ORAL ARGUMENT NOT YET SCHEDULED

NO. 18-5099

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

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

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

BRIEF OF PLAINTIFFS-APPELLANTS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Plaintiffs-Appellants, through counsel, certify as follows:

(1) Parties and *Amici*.

Plaintiffs: Plaintiffs-Appellants (hereafter collectively "Plaintiffs") are John Doe 2, a trust, and John Doe 1, the trustee of John Doe 2.[1]

Defendant: The Defendant-Appellee is the Federal Election Commission ("FEC").

Intervenors and Defendants: The Center for Responsibility and Ethics in Washington ("CREW") and Anne Weismann unsuccessfully sought to intervene as defendants in the District Court. Plaintiffs are unaware if CREW and Ms. Weismann intend to move to intervene before this Court.

Amici: When the District Court denied CREW's and Ms. Weismann's motion to intervene, it granted them leave to file an *amicus* brief in support of the FEC, which they filed on February 12, 2018.

(2) Rulings Under Review

Plaintiffs seek review of the District Court's order and opinion issued March 23, 2018, in *John Doe 1, et al. v. Federal Election Commission*, Civ. Action No.

[1] Plaintiffs use pseudonyms in this filing. They have filed under seal with this Court their true identities.

17-2694 (ABJ) (D.D.C.) (ECF Nos. 46 and 47). *See* 2018 U.S. Dist. LEXIS 48135 (Mar. 23, 2018).

(3) Related Cases

CREW and Ms. Weismann filed a complaint against the FEC pursuant to 52 U.S.C. § 30109(a)(8) alleging that the FEC's decision with respect to the underlying administrative matter that is at issue in this case was contrary to law. *See CREW v. FEC*, No. 17-2770-ABJ (D.D.C). That matter is pending in the district court.

/s/ William W. Taylor, III
Counsel for John Doe 1

/s/ Michael Dry
Counsel for John Doe 2

CORPORATE DISCLOSURE STATEMENT[2]

Pursuant to D.C. Circuit Rule 26.1, Plaintiffs John Doe 1 and John Doe 2, by counsel, certify as follows:

John Doe 2 is a closely-held trust. John Doe 1 is John Doe 2's trustee.

No publicly held corporation has a 10 percent or greater ownership interest in John Doe 2.

[2] Plaintiffs have filed a sealed version of this Disclosure Statement with this Court.

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GLOSSARY

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

STATEMENT OF JURISDICTION

This is an appeal from the District Court's March 23, 2018 final order denying Plaintiffs' efforts to enjoin the FEC from identifying Plaintiffs by name in materials to be publicly released after the close of one of the FEC's investigations. The District Court had subject matter jurisdiction over this case under 28 U.S.C. § 1331 and 5 U.S.C. §§ 702-706. Plaintiffs filed a timely notice of appeal on April 11, 2018. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

LIST OF KEY STATUTES, REGULATIONS, AND AGENCY POLICIES

The pertinent statutes and regulations are:

5 U.S.C. § 552(b)(7)(C)

52 U.S.C. § 30109(a)(1)

52 U.S.C. § 30109(a)(2)

52 U.S.C. § 30109(a)(4)(A)(i)

52 U.S.C. § 30109(a)(4)(B)(i), (ii)

52 U.S.C. § 30109(a)(12)(A)

11 C.F.R. § 4.5(a)(7)(iii)

11 C.F.R. § 111.6

11 C.F.R. § 111.9

11 C.F.R. § 111.20

81 Fed. Reg. 50,702 (Aug. 2, 2016)

These statutes, regulations, and policies are reprinted in the addendum to this brief.

INTRODUCTION

This case is about whether the FEC (alternatively, "the Commission") may publicly disclose, through the release of materials related to a closed investigation, the identities of a trust and its trustee that (1) the Commission expressly declined even to investigate for violations of federal election laws, (2) were afforded none of the procedural due process required by the Federal Election Campaign Act ("FECA"), FEC regulations, and the Commission's standard practices, (3) have never been found – even under the most minimal legal standard – to have violated any law, and (4) have since been accused by a sitting FEC Commissioner of violating the law through the very conduct the FEC formally declined to investigate. The answer, under the Freedom of Information Act ("FOIA"), the FECA, and the First Amendment, is "no."

In looking to disclose Plaintiffs' identities, the FEC seeks to accomplish through public shaming what it was unwilling and unable to do through the Commission's detailed and mandatory enforcement processes – *i.e.*, brand Plaintiffs as federal election law violators. This compelled disclosure outside of formal FEC processes is impermissible under FECA and FOIA (which FEC disclosure regulations and policies expressly incorporate). It also exerts a significant chilling effect on core First Amendment activity by discouraging political activity *not found to have violated any law*. Finally, the FEC's erroneous

and unreasonable application of its disclosure policy in no way would advance the kinds of governmental interests in deterrence or the government's own accountability that have traditionally warranted the extraordinary step of publishing investigatory materials about non-parties to a government investigation.

Indeed, the FEC's assertion that it may name and shame any individual or entity that is part of an investigation is antithetical to the Commission's mission and purpose. This Court has reiterated time and again the FEC's duty to safeguard First Amendment rights when enforcing FECA. While Congress has enshrined in law the principle that the names of witnesses, subjects, and others identified in law enforcement records should not be disclosed, the FEC seeks in this case to dramatically depart from this core principle.

The critical First Amendment interests at stake are at their zenith for an agency that regulates political speech and conduct. The FEC's disclosure of investigative materials warrants greater caution than for agencies that enforce business regulations or prosecute crimes. Yet other federal investigative agencies adhere to the non-disclosure principle,[3] and for good reason. In addition to the

[3] *See, e.g.*, 17 C.F.R §§ 200.80(b); 203.2; 203.5 (providing that investigatory materials compiled in SEC investigations, including internal reports, are nonpublic and not subject to disclosure); 12 C.F.R. § 1070.41(c) (providing that, when it discloses information, the Consumer Financial Protection Bureau may not "identify, directly or indirectly, any particular person to whom the confidential

privacy interests implicated when private citizens are named in law enforcement records without a finding of wrongdoing, the rule against disclosure provides practical benefits. If the FEC's shortsighted view of its role prevails, witnesses will be less likely to cooperate with an investigation, knowing that they might have their names dragged through the public square if they are merely part of the FEC's investigation, even where they are given no opportunity to defend themselves and where the Commission has never found that they violated the law. The FEC's position would permit any Commissioner who disapproves of the witness's conduct to publicly declare the witness's guilt – notwithstanding the lack of due process.

In dismissing Plaintiffs' arguments, the District Court ignored the express statutory language of FECA and FOIA, misstated Plaintiffs' First Amendment interests in engaging in political participation without being tarred with charges they had no opportunity to answer, and uncritically accepted the FEC's boilerplate and unsubstantiated assertions of the public interest in disclosure of Plaintiffs' identities. This Court should reverse the District Court's decision; reject the FEC's efforts to brand Plaintiffs as lawbreakers without ever having made a finding that

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information pertains"); 15 U.S.C. § 57b-2(b), 2(f) (providing for confidentiality of investigations by the Federal Trade Commission).

they violated FECA; and maintain Plaintiffs' fundamental statutory and constitutional rights to privacy and political participation.

ISSUES PRESENTED FOR REVIEW

Whether the FEC's disclosure of Plaintiffs' identities in connection with a closed investigation violates FECA, FOIA, and the First Amendment, where (1) the FEC failed to find that there was reason to believe Plaintiffs violated federal election laws and never named them as respondents to an administrative proceeding and investigation; (2) Plaintiffs received none of the due process protections afforded such respondents; and (3) an FEC Commissioner has publicly accused Plaintiffs of violating the law.

STATEMENT OF THE CASE

I. Statutory and Regulatory Framework

A. FEC Investigations

FECA, 2 U.S.C §§ 30101 *et seq.*, establishes the FEC, which is empowered to investigate potential violations of federal election laws, including violations alleged in administrative complaints filed by private citizens. FECA sets forth a detailed framework governing the initiation and conduct of FEC investigations.

Upon receiving an administrative complaint, the FEC must provide written notice of the complaint to any person alleged in the complaint to have violated FECA (a "respondent") and give the respondent an opportunity to demonstrate in

writing why the complaint provides no basis for the Commission to take action against them. 52 U.S.C. § 30109(a); 11 C.F.R. § 111.6(a). The FEC must also give the respondent notice and an opportunity to respond before taking any vote on the complaint (other than a vote to dismiss it). 52 U.S.C. § 30109(a); 11 C.F.R. § 111.6(b). If the FEC decides by an affirmative vote of four Commissioners that it has reason to believe a respondent violated, or is about to violate, FECA, it must provide the respondent with the factual basis for its determination and may then conduct an investigation into the alleged violation. 52 U.S.C. § 30109(a)(2). If, in the course of its investigation, the Commission determines that a party not named in the administrative complaint should be added as a respondent, its ordinary practice, consistent with the statutory requirements governing complaints against originally-named respondents, is to afford that party an opportunity to respond before the Commission holds a "reason to believe" vote that will trigger investigation of that respondent. *See, e.g.*, 52 U.S.C. § 30109(a); Agency Procedure for Notice to Respondents in Non-Complaint Generated Matters, 74 Fed. Reg. 38,617 (Aug. 4, 2009); *see also* Statement of FEC Comm'r Weintraub, MUR 5659, *In the Matter of Democratic Party of Haw.* (July 14, 2005) (stating that it is "a matter of fundamental fairness" that the Commission "uniformly" afford persons "the opportunity to answer the charges" against them before a reason-to-believe vote).

If the Commission finds no reason to believe that a respondent has violated FECA or otherwise terminates its proceedings, the FEC's Office of General Counsel ("OGC") is required to advise both the complainant and the respondent by letter. 11 C.F.R. § 111.9(b).

If the FEC finds reason to believe a FECA violation has occurred and conducts an investigation, it is then authorized to determine, again upon an affirmative vote of four Commissioners, that there is probable cause to believe a respondent violated FECA. 52 U.S.C. § 30109(a)(4)(A)(i). Upon such a finding of probable cause, the statute requires the FEC to attempt to prevent or correct such violation through "informal methods of conference, conciliation, and persuasion." *Id.* One potential result of these efforts can be a "conciliation agreement" between the Commission and the respondent, which also requires an affirmative vote of four commissioners to be accepted. *Id.* A conciliation agreement "is a complete bar to any further action by the Commission." *Id.*

B. Public Disclosure of Information Relating to FEC Investigations

FECA and FEC regulations contain a detailed framework for the publication of information related to the Commission's investigations. FECA provides that "[a]ny notification or investigation . . . shall not be made public." *Id.* at § 30109(a)(12)(A). The statute only provides for disclosure of a conciliation

agreement and "a determination that a person has not violated" federal election laws. 52 U.S.C. § 30109(a)(4)(B)(ii).

The FEC's regulation relating to disclosure states that "[i]f the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor." 11 C.F.R. § 111.20(a).

