UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1, *et al.*,	
Plaintiffs,	Civ. No. 17-2694 (ABJ)
v.	
FEDERAL ELECTION COMMISSION,	SURREPLY TO MOTION FOR PRELIMINARY INJUNCTION
Defendant	

FEDERAL ELECTION COMMISSION'S SURREPLY IN RESPONSE TO PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
ckitcher@fec.gov

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Robert W. Bonham III (D.C. Bar No. 397859)
Senior Attorney
rbonham@fec.gov

Haven G. Ward (D.C. Bar. No. 976090)
Attorney
hward@fec.gov

COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

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The Court should sustain the Federal Election Commission's ("FEC" or "Commission") release of plaintiffs' identities in connection with the public disclosure of documents from the agency's administrative case file for Matter Under Review ("MUR") 6920. Consistent with the FEC's carefully calibrated disclosure policy, which has been tailored in light of the agency's experience and judicial guidance, plaintiffs' names should be released along with the rest of the agency's public file for MUR 6920 so that the FEC's actions regarding that matter — finding a contribution illegally made in the name of another — may be understood and evaluated. The FEC's disclosure policy is constitutional and plaintiffs' privacy interests are far outweighed here.

Plaintiffs' arguments in favor of nondisclosure are unavailing. The FEC's disclosure of plaintiffs' identities readily passes the deferential review that applies here. Plaintiffs' claim that their identities must not be disclosed because the FEC made no determination regarding them is erroneous. Disclosure of their names is necessary to promote the Federal Election Campaign Act's ("FECA" or "Act") purposes of public accountability of the Commission and deterrence. Such disclosure does not infringe unduly on plaintiffs' First Amendment rights. On the contrary, plaintiffs have failed to establish likely harm and disclosure here is supported by general judicial approval of FECA's disclosure programs. Finally, the FEC's current disclosure policy is valid under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003). Accordingly, the Court should deny plaintiffs' request for preliminary and permanent injunctive relief and enter judgment in the FEC's favor.

SUPPLEMENTAL BACKGROUND

The FEC's initial brief set out the principal relevant background. (FEC's Resp. to Mot. for TRO and Mot. to Seal at 1-4 (Docket No. 16) ("FEC Response").) In this brief, the

Commission provides relevant additional background information about its enforcement process and subsequent procedural history.

I. ADMINISTRATIVE ENFORCEMENT AND DISCLOSURE PROCEDURES

Under FECA and 11 C.F.R § 111.3(a), there are two ways an FEC enforcement matter can be "initiated": (1) the filing of an administrative complaint, 52 U.S.C. § 30109(a)(1); and (2) "on the basis of information ascertained in the normal course of carrying out [the FEC's] supervisory responsibilities," *id.* § 30109(a)(2). In the former situation, upon receipt of the complaint, respondents are generally provided notice and an opportunity to respond prior to the Commission voting on reason to believe the respondent violated FECA. 52 U.S.C. § 30109(a)(1); 11 C.F.R. §§ 111.5-7. When the Commission votes to dismiss the matter at this stage, however, the Commission can do so without providing a respondent the opportunity to respond. 52 U.S.C. § 30109(a)(1); 11 C.F.R. § 111.6(b). If an enforcement matter is initiated based on information obtained during the normal course, a respondent is not required to be notified before the Office of General Counsel recommends finding reason to believe. 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.8; *see also* 11 C.F.R. § 111.3(b) (making clear that 11 C.F.R. §§ 111.4-7 do not apply). Following a reason-to-believe vote, all matters are processed in the same way regardless of how they were initiated. *See* 11 C.F.R. § 111.3(b).

If the Commission determines by an affirmative vote of four or more members to make a reason-to-believe finding, the Commission then notifies the respondent and conducts any needed investigation. 52 U.S.C. § 30109(a)(2); 11 C.F.R. §§ 111.9(a), 111.10(a). "If the Commission finds no reason to believe, or otherwise terminates its proceedings," the respondent also must be notified. 11 C.F.R. § 111.9(b). If the Commission proceeds with an investigation, it next determines whether there is probable cause to believe the respondent violated FECA. 52 U.S.C.

§ 30109(a)(3), (a)(4); 11 C.F.R. § 111. Although the Commission may enter into a conciliation agreement at any time during the enforcement process, 11 C.F.R. § 111.18(d), after an affirmative vote of four or more Commissioners finding probable cause, the Commission is required to attempt to conciliate for a period of time. 52 U.S.C. § 30109(a)(4)(A)(i); 11 C.F.R. § 111.18(a). If unsuccessful, the Commission may, by an affirmative vote of four members, authorize the filing of suit. 52 U.S.C. § 30109(a)(6)(A); 11 C.F.R. § 111.19. Once initiated, there are thus generally three ways an enforcement matter can be resolved: (1) the Commission enters into a conciliation agreement, (2) the Commission determines not to pursue the matter and terminates it, or (3) the Commission files suit.

Congress ensured that the FEC's enforcement process would be open to public review. No matter how an enforcement matter is resolved, FECA and Commission regulations require making the Commission's resolution of the matter public. FECA requires the Commission to make public conciliation agreements, as well as any "determination that a person has not violated" FECA. 52 U.S.C. § 30109(a)(4)(B)(ii); 11 C.F.R. § 111.20. The Commission has construed this provision to include any "finding 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).

