualifies as a "final opinion" under section 552(a)(2)(A)). As such, FOIA Exemption 7(C) does not apply to them. *See* 1974 FOIA Amendments Conference Committee Report, S. Conf. Rep. 93-1200, 93d Cong., 2d Sess. (1974), 1974 U.S.C.C.A.N. 6285, 6291.

Notably, FOIA does not permit redactions due to personal privacy from final agency voting records, such as the Commission's certifications here. 5 U.S.C. § 552(a)(5). And while FOIA provides that an agency "*may*" redact information from agency opinions and orders, it permits redaction only to "the extent required to prevent a clearly unwarranted invasion of personal privacy." *Id.* § 552(a)(2). It further requires that, if an agency elects to redact such information, "in each case the justification for the deletion shall be explained fully in writing." *Id.*

As this Court has held, "[i]n addition to Congress's general purpose to make disclosure the dominant practice and withholding the exception," the "requirement that disclosure be 'clearly unwarranted' instructs us to 'tilt the balance (of disclosure interests against privacy interests) in favor of disclosure.'" *Wash. Post Co. v. U.S. Dep't of Health & Human Servs.*, 690 F.2d 252, 261 (D.C. Cir. 1982) (citation omitted); *see also Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 37 (D.C. Cir. 2002) (holding that the "presumption favoring disclosure . . . is at its zenith" under the exemption for clearly unwarranted invasions of privacy).

2. As An Artificial Entity, John Doe 2 Does Not Have "Personal" Privacy Rights

Appellants incorrectly assert that John Doe 2's identity "implicates a privacy interest protected by" FOIA. (Br. at 26.) As the district court found (J.A. 562-63), FOIA's protection for "personal privacy," however, does not extend to corporations or other artificial entities like John Doe 2. *AT&T Inc.*, 562 U.S. at 403-09. While the Supreme Court's holding in *AT&T* pertained only to corporations, its analysis and rationale was not so limited. As the Supreme Court explained, "'[p]ersonal' ordinarily refers to individuals," and "[w]e do not usually speak of personal characteristics, personal effects, [etc.] as referring to corporations or other artificial entities." *Id.* at 403; *see also id.* at 406 (quoting Restatement (Second) of Torts § 652I, Comment c (1976)) ("A corporation, partnership or unincorporated association has no personal right to privacy."). This rationale applies equally to trusts, which are not natural persons, but are formally organized entities, with legally separate identities from their trustee(s) and beneficiaries, and trustee(s) act in a representational capacity. Although there may be differences between corporations and trusts, none of these differences imbue a trust with "personal" rights. *Compare United States v. Harrison*, 653 F.2d 359, 361 (8th Cir. 1981) (holding that documents belonging to a small family trust are not "personal" documents protected against compulsory self-incrimination); *Iowa Citizens for Cmty. Improvement v. U.S. Dep't of Agric.*, 256 F. Supp. 2d 946, 952

n.10 (S.D. Iowa 2002) (doubting that a trust has privacy interests protected by FOIA). Tellingly, appellants cite no authority in support of their claim that a trust is materially distinguishable in this context.

Instead, relying on *Multi Ag Media LLC v. Department of Agriculture*, 515 F.3d 1224 (D.C. Cir. 2008), appellants argue that "the Trust's name presents a substantial risk of identifying its trustee" and thus cannot be disclosed due to the trustee's privacy rights. (Br. at 27.) Appellants are incorrect that the trustee's name cannot be disclosed. *See infra* pp. 47-49. But even if they were correct, *Multi Ag Media* is wholly inapposite. In that typical FOIA case, the Court recognized that business records could potentially be subject to FOIA Exemption 6 where the records contained "information *easily traceable* to an individual" and would "*necessarily reveal*" that individual's personal, as opposed to business, information. 515 F.3d at 1228-29 (emphasis added). But in contrast to the situation in *Multi Ag Media*, here there is not *any* evidence in the record substantiating appellants' assertion that disclosing John Doe 2's name would cause "a substantial risk of identifying its trustee" (Br. at 27) — much less that John Doe 2's name would be "easily traceable" to John Doe 1 and "necessarily reveal" his personal information, 515 F.3d at 1228-29. As the party seeking to prevent disclosure, appellants have the burden of proof. *Chiquita Brands Int'l*, 805 F.3d at 294. [redacted]