FEC regulations also incorporate provisions from FOIA, including FOIA "Exemption (7)(C)," which exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). The FEC's regulations make clear that the Commission will not disclose information subject to this FOIA exemption. *See* 11 C.F.R. § 4.5(a)(7) (mirroring FOIA (7)(C) exemption for "records or information compiled for law enforcement purposes"); *see also* 11 C.F.R. § 5.4(a)(4) (providing that "non-exempt" investigatory materials shall be placed on the public record); 11 C.F.R. § 4.4(b) (providing that the "Commission shall make available . . . all *non-exempt* Agency records") (emphasis added).

Following this Court's decision in *American Federation of Labor & Congress of Industrial Organizations v. Federal Election Commission*, 333 F.3d

168 (D.C. Cir. 2003) ("*AFL-CIO*"), which struck down the Commission's prior disclosure policy because it failed to adequately protect First Amendment rights, the FEC adopted a revised policy regarding the disclosure of investigatory documents. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016) ("Disclosure Policy"). The Disclosure Policy enumerates the specific types of documents the FEC will generally disclose at the conclusion of enforcement proceedings, *id.* at 50,703, and also states that the Disclosure Policy "does not alter any existing regulation or policy requiring or permitting the Commission to redact documents, including those covered under this policy, to comply with FECA, the principles set forth by the court of appeals in *AFL-CIO*, and the FOIA," *id.* at 50,704. Under *AFL-CIO*, the FEC must provide a "First Amendment justification for publicly disclosing" information it "compile[d] . . . relating to speech or political activity for law enforcement purposes." 333 F.3d at 179 (citation omitted).

II. Factual and Procedural Background

John Doe 2 (hereafter "the Trust") is a trust, and John Doe 1 (hereafter "the Trustee") is its trustee. As is relevant to this appeal, the Trust purportedly transferred a sum of money to one of the named respondents investigated by the FEC as described below. At no point has either Plaintiff conceded, nor has the FEC determined, that any such transfer would constitute a reportable event subject to

FECA's disclosure provisions. The FEC has never found that Plaintiffs were the "source" of the contribution for purposes of 52 U.S.C. § 30122, and Plaintiffs have not taken a position on this question.[4]

A. MUR 6920

In February 2015, a third party filed an administrative complaint with the FEC alleging violations of FECA in connection with a $1.71 million contribution to the Now or Never Political Action Committee ("PAC"), an independent expenditure-only committee, or "SuperPAC," made in 2012 in the name of the American Conservative Union. This complaint caused the FEC to open Matter Under Review ("MUR") 6920. That matter concluded on October 31, 2017, when the FEC entered into a conciliation agreement with four respondents – (1) Government Integrity, LLC, which was alleged to have provided $1.8 million to the American Conservative Union that later formed the $1.71 million contribution to Now or Never PAC; (2) the American Conservative Union; (3) Now or Never PAC; and (4) the Now or Never PAC's treasurer.[5] The administrative complaint did not name either Plaintiff as a respondent; neither Plaintiff was ever added to

[4] For this reason, the FEC's assertion to this Court in its motion for an expedited briefing schedule that it is "undisputed" John Doe 2 was the "source of the contribution at issue" is erroneous and misleading. Mot. to Expedite at 12.

[5] The full published casefile, including the original complaint filed with the FEC, is available at https://www.fec.gov/data/legal/matter-under-review/6920/.

MUR 6920 as a respondent; neither Plaintiff was party to or named in the conciliation agreement; and neither Plaintiff received written notice from OGC of the complaint or any Commission vote with respect to Plaintiffs. Nor were the Plaintiffs formally notified of the termination of proceedings in MUR 6920. In short, neither Plaintiff was ever named or treated as a respondent.

B. Plaintiffs' Involvement in MUR 6920

Plaintiffs' sole involvement in MUR 6920 came almost five years after the contribution that gave rise to the administrative complaint and two-and-a-half years after the filing of that complaint. In August 2017, after the OGC identified the Trust as an entity that purportedly transferred funds to Government Integrity, LLC (which transferred funds to American Conservative Union, which made a contribution to Now or Never PAC), the FEC served both Plaintiffs with a subpoena in connection with MUR 6920. JA213. At that time, the FEC sent a letter to counsel for the Trustee expressly stating that "the Commission does not consider your client a respondent in this matter, *but a witness only*." *Id*. (emphasis added).

Plaintiffs did not respond to the subpoena, and on September 15, 2017, unbeknownst to Plaintiffs, and without their being given notice or an opportunity to respond, OGC recommended to the Commission that it (1) find reason to believe Plaintiffs, to whom OGC referred by name, violated FECA in connection with MUR 6920, and (2) authorize a subpoena enforcement action in federal district

court. *Id.* On September 20, 2017, the Commission declined to follow these recommendations and thus, among other things, declined to find reason to believe Plaintiffs violated FECA. JA135-37.

At no point before the Commission's September 20 decision were Plaintiffs (1) added to MUR 6920 as respondents, (2) notified of OGC's recommendation or given any other indication that they may have been accused of having violated FECA, or (3) provided an opportunity to respond to OGC's recommendation. As two Commissioners later observed, this lack of process was "irregular," JA207 n.2: Under FECA and the FEC's ordinary practice, an entity accused of violating FECA would be entitled to (1) notice of the allegations of illegality (including, where the entity is not named in an original complaint, through formal addition to the MUR as a respondent) and (2) an opportunity to respond to the allegations before the commission takes *any* action. *See* 52 U.S.C. § 30109(a)(1). Plaintiffs, who were never added as respondents to MUR 6920, and indeed were expressly assured by OGC that they were *not* considered respondents, received no such process. Nor were they notified in writing of any "termination of proceedings" under MUR 6920 pursuant to FEC regulations, 11 C.F.R. § 111.9 − either after the Commission's September 20, 2017 vote declining to adopt OGC's "reason to believe" recommendations or upon execution of the conciliation agreement between the FEC and the four respondents in that matter.

Indeed, it was only upon initiation of this litigation and the FEC's subsequent release of the investigative materials in MUR 6920 that Plaintiffs learned they had been accused of anything and that there had been a Commission vote whether to find reason to believe they violated FECA. After execution of the conciliation agreement between the FEC and the respondents, counsel for Plaintiffs objected to any potential publication of Plaintiffs' names in connection with the release of the MUR 6920 investigative file. After the FEC refused to redact Plaintiffs' names from the documents they planned to release, Plaintiffs brought this action, and the parties reached agreement that the FEC would release a redacted version of the MUR 6920 file pending resolution of this litigation. Thus, it was only upon the FEC's response to their inquiries that Plaintiffs learned anything about the OGC recommendations relating to them and the Commission's vote.[6]

The impact of the lack of process provided to Plaintiffs became even more evident after the conclusion of MUR 6920. Following the commencement of this litigation, but before the Commission released the FEC's materials to the public in

[6] The documents the FEC has published in redacted form include: (1) the certification of the FEC's September 20, 2017 vote in which the Commissioners, *inter alia*, declined to adopt OGC's "reason to believe" recommendation regarding Plaintiffs; (2) OGC's September 15, 2017, report making this recommendation; (3) correspondence and related pleadings submitted by the FEC or Respondents in MUR 6920 that reference Plaintiffs; (4) statements of reasons issued by two sets of FEC Commissioners in MUR 6920 that reference Plaintiffs; and (5) administrative forms signed by either the Trustee or the Trust. *See* JA93-211.

redacted form, FEC Commissioner Ellen Weintraub published, via the social media service Twitter, her redacted Statement of Reasons for supporting OGC's September 15, 2017, recommendations relating to Plaintiffs. JA215; JA203-06. Although the Commission failed to find reason to believe Plaintiffs committed any illegal conduct and afforded them no formal process as part of MUR 6920, Commissioner Weintraub's "tweet" accompanying her statement of reasons expressed complete certainty of Plaintiffs' guilt, saying of them, "these guys laundered their millions thru 4 orgs, got away with keeping the name of the true donor secret, & are STILL suing @FEC to censor our reports." JA215.

Two other FEC Commissioners issued their own Statement of Reasons relating to Plaintiffs and MUR 6920. These Commissioners stated they voted against finding reason to believe Plaintiffs violated FECA because such finding would be based on a "novel theor[y] of violation" raising issues "of first impression" when the FEC lacked any "direct evidence" of a violation. JA208-09. The statement also acknowledged the lack of due process provided Plaintiffs, stating that OGC's actions were "irregular" in seeking a reason to believe finding without first recommending that the Commission name Plaintiffs as respondents and affording them an opportunity to respond to the allegations against them. JA209. Moreover, the statement noted that Commissioner Weintraub's tweet had "prejudged [Plaintiffs'] guilt" through her characterizations of their alleged

conduct in the matter and had "presupposed facts and intent without investigation or consideration of a response," which raised "serious due process concerns . . . ." JA209.

C. Proceedings in the District Court

After unsuccessfully urging the FEC not to publish their names in connection with the Commission's release of its MUR 6920 investigative materials, Plaintiffs filed this action, seeking preliminary and permanent injunctive relief to prevent disclosure of their identities in connection with MUR 6920. JA11-23. Plaintiffs contended that the FEC's intended disclosure of their names was arbitrary and capricious and contrary to law, in violation of the Administrative Procedure Act ("APA") (5 U.S.C. § 706(2)), because disclosure would violate FOIA, FECA, FEC regulations, and the First Amendment. JA11-23. Appellants also sought emergency relief. JA24-43. After the FEC agreed to release a version of the MUR investigative file that omitted Plaintiffs' names during the pendency of this litigation, the District Court denied Plaintiffs' request for emergency relief as moot and consolidated the briefing on the motion for preliminary injunction with the briefing on the merits. JA4 (December 18, 2017 minute order outlining this approach).

The District Court entered judgment for the FEC, declining to enjoin the disclosure of Plaintiffs' identities. JA257. The District Court analyzed the

disclosure issues using the two-step framework set forth in *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The District Court first determined under *Chevron* "Step I" that FECA neither unambiguously required disclosure of Plaintiffs' identities, as the FEC argued, nor prohibited disclosure, as Plaintiffs argued. JA265-67. The District Court, relying on this Court's decision in *AFL-CIO*, determined that the key question was whether the Commission's revised Disclosure Policy and its application to the information Plaintiffs sought to shield were constitutional under the First Amendment. JA271-76. The District Court held that the FEC's policy and its application in this case were constitutional, concluding that Plaintiffs made no colorable claim that their associational or free speech rights would be chilled or otherwise infringed by disclosure of their identities and that this disclosure, in contrast to the disclosures at issue in *AFL-CIO*, was narrow and "directly related" to the FEC's investigation. JA273-76. Because it determined the challenged disclosures to be constitutional, the District Court proceeded to defer to, and to uphold, the FEC's disclosure policy under *Chevron* "Step II," holding that the FEC could publish Plaintiffs' names under its regulatory authority to make public the Commission's "termination of proceedings" in a matter. JA277-78 (citing 11 C.F.R. § 111.20).

The District Court also rejected Plaintiffs' contention that disclosure of their names was prohibited by FOIA Exemption (7)(C), concluding that the Trust lacked

a cognizable privacy interest and that the Trustee's privacy interests were "minimal" because his actions were "solely on behalf of the trust and not himself" and were outweighed by the FEC's asserted interests in disclosure. JA279-90. This appeal followed.

