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

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.	No. 18-5099

PLAINTIFFS-APPELLANTS' UNOPPOSED MOTION FOR A STAY OF THE MANDATE

William W. Taylor, III
Dermot Lynch
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036
202-778-1800
202-822-8106 (fax)
wtaylor@zuckerman.com
dlynch@zuckerman.com

Counsel for Plaintiff-Appellant John Doe 1

Michael Dry
VINSON & ELKINS
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, DC 20037
202-639-6500
202-879-8984 (fax)
mdry@velaw.com

Counsel for Plaintiff-Appellant John Doe 2

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PRELIMINARY STATEMENT

Pursuant to 28 U.S.C. § 2101(f), Federal Rule of Appellate Procedure 41(d), and D.C. Circuit Rule 41(a)(2), Plaintiffs-Appellants John Doe 1 and John Doe 2 move the Court for a stay of the mandate pending the filing of a petition for writ of certiorari in the United States Supreme Court. This Court entered judgment on April 12, 2019, and on that same day ordered that the mandate be withheld "until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc." Plaintiffs timely filed a motion for rehearing en banc on May 28, 2019, which this Court denied on July 11, 2019. Absent a stay, the mandate will issue on July 18, 2019. Plaintiffs respectfully request a stay of the mandate to file a timely petition for writ of certiorari and to allow the Supreme Court an opportunity to consider that petition and, if certiorari is granted, the merits of this dispute. *See* Fed. R. App. P. 41(d)(2)(A); D.C. Cir. R. 41(a)(2). The Federal Election Commission ("FEC" or "Commission") has notified Plaintiffs that it consents to this motion as long as Plaintiffs file their petition for certiorari on or before September 16, 2019.

This Court may stay a mandate pending the filing of a petition for writ of certiorari when "there is good cause for a stay" and when "the petition would present a substantial question." Fed. R. App. P. 41(d)(1). This case readily satisfies those standards. Indeed, there is plainly good cause for a stay because a

stay is necessary to permit the Supreme Court to consider a petition in this case; the case will become moot in the absence of a stay.

This case presents the question whether the Commission may publicly disclose Plaintiffs' names as part of materials from an FEC investigation that addressed potential violations of federal election laws in 2012—fully four election cycles ago—and resulted in no enforcement action against Plaintiffs. Although certain materials in the FEC's file purport to connect Plaintiffs to the election-law violations investigated by the FEC, the FEC expressly declined to investigate Plaintiffs for any misconduct at the earliest possible stage of the FEC proceedings (even as it investigated four other persons), and Plaintiffs have never been charged with violating any law. A federal statute expressly provides what should be disclosed in this sensitive context when election-law charges are *not* pursued and does not provide for the disclosure of Plaintiffs' identities. The FEC staff has nonetheless decided to pursue disclosure.

Thus, the *entire point of this litigation*—as the caption of the case suggests—is to determine whether the FEC's actions are lawful and whether Plaintiffs' identities will continue to remain redacted in the FEC's public file. Absent a stay, the FEC will release an unredacted version of the file that reveals Plaintiffs' true identities, *see* JA9-10, thereby smearing Plaintiffs and mooting any further proceedings. Cognizant of such concerns, both the district court and the

Commission agreed that Plaintiffs' names should remain redacted from public view in proceedings before both the district court and this Court—thus preserving both a live controversy and the courts' ability to carefully consider the issues on the merits. A stay of the mandate would afford the Supreme Court the same opportunity to consider the important issues here, and there is no reason that the Supreme Court should be the only court to be denied an opportunity to consider the issues in an orderly manner. That is particularly true given that the certiorari process is relatively expeditious and the time needed to preserve the Supreme Court's ability to review the petition pales in comparison to the amount of time that disclosure has already been deferred.

A stay is all the more appropriate because Plaintiffs' petition for certiorari will present a substantial question for the Supreme Court—namely, whether, given the substantial First Amendment values implicated by FEC investigations into alleged violations of the Federal Election Campaign Act ("FECA"), the FEC may publicly disclose investigatory files (including the names of persons connected to an FEC investigation, but who were never formally investigated or charged themselves) when it declines to pursue charges. FECA specifies only modest disclosures under two narrow circumstances not presented here, and the FEC's view that it retains a residual authority to disclose all manner of investigatory materials related to core First Amendment activity raises critically important