[redacted] And "unlike corporations, limited liability companies, or limited partnerships, trusts generally do not file their governing instrument with the State to become legal." Ward L. Thomas & Leonard J. Henzke, Jr., *Trusts: Common Law and IRC 501(c)(3) and 4947*, Exempt Organizations-Technical Instruction Program for FY 2003, https://www.irs.gov/charities-non-profits/cpe-for-fy-2003-2. Further, under the Internal Revenue Service's disclosure guidance, a trust's tax returns generally are not public. Internal Revenue Manual, Part 11 § 11.3.2.4.8, 11.3.13.9.27, https://www.irs.gov/irm/part11.

3. Because Any Reference to John Doe 1 Was Solely in His Official Capacity, His Privacy Interests Are Reduced

The identity of John Doe 1 also may be disclosed. Appellants' argument that "[t]he fact that the Trustee's actions that are of interest to the FEC were 'solely on behalf of' the Trust has no legal relevance" is incorrect. As this Court has held, "[i]nformation relating to business judgments and relationships does not qualify for exemption" under FOIA. *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988) (Exemption 7(C)); *see also Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980) ("Exemption 6 was developed to protect intimate details of

personal and family life, not business judgments and relationships.").[12] And the Court confirmed that "[t]his is so even if disclosure might tarnish someone's professional reputation." *Wash. Post Co.*, 863 F.2d at 100.

AFL-CIO itself did not hold otherwise, as appellants argue. (Br. at 25-26.) To the contrary, the Court there found that FOIA did "little to protect the First Amendment interests at issue," and it was the First Amendment interests on which the Court based its decision. *AFL-CIO*, 333 F.3d at 178. If anything, *AFL-CIO* thus undercuts appellants' argument that the Court in that case recognized rights protected by FOIA.

Nor is the instant case a situation where the documents would reveal that John Doe 1 was investigated for a crime, and thus the cases cited by appellants are inapposite. (*See* Br. at 25.) Rather, John Doe 1 was only discussed in FEC documents in his "official capacity" as trustee for John Doe 2. As is well-established, official-capacity suits are merely "another way of pleading an action against an entity of which [the trustee] is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (internal quotation marks omitted); *cf.* FEC, *Statement of Policy Regarding Treasurers Subject to Enf't Proceedings*, 70 Fed. Reg. 3, 4 (Jan.

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[12] To the extent that the unpublished district court opinion from over 20 years ago appellants rely upon may have indicated otherwise (Br. at 26 (citing *Alexander & Alexander Servs. v. SEC*, Civ. No. 92-1112 (JHG), 1993 WL 439799 (D.D.C. Oct. 19, 1993)), it is in tension with the cited precedents of this Court.

3, 2005) ("In other words, an official capacity proceeding 'is not a suit against the official but rather is a suit against the official's office.'" (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989))).

As in *Washington Post*, the documents at issue do not reveal any intimate private facts about John Doe 1, nor do they personally implicate him in an alleged FECA violation. Accordingly, to the extent John Doe 1 has cognizable privacy rights here, they are, at best, diminished. *See People for the Ethical Treatment of Animals v. Nat'l Inst. of Health*, 745 F.3d 535, 545 (D.C. Cir. 2014) (holding that the researchers' privacy interests were "diminished" where the documents would reveal an investigation of the organization overseeing them, rather than an investigation of them personally).

* * *

In sum, the Commission has rationally and reasonably concluded that disclosing appellants' identities furthers the significant public interests of disclosure and government accountability under FECA, which it has been charged to implement. Indeed, given that transparency is at the heart of both FECA and FOIA, it would be perverse to interpret FOIA to prevent disclosure in a manner that undermines the FEC's "salutary interest in exposing its decision making to public scrutiny" (J.A. 563). *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978) (holding that the "basic purpose of FOIA is to ensure an informed

citizenry, vital to the functioning of a democratic society, needed to check against corruption").

