No. 18-5099

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE 1, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

RESPONSE TO PETITION FOR REHEARING EN BANC
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GLOSSARY

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
FOIA	Freedom of Information Act
J.A.	Joint Appendix
OGC	Office of General Counsel

Appellants have failed to demonstrate that this case is the type of extraordinary matter warranting *en banc* review. The panel's opinion presents nothing more than a routine application of longstanding principles of statutory interpretation in an otherwise garden-variety administrative law matter. As the panel correctly held, appellee Federal Election Commission's ("FEC" or "Commission") disclosure of appellants' identities as a part of its public enforcement file for a matter in which appellants had significant involvement in a violation of the Federal Election Campaign Act ("FECA") would not violate FECA or the Freedom of Information Act ("FOIA"). Moreover, as the panel observed, such disclosure would be consistent with this Court's most applicable precedent addressing the scope of the FEC's disclosure authority, *American Federation of Labor & Congress of Industrial Organizations v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) ("*AFL-CIO*").

The plenary review sought by appellants is "not favored," and they have failed to show, as they must, that either (1) *en banc* determination is "necessary" to "maintain uniformity of the court's decisions," or (2) "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). Appellants do not claim that there are any questions of exceptional importance in this case. And instead of demonstrating any actual conflict among this Court's rulings, they devote the overwhelming majority of their petition to re-arguing the merits and

requesting "[e]n banc review . . . to correct the panel's decision." (Pls.-Appellants' Pet. For Reh'g En Banc ("Pet.") at 10 (Doc. # 1789715).)

But "mere disagreement" with the outcome is not a valid basis for rehearing. *Jolly v. Listerman*, 675 F.2d 1308, 1311 (D.C. Cir. 1982) (Robinson, III, J., concurring in denial of rehearing *en banc*). Rather, "it flies in the face of both the intent of Congress and Supreme Court precedent to use the Rule 35 procedure merely to correct individual injustices or mistakes." *Church of Scientology of Cal. v. Foley*, 640 F.2d 1335, 1341 (D.C. Cir. 1981) (Robinson, J,. dissenting).

To the extent appellants do claim to identify purported conflicts, those conflicts are illusory. Appellants do not claim that the panel's ruling conflicts with *AFL-CIO*; instead, appellants mislabel the panel's rejections of certain of their merits arguments as "conflicts" with previous cases' statements of general principles of administrative law. First, appellants incorrectly argue that the panel was wrong to hold that the Commission has broad disclosure authority; but even if appellants were right, the panel's holding still does not conflict with previous case law stating that agencies are bound by the power delegated to them by Congress, as appellants claim. (Pet. at 3-11.) Second, appellants also claim that the panel should have concluded that the FEC departed from its previous disclosure practices. (Pet. at 12-14.) That is incorrect, but even if the panel got it wrong, its actual holding in the FEC's favor still says nothing that conflicts with the general

principle that agencies should explain such changes when they occur, as appellants contend. (Pet. at 11-17.) Appellants' desire to relitigate the panel ruling does not justify rehearing under Rule 35.

Because the panel's decision neither conflicts with Circuit or Supreme Court law, nor involves questions of exceptional importance — as appellants effectively concede (*see* Pet. at 1) — they have failed to meet the high standard for *en banc* review. Their petition should be denied.

BACKGROUND

I. DISCLOSURE OF ENFORCEMENT MATTERS

When an enforcement matter is initiated, appellee FEC must follow a series of steps. 52 U.S.C. § 30109(a). If the FEC finds "reason to believe" a violation of FECA occurred, an investigation may ensue. *Id.* § 30109(a)(1), (2). If the agency then finds "probable cause to believe," it must attempt to conciliate with the respondent. *Id.* § 30109(a)(4)(A). If negotiations fail, the FEC can sue the respondent to enforce FECA. *Id.* § 30109(a)(6)(A). If, at any point, four or more Commissioners do not vote to proceed to the next step, the matter may then be terminated and the complaint dismissed. *See id.* § 30106(c). That dismissal may then be challenged by the complainant by filing a petition in federal district court. *Id.* § 30109(a)(8)(A).

While a matter is ongoing, FECA forbids the Commission or any other person from making the investigation public absent the respondent's consent. *Id.* § 30109(a)(12)(A). This prohibition, however, ends upon the matter's conclusion. *AFL-CIO*, 333 F.3d at 179.