FECA provides for judicial review of the FEC's dismissal of an administrative complaint. 52 U.S.C. § 30109(a)(8). If an enforcement matter is under review in federal court, it need not be litigated under seal, regardless of whether it is there as a civil enforcement action under § 30109(a)(6) or a dismissal challenge under § 30109(a)(8). *AFL-CIO*, 333 F.3d at 174. The FEC has further implemented FECA's disclosure requirement through a policy that lists more than twenty categories of enforcement documents that the Commission will place on the public record pursuant to 52 U.S.C. § 30109(a)(4)(B)(ii). FEC, *Disclosure of Certain*

Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702, 50703 (Aug. 2, 2016), *available at* https://transition.fec.gov/law/cfr/ej_compilation/2016/notice2016-06.pdf ("FEC Disclosure Policy"). The policy was specifically developed in response to the analysis of the Court of Appeals in *AFL-CIO*, which found the FEC's earlier disclosure policy overbroad due to First Amendment concerns. 333 F.3d 168. The categories of documents now disclosed "either do not implicate the [*AFL-CIO*] Court's concerns or, because they play a critical role in the resolution of the matter, the balance tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information." 81 Fed. Reg. at 50703. These documents provide critical information necessary for administrative complainants, the public, and ultimately courts in dismissal cases to evaluate the Commission's decisions. The policy also notes that the Commission may disclose, on a case by case basis, other documents "that edify public understanding of a closed matter," explaining that such documents will "assist the public in understanding the record without intruding upon the associational interests of the respondents." *Id.* At the same time, the policy excludes certain materials from disclosure, including "certain other materials from [the FEC's] investigative files, such as subpoenaed records, deposition transcripts, and other records produced in discovery, even if those evidentiary documents are referenced in, or attached to, documents specifically subject to release under this policy." *Id.*

II. SUPPLEMENTAL PROCEDURAL BACKGROUND

Since the December 18, 2017 hearing, the Commission has published a redacted version of its administrative case file for MUR 6920. (FEC's Notice (Docket No. 20) (notifying Court and parties that the case materials may be accessed at https://www.fec.gov/data/legal/matter-

under-review/6920/).[1]) In addition, the administrative complainants Citizens for Responsibility and Ethics and Anne Weismann (collectively, "CREW") have filed a lawsuit against the Commission in this Court pursuant to 52 U.S.C. § 30109(a)(8). CREW challenges the FEC's handling of MUR 6920, including an alleged failure to investigate plaintiffs. *Citizens for Responsibility & Ethics in Wash., et al. v. FEC*, No. 1:17-cv-02770, Compl. (Docket No. 1) (D.D.C.). After plaintiffs filed their reply brief, the Court permitted the Commission to respond in this surreply. (Minute Order Jan. 10, 2018.)

ARGUMENT

The FEC's proposed disclosure of plaintiffs' identities is reasonable and should be sustained. Such disclosure, squarely pursuant to the FEC's current disclosure policy, satisfies the highly deferential standard of review that applies here, as well as the well-established deference that is to be accorded to the FEC's interpretations of FECA and its own regulations. The Commission's disclosure policy properly balances the competing interests identified in *AFL-CIO* and is neither arbitrary or capricious nor constitutionally infirm. It is well within the scope of the Commission's authority. Because disclosure here is reasonable and serves the FEC's important interests in deterring future violations and promoting accountability of the agency's decisions, the Court should enter judgement in the FEC's favor.

I. THE COURT'S REVIEW IS DEFERENTIAL

As plaintiffs acknowledge, the Court's review in this case employs the Administrative Procedure Act's arbitrary or capricious standard. (Pls.' Reply Mem. in Supp. of Mot. for a Prelim. Inj. at 5-6 (Docket No. 25) ("Pls. Reply"); Compl. ¶¶ 36-44 (Docket No. 12).) Under

[1] Contrary to plaintiffs' statement (Pls. Reply at 5 n.3) the FEC did not assert that the list of redacted documents in its notice was exhaustive, but the highly relevant Third General Counsel's Report was inadvertently omitted.

that standard, the Court "must" uphold the FEC's disclosure decision unless it is "'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Jurewicz v. U.S. Dept. of Agric.*, 741 F.3d 1326, 1330 (D.C. Cir. 2014) (quoting 5 U.S.C. § 706(2)(A)). "This 'arbitrary and capricious' standard of review is a highly deferential one which presumes the agency's action to be valid. The standard mandates judicial affirmance if a rational basis for the agency's decision is presented even though [the court] might otherwise disagree." *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). Thus, "[u]nlike a typical [Freedom of Information Act ("FOIA")] case, in which the court would undertake its own analysis of the interests at stake, under this deferential standard of review [in reverse-FOIA actions], the court does not substitute its judgement for that of the [FEC]." *Jurewicz*, 741 F.3d at 1330-31.

Deference is also accorded because the FEC here interprets FECA and its own regulations. The Commission's "express authorization to elucidate statutory policy in administering FECA 'implies that Congress intended the FEC . . . to resolve any ambiguities in statutory language,'" and so "'the FEC's interpretation of the Act should be accorded considerable deference.'" *United States v. Kanchanalak*, 192 F.3d 1037, 1049 (D.C. Cir. 1999) (citation omitted); *see also Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986).[2]

Further, when the FEC is interpreting its own regulations, as here, deference to the agency is particularly high. *Consarc Corp. v. U.S. Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995) ("[A]n agency's application of its own regulations,

[2] Accordingly, the Court's task in this case is "not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (internal quotation marks omitted). The FEC's decision need not be "the only reasonable one or even" the decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.*

receives an even greater degree of deference than the *Chevron* standard." (internal quotation marks omitted)).

II. THE COURT SHOULD SUSTAIN DISCLOSURE OF PLAINTIFFS' NAMES

Under the applicable standard of deferential review, the FEC should be permitted to disclose plaintiffs' identities in connection with its file for MUR 6920. Plaintiffs' names are included in documents the disclosure of which the agency has deemed "integral to its decisionmaking process." FEC Disclosure Policy, 81 Fed. Reg. at 50703. They were referenced in documents addressing whether there was reason to believe they violated FECA, whether discovery should be sought from them and pursued in litigation, and whether there is probable cause to believe that others committed FECA violations. (FEC Response at 5.) John Doe 2 provided the funds that Government Integrity LLC ("GI LLC") sent to American Conservative Union ("ACU") and was discussed extensively in the FEC General Counsel's briefs. *Id.* at 5-6; MUR 6920 (American Conservative Union), Third General Counsel's Report at 1, 4-8, 9-15 (brief containing numerous redactions of plaintiffs' identities and recommending that the FEC find reason to believe plaintiffs violated FECA and authorize suit to enforce a subpoena to which they refused to respond), http://eqs.fec.gov/eqsdocsMUR/17044435484.pdf ("Third GCR").

