IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1	)	
and	)	**EMERGENCY MOTION**
JOHN DOE 2	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 17-cv-2694 (ABJ)
	)	ORAL ARGUMENT REQUESTED
FEDERAL ELECTION COMMISSION	)	
Defendant.	)	

PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and LCvR 65.1, Plaintiffs, by and through undersigned counsel, hereby move the Court for a Temporary Restraining Order and Preliminary Injunction enjoining Defendant, the Federal Election Commission, a federal agency, from disclosing portions of the investigative record in Matter Under Review 6920 that identify Plaintiffs. Plaintiffs have exhausted any other administrative remedies available to them through the Federal Election Commission's administrative process.

In support of this motion, Plaintiffs rely upon the attached memorandum of points and authorities. A proposed order is attached. Oral argument is respectfully requested.

Dated: December 15, 2017

Respectfully submitted,

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*****EMERGENCY MOTION*****

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1	)	
and	)	
JOHN DOE 2	)	
Plaintiffs,	)	
v.	)	Civil Action No.:
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FEDERAL ELECTION COMMISSION	)	
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PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

Pursuant to Fed. R. Civ. P. 65 and LCvR 65.1, Plaintiffs, an individual, John Doe 1, and a trust, John Doe 2, by and through undersigned counsel, respectfully move this Court for an order enjoining the Federal Election Commission ("FEC") from disclosing Plaintiffs' identities when, pursuant to 11 C.F.R. § 5.4(a)(4), it makes the investigative materials from Matter Under Review ("MUR") 6920 available for public inspection. Disclosure of Plaintiffs' identities is prohibited by law, including the FEC's organic statute, the Federal Election Campaign Act ("FECA"), the FEC's own regulations, and the Administrative Procedure Act ("APA"). Neither Plaintiff was a respondent in MUR 6920. Thus, there has been no finding that either violated FECA. Disclosing that Plaintiffs' were investigated in connection with MUR 6920 would result in certain harm to Plaintiffs' reputations. Upon information and belief, the documents the FEC intends to make public include internal memoranda compiled by the FEC staff during the course of its law enforcement investigation, in which the FEC staff insinuated that Plaintiffs participated in a violation of FECA. In the absence of any finding by the Commission that Plaintiffs engaged in any wrongdoing, the disclosure of their identities in the context of staff-generated law enforcement documents impermissibly serves as a de facto public reprimand when the Commission has not followed the procedures carefully elaborated by Congress in FECA for finding a violation. Such unfair and illegal disclosure is sure to cause Plaintiffs considerable harm. By contrast, the FEC would not be harmed, and the public has no interest in the disclosure of the identities of targets or witnesses of a law enforcement investigation in the absence of a finding of wrongdoing.

A temporary restraining order is necessary to preserve the status quo in this case in order to give the Court sufficient time to adjudicate the merits of this matter. In the absence of such an

order, the case will be moot, and it will be impossible to remedy the harm that Plaintiffs suffer from the disclosure. The subject matter of this case, which touches on key First Amendment rights and the authority of the agency entrusted with defending those rights to name individuals it has investigated but against whom it has made no finding of liability, warrants careful scrutiny before irrevocable action is taken.

FACTUAL BACKGROUND

As more fully set forth in Plaintiffs' Complaint in this matter, at issue in this case is the FEC's decision to disclose the identity of an individual (John Doe 1) and an entity (John Doe 2) who were named in internal FEC documents compiling the results of an investigation into an alleged violation of the Federal Election Campaign Act ("FECA"). The individual and entity were part of this investigation because of their alleged participation in core First Amendment activity: a contribution to a Super PAC that made independent expenditures in support of candidates for federal office. *See generally Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

The FEC investigation at issue in this matter resulted in a conciliation agreement among three entities, and one individual (collectively, "Respondents"), and the FEC, wherein the FEC found violations of FECA and Respondents agreed to pay a civil penalty without admitting liability. Significantly, neither Plaintiff was a party to the conciliation agreement, and the FEC made no findings of any violation against them. Nor did the FEC make a final determination that there was no reason to believe that they violated FECA. The FEC now plans to make public Plaintiffs' names as part of its release of documents in connection with that matter.