questions. Those questions divided a panel of this Court and generated a vigorous dissent from Judge Henderson—and for good reason. As Judge Henderson explained, the Commission is responsible for overseeing and investigating activity that implicates the absolute core of the First Amendment, and when the FEC declines to pursue charges in this sensitive context, the disclosures should be limited to those specified in FECA. The panel majority disagreed with that conclusion, holding instead that the Commission has residual authority to disclose identities and sensitive investigatory files under its general rulemaking provision. The First Amendment protects robust participation in election campaigns, including anonymous support in many circumstances. *See, e.g.*, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342, 357 (1995). To interpret a general rulemaking provision to authorize the Commission to disclose the identities of individuals whom it declines to prosecute (or here even fails to vote to investigate) thus implicates important First Amendment values. What is more, the panel decision empowers FEC staff to frustrate the decision of the Commission itself by disclosing the names of individuals the duly-appointed Commissioners declined to pursue. These issues have far-reaching importance in the field of election law and are "substantial" under any definition of the term. A stay of the mandate to allow for the filing of a petition for writ of certiorari thus is amply warranted.

ARGUMENT

THERE IS GOOD CAUSE FOR A STAY TO PRESERVE THE STATUS QUO.

There can be no serious dispute that Plaintiffs satisfy the "good cause" prong of Rule 41(d)(2). A party can establish "good cause" to stay the mandate by showing that "substantial harm … would result from the reactivation of proceedings in the District Court during the pendency of the certiorari petition." *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, No. 02-5355, 2003 WL 22319584, at *1 (D.C. Cir. Sept. 30, 2003) (Edwards, J., concurring); *United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001). Plaintiffs clear that hurdle with considerable room to spare.

As noted, this case involves unproven (and never charged) assertions that Plaintiffs were involved in illegal campaign contributions in 2012. The FEC declined to investigate Plaintiffs in relation to this activity, and instead elected to investigate four other entities and individuals. *See, e.g.*, Op. 5. After the FEC concluded its proceedings—specifically, the Commission entered into a "conciliation agreement" with the four persons who were investigated instead of bringing an enforcement action, *see id.*—it sought to release not only those investigatory records that named those four persons, but *also* records that connected Plaintiffs to this investigation and identified Plaintiffs by name. Plaintiffs filed suit to enjoin the FEC from disclosing their names, but the district

court denied relief. But while denying relief on the merits, the district court recognized that a stay was necessary to preserve meaningful appellate review. Thus, the district court stayed its judgment pending Plaintiffs' appeal to this Court and observed that "denying the stay"—and thus allowing the FEC to proceed with disclosure—"would essentially render plaintiffs' appeal to be moot," which "would constitute irreparable harm." JA9.

By its terms, however, the district court's stay expires upon the resolution of the appeal "in the D.C. Circuit." JA10. Accordingly, absent a stay of the mandate, there will be a "reactivation of proceedings in the District Court," *Judicial Watch*, 2003 WL 22319584, at *1 (Edwards, J, concurring), and the Commission will be permitted to disclose Plaintiffs' names in its publicly available investigatory file. That action would inflict the exact "substantial harm," *id.*, that Plaintiffs have sought to avoid throughout this litigation and would frustrate the Supreme Court's ability to review a petition for certiorari. Given that the district court and this Court had the opportunity to review this case while it still presented a live controversy, there is no reason in law or logic to deprive the Supreme Court of that same opportunity. *See, e.g.*, *John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309 (1989) (Marshall, J., in chambers) (noting that "[t]he fact that disclosure would moot … part of the Court of Appeals' decision … would also create an irreparable injury" that justified the imposition of a stay pending consideration of

the petition for certiorari); *In re Roche*, 448 U.S. 1312, 1316 (1980) (Brennan, J., in chambers) (continuing a stay pending the resolution of a petition for certiorari when denying the stay could "moot [applicant's] claim"); *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification for a Circuit Justice to upset an interim decision by a court of appeals [is] to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals"). While these authorities underscore that a Circuit Justice could grant a motion to stay or recall the mandate, there is no reason to put the parties or the Chief Justice to the trouble of emergency briefing during the Court's summer recess. Just as the district court granted a stay to preserve and facilitate this Court's orderly review, this Court should grant a stay of the mandate to preserve and facilitate the Supreme Court's orderly review.

