ORAL ARGUMENT HELD ON OCTOBER 19, 2018
DECISION ISSUED ON APRIL 12, 2019

NO. 18-5099

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

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

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

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

PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FOIA	Freedom of Information Act

RULE 35 STATEMENT

This case concerns an attempt by the Federal Election Commission ("FEC") to disclose the identities of two Plaintiffs, a trust and trustee, which were referenced in an FEC investigation. The FEC only found that *other* persons and entities—not Plaintiffs—violated federal election laws. Nevertheless, it is undisputed that by disclosing Plaintiffs' names, the FEC seeks to link them to the others' election law violations. The FEC continues to pursue this guilt-by-association strategy despite explicitly declining to investigate Plaintiffs.

Disclosing Plaintiffs' names under such circumstances violates both (1) the Federal Election Campaign Act ("FECA"), and (2) decades-old FEC policies that explicitly preclude the agency from releasing records exempt from disclosure under the Freedom of Information Act ("FOIA").

Plaintiffs request rehearing en banc because "the panel decision conflicts with . . . decision[s] of . . . th[is] court . . . and consideration by the full court is therefore necessary to secure and maintain uniformity of [this] court's decisions." Fed. R. App. P. 35(b)(1)(A).

First, there is a long line of precedent from this Court, including in *Railway Labor Executives' Association v. National Mediation Board*, 29 F.3d 655, 671 (en banc), *amended*, 38 F.3d 1224 (D.C. Cir. 1994), and *Colorado River Indian Tribes v. National Indian Gaming Commission*, 466 F.3d 134, 135 (D.C. Cir. 2006), that

prohibits an agency from relying on a mere general legislative grant of rulemaking authority to issue a regulation where the regulation contradicts the plain language of the legislative scheme under which it operates, or where Congress has left no gap for the agency to fill by such regulation. The panel majority recognized that FECA did not authorize the disclosure of Plaintiffs' names here, Op. 9, but held (over Judge Henderson's dissent) that the FEC could use its general rulemaking authority to expand its disclosure powers beyond what FECA allows. In so holding, the majority ignored circuit precedent and myriad FECA provisions that prohibit the FEC's maximalist regulatory disclosure regime or at the least make plain that there is no gap for the agency to fill with any expanded disclosure powers. Review is particularly warranted because, as this Court has recognized, 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).

Second, it is well-established that, "when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017); *accord Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). Here, the FEC has maintained a consistent policy "[f]or approximately the first 25 years of its existence," of "plac[ing] on its public record the documents that had been considered by

the Commissioners . . . , *minus those materials exempt from disclosure under . . . [FOIA]*." Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016) ("Disclosure Policy") (emphasis added). And the FEC's current policy is quite explicit that it "does not alter any existing regulation or policy requiring or permitting the Commission to redact documents." *Id.* at 50,704. Both the trust and trustee's identities are exempt from disclosure under FOIA. *Cf.* Op. 13 (acknowledging that "the Commission may . . . have had discretion to withhold the trustee's name"). Accordingly, before releasing Plaintiffs' names, the FEC needed to explain the departure from its longstanding policy of *not* releasing FOIA-exempt material. The FEC provided no such explanation, and although Plaintiffs noted this error, *see* Br. 22-23; Reply 17-18, the panel disregarded that argument and thereby contravened the rule governing unexplained changes in agency practices.

ARGUMENT

I. The Majority Opinion Contravenes this Court's Longstanding Precedent that the Scope of Agency Authority Is Bound by the Power Delegated by Congress.

This Court has long recognized that "it is beyond cavil that 'an agency's power is no greater than that delegated to it by Congress.'" *Ry. Labor Execs.' Ass'n*, 29 F.3d at 670 (quoting *Lyng v. Payne*, 476 U.S. 926, 937 (1986)). In derogation of this bedrock principle of separation of powers, despite explicitly recog-

nizing that the FEC's regulation "requires more disclosure than the governing statute," Op. 9, and despite FECA's comprehensive disclosure regime, the panel majority held that the FEC had the power to expand its disclosure authority in order to disclose Plaintiffs' identities.

