IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.: 17-cv-2694 (ABJ)
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	
	)	

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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At the telephonic hearing on December 18, 2017, the Court instructed Plaintiffs to file their Reply to Defendant Federal Election Commission's ("FEC" or "the Commission") Opposition on or before January 3, 2018, and to address certain issues of concern to the Court. Plaintiffs file this Memorandum in response to that order. We trust that the Reply responds to the Court's questions, and we respectfully submit that, together with the Memorandum submitted in support of the request for a temporary restraining order and preliminary injunction, it amply demonstrates Plaintiffs' entitlement to the relief they seek.[1]

Plaintiffs' request for relief is simple. They ask that the Court enjoin the FEC from releasing Plaintiffs' names contained in pleadings, correspondence, and memoranda created by FEC staff and others during an investigation of political contributions the FEC believed to be improper. Plaintiffs were neither targets of the FEC's investigation nor respondents in the administrative proceedings before the FEC. The FEC never found that Plaintiffs engaged in any illegal conduct, and failed even to find a *reason to believe* that Plaintiffs had done so.[2] Yet, notwithstanding the absence of any findings that Plaintiffs participated in an illegal act, the FEC proposes to release Plaintiffs' names and smear them with untested innuendo in furtherance of the FEC's stated purpose of deterring illegal conduct. Under these circumstances, federal statutes and decisions, the First Amendment, and the FEC's own regulations require that Plaintiffs' identities be protected from public disclosure. Disclosure of the information will do Plaintiffs irreparable harm and serves no public interest.

Thus far the FEC has not demonstrated any deliberation on or consideration of the legal principles upon which Plaintiffs rely. Indeed, the FEC contends that it may disclose the names of

[1] Throughout this Reply, Plaintiffs cite the Original Memorandum, ECF No. 13, as "Pl. Br." and the FEC's Response, ECF No. 16, as "Resp."

[2] There was not a majority of FEC Commissioners who voted to find a reason to believe that Plaintiffs engaged in illegal conduct.

individuals and entities against whom it has made no finding merely because they received some attention in its investigation.

The FEC's decision to release Plaintiffs' names and other identifying information is arbitrary and capricious because it relies on a demonstrably wrong interpretation of FECA, and it ignores controlling principles elsewhere in federal law. Its Response does not provide authority for its position. The FEC does not contest that its release of Plaintiffs' names and other identifying information will cause Plaintiffs to be branded as lawbreakers or associated with lawbreakers. Indeed, the FEC trumpets this as the primary justification for disclosing Plaintiffs' names. However, Plaintiffs are neither, and they are entitled not to be unfairly branded without due process by an agency whose fundamental responsibility is to protect the American political system and the right of all citizens to participate in it without fear.

I. SUPPLEMENTAL BACKGROUND

As we advised the Court during the hearing, Plaintiffs have learned additional facts since the filing of the complaint and motion for temporary restraining order. These facts come in substantial part from the FEC Opposition and the documents which it published. Mindful of the need to avoid repetition, we respectfully direct the Court to those additional important facts.

The FEC proceeding at issue is MUR 6920, a proceeding that involved accusations against and investigation of four respondents. Plaintiffs were not at any point respondents in MUR 6920 and are not party to the conciliation agreement resolving MUR 6920.

Throughout the course of the MUR, the FEC repeatedly advised Plaintiffs' counsel that Plaintiffs were witnesses in the investigation and not subjects or respondents. *See also* Pl. Br. at 1-2 (stating as much in the memorandum in support). Even after serving John Doe 2 (through John Doe 1 as Trustee of John Doe 2) with a subpoena seeking documents and written answers

to questions, the FEC maintained its position that Plaintiffs were "witness[es] only." Ex. B at 1 (Aug. 10, 2017 letter to W. Taylor).

Plaintiffs now know that, by September 15, 2017, without any notice to Plaintiffs or counsel, FEC staff unsuccessfully sought authority from the Commission to proceed against Plaintiffs. On that date, the Commission's Office of General Counsel ("OGC") submitted its Third General Counsel's Report to the Commission, outlining allegations against Plaintiffs, Ex. A at 0028-33, recommending that the Commission find reason to believe that they violated 52 U.S.C. § 30122, *id.* at 0040, and requesting authorization to file an action in the district court to enforce a subpoena against them, *id.* at 0039. Despite repeated interactions with Plaintiffs' counsel over the three months following the FEC's first letter to counsel in August 2017, the FEC never informed Plaintiffs of OGC's allegations and recommendations, and thus Plaintiffs were never offered an opportunity to respond to the allegations. It was not until December 18, 2017, when the FEC submitted its Response to this Court, that Plaintiffs first learned of the FEC's allegations against them. Plaintiffs first saw the Third General Counsel's Report on December 20, when the FEC published materials related to MUR 6920 on its website.

What Plaintiffs also learned for the first time in December was that OGC's effort to obtain necessary authority was turned aside by the Commission at the earliest possible stage. On September 20, 2017, the Commission failed to accept OGC's recommendations as to Plaintiffs. Ex. A at 0042-43. By this vote, the Commission thus failed to find "reason to believe" that Plaintiffs violated FECA, and neither the OGC nor the Commission added Plaintiffs to the MUR as respondents. The Commission then voted 5-0 to take no action "at this time" on the remaining OGC recommendations then pending. *Id*. Plaintiffs were not advised of these votes and remained

unaware that they occurred until after the initiation of this litigation. To Plaintiffs' knowledge, the FEC has taken no other action with respect to Plaintiffs.