Once an enforcement matter is concluded, FECA, FEC regulations, and FOIA require making resolution of the matter public regardless of how it is resolved. FECA requires publication of conciliation agreements and "determination[s] that a person has not violated" FECA. 52 U.S.C. § 30109(a)(4)(B)(ii). An FEC regulation implements this provision, requiring publication of "finding[s] of no reason to believe or no probable cause to believe" or other "terminat[ion of] proceedings" and "the basis therefor." 11 C.F.R. § 111.20(a). FOIA also requires disclosure of orders, opinions, and votes. 5 U.S.C. § 552(a)(2)(A), (a)(5).

In response to *AFL-CIO*, the Commission refined its disclosure policy several times, culminating in the adoption of *Disclosure of Certain Documents in Enforcement & Other Matters*, 81 Fed. Reg. 50,702-01 (Aug. 2, 2016) ("Disclosure Policy"). While *AFL-CIO* found that the FEC could release more information than what FECA expressly requires in section 30109(a)(4)(B)(ii), it held that the then-governing regulation, 11 C.F.R. § 5.4(a)(4), requiring blanket

disclosure of entire investigation files, was unconstitutionally overbroad. 333 F.3d at 179.

After carefully weighing the various interests involved, the FEC now limits disclosure to a set of documents that are "integral to [the FEC's] decisionmaking process." Disclosure Policy, 81 Fed. Reg. at 50,703. These documents "either do not implicate the [*AFL-CIO*] Court's concerns or, because they play a critical role in the resolution of a matter, the balance tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information." *Id.*

II. ADMINISTRATIVE PROCEEDINGS

An administrative complaint was filed alleging that an "unknown respondent" made a $1.7 million contribution in the name of the American Conservative Union to the political committee Now or Never PAC in violation of FECA's prohibition on contributions in the name of another, 52 U.S.C. § 30122. (Admin. Compl.[1]) The Commission later identified Government Integrity, LLC as

[1] https://www.fec.gov/files/legal/murs/6920/17044434345.pdf.

the "unknown respondent" and found reason to believe that it had violated FECA. (Jan. 24, 2017 Certification[2]; July 11, 2017 Certification.[3])

Discovery led the Office of General Counsel ("OGC") to conclude that appellant John Doe 1, in his capacity as trustee of appellant John Doe 2, [redacted] and the trust provided the funds that were used to make the contribution at issue. (J.A. 120-21, 123-24, 543 & n.2.) OGC recommended that the Commission find reason to believe that the trust and the trustee, in his official capacity, violated FECA. (*Id.*) Two Commissioners approved; three opposed. (J.A. 135-36.) Several Commissioners issued statements explaining their votes, all accepting that the trust provided the funds. (J.A. 205; J.A. 208-09.) [redacted] (Op. at 4.)

The Commission approved a conciliation agreement with, among others, Government Integrity, in which the respondents agreed to pay a $350,000 penalty. (Oct. 24, 2017 Certification[4]; Conciliation Agreement (Nov. 3, 2017).[5]) It then

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2 https://www.fec.gov/files/legal/murs/6920/17044434423.pdf.

3 https://www.fec.gov/files/legal/murs/6920/17044434511.pdf.

4 https://www.fec.gov/files/legal/murs/6920/17044434742.pdf.

5 https://www.fec.gov/files/legal/murs/6920/17044434756.pdf.

closed the file, thereby concluding the enforcement proceedings. (Oct. 24, 2017 Certification.[6])

Appellants thereafter requested redaction of their identities from any documents to be disclosed under the Disclosure Policy, which include Commission voting certifications, Commissioners' statements explaining their votes, various General Counsel Reports, a response by Government Integrity, and designation of counsel forms. (*See* J.A. 93-211.) After careful consideration, the Commission determined not to deviate from its disclosure policy. (*Id.*)

III. PROCEDURAL HISTORY

Appellants filed suit seeking a permanent injunction barring the FEC from disclosing their identities (J.A. 11), which the district court denied, *Doe v. FEC*, 302 F. Supp. 3d 160 (D.D.C. 2018).[7]

A panel of this Court affirmed. *Doe v. FEC*, 920 F.3d 866 (D.C. Cir. 2019). In an opinion authored by Senior Judge Randolph, the panel majority rejected the contention "that FECA's specification of what the Commission is required to disclose deprives the Commission of authority to disclose anything else." (Op. at

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[6] https://www.fec.gov/files/legal/murs/6920/17044434742.pdf.

[7] Following the district court's ruling in the FEC's favor, the agency consented to appellants' motion for a stay pending appeal, which the court granted. (J.A. 9-10 (Minute Order (Apr. 10, 2018)).)