The default rule for FEC investigations under FECA is one of nondisclosure. First, FECA prohibits the Commission from revealing anything gleaned from the required mediation process in which the FEC must engage before bringing an enforcement action: The Commission cannot disclose any "action . . . [or] information derived, in connection with any conciliation attempt." 52 U.S.C. § 30109(a)(4)(B)(i). FECA further forbids any person from disclosing "[a]ny notification or investigation made under this section . . . without the written consent of the person receiving such notification or the person with respect to whom such investigation is made." *Id.* § 30109(a)(12)(A). This Court has held that the latter protection confers "an extraordinarily strong privacy interest," analogous to a matter occurring before a grand jury, because "[i]n both contexts, secrecy is vital 'to protect [an] innocent accused who is exonerated from disclosure of the fact that he has been under investigation.'" *In re Sealed Case*, 237 F.3d 657, 666-67 (D.C. Cir. 2001) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.6 (1958) (alteration in original)).

Against this backdrop of a legislative scheme broadly prohibiting disclosure, one subsection authorizes limited disclosure in two—and only two—circumstances. *See* 52 U.S.C. § 30109(a)(4)(B)(ii). 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.* Second, "[i]f the Commission makes a determination that a person has not violated this Act . . . the Commission shall make public such [a] determination." *Id.* But the panel majority conceded that neither of those provisions applies in this case: Plaintiffs were not identified in the conciliation agreement that resolved the FEC investigation at issue here, and the Commission made no determination that they had not violated FECA.

With no legislative authorization for disclosing Plaintiffs' names, the majority instead located the FEC's disclosure authority in 11 C.F.R. § 111.20(a). Op. 7. That regulation provides that when the FEC "otherwise terminates its proceedings," the Commission is required to "make public such action and the basis therefor." 11 C.F.R. § 111.20(a). As the panel majority concluded (apparently and properly rejecting the FEC's contention that § 30109(a)(4)(B)(ii) was ambiguous, *see* Op. 8), the FEC purports to derive its authority to promulgate § 111.20(a) from its general rulemaking authority, specifically the power "to make

. . . such rules . . . as are necessary to carry out the provisions of this Act." 52 U.S.C. § 30107(a)(8); *see id.* § 30111(a).

Contrary to this Court's longstanding precedents, the panel held that this housekeeping provision gave the FEC a general, broad-reaching disclosure authority beyond anything contemplated by Congress. Relying on *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356 (1973), the panel held that an agency with a similar grant of authority has the power to enact any regulation that it deems is "reasonably related to the purposes of the legislation." Op. 8 (internal quotation marks omitted). That is not the law in this Circuit, and en banc review is necessary to correct this departure from the limits this Court has placed on agency action, limits necessary to meaningfully constrain administrative authority from subsuming the legislative function.

This Court has rejected the "bare suggestion" that an agency "possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area." *Ry. Labor Execs.' Ass'n*, 29 F.3d at 670. *Railway Labor Executives' Association* controls here: Any argument for agency authority that "essentially boils down to a claim" that "any action taken by the [agency] was lawful unless expressly prohibited by Congress" must be rejected as "specious." *Univ. of D.C. Faculty Ass'n/NEA v. D.C. Fin. Responsibility & Mgmt. Assistance Auth.*, 163 F.3d 616, 621-23 (D.C. Cir. 1998).

This Court has likewise rejected the proposition that *Mourning* established that regulations promulgated pursuant to "general rulemaking provisions . . . are valid so long as they are 'reasonably related to the purposes of the enabling legislation,'" where no provision of the Act explicitly grants it the power to regulate in a particular area. *Colo. River Indian Tribes*, 466 F.3d at 139 (quoting *Mourning*, 411 U.S. at 369). This Court held that "[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.* There, the Court held that legislative authority over class II Indian gaming and general congressional intent to ensure the integrity of Indian gaming did not give an agency authority to regulate *class III* gaming. Although Congress wished to achieve a particular purpose through enabling legislation, this Court observed "it is equally clear that Congress wanted to do this in a particular way," outlined by statute; in the absence of a "statutory basis empowering" the agency, the regulation was invalid. *Id.* at 139-40.

Mourning does not support the majority opinion. There, Congress proscribed certain conduct through remedial legislation, while also granting the agency the authority to "define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled." *Mourning*, 411 U.S. at 366. *Mourning* does not stand for the proposition that an agency may make any regulation it chooses so long as not explicitly forbidden by the statutory text. It is simply

an application of *Chevron* step one: Congress left a gap for the agency to fill and provided it the tools to fill that gap.