After the FEC entered into a conciliation agreement with the four respondents, counsel for Plaintiffs sought to redact Plaintiffs' names from the FEC's public release of information related to the MUR. At no point during any of these conversations did the FEC advise Plaintiffs of the Third General Counsel's Report or the Commission's votes relating to Plaintiffs. On December 14, 2017, the FEC belatedly advised counsel for Plaintiffs that documents naming Plaintiffs would be released without redactions. Plaintiffs then immediately brought this action to prevent their identities from being disclosed in materials they had no reason to believe contained any accusations against them.

Following the commencement of this litigation, but before the Commission released the FEC's materials to the public, a Commissioner published, via Twitter, her redacted Statement of Reasons in connection with this matter. In her tweet, she accused Plaintiffs of being "money launder[ers]," Ex. C, and highlighted her view—which was not adopted by a majority of Commissioners—that Plaintiffs had violated FECA, Ex. A at 0110. The Commissioner's tweet ignored that the Commission failed to find even reason to believe such conduct occurred and instead focused on the unproven accusations against Plaintiffs, which they never had an opportunity to address. On December 21, 2017, two other commissioners issued their own Statement of Reasons in which they advised that they had voted against naming Plaintiffs as respondents in the matter because OGC's legal theory of responsibility was "unclear" and based on a "novel theor[y] of violation" in a case "of first impression" that lacked any "direct evidence" of a violation. Ex. A at 0115-16. These commissioners' statement further indicated that the Commission did not determine whether a violation occurred, but instead did not make

Plaintiffs respondents in the matter at all. The statement also acknowledged the lack of due process provided to Plaintiffs, stating that OGC's actions were "irregular" in seeking a reason to believe finding without recommending that the Commission first add Plaintiffs as respondents. Moreover, the statement advised that the Commissioner who published the tweet had "prejudged [Plaintiffs'] guilt" through her characterizations of Plaintiffs' conduct in the matter. In this regard, they stated that "[o]ur colleague has presupposed facts and intent without investigation or consideration of a response," which raises "serious due process concerns . . . ." *Id*. at 0116.

The FEC has published documents relating to MUR 6920 on its website with redactions agreed to in this litigation, including in relevant part:[3]

- The three-page certification of a vote, in which the FEC failed to find reason to believe that Plaintiffs had violated FECA. Ex. A at 0042-44.
- The Third General Counsel's Report. *Id.* at 0025-40.
- Correspondence and related pleadings submitted by the FEC or Respondents in MUR 6920 that reference Plaintiffs. *Id.* at 0002-07, 0012-24, 0045-108.
- The two statements of reasons issued in MUR 6920. *Id.* at 0109-13, 0114-18.
- Administrative forms signed by either John Doe 1 or 2. *Id*. at 0001, 0008-11.

II. ARGUMENT[4]

Plaintiffs bring this action under the Administrative Procedure Act ("APA"). Under § 706(2) of the APA, this Court is empowered to "hold unlawful and set aside agency action,

[3] The FEC filed a notice with this Court, *see* ECF No. 20, that erroneously failed to list some of these documents, including the General Counsel's Report. The full record related to MUR 6920 is available at https://www.fec.gov/data/legal/matter-under-review/6920/.

[4] As the Court indicated at the telephonic hearing, it intends to consolidate Plaintiffs' motion for a preliminary injunction with the merits. Plaintiffs addressed the preliminary injunction standard in their original memorandum and therefore do not repeat it here. Because the FEC's Response does not contest three of the four elements of obtaining preliminary injunctive relief, this Reply addresses the only contested element: why Plaintiffs are likely to succeed on the merits.

findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity." The FEC's final decision to disclose Plaintiffs' identities in connection with MUR 6920 is arbitrary and capricious and must be set aside for all those reasons.

The FEC's position would thwart the carefully calibrated enforcement scheme created by Congress and trample privacy and free speech rights in this most sensitive area. *First*, neither the FEC's regulations nor FECA authorize the disclosure of materials with respect to Plaintiffs, because there was no "determination" made with respect to Plaintiffs. *Second*, disclosure of Plaintiffs' names is forbidden by FECA, FOIA, and the categorical rule against disclosure of the identities of witnesses, subjects, and others in law enforcement files. *Third*, the FEC cannot justify disclosure of Plaintiffs' identities under the First Amendment, and its proposed enforcement program is unlawful. *Fourth*, the regulation upon which the FEC relies to justify disclosure is inapplicable—but if read to require the blanket disclosure of names of parties who are not respondents and who were not found to have engaged in wrongdoing, also is unlawful.

A. Subsection (a)(4)(B)(ii) and 11 C.F.R. § 111.20(a) Do Not Apply Because the FEC Made No "Determination" and Neither Initiated Nor Terminated Proceedings Against Plaintiffs

To avoid the conclusion that it acted arbitrarily and capriciously, the FEC must identify a source of authority that permits it to disclose each element of its investigative file. *See Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) ("It is axiomatic that an agency must act in accordance with applicable statutes and its regulations."). But the FEC has not identified any authority justifying disclosure of Plaintiffs' identities. Because the FEC never initiated administrative enforcement proceedings against Plaintiffs, none of the provisions in FECA or the FEC's regulations that provide for disclosure upon the conclusion of such

proceedings apply. Accordingly, there is no basis in law for the FEC's refusal to protect Plaintiffs' anonymity.

The general rule regarding information obtained by the FEC during the course of its investigations is one of non-disclosure. For example, disclosure is prohibited absent consent during the pendency of the investigation by 52 U.S.C. § 30109(a)(12)(A), a prohibition enforced with the threat of a fine. *Id.* § 30109(a)(12)(B). FECA itself provides for disclosure in only two instances, both set out in § 30109(a)(4)(B)(ii). That subsection provides that the Commission shall publicize (1) conciliation agreements, and (2) any "determination" that a person has not violated FECA. *Id*. Here, Plaintiffs are party to no conciliation agreement and their identities are not mentioned in the only conciliation agreement to come out of this matter. Nor did the FEC make a "determination" that Plaintiffs did not violate FECA. Indeed, it would be strange for the FEC to argue that at this juncture, in light of the lengths to which it now is going to insinuate that Plaintiffs *might*, by virtue of their association with respondents, have done so.