6-7; *see also id.* at 9 ("'[D]eterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by' the statute." (quoting *AFL-CIO*, 333 F.3d at 179)).) The panel observed that FECA endows the FEC with broad rulemaking authority and that similar grants of authority "'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.'" (Op. at 8 & n.8, 9 (quoting *FCC v. Schreiber*, 381 U.S. 279, 291-92 (1965)).)

The particular disclosures at issue here, the panel concluded, were authorized by the FEC's "longstanding regulation requiring it to make public its action terminating a proceeding and 'the basis therefor.'" (Op. at 7 (quoting 11 C.F.R. § 111.20(a))). The panel determined that the Commission had properly "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.'" (Op. at 9 (quoting Disclosure Policy, 81 Fed. Reg. at 50,703) & n.9.)

The panel unanimously held that appellants' remaining claims failed, including appellants' claim that FOIA Exemption 7(C) bars disclosure. (Op. at 10-13; Henderson, J., concurring in part and dissenting in part, at 1 & n.1.) First, the panel concluded that an "agency cannot possibly violate FOIA" if it "discloses

information pursuant to other statutory provisions or regulations." (Op. at 11.)

Second, the panel found that, "[i]n any event, there is nothing to plaintiffs' complaint that their privacy would be unduly compromised if their identities were revealed." (Op. at 12.) The panel cited appellants' extensive involvement in the uncontested FECA violations of Government Integrity, [redacted]. (*Id.*) The panel also pointed out that a non-individual like the trust has no protected privacy interests under Exemption 7(C), and that "the trustee's privacy interest in his representational capacity is minimal" since "[i]nformation relating to business judgments and relationships does not quality for exemption." (Op. at 12-13.)

ARGUMENT

I. THE PANEL'S OPINION REGARDING THE FEC'S STATUTORY AUTHORITY DOES NOT CREATE A CONFLICT

The panel's opinion correctly held that the FEC has the authority to disclose the information at issue and that ruling is not in conflict with any Circuit or Supreme Court decision. It is instead merely an application of well-established principles of statutory interpretation to the particular circumstances of this case that is consistent with precedent. Appellants identify no case stating that the FEC does *not* have the authority to release any information in addition to the minimum disclosures that FECA requires, and there is no such case. To the contrary, this Court's most on-point precedent held just the opposite: In *AFL-CIO*, this Court

found the FEC's interests in deterrence and accountability "may well justify releasing more information than the minimum disclosures required by" FECA. 333 F.3d at 179. The panel properly followed and applied that ruling. (Op. at 9.) Tellingly, appellants argue not that the panel's ruling conflicts with *AFL-CIO*, but that *AFL-CIO* is either distinguishable or should be "overturned." (Pet. at 10-11.)

Unable to demonstrate a conflict between the panel's opinion and this Court's most applicable precedent, appellants attempt to manufacture one. They claim that the panel's ruling conflicts with two precedents stating the truism that an agency's authority is bound by the power delegated by Congress. (*See* Pet. at 1, 3.) An examination of those two cases, however, reveals no conflict. In truth, appellants merely disagree with the panel opinion's interpretation of the extent of the agency's statutory authority, which is not a valid basis for rehearing.

First, appellants argue that the panel's opinion conflicts with the holding of *Railway Labor Executives' Ass'n v. National Mediation Board* ("*Railway Labor*") that "'an agency's power is no greater than that delegated to it by Congress.'" (Pet. at 3 (quoting 29 F.3d 655, 670 (D.C. Cir. 1994) (*en banc*)).) But the panel's opinion — authored by Senior Judge Randolph who joined *Railway Labor* in relevant part — nowhere disagrees with this broad principle. To the contrary, the panel opinion examined FECA's provisions and determined that, under long-established Supreme Court case law interpreting similar provisions, Congress had

delegated power to the FEC to disclose information (like that at issue here) that is reasonably related to FECA's purposes. (Op. at 6-9.) The panel correctly concluded that FECA's requirement that certain information *must* be disclosed did not, by implication, forbid disclosure of all other information, again applying Supreme Court precedent. (*Id.*)

Nothing about the panel's faithful application of Supreme Court precedent remotely warrants rehearing. *Railway Labor* nowhere even considers whether provisions similar to 52 U.S.C. §§ 30106(b)(1), 30107(a)(8) grant agencies the authority to set reasonable disclosure policy, much less disagrees with the panel's holding on that question. In fact, the panel's holding is entirely consistent with the case law on this point. *Schreiber*, 381 U.S. at 291-92 & n.18 (collecting cases); *FTC v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) (holding that the agency has discretion in such matters as publicity and disclosure) (citing *Schreiber*); *cf. Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) (holding that FOIA "places a general obligation on the agency to make information available to the public").