The underlying investigation at issue began at the FEC on or around February 27, 2015, when a complaint was filed by a third party alleging violations of FECA relating to a

contribution by American Conservative Union, an organization organized under Section 501(c)(4) of the Internal Revenue Code, to Now or Never PAC, an independent expenditure-only committee (known colloquially as a "Super PAC"). The complaint also named Now or Never PAC's treasurer and an unknown respondent. During its investigation, FEC staff prepared various memoranda that summarized the actions of the four Respondents and included references to Plaintiffs and their alleged roles in the conduct at issue. After an investigation, the FEC reached a conciliation agreement with a number of entities and individuals. Neither Plaintiff was a party to the conciliation agreement.

After the Commission accepted the conciliation agreement, counsel for one of the respondents, Government Integrity, LLC ("Government Integrity") and counsel for Plaintiffs objected to any potential release of their names in connection with the release of the investigative file in MUR 6920. The FEC took these objections under consideration. Counsel for the FEC's Enforcement Division informed counsel for Government Integrity on November 29, 2017 that it would provide forty-eight hours' notice before releasing any investigative materials in MUR 6920.

On December 12, 2017, the FEC informed counsel for Government Integrity during a telephonic conference that the FEC intended to release certain materials from its investigative file in MUR 6920. These materials included the reports of the FEC's general counsel, the briefs drafted as part of the administrative enforcement proceedings, and the certifications of the Commission's votes. The Commission has not advised counsel for Plaintiffs as to which documents it intends to release, and it has not provided advance copies of these documents to Plaintiffs. However, the Commission informed counsel for Government Integrity that it does not intend to redact Plaintiffs' names from the materials that it releases. Counsel for Government

Integrity informed the FEC that it would notify Plaintiffs of the FEC's position regarding release of Plaintiffs' names in these materials. When asked the basis for its decision to release this information in light of Plaintiffs' objections, the FEC did not articulate its reasons and stated only that it was following its policies. On December 14, 2017, counsel for the FEC advised counsel for Plaintiffs that the FEC would release documents identifying Plaintiffs on or after December 18, 2017 at 5:00 p.m. Therefore, Plaintiffs anticipate that their identities will be disclosed by the FEC in the absence of a temporary restraining order or other injunctive relief.

LEGAL STANDARD

"The standard for obtaining injunctive relief through either a temporary restraining order or a preliminary injunction is well established." *Gomez v. Kelly*, 237 F. Supp. 3d 13, 14 (D.D.C. 2017). In assessing whether to grant such relief, a court must balance four factors: "(1) whether the movant is substantially likely to succeed on the merits; (2) whether the movant would suffer irreparable injury if the injunction were not granted; (3) whether an injunction would substantially injure other interested parties; and (4) whether the public interest would be furthered by the injunction." *Citizens for Responsibility and Ethics in Washington v. Cheney*, 577 F. Supp. 2d 328, 334 (D.D.C. 2008). "In applying this four-factored standard, district courts employ a sliding scale under which a particularly strong showing in one area can compensate for weakness in another." *Id.* at 334-35. Accordingly, "the D.C. Circuit has explained: To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision . . . be absolutely certain . . . if the other elements are present . . . it will ordinarily be enough that the plaintiff has raised substantial questions going to the merits." *Id.* at 335 (quoting *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). For instance, "a court may issue injunctive relief upon 'a particularly strong likelihood of success on the

merits even if there is a relatively slight showing of irreparable injury.'" *Alf v. Donley*, 666 F. Supp. 2d 60, 69 (D.D.C. 2009) (quoting *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995)).

ARGUMENT

Plaintiffs satisfy all four of the requirements needed to justify a TRO or preliminary injunction in this case. *First*, the FEC's imminent disclosure of Plaintiffs' identities violates FECA, the APA, and the FEC's own regulations, all of which guarantee that the identities of targets or witnesses of an investigation into violations of FECA are protected from disclosure in this sensitive area of the law. *Second*, Plaintiffs stand to suffer irreparable harm to their reputations. *Third*, the FEC would not be injured by this temporary injunction, as Plaintiffs do not object to the disclosure of the portions of those documents – which relate to conduct that occurred more than five years ago – that are necessary to deter violations of campaign finance law and explain the FEC's factual and legal basis for its decision. *Fourth*, there is no public interest in the disclosure of the identities of targets and witnesses in law enforcement investigations against whom there has been no finding of wrongdoing, and the public interest is furthered by careful examination of the FEC's decision, which necessarily implicates fundamental First Amendment rights to political participation. Accordingly, Plaintiffs respectfully request that this Court enter an order enjoining the FEC from disclosing materials that reveal their identities until the merits of this action can be fully addressed and considered.