That is not the case here. As the dissent concluded, and as is demonstrated by Congress's decision to broadly prohibit disclosure under a variety of circumstances and enumerate only two precisely delineated exceptions to the non-disclosure rule, FECA establishes a comprehensive disclosure regime. Op. 5-6 (Henderson, J., dissenting). Because "there is no gap for the agency to fill," *Ry. Labor Execs.' Ass'n*, 29 F.3d at 671, the inquiry ends and the FEC may not assume Congress's legislative powers and expand the scope of its own authority.

Congress's decision to limit the FEC's disclosure authority accords with the statute's purposes. As this Court has observed, the FEC is "[u]nique among federal administrative agencies," because it "has as its sole purpose the regulation of core constitutionally protected activity – the behavior of individuals and groups only insofar as they act, speak and associate for political purposes." *AFL-CIO*, 333 F.3d at 170 (internal quotation marks omitted). Therefore, "more than other agencies whose primary task may be limited to administering a particular statute, every action the FEC takes implicates fundamental rights." *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016). As this Court recognized in *AFL-CIO* and the Supreme Court has recognized in every major campaign finance decision since *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (per curiam) ("compelled disclosure, in itself, can

seriously infringe on privacy of association and belief guaranteed by the First Amendment"), the disclosure of information bearing on political activity implicates fundamental First Amendment rights. *See* 333 F.3d at 175-76. "Disclosure chills speech." *Van Hollen* 811 F.3d at 488. First Amendment interests are plainly implicated where the FEC seeks to disclose alleged participation in political activity to name and shame Plaintiffs as a warning to others without following the procedures Congress established governing disclosure of contributors and those who violate FECA.[1]

In FECA, Congress established a comprehensive disclosure regime for political activity. It set out the precise conditions governing when participants in the political process must disclose their identities and activities. In the enforcement context, Congress authorized only limited disclosure at the conclusion of an enforcement proceeding while unambiguously requiring secrecy during the investigation. But the panel majority adopted the FEC's contention that in this constitu-

[1] The panel majority minimized these interests by citing Supreme Court precedent upholding the constitutionality of FECA's disclosure provisions. Op. 10. However, Plaintiffs do not challenge the constitutionality of FECA's disclosure provisions. The panel majority concluded that 52 U.S.C. § 30122, which prohibits contributing in the name of another, compelled disclosure of Plaintiffs' identities. *Id.* However, only the FEC, which enjoys the sole power for civil enforcement of FECA, can make that determination, 52 U.S.C. § 30107(e), and the FEC has never found that Plaintiffs violated § 30122 or that any other provision of FECA requires disclosure of their identities. Indeed, it is this assumed power to name and shame persons who have not been found to violate FECA that is at the heart of this case.

tionally-sensitive area Congress tacitly delegated to the FEC in its general rule-making authority the power to name and shame any person whose conduct, in the judgment of any one Commissioner or enforcement staff member, may have violated FECA without providing an opportunity to respond to such allegations. And the majority reached that conclusion despite FECA's comprehensive disclosure regime and detailed enforcement process providing that the FEC can act *only* when four Commissioners agree. *See* 52 U.S.C. § 30106(c). En banc review is needed to correct the panel's decision, which undermines the statutory scheme established by Congress in FECA. Adherence to that scheme is necessary to prevent the FEC and its staff from acting out of "some vindictive desire to publicize allegations that are yet to be established." *See In re Sealed Case*, 237 F.3d at 668.

This Court's decision in *AFL-CIO v. FEC* is not to the contrary. That case only resolved the question whether § 30109(a)(12)(A)'s prohibition on disclosure of "[a]ny notification or investigation" *alone* unambiguously "prohibit[ed] the release of investigatory file materials in both open and closed cases," *AFL-CIO*, 333 F.3d at 173, not whether FECA *as a whole* granted the FEC unlimited disclosure authority, much less whether the FEC could make a disclosure not authorized by statute. And though, as the panel noted, *AFL-CIO* mused that deterrence and accountability interests "may well justify releasing more information than the minimum disclosures required by" the statute, Op. 9 (quoting *AFL-CIO*, 333 F.3d at

179), it did not purport to resolve whether FECA's text and structure authorized additional disclosures, and this Court counseled caution because such disclosures implicated First Amendment interests. *See* 333 F.3d at 179. To the extent *AFL-CIO* is read to have held that the FEC may authorize itself to disclose any information its staff uncovers during an investigation, it was wrongly decided for the reasons stated above and should be overturned by the full Court. *See United States v. Burwell*, 690 F.3d 500, 504 (D.C. Cir. 2012) (en banc) (noting that an en banc court may set aside its own precedent if the earlier decision's holding on an important question of law was fundamentally flawed).