Railway Labor likewise does not contradict the panel's observation that the negative-implication canon is not mandatory in the administrative context. (Op. at 7 n.5.) Again, the panel's holding is consistent with Circuit law on this point. *E.g.*, *Van Hollen, Jr. v. FEC*, 811 F.3d 486, 493-94 (D.C. Cir. 2016) ("[W]e have consistently recognized that a congressional mandate in one section and silence in

another often suggests not a prohibition but simply a decision not to mandate any solution in the second context, *i.e.*, to leave the question to agency discretion." (internal quotation marks omitted)). Accordingly, *Railway Labor* does not establish a conflict.

Second, appellants allege a conflict with *Colorado River Indian Tribes v. National Indian Gaming Commission* ("*Colorado River*"), which recognized 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.'" (Pet. at 7 (quoting 466 F.3d 134, 139 (D.C. Cir. 2006) (Randolph, J.)).) But, again, the panel's opinion did not contradict this general proposition. Rather, it required such a regulation to be "'reasonably related' to the purposes of the legislation," and held that this requirement was satisfied here. (Op. at 8 (quoting *Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 369 (1973) (internal quotation marks omitted)).)

That holding does not conflict with *Colorado River*, as appellants suggest (Pet. at 7), simply because the Court there held that a different set of regulations was *not* reasonably related to the purposes of a different statute. That statute gave a commission and Indian tribes shared regulatory authority over "class II" gaming on Indian lands, but "class III" gaming was governed by tribe-state compacts. *Colo. River*, 466 F.3d at 135-36. This Court rejected the agency's reliance on the statute's general rulemaking provision for authority for class III gaming

regulations because they were contrary to Congress' intent that class III gaming be governed by tribe-state compacts. *Id.* at 139-40. That is, a regulation is not reasonably related to a statute's purpose where it "contradicts and undermines the [statute's] pre-existing remedial scheme." *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 92 (2002) (contrasting *Mourning*, where the regulation's "requirement was in fact enforced through the statute's pre-existing remedial scheme and in a manner consistent with it"). Appellants' disagreement with *Mourning*'s application to the particular circumstances of this case and advocacy for a different result is not grounds for granting their petition.

In lieu of identifying any intra-Circuit conflict, appellants engage in extended merits briefing that not only is misplaced in an *en banc* petition, but also lacks any merit. When Congress founded the FEC in 1974, it was well-established that Congress required all agencies "to adhere to a general philosophy of full agency disclosure." *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989). It thus was plain that information not specifically prohibited from disclosure would be — as Congress intended — presumptively disclosable. By requiring the FEC to affirmatively disclose certain information and specifically barring certain other disclosures in FECA — while at the same time mandating a presumption of agency openness generally — Congress left the quintessential "gap" to fill regarding information not in those categories. *See Chevron USA, Inc.*

v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984). Some level of gap-filling agency disclosure is appropriate even in the context of the FEC's "'regulation of core constitutionally protected activity.'" (Pet. at 8 (quoting *AFL-CIO*, 333 F.3d at 170).) Indeed, the *AFL-CIO* opinion which appellants quote regarding First Amendment interests is the very ruling of this Court which suggested that the FEC would be justified in releasing more than the minimum mandated by FECA.[8] 333 F.3d at 179.

Moreover, it is *appellants'* proposed rule that would be contrary to FECA's remedial scheme. Although "[t]ypically, the decision not to prosecute insulates individuals who have been investigated but not charged from th[e] rather significant intrusion into their lives" occasioned by public scrutiny, *Fund for Constitutional Government v. National Archives & Records Service*, 656 F.2d 856, 864 (D.C. Cir. 1981), Congress made a different policy choice in the area of FEC civil enforcement of campaign finance law, *AFL-CIO*, 333 F.3d at 175. While targets of an ongoing FEC investigation may have "a strong confidentiality interest analogous to the interests of targets of grand jury investigations," this "analogy breaks down once a Commission investigation closes." *Id.* (internal quotation

[8] The panel unanimously and resoundingly dismissed appellants' First Amendment claim, agreeing with the district court that it was foreclosed by *Citizens United v. FEC*, 558 U.S. 310 (2010). (Op. at 10.)

marks omitted). This Court reasoned that, while Congress continued to protect identities of "suspects exonerated by a grand jury," "FECA expressly requires disclosure of 'no violation' findings." *Id.* (citing Fed. R. Crim. P. 6(e)(6); 52 U.S.C. § 30109(a)(4)(B)(ii)). Indeed, FECA goes even further still — it provides for *judicial review* of certain Commission decisions not to pursue enforcement. 52 U.S.C. § 30109(a)(8)(A).