Making public plaintiffs' identities allows the public to understand the Commission's applications of FECA and FEC regulations and promotes accountability, consistent with FECA's requirement that the Commission make public any "determination that a person has not violated" the Act. 52 U.S.C. § 30109(a)(4)(B). The FEC's regulation interpreting section 30109(a)(4)(B) to apply to any no reason to believe or probable cause to believe finding or other termination of FEC proceedings, 11 C.F.R. § 111.20(a), and disclosure policy making public certain enforcement documents naming plaintiffs "because they play a critical role in the resolution" of

such matters, FEC Disclosure Policy, 81 Fed. Reg. at 50703, is reasonable and appropriate. It also ensures that any challenge to the FEC's decisions brought pursuant to section 30109(a)(8) can be litigated in open court. (FEC Response at 7.) And because it takes judicial guidance, including *AFL-CIO*, 333 F. 3d 168, into account, it is permissible. (FEC Response at 8.) Release of plaintiffs' identities is not arbitrary or capricious.

Plaintiffs' arguments to the contrary are meritless.

A. The Commission Has Reasonably Interpreted 52 U.S.C. § 30109(a)(4)(B) and 11 C.F.R. § 111.20(a) to Permit Disclosure of Plaintiffs' Names

Plaintiffs argue that FECA section 30109(a)(4)(B)(ii)'s disclosure requirement cannot serve as a basis for the disclosures here because there was no "determination" that plaintiffs did not violate FECA. (Pls. Reply at 6-10). Plaintiffs are incorrect.

FECA contains a provision for judicial review of the FEC's administrative enforcement dismissals, and the "Commission is inherently [at least] bipartisan in that no more than three of its six voting members may be of the same political party, § [30106](a)(1), and it must decide issues charged with the dynamics of party politics." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*"). To avoid any appearance of bias, partisanship, or corruption in the Commission's investigations, it is entirely reasonable for the Commission to conclude that the public has a right to know the identities of persons who materially participated in events investigated by the Commission. The public must have access to the identities, including partisan connections, of such persons in order to assess the Commission's nonpartisanship in enforcing the Act.

Initially, plaintiffs err in claiming (Pls. Reply at 7) that FECA's requirement in section 30109(a)(4)(B)(ii) that conciliation agreements and determinations of no violation be made public implies the confidentiality of all other aspects of agency enforcement proceedings. By

mandating disclosure of such agreements and findings, and by prohibiting disclosure in other relatively narrow circumstances, *see* 52 U.S.C. § 30109(a)(4)(B)(i), (a)(12)(A), Congress left the public disclosure of other administrative enforcement case materials to the agency's discretion. The Commission thus makes public the basis for its enforcement decisions under 11 C.F.R. § 111.20 and the current disclosure policy, 81 Fed. Reg. 50702.

Plaintiffs err even more fundamentally in claiming that the only type of proceedings that could trigger disclosure of their identities are "enforcement proceedings *against* Plaintiffs." (Pls. Reply at 6; *id.* at 6-10 (emphasis added).) This undeveloped assumption is incorrect. Even if plaintiffs would prefer to think of themselves merely as "third party witnesses" in the agency's investigation of ACU and GI LLC (*id.* at 8), the disclosure of witnesses' identities in FEC MUR files furthers the agency's goals of accounting for its actions and deterring future violations. *AFL-CIO*, 333 F.3d at 174, 179 (explaining that "deterring future violations and promoting Commission accountability may well justify releasing more information than the minimum disclosures required by section [30109](a)"). In this case, the FEC's Third General Counsel's Report discussed, in addition to plaintiffs, the roles played by ACU's former executive director Gregg Keller, the consulting firm Axiom Strategies and its founder, Jeff Roe, and the former sole manager officer and director of GI LLC, Christopher W. Byrd, who died in 2014. Third GCR at 3-8. Disclosure of these individuals' roles and the information that was obtained from them indisputably furthers the public's knowledge of, and ability to assess the agency's actions taken, on the MUR. Accordingly, plaintiffs' argument that they were not subjects of an FEC administrative enforcement proceeding ignores that their identities could properly be revealed in connection with the undisputed "[p]roceedings" involving ACU and GI LLC, which resulted in a

"[d]etermination" of liability (Pls. Reply at 6) memorialized in a conciliation agreement and $350,000 penalty.[3]

In any event, plaintiffs' argument is especially weak because, in contrast to the identities of other persons who were not respondents in MUR 6920, plaintiffs themselves were the subject of proceedings even under their own view. Plaintiffs assert that because 52 U.S.C. § 30106(c) requires all FEC "decision[s]" to be made by a majority vote, there was no determination made as to plaintiffs here because the FEC's resolution of the matter resulted from a split vote. (Pls. Reply at 7.) FECA, however, does not define "determination." And because the "FEC cannot investigate complaints absent majority vote," "the statute compels [the] FEC to dismiss complaints in deadlock situations." *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1170 (D.C. Cir. 2016); *id.* at 1171 (noting the "FEC will regularly deadlock as part of *its modus operandi*"). Accordingly, the D.C. Circuit has rejected the argument that FEC action caused by the lack of a majority vote "decides nothing." *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987) ("*DCCC*"); *see also Public Citizen*, 830 F.3d at 1170-71 (distinguishing FECA from other statutes because FEC deadlock "decisions" fully and finally resolve FEC enforcement matters); *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). In light of this well-established case law, it is reasonable to conclude that "determination[s]" under section 30109(a)(4)(B)(ii) include agency action resulting from a split vote. *See Navistar, Inc. v. Jackson*, 840 F. Supp. 2d 357, 364 (D.D.C. 2012) (deferring to an agency's interpretation of what constitutes a "'determination'" under a statute it enforces).

