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.	)	
_____	)	

[PROPOSED] PLAINTIFFS' MEMORANDUM IN RESPONSE TO NEW ISSUES RAISED IN DEFENDANT'S SURREPLY AND IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

In its surreply, the Federal Election Commission ("FEC") makes a number of new arguments that it could have raised, but did not, in its initial response to Plaintiffs' motion. Accordingly, Plaintiffs submit this response to address those new arguments.[1]

The FEC's surreply amounts to an assertion that it has near-unfettered discretion to decide when to brand a person a "money launder[er]" and a lawbreaker, even where no finding by the agency has been made as to guilt and where the subject has neither been notified nor given an opportunity to respond. Ex. C.[2] The FEC's anodyne presentation of its authority ignores the reality of this case: In the absence of relief from this Court, Plaintiffs will be publicly slandered by an agency wielding the imprimatur of the United States government. If the FEC desires to name and shame Plaintiffs, it must follow the law before it can do so. Disclosure is not authorized under the Federal Election Campaign Act ("FECA") or the FEC's regulations, is prohibited under the Freedom of Information Act ("FOIA"), and is impermissible under the First Amendment.

I. ARGUMENT

A. There is No Basis under FECA or the FEC's Regulations to Release Plaintiffs' Identities

It is clear from the FEC's surreply that it is unable to define or explain the nature of any "proceedings" regarding Plaintiffs. Indeed, two Commissioners described the process here as "irregular." Ex. A at 114. It is no surprise that the FEC fails to grapple with the conclusions of its own Commissioners; a close examination of the administrative process here reveals no basis for disclosing Plaintiffs' identities: No proceedings were commenced or terminated as to them.

In the face of this irregularity, the FEC attempts to cloak itself in the familiar mantle of

[1] Given the nature of this response, Plaintiffs do not address every point raised in the FEC's surreply. Plaintiffs seek to address only those new or "newly developed" (in the FEC's parlance) arguments that Plaintiffs should have had the opportunity to reply to in their initial reply. Plaintiffs do not waive any points raised in their reply.

[2] Plaintiffs refer to the exhibits attached to their Reply throughout.

agency deference, ignoring the plain and unambiguous language of the statute and its own regulations. *See In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001). Moreover, at no point in its surreply does the FEC acknowledge its role in protecting the First Amendment rights of those it investigates, which the D.C. Circuit has squarely held extends to protecting the identities of those swept up in FEC investigations. *See AFL-CIO v. FEC*, 333 F.3d 168, 175-76 (D.C. Cir. 2003).

The FEC's new interpretations amount to a post hoc attempt to rationalize the result that it desires. For the first time, the FEC argues that the vote regarding Plaintiffs was an "internally generated" matter. However, the FEC also argues that disclosure is appropriate in connection with MUR 6920. For the reasons stated below, the FEC's arguments are unavailing.

1. There Were No Proceedings Against Plaintiffs

The FEC argues, for the first time, that the vote regarding Plaintiffs arose as an "internally-generated matter." Surreply at 13. This assertion demonstrates the post-hoc nature of the FEC's reasoning. First, this contention is inconsistent with the FEC's prior representations. The FEC asserted in its original response that the "proceedings" against Plaintiffs flowed directly from the administrative complaint and were concluded with the same vote that concluded MUR 6920. Resp. at 1-2. This assertion is also contradicted by the administrative record, which makes no reference to an internally-generated matter, and where the Third General Counsel's Report making recommendations against Plaintiffs was issued as part of MUR 6920 and noted that the matter began with a complaint. Ex. A at 0026. The FEC's internal policy documents define what an internally-generated matter is and how one is opened, and it thus appears, based on the FEC's new position, that none of those policies were followed here.[3]

[3] *See* Office of the General Counsel, OGC Enforcement Manual at 10 (June 2013); Federal Election Commission, Guidebook for Complainants and Respondents on the FEC Enforcement Process at 10, 13 (May 2012); FEC Directive No. 6; Agency Procedure for Notice to Respondents in Non-