A. Plaintiffs are likely to succeed on the merits

The grounds for relief set forth in Plaintiffs' complaint demonstrates a strong likelihood of success on the merits. Plaintiffs' claim for relief is based on 5 U.S.C. § 706(2) of the APA, which empowers this Court to "hold unlawful and set aside agency action, findings, and

conclusions" that are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," or "contrary to constitutional right, power, privilege, or immunity." The FEC's decision to disclose Plaintiffs' names is contrary to law and is otherwise arbitrary, capricious, and an abuse of discretion. Specifically, the FEC's decision contravenes Exemption 7(C) of the Freedom of Information Act ("FOIA"), and is contrary to FECA and the FEC's own regulations. In addition, the FEC's failure to provide any substantive reason for its decision leaves this Court unable to evaluate that decision, and thus its final action was arbitrary and capricious. *See, e.g.*, *Moon v. U.S. Dep't of Labor*, 727 F.2d 1315, 1318 (D.C. Cir. 1984) ("an agency must provide a reasoned explanation for its actions and articulate with some clarity the standards that governed its decision").

1. Exemption 7(C) categorically prohibits disclosure of Plaintiffs' names

Exemption 7(C) exempts the disclosure of "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). "Exemption 7(C) 'affords broad privacy rights to suspects, witnesses, and investigators.'" *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991) (quoting *Bast v. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)) (alterations omitted)). To protect those rights, the D.C. Circuit has held that Exemption 7(C) *categorically* prevents an agency from disclosing information that falls within its ambit.[2] *See id.* at 1206; *see also The Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 896 (D.C. Cir. 1995)

[2] The one exception to this categorical rule is where "there is compelling evidence that the agency . . . is engaged in illegal activity, and access to the names of private individuals appearing in the agency's law enforcement files is necessary in order to confirm or refute that evidence." *SafeCard Servs., Inc.*, 926 F.2d at 1205-06. Those circumstance are not present here.

("to the extent any information contained in 7(C) investigatory files would reveal the identities of individuals who are subjects, witnesses, or informants in law enforcement investigations, those portions of responsive records are categorically exempt from disclosure"). As such, "the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) . . . [are] exempt from disclosure." *Id.*

Following *SafeCard Services*, D.C. Courts have recognized that Exemption 7(C) is not only an exemption from a FOIA request but may be used by an individual to affirmatively prevent the disclosure of protected information, a so-called "reverse FOIA" action. *See Tripp v. Dep't of Defense*, 193 F. Supp. 2d 229, 239 (D.D.C. 2002). This court has held elsewhere that Exemption 7(C) prevents the disclosure of the names and addresses of individuals compiled in FEC enforcement investigations. In that case, the FEC concluded its investigation and, as here, sought to disclose the investigative record, which included "names and identifying information of hundreds of [respondents'] employees, officials, and volunteers." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Fed. Election Comm'n*, 177 F. Supp. 2d 48, 54 (D.D.C. 2001) (hereinafter "*AFL-CIO*"). In that case, the respondents filed suit, relying "on Exemption 7(C) to protect the identities and personal information of third party individuals, such as officials, volunteers, members and employees of the DNC and AFL-CIO, who are referred to in the investigative files." *Id.* at 61.

The court rejected the FEC's argument that the proper analysis was for the court to weigh the privacy interests of the named individuals against the public interest in the results of an FEC enforcement investigation, noting that the D.C. Circuit held in *SafeCard Services* that Exemption 7(C) established a categorical rule against disclosure. *See id.* As the district court held: "names are exempt from disclosure—regardless of the public interest asserted." *Id.* Accordingly, the

district court ultimately held that "the FEC's refusal to apply Exemption 7(C) to bar release of the names and other identifying information of third-party individuals referred to in its investigative files is arbitrary, capricious, and contrary to law." *Id.* at 63.