[3] Plaintiffs' arguments based on an alleged lack of notice (Pls. Reply at 9-10) are unavailing because, *inter alia*, at issue in this case is whether the FEC may disclose plaintiffs' identities, not whether any purported procedural failings precluded finding reason to believe.

Plaintiffs also argue that, even if the Commission made a determination as to plaintiffs' alleged FECA violations, section 30109(a)(4)(B)(ii) does not apply because there was no determination that plaintiffs did not violate FECA. (Pls. Reply at 7-8.) But when determining whether Congress has specifically addressed an issue in a statute, "a court should not interpret each word in a statute with blinders on, refusing to look at the word's function within the broader statutory context." *Abramski v. United States*, 134 S. Ct. 2259, 2267 n.6 (2014). Here, section 30109(a)(4)(B)(ii) is part of a broader enforcement regime whereby by *all* dismissal decisions, regardless of whether dismissal results from a split decision, may be subject to judicial review. 52 U.S.C. § 30109(a)(8); *DCCC*, 831 F.2d at 1132. Indeed, even the district court that incorrectly found the Commission's interpretations of FECA impermissible in *AFL-CIO* did not construe section 30109(a)(4)(B)(ii) as narrowly as plaintiffs suggest. It interpreted a "determination of non-violation of FECA" to allow disclosure of all "'determination[s]' of no probable cause," regardless of whether the basis of that determination was a finding of actual innocence. *AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 58-59 (D.D.C. 2001).[4] That logic applies squarely to the FEC's reason to believe vote concerning plaintiffs.

Plaintiffs nonetheless argue that section 30109(a)(4)(B)(ii) is limited to determinations of only guilt or actual innocence because they speculate that "the respondents' names already would have been publicized," so "publication of a respondent's capitulation or exoneration

[4] The court there also agreed with the parties in that case that the General Counsel's Report recommending dismissal of nearly all respondents could be disclosed without redactions of the many persons referenced therein. *See AFL-CIO*, 177 F. Supp. 2d at 54 n.11; General Counsel's Report, In re: AFL-CIO, MURs 4291, *et al.* (June 9, 2000) https://www.fec.gov/files/legal/murs/4578/0000092E.pdf. That controlling document explaining the agency's reasoning for its dismissal is situated similarly to the statement by two Commissioners here which contains some of the references to plaintiffs that they seek to keep redacted. Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioner Lee E. Goodman, MUR 6920 (Dec. 20, 2017) https://www.fec.gov/files/legal/murs/6920/17044435563.pdf.

serves to provide resolution for respondents whose conduct already has been publicly scrutinized." (Pls. Reply at 7.) This argument is unpersuasive for four reasons. First, while the administrative complainant in the underlying matter here may have publicly announced the filing of their complaint (Pls. Reply at 7 n.11), that is not always the case. Second, even if an administrative complaint is made public, respondents may not be identified by name in the administrative complaint, as was the case here where CREW included allegations against an unknown respondent. (FEC's Response at 1.) Third, section 30109(a)(4)(B)(ii) applies equally to matters initiated as a result of an administrative complaint and those initiated on the basis of information ascertained in the ordinary course. Persons in the latter path about whom the Commission finds reason to believe violations have occurred and then later terminates its proceedings would not have been publicly identified prior to resolution under FECA section 30109(a)(12)(A). Thus, section 30109(a)(4)(B)(ii) is not designed exclusively "to 'clear' a name already sullied." (Pls. Reply at 8.) Fourth and finally, due to FECA's judicial review provision, allegations against respondents become public regardless of whether the Commission's dismissal decision is exonerating. The Commission may dismiss for a variety of non-merits reasons consistent with its prosecutorial discretion and its decisions can be overturned upon review.

Plaintiffs' arguments addressing 11 C.F.R. § 111.20 (Pls. Reply at 8-10) fare no better. Section 111.20(a) requires disclosure of any "terminat[ion" of an enforcement "proceeding[]" and "the basis therefor." 11 C.F.R. § 111.20(a). Here, as discussed above, it is indisputable that there were proceedings involving ACU and GI LLC. *Supra* pp. 9-10. Plaintiffs argue that the Commission's reason-to-believe vote here was "a vote on *whether to initiate* proceedings against Plaintiffs," and, because that vote failed, no proceedings were begun that could, in turn, have been "terminate[d]." (Pls. Reply at 9 (alteration in original).) This argument also fails on its

own terms. For internally-generated matters such as the reason to believe vote regarding plaintiffs, Commission procedures provide that the General Counsel may recommend finding reason to believe "[o]n the basis of information ascertained by the Commission in the normal course of carrying out its supervisory responsibilities, or on the basis of a referral from an agency of the United States or of any state." 11 C.F.R. § 111.8(a). Such a step constitutes the initiation of proceedings. Furthermore, internally initiated matters do not require notice prior to a reason-to-believe vote. 52 U.S.C. § 30109(a)(2); 11 C.F.R. §§ 111.3(b), 111.8(a)-(b).[5] Proceedings against plaintiffs thus were both initiated and terminated.

Thus, plaintiffs have not demonstrated that, examining FECA as a whole, and in light of the deference applying here, that the FEC's interpretation that section 30109(a)(4)(B)(ii) permits disclosure here is arbitrary or capricious. *See FEC v. Nat'l Rifle Ass'n*, 254 F.3d 173, 187 (D.C. Cir. 2001) ("'[C]ourts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views.'").

B. The FEC Has Inherent Authority to Disclose Material Persons Referenced in Commission Analyses

Irrespective of whether FECA section 30109(a)(4)(B)(ii) or section 111.20(a) specifically authorize the disclosures at issue here, the Commission also has the inherent authority to disclose that information, as well as the authority under FOIA. Plaintiffs do not contest that the documents at issue fall under the FEC's current disclosure policy. Because the documents fall within the policy, the Commission has a rational basis to disclose them.