The pairing of conciliation agreements and determinations of no violation in this disclosure provision is likely no accident. It suggests application only after a determination has been made as to guilt or innocence. In either situation, it is likely that the respondents' names already would have been publicized. That certainly was the case here, where CREW published its complaint against the MUR 6920 respondents on the same day it was filed.[5] It follows, then, that the publication of a respondent's capitulation or exoneration serves to provide resolution for respondents whose conduct already has been publicly scrutinized. The FEC here attempts to

[5] *See CREW Requests FEC and DOJ Investigate American Conservative Union's Illegal Conduit Contribution* (Feb. 27, 2015), https://www.citizensforethics.org/legal-filing/crew-fec-doj-investigate-american-conservative-union-cpac-illegal/.

convert this provision designed to "clear" a name already sullied into a vehicle for casting suspicion on a person who has not been accused of any violation.

No determination was made by the FEC with respect to Plaintiffs. The certification of the relevant vote in this case states that the Commission failed to find "reason to believe" because an insufficient number of commissioners voted for such a finding. All "decisions" of the Commission must be made by a majority of the Commission (*i.e.*, at least four votes), which did not occur here. 52 U.S.C. § 30106(c); *see Common Cause v. FEC*, 842 F.2d 436, 449 n.32 (D.C. Cir. 1988) ("The statute clearly requires that for any *official* Commission decision there must be at least a 4-2 majority vote."). Accordingly, in the absence of the votes of at least four Commissioners, there was no "determination" that Plaintiffs had not violated FECA.

FEC regulations also provide no support for the disclosure of Plaintiffs' names. Specifically, 11 C.F.R. § 111.20(a) only provides for disclosure of findings of no reason to believe, no probable cause, or where the FEC "otherwise terminates its proceedings," along with "the basis therefor." But the FEC did not make a finding of no reason to believe with respect to Plaintiffs; rather, its only action with respect to Plaintiffs was a failure to adopt OGC's recommendation to find reason to believe. Ex. A. at 0042-43. Nor did the FEC commence—let alone "terminate"—any proceedings against Plaintiffs. Plaintiffs are not parties to the conciliation agreement in MUR 6920 (in fact they are not even mentioned in that agreement). Counsel for Plaintiffs were never told that Plaintiffs were respondents or targets of the investigation; in fact, they were told just the opposite. At bottom, Plaintiffs' only involvement in MUR 6920 was as potential sources of information—that is, as third party witnesses.[6]

[6] Section 111.20(a) does not in itself require disclosure of names and the FEC offers no reason why Plaintiffs' names are an essential part of its basis for failing to find reason to believe they violated the FECA.

The FEC's argument that there were "proceedings" against Plaintiffs because they were "subjects of a split Commission vote regarding whether there was reason to believe they had committed a violation," Resp. at 6, is meritless. The Commission's September 20, 2017 vote is a vote on *whether to initiate* proceedings against Plaintiffs—a vote that failed—not one to terminate proceedings already in progress, and later votes could not terminate proceedings that had never begun. The FEC tacitly acknowledged this with its own behavior when it did not follow its own basic rules about how to initiate, conduct, or terminate "proceedings."

First, the FEC never notified Plaintiffs that it had initiated proceedings against them and did not provide them an opportunity to respond to the allegations in the complaint, belying its post hoc contention that proceedings had actually been initiated. As required by FECA and by its own rules, the Commission cannot make a "reason to believe" finding without providing notice to the subject that they have a right to respond to the complaint. *See* 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.6(a)-(b); *see also* Ex. A at 116 n.2 (statement by two FEC commissioners explaining that the FEC's practice is to vote to add a person or organization as a respondent, afford them a right to respond, and vote to find reason to believe). As such, the Commission here did not even have the power to make a reason to believe finding. As one Commissioner observed in another matter, it is "patently unfair" for the Commission to make reason to believe findings against parties "who have not been given the opportunity to answer the charges, particularly where the file is simultaneously closed so that there is never an opportunity to respond." Statement of Commissioner Weintraub, *In the Matter of Democratic Party of Hawaii*, MUR 5659 (July 14, 2005), *available at* https://www.fec.gov/files/legal/murs/current/61204.pdf.[7]

[7] The identities of the respondents were disclosed in MUR 5659 because the Commission found reason to believe they violated FECA.

Second, the FEC did not provide Plaintiffs the necessary post-vote notifications that a vote triggering § 111.20(a) would have generated. Pursuant to 11 C.F.R. § 111.9(b), when the Commission "finds no reason to believe, or otherwise terminates its proceedings, the General Counsel shall so advise both complainant and respondent by letter." The "otherwise terminates" language in § 111.9(b) is identical to the language in § 111.20(a). Here, OGC never advised Plaintiffs that any proceeding against them had been terminated. It is inconsistent for the FEC to argue now that the actions it took would trigger disclosure under § 111.20(a) but not trigger notification under § 111.9(b).

