REDACTED
APPENDIX

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5099

JOHN DOE, 1 and JOHN DOE, 2,
Appellants,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-02694)

Argued: Oct. 9, 2018
Decided: Apr. 12, 2019

Before: GARLAND, *Chief Judge*,
HENDERSON, *Circuit Judge*,
RANDOLPH, *Senior Circuit Judge.*

OPINION

RANDOLPH, *Senior Circuit Judge*:[1] This is an appeal from the decision of the district court refusing

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[1] NOTE: Portions of this opinion contain **Sealed Information,** which has been redacted.

to enjoin the Federal Election Commission from releasing information identifying a trust and its trustee in connection with a misreported federal campaign contribution. *Doe v. FEC*, 302 F. Supp. 3d 160 (D.D.C. 2018).

Plaintiffs—the trust and its trustee—appear *incognita* as John Doe 2 and John Doe 1. They claim that the Commission's release of documents identifying them would violate the First Amendment to the Constitution, the Federal Election Campaign Act (FECA), and the Freedom of Information Act (FOIA). Plaintiffs and the Commission have filed some of the documents bearing on this case under seal.

The case began when an organization—Citizens for Responsibility and Ethics in Washington (CREW), which appears here as amicus curiae—filed a complaint with the Commission alleging that a $1.71 million contribution to a political action committee in October 2012 was made and reported in the name of someone other than the actual donor.

The Commission's regulation, implementing 52 U.S.C. § 30122,[2] states that no person shall "[m]ake a contribution in the name of another;" "[k]nowingly permit his or her name to be used to effect that contribution;" "[k]nowingly help or assist any person in making a contribution in the name of another;" or "[k]nowingly accept a contribution made by one person

[2] 52 U.S.C. § 30122 provides: "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person."

in the name of another." 11 C.F.R. § 110.4(b)(1)(i)-(iv).[3]

In this case the Commission, acting on CREW's allegations, voted 6-0 finding reason to believe that the American Conservative Union violated § 30122 "by knowingly permitting its name to be used to effect a $1.71 million contribution in the name of another to Now or Never PAC, an independent expenditure-only political committee. The Commission also found reason to believe that [others implicated in CREW's complaint] violated 52 U.S.C. § 30122 by making the contribution in the name of another." Memorandum from Lisa Stevenson, Acting Gen. Counsel, to FEC 1 (Aug. 4, 2017) (footnote omitted), https://www.fec.gov/files/legal/murs/6920/17044435462.pdf. The Commission therefore authorized an investigation. *Id.*; *see also* 52 U.S.C. § 30109(a)(2).

The investigation, conducted by the General Counsel, traced the $1.71 million contribution and revealed the following undisputed facts. Government Integrity, LLC, a Delaware limited liability corporation, was formed in September 2012 for the purpose of making political contributions. [redacted] On or about October 31, 2012, the trust, presumably at the direction of its trustee, wired $2.5 million to Government Integrity. Minutes after receipt, Government Integrity wired $1.8 million to the American Conservation Union, which then wired the $1.71 million contribution to the political action

[3] *See also United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011); *United States* v. *O'Donnell*, 608 F.3d 546, 553-54 (9th Cir. 2010).

committee, the Now or Never PAC. [redacted]

While participating in these sequential transactions on October 31, 2012, James C. Thomas, III served as the lawyer for Government Integrity and, at the same time, as the treasurer of the Now or Never PAC. Thomas filed a report with the Commission, on behalf of the PAC, listing the American Conservative Union (ACU) as the source of the $1.71 million even though ACU considered itself merely a "pass through" for the contribution.

The General Counsel, in recommending that the Commission take enforcement action, concluded that this nearly simultaneous three-step transaction—from the trust to Government Integrity, from Government Integrity to ACU, and from ACU to the PAC—"suggests that the parties went through significant lengths to disguise the true source of the funds." Third General Counsel's Report at 11, Am. Conservative Union, No. MUR 6920 (FEC Sept. 15, 2017), https://www.fec.gov/files/legal/murs/6920/17044435484.pdf.

In 2017, the Commission, rather than bringing an enforcement action, entered into a "conciliation agreement" with Government Integrity, LLC, the American Conservative Union, the Now or Never PAC, and Thomas. Conciliation Agreement, Am. Conservative Union, No. MUR 6920 (FEC Nov. 3, 2017), https://www.fec.gov/files/legal/murs/6920/17044434756.pdf; *see also* 52 U.S.C. § 30109(a)(4)(A)(i). These respondents to CREW's complaint agreed not to contest the Commission's determination that each of

them violated § 30122 because the source of the $1.71 million contribution had been disguised. The conciliation agreement imposed an overall civil penalty of $350,000. The trust and the trustee were not parties to the agreement and, [redacted] were not identified within it.

Because it accepted the conciliation agreement, the Commission voted to close its file. Pursuant to its disclosure policy, the Commission announced that it would release documents from the investigation, some of which identified the trust and trustee. *See generally* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702, 50,702-03 (Aug. 2, 2016) [hereinafter Disclosure Policy]. The Commission later issued those documents. It removed the disputed identifying information before publication pending the outcome of this lawsuit.

Plaintiffs' complaint sought an injunction barring the Commission from revealing their identities. They did not deny the Commission's assertion that the trust was the source of the $1.71 million contribution. Distinguishing *AFL-CIO v. FEC,* 333 F.3d 168 (D.C. Cir. 2003), the district court held that the First Amendment did not prevent the Commission from disclosing the identity of the trust and trustee; that the application of the Commission's disclosure policy to plaintiffs was reasonable; and that FECA's provisions and the regulations thereunder did not bar the disclosure and authorized the Commission's action. *Doe,* 302 F. Supp. 3d at 165-74.

I.

The basic claim of the trust and the trustee is that the Commission had no statutory authority to disclose any documents identifying them.[4] They point out that 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)." Does' Br. 32 (alterations in original). As to (1), the Commission has made the conciliation agreement public. As to (2), the Commission did not decide whether plaintiffs violated FECA.

Plaintiffs' theory must be that FECA's specification of what the Commission is required to disclose deprives the Commission of authority to disclose anything else.[5] And so they say that if the Commission publicly releases the additional material

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[4] The district court rejected plaintiffs' argument that the Commission would be violating 52 U.S.C. § 30109(a)(12)(A), which forbids disclosure of an "investigation" unless the person being investigated consents. *Doe*, 302 F. Supp. 3d at 166-68. On appeal, plaintiffs have abandoned this argument. *See Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015).

[5] Without saying as much, plaintiffs implicitly invoke the familiar negative-implication canon—the "expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). See *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991), stating that the "*expressio* maxim" may be "inappropriate in the administrative context" in light of cases such as *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372 (1973).

it would be acting "not in accordance with law" under the Administrative Procedure Act. 5 U.S.C. § 706(2)(A).[6]

Plaintiffs' argument presents an obvious question: "not in accordance with" what "law"? The Commission has a longstanding regulation requiring it to make public its action terminating a proceeding and "the basis therefor." 11 C.F.R. § 111.20(a).

Does an agency's disclosure regulation constitute "law" within the meaning of § 706 of the Administrative Procedure Act? A similar question was presented in *Chrysler Corp. v. Brown,* 441 U.S. 281 (1979). The Supreme Court answered: "authorized by law" includes "properly promulgated, substantive agency regulations." 441 U.S. at 295. We gave the same answer in *Bartholdi Cable Co. v. FCC,* 114 F.3d 274,281 (D.C. Cir. 1997). Although these FOIA cases were interpreting the Trade Secrets Act, 18 U.S.C. § 1905, their statements apply as well to the quoted language in the Administrative Procedure Act.

Plaintiffs have not argued that § 111.20(a) is anything other than a "properly promulgated" regulation.[7] FECA empowers the Commission to

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[6] The trust and trustee dispute the release of their names and the Commission's planned removal of the redactions. They have not contested the release of the documents in redacted form, which has already occurred.

[7] *See Bartholdi,* 114 F.3d at 281-82:

> Bartholdi argues that § 0.457 of the Commission's regulations does not meet the definition of "authorized by law" under *Chrysler.* But *Bartholdi* did not raise this challenge before the Commission. Bartholdi's application for review made no mention of *Chrysler.*

"prescribe[] forms and to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of this Act," 52 U.S.C. § 30107(a)(8), and to "formulate policy with respect to" the Act, 52 U.S.C. § 30106(b)(1).[8] When an agency's "empowering provision" contains such language, the courts will sustain a regulation that is "reasonably related" to the purposes of the legislation. *Mourning,* 411 U.S. at 369 (quoting *Thorpe v. Hous. Auth. of Durham,* 393 U.S. 268, 280 (1969)). This regulation—like the regulation in *Mourning*—requires more disclosure than the governing statute, but that is no reason for rejecting it. *Id.* at 371-73. The Supreme Court long has recognized that "[g]rants of agency authority comparable in scope" to FECA's provisions at issue here "have been held to authorize public disclosure of information . . ., as the agency may determine to be proper upon a balancing of the public interests involved." *FCC v. Schreiber,* 381 U.S. 279, 291-92 (1965).