Having been vested with broad authority to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, the Commission has the inherent ability to set

[5] Even if the Commission has in other instances taken a preliminary vote on whether to name internally generated persons as respondents (Pls. Reply at 9), such a vote is not required under agency regulations.

agency disclosure policy and make public disclosures of information unless otherwise specifically prohibited. 52 U.S.C. § 30106(b)(1); *F.C.C. v. Schreiber*, 381 U.S. 279, 292 (1965). In addition to the agency's inherent authority, FOIA requires the agency to disclose several of the documents at issue here proactively, including the Commissioners' statements of reasons for their votes. 5 U.S.C. § 552(a)(2)(A), (a)(4) (requiring publication of adjudication opinions and orders, as well as voting records). Further, in light of "a profound national commitment to ensuring an open Government," agencies are encouraged to "take affirmative steps to make information public" regarding "what is known and done by their Government" even absent a FOIA request. *Presidential Mem. for Heads of Exec. Depts. and Agencies Concerning the FOIA*, 74 Fed. Reg. 4683 (Jan. 21, 2009). Accordingly, the FEC's broad policy and rulemaking powers authorized it to adopt its current disclosure policy, unless Congress has specifically forbidden it to do so. *F.T.C. v. Anderson*, 631 F.2d 741, 746 (D.C. Cir. 1979) ("The agency's discretion in regard to procedural rules includes discretion in such matters as publicity and disclosure.").

Plaintiffs have failed to identify any statute prohibiting the materials at issue from disclosure. They now appear to recognize that FECA section 30109(a)(12)(A)'s confidentiality provision only applies "during the *pendency* of the investigation." Pls. Reply at 7; *see also AFL-CIO*, 333 F.3d at 170, 174 (finding that the Commission's interpretation construing section 30109(a)(12)(A) as limited to only ongoing investigations was "not contrary to the plain language of the statute" and "may well be correct"). Indeed, the D.C. Circuit permitted the FEC to consider whether, in the future, it could release "more information than the minimum disclosures required by section [30109](a)(4)(B)." *AFL-CIO*, 333 F.3d at 179.

Nor does FOIA operate as an affirmative bar to the disclosures here. "FOIA is exclusively a disclosure statute" and "does not foreclose disclosure." *Chrysler Corp. v. Brown*,

441 U.S. 281, 292 (1979). While, for example, an agency "*may* delete identifying details" from agency opinions "to prevent a clearly unwarranted invasion of personal privacy," FOIA by no means *requires* an agency to do so. 5 U.S.C. § 552(a)(2) (emphasis added). Indeed, agencies have been "strongly encourage[d] . . . to make discretionary disclosure of information" and instructed not to "withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." *Attorney General Holder's Mem. for Heads of Exec. Depts. and Agencies Concerning the FOIA*, 74 Fed. Reg. 51878 (Oct. 8, 2009). This discretion is memorialized in Commission regulations as well. 11 C.F.R. § 4.6. Thus, while plaintiffs argue that FOIA exemption 7(C) operates to bar disclosure (Pls. Reply at 10-15), the Supreme Court has expressly held that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure." *Chrysler Corp.*, 441 U.S. at 293; *see also Bartholdi Cable Co. v. F.C.C.*, 114 F.3d 274, 282 (D.C. Cir. 1997) ("FOIA's exemptions simply permit, but do not require, an agency to withhold exempted information from the public.").

SafeCard Services, Inc. v. SEC, 926 F.2d 1197 (D.C. Cir. 1991), is not to the contrary. Unlike *Chrysler Corp.*, which was a reverse-FOIA case, *SafeCard* was a typical FOIA case. There, the D.C. Circuit merely affirmed the agency's decision to withhold categorically from disclosure certain names as exempt from FOIA's disclosure requirements, rather than requiring the agency to provide more individualized proof to substantiate its withholding. 926 F.2d at 1206 (holding that "such information is exempt from disclosure"). It nowhere considered — much less held — that agencies could be categorically *prohibited* from disclosing that information. Indeed, the Court of Appeals appeared to recognize as much: "No . . . evidence of agency misconduct appearing in this case, the agency *need not* disclose the names and addresses

redacted from the documents at issue here." *Id.* (emphasis added). Tellingly, the court did not say that the agency *could not* disclose the information; merely that it did not *have* to disclose it.

Nor did the court's opinion in *AFL-CIO* anywhere "recognize[] the mandatory nature of the FEC's FOIA compliance" through requiring redaction of any permissible exemptions, as plaintiffs suggest. (Pls. Reply at 14.) The aspect of FEC's previous regulation found to be impermissible required publication of "'non-exempt . . . investigatory materials.'" *AFL-CIO*, 333 F.3d at 171 (quoting 11 C.F.R. § 5.4(a)(4)). The present disclosure policy no longer affirmatively discloses "investigatory materials" such as subpoenaed documents or deposition transcripts. Unlike in *AFL-CIO*, the majority, if not all, of the documents at issue here are not "investigatory materials," but rather certifications of FEC votes, Commissioner statements, and general counsel's reports. The FEC continues to release such documents, which were not at issue in *AFL-CIO*. Thus, even if plaintiffs could argue that an invalid regulation governs here, which they cannot, that regulation would not bar disclosure of the documents at issue.

Moreover, FOIA exemption 7(C)'s protection for "personal privacy" does not extend to corporations or other artificial entities, like John Doe 2. *FCC v. AT&T Inc.*, 562 U.S. 397, 403-09 (2011).[6] While the Supreme Court's holding technically pertained only to corporations, its analysis and rationale was plainly not so limited. As the Court reasoned, "'[p]ersonal' ordinarily refers to individuals," and "[w]e do not usually speak of personal characteristics, personal effects, [etc.] as referring to corporations *or other artificial entities*." *Id.* at 403; *see also id.* at 406 (quoting Restatement (Second) of Torts § 652I, Comment c (1976)) ("'A corporation,

[6] Plaintiffs incorrectly assert that the FEC has waived this argument. (Pls. Reply at 11 n.9). The waiver doctrine, however, is not so rigid. Indeed, if it were, plaintiffs' case would fail for its wholesale failure to address the governing FECA provision and regulations. Because the case was consolidated with the merits after the FEC promptly filed its response to briefing at an emergency pace, the FEC should be permitted to make its full arguments — as plaintiffs were.