II. The Panel Opinion Ignores the Principle that an Unexplained Departure from Agency Practice Is Arbitrary and Capricious.

Rehearing en banc is necessary for a second reason: The panel opinion contradicts this Court's consistent holding that "[a] central principle of administrative law is that, when an agency decides to depart from decades-long past practices and official policies, the agency must at a minimum acknowledge the change and offer a reasoned explanation for it." *Am. Wild Horse Pres. Campaign*, 873 F.3d at 923. "[G]loss[ing] over or swer[ving] from prior precedents without discussion" is "the very essence of unreasoned and arbitrary decisionmaking." *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22 (D.C. Cir. 2014) (quoting *Bush-Quayle '92 Primary Comm., Inc. v. FEC*, 104 F.3d 448, 453 (D.C. Cir. 1997)). Because the

FEC's action "fails to comply with its own regulations" and policy, it must "be set aside as arbitrary and capricious." *Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (internal quotation marks omitted). The panel decision breaks with that bedrock principle.

As Plaintiffs explained, "[t]he FEC's Disclosure Policy reiterates that the agency's historical practice has been not to publish 'materials exempt from disclosure under . . . [FOIA],' 81 Fed. Reg. at 50,702." Br. 22-23; *accord* Reply 17 (quoting Federal Register notice). The FEC regulation governing "[a]vailability of records" likewise provides only for disclosure of "*non-exempt* . . . investigatory materials." 11 C.F.R. § 5.4(a)(4) (emphasis added). This regulation, on its face, therefore, contemplates nondisclosure of *exempt* investigatory materials. *Cf.* 11 C.F.R. § 4.5(a)(7)(iii) (no request shall be denied under FOIA unless record contains, *inter alia*, information subject to Exemption (7)(C)).

Moreover, FEC policy has explicitly *embraced* redaction of FOIA-exempt material, acknowledging that the Commission "frequently" redacts documents, specifically including general counsel reports of the sort at issue here. Disclosure Policy, 81 Fed. Reg. at 50,702. The policy roots all its disclosures in 5 U.S.C. § 552(a)(2), a section of FOIA that explicitly permits redactions to eliminate "identifying details" to protect "personal privacy." *See* Disclosure Policy, 81 Fed. Reg. at 50,703. And the FEC's revised policy at issue in this case could not be

more explicit that it "does not alter any existing regulation or policy requiring or permitting the Commission to redact documents." *Id.* at 50,704.

Courts have recognized that agencies can make withholding of FOIA-exempt materials *mandatory* through regulations and policies. *See AT&T Inc. v. FCC*, 582 F.3d 490, 495 n.2 (3d Cir. 2009) (recognizing agency made nondisclosure of FOIA-exempt materials mandatory through regulation), *rev'd on other grounds*, 562 U.S. 397 (2011); *cf. Nat'l Envtl. Dev. Ass'n's Clean Air Project*, 752 F.3d at 1009 (recognizing that rule had made compliance with regulation mandatory). That is exactly what the FEC has done here.

As Plaintiffs explained, the FEC's action is "arbitrary and capricious or contrary to law" because disclosure of Plaintiffs' names contravenes the Commission's own regulations and inexplicably departs from consistent historical practice. *See* Br. 22-23; Reply 17-18. The panel even acknowledged that "the Commission may . . . have had discretion to withhold the trustee's name." Op. 13. And it acknowledged that the disclosure of the trust's name might be "tantamount to revealing the name of the trustee." *Id.* Because that information would be eligible for withholding under FOIA, the Commission was obligated to withhold it under the Commission's long-held and consistent policy. The agency's unexplained departure from that established practice was "the very essence of unreasoned and arbitrary decisionmaking." *W. Deptford Energy*, 766 F.3d at 22.