> Because Bartholdi failed to challenge the validity of § 0.457 before the Commission, we decline to consider the issue.

See also Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) ("[A]ppellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

[8] Congress gave the Commission the "primary and substantial responsibility for administering and enforcing [FECA]," "extensive rulemaking and adjudicative powers," and the authority to "formulate general policy with respect to the administration of [FECA]." *Buckley v. Valeo,* 424 U.S. 1, 109, 110 (1976) (per curiam) (citation omitted); *see also* 52 U.S.C. § 30111(a)(8).

As to this particular regulation's relationship to the purposes of FECA, we have recognized that "deterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by" the statute. *AFL-CIO,* 333 F.3d at 179. The Commission's 2016 Disclosure Policy, adopted in response to *AFL-CIO,* considered the public and private interests involved and reasonably concluded that disclosure of the contemplated documents "tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information." Disclosure Policy, 81 Fed. Reg. at 50,703.[9]

II.

Plaintiffs claim that the First Amendment to the Constitution barred the Commission from publicly identifying them. We agree with the district court that *Citizens United v. FEC,* 558 U.S. 310 (2010), forecloses their argument. The Supreme Court there rejected the argument that FECA's disclosure provisions violated the First Amendment. 558 U.S. at 366-71. The provision requiring contributions to be made in the name of the source of the funding—52 U.S.C. § 30122—is thus plainly constitutional. *Citizens United* left open the possibility of an as-applied First Amendment challenge, but only if the donor proved

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[9] When the Commission ended its investigation and closed the file, it "terminate[d] its proceedings" within the meaning of 11 C.F.R. § 111.20(a), as the district court held. The "proceedings" included an investigation of the plaintiffs and a Commission vote on whether to take action against them. The documents containing plaintiffs' names reveal the "basis" for the Commission's actions. *Doe v. FEC,* 302 F. Supp. 3d at 172-73.

that revealing its identity would probably bring about threats or reprisals. 558 U.S. at 370. Plaintiffs provided no such evidence and did not allege that they would be subject to threats or reprisals. They did claim that disclosing their identity would "chill" them from engaging in political activity. But this does not distinguish them from others who make campaign contributions. And in any event, the Supreme Court rejected just such a claim of "chill" in *Citizens United. Id.*; *see also AFL-CIO,* 333 F.3d at 176-178.

III.

This brings us to plaintiffs' argument resting on the Freedom of Information Act. Under FOIA, 5 U.S.C. § 552, federal agencies must make their records available to the public. There are several exceptions. One is for "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). This exemption, plaintiffs claim, entitled them to an injunction preventing the Commission from disclosing their identities.

This is not a run-of-the-mill "reverse-FOIA" case. In the typical "reverse-FOIA" case an entity submits information to an agency and later "seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter's FOIA request." *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1133 n.1 (D.C. Cir. 1987).

Here neither the trust nor the trustee provided any of the information the Commission would release.

In fact, when the Commission served these plaintiffs with a subpoena seeking information, they refused to comply and provided no information. For another thing, when the Commission announced its intention to disclose the documents containing plaintiffs' names, no FOIA request was pending.

In these circumstances, FOIA cannot be used to prevent the Commission from publicly revealing plaintiffs' identities. FOIA is a disclosure statute. If an agency wrongly withholds information in the face of a proper FOIA request, it violates that statute. But if an agency discloses information pursuant to other statutory provisions or regulations, the agency cannot possibly violate FOIA. *Chrysler Corp. v. Brown* held that the FOIA exemptions regime in § 552(b) on which the trust and the trustee rely "demarcates the agency's obligation to disclose; it does not foreclose disclosure." 441 U.S. at 292. In other words, "Congress did not limit an agency's discretion to disclose information when it enacted the FOIA." *Id.* at 294; *see also Bartholdi,* 114 F.3d at 281.[10]

In any event, there is nothing to plaintiffs' complaint that their privacy would be unduly compromised if their identities were revealed. They emphasize that the Commission did not determine whether they violated FECA. That is true but beside the point. The conciliation agreement, the General Counsel's report, and other documents contained evidence that the trust and its trustee "assist[ed] [a]

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[10] Many reverse-FOIA cases are explained in light of the Trade Secrets Act, 18 U.S.C. § 1905, which can constrain an agency's disclosure discretion, *see, e.g., Canadian Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).

person in making a contribution in the name of another." 11 C.F.R. § 110.4(b)(1)(iii).[11] The conciliation agreement stated that Government Integrity, LLC agreed not to contest its violation of FECA's bar against making a contribution in the name of another. [redacted]

We add that, under Exemption 7(C), the Commission would not have had discretion to withhold information identifying the trust in response to a FOIA request. Revealing the name of the trust could not constitute an "unwarranted invasion of personal privacy" because "personal privacy" in Exemption 7(C) refers to "individuals," not "corporations or other artificial entities." *FCC v. AT&T Inc.*, 562 U.S. 397, 403 (2011). To state the obvious, a trust is an artificial entity. The Commission thus not only had the authority to release the trust's identity, it may well have had the legal duty to do so had that information been requested.

As to the trustee, plaintiffs insist that if and when the Commission makes the name of the trust public—as it must—this would be tantamount to revealing the name of the trustee as well. Does' Br. 26-27. Even if this were so, the trustee's privacy interest in his representational capacity is minimal. In addition "[t]he disclosures with which the statute is concerned

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[11] This regulation applies to those who "initiate or instigate or have some significant participation" in the making of a contribution in the name of another. *See* Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,105 (Aug. 17, 1989).

are those of 'an intimate personal nature' such as marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, and reputation. *Sims v. CIA,* 642 F.2d 562,574 (D.C. Cir. 1980). Information relating to business judgments and relationships does not qualify for exemption. *See id.* at 575. This is so even if disclosure might tarnish someone's professional reputation. *See Cohen v. EPA,* 575 F. Supp. 425, 429 (D.D.C. 1983)." *Wash. Post Co. v. U.S. Dep't of Justice,* 863 F.2d 96, 100 (D.C. Cir. 1988).[12] While the Commission may nevertheless have had discretion to withhold the trustee's name, it was not required to do so.

We therefore affirm the judgment of the district court, and remand for proceedings consistent with this opinion.

So ordered.

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[12] *SafeCard Services, Inc. v. SEC,* 926 F.2d 1197 (D.C. Cir. 1991), decided only that an agency may—not must—withhold "the names and addresses of third parties mentioned in witness interviews, of customers listed in stock transaction records obtained from investment companies, and of persons in correspondence with the" agency. *Id.* at 1205.

KAREN LECRAFT HENDERSON, *Circuit Judge,* concurring in part and dissenting in part: I agree with much of the Court's opinion which ably disposes of the plaintiffs' Freedom of Information Act and First Amendment arguments.[1] But I believe my colleagues err in concluding that the Federal Election Commission (Commission) has authority under the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, as amended (codified at 52 U.S.C. §§ 30101 *et seq)* (FECA or Act), to disclose documents from MUR 6920 that reveal the plaintiffs' identities. The Commission "has as its sole purpose the regulation of core constitutionally protected activity." *AFL-CIO v. FEC,* 333 F.3d 168, 170 (D.C. Cir. 2003). Its "investigations into alleged election law violations frequently involve subpoenaing materials of a 'delicate nature'," materials regarding "political expression and association" that go to "the very heart of the" First Amendment. *Id.* (quoting *FEC v. Machinists Non-Partisan Political League,* 655 F.2d 380,388 (D.C. Cir. 1981)). These serious privacy and First Amendment interests make holding the statutory line even more critical. I would preserve the delicate balance that the Congress struck and, accordingly, limit the Commission to making only those disclosures expressly authorized by FECA. The disclosures at issue, I submit, are not among them.