STANDARD OF REVIEW

The District Court consolidated Plaintiffs' motion for a preliminary injunction with a final decision on the merits, pursuant to Fed. R. Civ. P. 65(a)(2). In essence, the District Court treated Plaintiffs' motion as one for summary judgment. Therefore, this Court reviews the District Court's "legal determination de novo." *Teva Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 3 (D.C. Cir. 2006). In effect, this Court reviews the FEC's decision "under the familiar standards of the Administrative Procedure Act." *Id*. (citations omitted).

Under the APA, a court "shall . . . hold unlawful and set aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C). This type of illegal agency action includes actions that exceed the delegated authority Congress has granted the agency. *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 497 (D.C. Cir. 2010). Under a separate provision of the APA, a court must set aside any agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's failure to follow its own

regulations constitutes arbitrary agency action. *Nat'l Envtl. Dev. Ass'ns Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014).

SUMMARY OF ARGUMENT

Disclosure of Plaintiffs' identities by the FEC would be illegal for three independent reasons.

1. Disclosure would violate what this Court has long held is a "categorical" prohibition under FOIA Exemption (7)(C) against the disclosure of individuals named in records and information compiled for law enforcement purposes. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991); *Nation Magazine, Wash. Bureau v. United States Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995). Under this Court's precedents, Exemption (7)(C), which is also incorporated in the FEC's regulations and Disclosure Policy, categorically gives controlling weight to Plaintiffs' compelling privacy interests in their personal information, requiring that it be kept confidential in light of the public's insubstantial interests in disclosure. *SafeCard*, 926 F.2d at 1205. The District Court's holdings that John Doe 1 (the trustee) had no significant privacy interests because he was merely acting on behalf of John Doe 2 (the trust) and that the Trust had no privacy interests at all in its identity contravened these clear Circuit precedents. Even if Exemption (7)(C) required balancing of the privacy interests

and interests favoring disclosure, that balance tips dispositively in favor of privacy here.

2. Disclosure of Plaintiffs' identities would also violate the unambiguous terms of FECA, which provides for disclosure in only two instances: where there has been a finding of no violation of FECA or where the FEC enters into a conciliation agreement with a named respondent, 52 U.S.C. § 30109(a)(4)(B)(ii) – neither of which occurred here. The FEC therefore is without authority to disclose Plaintiffs' identities under the unambiguous statutory language. To permit the FEC's conduct here would allow it to usurp Congress's role in setting the bounds of permissible disclosure in the sensitive area of the enforcement of campaign finance law.

Even if FECA permitted disclosure, the FEC's regulations and Disclosure Policy do not allow it, and the FEC's contrary view was manifestly unreasonable. Specifically, the FEC's regulation allowing disclosure of information in connection with the Commission's "termination of proceedings," 11 C.F.R. § 111.20(a), cannot be read to authorize disclosure of Plaintiffs' identities, given that the FEC never *initiated* any "proceedings" against them, never took action against them, and Plaintiffs received none of the due process afforded respondents under FECA, FEC regulations, and the Commission's ordinary practice. And there has been no

showing that the *names* of Plaintiffs were a "basis therefor" for the termination of proceedings.

3. Disclosure of Plaintiffs identities would also violate the First Amendment. Because, as this Court and the Supreme Court have consistently held, FEC regulation – including the release of investigative information – implicates core constitutionally-protected political speech, this Court held in *AFL-CIO* that the FEC must justify its release of information under the First Amendment. The District Court's determination that no significant First Amendment interests were implicated by the FEC's disclosure of identifying information contravened these clear precedents. Plaintiffs have a compelling First Amendment interest in being identified in connection with an FEC enforcement proceeding, especially where a Commissioner branded them as lawbreakers even though there has been no finding that they violated FECA. Such a public attack would have a clear chilling effect on speech and political participation. On the other hand, the FEC can point to no interest in deterrence (since Plaintiffs' conduct was never found to be wrongful) or in agency accountability that would be advanced by releasing the identities of individuals and entities that the Commission has not decided to investigate. In short, the First Amendment does not allow the FEC to "deter" protected political activity through the use of public shaming in lieu of a formal process that provides the respondent with notice and an opportunity to respond to claims of illegality.

ARGUMENT

I. FOIA Exemption (7)(C) and FEC Regulations and Policies Applying this Exemption Categorically Prohibit Release of Plaintiffs' Identities.

FOIA Exemption 7(C) exempts from disclosure "records and information compiled for law enforcement purposes" whose release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). There can be no dispute that the references to the Trust and Trustee in the FEC's files constitute "records and information" compiled for law enforcement purposes. *See FBI v. Abramson*, 456 U.S. 615, 631-32 (1982). Thus, the question before this Court is whether disclosure of Plaintiffs' identities, in light of FOIA Exemption (7)(C), is arbitrary and capricious under the APA.

"[I]n a long line of FOIA cases," this Court has held "that disclosure of the *identities* of private citizens mentioned in law enforcement files constitutes an unwarranted invasion of privacy and is thus exempt under 7(C)." *Nation Magazine*, 71 F.3d at 896 (emphasis in original; collecting authorities). "In other words, names are exempt from disclosure – regardless of the public interest asserted" for disclosure. *AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 61 (D.D.C. 2001), *aff'd on other grounds*, 333 F.3d 168 (D.C. Cir. 2003).

Indeed, this Court has unequivocally held that Exemption (7)(C) "*categorically*" exempts from disclosure the identities of subjects, witnesses, and informants contained in government law enforcement files. *SafeCard*, 926 F.2d at

1206 (D.C. Cir. 1991) (emphasis added). The one narrow exception to this rule, not implicated here, is where "access to the names and addresses of private individuals . . . is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity." *Id.*; *see also AFL-CIO*, 177 F. Supp. 2d at 61 (disclosure of names prohibited "unless disclosure would bear directly on illegal agency activity"). This Court further clarified the scope of the categorical *SafeCard* rule in *Nation Magazine*, where it explained that "[a]s a general rule, *SafeCard* directs an agency to redact the names, addresses, or other identifiers of individuals mentioned in investigatory files in order to protect the privacy of those persons." 71 F.3d at 896.

Although analyzing a FOIA exemption normally requires a court to balance the public interest in disclosure against the asserted privacy interest, in *SafeCard* this Court accepted the Supreme Court's invitation in *Department of Justice v. Reporters Committee for Freedom of the Press* to adopt a categorical rule where, for certain kinds of Exemption 7(C) cases, "the balance characteristically tips in one direction." 489 U.S. 749, 776 (1989). This Court took this approach in *SafeCard* because it determined that the public interest in disclosure of the identities of individuals named in law enforcement files is "not just less substantial" than the identified individuals' privacy interests, "it is *insubstantial*." *SafeCard*, 926 F.2d at 1205 (emphasis added). This rule follows from the Supreme

Court's holding in *Reporters Committee* that the purpose behind FOIA – *i.e.*, shedding "light on an agency's performance of its statutory duties," 489 U.S. at 773 − was "not fostered by disclosure of information about private citizens that is accumulated in various governmental files [which] reveals little or nothing about an agency's own conduct." *Id.* In such cases, the inquiry is more about "one private citizen seeking information about another," *id.* – which decidedly is not the purpose of FOIA.

In contrast to the government's insubstantial interest in disclosure, this Court has stated that "[t]here can be no clearer example of an unwarranted invasion of personal privacy than to release to the public that another individual was the subject" of a law enforcement investigation. *Fund for Const. Gov't v. Nat'l Archives and Records Serv.*, 656 F.2d 856, 864 (D.C. Cir. 1981) (quoting *Baez v. United States DOJ*, 647 F.2d 1328, 1338 (D.C. Cir. 1980)). Thus, in light of the urgent privacy interest and utter lack of countervailing public interest in circumstances involving the disclosure of the identities of subjects and witnesses of law enforcement investigations, this Court held in *SafeCard* that the balancing test *always* tilts towards the privacy interest, thus justifying the categorical rule against disclosure. *See SafeCard*, 926 F.2d at 1206.

FEC regulations expressly incorporate FOIA Exemption (7)(C) into the Commission's own rules governing the release of investigative information. *See* 11

C.F.R. § 4.5(a)(7)(iii) (providing that no requests for records shall be denied release under FOIA unless the record contains, *inter alia*, information subject to Exemption (7)(C)); *see also* 11 C.F.R. § 5.4(a)(4) (providing that "non-exempt" investigatory materials shall be placed on the public record). The FEC's Disclosure Policy reiterates that the agency's historical practice has been not to publish "materials exempt from disclosure under . . . [FOIA]," 81 Fed. Reg. at 50,702 (citing 11 C.F.R. § 5.4(a)(4)), and states that the new policy "does not alter any existing regulation or policy requiring or permitting the Commission to redact documents, including those covered by this policy, to comply with . . . FOIA," *id.* at 50,704.

Thus, both because FOIA itself contains a "categorical" rule against identifying individuals in law enforcement files and because the FEC has incorporated FOIA requirements into its own regulations and policies, the FEC's publication of the identities of Plaintiffs in this case gives rise to a so-called "reverse FOIA" claim under the APA for agency action that is arbitrary and capricious or contrary to law. *See AFL-CIO*, 177 F. Supp. 2d at 61-63 (sustaining reverse FOIA claim against FEC for identifying individual identities exempted from disclosure under Exemption (7)(C)); *see also Tripp v. United States Dep't of Def.*, 193 F. Supp. 2d 229, 238-40 (D.D.C. 2002) (agreeing that a violation of Exemption (7)(C) can give rise to a "reverse FOIA" claim under the APA).

Because the "disclosure of the identities of private citizens mentioned in law enforcement files constitutes an unwarranted invasion of privacy," this Court has held that "*SafeCard* directs an agency to redact the names . . . of individuals mentioned in investigatory files in order to protect the privacy of those persons." *Nation Magazine*, 71 F.3d at 896. Thus, a person may sue under the APA to prevent an "agency [from] acting unlawfully by releasing information" that is "require[d] to be withheld." *Tripp*, 193 F. Supp. 2d at 239; *see also AFL-CIO*, 177 F. Supp. 2d at 61-63.

The District Court in this case barely considered Plaintiffs' reverse FOIA claim when it declined to block the FEC from publishing Plaintiffs' identities in connection with materials relating to MUR 6920. With respect to the Trustee, the District Court held that because his actions "were solely on behalf of the trust, not himself . . . his asserted privacy interests are minimal," JA280 − even though the FEC documents, in unredacted form, clearly identify him by name, not just as trustee of the Trust. With respect to the Trust, the District Court asserted summarily that the Trust, as a matter of law, lacked any privacy interests implicated by Exemption (7)(C). The District Court was incorrect as to both the Trust and the Trustee: Exemption (7)(C) unambiguously prohibits disclosure of both their identities.

A. The Trustee Has a Personal Privacy Interest Protected Under Exemption 7(C).

This Court has held unequivocally and repeatedly that Exemption (7)(C)'s "categorical" rule against disclosure prohibits "disclosure of the *identities* of private citizens mentioned in law enforcement files." *Nation Magazine*, 71 F.3d at 896 (noting the "long line of FOIA cases" finding such disclosure to be "an unwarranted invasion of privacy and . . . thus exempt under (7)(C) (citations omitted)). The Trustee's identity – *his name* − is exactly the information that the FEC seeks to make public in connection with MUR 6920. But "disclosure of records regarding private citizens, *identifiable by name*, is not what the framers of the FOIA had in mind." *Reporters Comm. for Freedom of the Press*, 489 U.S. at 765 (emphasis added).