partnership or unincorporated association has no personal right to privacy.'")). This rationale applies equally to trusts, which are not natural persons, but are formally organized entities, with legally separate identities from their trustee(s) and beneficiaries, and trustee(s) act in a representational capacity. Although there may be differences between corporations and trusts, as plaintiffs note (Pls. Reply at 11 n.9), they do not imbue a trust with "personal" rights. *See United States v. Harrison*, 653 F.2d 359, 361 (8th Cir. 1981) (holding that documents belonging to a small family trust are not "personal" documents protected against compulsory self-incrimination); *Iowa Citizens for Cmty. Improvement v. U.S. Dep't of Agric.*, 256 F. Supp. 2d 946, 952 n.10 (S.D. Iowa 2002) (doubting that a trust has privacy interests protected by FOIA).

Similarly, because John Doe 1 is identified only in his representative capacity as trustee and not in his personal capacity [redacted] (Pls. Reply at 21), the privacy interest in his identity is highly reduced, if not *de minimis*. As the D.C. Circuit has held, "[i]nformation relating to business judgments and relationships does not qualify for exemption" under FOIA exemption 7(C). *Wash. Post Co. v. U.S. Dep't of Justice*, 863 F.2d 96, 100 (D.C. Cir. 1988); *cf. Dep't of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (holding that, because "disclosure, not secrecy, is [FOIA's] dominant objective," any exceptions to disclosure must be "narrowly construed"). The court confirmed that "[t]his is so even if disclosure might tarnish someone's professional reputation." *Wash. Post Co.*, 863 F.2d at 100. As in *Washington Post*, the documents at issue here do not reveal any private facts about John Doe 1, nor do they personally implicate him in an alleged FECA violation. His identity thus is likewise not protected by exemption 7(C).

Finally, even if plaintiffs did have a cognizable privacy interest, exemption 7(C) only exempts "*unwarranted* invasion of personal privacy." 5 U.S.C. § 552(b)(7) (emphasis added).

The Commission has weighed the public "interest in promoting its own accountability and in deterring future violations" against competing interests. FEC Disclosure Policy, 81 Fed. Reg. at 50703. It has determined that, because the documents listed in the policy "play a critical role in the resolution of [an enforcement] matter, the balance tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information," and "regardless of the outcome" of the administrative enforcement matter. *Id.*

C. Reasonable Disclosure Here Includes Disclosure of Plaintiffs' Names

Plaintiffs also contend that it is unnecessary to disclose their names. (Pls. Reply at 10-15.) But it is reasonable for the Commission to conclude that the public has a right to know the identities of the persons who not only undisputedly participated in the events that were the subject of a Commission investigation but also who themselves were the subject of a Commission vote regarding whether there was reason to believe that they violated FECA.

An important part of FECA's regime is its detailed statutory framework for enforcement — one which also places a premium upon disclosure and openness to scrutiny in Commission resolution of enforcement matters. Congress ensured that the FEC's enforcement process would be open to public and judicial review. FECA's judicial review provision for dismissal decisions is "unusual in that it permits a private party to challenge the FEC's decision not to enforce," *Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995), a type of decision that is normally unreviewable, *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). 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 Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 864 (D.C. Cir. 1981), Congress made a different policy choice regarding such decisions in the area of campaign

finance, *AFL-CIO*, 333 F.3d at 175.[7] FECA's judicial review provision demonstrates that public confidence in the Commission's performance of its enforcement duties in a fair, consistent, and nonpartisan manner is necessary to FECA's goal to preserve public faith in our electoral system.

Plaintiffs "hinge[] [their] argument on the mistaken premise that publicly releasing [their] names . . . would not shed light on how the government operates." *Edelman v. S.E.C.*, 239 F. Supp. 3d 45, 55 (D.D.C. 2017) (citation and internal quotation marks omitted). To avoid any appearance of bias or partisanship in the Commission's resolution of enforcement matters, it is entirely reasonable for the Commission to conclude that the public should know the identities of persons found to be involved in a chain of events leading to violations of FECA and who two Commissioners found reason to believe violated FECA, even if the Commission determined not to pursue enforcement. *See Baltimore Sun v. U.S. Marshals Serv.*, 131 F. Supp. 2d 725, 729-30 (D. Md. 2001) (holding that "a valid public interest exists in the names" at issue because this information "would enable the public to assess law enforcement agencies' exercise" of discretion); *cf. Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 746 F.3d 1082, 1092-93 (D.C. Cir. 2014) (holding that there was "a weighty public interest in shining a light on . . . the DOJ's ultimate decision not to prosecute a prominent member of the Congress for any involvement he may have had" with public corruption for which others had been convicted). The public's interest in evaluating the Commission's evenhandedness and diligence outweighs the private interests of persons whose own activities were alleged to have violated FECA. *See People for the Am. Way Found. v. Nat. Park Serv.*, 503 F. Supp. 2d 284, 306 (D.D.C. 2007) (holding that "the public interest in knowing who may be exerting influence on [agency]

[7] Plaintiffs' reliance on this Court's decision in *Sandoval v. U.S. Department of Justice*, No. 16-cv-1013 (ABJ), --- F. Supp. 3d ---, 2017 WL 5075821 (D.D.C. Nov. 2, 2017), is thus misplaced. (*See* Pls. Reply at 13.) *Sandoval* was not a reverse-FOIA case, so the Court's inquiry was entirely different. Further, it did not pertain to an enforcement matter under FECA.

officials . . . outweighs any privacy interest in one's name"); *Lardner v. U.S. Dep't of Justice*, No. CIV.A.03-0180(JDB), 2005 WL 758267, at *18 (D.D.C. Mar. 31, 2005) (holding that "the considerable public interest in identifying the actors who are able to exert influence on the pardon application and selection process" outweighs the privacy interest in the names of individuals supporting clemency applications); *Judicial Watch of Fla., Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 18 (D.D.C. 2000) ("Depriving the public of knowledge of the writer's identity would deprive the public of a fact which could suggest that their Justice Department had been steered by political pressure rather than by the relevant facts and law.").