The plaintiffs—a trust and a trustee—gave money to Government Integrity, LLC. Government Integrity immediately transferred the money to the American Conservative Union, which, in turn, made a large

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[1] Accordingly, I concur in Parts II and III of the majority opinion.

contribution to a political action committee, Now or Never PAC. The Commission opened an investigation into the transfers and the contribution, naming as respondents, *inter alia,* Government Integrity, the American Conservative Union and Now or Never PAC. *See* 52 U.S.C. § 30109(a)(1)-(2) (granting authority to commence investigation upon receiving complaint). Acting under authority given him by 11 C.F.R. § 111.8(a), the Commission General Counsel asked the Commission to "find reason to believe" that the trust and trustee plaintiffs "ha[ve] committed . . . a violation" and should be added as respondents. In a 2-3 vote, the Commission declined the request; the three Commissioners voting "no" explained that their decision was based on prosecutorial discretion–namely, a rapidly approaching statute of limitations and a novel theory supporting the trust/trustee plaintiffs' culpability under FECA. The Commission later entered a conciliation agreement with the respondents, who admitted violating FECA.

In closing MUR 6920, the Commission plans to make public its investigative files, invoking as authority a FECA regulation and a policy statement. The disclosure regulation provides: "[i]f a conciliation agreement is finalized, the Commission shall make public such conciliation agreement forthwith." 11 C.F.R. § 111.20(b). It also declares: "[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.*" *Id.* § 111.20(a) (emphasis added). The disclosure regulation does not specify which documents are included in the "basis" for the Commission's action. *Id.* The Commission fills the gap

with a policy statement, which identifies twenty-one "categories of documents integral to its decisionmaking process that will be disclosed upon termination of an enforcement matter." *Disclosure of Certain Documents in Enforcement and Other Matters,* 81 Fed. Reg. 50,702 (Aug. 2, 2016). The plaintiffs began this litigation pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 500 *et seq,* to stop the Commission from revealing their identities in its MUR 6920 disclosures.

The APA requires a reviewing court to "set aside agency action" that is "not in accordance with law." 5 U.S.C. § 706(2)(A). The plaintiffs assert that FECA's plain text prohibits the Commission from making public the documents revealing their identities and thus any such disclosure is "not in accordance with law."[2] *Id.* It is hornbook law that an agency cannot grant itself power via regulation that conflicts with plain statutory text. *Orion Reserves Ltd. P'ship v. Salazar,* 553 F.3d 697, 703 (D.C. Cir. 2009) ("[R]egulation contrary to a statute is void."); *Murphy v. IRS,* 493 F.3d 170, 176 n.* (D.C. Cir. 2007) (if "the regulation conflicts with the plain text, . . . the statute clearly controls"). As a result, the Commission cannot use a regulation or policy statement to contravene the plain limits that FECA sets on its disclosure authority. This case, then, turns on whether FECA

[2] Although the plaintiffs' argument focuses on the Commission's lack of authority to release certain documents under FECA, the plaintiffs request as relief only redaction of their own identities, not withholding of the documents *in toto.* The Commission does not argue–nor do my colleagues suggest–that the plaintiffs' failure to ask for more expansive relief in any way affects their merits argument.

prohibits–by necessary implication–the disclosure of records containing the plaintiffs' identities. If so, the Commission's intended disclosures are unlawful and in violation of the APA. 1A Sutherland Statutory Construction § 31.02, at 521 (4th ed. 1985) ("The legislative act is the charter of the administrative agency and administrative action beyond the authority conferred by the statute is ultra vires."). If not, the plaintiffs' challenge fails.

Section 30109 of FECA sets forth the Commission's disclosure authority. 52 U.S.C. § 30109. It requires disclosure under two circumstances. First, "[i]f 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." *Id* § 30109(a)(4)(B)(ii). Second, "[i]f 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." *Id.* These are the only two situations in which FECA affirmatively requires the Commission to make disclosures.

But does FECA *permit* additional non-required disclosures? I think not. *First,* section 30109 does not expressly grant the Commission discretion to make additional disclosures. An "agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 357 (1986). We have held, as a corollary to that principle, "[t]he *duty* to act under certain carefully defined circumstances simply does not subsume the *discretion* to act under other, wholly

different, circumstances, unless the statute bears such a reading." *Ry. Labor Execs.' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (en banc). The Congress has charged the Commission with making limited disclosures in two carefully defined circumstances and there is no *textual* basis for concluding that additional discretionary disclosure authority exists.

Second, section 30109 includes confidentiality provisions that expressly forbid the Commission from making its investigative files public unless disclosure is otherwise authorized. The first provision states: "[a]ny notification or investigation . . . shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." 52 U.S.C. § 30109(a)(12)(A). The prohibition against revealing "any investigation" includes–at a minimum–information that would confirm the existence of an investigation. *See AFL-CIO,* 333 F.3d at 174 ("[T]he Commission may well be correct . . . that Congress merely intended to prevent disclosure of the fact that an investigation is pending."). The second provision provides: "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission . . . may be made public by the Commission without the written consent of the respondent and the Commission." *Id.* § 30109(a)(4)(B)(i). The section 30109 confidentiality provisions are robust: nearly any disclosure of an investigatory file will reveal the existence of an investigation and thereby violate section 30109(a)(12)(A). *See In re Sealed Case,* 237 F.3d 657,

666-67 (D.C. Cir. 2001) (section 30109(a)(12)(A) "plainly prohibit[s] the FEC from disclosing information concerning ongoing investigations under any circumstances without the written consent of the subject of the investigation"). Moreover, the section 30109 confidentiality provisions do not have expiration dates: they continue to bind the Commission unless and until another provision of section 30109 authorizes disclosure. *See* 52 U.S.C. § 30109(a)(4)(B)(i), (a)(12)(A).

In my view, FECA's disclosure scheme is comprehensive and sets forth precisely when the Commission can and cannot make its records public. The Commission *must* make limited disclosures in two–and only two–cases: (1) upon entering a signed conciliation agreement and (2) after determining that a person did not violate FECA. *See id.* § 30109(a)(4)(B)(ii). In all other cases, the Commission must keep its investigatory information confidential. *See id.* § 30109(a)(4)(B)(i), (a)(12)(A). The statute does not authorize any *discretionary* disclosure.[3]

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[3] Contrary to the majority's suggestion, my reading of FECA does not rely on the canon of construction *expressio unius est exclusio alterius,* Maj. Op. at 6 n.4, a so-called "feeble helper" in the administrative law context *Adirondack Med. Ctr.* v. *Sebelius,* 740 F.3d 692,697 (D.C. Cir. 2014). *Expressio unius,* like other canons of construction, sheds light on the meaning of statutory text. *See Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992) ("[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation . . . ."). But we do not use statutory construction canons if the statutory text is plain. *Id.* at 253-54. FECA's disclosure provisions are plain as day and the *expressio unius* canon is therefore inapplicable.

Neither mandated disclosure under FECA authorizes the Commission to release documents containing the plaintiffs' identities. Regarding the first, the Commission entered a conciliation agreement in MUR 6920 and the plaintiffs do not take issue with the Commission making that agreement public. *See id* § 30109(a)(4)(B)(ii). But the Commission's power to release the signed conciliation agreement plainly does not include the remainder of its investigative file. *Id.* ("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."). Regarding the second mandated disclosure—a no violation determination—the Commission concedes that not every enforcement matter ends with a determination of liability *vel non.* Indeed, the Commission sometimes decides against pursuing an investigation as a matter of prosecutorial discretion. *See, e.g., Citizens for Responsibility & Ethics in Washington v. FEC,* 892 F.3d 434,438 (D.C. Cir. 2018). That is what happened here. The Commission declined to pursue enforcement against the two plaintiffs as a matter of prosecutorial discretion, citing a rapidly approaching statute of limitations and a novel theory of liability. Because neither basis of disclosure under FECA applies, I believe the Commission's decision to release its documents containing the plaintiffs' identities is contrary to law and should be enjoined. *Cf. In re Sealed Case,* 237 F.3d at 666-67.

The majority reaches a different conclusion without discussing FECA's disclosure provisions. *See* Maj. Op. at 6-9. It instead upholds the Commission's

position as a permissible exercise of its general power to make rules "as are necessary to carry out the provisions of" FECA, 52 U.S.C. § 30107(a)(8), and to "formulate policy with respect to" FECA, *id.* § 30106(b)(1). The key to the majority's reading is the United States Supreme Court's holding in *Mourning v. Family Publications Service, Inc.*, which declared that "[w]here the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' . . . the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" 411 U.S. 356, 369 (1973) (alteration in original) (quoting *Thorpe v. Housing Auth. of City of Durham*, 393 U.S. 268, 280-81 (1969)). Applying *Mourning*, my colleagues conclude that the Commission may use its general power to promulgate regulations to authorize disclosures in addition to those carefully limited by section 30109. Maj. Op. at 7-8. In their view, "[t]he Commission's 2016 Disclosure Policy . . . considered the public and private interests involved and reasonably concluded that disclosure of the contemplated documents 'tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information.'" Maj. Op. at 8-9 (quoting *Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. at 50,703)).