The post-hoc nature of the FEC's argument is also revealed by its failure to address the notice provisions that it implicitly recognizes were violated in this case. The FEC does not contest that it failed to give notice to Plaintiffs of the reason to believe vote and the opportunity to respond, as required either by its policies or 52 U.S.C. § 30109(a)(1), and that it failed to give Plaintiffs notice of *any* vote that "otherwise terminate[d] its proceedings," as required by 11 C.F.R. § 111.9(b). The FEC attempts to deflect Plaintiffs' arguments by asserting that the lawfulness of the reason to believe vote is not before the Court. Surreply at 10 n.3. The FEC misses the point. That the FEC did not provide notice to Plaintiffs upon termination of any "proceedings" suggests that no such proceedings took place. It is telling that the FEC would rather admit that it violated FECA and its regulations than give up on branding Plaintiffs as lawbreakers.

The FEC's belated contention carries certain implications. Much of the FEC's arguments for disclosure of Plaintiffs' names depends on the public interest that is vindicated by a Subsection (a)(8) appeal. However, that appeal is only available from an order dismissing a complaint, and then only by the complainant who filed it. There is no general authority to challenge FEC enforcement decisions. If the FEC is correct that the vote regarding Plaintiffs arose from an internally generated matter, then there can be no Subsection (a)(8) interest to vindicate and much of the FEC's argument for disclosing Plaintiffs' names accordingly collapses.

2. Disclosure is Inappropriate in Connection with MUR 6920

If there were no "proceedings" against Plaintiffs, then disclosure could only be possible through MUR 6920. Plaintiffs have already explained why whatever discretion the FEC possesses

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Complaint Generated Matters, 74 Fed. Reg. 38,617, 38,617 (Aug. 4, 2009). Among other things, these policies require notice and an opportunity to be heard prior to a reason to believe vote. *See* 74 Fed. Reg. at 38,617 ("This agency procedure is intended to provide respondents in non-complaint generated enforcement matters with notice of the basis of the allegations, and an opportunity to respond."). No such opportunity was provided here.

in connection with MUR 6920 is constrained by the language of the statute, FOIA, and the First Amendment. Two newly developed points, however, merit brief comment.

The language of Subsection (a)(4)(B)(ii) is plain and unambiguous, triggering disclosure only where "the Commission makes a determination that a person has not violated this Act." 52 U.S.C. § 30109(a)(4)(B)(ii). The FEC argues that the term "determination" is ambiguous, Surreply at 10, but even if that is the case, the second part of the Subsection, "that a person *has not violated* this Act," is not. A vote where the FEC fails to find reason to believe that a violation occurred does not determine that the subject of that vote did not violate FECA. Indeed, at least one Commissioner continues to assert that Plaintiffs are "money launder[ers]" who got away with it. Ex. C. Contrary to the FEC's assertions, the district court's decision in *AFL-CIO* supports Plaintiffs' position, as the determination that there was no probable cause garnered a majority of Commissioners. No such determination was made here, so the statute cannot authorize disclosure.

The FEC asserts that disclosure of Plaintiffs' identities in a MUR in which they were not respondents is necessary for a Subsection (a)(8) appeal. The FEC fails to articulate any reason why Plaintiffs' names are necessary to challenge its decision against the MUR 6920 respondents, aside from its general interest in accountability, addressed below. The FEC also fails to explain why Subsection (a)(8) is relevant at all, when there was no order from the FEC dismissing the administrative complaint. Moreover, the cases the FEC cites, such as *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C. Cir. 1987), are irrelevant with respect to Subsection (a)(4)(B)(ii). Subsection (a)(8)'s review provision is triggered "by an order of the Commission dismissing a complaint," whereas Subsection (a)(4)(B)(ii)'s disclosure provision is triggered by "a determination that a person has not violated this Act." The FEC's cases are concerned with how a court should conduct its review of the administrative record so it can

determine whether the FEC's dismissal was "contrary to law." Whether there is a "determination" of a violation is irrelevant with respect to Subsection (a)(8), which encompasses dismissal for any reason and for which some controlling statement must be identified to permit court review.