The fact that the Trustee's actions that are of interest to the FEC were "solely on behalf of" the Trust has no legal relevance and in no way detracts from the fact that his name would be used to identify him personally. Indeed, taken to its logical conclusion, this reasoning would broadly eliminate Exemption (7)(C)'s protection for individuals in any case of a FOIA request seeking law enforcement information about individuals acting as an employee or agent or in similar capacities – a sweeping outcome unsupported by any legal authority and clearly at odds with this Court's "categorical" rule against disclosure. Indeed, in *AFL-CIO*, this Court never suggested that the "officials[] [and] employees" whose identifying

information was at issue there were entitled to lesser protection simply because they were acting on behalf of a labor organization. 333 F.3d at 172. On the contrary, it unambiguously recognized the existence of their interests in nondisclosure. *Id.* at 176. And another court has rejected the argument that agencies can disclose identities otherwise protected by Exemption (7)(C) merely because "the references dealt only with their professional capacities." *See Alexander & Alexander Servs. v. SEC*, Civ. A. No. 92-1112 (JHG), 1993 WL 439799, at *10 (D.D.C. Oct. 19, 1993). As that court reasoned, "personal information should be kept confidential," because such information "is irrelevant to the inquiry whether the information sheds any light on what [the agency] was up to." *Id.* (internal quotation marks omitted).

B. Disclosure of the Trust's Identity Likewise Implicates a Privacy Interest Protected by Exemption 7(C).

The Trust's legal status does not, as the District Court held, necessarily preclude application of Exemption (7)(C). In reaching the opposite conclusion, the District Court relied on the Supreme Court's decision in *FCC v. AT&T Inc.*, 562 U.S. 397, 409-10 (2011). JA279-90. But that case held only that a corporation does not necessarily have personal privacy interests protected by Exemption (7)(C) merely because it is regarded as a "person" for certain legal purposes. This Court, however, has recognized that where disclosure of business records threatens to reveal protected information about a natural person, such disclosures can be

precluded under Exemption (7)(C). *See Multi Ag Media LLC v. United States Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008). At a minimum, disclosing the Trust's name presents a substantial risk of identifying its trustee, meaning the Trust's identity is likewise protected. A trust is not like a corporation, because disclosure of a trust may implicate the privacy interests of natural persons – the trust's settlor, trustee, and beneficiaries. Thus, *AT&T* does not control this case, and the District Court erred in failing to undertake any analysis of whether disclosing the Trust would implicate personal privacy rights.

C. The Public Interest Is Not Served by Disclosure of Plaintiffs' Identities.

Even if Exemption 7(C) does not categorically prohibit release of Plaintiffs' identities here, the FEC's Disclosure Policy incorporates FOIA principles, which require the balancing of an individual's interest in privacy against the public interest in disclosure before the release of information. *ACLU v. United States DOJ*, 655 F.3d 1, 6 (D.C. Cir. 2011). Balancing these principles in this case compels non-disclosure of Plaintiffs' identities. Accordingly, were the FEC to disclose Plaintiffs' identities it would do so in violation of its own regulations, which is unlawful. *See Nat'l Envtl. Dev. Ass'ns Clean Air Project*, 752 F.3d at 1009.

Plaintiffs have a clear and compelling interest in not being publicly associated with actions by others that have been found to violate the law. *See Stern*

v. FBI, 737 F.2d 84, 91-92 (D.C. Cir. 1984) (noting that an individual has "a strong interest in not being associated unwarrantedly with alleged criminal activity"). This interest is particularly powerful given that Plaintiffs have been subjected to accusations by an FEC Commissioner on social media that they acted illegally as money launderers. If Plaintiffs' identities were disclosed, these accusations would clearly harm their reputations, despite the fact that Plaintiffs have never been afforded notice and an opportunity to respond to those accusations in agency proceedings. *See Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 876 F.3d 346, 350 (D.C. Cir. 2017) (noting that the disclosure of requested information would "produce the unwarranted result of placing [the subject of the information] in the position of having to defend her conduct in the public forum outside of the procedural protections normally afforded the accused in criminal proceedings") (citation omitted)).

By contrast, the *only* public interest to be weighed against these privacy interests under FOIA "is one that focuses on the citizens' right to be informed about what their government is up to." *Davis v. United States Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992) (citation, internal quotation omitted). As the Supreme Court has recognized, disclosure of the identities of individuals in law enforcement records does "not shed any light on the conduct of any Government agency or official." *See Reporters Comm. for Freedom of the Press*, 489 U.S. at

773. Indeed, even where disclosure of documents may be appropriate, this Court has held that redaction of "the names and identifying information of private citizens mentioned in law enforcement files" is appropriate, following the approach in *SafeCard*. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1094 (D.C. Cir. 2014). This is precisely the sort of redaction that is recognized by the FEC's Disclosure Policy. *See* 81 Fed. Reg. at 50,704.

Disclosing Plaintiffs' names – rather than, for example, referring to them generically as a "Trust" and "Trustee" or by pseudonyms − adds nothing to citizens' understanding of "what their government is up to." The District Court's formulation of the public interest – its interest "in the agency's decision to terminate this proceeding involving [respondent] Government Integrity without enforcing its subpoenas and following the money back to its source," JA278 – does not change the equation. That interest can be fully advanced, without tarnishing Plaintiffs with allegations of illegal conduct they have never had the opportunity to respond to, by simply identifying them pseudonymously or generically as the purported source of the funds and the subject of an FEC subpoena.

There is thus no valid public interest to weigh against Plaintiffs' well-founded privacy interests. Accordingly, disclosure of their identities would be

arbitrary and capricious and contradict the FEC's own regulations incorporating FOIA.

II. Disclosure of Plaintiffs' Identities is Arbitrary and Capricious and Contrary to FECA.

In addition to violating the categorical prohibition against disclosure of Plaintiffs' identities afforded by FOIA Exemption (7)(C) (standing on its own and as incorporated into the FEC's regulations and policies), such disclosure is unreasonable, arbitrary and capricious, and contrary to law, in violation of the APA. In addition, to the extent the FEC's Disclosure Policy requires disclosure exceeding the scope of disclosure allowable under FECA, it is unlawful.

Plaintiffs challenge the FEC's interpretation of FECA, as set out in the FEC's regulations and Disclosure Policy. This challenge is governed by the familiar two-step *Chevron* framework. Under this framework, this Court will "stop the music at step one if the Congress 'has directly spoken to the precise question at issue' because [the Court] and the agency—'must give effect to its unambiguously expressed intent.'" *Northpoint Tech., Ltd. v. FCC, Inc.*, 412 F.3d 145, 151 (D.C. Cir. 2005) (quoting *Chevron*, 467 U.S. at 842-43 (alteration omitted)). As part of the "Step I" analysis, this Court "consider[s] the provisions at issue in context, using traditional tools of statutory construction and legislative history." *AFL-CIO*, 333 F.3d at 172. The agency is owed no deference at this stage. *See Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011). "Only

if the statute is either silent or ambiguous on the question at issue [does this Court] defer to the agency's reasonable interpretation." *AFL-CIO*, 333 F.3d at 173. If this is so, the question at *Chevron* "Step II" is whether the agency's action "reflects 'a permissible construction of the statute.'" *Id.* at 175 (quoting *Chevron*, 467 U.S. at 843).

Furthermore, even if the FEC's interpretation of FECA were valid, the FEC's application of its disclosure regulation and Disclosure Policy is impermissible if, as here, it is manifestly unreasonable and contrary to the plain language of the regulation. Plaintiffs recognize that, "[a]s a general matter, an agency's interpretation of its own regulations is 'controlling unless plainly erroneous or inconsistent with the regulation.'" *Rhea Lana, Inc. v. United States DOL*, 824 F.3d 1023, 1030 (D.C. Cir. 2016) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quotation marks omitted)). However, this Court has held that this "deference is unwarranted 'when it appears that the interpretation is nothing more than a convenient litigating position, or a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack.'" *Id.* at 1030-31 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). Moreover, an "agency interpretation . . . [i]s substantively invalid" when "it conflict[s] with the text of the regulation," because "to defer in such a case would allow the agency to create *de facto* a new regulation." *Perez v. Mortg. Bankers*

Ass'n, 135 S. Ct. 1199, 1208 (2015). In addition to being contrary to the plain language of the regulation and a *post hoc* justification for an arbitrary agency action, the FEC's application of its regulations here is manifestly unreasonable, and this Court will not "defer to an unreasonable agency interpretation of an ambiguous regulation." *Menkes v. United States Dep't of Homeland Security*, 637 F.3d 319, 343 (D.C. Cir. 2011) (citation omitted) (Brown, J., dissenting in part) (citing, *inter alia*, *Kidd Commc'ns v. FCC*, 427 F.3d 1, 4 (D.C. Cir. 2005)).

A. The FEC Lacks Authority Under FECA to Disclose Plaintiffs' Identities.

FECA affirmatively and unambiguously provides for disclosure of two – and *only* two – items: (1) "any conciliation agreement signed by both the Commission and the respondent" and (2) FEC "determination[s] that a person has not violated [FECA or other federal election laws]." 52 U.S.C. § 30109(a)(4)(B)(ii). Congress has spoken clearly and directly on the subject of disclosure of investigative information, leaving no gap for the agency to fill.[7] Accordingly, no deference is owed under *Chevron*. The FEC lacks authority to disclose Plaintiffs' identities because neither basis for disclosure under FECA applies here. It is undisputed that

[7] 11 C.F.R. § 111.20's title, "Public disclosure of Commission action (52 U.S.C. § 30109(a)(4))," itself makes clear that the statutory provision the regulation implements is the affirmative disclosure provision found in 52 U.S.C. § 30109(a)(4).

the conciliation agreement in MUR 6920 did not mention Plaintiffs and thus does not raise any disclosure issues. Therefore, the only question here is whether the FEC made a determination that Plaintiffs did not violate FECA. As the District Court properly concluded, JA266-67, the FEC made no such determination.

All FEC decisions must be supported by a majority of (*i.e.*, at least four) Commissioners, 52 U.S.C. § 30106(c); *see also Common Cause v. FEC*, 842 F.2d 436, 449 n. 32 (D.C. Cir. 1988). There was no affirmative vote by four Commissioners in this case with respect to Plaintiffs' conduct one way or another. As the District Court recognized, "the record reflects that the Commission did not make any 'determination' that plaintiffs had not violated [FECA]; it simply did not vote to find reason to believe that they had." JA266-67. The District Court further held that "the Commission did not '*make a finding* of no reason' to believe in this case. Rather, all the Commission did with respect to Plaintiffs was decline to make a finding that there *was* reason to believe, even though the OGC asked it to." JA277. This conclusion should end the inquiry at *Chevron* Step I, as there is no authority in FECA to disclose anything with respect to Plaintiffs. The FEC may not usurp Congress's role and authorize disclosure beyond that provided for in the statute.

The FEC's briefing before the District Court acknowledged that FECA was silent with respect to any disclosures beyond that explicitly mandated in the statute.