This case is materially indistinguishable from *AFL-CIO*. Neither Plaintiff was named as a respondent in MUR 6920. There has been no finding that either of them violated FECA. In this posture, Plaintiffs are third parties to the investigative process before the FEC. Disclosing their identities would reveal that the FEC had examined their conduct in connection with its investigation, precisely the privacy interest that the D.C. Circuit has held is protected by Exemption 7(C). Accordingly, given the D.C. Circuit's categorical bar on an agency releasing information that falls within the ambit of Exemption 7(C), Plaintiffs have demonstrated a significant likelihood of success.

2. Disclosure of Plaintiffs' names is contrary to FECA and the FEC's regulations

a. Disclosure of the fact Plaintiffs were investigated, when no finding of wrongdoing has been made, violates FECA

Nondisclosure of the details of an investigation is enshrined in FECA and the FEC's regulations. FECA provides that: "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).[3]

The exact scope of § 30109(a)(12)(A) is not clear, but even under a limited interpretation it prevents the disclosure of the names of non-respondents, because disclosing their names would reveal the fact of an investigation into their conduct. The D.C. Circuit has held that the main

[3] Plaintiffs have not consented to their identities being made public.

purpose of FECA's nondisclosure scheme is "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, 667 (D.C. Cir. 2001) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 n.6 (1958) (alterations and quotation marks omitted). In the *AFL-CIO* case, the FEC offered a much more limited interpretation of § 30109(a)(12)(A) that would prevent only "disclosure of the fact that an investigation is pending," *see Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Fed. Election Comm'n*, 333 F.3d 168, 174 (D.C. Cir. 2003) ("*AFL-CIO*"). However, in *AFL-CIO*, the D.C. Circuit made no holding as to the ultimate scope of § 30109(a)(12)(A). While the D.C. Circuit found that, under *Chevron* Step One, § 30109(a)(12)(A) was ambiguous, at Step Two it found that the interpretation of § 30109(a)(12)(A) set forth in the FEC's regulations, which provided for the disclosure of all investigative material, was not a permissible interpretation of the statute in light of First Amendment concerns. *Id.* at 175-179. Therefore, § 30109(a)(12)(A) must have continuing vitality after an investigation is concluded; otherwise it would run afoul of constitutional concerns. However, as one D.C. Circuit judge observed, even under the FEC's narrow interpretation of § 30109(a)(12)(A)'s nondisclosure provision, the disclosure of information that "would inevitably reveal upon publication the *fact* that [a person] had been investigated" would violate § 30109(a)(12)(A). *Id.* at 182 n.3 (Henderson, J., concurring).

Section 30109(a)(12)(A) prohibits the FEC from disclosing Plaintiffs' names, because to do so would disclose that there was an investigation into their conduct. FECA mandates disclosure of a conciliation agreement where the FEC makes findings that FECA has been violated or the fact that the FEC found no reason to believe a violation occurred. *See* 52 U.S.C. § 30109(a)(4)(B)(ii). Neither applies to a person whose conduct was examined as part of an

investigation into an alleged violation of FECA, and who thus was named in investigation documents generated in connection with the law enforcement investigation, but was never formally named a respondent. In these circumstances, disclosing Plaintiffs' identities would disclose the fact of an investigation into their conduct when no other provision of FECA permits or requires that disclosure. The purpose of § 30109(a)(12)(A), to protect the innocent accused, is wholly contravened if the FEC staff may freely make insinuations in its internal memoranda against individuals against whom the Commission has made and will make no finding, knowing that those insinuations will be made public. Accordingly, FECA prohibits the disclosure at issue here.

b. The FEC must justify its disclosure decisions under the First Amendment

Moreover, under the D.C. Circuit's interpretation of § 30109, the FEC's decision to disclose the contents of its investigative file implicates fundamental First Amendment concerns. *See AFL-CIO*, 333 F.3d at 175. Indeed, the D.C. Circuit held that 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.'" *Id.* at 170 (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)). Therefore, the FEC has the "unique prerogative to safeguard the First Amendment when implementing its congressional directives," because "every action the FEC takes implicates fundamental rights." *Van Hollen v. FEC*, 811 F.3d 486, 499-500 (D.C. Cir. 2016). The FEC carries out this prerogative by "tailoring the disclosure requirements to satisfy constitutional interests in privacy." *Id.* at 499.