IV. THE FIRST AMENDMENT DOES NOT BAR DISCLOSURE OF APPELLANTS' IDENTITIES

As the district court correctly found, disclosure of appellants' identities under the Commission's carefully tailored disclosure policy readily survives First Amendment review. (J.A. 554-59.) Because disclosure "'do[es] not prevent anyone from speaking,'" courts apply "exacting scrutiny" to disclosure requirements, which "'requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest.'" *Doe v. Reed*, 561 U.S. 186, 196 (2010) (quoting *Citizens United v. FEC*, 558 U.S. 310 (2010)). The FEC's disclosure policy serves important accountability and deterrence interests in a manner that is substantially related to providing the public with the documents that "play[ed] a critical role in the resolution of a matter." FEC Disclosure Policy, 81 Fed. Reg. at 50703. Disclosure of appellants' identities in the documents at issue furthers these important government interests. Particularly because the First Amendment interests appellants have alleged are tenuous, at best, disclosure of their identities is constitutional under the First Amendment.

A. Appellants' Alleged First Amendment Interests Are Insubstantial

In the district court, appellants did not dispute that they participated in the events that were the subject of the Commission's investigation [redacted]

[redacted]

[redacted] Appellants now expressly disclaim the idea that they are attempting to invoke a constitutional right to make anonymous political contributions. (Br. at 51-53.) Eschewing the First Amendment speech and associational rights that the Supreme Court has said come into play in the context of contributions to political committees, *see, e.g.*, *Buckley*, 424 U.S. at 15, appellants appear to focus now on a right to "'*privacy* of association and belief guaranteed by the First Amendment.'" (Br. at 48 (quoting *AFL-CIO*, 333 F.3d at 177).)

But, accepting their assumption that political giving is not at issue, neither the Supreme Court nor the D.C. Circuit has recognized some other generalized constitutional right to informational privacy as appellants vaguely assert here. Critically, in contrast to the First Amendment interests that were substantiated in *AFL-CIO*, 333 F.3d at 177-78 (relying on submitted affidavits), appellants have not articulated any associational interests or harms, and instead have focused on a business reputational interest (J.A. 45 ¶¶ 10-11; J.A. 306 ¶¶ 1, 10 [redacted]) and the "core First Amendment activity" of "political fundraising" (J.A. 45 ¶ 12). But the latter right (to make an anonymous political contribution) is the one that appellants' now explicitly disclaim. And as to the former, as the district

court correctly concluded (J.A. 557), such reputational damage is not protected by the First Amendment. *Paul v. Davis*, 424 U.S. 693, 713 (1976). In *Davis*, the respondent argued that the government publicly naming him as an "active shoplifter" after he had been charged with shoplifting but prior to any determination of guilt and where the charges were subsequently dismissed violated his "right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments." 124 U.S. at 696, 712. The Supreme Court, however, refused to find a constitutional right of privacy based on the government's decision to "publicize a record of an official act such as an arrest," noting that "[n]one of our substantive privacy decisions hold this or anything like this." *Id.* at 713. Accordingly, appellants' generalized and unsupported "First Amendment Interest[s]" (Br. at 47) and constitutional claims of privacy are insubstantial, at best.

B. Disclosure of Appellants' Identities Does Not Impermissibly Infringe on Appellants' First Amendment Rights, If Any

Even if the Court assumes appellants have First Amendment privacy interests they may assert in this context, such interests do not rise to the level of requiring the FEC to withhold their identities indefinitely. As the district court correctly found, "the constitutional issue has already been decided in the [FEC's] favor." (J.A. 558; *id.* at 558-59 (explaining that the burdens of disclosure in the campaign finance context survive heightened constitutional scrutiny).) In contrast

to appellants' "insubstantial privacy concerns" (J.A. 563), the FEC's acknowledged interests in accountability and deterrence from disclosure undoubtedly "reflect[s] the seriousness of the actual burden" on appellants from disclosure of their identities. *Reed*, 561 U.S. at 196 (internal quotation marks omitted). Because the FEC's policy is carefully calibrated to take into account public informational interests, the agency's own accountability, and the privacy interests that arise during the processing of administrative enforcement matters, disclosure of appellants' identities pursuant to that policy is permissible under the First Amendment.

As appellants acknowledge, this Court previously recognized that the Commission's interests in public accountability and deterrence constitute valid governmental interests for the agency's disclosure of its enforcement matters under the First Amendment. *AFL-CIO*, 333 F.3d at 178 (stating that "we have no doubt that these interests are valid"); Br. at 46, 54 (recognizing that the *AFL-CIO* court "identif[ied] deterring future violations and promoting Commission accountability as valid governmental interests in disclosure" (internal quotation marks omitted)). Rather than casting doubt on those interests, the Court took issue only with the FEC's "fail[ure] to tailor its disclosure policy to avoid unnecessarily infringing . . . First Amendment rights." *AFL-CIO*, 333 F.3d at 175. But the agency has since cured that problem by explicitly balancing those interests in a reasonable way.