Accordingly, in light of the circumstances where Plaintiffs were never respondents, and the FEC did not treat Plaintiffs as a party against whom proceedings were initiated or terminated, the only permissible conclusion is that there were no "proceedings" ever commenced for purposes of § 111.20(a). In the absence of any determination concerning Plaintiffs, or even any proceedings against Plaintiffs, the FEC's reliance on Subsection (a)(4)(B) is foreclosed.[8]

B. Subsection (a)(4)(B)(ii) Requires Disclosure of Decision-Making—Not Names—and Disclosure of Names Must Be Balanced Against Plaintiffs' Privacy Interests as Outlined in Plaintiffs' Memorandum in Support

Even if the FEC did, in fact, "make[] a determination that [Plaintiffs] ha[ve] not violated" FECA, Subsection (a)(4)(B)(ii) does not create an exception to the FEC's unflagging duty to comply with FOIA, and there is nothing in that provision that requires the FEC to release

[8] The FEC contends that Plaintiffs' position would frustrate lawsuits against the Commission pursuant to 52 U.S.C. § 30109(a)(8). Plaintiffs do not contend, however, that the Commission may not disclose the names of actual respondents who were named in complaints that the Commission ultimately dismissed. Section 30109(a)(8), which provides a cause of action against the FEC for complainants to assert that the dismissal of their complaint was contrary to law, is inapposite in this case. There was no "dismissal" of any complaint that actually named Plaintiffs as respondents. Redacting Plaintiffs' names thus cannot frustrate the operation of § 30109(a)(8).

Plaintiffs' ***names***.[9] To the contrary, FOIA prohibits the FEC from disclosing Plaintiffs' identities, even if the agency has an affirmative obligation to release the basis for its decision-making. Pl. Br. at 6-8. The agency cannot use this affirmative obligation as an end run around privacy-related mandates enshrined in law.

Balancing the disclosure of agency decision-making while respecting the privacy rights in FOIA is a part of the disclosure regime the FEC enacted after Judge Tatel's decision in *AFL-CIO v. FEC*, 333 F.3d 174 (D.C. Cir. 2003). The FEC's post-*AFL-CIO* Guidance states that publication of what the FEC calls a "'final determination' . . . is required under 52 U.S.C. 30109(a)(4)(B)(ii) ***and section (a)(2)(A) of the FOIA***." *Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50,702, 50,702 (Aug. 2, 2016) (emphasis added) (hereinafter, the "Guidance").

In turn, the FOIA provision the Guidance relies upon, 5 U.S.C. § 552(a)(2)(A), requires an agency to balance its affirmative obligations against the need to protect privacy, allowing an agency to delete "identifying details" if necessary to "prevent a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(a)(2) (accompanying note). This provision is read in concert with 5 U.S.C. § 552(b), which allows the disclosure of "[a]ny reasonably segregable portion of a

[9] Plaintiffs recognize that the Supreme Court held in *FCC v. AT&T*, 562 U.S. 397 (2011), that Exemption 7(C) does not protect corporate privacy interests. Neither the Supreme Court nor this district, however, has extended that holding to trusts like John Doe 2. Trusts are different from corporations, and the trust form can implicate the privacy interests of its settlor, trustee, and beneficiaries. *See, e.g.*, Restatement (Third) of the Law of Trusts, § 5 cmt. G (noting similarities and differences between trustees and corporate officers or directors). For example, disclosing a trust's identity could lead to the identification of the individuals associated with it. Indeed, the government in *AT&T* conceded that even corporate records can implicate individual privacy interests and thus warrant protection from disclosure under Exemption 7(C). Pet'r Br. at 36 n.11, *FCC v. AT&T*, No. 09-1279, 2010 WL 4496009 (U.S. Nov. 9, 2010). Moreover, the FEC here failed to argue in its Response that Exemption 7(C) does not apply to trusts, instead taking the much broader position that Exemption 7(C) does not apply to disclosures under § (a)(4)(B)(ii) at all. Accordingly, the FEC has forfeited any argument that the Exemption does not apply to John Doe 2 on the ground that it is a trust.

record . . . to any person requesting such record after deletion of the portions which are exempt," *id*. § 552(b) (accompanying note).

Together, "[t]hese provisions, for deletion of identifying references and disclosure of segregable portions of records with exempt information deleted, reflect a congressional understanding that disclosure of records containing personal details about private citizens can infringe significant privacy interests." *Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 766 (1989). The operation of these FOIA provisions together "bolster[s] the conclusion that disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind," when they enacted § 552(a)(2). *Id*. at 765.

In applying these principles, it is common ground that "[t]he public has a need to know, for example, the details of an agency opinion or statement of policy on an income tax matter, but there is no need to identify the individuals involved in a tax matter if the identification has no bearing or effect on the general public." *Id*. at 766 n.18 (quoting FOIA's legislative history). There is no reason this principle does not extend from tax determinations to FEC determinations.

And the same reasoning broadly applies with particular force to the public's understanding of law enforcement: "just as the identity of the individuals . . . involved in tax matters is irrelevant to the public's understanding of the Government's operation, so too is the identity of individuals who are the subjects of rap sheets irrelevant to the public's understanding of the system of law enforcement." *Id*. The identity of these persons "tell[s] us nothing about matters of substantive law enforcement policy that are properly the subject of public concern." *Id*. This same reasoning should apply *a fortiori* here as the FEC failed to find sufficient reason to investigate Plaintiffs at the earliest possible stage of an FEC proceeding.