In *AFL-CIO*, the D.C. Circuit applied this constitutional mandate to the FEC's decision to disclose the contents of its investigative file following the conclusion of its investigation. When weighing a disclosure requirement, courts "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 requirements to serve its interests." *AFL-CIO*, 333 F.3d at 176. It is not sufficient for the FEC to reiterate the governmental interests that support disclosure of information in the course of an investigation: the D.C. Circuit has "held that 'compelling *public* disclosure presents a separate first amendment issue' that requires a separate justification." *Id.* (quoting *Block v. Meese*, 793 F.2d 1303, 1315-16 (D.C. Cir. 1986)) (alterations omitted). In *AFL-CIO*, the FEC identified two interests that it alleged supported public disclosure of investigative materials: (1) deterring FECA violations; and (2) promoting the agency's own public accountability. *Id.* at 178. The FEC's recent disclosure policy does not disclose any additional interests. *See Disclosure of Certain Documents and Enforcement and Other Matters*, 81 Fed. Reg. 50,702 (Aug. 2, 2016). Accordingly, the FEC must demonstrate that its decision to disclose Plaintiffs' identities furthers these governmental interests. It cannot.

Disclosing Plaintiffs' identities would serve no deterrent function. There can be no deterrence value in disclosing the identities of non-respondents against whom no finding of liability has been made. The FEC has already named those it found to be responsible for violations of FECA and announced the penalties against them. For the same reasons, disclosing Plaintiffs' identities can say nothing about the integrity of the FEC's process. All of the pertinent facts that led to the FEC's finding in the conciliation agreement, and its reasons for reaching the conclusion that it did, may be disclosed. Therefore, the FEC's decision to disclose

Plaintiffs' identities is inconsistent with its obligation to safeguard the First Amendment when disclosing the contents of its investigative file.

c. Disclosure of Plaintiffs' identities violates the FEC's regulations

The FEC's own regulations also provide that disclosure of Plaintiffs' names would be improper.[4] "Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures." *Nat'l Cons. Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980). The FEC adopted its present disclosure policy in the wake of the D.C. Circuit's opinion in the *AFL-CIO* case, which replaced a more sweeping disclosure regime. *See Disclosure of Certain Documents and Enforcement and Other Matters*, 81 Fed. Reg. 50,702, 50,702-50,703 (Aug. 2, 2016). That policy permits the disclosure of documents deemed "integral to [the FEC's] decisionmaking process" and "integral to [the FEC's] administrative functions." *Id.* at 50,703. The present disclosure policy explicitly "does not alter any existing regulation or policy requiring or permitting the Commission to redact documents, including those covered by this policy, to comply with the FECA, the principles set forth by the court of appeals in *AFL-CIO*, and the FOIA." *Id.* at 50,704.

The FEC's regulations, which mandate limited disclosure of information conveying the results of the investigation and the Commission's analysis (by, for instance, directing that the report of the FEC's general counsel be made public), provide that the FEC will release only "non-exempt 52 U.S.C. 30109 investigatory materials." *See, e.g.*, 11 C.F.R. § 5.4(a)(4). Thus, "the material subject to disclosure," excludes those records that "are subject to the collateral provisions of the Freedom of Information Act." *See* 11 C.F.R. § 5.3(b). FEC regulations

[4] Plaintiffs reserve the right to challenge the legality of the regulations, to the extent that the FEC argues that its regulations mandate the disclosures at issue.

recognize Exemption 7(C) and exclude material falling under that exemption from disclosure.[5] *See* 11 C.F.R. § 4.5(a)(7)(iii).

As demonstrated above, Plaintiffs' names are categorically protected from disclosure by Exemption 7(C), so under the FEC's own regulations the FEC may not release those names to the public because they are protected from disclosure by Exemption 7(C).

In addition, as non-respondent third-party witnesses, Plaintiffs' identities are not integral to the FEC's decisionmaking process or its administrative functions. The FEC's regulations grant it the power to redact documents, such as the general counsel's report, that run afoul of FOIA, § 30109(a)(12)(A), or the First Amendment. The FEC regularly redacts material from documents its makes available to the public. The FEC's decision not to exercise that power in this case is contrary to its own regulations and FECA. The FEC has offered no explanation for this departure from the requirements of its own regulations.