Plaintiffs' argument that this Court already "acknowledged that the names themselves are *not* necessary" because "the redacted record was sufficient for any interested parties to determine whether" to file for judicial review (Pls. Reply at 14) is incorrect. The Court's provision for *temporary* redaction of plaintiffs' names was not a resolution of this case on the merits. Assuming CREW may properly challenge the Commission's actions in MUR 6920, review of the agency's actions will require the identities of John Does 1 and 2 to be disclosed in the context of that case. Knowing their identities is necessary for evaluation of the FEC's enforcement decision, both because that decision will have to be evaluated on a full administrative record and because information about the partisan connections of persons uncovered in investigations is necessary to fulfill part of the purpose of judicial review of FEC enforcement decisions. *DSCC*, 454 U.S. at 37 (noting the Commission's party registration requirements and its authority to decide issues affecting political party dynamics); *Jurewicz*, 741 F.3d at 1334 ("A public interest exists where the public can more easily determine whether an agency is in compliance with [its]

statutory mandate." (citation and internal quotation marks omitted)).[8] Particularly where a central purpose of FECA is "provid[ing] the electorate with information as to where political campaign money comes from," *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam), and here where part of what will be disclosed is a funder of other persons deemed to have used the funds unlawfully, plaintiffs' request for anonymity is misplaced.

Plaintiffs' analogy to tax matters and rap sheets thus is inapt. (Pls. Reply at 12.) In contrast to FECA's enforcement regime, tax returns are generally barred from being made public, 26 U.S.C. § 6103, and there is a "web of federal statutory and regulatory provisions that limit[] the disclosure of rap-sheet information," *U.S. Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 764-65 (1989). By contrast, in the context of FECA, the identification of persons found to not have violated FECA is part of the statutory scheme. Thus, while plaintiffs may be correct that the identity of a disputed tax debtor or alleged criminal "'has no bearing or effect on the general public'" (Pls. Reply at 12 (quoting 489 U.S. at 766 n.18), knowing the identity of those materially involved in investigated activity is appropriate and consistent with FECA's accountability purpose.

D. Disclosure of Plaintiffs' Identities Does Not Impermissibly Infringe on Their First Amendment Rights

Plaintiffs' argument that the First Amendment precludes disclosure of their names (Pls. Reply at 15-22) is likewise meritless.

Plaintiffs' First Amendment arguments focus heavily on partial judicial pronouncements regarding the burdens of FECA's disclosure regimes. (*See id.* at 15-18.) But the decisions plaintiffs rely on sustained such requirements because FECA's disclosure requirements serve

[8] Portions of the dismissal case could theoretically be conducted under seal, but that would be contrary to the presumption of public access to courtroom proceedings in the context of the regulation of democracy where public accountability is particularly acute.

important governmental interests outweighing the burdens plaintiffs identify. Indeed, in *Buckley*, the Supreme Court explained that the disclosure interests at stake in FECA involve no less than the free functioning of our national institutions. 424 U.S. at 66. Thus, the Supreme Court and the D.C. Circuit have repeatedly embraced disclosure interests in upholding the Act's requirements against constitutional challenges.[9]

Accordingly, courts have sustained FECA's disclosure requirements under "'exacting scrutiny,' which requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *Id.* at 366-67 (quoting *Buckley*, 424 U.S. at 64, 66). The FEC's disclosure policy readily meets this standard by serving important deterrence and accountability interests in a manner that is substantially related to providing the public with the documents that "play[ed] a critical role in the resolution of a matter." FEC Disclosure Policy, 81 Fed. Reg. at 50703.

Plaintiffs' observations about the FEC's regulation of "core constitutionally protected activity" (Pls. Reply at 17-18) do not advance their claims. Contrary to plaintiffs' claim of a lack of tailoring (*id.* at 17), the FEC's policy is carefully calibrated to take into account public informational interests, the agency's own accountability, and the privacy interests that arise

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[9] *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434, 1459 (2014) ("[d]isclosure requirements are in part justified based on a governmental interest in provid[ing] the electorate with information about the sources of election-related spending" (internal quotation marks omitted)); *Buckley*, 424 U.S. at 68 (FECA's political committee disclosure requirements "directly serve substantial governmental interests"); *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010) (en banc) (such requirements further the public's "interest in knowing who is speaking about a candidate and who is funding that speech," and "deter[] and help[] expose violations of other campaign finance restrictions"). Plaintiffs argue that "'[d]isclaimer and disclosure requirements may burden the ability to speak'" (Pls. Reply at 16-17 (quoting *Citizens United v. FEC*, 558 U.S. 310, 366 (2010)), but in stopping the quotation midway they fail to provide the Court with the rest of the Supreme Court's assessment that such requirements "*impose no ceiling on campaign-related activities, and do not prevent anyone from speaking*." *Citizens United*, 558 U.S. at 366 (citations and internal quotation marks omitted) (emphasis added).

during the processing of administrative enforcement matters. The FEC's "fail[ure] to tailor its disclosure policy to avoid unnecessarily burdening . . . First Amendment rights" was problematic in *AFL-CIO*. FEC Disclosure Policy, 81 Fed. Reg. at 50703. But the agency has since cured that problem by explicitly balancing those interests in a reasonable way. *Id.*

Although plaintiffs launch a lengthy attack on the validity of the FEC's deterrence interest (Pls. Reply at 18-22), they acknowledge but do not question the agency's accountability interest (*id.* at 18). The Court can accordingly sustain the FEC's disclosure policy solely on the unchallenged interest in making the agency's enforcement determinations capable of public scrutiny. Accountability requires identifying plaintiffs by name. In *AFL-CIO*, the D.C. Circuit had "no doubt" that this interest was "valid." 333 F.3d at 178.