But Circuit precedent rejects this generous reading of *Mourning*. In *Colorado River Indian Tribes* v. *National Indian Gaming Commission*, we were called upon to decide whether the Indian Gaming Regulatory Act gives the National Indian Gaming Commission "authority to promulgate regulations

establishing mandatory operating procedures for certain kinds of gambling in tribal casinos." 466 F.3d 134, 135 (D.C. Cir. 2006). Unable to find a statutory hook for its regulation, the Gaming Commission, invoking *Mourning,* rested on its general authority to promulgate rules carrying out the Indian Gaming Regulatory Act and the Act's underlying policy goals. *Id.* at 139. We rejected its defense: "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." *Id.* To the contrary, "[a]ll questions of government are ultimately questions of ends and means" so "[a]gencies are therefore 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Id.* (first alteration in original) (first quoting *Nat'l Fed'n of Fed. Emps. v. Greenberg,* 983 F.2d 286, 290 (D.C. Cir. 1993); then quoting *MCI Telecomms. Corp. v. AT&T,* 512 U.S. 218, 231 n.4 (1994)). Under *Mourning,* then, we focus both on the goals the Congress seeks to achieve and the mechanism it uses to achieve them. *Id.* at 140 (Congress sought to protect gaming business integrity not generally but instead "through the 'statutory basis for the regulation of gambling' provided in the Act" (quoting 25 U.S.C. § 2702(2))). "This le[d] us back to the opening question—what is the statutory basis empowering the Commission to regulate" the gaming at issue? *Id.* "Finding none," we held that the regulation was invalid. *Id.*

Mourning does not resolve this case. *See NetCoalition v. SEC,* 615 F.3d 525, 533-34 (D.C. Cir. 2010) ("[A] statute's 'general declaration of policy' does not protect agency action that is otherwise

inconsistent with the congressional delegation of authority for '[a]gencies are . . . "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes."'" (second and third alterations in original) (quoting *Colorado River Indian Tribes,* 466 F.3d at 139)). It instead "leads us back to the opening question"—what disclosure mechanism did the Congress use to further FECA's underlying policy goals of deterring election law violations and promoting Commission accountability? *Colorado River Indian Tribes,* 466 F.3d at 140; *see also AFL-CIO,* 333 F.3d at 179 (listing FECA policy goals related to disclosure). I have already given my answer: FECA allows disclosure in two—and only two—circumstances. Because neither circumstance exists here, I believe the Commission is without authority to release the documents containing the plaintiffs' identities and would therefore reverse the district court.

Accordingly, I respectfully dissent from Part I of the majority opinion.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-5099

JOHN DOE, 1 and JOHN DOE, 2,
Appellants,
v.
FEDERAL ELECTION COMMISSION,
Appellee.

Appeal from the United States District Court
for the District of Columbia
(No. 1:17-cv-02694)

Filed: July 11, 2019

Before: GARLAND, *Chief Judge*; Henderson, Rogers, Tatel, Griffith, Srinivasan, Millett, Pillard, Wilkins, Katsas, and Rao, Circuit Judges; Randolph, Senior Circuit Judge

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ORDER

Upon consideration of appellants' petition for rehearing en banc, the response thereto, and the absence of a request by any member of the court for a vote it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Ken R. Meadows
Deputy Clerk

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 17-2694

JOHN DOE, 1 and JOHN DOE, 2,
Plaintiffs,
v.
FEDERAL ELECTION COMMISSION,
Defendant.

Filed: March 23, 2018
Amended: May 29, 2018

AMENDED MEMORANDUM OPINION

Plaintiffs John Doe 1 and John Doe 2, a trustee and the trust, challenge the decision of the Federal Election Commission ("FEC") to disclose their identities when it publicly releases the file pertaining to an investigation that is now closed. Plaintiffs, whose names and identifying information appear in the file, assert that the agency's decision is unlawful because releasing their identities would violate the Federal Election Campaign Act and its regulations, the Freedom of Information Act, and plaintiff's rights under the First Amendment of the U.S. Constitution. They have brought this case under the Administrative Procedure Act and ask the Court to enjoin the agency

from disclosing their identities as part of its release of the investigative file.

For the reasons explained below, the Court will not enjoin defendant's disclosure of plaintiffs' identities pursuant to the agency's disclosure policy.

BACKGROUND

The Federal Election Campaign Act ("FECA" or "the Act") is a statute that imposes extensive recordkeeping and disclosure requirements of campaign contributions in an effort "to remedy corruption of the political process." *FEC v. Akins*, 524 U.S. 11, 11 (1998). Among its requirements, the Act prohibits "mak[ing] a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution" or "knowingly accept[ing] a contribution made by one person in the name of another person." 52 U.S.C. § 30122. The Act established the Federal Election Commission, and it requires the agency to investigate violations of the Act. 52 U.S.C. §§ 30106(a)-(b), 30107(a). It also sets forth requirements for how the agency's investigations are handled, including the public disclosure of the results of investigations and of the materials and information uncovered in them. *See, e.g.*, 52 USC §§ 30109(a)(12)(A); (a)(4)(B)(ii). This case concerns whether the identities of an individual and an entity, who were not named as respondents in an FEC investigation, but were alleged to have had some role in or connection to the activities being investigated, may be disclosed by the agency as part of the release of its investigative materials.

FACTUAL AND PROCEDURAL HISTORY

On February 27, 2015, the FEC received an administrative complaint from Citizens for Responsibility and Ethics in Washington ("CREW"), alleging that American Conservative Union, Now or Never PAC, the PAC's treasurer James C. Thomas III, and an unknown respondent violated the Federal Election Campaign Act when American Conservative Union made a $1.71 million contribution, which it received from an unknown respondent, to Now or Never PAC. *See* Pls.' Emergency Mot. for TRO and Prelim. Inj. and Mem. of P. & A. in Supp., (Sealed) [Dkt. # 4],[1] (Redacted) [Dkt. # 13] ("Pls.' Mot.") at 2-3; Decl. of John Doe 1, (Sealed) [Dkt. # 4-1], (Redacted) [Dkt. # 13-1] ¶ 3; Resp. to Pls.' Mot., (Sealed) [Dkt. # 8] (Redacted) [Dkt. # 16] ("Def's. Opp.") at 1; *see also* CREW's Admin. Compl., ¶¶ 1, 13-20, https://www.fec.gov/files/legal/murs/6920/17044434345.pdf.

The agency initiated an investigation based on these allegations, Matter Under Review ("MUR") 6920, and it identified Government Integrity LLC as the "unknown respondent." Def.'s Opp. at 1. The FEC's

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[1] On December 18, 2017, the court granted plaintiffs' motion to seal this case. Order [Dkt. # 5] (allowing the case to proceed temporarily under seal). After the case was assigned to the undersigned judge, the Court ordered the parties to file public, redacted versions of their previously sealed pleadings on the docket, and by agreement of the parties, the FEC published a redacted version of the investigative file in dispute on its website at https://www.fec.gov/data/legal/matter-under-review/6920/. *See* Min. Order (Dec. 18, 2017); Min. Order (Dec. 19, 2017). This memorandum opinion cites to the public versions of the filings in this case.

Office of General Counsel ("OCG") learned through discovery that Government Integrity wired $1.8 million to American Conservative Union on the same day that American Conservative Union sent $1.7 million to Now or Never PAC and that John Doe 2—which had a relationship with Government Integrity[2]—had transmitted funds to Government Integrity immediately before that.[3] *See* Third General Counsel's Report (Sept. 15, 2017) at 6, https://www.fec.gov/files/legal/murs/6920/17044435484.pdf.

On August 10, 2017, the OGC served a subpoena for information on plaintiffs John Doe 1 and John Doe 2. Def.'s Opp. at 1-2. Plaintiffs refused to respond to the subpoena, Def.'s Opp. at 1-2, and on September 15, 2017, the OGC recommended that the Commission

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[2] *See* FEC Memorandum, Circulation of Discovery Documents (Aug. 4, 2017) at 2, https://www.fec.gov/files/legal/murs/6920/17044435462.pdf. ("In response to our request for information regarding the known principals and agents of [Government Integrity] LLC, Thomas states [REDACTED] 'acting as trustee of an entity named [REDACTED]' [REDACTED] appointed GI LLC's now-deceased principal.").