Nor would any other party suffer prejudice from a stay of the mandate. To the contrary, even the FEC has previously "acknowledge[d] the unique mootness danger posed by immediate disclosure" of Plaintiffs' names. JA50. For that reason, the Commission did not object to redacting Plaintiffs' names during the pendency of the litigation before both the district court and this Court. JA4, 9-10. And although certain third parties may have an interest in learning Plaintiffs' names, *see* JA9-10, there is nothing to justify *immediate* disclosure. After all, this case involves events that occurred four election cycles ago, and Plaintiffs' names

have been redacted in the FEC's public file since 2017. *See* JA4. Keeping Plaintiffs' names under seal for just a few months longer so the Supreme Court may consider whether to review this case on the merits before it becomes moot is not too much to ask. *See also U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989) (the public interest in shedding "light on an agency's performance of its statutory duties" is "not fostered by disclosure of information about private citizens that is accumulated in various government files," which "reveals little or nothing about an agency's own conduct").

PLAINTIFFS' PETITION FOR CERTIORARI WILL PRESENT A SUBSTANTIAL QUESTION.

A stay of the mandate is also warranted because Plaintiffs' petition for certiorari will present a "substantial question" for review by the Supreme Court. The principal question here is whether FECA authorizes the FEC to disclose investigatory files (including documents that identify persons that the FEC explicitly *declined* to investigate) even though such disclosure is not expressly authorized by FECA and even though such disclosure implicates sensitive First Amendment conduct. As the district court acknowledged, determining the extent of the FEC's disclosure authority under FECA is not "easy" to resolve. JA258. And this Court's divided panel opinion on this question only underscores the point. When members of this Court disagree on an important question that implicates First Amendment values, the "substantial question" prong is readily satisfied.

Section 30109 of FECA expressly addresses the FEC's disclosure authority. Consistent with the First Amendment values implicated by the FEC's sensitive mission, the statute generally *forbids* the FEC from publicly disclosing its investigatory files. *See* 52 U.S.C. § 30109(a)(12)(A) ("[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"); *id.* § 30109(a)(4)(B)(i) ("[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"). In two circumstances, however, Congress has carved limited exceptions to that default rule: (1) "[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," and (2) "[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.* § 30109(a)(4)(B)(ii). As Judge Henderson sensibly concluded in light of this statutory scheme, "FECA's disclosure scheme is comprehensive and sets forth precisely when the Commission can and cannot make its records public." Dissenting Op. 5. That is, while "[t]he Commission *must* make limited disclosures

in two—and only two—cases," the fact of the matter is that, "[i]n all other cases, the Commission must keep its investigatory information confidential." *Id.*

There is no dispute in this case that Plaintiffs have not agreed to any conciliation agreement, nor has the FEC made any determination one way or the other as to whether Plaintiffs violated FECA (indeed, the FEC declined to even investigate Plaintiffs in the first place). The two statutory exceptions to FECA's default rule of confidentiality are therefore inapplicable here. Nor is this a case where evidence is disclosed as part of an enforcement action. Thus, the sensitive information in the FEC's investigatory files, including Plaintiffs' identities, should remain confidential. The panel majority nonetheless concluded that the FEC has authority to publicly disclose investigatory files that reveal Plaintiffs' true identities—and which link Plaintiffs to election-law violations committed by others. In other words, the majority held that the Commission has residual power under FECA (through a general rulemaking provision in FECA that is separate from the provision that actually addresses the FEC's disclosure authority) to make disclosures that Congress never expressly authorized. *See* Op. 8. As Judge Henderson noted, the fact that the majority reached that conclusion *without even conducting an examination of the relevant statutory text* is the first sign that something is amiss here. *See* Dissenting Op. 7 ("The majority reaches [its] conclusion without discussing FECA's disclosure provisions."); *see also Kisor v.*

Wilkie, 139 S. Ct. 2400, 2415 (2019) (reiterating that "a court must exhaust all the 'traditional tools' of construction" when interpreting statutory text and before deferring to an agency's construction of the statute). But it is hardly the only one.