In any event, plaintiffs' challenge to the FEC's deterrence interest is unfounded. Plaintiffs question "how [their] conduct is relevant to deterrence at all" (Pls. Reply at 18), apparently failing to appreciate that [redacted] and two Commissioners believed there was reason to believe that plaintiffs themselves violated FECA. Plaintiffs may prefer to focus on the fact that they were not found to have "engaged in wrongdoing" (*id.* at 21), but anyone considering taking actions similar or identical to the ones plaintiffs took is now on notice that [redacted] they themselves could be found to have violated FECA. The purpose of such notice is not to "instill fear," as plaintiffs claim (*id.* at 19), but to provide the regulated community with a full picture of the actions that led to respondents' conciliation with the agency and payment of a substantial penalty. Plaintiffs' identities, like the other non-respondents discussed above, *see supra* p. 9, provides a complete picture of the actions and relationships that led to the subject FECA violation, furthering the Commission's "valid" interests in deterrence. *AFL-CIO*, 333 F.3d at 178. Contrary to plaintiffs'

suggestion that their connections to MUR 6920 were "tangential" (Pls. Reply at 17), the record demonstrates that they played a central role in facts leading up to the contribution at issue.

Plaintiffs claim that identifying persons who have not been found by the Commission to have violated the statute is "out of step with the practice of other federal agencies." (Pls. Reply at 21-22.) The FEC's proceeding, however, involved a unique public review and plaintiffs can point to no analogues where enforcement cases are pursued in open court and exercises of prosecutorial discretion are reviewed under seal.

E. The FEC's Disclosure Policy is Valid Under *Chevron*

Finally, plaintiffs argue that section 111.20(a) exceeds the Commission's authority and that it amounts to an unconstitutional "blanket" disclosure policy. (Pls. Reply at 22-25.) These arguments are easily dispatched.

Plaintiffs' claim that section 30109(a)(4)(B)(ii) establishes that the Commission may disclose only conciliation agreements and determinations of non-violations and "nothing more" (Pls. Reply at 23) is inaccurate. As discussed above, *see supra* pp. 8-9, section 30109(a)(4)(B)(ii) mandates two forms of disclosure but does not actually state that the Commission must not disclose anything more. Indeed, the D.C. Circuit in *AFL-CIO* confirms that the FEC may disclose more, observing that the governmental interests in deterrence and promoting accountability "may well justify releasing more information than the minimum disclosures required by section [30109](a)." 333 F.3d at 179. Were there any basis to plaintiffs' *Chevron* argument (Pls. Reply at 23-24), then the Commission would lack such discretion. But plaintiffs themselves admit that "FECA is silent as to what other disclosure might be made" (*id.* at 24), establishing that such disclosure is subject to the Commission's gap-filling authority and powers to implement FECA. Congress authorized the FEC to "formulate policy" with respect to FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to

carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). These powers include the power to adopt the current disclosure policy, as presumed in *AFL-CIO*.

Nor are plaintiffs correct that the FEC's disclosure policy can be invalidated due to its "'blanket nature.'" (Pls. Reply at 24-25.) The FEC no longer "releas[es] *all* information not expressly exempted by FOIA." *AFL-CIO*, 333 F.3d at 178. Instead, after careful consideration, the Commission has reasonably identified "several categories of documents integral to its decisionmaking process that will be disclosed upon termination of an enforcement matter." FEC Disclosure Policy, 81 Fed. Reg. at 50703. Thus, the Commission is no longer releasing *all information* but has focused only on just the most important documents relevant to its enforcement decisions. It has done the balancing plaintiffs seek, concluding that disclosure of documents including their names "tilts decidedly in favor of public disclosure, even if the documents reveal some confidential information." *Id.* Accordingly, the FEC's current disclosure policy takes *AFL-CIO* into account and cannot be invalidated on the basis of the invalidity of its prior disclosure policy. (FEC Response at 8.) This is not a situation involving the release of "10,000 and 20,000 pages of documentation that [the FEC] has never examined," *AFL-CIO*, 333 F.3d at 178, but rather the considered disclosure of the role of participants who were central in a chain of events that led to a contribution made in the name of another.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Commission's response to plaintiffs' motion for temporary restraining order and preliminary injunction, the Court should deny plaintiffs' request to permanently enjoin disclosure of their identity in the documents publicly released in the Commission's administrative case file for MUR 6920.

Respectfully submitted,

Lisa J. Stevenson (D.C. Bar No. 457628)
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

/s/ Charles Kitcher
Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
ckitcher@fec.gov

Robert W. Bonham III (D.C. Bar No. 397859)
Senior Attorney
rbonham@fec.gov

Haven G. Ward (D.C. Bar. No. 976090)
Attorney
hward@fec.gov

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COUNSEL FOR DEFENDANT
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463
(202) 694-1650

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of January, 2018, I served the unredacted version of the foregoing surreply that was filed with the Court under seal, by sending it by email to the following counsel, who have consented to receive service by email and who are permitted to receive the document pursuant to the Court's protective order:

William W. Taylor, III (D.C. Bar # 84194)
Adam Fotiades (D.C. Bar # 1007961)
Dermot W. Lynch (D.C. Bar # 1047313)
ZUCKERMAN SPAEDER LLP
1800 M Street, NW, Suite 1000
Washington, DC 20036
202-778-1800
202-822-8106 (fax)
wtaylor@zuckerman.com
afotiades@zuckerman.com
dlynch@zuckerman.com

Michael Dry (D.C. Bar # 1048763)
Craig Margolis (D.C. Bar # 454783)
Kathleen Cooperstein (D.C. Bar # 1017553)
Vinson & Elkins
2200 Pennsylvania Avenue, NW
Suite 500 West
Washington, D.C., 20037
202-639-6500
202-879-8984 (fax)
mdry@velaw.com
cmargolis@velaw.com
kcooperstein@velaw.com

/s/ Charles Kitcher
Charles Kitcher (D.C. Bar No. 986226)
Acting Assistant General Counsel
Federal Election Commission

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