In fact, as this Court held only two months ago, the same FOIA exemption invoked by Plaintiffs justifies the withholding of names and identifying information of "third parties of investigative interest" who "ha[ve] a 'strong interest in not being associated unwarrantedly with alleged criminal activity'" that can only be overcome by the public's interest in knowing "what their government is up to." *Sandoval v. Dep't of Justice*, Civ. Action No. 16-1013, 2017 WL 5075821, at *11, *12 (D.D.C. Nov. 2, 2017) (Jackson, J.) (citations to D.C. Circuit authority omitted). Like the individuals in *Sandoval*, Plaintiffs are third parties to an enforcement proceeding with a strong interest in not being publicly associated with actions that were found to have violated the law. Indeed, Exemption 7(C) is widely applied under circumstances similar to this case, where an agency might release documents that reveal its decision-making related to an investigation, while still guarding the identifying information of those investigated.[10]

[10] *See, e.g.*, *Judicial Watch, Inc. v. Nat'l Archives and Records Admin.*, 876 F.3d 346, 350 (D.C. Cir. 2017) (affirming the withholding of a draft indictment under 7(C) and reasoning that "[h]aving never been formally accused of criminal conduct . . . [the target of an investigation], no less than an individual who has been charged but not convicted, is entitled to move on with her life without having the public reminded of her alleged but never proven transgressions" (internal quotation marks omitted)); *Comput. Prof'ls for Soc. Responsibility v. U.S. Secret Serv.*, 72 F.3d 897, 904 (D.C. Cir. 1996) (holding that suspects had a 7(C) privacy interest in not having their names exposed and that this interest does not dissipate if cleared of wrongdoing given that "their public identification with a meeting that had reportedly attracted the attention of law enforcement officials would subject them to a degree of interest that would impinge upon their privacy"); *Cooper Cameron Corp. v. OSHA*, 280 F.3d 539 (5th Cir. 2002) (holding that information identifying each witness in an OSHA investigation of an explosion and fire at a petrochemical plant was exempt from disclosure under 7(C)); *Neely v. FBI*, 208 F.3d 461, 463-64 (4th Cir. 2000) (similar); *Sakamoto v. EPA*, 443 F. Supp. 2d 1182 (N.D. Cal. 2006) (denying disclosure of identities of manager accused of discrimination and witnesses); *Envtl. Prot. Servs. v. EPA*, 364 F. Supp. 2d 575 (N.D. W.Va. 2005) (denying disclosure of EPA records, including names of individuals); *Ayuda Inc. v. FTC*, 70 F. Supp. 3d 247 (D.D.C. 2014) (denying release of identifying information from FTC online repository of consumer complaints); *Atkinson v. FDIC*, No. Civ. A. 79-1113, 1980 WL 355660 (D.D.C. Feb. 13, 1980) (denying under 7(C) the release of examination reports from investigation where no formal charges made); *see also Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667 (D.C. Cir. 2016) (recognizing privacy interest of immigration judges subject to complaints under FOIA), *on*

In a similar vein, the FEC has failed to refute the FOIA arguments presented in the original memorandum by connecting Plaintiffs' names to the basis for any decision in MUR 6920. This Court acknowledged that the names themselves are *not* necessary in service of the public's interest in understanding the FEC's decision-making when it determined during the December 18 telephonic hearing that the redacted record was sufficient for any interested parties to determine whether they wanted to file suit objecting to the FEC's decision pursuant to 52 U.S.C. § 30109(a)(8)(A).

Here, the FEC must comply with both Exemption 7(C) and the language of § 552(a)(2) by redacting Plaintiffs' identifying information. The D.C. Circuit's opinion in *SafeCard* categorically precludes disclosing the identities of targets or witnesses in law enforcement proceedings such as these, *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991), and two opinions from this Court recognize that this categorical prohibition allows a party that would be aggrieved by the release of their identifying information to enjoin its disclosure, *see AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001); *Tripp v. Dep't of Defense*, 193 F. Supp. 2d 229, 239 (D.D.C. 2002); *see also* Pl. Br. at 6-8 (outlining this argument). Indeed, in *AFL-CIO*, the district court applied Exemption 7(C) to prohibit disclosure of names of individuals in an FEC investigative file. 177 F. Supp. 2d at 61-63. This case is materially indistinguishable from *AFL-CIO*.

The Commission's only other retort is to suggest that its FOIA-compliant regulatory disclosure regime was "struck down" by the D.C. Circuit's decision in *AFL-CIO*. *See* Resp. at 7. The FEC misreads *AFL-CIO*: Judge Tatel's opinion recognized the mandatory nature of the FEC's FOIA compliance but found that complying with FOIA was insufficient to save the FEC's

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remand, No. 13-CV-00840 (CRC), 2017 WL 5564548, at *4 (D.D.C. Nov. 17, 2017) (allowing redaction of reprimanded judges' names under FOIA Exemption 6).

disclosure policy from separate First Amendment problems. *AFL-CIO*, 333 F.3d at 178 (recognizing the disclosure regime allowed the release of materials "not expressly exempted by FOIA" and holding that the Commission's redaction of information under one or more FOIA exemptions was insufficient). And the plain language of the Guidance similarly incorporates the FOIA compliance regime that predated *AFL-CIO* into the policy the FEC adopted after that decision. *See* Guidance, 81 Fed. Reg. at 50,704 (stating the new Guidance "does not alter" any existing regulation or policy requiring compliance with FOIA). Finally, the Guidance itself recognizes that the FEC, in undefined "appropriate cases implicating the law enforcement privilege" under FOIA Exemption 7(C), might withhold the entirety of a document. *Id.*

In sum, the FEC cannot use the requirement to release certain records under Subsection (a)(4)(B)(ii) as an excuse to ignore its obligations under FOIA, the Guidance, and its own regulations to protect Plaintiffs' privacy interests. For the reasons explained above and in Plaintiffs' Motion, Plaintiffs' privacy interests preclude the release of their names.

C. The FEC Cannot Justify Disclosure under the First Amendment

The FEC's articulated justification for releasing Plaintiffs' names disregards the agency's obligation to safeguard First Amendment rights in the political arena and exceeds the agency's enforcement powers under the carefully delineated regime that Congress enacted.