[3] "On August 10, 2017, the Commission served [REDACTED] through its trustee, [REDACTED] with a Subpoena and Order requesting the production of documents and the answers to interrogatories regarding its role in the transaction and the source of the funds used to make a contribution to Now or Never PAC. [REDACTED] response was due on August 25, 2017. The day before response was due, [REDACTED] newly retained counsel requested an extension of seventeen days. Because of statute of limitations concerns, OGC was unable to grant the request. Nonetheless, counsel for [REDACTED] stated that [REDACTED] would not respond to the Subpoena and Order until September 11, 2017." Third General Counsel's Report at 5.

find reason to believe that plaintiffs violated 52 U.S.C. § 30122 and authorize the filing of a civil action to enforce the subpoena. Pls.' Reply Mem. in Supp. of Pls.' Mot., (Sealed) [Dkt. # 8]; (Redacted) [Dkt. # 25] ("Pls.' Reply") at 3; Third General Counsel's Report at 12-13.

On September 20, 2017, the Commission rejected the OGC recommendation by a vote of 3 to 2. Pls.' Reply at 3; Def.'s Opp. at 2; Certification (Sept. 20, 2017), https://www.fec.gov/files/legal/murs/6920/17044434647.pdf. That same day, the Commission voted 5 to 0 to authorize the OGC to pursue conciliation with American Conservative Union and "pre-probable cause" conciliation with Government Integrity, Now or Never PAC, and Mr. Thomas. *Id.* Finally, it voted 5 to 0 to "[t]ake no action at this time on the remaining recommendations" of the OGC. *Id.* The FEC did not inform plaintiffs of the OGC's allegations and recommendations. Pls.' Reply at 3-4.

Thereafter, the agency entered into conciliation discussions with respondents to the investigation and ultimately reached a conciliation agreement with them. *See* Def.'s Opp. at 2; Pls.' Reply at 4. On October 24, 2017, the Commission voted unanimously to approve the conciliation agreement, which involved Government Integrity, American Conservative Union, Now or Never PAC, and James C. Thomas III. Def.'s Opp. at 2; Certification (Oct. 24, 2017), https://www.fec.gov/files/legal/murs/6920/17044434742.pdf. That agreement concluded MUR 6920. *Id.* Government Integrity agreed not to contest the Commission's finding against it any further, and the

respondents collectively agreed to pay a civil penalty of $350,000. Def.'s Opp. at 2.

On November 3, 2017, the FEC notified CREW of the results of its investigation, advising that:

> the Commission found that there was probable cause to believe American Conservative Union violated 52 U.S.C. § 30122 . . . . The Commission also found reason to believe that Government Integrity, LLC, violated 52 U.S.C. § 30122; that Now or Never PAC and James C. Thomas, III in his official capacity as treasurer knowingly and willfully violated 52 U.S.C. §§ 30122 and 30104(b); and that James C. Thomas, III knowingly and willfully violated 52 U.S.C. §§ 30122 and 30104(b).

Letter from Antoinette Fuoto, FEC, to Anne L. Weismann, CREW (Nov. 3, 2017), https://www.fec.gov/files/legal/murs/6920/17044434744.pdf ("FEC Closing Letter"), at 1.

The FEC also advised that pursuant to its disclosure policy, "[d]ocuments related to the case [would] be placed on the public record within 30 days"—or by December 3, 2017. FEC Closing Letter at 1, citing Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016) ("Disclosure Policy").

Counsel for plaintiffs and counsel for Government Integrity objected to the publication of their clients' names and identifying information in connection with the release of the investigative file. Pls.' Mot. at 3. While the agency was considering these objections, and after the 30-day deadline to release the

investigation file had passed, CREW contacted the agency to ask when it would publish the file. Def.'s Opp. at 3.

On December 12, 2017, the FEC told counsel for Government Integrity that, pursuant to its disclosure policy, the agency would not redact plaintiffs' names when it released the investigative file. Pls.' Mot. at 3. Two days later, on December 14, the FEC advised plaintiffs' counsel of this decision. Pls.' Reply at 4; Def.'s Opp. at 3. Plaintiffs asked the agency to wait two business days to publish the file, and the agency agreed to wait until December 18, 2017 at 5:00 p.m. or later to do so. Pls.' Mot. at 4; Def.'s Opp. at 3.

On the next day, December 15, 2017, plaintiffs filed this lawsuit. Compl., (Sealed) [Dkt. # 1]; (Redacted) [Dkt. # 12]; Pls.' Mot. They filed a sealed complaint and a sealed motion for a temporary restraining order, asking the Court to enjoin the agency from releasing their identities in its investigative file. On December 18, 2017, defendant filed its opposition to plaintiffs' motion, Def.'s Opp., and on that day, the Court held a sealed hearing in which the FEC agreed to redact plaintiffs' names and any other identifying information from its investigative file and not publish the redacted information until further order of the Court in this case. Min. Order (Dec. 18. 2017). In light of that agreement, the Court denied plaintiffs' motion for a temporary restraining order as moot and consolidated the motion for a preliminary injunction with the merits of the case. *Id.*, citing Fed. R. Civ. Proc. 65.

On December 19, 2017, Commissioner Ellen Weintraub released through Twitter a redacted

version of a Statement of Reasons concerning this matter and the September 20 vote of 2 to 3 against authorizing action to enforce the subpoena against plaintiffs. Pls.' Reply, Ex. C; Commissioner Weintraub Statement of Reasons, https://www.fec.gov/files/legal/murs/6920/17044435456.pdf ("Weintraub Statement of Reasons"). On December 20, 2017, Commission Vice Chair Caroline Hunter and Commissioner Lee Goodman issued their own Statement of Reasons about the vote. Statement of Reasons (Dec. 20, 2017), https://www.fec.gov/files/legal/murs/6920/17044435563.pdf ("Hunter and Goodman Statement of Reasons").

On December 22, 2017, defendant filed notice with the Court that it had published a redacted version of the investigative file. Notice [Dkt. # 20]. On January 3, 2018, plaintiffs filed their reply in support of their motion. Pls.' Reply. Finally, on February 12, 2018, CREW filed an amicus brief in this matter.[4] Brief of CREW and Anne Weismann as Amici Curiae [Dkt. # 45].

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") establishes the scope of judicial review of agency action. *See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 545-49 (1978). It requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that

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[4] CREW filed a motion to intervene in this action on January 3, 2018, Mot. to Intervene by CREW and Anne Weismann [Dkt. # 22], which the Court denied on January 31, 2018, authorizing CREW instead to file an amicus curaie brief. *See* Order [Dkt. # 44].

are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," in excess of statutory authority, or "without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A), (C) and (D).

Courts are required to analyze an agency's interpretation of a statute by following the two-step procedure set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). First, the court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the court concludes that the statute is either silent or ambiguous, the second step of the court's review process is to determine whether the interpretation proffered by the agency is "based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843.

Once a reviewing court reaches the second step, it must accord "considerable weight" to an executive agency's construction of a statutory scheme it has been "entrusted to administer." *Id.* at 844. "[U]nder *Chevron,* courts are bound to uphold an agency interpretation as long as it is reasonable—regardless whether there may be other reasonable or, even more reasonable, views." *Serono Labs., Inc. v. Shalala,* 158 F.3d 1313, 1321 (D.C. Cir. 1998). And the court must defer to an agency's reading of its own regulations unless it is "plainly erroneous or inconsistent with the regulation." *Id.* at 1320 (internal quotation marks omitted).

ANALYSIS

The Federal Election Campaign Act has a number of provisions that address the confidentiality of investigation materials. The Court has concluded that the issue cannot be resolved at the *Chevron* step one stage, since none of the statutory provision cited by the parties speaks directly to the matter.

I. Disclosure in this case is neither barred by 52 U.S.C. § 30109(a)(4)(B)(i), as plaintiffs contend, nor required by section 30109(a)(4)(B)(ii), as the FEC contends.

The Federal Election Commission's administrative enforcement authority is set forth in 52 U.S.C § 30109. Subsection (a)(4) specifies the informal methods and procedures the agency may invoke to correct or prevent violations of FECA. *Id.* at § 30109(a)(4). Subsection (a)(4)(A) requires the FEC to attempt to correct or prevent a violation through a number of informal methods, and it authorizes the agency to enter into conciliation agreements with any person involved. *Id.* at § 30109(a)(4)(A). "A conciliation agreement, unless violated, is a complete bar to any further action by the Commission." *Id.*

The Commission seeks to disclose its investigative file for MUR 6920 pursuant to subsection (a)(4)(B), which governs disclosures by the agency within the context of these conciliation attempts and agreements. Def.'s Opp. at 4. Subsection (a)(4)(B)(i) states the following with regard to conciliation attempts:

> 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.