Accordingly, it is plain that the FEC's action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

B. Plaintiffs stand to suffer irreparable injury in the absence of relief

In the absence of an order prohibiting the FEC from disclosing Plaintiffs' identities, Plaintiffs will suffer irreparable harm through damage to their reputations. "To be irreparable, an injury must be 'certain and great,' 'actual and not theoretical,' and 'of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm.'" *Fraternal Order of Police Library of Cong. Labor Comm. v. Library of Cong.*, 639 F. Supp. 2d 20, 24 (D.D.C. 2009) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

[5] FEC regulations generally provide that the Commission has the discretion to release records otherwise exempt under § 4.5(a), *see* 11 C.F.R. § 4.6, but that discretion cannot be interpreted to extend to § 4.5(a)(7)(iii) given the D.C. Circuit's holding in *SafeCard Services.*

Additionally, "[t]he injury also must be 'beyond remediation,' meaning: Mere injuries . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm." *Fraternal Order of Police Library of Cong. Labor Comm.*, 639 F. Supp. 2d at 24 (quoting *Chaplaincy of Full Gospel Churches*, 454 F.3d at 297-98). The injuries Plaintiffs stand to suffer if the FEC discloses Plaintiffs' names are imminent, as the FEC will very shortly release the investigative materials disclosing their names. As demonstrated below, this court and others have recognized the magnitude of the injuries that will inure to Plaintiffs in the absence of relief. Moreover, once Plaintiffs' names are disclosed, the genie cannot be put back in the bottle; if relief is not granted now, there is no remedy this Court can fashion that would restore Plaintiffs' anonymity.

This release is imminent and certain and will occur in the absence of relief from this Court. Thus, the harm that Plaintiffs will suffer is not theoretical. The release of information in this case has already drawn scrutiny from activist groups and the media,[6] and Plaintiffs' concerns that the proposed disclosure will expose them to an invasion of their privacy and the ensuing harm to their reputations are therefore well-founded.

As set forth in the attached Declaration of John Doe 1, Ex. A, disclosure of Plaintiffs' identities will directly and substantially harm their reputations, while disclosing confidential information about their political activity. John Doe 1 [redacted], and thus the disclosure that

[6] *See CREW Complaint Results in Record Post-Citizens United Penalty*, Citizens for Responsibility and Ethics in Washington (Nov. 20, 2017), https://www.citizensforethics.org/press-release/crew-complaint-results-record-post-citizens-united-penalty/; Julie Bykowicz, Wall St. J., *Elections Regulator Fines Conservative Groups Over Finance Infraction* (Nov. 20, 2017), https://www.wsj.com/articles/elections-regulator-fines-conservative-groups-over-finance-infraction-1511211219.

he was investigated in connection with an alleged violation of federal law stands to work serious reputational harm against him. Further, the materials that the FEC proposes to disclose suggest that John Doe 2 violated the law by failing to comply with an FEC subpoena. In addition, disclosure of Plaintiffs' alleged prior political activities would chill the future exercise of their free speech rights under the First Amendment.

These harms are sufficient to warrant a TRO or preliminary injunction. "[H]arm to reputation has been recognized repeatedly as a type of irreparable injury." *Brodie v. U.S. Dep't of Health and Human Servs.*, 715 F. Supp. 2d 74, 84 (D.D.C. 2010). The D.C. Circuit has held that "[t]he privacy interest at stake" in these circumstances is "substantial. 'There is little question that disclosing the identity of targets of law-enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm.'" *SafeCard Servs., Inc.*, 926 F.2d at 1205 (quoting *Bast v. Dep't of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)) (alterations omitted). Plaintiffs stand to suffer such serious harm given that the investigation into their conduct focused on a matter of significant interest to the public: the conduct of elections and political speech. Moreover, John Doe 1 [redacted] whose reputation will be implicated by the disclosure that he was connected to a law enforcement investigation by the FEC. *See Muhaisen v. John and Jane Does*, No. 17-cv-01575-PAB, 2017 WL 4012132, at *3 (D. Col. Sept. 12, 2017) ([redacted]); *Bruder v. Smith*, No. 05-74511, 2005 WL 3502269, at *4 (E.D. Mich. Dec. 22, 2005) ([redacted]). There has been no finding that there is reason to believe that Plaintiffs violated FECA – let alone a finding that Plaintiffs actually violated FECA – that would warrant this disclosure. Thus, disclosure of their identities

invites speculation that is harmful to Plaintiffs' reputations and is precisely the reason why, for the reasons set out above, the disclosure of their identities is unlawful.