1. First Amendment Precedent Urges Generally Against Disclosure

"Disclosure 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). Judge Tatel's opinion for the D.C. Circuit in *AFL-CIO* reinforces this proposition, stating that "disclosure of campaign contributions would chill political activity and therefore place 'not insignificant burdens' on First Amendment rights." 333 F.3d at 176. Over the course of time, Congress and the courts have struggled to strike the appropriate balance between the exercise of speech and

disclosure of enforcement proceedings, a process that has resulted in the present campaign finance regime. Whatever the wisdom of the present balance, the FEC does not have the authority to upset it by disclosing information bearing on political activity outside of the channels that Congress and the courts have carved for that disclosure.

The Supreme Court's seminal opinion in *Buckley v. Valeo* observed that "[t]he First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" 424 U.S. 1, 14 (1976) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). The Court held that "compelled disclosure [of the names of contributors], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." *Id.* at 64. Accordingly, infringement is justified only by compelling government interests, *id.* at 66-68, and disclosure of political activity and affiliations cannot be undertaken as a matter of course.

In *McConnell v. FEC*, the high-water mark for campaign finance reform efforts, the Supreme Court echoed the observation in *Buckley* "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).[11] The Court in *Citizens United* and in subsequent cases has adhered to the *Buckley* reasoning: "Disclaimer and disclosure requirements may burden the

[11] Since *McConnell*, the Supreme Court has continued to emphasize the importance of speech and associational rights. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" *Citizens United v. FEC*, 558 U.S. 310, 339 (2010) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)) (quotation marks omitted). Notably, *Citizens United* expanded speech protections to encompass all potential speakers: "Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some but not others." *Id.* at 340-41. Thus, "political speech does not lose First Amendment protection 'simply because its source is a corporation.'" *Id.* at 342 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978)).

ability to speak," and the government must provide a compelling basis to justify disclosure. 558 U.S. 310, 366-67 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014).

2. The FEC Has the Unique Mandate to Protect First Amendment Rights when it Acts, Including by Protecting Parties from Unwarranted Compelled Disclosure

The FEC is "[u]nique among federal administrative agencies" because its sole purpose is the regulation of core constitutionally protected activity. *AFL-CIO*, 333 F.3d at 170 (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)) (quotation marks omitted). "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. Accordingly, the FEC has an obligation when carrying out its statutory functions to tailor "disclosure requirements to satisfy constitutional interests in privacy." *Id.*; *see AFL-CIO*, 333 F.3d at 178 (faulting FEC for failing to "tailor its [disclosure] policy to avoid unnecessarily burdening . . . First Amendment rights . . ."). The disclosure regime proposed by the FEC here lacks the requisite tailoring entirely, positing instead an arrangement whereby mere tangential connections to an investigation results in a complete yielding of one's privacy interests.

The First Amendment interests inherent in an FEC investigation into political activity are themselves sufficient to trigger scrutiny under *AFL-CIO*. When determining whether to release investigative material, the FEC must provide a "separate First Amendment justification for publicly disclosing" information "relating to speech or political activity for law enforcement purposes." *AFL-CIO*, 333 F.3d at 179. Even a "marginal interest in preventing the chilling of political participation," which is inherent in all compelled disclosures, is sufficient to require the FEC to provide a compelling justification when it discloses the identity of a person of investigative interest. *Id.* at 178. That is precisely the situation here, where the FEC seeks to

disclose Plaintiffs' identities to show that they had "some involvement" in violations of FECA committed by others. Resp. at 8.

Accordingly, the FEC must demonstrate that its justification for disclosing Plaintiffs' names "serves a compelling state interest." *Id.* at 176; *see FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986) (holding that "*compelling* state interest necessary to justify any infringement on First Amendment freedom") (emphasis added). This, the FEC has not done. The D.C. Circuit identified two such interests: "deter[ring] FECA violations, and . . . promot[ing] the agency's own public accountability." *AFL-CIO*, 333 F.3d at 178. The same interests appear in the FEC's current disclosure policy. *See* Guidance, 81 Fed. Reg. at 50,703.

The disclosure of Plaintiffs' names here would not further either of these interests. As noted above, this Court already has acknowledged that disclosure of names is unnecessary for the public to understand the basis of the FEC's decision making.[12] Furthermore, any purported "deterrence" interest would be unlawful, as explained below.

3. **The FEC's Asserted Deterrence Interest is Unlawful**

Plaintiffs were never respondents to MUR 6920, and the FEC never found reason to believe that they violated the FECA, raising the question of how Plaintiffs' conduct is relevant to deterrence at all. *Cf. AFL-CIO*, 333 F.3d at 178 (expressing skepticism that information related

[12] The FEC tries to distinguish *AFL-CIO* on the basis that the materials here are its own reports and not material obtained in the course of an investigation. *See* Resp. at 8. The FEC attempted a similar argument in *AFL-CIO*, contending that it was merely disclosing its own records, which the court rejected. *AFL-CIO*, 333 F.3d at 178-79. It bears repeating that the only thing that Plaintiffs are asking that the FEC withhold is their names. One of the items at issue in *AFL-CIO* was "personal information concerning hundreds of employees, volunteers and members of the Plaintiff organizations." *AFL-CIO v. FEC*, 177 F. Supp. 2d at 51. The FEC obtained those names in the course of its investigation. Similarly, the FEC obtained Plaintiffs' names in the course of the investigation in MUR 6920. Compelled disclosure does not lose its First Amendment protection if an FEC staffer places a name that was discovered in an investigation in a report or if a Commissioner does the same. Otherwise, there would be no protection at all. It is the information, not the type of document, that the First Amendment protects.

to those cleared of wrongdoing has any deterrence value). Nevertheless, the Commission asserts that it is entitled to release Plaintiffs' names because they "feature prominently in the agencies' examination of the underlying facts." Resp. at 5. The FEC never explains why disclosure of Plaintiffs' identities, as opposed to their factual circumstances, is necessary to understand its reasons for finding that the actual respondents in MUR 6920 violated FECA. Instead, the FEC asserts that disclosure of Plaintiffs' names is required for deterrence purposes. The FEC contends that "publicity of plaintiffs' names [redacted]" by the FEC for their connections to other people who *have* violated FECA. *Id.* at 6. In other words, the Commission asserts that it is important to instill fear in others that they, too, may be unofficially labeled violators of FECA without the benefit of the due process, even if they were never respondents before the FEC, even if there has been no finding of a reason to believe they violated FECA (let alone a violation) against them, and even where they had no opportunity to respond to any allegations against them, if they even associate with alleged violators of the FECA.