JA241. Nevertheless, the FEC asserted that it had the authority under FECA to fill this supposed "gap." *Id.* (citing *Chevron*, 467 U.S. at 842-43). However, this Court has rejected such overexpansive views of agency authority. It is axiomatic that "[a]gencies owe their capacity to act to the delegation of authority, either express or implied, from the legislature." *Ry. Labor Exec. Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994). As such, an agency does not possess "*plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Id.* This Court has held that when Congress "direct[s]" an agency by making "express provision" it take a number of specified actions, it "could hardly leave room" for an agency to mandate other ones. *Albany Eng'g v. FERC*, 548 F.3d 1071, 1075 (D.C. Cir. 2008). Similarly, as the Tenth Circuit recently held, an agency cannot rely on the fact that a statute is "silent" for authority to enact a regulation, especially where the statute already provides the rule that covers the subject matter on which the agency seeks to regulate. *See Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1162-63 (10th Cir. 2017). Therefore, the FEC may not rely "on the *absence* of any [express] statutory directive to the contrary" for authority to disclose Plaintiffs' identities. *Id.* at 1164.[8]

[8] This Court's decision in *AFL-CIO* is not to the contrary. Although the Court noted that the governmental interests identified by the Commission in its First Amendment analysis "may well justify releasing more information than the minimum disclosures" required by FECA, it did not ultimately reach the question

B. The FEC's Regulations Do Not Authorize Disclosure of Plaintiffs' Identities.

Even if the absence of an express prohibition on disclosing Plaintiffs' identities in FECA means that the FEC could issue regulations authorizing such disclosures, the regulations that the FEC has actually issued do not do so. The disclosure regulation at issue here, 11 C.F.R. § 111.20(a), provides that "[i]f the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefor." As explained above, the District Court correctly concluded that the FEC did not make a finding of no reason to believe or no probable cause with respect to Plaintiffs. JA277. But the District Court nevertheless erroneously concluded that this case "fall[s] well within the provision of the regulation requiring disclosure in cases where the Commission 'otherwise terminates its proceedings." JA277-78 (quoting 11 C.F.R. § 111.20(a)). Put another way, the District Court held that when the FEC "terminates" its proceedings in a matter, it may make public information about individuals or entities who were in any way involved in those proceedings – including their identities − even if, as here, they

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presented here regarding the Commission's authority under FECA. 333 F.3d at 179. Whether the First Amendment might permit disclosure broader than that provided for in FECA is a different question and does not control whether Congress has authorized such disclosure.

were non-parties to those proceedings. For at least three reasons, no reasonable reading of § 111.20(a) could authorize the disclosure of Plaintiffs' names.

First, 11 C.F.R. § 111.20 must be read to permit disclosure of information only regarding those *against whom the FEC has initiated proceedings*, *i.e.*, those who are named as respondents and who have received the benefit of the detailed, formal procedures FEC regulations establish to allow them to know the charges against them and contest allegations before the Commission acts. The type of "proceedings" referenced by § 111.20(a) are clearly the formal adversary proceedings outlined by FEC regulations, because each of the other actions referenced by § 111.20 is the culmination of such a proceeding: "finding[s] of no reason to believe or no probable cause," "finalizing" a "conciliation agreement," and "commence[ment]" of "a civil action." 11 C.F.R. § 111.20(a), (b), and (c). Because none of those actions can, under the regulations, be taken without formal adversary proceedings – giving notice to the party who might be subject of adverse action (*i.e.*, the respondent) and allowing them an opportunity to respond – it follows the term should have the same meaning when determining whether the Commission has "otherwise terminate[d] its proceedings." *Cf. Cement Kiln Recycling Coalition v. EPA*, 493 F.3d 207, 221 (D.C. Cir. 2007) ("general words" in regulations are "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words" (citation omitted)).

Plaintiffs, by contrast, were not the subject of any action before the Commission that could even conceivably fall within the definition of "proceedings." In fact, OGC assured them that they were merely witnesses and not subjects of MUR 6920. JA213. And, as two Commissioners have acknowledged, Plaintiffs were provided *none* of the procedural protections afforded under FECA, FEC regulations, and ordinary Commission practice to persons against whom "proceedings" *are* initiated. In short, it makes sense to read the disclosure provisions to apply only to the kinds of "proceedings" likely to provide formal and fair process sufficient to give confidence to the resulting determination, but not to the sort of "irregular," JA207 n.2, *ad hoc* procedures used here, which afford no such protections.

Second, the regulation by its own terms only authorizes "[p]ublic disclosure of Commission *action*." 11 C.F.R. § 111.20 (emphasis added). The actions whose disclosure the regulation authorizes are all actions that require the affirmative vote of at least four Commissioners: Commission "finding[s] of no reason to believe or no probable cause," "finaliz[ing]" a "conciliation agreement," and "commence[ment]" of "a civil action." 11 C.F.R. § 111.20(a), (b), and (c); *see also* § 111.19(b) (necessary vote to commence civil action). By the same token, the regulation applies only when "the *Commission* . . . otherwise terminates its proceedings," 11 C.F.R. § 111.20(a) (emphasis added), which can only be

understood to mean through an affirmative vote of at least four Commissioners. *Cf. Cement Kiln Recycling Coalition*, 493 F.3d at 221. Thus, the regulation plainly only applies when the Commission affirmatively votes to order proceedings terminated, as it sometimes does. The regulation does not apply when the Commission simply does not proceed for lack of affirmative vote. This understanding accords with the regulations' rules for the timing of disclosures, which specify that they be made within 30 days of the date "on which the required notifications are sent." 11 C.F.R. § 111.20(a). But no notifications are required when the Commission does not proceed through mere failure to act; they are required when "the Commission finds no probable cause to believe or otherwise *orders* a termination of Commission proceedings." 11 C.F.R. § 111.17(b) (emphasis added). And tellingly, the FEC never provided Plaintiffs any notice of the proceedings being "otherwise terminated," suggesting they believed no such notice was "required."

As the District Court recognized, "[A]ll the Commission did with respect to plaintiffs was decline to make a finding that there *was* reason to believe." JA277. In other words, the *Commission* did not "otherwise terminate[] its proceedings." Without an affirmative vote, the resulting inaction is not a "decision[] of the Commission with respect to the exercise of its duties and powers" under FECA. 52

U.S.C. § 30106(c). It resulted from an *absence* of any Commission decision. Accordingly, it triggered no required disclosures.

Third, the language of the rule does not authorize the disclosure of Plaintiffs' *names* in connection with the disclosure of the proceedings in MUR 6920. The unambiguous language of 11 C.F.R. § 111.20(a) authorizes the Commission to disclose two things: (1) the FEC's action; and (2) the basis for that action. Thus, by its plain language, § 111.20(a) authorizes the disclosure of the basis for the FEC's disposition of the proceeding. The FEC's application of § 111.20(a) to require additional disclosure is contrary to the plain language of the regulation, *see Rhea Lana, Inc.*, 824 F.3d at 1030, and unreasonable.

Plaintiffs' identities did not form any "basis" for the FEC's disposition of MUR 6920. Indeed, Plaintiffs are not even *mentioned* in the conciliation agreement. Although the District Court held that it was reasonable for the FEC to disclose Plaintiffs' names pursuant to § 111.20(a) because they were "involved" in the investigation and the conduct at issue, JA278-79, the regulation in no way requires making public *the identities* of non-respondents as part of the disclosure in MUR 6920. Indeed, given that MUR 6920 concluded without investigation of Plaintiffs' conduct, much less a determination of probable cause to believe they violated the law, referring to Plaintiffs by name (rather than by pseudonym or generically as "the Trust" and "the Trustee") would be manifestly unreasonable

and at odds with fundamental notions of privacy enshrined in FECA and FOIA, which the FEC expressly incorporates into its Disclosure Policy. 81 Fed. Reg. at 50,704.

The other reasons the District Court gave for disclosure do not survive even brief scrutiny. Although the District Court asserted that it would be anomalous for the FEC's regulations to fail to authorize disclosure of Plaintiffs' identities but require the disclosure of the identities of those affirmatively exonerated by the Commission, JA278, this outcome is completely appropriate. An FEC decision affirmatively stating there is no reason to believe or no probable cause to believe that a respondent violated FECA is an affirmative exercise of the Commission's power and represents its affirmative judgment that a violation has not occurred or should be excused. It is reasonable to require disclosure of the basis for that decision, which implicates the public interest in how the FEC exercises its power and lifts a cloud of suspicion over the respondent. This outcome is all the more appropriate where administrative complainants routinely publicize their claims of alleged illegal conduct against named respondents.[9] The privacy concerns of

[9] For instance, the administrative complainant in this matter posted the complaint to its public website at the same time it was filed. *See* Citizens for Responsibility & Ethics in Wash., *CREW Requests FEC and DOJ Investigate American Conservative Union's Illegal Conduit Contribution* (Feb. 27, 2015) http://www.citizensforethics.org/legal-filing/crew-fec-doj-investigate-american-

named respondents are reduced because the Commission is essentially clearing them of wrongdoing. In contrast, the FEC did not exercise its power here with respect to Plaintiffs, who were not respondents implicated in a complaint, and about whom the Commission took no action. There is therefore no accountability interest or need to resolve allegations against them that would warrant disclosure.

The District Court also reasoned that publication of Plaintiffs' identities was justified as part of the FEC's termination of proceedings in MUR 6920 because Plaintiffs were "integrally involved in a narrow, focused investigation" and would have had their identities revealed if they had not resisted responding to the OGC subpoena. JA278. But the court cited no FEC statement in support of this characterization, nor did it justify a leap from authorized disclosure of the "basis" for a decision to disclosure of the names of any person "involved" in any way in the investigation. Likewise, there is nothing whatsoever in FECA (or for that matter FEC regulations) to suggest that the FEC may decide to disclose private information of a non-party based on its alleged "integral involve[ment]" in the conduct at issue in a MUR. Section 111.20(a) is, like FOIA, aimed at disclosing the basis for the *Commission's* conduct, not the conduct of others.

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conservative-union-cpac-illegal/. The complainant routinely posts its numerous FEC complaints to its website.

It is simply not enough that the FEC asserts that "the public must have access to the identities, including partisan connections, of such persons" who "materially participated in events investigated by the commission" in order to "assess the Commission's nonpartisanship in enforcing the Act." JA225. Even taking that statement at face value falls far short of demonstrating that Plaintiffs' names were "the basis" for the "terminat[ion]" of the proceedings. Moreover, the same rationale could be used to override privacy rights completely, because it could *always* be asserted that the undisclosed names of witnesses are necessary "in order to assess the Commission's nonpartisanship in enforcing the Act." And in any event, no FEC Commissioner suggested that the Plaintiffs' partisan affiliations had anything to do with the FEC's actions.