FEC Disclosure Policy, 81 Fed. Reg. at 50703. Indeed, the agency no longer releases, at all, the type of records that concerned the Court in *AFL-CIO* — *i.e.*, records obtained by subpoena from political groups including their "strategic documents and other internal materials" and references to uninvolved volunteers and members. *Compare AFL-CIO*, 333 F.3d at 170, 171, *with* FEC Disclosure Policy, 81 Fed. Reg. at 50703 (excluding from disclosure of "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"). Instead, the agency only releases a narrow class of documents that the Commission has determined are "integral to its decisionmaking." FEC Disclosure Policy, 81 Fed. Reg. at 50703.

Appellants argue that applying the Commission's disclosure policy to them violates the First Amendment (Br. at 53-55), but have not demonstrated that they would face "threats, harassment, or reprisals" if their names were disclosed. *Buckley*, 424 U.S. at 74. The only purported evidence of harassment is appellants' apparent [redacted] factual disagreement with the FEC's assertion in its Motion to Expedite that "John Doe 2 was the undisputed source of the contribution at issue" and that a Commissioner publicized her redacted Statement of Reasons via Twitter and her view, set forth therein, that appellants appeared to have violated FECA. (Br. at 50 (quoting FEC Mot. to Expedite at 12).) Neither of

these things constitute harassment. *Compare* 5 U.S.C. § 552(a)(2)(A) (requiring publication of dissenting opinions); *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) (in which the NAACP "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility"); *Buckley*, 424 U.S. at 69-71 (rejecting minor party's challenge because "no appellant [had] tendered record evidence of the sort proffered in *NAACP v. Alabama*," and so had failed to make the "[r]equisite [f]actual [s]howing"); *see also* J.A. 559 (rejecting notion that appellants will face harassment or reprisal).

While appellants attack the validity of the FEC's deterrence interest as applied to them (Br. at 44, 54-55), the Court can sustain disclosure solely based on the Commission's obvious and concededly valid accountability interest alone. *See supra* pp. 28-32 (discussing the FEC's accountability interests). But appellants' challenge to the FEC's deterrence interest is also unfounded. While appellants may prefer to think of themselves as "hav[ing] been cleared of wrongdoing" (Br. at 54 (quoting *AFL-CIO*, 333 F.3d at 178)), this view is misperceived. Two Commissioners voted in favor of finding reason to believe appellants violated FECA. And the three Commissioners who voted against finding reason to believe

appellants violated FECA did not reach any conclusion regarding whether appellants may have violated FECA. Rather, two of those Commissioners explained that they did so vote as a matter of prosecutorial discretion in the investigation and handling of MUR 6920 because of procedural, fair notice, and statute of limitations concerns, and in the larger context of concluding an important settlement. (J.A. 208-11.)

Contrary to appellants' repeated claims that the FEC simply wants to "name and shame" the blameless (*e.g.*, Br. at 2), the purposes of disclosing appellants' identities does not include deterring lawful activity, but does include providing the regulated community with a full picture of the actions that led to numerous parties' conciliation with the agency and payment of a substantial penalty. Appellants cannot ignore that [redacted] that John Doe 2 provided funds used for a contribution the Commission found was unlawful, that some Commissioners believed there was reason to believe that appellants themselves violated FECA, and that other Commissioners who voted against finding reason to believe did so not because they reached a conclusion regarding whether appellants' conduct was lawful, but due to other considerations. Appellants' identities provides a complete picture of the actions and relationships that led [redacted] thus

furthers the Commission's "valid" interests in deterrence. *AFL-CIO*, 333 F.3d at 178. Disclosure of appellants' identities is constitutional.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the district court's judgment be affirmed.

Respectfully submitted,

Lisa J. Stevenson
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher
Acting Assistant General Counsel
ckitcher@fec.gov

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Robert W. Bonham III
Senior Attorney
rbonham@fec.gov

/s/ *Haven G. Ward*
Haven G. Ward
Attorney
hward@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

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I hereby certify that on this 18th day of June, 2018, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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