This practice transforms the carefully delineated disclosure requirements of FECA into a weapon to shame and expose individuals against whom the FEC has made no finding of wrongdoing. This is contrary to FECA, which lays out the requirements that must be met prior to such a finding, and which Congress designed to ensure such findings are "the product of a mature and considered judgment." H.R. Rep. No. 94-917, at 3 (1976). Indeed, here, two Commissioners have now observed that the FEC's proposed course of action "raises serious due process concerns." Ex. A at 0116. This same concern is echoed in the relevant precedent in this district. *See, e.g., Fund for Const. Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 865

(D.C. Cir. 1981) ("The disclosure of [the fact that individuals were investigated] would produce the unwarranted result of placing the named individuals in the position of having to defend their conduct in the public forum outside of the procedural protections normally afforded the accused in [investigative] proceedings."). The FEC's contention that it can release Plaintiffs' names based solely on the mere suspicion of certain members, without Plaintiffs ever having had a chance to address the allegations against them, and without any finding by the Commission itself of even reason to believe that the person has engaged in misconduct, grants individuals within the agency the unfettered discretion to disregard Congress's mandated process and trample key privacy interests to achieve their personal goals.

The peril of the FEC's position is on full display in this case. After Plaintiffs were forced to bring this action by the FEC's intransigence, delay, and lack of transparency, a Commissioner published a statement of reasons expressing her frustration that the FEC was unable to carry out her preferred enforcement program in MUR 6920. She acknowledged that the fact the FEC delayed in prosecuting MUR 6920 hampered its ability to investigate to her satisfaction. That Commissioner thus took it upon herself to explain "what happened," insinuating that Plaintiffs were just as guilty of violating FECA as the four respondents. The dangers of such an approach did not escape the notice of two other Commissioners who, in a separate Statement of Reasons, suggested that the other Commissioner had "prejudged [Plaintiffs'] guilt" and adopted an approach that raises "serious due process concerns" given that the FEC never informed Plaintiffs that it had even considered levelling charges against them, let alone offered them an opportunity to respond. Ex. A at 0116.

The human consequences of the FEC's misbegotten campaign are particularly acute for Plaintiff John Doe 1, especially in light of the Commissioner's tweet, which has been retweeted

over seven hundred times. *See* Ex. C. The full record now reveals that the FEC accused John Doe 1 of a violation in his official capacity as a trustee only. Even assuming FECA permits the FEC to insinuate guilt-by-association, the FEC provides no explanation for why John Doe 1 should have his reputation smeared because he was the agent of John Doe 2 during a period when John Doe 2 was subject to regulatory scrutiny. Tellingly, as the Court also observed, the FEC hardly references John Doe 1 in its Response.

Regardless of what a single Commissioner believes should have happened, what did happen is that the FEC did not name Plaintiffs as respondents and failed to make any finding of wrongdoing against them—indeed, failed even to find reason to believe they had engaged in wrongdoing. The purpose of FECA's enforcement process, which painstakingly prescribes the steps that the Commission must take to find a party liable (a process that, ultimately, requires the imprimatur of a United States District Court if the party is unwilling to reach a settlement with the Commission), is wholly defeated if a single Commissioner, acting on his or her own view of the law and the facts, is permitted to disclose the identity of any witness or person of interest that they suspect was involved in a violation of FECA. It cannot be the case that, having failed to complete or even engage in the enforcement processes delineated under FECA, the FEC staff, or a single Commissioner, may brand any individual or entity they please as a violator of FECA. Such an arbitrary and abusive exercise of power cannot be sanctioned in light of the well-recognized First Amendment principles that undergird FECA.

Moreover, the FEC's claim that it may name non-respondents suspected by OGC or one Commissioner of having committed an offense is out of step with the practice of other federal agencies. Those agencies, which investigate predominantly economic areas, do not disclose the

sensitive information that the FEC seeks to disclose here.[13] In contrast to these agencies, which essentially "oversee fair dealings in commerce," the conduct that the "FEC oversees . . . relates to the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *Machinists Non-Partisan Political League*, 655 F.2d at 387. In view of how its work regulates activity protected by the First Amendment, the FEC should be held to a higher standard than these other agencies, and not be permitted to evade Congress's careful protections to assign blame where its enforcement staff or a minority of Commissioners sees fit.

D. To the Extent the FEC's Disclosure Regulations Compel Disclosure of Non-Respondent Plaintiffs' Identities, They Are Invalid

If the Court determines that disclosure of Plaintiffs' identities is required by 11 C.F.R. § 111.20(a), Plaintiffs contend that this regulation is unlawful because it exceeds the scope of the FEC's authority and the FEC's practice of requiring blanket disclosure of documents by type is unconstitutional. The FEC lacks the authority under FECA to enact rules compelling the disclosure of the identities of non-respondent witnesses. Plaintiffs make these arguments in the alternative to those above, such that the Court need not reach the question of the legality of § 111.20(a) if it already has determined that disclosure of Plaintiffs' identities is not warranted.