Further, in *Railway Labor* and *Colorado River*, this Court found significant the agencies' departure from their prior longtime practice. *Ry. Labor*, 29 F.3d at 659; *Colo. River*, 466 F.3d at 138. Yet the Commission has disclosed similar documents since its inception approximately 45 years ago, thereby deserving considerable deference. *E.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001).

In sum, far from conflicting with Circuit or Supreme Court law — as is required to justify the extraordinary step of *en banc* consideration — the panel's decision regarding the FEC's disclosure authority is a correct and straightforward application of well-settled legal principles.

II. THE PANEL'S OPINION REGARDING APPELLANTS' FOIA-BASED CLAIM DOES NOT CREATE A CONFLICT

The panel correctly and unanimously held that FOIA — "a disclosure statute" — did not *prevent* the FEC from releasing the documents at issue in this case, and that in any event, FOIA Exemption 7(C) would not require the

Commission to conceal appellants' identities even if it applied here. (Op. at 10-13.) Appellants do not identify any Circuit or Supreme Court case law that conflicts with these holdings.

Instead, appellants claim that the panel's opinion contradicts this Court's statement in *American Wild Horse Preservation Campaign v. Perdue* 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." (Pet. at 11 (quoting 873 F.3d 914, 923 (D.C. Cir. 2017).) But the panel here had no occasion to opine on this principle (let alone contradict it) because, as appellants admit, the panel did not determine that the FEC departed from any decades-long past practices or official policies. (*See* Pet. at 14 (objecting that the panel "failed to engage this particular argument").)

Appellants' argument for plenary review thus boils down to a claim that the panel erred by not countenancing their argument that the FEC departed from its purported policy of not releasing FOIA-exempt materials. (Pet. at 2-3, 11-17.) On its face, this argument fails since error correction is not a valid basis for granting rehearing.

Regardless, their assertion that the panel erred misses the mark for at least two reasons. First, appellants have not identified any policy from which the Commission has departed. The Disclosure Policy does not itself mandate

redaction of FOIA-exempt information, as appellants note. (Pet. at 3 (quoting Disclosure Policy, 81 Fed. Reg. at 50,704).) Instead, appellants seize upon a reference therein to the FEC's disclosure practice before *AFL-CIO*. (*Id.* at 2-3.) But the Disclosure Policy's discussion, as well as the cases themselves, demonstrate that the FEC's disclosure practices before *AFL-CIO* were governed by 11 C.F.R. § 5.4(a)(4), which that ruling invalidated, 333 F.3d at 179. It thus is not an "existing regulation" that the FEC's Disclosure Policy says it "does not alter." *Compare* Disclosure Policy, 81 Fed. Reg. at 50,704, *with Ctr. for Sci. in the Pub. Interest v. Regan*, 727 F.2d 1161, 1164 (D.C. Cir. 1984) (superseded regulation "no longer has any force"). But even had section 5.4(a)(4) survived *AFL-CIO*, that regulation does not limit the disclosure of the type of documents largely at issue in this case — Commissioners' statements and General Counsel Reports — to only those that are non-exempt because "non-exempt" modifies only the distinct category of documents termed "investigatory material."

Second, the unanimous panel's holding that FOIA Exemption 7(C) would not require the Commission to withhold appellants identities anyway was correct (Op. at 10-13), particularly under the highly deferential standard of review for claims under the Administrative Procedure Act, *see Jurewicz v. U.S. Dep't of Agric.*, 741 F.3d 1326, 1330 (D.C. Cir. 2014). (*Compare* Op. at 12-13 (applying

binding Supreme Court and Circuit authority), with Pet. at 14 (quoting unpublished district court opinion).)

Finally, rehearing regarding the applicability of Exemption 7(C) is not justified for the additional reason that any ruling on that question could not alter the result of the case, since appellants do not otherwise challenge the panel's holding that FOIA offers no avenue for relief (Op. at 11). *See, e.g.*, *Pub. Serv. Co. of N.M. v. FERC*, 863 F.2d 1021, 1022 (D.C. Cir. 1988) (Ginsburg, J., concurring in denial rehearing *en banc*) (explaining that plenary review is not proper where "the outcome of the case need not rest on the challenged ground").

Accordingly, the panel's disposition of appellants' FOIA-based claim plainly does not warrant plenary review.

CONCLUSION

For the foregoing reasons, appellants' petition should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of June, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Haven G. Ward*
Haven G. Ward