The panel opinion failed to engage this particular argument, despite it being raised repeatedly by Plaintiffs (and largely ignored by the FEC). *See* Br. 7, 22-23; Reply 15-18. Instead, the panel opinion reiterated a line of precedent starting with *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), which recognizes that FOIA exemptions are not themselves mandatory bars to disclosure. Op. 11. But as Plaintiffs noted in their reply, that observation "is irrelevant," as Plaintiffs are not pursuing a freestanding claim under FOIA but rather claims that the Commission's action "contravenes its own regulations, inexplicably departs from historical practice, and strikes a balance that conflicts with this Court's precedents." Reply 14-15.

The panel also concluded that "the trustee's privacy interest in his representational capacity is minimal," because it concerns only "[i]nformation relating to business judgments and relationships." Op. 13. That was demonstrably wrong and conflicts with circuit precedent: Interests in nondisclosure are in no way lessened simply because "the references . . . deal[]" with acts done by the person in "their professional capacit[y]." *Alexander & Alexander Servs., Inc. v. SEC*, No. 92-cv-1112, 1993 WL 439799, at *10 (D.D.C. Oct. 19, 1993). Indeed, this Court in *AFL-CIO* held that identifying information implicated persons' privacy interests even though it concerned their actions as "officials[] [and] employees," not actions undertaken in any personal capacity. 333 F.3d at 172, 177-78. Moreover, the trust

has a compelling interest not in its own right, but because disclosure of its name threatens to reveal the identity of the trustee. This Court has recognized that where disclosure of business records threatens to reveal protected information about a natural person, such disclosures implicate privacy interests. *See Multi Ag Media LLC v. Dep't of Agric.*, 515 F.3d 1224, 1230 (D.C. Cir. 2008). The panel failed to engage with that conflicting precedent.

The FEC's disclosure of Plaintiffs' identities violates the Administrative Procedure Act for the additional reason that the FEC cannot provide any "coherent explanation for [this] decision"; it is therefore "arbitrary and capricious for want of reasoned decisionmaking." *Fox v. Clinton*, 684 F.3d 67, 69, 75 (D.C. Cir. 2012). The Disclosure Policy requires balancing "the Commission's interest in promoting its own accountability and in deterring future violations" against "consideration of the respondent's interest in the privacy of association and belief guaranteed by the First Amendment." Disclosure Policy, 81 Fed. Reg. at 50,703. However, circuit precedent forecloses any public interest the Commission may assert to justify disclosure of Plaintiffs' identities. *See* Br. 28-29.

For information about the identity of persons named in FEC enforcement files, this Court has *already decided* that the balance conclusively tips in favor of the "substantial" privacy interest of targets and witnesses in law enforcement investigations, while the Commission's interest in disclosure is "insubstantial";

accordingly, disclosure is "categorical[ly]" barred absent "compelling evidence" disclosure would confirm or refute allegations of illegal agency activity. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991). The panel acknowledged that *SafeCard* held that "an agency may . . . withhold 'the names and addresses of third parties'" mentioned in its files, Op. 13 n.12, but never grappled with the implications of its conclusive weighing of privacy interests for disclosure.

The FEC's "conclusory [and] unsupported" statements fall far short of what is necessary to support the FEC's policy. *Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1331 (D.C. Cir. 2014) (citation omitted). The Commission offers no explanation how disclosure promotes deterrence when the Agency *never found Plaintiffs engaged in any wrongdoing*. *See* Br. 54 (noting *AFL-CIO*, 333 F.3d at 178, questioned "how releasing investigatory files will deter future violations in cases where . . . the respondents have been cleared of wrongdoing"). And the FEC's overbroad "accountability" interest, that "the public must have access to the identities of persons" "to confirm the FEC's nonpartisan enforcement of FECA," FEC Br. 29, would justify disclosing the name of *every person* even tangentially involved in any investigation, to confirm that the Commission did not favor them in enforcement decisions. This Court requires compelling evidence of improper favoritism to justify such disclosures. *SafeCard*, 926 F.2d at 1206. The panel opinion failed to engage with that conflicting precedent. The Commission's six-

person, bipartisan membership is enough to assure the public that identifying information is not being suppressed because of political favoritism.

CONCLUSION

For the foregoing reasons, this case should be reheard by the full Court.

Respectfully submitted,

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

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 3786 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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

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/s/ John P. Elwood
Counsel for John Doe 2

CERTIFICATE OF SERVICE

Pursuant to D.C. Circuit Local Rule 25(c), I hereby certify that on this 28th day of May, 2019, I electronically filed the foregoing Plaintiffs-Appellants' Petition for Rehearing En Banc with the Court by using the CM/ECF system. All parties to the case have been served through the CM/ECF system.