B. FOIA Exemption 7(C) Prohibits Disclosure of Plaintiffs' Identities and Such Disclosure is Unnecessary

The FEC argues, for the first time in its surreply, that FOIA Exemption 7(C) does not apply in this case, and makes sweeping assertions of its inherent authority. The FEC fails to recognize the constraints FOIA Exemption 7(C) places on whatever discretion it possesses. In addition, its arguments regarding the necessity of disclosing Plaintiffs' names are flawed, and the cases it cites undermine the FEC's position.

Disclosure of Plaintiffs' identities is prohibited by the Administrative Procedure Act, which provides Plaintiffs with a cause of action to challenge the arbitrary and capricious disclosure of their identities under FOIA Exemption 7(C). This is the cause of action that plaintiffs raised in *AFL-CIO* and the court there held that Exemption 7(C) prohibited the disclosure of names in the FEC's investigative file—"regardless of the public interest asserted." *AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 61 (D.D.C. 2001). Moreover, the FEC's Disclosure Policy expressly notes that it does not alter any policy requiring the FEC to comply with FOIA, s*ee* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,704 (Aug. 2, 2016), and the FEC's regulations provide that it will not release information subject to Exemption 7(C) in response to a FOIA request, s*ee* 11 C.F.R. § 4.5(a)(7)(iii). FOIA itself does not compel the disclosure at issue here; indeed it allows for protection of individual privacy. *See* 5 U.S.C. § 552(a)(2) (accompanying note). The FEC also challenges for the first time whether Exemption 7(C) may be raised in a "reverse FOIA" action. *See* Surreply at 14-16. The FEC did not address the holdings of other courts in this District that clearly provide for such relief, even in light of the

general FOIA principles that the FEC identifies. *See Tripp v. Dep't of Defense*, 193 F. Supp. 2d 229, 239 (D.D.C. 2002); *AFL-CIO*, 177 F. Supp. 2d at 62. The FEC thus asks this Court to depart from precedent in this District.

The FEC's basis for departing from this line of precedent is exceptionally thin: a single, misinterpreted line in the *SafeCard* decision. Surreply at 15. In that cited sentence, the D.C. Circuit noted that, because the conditions triggering the sole exception to the categorical rule against disclosure did not appear (the "evidence" in the line the FEC quoted), disclosure was not compelled. *See SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1206 (D.C. Cir. 1991). This observation cannot support the FEC's assertion that it has unfettered discretion to disclose information protected by Exemption 7(C). Indeed, the Supreme Court considered a reverse-FOIA action in *FCC v. AT&T, Inc.*, 562 U.S. 397 (2011), where a party argued that Exemption 7(C) forbid disclosure of their identity.

The FEC acknowledges the holding in *AFL-CIO* only to argue that, because the documents at issue in that case were "investigatory materials," that case is inapplicable. Surreply at 16. There is nothing in the *AFL-CIO* decision that suggests its holding is limited to the kinds of documents that were before it; those documents were merely the ones being challenged. Exemption 7(C) is not limited to "investigatory materials," it reaches all "records *or information* compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7)(C) (emphasis added). There can be no doubt that every record in the FEC's file that identifies Plaintiffs was compiled as part of the FEC's law enforcement investigation. To the extent the FEC is arguing there are documents in its file that were not compiled for law enforcement purposes, the Supreme Court has squarely held "that information initially contained in a record made for law enforcement purposes continues to meet the threshold requirements of Exemption 7 where that recorded information is reproduced or

summarized in a new document prepared for a non-law-enforcement purpose." *FBI v. Abramson*, 456 U.S. 615, 631-32 (1982).