Put simply, FECA and 11 C.F.R. § 111.20 do not allow the FEC to have it both ways. The FEC seeks to achieve the effect of an affirmative finding that Plaintiffs violated FECA, without allowing Plaintiffs to challenge the allegations against them. Indeed, the FEC has leveraged the uncertainty created by its unlawful course to maximum effect. An FEC Commissioner has issued public statements accusing Plaintiffs of "laundering . . . millions" of dollars to hide the true source of the contribution at issue and asserting they "got away with [it]." JA215. At the same time, OGC asserted in its motion to expedite before this Court that it was "undisputed" that Plaintiffs were the source of the contribution, Mot. to

Expedite 12, in order to urge this Court to deny relief to Plaintiffs.[10] The Commissioner's untested accusations and the FEC's efforts to pre-judge the source of the contribution at issue in MUR 6920 both flow from the FEC's ability to brand as wrongdoers any person or entity that OGC or any one Commissioner suspects of wrongdoing without the benefit of the process mandated by FECA. No reasonable interpretation of § 111.20(a) could permit this approach, which is the essence of arbitrary and capricious conduct.

III. Disclosure of Plaintiffs' Identities Would Violate Their First Amendment Rights.

Disclosure of Plaintiffs' identities through release of the unredacted investigative file for MUR 6920 is also contrary to law under the APA because it violates the First Amendment. Therefore, to the extent the Commission's Disclosure Policy or regulations are interpreted to compel disclosure, they are an impermissible interpretation of the statute under *Chevron* Step II. *See AFL-CIO*, 333 F.3d at 179-80.

Contrary to the District Court's summary dismissal of the First Amendment interests implicated by disclosure of investigatory materials relating to Plaintiffs, JA273-76, this Court has held that these kinds of disclosures directly implicate

[10] The assertion in the FEC's motion is inaccurate. Plaintiffs have never taken a position, and the FEC has made no finding, with respect to the source of the contribution at issue in MUR 6920.

First Amendment rights, and that therefore the Commission must provide a "First Amendment justification for publicly disclosing" information "relating to speech or political activity for law enforcement purposes." *Id.* at 179. The District Court failed to apply this Court's clear precedent and in so doing mischaracterized and gave insufficient weight to the core First Amendment interests at stake in this case. The FEC here plainly asserts the right to publicly identify individuals and entities it alleges engaged in conduct relating to an illegal contribution solely to serve as a warning to others that they too might be publicly labeled money launderers or other unlawful actors − even where the Commission has not made even an initial determination that the individual or entity may have done anything wrong. This asserted deterrence interest plainly threatens open participation in the electoral process, and with it critical First Amendment rights.

A. Compelled Disclosure of Political Activity in the Context of FEC Investigations and Proceedings Implicates First Amendment Rights.

That Plaintiffs have a protectable First Amendment interest in the disclosure of their identities in connection with an FEC enforcement proceeding was settled by this Court in *AFL-CIO*. In that case, the FEC sought to disclose information it collected from the respondent during an investigation where the FEC did not find that the respondent committed any wrongdoing. *AFL-CIO*, 333 F.3d at 171. The same circumstances are present here: The FEC seeks to compel disclosure of

information that it asserts would reveal political affiliations and activities. There can be no doubt, based on longstanding precedent recognizing the FEC's unique role in regulating core constitutional speech, that this compelled disclosure implicates First Amendment rights.

"The First Amendment affords the broadest protection to . . . political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). In *Buckley*, the Supreme Court held that "compelled disclosure [of political activity and affiliations], *in itself*, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 424 U.S. at 64. Both the Supreme Court and this Court have reiterated this clear rule in the decades since *Buckley*. In *McConnell v. FEC*, the Supreme Court held that "compelled disclosure [of contributors] may impose an unconstitutional burden on the freedom to associate in support of a particular cause." 540 U.S. 93, 198 (2003). This Court, too, has recognized that in the area of campaign finance law, "[d]isclosure chills speech," and the values of disclosure and speech "exist in unmistakable tension." *Van Hollen v. FEC*, 811 F.3d 486, 488 (D.C. Cir. 2016). Therefore, as this Court has recognized in this very context, "compelled disclosure of political affiliations and

activities can impose just as substantial a burden on First Amendment rights as can direct regulation." *AFL-CIO*, 333 F.3d at 175.

Because of the First Amendment interests at stake, the FEC's role is to act as guardian of these interests through its just and proper administration of the election laws. As this Court has held, the FEC is "[u]nique among federal administrative agencies" because "its sole purpose [is] the regulation of core constitutionally protected–activity – 'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'" *Id.* at 170 (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)). "Thus, more than other agencies whose primary task may be limited to administering a particular statute, *every action the FEC takes* implicates fundamental rights," *Van Hollen*, 811 F.3d at 499 (emphasis added), and the FEC has an obligation to tailor "disclosure requirements to satisfy constitutional interests in privacy." *Id.*

Accordingly, as in every other context where government activity infringes on First Amendment rights, the FEC must identify a "substantial government interest[]" to justify disclosure. *See Buckley*, 424 U.S. at 66-68; *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014). This Court in *AFL-CIO* identified two such interests: "deter[ring] FECA violations, and . . . promot[ing] the agency's own public accountability." 333 F.3d at 178. The FEC identified these same interests as

justifying the scope of the disclosure called for by its Disclosure Policy. *See* 81 Fed. Reg. at 50,703. Neither of these interests supports disclosure here.

B. Plaintiffs Have Demonstrated a First Amendment Interest in Preventing the Disclosure of Their Identities.

1. *AFL-CIO* Governs this Case, and Plaintiffs Have a Clear First Amendment Interest in Preventing Disclosure.

This Court's decision in *AFL-CIO* stands for the broad proposition that, because the compelled disclosure of political activities and affiliations inherently implicates the First Amendment and the FEC is tasked with safeguarding fundamental rights in the context of its investigations, the FEC must justify its decision to release identifying material from its investigative file. Instead of applying this rule, the District Court essentially limited *AFL-CIO* to its facts. JA271-73. Given its full and proper force, however, *AFL-CIO* controls the FEC's proposed disclosure here.

In *AFL-CIO*, this Court expressed its concern with the chilling effect on political participation and effectiveness that would result from compelled disclosure of the identities of the respondent's personnel. *See AFL-CIO*, 333 F.3d at 176, 178. The District Court all but ignored this element of *AFL-CIO*, focusing instead on this Court's discussion of disclosure of the respondent's internal organizational materials and concluding that no similar concerns applied in this case. JA271-73. The District Court committed the same error as the FEC in *AFL-*

CIO: By contrasting the volume and type of materials that were to be disclosed in *AFL-CIO*, which this Court held only bore on "the strength of the First Amendment interests asserted, not to their existence," *AFL-CIO*, 333 F.3d at 176, against Plaintiffs' identities, the District Court erroneously held that a First Amendment interest did not exist.

Notably, the FEC in this case has never challenged the existence of Plaintiffs' First Amendment right against compelled disclosure, even though it has rigorously defended its asserted interests supporting disclosure. Despite the FEC's position, however, the District Court held that "plaintiffs do not make any claim that anyone's associational rights are being infringed, and disclosing the identities of plaintiffs would not involve the disclosure of anyone's internal operations or political strategies." JA272. The District Court dismissed Plaintiffs' concerns about the chilling effect that would result from the threat of public opprobrium as mere "privacy concerns, not . . . constitutional concerns." JA274. This distinction is unsupported, and indeed is directly contradicted, by the relevant precedent. Quoting *Buckley*, this Court held in *AFL-CIO* that compelled disclosure violates the First Amendment because "it intrudes on the '*privacy* of association and belief guaranteed by the First Amendment.'" 333 F.3d at 177 (quoting *Buckley*, 424 U.S.

at 64).[11] Therefore, the District Court erred by failing to recognize the critical First Amendment interests in this case.

The chilling effect that would result from this disclosure is consistent with the longstanding observations of the Supreme Court and this Court that compelled disclosure of political activity chills core First Amendment-protected speech. *E.g.*, *Van Hollen*, 811 F.3d at 488 (noting that "[d]isclosure chills speech"); *AFL-CIO*, 333 F.3d at 176 (quoting *Buckley*, 424 U.S. at 65-66, for the proposition that "disclosure of campaign contributions would chill political activity and therefore place 'not insignificant burdens' on First Amendment rights"). As the Trustee stated in his affidavit, disclosure of political activity and affiliations outside of the enforcement process will have a chilling effect on speech. JA45. In fact, chilling political activity is not an unfortunate side effect of disclosure, it is the FEC's goal here. By disclosing Plaintiffs' identities, without any finding that their conduct violated FECA (and without giving Plaintiffs any opportunity to prove they did not), the FEC hopes that others will be put "on notice" that they too could find themselves named and shamed as FECA violators without due process if they

[11] Although the quoted passage involved disclosure of an association's confidential materials, the court recognized the First Amendment interest in nondisclosure of personal information, as noted above.

participate in the political process in a way even one Commissioner believes is inappropriate. JA240.

The chilling effect of disclosure on Plaintiffs' First Amendment interests is not merely speculative. It is on full display. Since the filing of this lawsuit, Plaintiffs have been subjected to public attacks by an FEC Commissioner accusing them of money laundering in connection with MUR 6920, even though the FEC declined to find "reason to believe" Plaintiffs violated FECA or investigate their conduct. JA135-37. Further, the FEC has, in public documents filed in this Court, erroneously stated that "John Doe 2 was the undisputed source of the contribution at issue" here, even though the Commission never addressed the question of whether Trust was a source of the contribution, much less made such a finding of fact to that effect. Mot. to Expedite 12. It is not a stretch of the imagination to believe that if Plaintiffs' names are ultimately identified, this criticism will chill their (and, if the FEC has its way, others') First Amendment-protected activity.[12]

[12] As the District Court pointed out, JA276, the Supreme Court has held that "as-applied challenges [to forced disclosure of political contributions] would be available if a group could show a 'reasonable probability' that disclosure of its contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Citizens United v. FEC*, 558 U.S. 310, 367 (2010) (citation omitted). The District Court found no such harassment to be likely in this case. The facts prove otherwise. In any event, as this Court noted in *AFL-CIO*, a "harassment" finding is necessary only if the compelled disclosure survives strict scrutiny by being shown to be the least restrictive means of advancing a compelling government interest. *AFL-CIO*, 333 F.3d at 176. As

Plaintiffs have a clear First Amendment interest in avoiding disclosure of their identities. The District Court's decision to the contrary ignored this Court's holding in *AFL-CIO* that even a "marginal interest in preventing the chilling of political participation" is sufficient to trigger First Amendment protections. 333 F.3d at 178. After it determined that *AFL-CIO* was inapposite, the District Court purported to analyze whether disclosure would have a chilling effect, but its narrow conception of the First Amendment rights at stake was also erroneous.

2. Plaintiffs Do Not Assert the Right to Make an Anonymous Contribution.

Failing to recognize the First Amendment interests threatened by the FEC's compelled disclosure of political activities and affiliations, the District Court erroneously concluded that "the only right that is implicated by the agency's actions in this case is the right to contribute anonymously." JA275. Neither Plaintiffs nor the FEC took this position in their briefing below, because the question of when a contributor may remain anonymous or must disclose their identity is not implicated in this case. The District Court's First Amendment analysis was therefore erroneous.

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discussed below, the disclosure advances no compelling government interest, rendering a finding of "harassment" unnecessary.