Once the disclosure at issue is made in this case, the harm is irreparable. Information once disclosed cannot be undisclosed, and no amount of financial compensation can undo the reputational harm that would necessarily result if the FEC is permitted to make the disclosures that it intends to make here. Therefore, a TRO or preliminary injunction is necessary to prevent these irreparable injuries from coming to pass before the Court has had the opportunity to weigh the merits of this case.

C. The FEC would not be harmed by a TRO or injunction

Preventing the FEC from releasing the names of an individual and an entity who are non-respondents and, at this stage, essentially third-party witnesses, could not harm the agency or its mission. Plaintiffs do not oppose the release of the conciliation agreement or other investigative materials that would inform the public about the basis for the FEC's decision.[7] The release of the conciliation agreement itself is sufficient to communicate the FEC's position and deter any future violations of FECA. Any harm to the FEC or its mission by delaying the release of these names would be marginal at best; identifying Plaintiffs adds nothing except to needlessly and unlawfully expose the identities of non-respondents to a law enforcement investigation.

[7] The FEC therefore may not complain that any injunction issued by this Court would contravene its regulations, which require the disclosure of certain materials within 30 days of notice of the conciliation agreement. *See* 11 C.F.R. § 5.4(a)(4). The purpose of this action is, in part, to enforce compliance with this regulation. Plaintiffs further note that the FEC had previously agreed not to disclose certain documents during its consideration of Plaintiffs' request to redact the Plaintiffs' names, notwithstanding the expiration of the 30 day time period during the pendency of those considerations.

D. Delay to allow for consideration of the critical privacy and First Amendment interests at issue would further the public interest

The public can have no interest in the immediate disclosure of the names of non-respondents to a law enforcement investigation when there is no dispute that all of the information pertinent to understanding the findings and legal conclusions of that investigation may be disclosed in accordance with law. As the D.C. Circuit observed, the public's interest in the disclosure of the names of suspects, witnesses, and investigators compiled as part of a completed law enforcement proceeding is "insubstantial," and outside of circumstances not applicable to this case, "there is no reason to believe that the incremental public interest in such information would ever be significant." *SafeCard Servs., Inc.*, 926 F.2d at 1206.

By contrast, there is "a strong public interest in the exercise of free speech rights" and "protecting First Amendment rights." *See Pursuing Am.'s Greatness v. FEC,* 831 F.3d 500, 511-12 (D.C. Cir. 2016). The D.C. Circuit has stated that the FEC's decision to disclose information compiled as part of its investigative record must be in accord with the First Amendment. *See AFL-CIO*, 333 F.3d at 176-78. Accordingly, there is a strong public interest in ensuring that the FEC does not disclose more information regarding its investigations than is necessary to carry out its governmental functions. The FEC's conduct here, which would in essence provide it an avenue to make public its suspicions and insinuations against private individuals without the safeguards of the administrative process carefully delineated by Congress in FECA, warrants significant and careful examination to ensure that the public's interest in the proper and lawful enforcement of FECA is vindicated. In the absence of an order prohibiting the disclosure of Plaintiffs' names, the First Amendment interests will be lost and the public interest harmed.

Accordingly, all four of the prongs of the test governing whether a TRO or a preliminary injunction should issue demonstrate that such relief is appropriate in this case.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court enter the proposed order restraining or enjoining the FEC from releasing Plaintiffs' names as part of its investigative file.

Dated: December 15, 2017

/s/ William W. Taylor, III
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Adam Fotiades (D.C. Bar # 1007961)
Dermot W. Lynch (D.C. Bar # 1047313)[8]
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kcooperstein@velaw.com
Counsel for John Doe 2

[8] Application for admission pending.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1	)	
and	)	
JOHN DOE 2	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 17-cv-2694 (ABJ)
FEDERAL ELECTION COMMISSION	)	
Defendant.	)	

DECLARATION OF JOHN DOE 1 IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I, John Doe 1, being over the age of 18, do hereby declare and state as follows:

1. [redacted]

2. Since 2012, I have served as the trustee for John Doe 2.

3. I understand that, in February 2015, the Federal Election Commission ("FEC") opened an investigation into certain contributions to Now or Never PAC. This investigation was titled Matter Under Review ("MUR") 6920.