[13] *See, e.g.*, 17 C.F.R § 200.80(b); 17 C.F.R. § 203.2; 17 C.F.R. § 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 information pertains"); 12 C.F.R. § 308.147 (providing that information obtained in Federal Deposit Insurance Corporation investigations should not be disclosed without good cause); 18 C.F.R. § 1b.9, Enforcement of Statutes, Regulations and Orders, 123 FERC ¶ 61,156 ¶ 23-32 (2008), Enforcement of Statutes, Regulations, and Orders, 134 FERC ¶ 61,054 (2011) (providing for confidentiality of investigations by the Federal Energy Regulatory Commission); 15 U.S.C. § 57b-2(b), 2(f) (providing for confidentiality of investigations by the Federal Trade Commission).

1. Section 111.20(a) Exceeds the Commission's Authority

As noted, Subsection (a)(4)(B)(ii) requires disclosure in only two instances, one of which is when "the Commission makes a determination that a person has not violated" FECA. In that event, FECA provides that the Commission disclose only the "determination." *Id.* By contrast, 11 C.F.R. § 111.20(a) calls for disclosure of not only the determination, but "the basis therefor," and expands the triggering events to include any event that "otherwise terminates" Commission proceedings.

Although the Act authorizes the FEC to develop rules and regulations "as are necessary to carry out the provisions of" FECA, 52 U.S.C. § 30107(a)(8), the FEC cannot depart from its clear statutory mandate. Subsection (a)(4)(B)(ii) is unambiguous: the Commission must disclose only conciliation agreements and the determination that a person has not violated FECA, nothing more. Thus, § 111.20(a) is not an interpretation of Subsection (a)(4)(B)(ii), but rather represents the Commission's own decision to expand the scope of disclosure beyond that required.

"Agencies 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.* Recently, the Tenth Circuit invalidated a Department of Labor regulation purporting to regulate tip pooling, even though the statute already contained a provision regarding when employers were required to share tips among employees. *See Marlow v. New Food Guy, Inc.*, 861 F.3d 1157, 1164 (10th Cir. 2017). The Tenth Circuit acknowledged that the authorizing statute granted the Department of Labor broad rulemaking authority, but held that it did not permit the Department to regulate in an area simply because the statute was "silent" on that particular issue. *Id.* at 1162-63. Thus, where the statute did not direct "the DOL to regulate the ownership of tips

when the employer is not taking the tip credit," the government could not rely "on the *absence* of any statutory directive to the contrary." *Id.* at 1164. In other words, just because Congress is silent on an issue does not mean that there is a "gap" or "ambiguity" in the statute for the agency to fill. *See Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

Section 111.20(a) cannot stand for the same reasons that the Department of Labor rule was invalidated in *Marlow*. There is already a provision of FECA that informs the FEC what information to disclose upon the conclusion of its administrative enforcement proceedings. Simply because FECA is silent as to what other disclosure might be made does not confer on the FEC plenary authority to determine what disclosure is required, particularly when that disclosure contravenes other law. Accordingly, § 111.20(a) exceeds the scope of the FEC's authority and there is thus no authority that compels the disclosure of Plaintiffs' identities here.

2. Interpreting the Regulations to Provide for Blanket Disclosure is Unconstitutional

The D.C. Circuit in *AFL-CIO* invalidated the FEC's old disclosure policy under Subsection (a)(12)(A) because its "blanket nature," calling for disclosure of "*all* information," resulted in the release of information without attention to First Amendment principles. *Id.* (emphasis in original). To the extent that the FEC asserts that it may release all information contained in various categories of documents that it slates for release under Subsection (a)(4)(B)(ii), this interpretation is similarly unconstitutional because it does not tailor the disclosure decisions to the First Amendment. It does no good for the FEC to provide lip service to these concerns in its regulations or guidance if in practice the disclosures are made without regard to them. Yet that is the case here, where the FEC's disclosure policy calls for redactions consistent with "the principles set forth by the court of appeals in *AFL-CIO*," Guidance, 81 Fed. Reg. at 50,704, but its proposed implementation amounts to a blanket disclosure of the MUR

6920 file with no consideration for Plaintiffs' First Amendment rights. As such, this Court should compel the FEC to amend its practice and avoid any constitutional issues that may rise from the disclosure policy.

III. CONCLUSION

Plaintiffs will be harmed if their names are published in the context of MUR 6920, an inescapable truth that becomes ever more evident with every re-tweet or bit of news coverage disparaging those involved. Denying Plaintiffs' requested relief will permit the FEC to sully Plaintiffs' reputations publicly, not because the Commission determined Plaintiffs did anything wrong, but in *spite* of the fact that it has not. For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion for preliminary injunction.[14]

Dated: January 3, 2018

Respectfully submitted,

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[14] If the Court denies Plaintiffs the relief they seek, they ask the Court, pursuant to Federal Rule of Civil Procedure 62(c), to grant a stay of the denial pending an appeal to the D.C. Circuit. Even if the Court disagrees with Plaintiffs on the merits of their claim, Plaintiffs "have demonstrated 'a substantial case on the merits' and irreparable harm in the absence of a stay." *Ctr. for Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003). The irreparable harm to Plaintiffs' is undisputed. This case also presents a "substantial case on the merits"—namely, a question of first impression in this Court related to the FEC's application of a disclosure regime that was previously struck down by the D.C. Circuit, and a novel legal question related to the intersection of the FEC's obligations under FOIA and FECA. *See id.* (holding that these types of questions satisfied the substantial case on the merits standard).

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of January, 2018, I filed the foregoing papers using the Court's CM/ECF system, which served the following:

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