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/s/ John P. Elwood
Counsel for John Doe 2

ADDENDUM

PUBLIC ADDENDUM – MATERIAL UNDER SEAL IN SEPARATE SUPPLEMENT

Index to Addendum to Plaintiff-Appellants' Petition for En Banc Rehearing

Exhibit	Description
A	Panel's Opinion (April 12, 2019)
B	Certificate as to Parties, Rulings, and Related Cases
C	Corporate Disclosure Statements

Exhibit A

PUBLIC COPY – SEALED INFORMATION DELETED

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 19, 2018 Decided April 12, 2019

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)

John P. Elwood argued the cause for appellants. With him on the briefs were *Michael S. Dry*, *Katherine Cooperstein*, *William W. Taylor III*, *Carlos T. Angulo,* and *Dermot Lynch*.

Haven G. Ward, Attorney, Federal Election Commission, argued the cause for appellee. With her on the brief were *Kevin Deeley*, Associate General Counsel, *Charles Kitcher*, Acting Assistant General Counsel, and *Robert W. Bonham III*, Senior Attorney.

Adav Noti, *Mark P. Gaber*, *Stuart C. McPhail*, and *Adam J.*

Rappaport were on the brief for *amici curiae* Citizens for Responsibility and Ethics in Washington and Anne Weismann in support of Federal Election Commission and affirmance.

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

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* HENDERSON.

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

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

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 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

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[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."

[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).

/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 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

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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).

of authority to disclose anything else.[5] And so they say that if the Commission publicly releases the additional material 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 long-standing 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

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[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).

[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.

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 "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

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[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*. 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).

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).

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]

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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.

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 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]

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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

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] 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.

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disclosure discretion, *see, e.g.*, *Canadian Commercial Corp. v. Dep't of the Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008).

[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).

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 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.

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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 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

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

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 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.

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[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.

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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]

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

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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.

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.

Exhibit B

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

JOHN DOE 1, ET AL., *Plaintiffs-Appellants*, v. FEDERAL ELECTION COMMISION *Defendant-Appellee.*	No. 18-5099

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(1) Parties

Pursuant to D.C. Circuit Rule 28(a)(1)(A), Plaintiffs-Appellants, through counsel, certify as follows as to the Parties and Amici in this appeal:

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

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

Intervenors and Defendants: The Center for Responsibility and Ethics in Washington ("CREW") and Anne Weismann unsuccessfully sought to intervene as defendants in the District Court.

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

Amici: When the District Court denied CREW's and Ms. Weismann's motion to intervene, it granted them leave to file an *amicus* brief in support of the FEC. The same amici filed an amicus brief on appeal.

(2) Rulings Under Review

Plaintiffs seek review of the District Court's order and opinion issued March 23, 2018, in *John Doe 1, et al. v. Federal Election Commission*, Civ. Action No. 17-2694 (ABJ) (D.D.C.) (ECF Nos. 46 and 47). *See* 2018 U.S. Dist. LEXIS 48135 (Mar. 23, 2018).

(3) Related Cases

CREW and Ms. Weismann filed a complaint against the FEC pursuant to 52 U.S.C. § 30109(a)(8), alleging that the FEC's decision with respect to the underlying administrative matter that is at issue in this case was contrary to law. The district court dismissed that complaint for lack of subject matter jurisdiction. *See CREW v. FEC*, 363 F. Supp. 3d 33 (D.D.C. 2018).

Dated: May 28, 2019

Respectfully Submitted,

/s/ William W. Taylor, III
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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2019, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to all filers registered in this case.

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

/s/ John P. Elwood
Counsel for Plaintiff-Appellant John Doe 2

Exhibit C

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

JOHN DOE 1, ET AL., *Plaintiffs-Appellants*, v. FEDERAL ELECTION COMMISION *Defendant-Appellee.*	No. 18-5099

CORPORATE DISCLOSURE STATEMENT[1]

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

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

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

Respectfully Submitted,

/s/ William W. Taylor, III
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[1] Plaintiffs have filed a sealed version of this Disclosure Statement with this Court.

/s/ John P. Elwood
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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2019, I electronically filed the foregoing using the court's CM/ECF system, which will send notification of such filing to all filers registered in this case.

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

/s/ John P. Elwood
Counsel for Plaintiff-Appellant John Doe 2