52 U.S.C. § 30109(a)(4)(B)(i). Subsection (a)(4)(B)(ii) deals with conciliation agreements:

> 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.

52 U.S.C. § 30109(a)(4)(B)(ii).

The Court agrees with defendant that subsection (a)(4)(B)(i) does not *bar* the agency from making the disclosures plaintiffs seek to enjoin here, since the prohibition in that subsection is limited to disclosure of any action by the Commission, or information derived "in connection with any *conciliation attempt* by the Commission under subparagraph (A)." 52 U.S.C. § 30109(a)(4)(B)(i) (emphasis added). In other words, that provision relates to the confidentiality of the conciliation process.

But plaintiffs are correct that subsection (a)(4)(B)(ii) does not *require* the agency to disclose the plaintiffs' identity either, since the record reflects that the Commission did not make any "determination" that plaintiffs had not violated the Act; it simply did not vote to find reason to believe that they had. *See* Exhibit A to Def.'s Opp. [Dkt. # 25-1] at 41-44. Thus,

subsection (a)(4)(B) does not mandate the outcome in this case.

II. Disclosure in this case is not barred by subsection (a)(12)(A), as plaintiffs contend.

Subsection (a)(12)(A) governs the disclosure of notifications or investigations:

> 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.

52 U.S.C. § 30109(a)(12)(A). Plaintiffs point to this subsection to support their argument that disclosure of their names is prohibited. Pls.' Mot. at 8-10. The Commission interprets this provision as governing disclosures of *pending* investigations only, and it argues that any other interpretation would be inconsistent with the statutory mandate in subsection (a)(4)(B)(ii) to make certain disclosures at the conclusion of an investigation. Def.'s Opp. at 6-8.

The Court acknowledges that the issue before it is not an easy one to resolve, but it is not writing on a blank slate. The D.C. Circuit has considered the scope of subsection (a)(12)(A) and disclosures by the FEC in a case that struck down the agency's prior disclosure policy. As the FEC explained in the Federal Register Notice announcing its current policy:

> For approximately the first 25 years of is existence, the Commission viewed the confidentiality requirements 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 . . . .

Disclosure Policy, 81 Fed. Reg. at 50702. In 2001, however, that policy was challenged in court, and the district court rejected the agency's longstanding interpretation of the confidentiality provision in subsection (a)(12)(A). *See AFL-CIO v. FEC,* 177 F. Supp. 2d 48, 56 (D.D.C. 2001) (holding based on its plain language that the protections in subsection (a)(12)(A) do not lapse as soon as the FEC terminates an investigation).

On appeal, the D.C. Circuit affirmed the district court's decision with respect to the disclosure of the particular materials at issue in that case, but it did not adopt the lower court's interpretation. Specifically, it rejected the district court's conclusion that the plain text of subsection (a)(12)(A) clearly prohibited disclosure and that the case could be resolved at the first step of the *Chevron* analysis:

> [W]e think the Commission may well be correct that subsection (a)(12)(A) is silent with regard to the confidentiality of investigatory files in closed cases and that Congress merely intended to prevent disclosure of the fact that an investigation is pending. But even if the AFL-CIO could convince us that its alternate construction represents the more natural reading of subsection (a)(12)(A), the fact that the

> provision can support two plausible interpretations renders it ambiguous for purposes of *Chevron* analysis.

AFL-CIO v. FEC, 333 F.3d 168, 174 (D.C. Cir. 2003).[5] This ruling is binding on this Court.

The Court of Appeals then proceeded to consider step two of the *Chevron* analysis: whether the Commission's disclosure policy constituted a permissible construction of the statute. It observed: "[a]t this stage of our *Chevron* analysis, we would normally accord considerable deference to the Commission . . . particularly where, as here, Congress took no action to disapprove the regulation when the agency submitted it for review pursuant to 2 U.S.C. § 438(d)." *Id.* at 175 (citations omitted). At the same time, however, the Court recognized that "we do not accord the Commission deference when its regulations 'create serious constitutional difficulties.'" *Id.*, citing *Chamber of Commerce v. FEC,* 69 F. 3d 600, 604-05 (D.C. Cir. 1995). Faced with a policy that called for the placement of the agency's *entire* investigatory file in the *AFL-CIO* matter on the public record, the Court concluded that "the Commission failed to tailor its

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[5] The Court notes that the concurring opinion in *AFL-CIO* did agree with the interpretation that plaintiffs advance here, finding it to be compelled by the plain text of subsection (a)(12)(A). *See* 333 F. 3d at 180-84 (J. Henderson, concurring) ("While the provision does not state in so many words that 'no *completed* investigation shall be made public,' that does not mean it is silent on the matter; whatever the word "investigation" means, section 437g(a)(12)(A) plainly covers '*[a]ny* . . . investigation,' ongoing or completed.") (emphasis in original).

disclosure polity to avoid unnecessarily infringing upon First Amendment rights." *Id.*

The Court rejected arguments that the longstanding disclosure policy warranted *Chevron* deference and was essential to public oversight of the Commission. *Id.* at 172.

> In sum, although we agree that deterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by section 437g(a), the Commission must attempt to avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a delicate nature representing the very heart of the organism which the first amendment was intended to nurture and protect. Because 11 C.F.R. § 5.4(a)(4) fails to undertake this tailoring, it creates the serious constitutional difficulties outlined above. We therefore conclude that the regulation is impermissible.

Id. at 179 (citations, edits, and quotation marks omitted).

In light of that ruling, the Commission revised its disclosure policy, and in 2016, it published the current policy. Disclosure Policy, 81 Fed. Reg. 50,702. The FEC undertook to revise the policy as instructed by the Court of Appeals to "avoid unnecessarily infringing on First Amendment interests where it regularly subpoenas materials of a delicate nature." *Id.* at 50,703. The policy narrowed the scope of the information that would be made public in closed

investigations to "several categories of documents integral to its decisionmaking process . . . as well as documents integral to its administrative functions," including: administrative complaints, responses to complaints, certain General Counsel's Reports, statements of reasons issued by one or more Commissioners, conciliation agreements, certain memoranda and reports from the OGC prepared for the Commission in connection with specific pending MURs, and closeout letters. *Id.* The agency explained:

> 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.

Id.

The Commission maintains in this case that the disclosure of plaintiffs' identities as part of the release of the investigative file for MUR 6920 is appropriate under the revised disclosure policy because plaintiffs "are referenced in documents addressing whether there is reason to believe they committed violations of FECA, whether discovery should be sought from them and other parties, and whether there is probable cause to believe others committed violations of FECA." Def.'s Opp. at 5. Defendant notes that the administrative complainant CREW did not originally name plaintiffs as respondents because it did not know the source of the contribution at issue, and it acknowledges that the Commission did not designate plaintiffs as

respondents after it became aware of their identities in the investigation. *Id.* Nevertheless, according to the FEC, plaintiffs "feature[d] prominently" in the investigation, and the Commission asserts that there is "obvious public importance of making the identities of plaintiffs transparent where they appear in the Commission's deliberations." *Id.*

But the application of the policy to plaintiffs has been challenged on First Amendment grounds, so in accordance with the approach outlined in *AFL-CIO,* the Court must first resolve whether the Commission's revised disclosure policy, and its application to the information plaintiffs are seeking to shield here, are constitutional before it can conduct the *Chevron* step two analysis under the APA and afford the agency the deference it is seeking in this case.

III. The Disclosure in this Case Does Not Violate the First Amendment

A. Disclosure of plaintiffs' identities is not barred by *AFL-CIO.*

Plaintiffs rely heavily on *AFL-CIO*, but the case is inapposite. The investigatory files at issue in *AFL-CIO* involved an estimated 10,000 to 20,000 pages of materials gathered during the course of the FEC's proceedings, none of which it had reviewed before it dismissed the administrative complaints under investigation. 333 F.3d at 171-72. The agency's disclosure policy at the time required "the release of *all* information not expressly exempted by FOIA." *Id.* at 178 (emphasis in original). Pursuant to that policy, upon closing the investigation, the Commission made an initial disclosure of 6,000 pages of investigatory

material. *Id.* at 172. The AFL-CIO and Democratic National Committee sued to enjoin disclosure, providing affidavits attesting that the agency's initial and further releases would disclose the names of hundreds of their volunteers, members, and employees, making make it more difficult for the organizations to recruit personnel in the future. *Id.* at 176. They further attested that the disclosures would make public "detailed descriptions of training programs, member mobilization campaigns, polling data, and state-by-state strategies," and that revealing their activities, strategies, and tactics to their opponents would frustrate their ability to pursue their political goals effectively. *Id.* at 176-77.