The other threshold requirements for Exemption 7(C) have been met. John Doe 1, a natural person, undoubtedly has a privacy interest protected by Exemption 7(C). Another court in this District has found an agency's decision to disclose "information regarding some individuals if the references to them dealt only with their professional capacities" to be "unsupportable." *Alexander & Alexander Servs., Inc. v. SEC*, No. 92-1112 (JHG), 1993 WL 439799, at *10 (D.D.C. Oct. 19, 1993). The case that the FEC cites to support its position in fact provides protection for John Doe 1. In *Washington Post Co. v. U.S. Dep't of Justice*, the D.C. Circuit held that "the protection accorded reputation would generally shield material when disclosure *would show that an individual was the target of a law enforcement investigation.*" 863 F.2d 96, 101 (D.C. Cir. 1988) (emphasis added). That is what would happen here if John Doe 1's name was revealed. The FEC's position, that John Doe 1 was not "personally implicate[d] in an alleged FECA violation," also seriously undermines its contentions that disclosure of John Doe 1's name is essential to fulfill any of the purposes the FEC identifies. If John Doe 1 is only relevant in his capacity as the trustee of John Doe 2, then there is no reason for the FEC to disclose anything more.

The fact that John Doe 2 is a trust also does not foreclose the protections of Exemption 7(C). As the government recognized in *FCC v. AT&T*, Exemption 7(C) can shield even a corporation's name where such disclosure would necessarily reveal protected information about a natural person. *See* Pet'r's Br. at 36 n.11, *FCC v. AT&T*, No. 09-1279, 2010 WL 4496009 (U.S. Nov. 9, 2010). The D.C. Circuit has recognized this principle. *See Multi Ag Media LLC v. Dep't of Agriculture*, 515 F.3d 1224, 1230 (D.C. Cir. 2008). Disclosing John Doe 2's name presents a risk of identifying its trustee, meaning John Doe 2's identity is likewise protected.

With all of the requirements for Exemption 7(C) satisfied, it operates as a categorical bar to the disclosure of Plaintiffs' identities, which cannot be balanced against the interests the FEC identifies. *See AFL-CIO*, 177 F. Supp. at 61. However, even if these interests were implicated, disclosure of Plaintiffs' identities cannot further them. The FEC asserts that it may disclose Plaintiffs' identities merely because they were "involved" in the FEC's investigation, Surreply at 19, but none of the cases that the FEC cites support this conclusion. With one exception, none of the cases involve the disclosure of targets or witnesses in law enforcement investigations. Instead, they involve the identities of those who lodged complaints or comments with the government[4] or who purchased seized property from the government.[5] While there may be an interest in disclosing the names of individuals who affirmatively sought to influence government action, these cases draw a distinction between them and individuals like Plaintiffs who have become involved "in law enforcement investigations due to forces beyond their control." *Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729 (D. Md. 2001).

The one case the FEC cites that involves the target of an investigation reinforces Plaintiffs' position. In *CREW v. U.S. Dep't of Justice*, the target of the investigation publicly admitted he had been under investigation. 746 F.3d 1082, 1091-92 (D.C. Cir. 2014). The D.C. Circuit held that the agency could not withhold an entire document based on the fact that the target of an investigation was identified therein, but it *would* be appropriate, under *SafeCard*, to redact "the names and identifying information of private citizens mentioned in law enforcement files." *Id.* at

[4] *Edelman v. SEC*, 239 F. Supp. 3d 45, 55 (D.D.C. 2017) (individuals who lodged complaints with SEC); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 306 (D.D.C. 2007) (individuals who wrote letters regarding sign); *Judicial Watch of Fla., Inc. v. Dep't of Justice*, 102 F. Supp. 2d 6, 18 (D.D.C. 2000) (individuals who wrote letters regarding Independent Counsel Act); *Lardner v. U.S. Dep't of Justice*, No. Civ.A.03-0180 (JDB), 2005 WL 758267, at *18 (D.D.C. Mar. 31, 2005) (individuals who wrote comments in support of pardon applicants).
[5] *Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 726 (D. Md. 2001).