As Judge Henderson further explained, it is important to remember that the FEC "has as its sole purpose the regulation of core constitutionally protected activity," and that "[i]ts 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." Dissenting Op. 1 (internal quotation marks omitted). Precisely because of the "serious privacy and First Amendment interests" at stake, *id.*, there is no principled basis to conclude that Congress *sub silentio* gave the FEC the power to publicly disclose investigatory files beyond the two circumstances addressed in the statute itself. Indeed, as this Court has explained elsewhere, the need for secrecy in this sensitive First Amendment context is analogous to the need for secrecy in grand jury proceedings. *See In re Sealed Case*, 237 F.3d 657, 667 (D.C. Cir. 2001) ("The plain language of these provisions and the overall purpose and structure of the statutory scheme create a strong confidentiality interest analogous to that protected by Federal Rule of Criminal Procedure 6(e)(6).").[1]

[1] Notably, just one week before the panel opinion in this case issued, another panel of this Court (adopting the position advanced by the federal government) concluded that the rules that govern disclosure in grand jury proceedings are

At a bare minimum, however, Plaintiffs' petition for certiorari will present a substantial question on this front that has a "reasonable probability of succeeding on the merits." *NextWave Personal Commc'ns v. FCC*, No. 00-1402, 2001 U.S. App. LEXIS 19617, at *4 (D.C. Cir. Aug. 23, 2001) (quoting *Books v. City of Elkhart*, 239 F.3d 826, 827 (7th Cir. 2001) (Ripple, J., in chambers)); *see also Books*, 239 F.3d at 829 (granting stay of mandate notwithstanding that applicant "present[ed] a weak case for a grant of certiorari"). That is especially true considering the significant implications of the majority's conclusion. As things now stand, the Commission has wide-ranging authority to name and shame persons by linking them to election-related misconduct committed by others even if the Commission has no intention (indeed, no basis at all) to investigate or charge those persons themselves. *Cf. In re Sealed Case*, 237 F.3d at 668 ("the weakness of the FEC's position in this case invites the suspicion that its actions are externally motivated"). That simply cannot be right, but in all events, the Supreme Court at

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comprehensive and exclusive, and that courts have no residual authority to release grand jury materials in other circumstances—even in closed cases. *See McKeever v. Barr*, 920 F.3d 842, 843 (D.C. Cir. 2019) (concluding that a "district court does not have the inherent authority [to disclose grand jury records] but rather is limited to the exceptions to grand jury secrecy listed in Federal Rule of Criminal Procedure 6(e)").

least deserves the opportunity to address this important issue without any concern that this case will become moot before it can act.[2]

CONCLUSION

For the foregoing reasons, the Court should grant the motion for a stay of the mandate pending the filing of a petition for writ of certiorari. If the Court denies this motion, the Court—in accordance with Federal Rule of Appellate Procedure 41(b)—should withhold issuance until seven days after entry of the Court's order so that the Supreme Court at least has an opportunity to consider and rule on an application for an emergency stay.

Date: July 17, 2019

Respectfully Submitted,

William W. Taylor, III
Dermot Lynch
ZUCKERMAN SPAEDER LLP
1800 M Street, NW

Michael Dry
VINSON & ELKINS
2200 Pennsylvania Avenue, NW
Suite 500 West

[2] Under Rule 41(d)(2), Plaintiffs need only show that their petition for certiorari will present one substantial question. This case, however, presents two. As explained more fully in Plaintiffs' petition for rehearing en banc, the Disclosure Policy that the Commission has relied upon to justify the release of the records that identify Plaintiffs' names "reiterates that the agency's historical practice has been not to publish 'materials exempt from disclosure under ... [FOIA]." En Banc Pet. 12. Plaintiffs' names are exempt from disclosure under FOIA. *Id.* at 13. Accordingly, before releasing Plaintiffs' names, the FEC needed to explain the departure from its longstanding policy, and it failed to do so. That contravenes Supreme Court precedent. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

Suite 1000
Washington, DC 20036
202-778-1800
202-822-8106 (fax)
wtaylor@zuckerman.com
dlynch@zuckerman.com

Counsel for Plaintiff-Appellant John Doe 1

Washington, DC 20037
202-639-6500
202-879-8984 (fax)
mdry@velaw.com

Counsel for Plaintiff-Appellant John Doe 2

CERTIFICATE OF COMPLIANCE

1. This motion complies with the word limit of Fed. R. App. P. 27(d)(2) because it contains 3,154 words, excluding the parts exempted by Fed. R. App. P. 32(f) and 27(d)(2).

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

DATED: July 17, 2019

/s/ William W. Taylor, III

William W. Taylor, III
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036
202-778-1800
202-822-8106 (fax)
wtaylor@zuckerman.com

Counsel for Plaintiff-Appellant
John Doe 1

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on July 17, 2019, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

/s/ William W. Taylor, III
William W. Taylor, III
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036
202-778-1800
202-822-8106 (fax)
wtaylor@zuckerman.com

Counsel for Plaintiff-Appellant
John Doe 1