Faced with these concerns, the D.C. Circuit concluded that applying the broad disclosure policy the agency followed at the time to the DNC and AFL-CIO would raise substantial First Amendment concerns; the public disclosure of the associations' confidential internal materials would "intrude[ ] on the 'privacy of association and belief guaranteed by the First Amendment," and seriously interfere with internal group operations and effectiveness. 333 F.3d 177-78, quoting *Buckley v. Valeo,* 424 U.S. 1, 64 (1976); *see also id.* at 178 (expressing concern that compelled disclosure of such materials combined with the Commission's broad subpoena practices would encourage political opponents to file charges against their competitors to chill the expressive efforts of their competitors and to learn and exploit their political strategies).

The Court stated that when analyzing a constitutional challenge to a disclosure requirement, courts must

> balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the disclosure requirement to serve its interests. Where a political group demonstrates that the risk of retaliation and harassment is "likely to affect adversely the ability of . . . [the group] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate," for instance, the government may justify the disclosure requirement only by demonstrating that it directly serves a compelling state interest. In contrast, where the burden on associational rights is "insubstantial," we have upheld a disclosure requirement that provided "the only sure means of achieving" a government interest that was, though valid, "not . . . of the highest importance."

333 F.3d at 176, quoting *Buckley,* 424 U.S. at 64-68, *Block v. Meese,* 793 F.2d 1303, 1315-16 (D.C. Cir. 1986), and *NAAPC v. Alabama,* 357 U.S. 449, 462-63 (1958) (citations omitted) (edits in original).

Here, plaintiffs do not make any claim that anyone's associational rights are being infringed, and disclosing the identities of plaintiffs here would not involve the disclosure of anyone's internal operations or political strategies.

Moreover, the investigative file in *AFL-CIO* involved tens of thousands of pages that the Commission gathered but never reviewed—and so the information in those pages played no role in the agency's decision making process. *See AFL-CIO*, 333 F.3d at 171-72. The unreviewed files included the names of hundreds of volunteers, members, and employees, *id.* at 176, none of whom had any role in the matter being investigated. *See id.* at 171 (describing the underlying complaint to allege that the AFL-CIO and other unions had unlawfully coordinated campaign expenditures with political candidates and party committees). By contrast, here the Commission seeks to disclose documents that were central to its handling and decision making in reaching the conciliation agreement and closing MUR 6920, including its decision of whether to pursue litigation against plaintiffs that arose out of and was directly related to the investigation.

The disclosure defendant seeks to make here is pursuant to its recently revised policy, which the agency carefully tailored to minimize the burdens on constitutional rights while providing for sufficient disclosure to advancing legitimate concerns of deterring future violations and promoting Commission accountability. Thus, the limited disclosure of plaintiff's names would not threaten any of the interests that concerned the Court in *AFL-CIO,* and that case does not govern the outcome here.

B. Disclosure of plaintiffs' identity does not violate the First Amendment.

So then the question is: do the reasons advanced for disclosing the records of completed investigations,

which the D.C. Circuit stated "may well justify releasing more information than the minimum disclosures required by section 437g(a)," *AFL-CIO*, 333 F.3d at 179, outweigh any concerns the Court might have about the more limited intrusion on First Amendment rights that is being alleged here?

The Court notes at the outset that although John Doe 2 appears to be asserting a First Amendment right to make a political contribution without being identified, *see* Pls.' Reply at 15-17, it is unclear whether John Doe 1 is asserting a personal constitutional right in this case and whether he has standing to raise the First Amendment issue. The complaint only mentions the constitution once: paragraph 40 alleges summarily that "[t]he Commission's disclosure of Plaintiffs' names is an arbitrary and capricious decision, and an abuse of discretion because such action violates the First Amendment to the United States constitution." Compl. ¶ 40; *see also* Compl. ¶ 3 (alleging that the release of their identities is contrary to law under FECA and FOIA for a number of reasons, including that it "has the effect of chilling speech").

But there are no factual allegations in the complaint concerning plaintiffs' exercise of their right to free speech. In his declaration in support of the motion for injunctive relief, John Doe 1, the trustee, states:

> 10. The disclosure that John Doe 2 and 1 were even marginally involved in an investigation into alleged violations of campaign finance law will damage my professional reputation [REDACTED].

> 11. I fear that being connected to this investigation will damage my reputation and John Doe 2's reputation.

Decl. of John Doe 1 in Supp. of Pls.' Mot. (Redacted) [Dkt. # 13-1] ¶¶ 10-11. These concerns go to John Doe 1's FOIA and privacy concerns, not the constitutional concerns.

John Doe 1 adds:

> 12. The events subject to the FEC's investigation in MUR 6920 pertained to core First Amendment activity, that is, political fundraising. It is objectively reasonable to conclude that disclosure of the identities of parties involved in an FEC investigation of events subject to First Amendment protections that result in no FEC enforcement action will be chilled in the exercise of their First Amendment rights.

Id. ¶ 12. This convoluted sentence does not actually specify who it is the trustee posits "will be chilled." And, since it was the trust, John Doe 2, that allegedly transferred the funds to Government Integrity to be used for the constitutionally protected purpose of funding campaign activities, and John Doe 1 was acting solely on behalf of the trust, it is not clear how John Doe 1's First Amendment rights play any role in this case.[6]

In any event, even if one concludes that at least one plaintiff has asserted an interest in preventing the

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[6] Indeed, John Doe 1 emphasizes that "the full record now reveals that the FEC accused John Doe 1 of a violation in his official capacity as a trustee only." Pls.' Reply at 21.

chilling of future speech in the form of donations, the only right that is implicated by the agency's actions in this case is the right to contribute anonymously, not the right to contribute at all.

Thus, the case is entirely distinguishable from *AFL-CIO,* and, more importantly, notwithstanding the plaintiffs' highly selective quotations from the case law, the constitutional issue has already been decided in the agency's favor.

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United v. FEC, 558 U.S. 310, 371 (2010).

It is true that in *Buckley v. Valeo*, the Supreme Court stated that disclosure of campaign contributions could chill political activity and impose "not insignificant burdens" on First Amendment rights. 424 U.S. at 65-66, 68. But as the Court recounted in *Citizens United,* it has repeatedly held that those burdens withstand strict scrutiny. 558 U.S. at 366-71. In *Citizens United,* the Court addressed not only the provisions of the Bipartisan Campaign Reform Act ("BCRA") that prohibited campaign expenditures by corporations and unions, but also the disclosure provisions contained in the legislation. And in doing so, it reviewed its treatment of the disclosure issue to date.

> Disclaimer and disclosure requirements may burden the ability to speak, but they "impose

> no ceiling on campaign-related activities." The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest.
>
> In *Buckley*, the Court explained that disclosure could be justified based on a governmental interest in "provid[ing] the electorate with information" about the sources of election-related spending. The *McConnell* Court applied this interest in rejecting facial challenges to BCRA §§ 201 and 311. There was evidence in the record that independent groups were running election-related advertisements "'while hiding behind dubious and misleading names.'" The Court therefore upheld BCRA §§ 201 and 311 on the ground that they would help citizens "make informed choices in the political marketplace."

558 U.S. at 366-67, quoting *Buckley*, 424 U.S. at 64, 66, and *McConnell v. FEC*, 540 U.S. 93, 196, 201, 231-32 (2003) (internal citations, quotation marks, and brackets omitted); *see also AFL*-CIO, 333 F.3d at 176 (observing that the Court in *Buckley* concluded that the disclosure requirements "survived strict scrutiny as the least intrusive means of achieving several compelling governmental interests"). Therefore, neither the FEC policy on its face nor its application in this case impinges impermissibly on the plaintiffs' First Amendment right to express themselves through political donations.

In *Citizens United*, though, the Court reassured litigants that "as-applied challenges 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*, 558 U.S. at 367, quoting *McConnell*, 540 U.S. at 198 and *Buckley*, 424 U.S. at 74. But plaintiffs do not even allege, much less demonstrate, that there are any grounds to fear that they would be subject to harassment or reprisals—the only harm they allege is the claimed harm to their reputations arising from the fact that they were under investigation.