1094. This is the relief that Plaintiffs seek, supported uniformly by the cases the FEC itself cites.

C. The FEC Cannot Justify its Disclosure Under the First Amendment

The FEC all but admits that its power to disclose Plaintiffs' identities is bounded by the First Amendment, and therefore the FEC must identify an accountability or deterrence interest that overwhelms the well-established free speech interests at issue.[6] While the FEC identifies these interests, it wholly fails to explain why Plaintiffs' *identities* are necessary to further these interests.

Disclosure of Plaintiffs' identities is not necessary to further any newly articulated interest in accountability. Surreply at 7-8, 23. The FEC asserts disclosure is warranted so that the public can determine whether the FEC's decision-making is influenced by bias or partisanship. *Id.* This interest is inapplicable here, where Plaintiffs' identities would add nothing to what the FEC has already disclosed. A fulsome record of the FEC's decision-making, and the reasons for its decision, is already available. The Commissioners have traded statements that discuss the FEC's enforcement process and priorities. The administrative complainants have filed their appeal. A wealth of information has been disclosed, and despite its best efforts the FEC has failed to articulate any convincing reason why Plaintiffs' identities would provide any further information about how the FEC carries out its duties. The sharp disagreement between Commissioners on party lines and the political affiliations of the MUR 6920 respondents allows for full evaluation of any partisan bias at play in the FEC's decision. If there is any harm to the FEC's accountability

[6] The FEC faults Plaintiffs for supposedly not recognizing the governmental interests in *Buckley* and its progeny that support disclosure. Surreply at 21-22. Plaintiffs did not ignore those interests; they are simply inapposite to this case. Those interests support the disclosure requirements in FECA, which are not implicated when there has been no finding that any of those requirements were violated by Plaintiffs. However, the observation in *Buckley* and its progeny that disclosure chills speech applies to all disclosure. The D.C. Circuit recognized that, in the context of the disclosure of the investigative record, the interests in deterrence and accountability are at issue, not the interests supporting FECA generally. *See AFL-CIO*, 333 F.3d at 179.

interest, it is self-inflicted. Plaintiffs should not have their well-established privacy and speech interests trampled because the FEC fell short in initiating proceedings or making findings with respect to them. The only purpose to disclosing Plaintiffs' names is to unjustifiably implicate them in wrongdoing.

The FEC asserts that the core of its deterrence interest is to "provide the regulated community with a full picture of the *actions*" at issue. Surreply at 23 (emphasis added). Disclosing Plaintiffs' identities says nothing about the actions any respondent took, nor does it shed light on any "relationships." *Id.* The FEC has already disclosed its findings regarding the flow of funds. Whether Plaintiffs committed any wrongdoing has not been determined, and thus disclosing their identities can provide no deterrence information to the regulated community. In short, disclosing Plaintiffs' identities is not necessary or even helpful for the interests the FEC has identified.

The only conclusion that can be drawn from the FEC's assertions is that it seeks to "instill fear" in those it regulates so that they will refrain from engaging in political activity that may very well be legal out of concern that they will be publicly branded as lawbreakers by the very agency tasked with protecting their First Amendment rights. The FEC's actions thus risk chilling speech. For good reason prosecutors are forbidden from making public comment about the guilt of those they accuse. *See* Standard 3-1.10(c), American Bar Association, Criminal Justice Standards for the Prosecution Function. The same result should obtain here.

II. CONCLUSION

For the reasons set out above, Plaintiffs respectfully request that the Court grant their motion.[7]

[7] Plaintiffs reiterate their request that, if the Court denies their motion, it grant a stay of the denial pending appeal to the D.C Circuit pursuant to Fed. R. Civ. P. 62(c).

January 23, 2018 `

Respectfully submitted,

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