4. I understand that MUR 6920 was concluded with the execution of a conciliation agreement on November 3, 2017. Neither I nor John Doe 2 were named as respondents in this conciliation agreement, and the FEC has not notified me that it has made any findings that I or

John Doe 2 violated federal election laws. My attorney was informed that I was not a subject of the investigation.

5. [redacted]

6. On November 21, 2017, my attorney and counsel for John Doe 2 submitted a letter to the FEC objecting to the release of their names as part of the investigative file for MUR 6920 and setting out the legal basis for our objection.

7. On December 13-15, 2017, my attorney held a number of telephone conversations with attorneys from the FEC reiterating these concerns.

8. The FEC has denied our request and has indicated that the release of the investigative file in MUR 6920 is imminent.

9. The release of the investigative file, which names me and John Doe 2, will reveal my involvement in this case.

10. The disclosure that John Doe 2 and I 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.

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.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on Date: December 15, 2017

/s/ John Doe 1
JOHN DOE 1[1]

[1] Original copy on file with Counsel for John Doe 1.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1	)	
and	)	
JOHN DOE 2	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 17-cv-2694 (ABJ)
FEDERAL ELECTION COMMISSION	)	
Defendant.	)	

CERTIFICATION OF COUNSEL PURSUANT TO LCvR 65.1(a)

Pursuant to LCvR 65.1(a), I hereby certify that for each Defendant, true and correct copies of the Plaintiffs' Complaint, Emergency Motion for Temporary Restraining Order, Memorandum of Points and Authorities in Support of Motion for Temporary Restraining Order and Preliminary Injunction, and all other papers filed with the Court on December 15, 2017, were hand delivered to the Federal Election Commission, 999 E Street N.W., Washington, D.C. 20436. True and correct copies of the foregoing were also delivered by electronic mail to the Federal Election Commission on December 15, 2017, and confirmation of receipt was received. Plaintiffs, by counsel, have also provided notice, by email to Charles Kitcher and Kevin Deeley, who represent Defendant, of Plaintiffs' intent to file the foregoing papers with this Court on December 15, 2017, and that Plaintiffs are requesting a hearing, at the Court's earliest convenience, on their Motion for Temporary Restraining Order and Preliminary Injunction.

December 15, 2017

Respectfully submitted,

/s/ William W. Taylor, III
William W. Taylor, III (D.C. Bar # 84194)
Adam Fotiades (D.C. Bar # 1007961)
Dermot W. Lynch (D.C. Bar # 1047313)[1]
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Counsel for John Doe 1

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Craig Margolis (D.C. Bar # 454783)
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Counsel for John Doe 2

[1] Application for admission pending.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1	)	
and	)	
JOHN DOE 2	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 17-cv-2694 (ABJ)
FEDERAL ELECTION COMMISSION	)	
Defendant.	)	

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, the Memorandum and Exhibits in support thereof, any opposition, any reply thereto, and any oral argument, it is hereby:

ORDERED that Plaintiffs' Motion for Temporary Restraining Order is GRANTED;

IT IS FURTHER ORDERED that a Temporary Restraining Order is hereby entered against Defendant.

IT IS FURTHER ORDERED that pursuant to the Order, Defendant shall not disclose to the public the names or other information identifying Plaintiffs compiled as part of the investigative record in Matter Under Review 6920 until the resolution of the underlying case on the merits, or by further order of this Court.

SO ORDERED.

DATED: December ___, 2017

_____
United States District Judge

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with LCvR 7(k), listed below are the names and addresses of the attorneys and parties entitled to be notified of the proposed order's entry:

_____

Federal Election Commission
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Washington, D.C. 20436
Counsel for the Federal Election Commission

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Adam Fotiades (D.C. Bar # 1007961)
Dermot W. Lynch (D.C. Bar # 10047313)
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Counsel for John Doe 2