Any implication from the District Court's decision that Plaintiffs violated FECA by failing to report their identities to the FEC in connection with the conduct alleged by OGC is unsubstantiated and beyond the scope of this case. In MUR 6920, the FEC entered into a conciliation agreement with the respondents based on a violation of 52 U.S.C. § 30122, which prohibits making a contribution in the name of another. Neither Congress in statute nor the Commission in regulation have defined terms for determining the "true source" of a contribution subject to FECA. Nor have the circuit courts that have faced the question; rather, those courts have simply opined that the purpose of this statute is to ensure that the "true source" of a contribution is accurately reported to the FEC. *See United States v. O'Donnell*, 608 F.3d 546, 553-54 (9th Cir. 2010); *United States v. Boender*, 649 F.3d 650, 660-61 (7th Cir. 2011). The Commission has not reached a definitive conclusion or made a finding regarding the true source of the contribution in MUR 6920, so the ultimate person required to report the contribution remains unsettled as a matter of both law and fact. Moreover, only the FEC, and not the District Court, can determine, in the first instance, whether FECA has been violated. *See FEC v. Nat'l Rifle Ass'n*, 553 F. Supp. 1331, 1333 (D.D.C. 1983) (holding that, under the FECA, the FEC is "the 'exclusive' administrator and enforcer").[13]

[13] Indeed, it is not clear that a violation occurred. In the nearly eight years since *Citizens United*, the FEC has failed to enact regulations governing contributions by

In this case, there has been no finding by the FEC or admission by Plaintiffs that either the Trust or Trustee were the true source of the contribution to Now or Never PAC, and thus the analysis with respect to the proper disclosure of that contribution is not at issue. Indeed, that question is irrelevant, and the Court has no jurisdiction to decide it. The relevant First Amendment analysis is with respect to Plaintiffs as third parties identified in an FEC investigative file. Plaintiffs stand in the same position as the persons whose names the FEC sought to disclose from its investigative file in the *AFL-CIO* case. That is the relevant framework for the First Amendment analysis, not the analysis that governs contribution cases. Therefore, the District Court erred by analyzing the issue presented in this case as if the interests that govern compelled disclosure of a contribution were at issue or controlling.

C. The FEC's Asserted Interests in Deterrence and Accountability in No Way Justify Disclosure over Plaintiffs' First Amendment Rights.

In a document recently filed in this Court, the FEC asserts that the two interests it believes would be advanced by release of Plaintiffs' identities are (1) deterrence and (2) accountability. Mot. to Expedite 11. Releasing Plaintiffs'

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corporations or other entities to SuperPACs. As such, the analysis of when a person such as a corporation or other entity is the "true source" of a contribution is unsettled.

identities, the FEC suggests, would advance both these interests by "allow[ing] the public to understand the Commission's applications of FECA and FEC regulations . . . ." *Id*. These are the same governmental interests recognized by this Court in *AFL-CIO*. 333 F.3d at 174, 179 (identifying "deterring future violations and promoting Commission accountability" as valid governmental interests in disclosure). Neither of these goals is conceivably advanced by release of Plaintiffs' identities.

Regarding deterrence, Plaintiffs were never respondents to MUR 6920, and the FEC expressly declined to investigate them. This Court has expressly questioned "how releasing investigatory files will deter future violations in cases where . . . the respondents have been cleared of wrongdoing." *Id.* at 178. The same question is equally true where, as here, the subject of the disclosure has never had the opportunity even to answer such charges, and yet is now being publicly accused of illegal conduct by an FEC Commissioner. The FEC simply has failed to identify any violation that would be deterred by disclosing Plaintiffs' identities. Indeed, where, as here, the alleged conduct was not found to violate the law, any kind of government effort at "deterrence" amounts to unconstitutional chilling of protected activity. *See, e.g.*, *Kenny v. Wilson*, 885 F.3d 280, 289 n.3 (4th Cir. 2018) (noting that "[g]overnment action will be sufficiently chilling when it is likely to deter a person of ordinary firmness from the exercise of First Amendment rights"

(brackets in original, citation and internal quotations omitted)). Put another way, the FEC has no legitimate interest in deterring political activity that it did not find provided a "reason to believe" that FECA had been violated.

Similarly, the FEC's interest in "accountability" is in no way advanced by identifying Plaintiffs by name. As extensively set forth above, no public interest in the FEC's conduct is served by disclosure. The Commission's decisionmaking and reasoning in MUR 6920 can clearly be explained by identifying Plaintiffs as the "Trustee" and "Trust," respectively, or by their current pseudonyms. No more information is necessary as to non-respondents the FEC has declined even to investigate. The FEC has already disclosed, through the normal agency process of releasing the conciliation agreement, the identities of those it *has* found violated the law and the basis for its decision with respect to them. The only evident purpose of identifying Plaintiffs by name is as part of an effort to publicly and unjustifiably shame them by associating them with conduct *by others* that the FEC has determined violated FECA–an effort that advances no permissible (much less compelling) governmental interest and is not justified by the facts and circumstances of this case.

CONCLUSION

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

Respectfully Submitted,

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

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,918 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

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CERTIFICATE OF SERVICE

Pursuant to D.C. Circuit Local Rule 25(c), I hereby certify that on this 14th day of May, 2018, I electronically filed the foregoing Brief of Plaintiffs-Appellants with the Court by using the CM/ECF system. All parties to the case have been served through the CM/ECF system.

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ADDENDUM OF STATUTES AND REGULATIONS

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5 U.S.C. § 552(b)(7)(C)

(b) This section does not apply to matters that are—

. . .

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;

. . .

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

52 U.S.C. § 30109

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and

factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clauses1 (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

. . .

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

. . .

(12)(A) Any 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.

11 C.F.R. § 4.5

Categories of Exemptions

(a) No requests under 5 U.S.C. 552 shall be denied release unless the record contains, or its disclosure would reveal, matters that are:

. . .

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

11 C.F.R. § 111.6

Opportunity to demonstrate that no action should be taken on complaint-generated matters (52 U.S.C. 30109(a)(1)).

(a) A respondent shall be afforded an opportunity to demonstrate that no action should be taken on the basis of a complaint by submitting, within fifteen (15) days from receipt of a copy of the complaint, a letter or memorandum setting forth reasons why the Commission should take no action.

(b) The Commission shall not take any action, or make any finding, against a respondent other than action dismissing the complaint, unless it has considered such response or unless no such response has been served upon the Commission within the fifteen (15) day period specified in 11 CFR 111.6(a).

11 C.F.R. § 111.9

The reason to believe finding; notification (52 U.S.C. 30109(a)(2)).

(a) If the Commission, either after reviewing a complaint-generated recommendation as described in 11 CFR 111.7 and any response of a respondent submitted pursuant to 11 CFR 111.6, or after reviewing an internally-generated recommendation as described in 11 CFR 111.8, determines by an affirmative vote of four (4) of its members that it has reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction, its Chairman or Vice Chairman shall notify such respondent of the Commission's finding by letter, setting forth the sections of the statute or regulations alleged to have been violated and the alleged factual basis supporting the finding.

(b) If the Commission finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter.

11 C.F.R. § 111.20

§ 111.20 Public disclosure of Commission action (52 U.S.C. 30109(a)(4)).

(a) 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 no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent.

(b) If a conciliation agreement is finalized, the Commission shall make public such conciliation agreement forthwith.

(c) For any compliance matter in which a civil action is commenced, the Commission will make public the non-exempt 52 U.S.C. 30109 investigatory materials in the enforcement and litigation files no later than thirty (30) days from the date on which the Commission sends the complainant and the respondent(s) the required notification of the final disposition of the civil action. The final disposition may consist of a judicial decision which is not reviewed by a higher court.

PRA that does not display a valid OMB control number.

DATES: Written comments should be submitted on or before September 1, 2016. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contacts below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicholas A. Fraser, OMB, via email *Nicholas_A._Fraser@omb.eop.gov;* and to Cathy Williams, FCC, via email *PRA@fcc.gov* and to *Cathy.Williams@fcc.gov.* Include in the comments the OMB control number as shown in the **SUPPLEMENTARY INFORMATION** section below.

FOR FURTHER INFORMATION CONTACT: For additional information or copies of the information collection, contact Cathy Williams at (202) 418–2918. To view a copy of this information collection request (ICR) submitted to OMB: (1) Go to the Web page *http://www.reginfo.gov/public/do/PRAMain,* (2) look for the section of the Web page called ''Currently Under Review,'' (3) click on the downward-pointing arrow in the ''Select Agency'' box below the ''Currently Under Review'' heading, (4) select ''Federal Communications Commission'' from the list of agencies presented in the ''Select Agency'' box, (5) click the ''Submit'' button to the right of the ''Select Agency'' box, (6) when the list of FCC ICRs currently under review appears, look for the OMB control number of this ICR and then click on the ICR Reference Number. A copy of the FCC submission to OMB will be displayed.

SUPPLEMENTARY INFORMATION:

OMB Control No.: 3060–0192.

Title: Section 87.103, Posting Station License.

Form No.: N/A.

Type of Review: Extension of a currently approved collection.

Respondents: Business or other for-profit, not-for-profit institutions, and state, local and tribal government.

Number of Respondents and Responses: 33,622 respondents, 33,622 responses.

Estimated Time per Response: .25 hours.

Frequency of Response: Recordkeeping requirement.

Obligation to Respond: Required to obtain or retain benefits. The statutory authority for this collection is contained in 47 U.S.C. 303.

Total Annual Burden: 8,406 hours.

Annual Cost Burden: No cost.

Privacy Act Impact Assessment: No impacts.

Nature and Extent of Confidentiality: There is no need for confidentiality with this collection of information.

Needs and Uses: Section 87.103 states the following: (a) Stations at fixed locations. The license or a photocopy must be posted or retained in the station's permanent records. (b) Aircraft radio stations. The license must be either posted in the aircraft or kept with the aircraft registration certificate. If a single authorization covers a fleet of aircraft, a copy of the license must be either posted in each aircraft or kept with each aircraft registration certificate. (c) Aeronautical mobile stations. The license must be retained as a permanent part of the station records.

The recordkeeping requirement contained in Section 87.103 is necessary to demonstrate that all transmitters in the Aviation Service are properly licensed in accordance with the requirements of Section 301 of the Communications Act of 1934, as amended, 47 U.S.C. 301, No. 2020 of the International Radio Regulation, and Article 30 of the Convention on International Civil Aviation.

Federal Communications Commission.

Marlene H. Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2016–18209 Filed 8–1–16; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL ELECTION COMMISSION

[NOTICE 2016–06]

Disclosure of Certain Documents in Enforcement and Other Matters

AGENCY: Federal Election Commission.

ACTION: Statement of policy.

SUMMARY: The Commission is adopting a policy with respect to placing certain documents on the public record in enforcement, administrative fines, and alternative dispute resolution cases, as well as administrative matters. The categories of records that will be included in the public record are described below.

DATES: Effective on September 1, 2016.

FOR FURTHER INFORMATION CONTACT: Adav Noti, Acting Associate General Counsel, 999 E Street NW., Washington, DC 20463, 202–694–1650 or 1–800–424–9530.