So the disclosure involved in this case would not offend the Constitution, and the only question that remains to be resolved is whether, considering the privacy issues asserted by the plaintiffs, disclosure is reasonable under standard APA principles.

IV. Application of the FEC's Disclosure Policy to Plaintiffs in this case is Reasonable and Consistent with FOIA.

FECA requires the disclosure of any "conciliation agreement" and any "determination that a person has not violated this Act." 52 U.S.C. § 30109(a)(4)(B)(ii). The implementing regulation provides:

> 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 . . . [and]

> If a conciliation agreement is finalized, the Commission shall make public such conciliation agreement forthwith.

11 C.F.R. §111.20(a)-(b) (emphasis added). Because, as explained above, there are no constitutional issues implicated by the Commission's proposed disclosure in this case, *Chevron* deference applies.

The Court holds that the agency's interpretation of the statute to require the public disclosure set forth in the regulation is reasonable. *See AFL-CIO*, 333 F.3d at 178 (recognizing that deterring FECA violations and promoting its own public accountability are valid goals of the disclosure regulation and finding the prior regulation invalid only on the basis that it was not tailored "to avoid unnecessarily burdening the First Amendment rights of the political organizations" the agency investigates). And the disclosure of plaintiffs' names in this case is consistent with subsection (a)(4)(B)(ii), as it has been interpreted by the agency in 11 C.F.R.§111.20(a).

The Court agrees with plaintiffs 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. But the facts of this case fall well within the provision of the regulation requiring disclosure in cases where the Commission "otherwise terminates its proceedings." 11 C.F.R. § 111.20(a). The investigation as a whole was otherwise terminated, including the aspect of the matter that involved issuing a subpoena to the plaintiffs. Indeed, since under terms of the statute, even the names of those who are investigated

and *exonerated* are publicly revealed, 52 U.S.C. § 30109(a)(4)(A)(ii), the Court finds that it would not be unreasonable to release the plaintiffs names here.

Plaintiffs emphasize that they were neither targets of, nor respondents to, the MUR 6920 investigation, so they reject the notion that there were any "proceedings" opened or closed as to them. *See* Pl.'s Reply at 1, 8. But the language of the regulation is not so narrow, and the public has an interest in the agency's decision to terminate this proceeding involving Government Integrity without enforcing its own subpoenas and following the money back to its source. And the only reason the Doe 2 trust was not a respondent from the outset was because CREW did not know who the donor was. This is not a situation where a person's name happened to come up in a wide ranging inquiry. Plaintiffs here were integrally involved in a narrow, focused investigation: plaintiff John Doe 2 was a link in the single chain involving a single contribution, it is related to Government Integrity, a party to the conciliation agreement, and it was the recipient of a subpoena from the agency. The only reason plaintiffs' identity was not revealed in the investigation was because plaintiffs resisted responding to the agency's subpoena.[7]

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[7] Plaintiffs make much of the fact that after Commissioner Weintraub published a statement of reasons decrying the resolution of the proceedings before the Commission established who was behind the $1.7 million contribution, *see* Weintraub Statement of Reasons, two of the Commissioners who voted to end the investigation issued a statement of their own. *See* Pls.' Reply at 4-5, 20, citing Hunter and Goodman Statement of Reasons. It is true that in a footnote to their separate statement, Vice Chair Hunter and Commissioner Goodman expressed

Plaintiffs also rely on FOIA principles when identifying the privacy interests the agency was bound to protect. They point out that FOIA Exemption 7(C) exempts from disclosure information compiled for law enforcement purposes, which "could reasonably be expected to constitute an unwarranted invasion of personal privacy;" and that the purpose of the provision is to protect the privacy interests of suspects, witnesses, and investigators. Pls.' Mot. at 6-8, citing 5 U.S.C. § 552(b)(7)(C), *SafeCard Servs., Inc. v. SEC*,

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concerns that Commissioner Weintraub had "publicly prejudged" plaintiffs' guilt and "pre-supposed facts and intent without investigation." Hunter and Goodman Statement of Reasons at 3 n.8. But plaintiffs make too much of these comments, and their efforts to highlight the footnote obscure the fact that there is nothing in the body of the two Commissioners' Statement of Reasons that militates against disclosure under the FEC policy. The Hunter and Goodman five-page letter makes several points: 1) that the legal theory underlying the OGC's "reason to believe" recommendation concerning plaintiffs was unclear, and that more factual investigation on the question of intent was needed because "the Commission had circumstantial evidence but not direct evidence," and "time was running out;" 2) the statute of limitations concerning the original respondents was close to expiring, and expanding the matter to include plaintiffs could delay the case further, so "we believed the most efficient prosecutorial path forward was to finalize the case against the 3 Respondents" as efficiently and expeditiously as possible;" 3) the agency's decision to conciliate with the named respondents and avoid "the procedural, legal, and investigative complexities" of adding plaintiffs was well within the agency's prosecutorial discretion; and 4) the decision was in the public interest since the conciliation agreement established precedent and secured a large penalty. *See* Hunter and Goodman Statement of Reasons. None of this suggests that the allegations of plaintiffs' involvement or the fact that the agency declined to enforce its own subpoena were not integral to the proceeding or its termination.

926 F.2d 1197, 1205 (D.C. Cir. 1991), and *Bast v. DOJ*, 665 F.2d 1251, 1254 (D.C. Cir. 1981). But John Doe 2 is a trust, *see* Pls.' Mot. at 1, and under well-established FOIA principles, an entity has no right to "personal privacy" under FOIA Exemption 7(C). *See FCC v. AT&T Inc.*, 562 U.S. 397, 409-10 (2011) (rejecting argument that "personal privacy" in Exemption 7(C) reaches corporations: "protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations"). And the actions of John Doe 1, as the trustee for John Doe 2, were solely on behalf of the trust, not himself, so his asserted privacy interests are minimal.

Accordingly, the Court defers to the FEC's reasonable interpretation of the statutory disclosure requirements and holds that the application of that policy to plaintiffs in this case is valid. The agency's salutary interest in exposing its decision making to public scrutiny outweighs plaintiffs' insubstantial privacy concerns.

CONCLUSION

For the reasons set forth above, the Court will not enjoin defendant's disclosure of plaintiffs' identities as part of the regular release of the investigative file for MUR 6920 under the FEC's revised disclosure policy. A separate order will issue.

[handwritten: signature]
AMY BERMAN JACKSON
United States District Judge

DATE: May 29, 2018

Appendix D

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND REGULATIONS

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

52 U.S.C. §30106(b)(1)

(b) Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office

> (1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

52 U.S.C. §30107(a)(8)

(a) Specific authorities

* * *

> (8) to develop such prescribed forms and to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, as are necessary to carry out the provisions of this Act and chapter 95 and chapter 96 of title 26; and

* * *

52 U.S.C. §30109. Enforcement

(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 clauses[1] (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

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[1] So in original. Probably should be "clause".

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).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(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.

(C)(i) Notwithstanding subparagraph (A), in the case of a violation of a qualified disclosure requirement, the Commission may—

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined, for violations of each qualified disclosure requirement, under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(iv) In this subparagraph, the term "qualified disclosure requirement" means any requirement of—

(I) subsections[2] (a), (c), (e), (f), (g), or (i) of section 30104 of this title; or

(II) section 30105 of this title.

(v) This subparagraph shall apply with respect to violations that relate to reporting periods that begin on or after January 1, 2000, and that end on or before December 31, 2023.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of

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[2] So in original. Probably should be "subsection".

title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney

General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the

court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or, in the case of a violation of section 30122 of this title, which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation).

(7) In any action brought under paragraph (5) or (6), subpenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) Repealed. Pub. L. 98-620, title IV, §402(1)(A), Nov. 8, 1984, 98 Stat. 3357.

(11) If the Commission determines after an investigation that any person has violated an

order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(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.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports

Before taking any action under subsection (a) against any person who has failed to file a report required under section 30104(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 30104(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification,

the Commission shall, pursuant to section 30111(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under title 18, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than 1 year, or both.

(B) In the case of a knowing and willful violation of section 30118(b)(3) of this title, the penalties set forth in this subsection shall

apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 30118(b)(3) of this title may incorporate a violation of section 30119(b), 30122, or 30123 of this title.

(C) In the case of a knowing and willful violation of section 30124 of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 30122 of this title involving an amount aggregating more than $10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence

their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

11 C.F.R. §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.

Disclosure of Certain Documents in Enforcement and Other Materials, 81 Fed. Reg. 50,702, 50,702-03 (Aug. 2, 2016)

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;

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[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.

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.

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