SUPPLEMENTARY INFORMATION: The ''confidentiality provision'' of the Federal Election Campaign Act, 52 U.S.C. 30101 *et seq.* (FECA), provides that: ''Any notification or investigation under [Section 30109] shall not be made public by the Commission . . . 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). For approximately the first 25 years of its existence, the Commission viewed the confidentiality requirement as ending with the termination of a case. The Commission placed on its public record the documents that had been considered by the Commissioners in their determination of a case, minus those materials exempt from disclosure under the FECA or under the Freedom of Information Act, 5 U.S.C. 552 (FOIA). *See* 11 CFR 5.4(a)(4). In *AFL–CIO* v. *FEC,* 177 F. Supp. 2d 48 (D.D.C. 2001), the district court disagreed with the Commission's interpretation of the confidentiality provision and found that the protection of section 30109(a)(12)(A) does not lapse at the time the Commission terminates an investigation. 177 F. Supp. 2d at 56.

Following that district court decision, the Commission placed on the public record only those documents that reflected the agency's ''final determination'' with respect to enforcement matters. Such disclosure is required under 52 U.S.C. 30109(a)(4)(B)(ii) and section (a)(2)(A) of the FOIA. In all cases, the final determination is evidenced by a certification of Commission vote. The Commission also continued to disclose documents that explained the basis for the final determination. Depending upon the nature of the case, those documents consisted of General Counsel's Reports (frequently in redacted form); Probable Cause to Believe Briefs; conciliation agreements; Statements of Reasons issued by one or more of the Commissioners; or, a combination of the foregoing. The district court indicated that the Commission was free to release these categories of documents. *See* 177 F. Supp. 2d at 54 n.11. In administrative fines cases, the Commission began placing on the public record only the Final Determination Recommendation and certification of vote on final determination. In alternative dispute resolution cases, the public record consisted of the certification of vote and the negotiated agreement.

Although it affirmed the judgment of the district court in *AFL–CIO,* the Court of Appeals for the District of Columbia Circuit differed with the lower court's restrictive interpretation of the confidentiality provision of 52 U.S.C. 30109(a)(12)(A). The Court of Appeals stated that: ''the Commission may well be correct that . . . Congress merely intended to prevent disclosure of the fact that an investigation is pending,''

and that: ''deterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by section [30109](a).'' *See AFL–CIO* v. *FEC,* 333 F.3d 168, 174, 179 (D.C. Cir. 2003). However, the Court of Appeals warned that, in releasing enforcement information to the public, the Commission must ''attempt to avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a 'delicate nature . . . represent[ing] the very heart of the organism which the first amendment was intended to nurture and protect.' '' *Id.* at 179 (citation omitted). The decision suggested that, with respect to materials of this nature, a ''balancing'' of competing interests is required—on one hand, consideration of the Commission's interest in promoting its own accountability and in deterring future violations and, on the other, consideration of the respondent's interest in the privacy of association and belief guaranteed by the First Amendment. Noting that the Commission had failed to tailor its disclosure policy to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates, *id.* at 178, the Court found the agency's disclosure regulation at 11 CFR 5.4(a)(4) to be impermissible, *id.* at 179. In December 2003, the Commission issued an interim disclosure policy. *See* Statement of Policy Regarding Disclosure of Closed Enforcement or Related Files, 68 FR 70423 (Dec. 20, 2003) (''Interim Disclosure Policy'').

The Commission is issuing this policy statement to identify several categories of documents integral to its decisionmaking process that will be disclosed upon termination of an enforcement matter, as well as documents integral to its administrative functions. This policy replaces the Interim Disclosure Policy as the Commission's permanent disclosure policy.

The categories of documents that the Commission intends to disclose as a matter of regular practice either do not implicate the 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. In addition, the Commission will make certain other documents available on a case by case basis which will assist the public in understanding the record without intruding upon the associational interests of the respondents.

Enforcement

With respect to enforcement matters, the Commission will place the following categories of documents on the public record:

1. Complaint (including supplements and amendments thereto);
2. Internal agency referral where the Commission opens a Matter Under Review;
3. Response (including supplements and amendments thereto) to complaint;
4. General Counsel's Reports [1] (including supplements [2] thereto) that recommend dismissal, reason to believe, no reason to believe, no action at this time, probable cause to believe, no probable cause to believe, no further action, or acceptance of a conciliation agreement;
5. Notification of reason to believe findings;
6. Factual and Legal Analyses identified as the subject of a vote in a Commission certification;
7. Respondent's response to reason to believe findings;
8. Briefs (General Counsel's Brief and Respondent's Brief);
9. Statements of Reasons issued by one or more Commissioners;
10. Conciliation Agreements;
11. Evidence of payment of civil penalty or of disgorgement;
12. Certifications of Commission votes;
13. Attachments to complaints and attachments to responses to complaints;
14. Memoranda and reports (including supplements [2] thereto) from the Office of the General Counsel prepared for the Commission in connection with a specific pending Matter Under Review circulated through the Office of the Secretary for the consideration and deliberation of the Commission;
15. Complaint notification letters, and correspondence from respondents submitted in response to them;
16. Notifications to respondents that were previously identified as ''Unknown Respondents,'' and correspondence from respondents submitted in response to them;
17. Designations of counsel;
18. Requests for extensions of time;
19. Responses to requests for extensions of time;
20. Tolling agreements; and
21. Closeout letters.

The Commission is placing the foregoing categories of documents on the public record in all matters it closes on or after September 1, 2016, regardless of the outcome. By doing so, the Commission complies with the requirements of 52 U.S.C. 30109(a)(4)(B)(ii) and 5 U.S.C. 552(a)(2)(A). Conciliation Agreements are placed on the public record pursuant to 52 U.S.C. 30109(a)(4)(B)(ii). On a case by case basis, the Commission may place on the public record other documents that edify public understanding of a closed matter.

The Commission will place these documents on the public record as soon as practicable, and will endeavor to do so within 30 days of the date on which notifications are sent to complainant and respondent. *See* 11 CFR 111.20(a). In the event a Statement of Reasons is required, but has not been issued before the date proposed for the release of the remainder of the documents in a matter, those documents will be placed on the public record and the Statement of Reasons will be added to the file when issued.

The Commission is not placing on the public record certain other materials from its investigative files, such as 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. The Commission also will not place the following categories of documents on the public record:

1. *Sua sponte* submissions and accompanying attachments;
2. External referrals from other agencies and law enforcement sources in which the Commission declines to open a Matter Under Review;
3. Documents (other than notification letters) related to debt settlement plans and proposed administrative terminations in which the Commission does not approve the debt settlement plan or administrative termination.

Administrative Fines

With respect to administrative fines cases, the Commission will place the entire administrative file on the public record, which includes the following:

1. Reason to Believe recommendation;
2. Respondent's response;
3. Reviewing Officer's memoranda to the Commission;

[1] This category of documents does not include General Counsel's Reports that have been withdrawn by the Office of the General Counsel. The Commission may, upon the affirmative vote of four or more Commissioners, place such documents on the public record on a case by case basis.

[2] Supplements are documents that contain new or additional substantive analysis from the Office of the General Counsel prepared for the Commission in connection with a specific pending Matter Under Review circulated through the Office of the Secretary for the consideration and deliberation of the Commission. Supplements do not include documents that solely transmit replacement pages to correct errors in circulated reports or memoranda.

4. Final Determination recommendation;
5. Certifications of Commission votes;
6. Statements of Reasons;
7. Evidence of payment of fine; and
8. Referral to Department of the Treasury.

Alternative Dispute Resolution

With respect to alternative dispute resolution (ADR) cases, the Commission will place the following categories of documents on the public record:
1. Complaint or internal agency referral;
2. Response to complaint;
3. ADR Office's informational memorandum on assignment to the Commission;
4. Notification to respondent that case has been assigned to ADR;
5. Letter or Commitment Form from respondent participating in the ADR program;
6. ADR Office recommendation as to settlement or dismissal;
7. Certifications of Commission votes;
8. Settlement agreement executed by the respondent and Commission; and
9. Evidence of compliance with terms of settlement.

When disclosing documents in administrative fines and alternative dispute resolution cases, the Commission will release publicly available records that are referenced in, or attached to, documents specifically subject to release under this policy.

Administrative Functions

The Commission will also place on the public record the following non-exclusive list of documents integral to its administrative functions:
1. Statistics related to number of EPS dismissals by fiscal year and current quarter;
2. Statistics related to number of cases opened and closed by fiscal year and current quarter, average number of days to close a matter, and total civil penalties assessed;
3. Case closing processing statistics;
4. Monthly reports from the Department of the Treasury of the balance available in the Presidential Election Campaign Fund;
5. Yearly Long Term Budget Estimates for the Presidential Election Campaign Fund;
6. Memoranda from the Office of the General Counsel prepared for the Commission in connection with debt settlement plans and proposed administrative terminations circulated through the Office of the Secretary for the consideration and deliberation of the Commission in which the Commission ultimately approves the debt settlement plan or administrative termination;
7. Certifications of Commission votes in which the Commission approves a debt settlement plan or administrative termination;
8. Service Contract Inventory Reports submitted by the Commission to the Office of Federal Procurement Policy pursuant to section 743 of Division C of the 2010 Consolidated Appropriations Act;
9. Annual reports of activities performed by the agency that in the judgment of the agency head are not inherently governmental submitted by the Commission to the Office of Management and Budget pursuant to the Federal Activities Inventory Reform Act of 1998;
10. Reports of official travel paid for by non-government sources made to the U.S. Office of Government Ethics pursuant to 31 U.S.C. 1353;
11. Annual reports of the receipt and disposition of gifts and decorations tendered by foreign governments to federal employees, spouses, and dependents submitted by the Commission to the State Department pursuant to Public Law 95–105;
12. Annual reports made by the Commission pursuant to Equal Employment Opportunity Commission Management Directive 715; and
13. Annual reports on the agency's privacy management program submitted by the Commission to the Office of Management and Budget.

With this policy, the Commission intends to provide guidance to outside counsel, the news media, and others seeking to understand the Commission's disposition of enforcement, administrative fines, and alternative dispute resolution cases and administrative functions. This will enhance their ability to assess particular matters in light of past decisions. This policy does not alter any existing regulation or policy requiring or permitting the Commission to redact documents, including those covered by this policy, to comply with the FECA, the principles set forth by the court of appeals in *AFL–CIO,* and the FOIA. In appropriate cases implicating the law enforcement privilege, an entire document may be withheld.

Dated: July 25, 2016.

On behalf of the Commission.

Matthew S. Petersen,

Chairman, Federal Election Commission.

[FR Doc. 2016–18190 Filed 8–1–16; 8:45 am]

BILLING CODE 6715–01–P

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisitions of Shares of a Bank or Bank Holding Company

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire shares of a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than August 17, 2016.

A. Federal Reserve Bank of Kansas City (Dennis Denney, Assistant Vice President) 1 Memorial Drive, Kansas City, Missouri 64198–0001:

1. *Richard Michael Howard and Patricia A. Turner Howard,* both of Gulf Shores, Alabama; as members of the Vision Bancshares, Inc. Shareholders Agreement to acquire shares of Vision Bancshares, Inc., parent of Vision Bank, N.A., both in Ada, Oklahoma.

Board of Governors of the Federal Reserve System, July 28, 2016.

Michele T. Fennell,

Assistant Secretary of the Board.

[FR Doc. 2016–18243 Filed 8–1–16; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The applications will also be