ORAL ARGUMENT SCHEDULED SEPTEMBER 17, 2018

NO. 18-5099

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

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

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the District of Columbia
(Honorable Amy Berman Jackson)

BRIEF OF *AMICI CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND ANNE WEISMANN IN SUPPORT OF FEDERAL ELECTION COMMISSION AND AFFIRMANCE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. Parties and *Amici*

All parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Brief of Appellee.

II. Rulings Under Review

References to the ruling at issue appears in the Brief for Appellee.

III. Related Cases

References to the related case appear in the Brief for Appellee. This case was not previously before this Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1, *Amicus* Citizens for Responsibility and Ethics in Washington certifies that no publicly held corporation has a 10 percent or greater ownership interest in it.

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GLOSSARY

FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
OGC	Office of General Counsel of the Federal Election Commission
PAC	Political Action Committee

STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in the Brief for Appellants.

INTERESTS OF *AMICI CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") and Anne Weismann are the complainants in the underlying FEC enforcement matter concerning the failure to disclose the true source of a $1.71 million campaign contribution. CREW is a nonpartisan, nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect citizens' right to be informed about the source of contributions used to fund campaign expenditures. Among its principal activities, CREW monitors FEC filings to ensure proper and complete disclosure as required by law and utilizes those filings to craft reports for public consumption. CREW also files requests under the Freedom of Information Act ("FOIA") to ensure government transparency and provides the information obtained from such requests to the public. At the time of the administrative complaint, Ms. Weismann was CREW's Interim Executive Director, and she is currently CREW's Chief FOIA counsel. She is a citizen of the United States and a registered voter and resident of the state of Maryland. Ms. Weismann is entitled to receive all of the information FECA requires to be reported. The principal activities

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* affirm that no counsel for a party authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

of *amici* include, where appropriate, filing complaints with government bodies to obtain information to which they are legally entitled.

SUMMARY OF ARGUMENT

The district court's judgment should be affirmed for a simple reason: Plaintiffs have no right to anonymity today because the recipient of Plaintiffs' funds, Now or Never PAC, was legally required to disclose Plaintiffs' identities on its campaign finance report in 2012. Plaintiffs have no First Amendment right to make anonymous campaign contributions, and no right to obtain a judicial gag order precluding the FEC from making public what Now or Never PAC has admitted it should have made public years ago.

Recipients of campaign contributions are required to report the identities of any source or conduit for all contributions over $200. Plaintiffs do not dispute that they were either the source or a conduit for the $1.71 million contribution to Now or Never PAC. Indeed, they admit that the purpose of their money transfer was to engage in political activity. In turn, Now or Never PAC has admitted that it violated its reporting obligations under 52 U.S.C. § 30104(b)(3)(A) by failing to disclose the sources of the contribution. These facts should be the beginning and end of this appeal—Plaintiffs have no right to avoid disclosure now because Now or Never PAC should have disclosed their identities years ago.

Plaintiffs' reliance on the First Amendment to contend otherwise is misplaced. The only First Amendment activity in which Plaintiffs claim to have engaged in is the transfer of money that formed a campaign contribution to Now or Never PAC. But the Supreme Court has repeatedly held that mandatory disclosure of campaign contributions does not violate the First Amendment, and vindicates interests fundamental to the operation of our democracy. Plaintiffs offer no argument to the contrary and instead premise their argument on inapt case law outside the disclosure context. Moreover, disclosure here also promotes the important governmental interests of deterring future reporting violations by contribution recipients who may wish to conceal the identities of their funders and ensuring accountability for the FEC's enforcement decisions.

This is a simple case about an admitted reporting violation by the recipient of a large campaign contribution. Plaintiffs' effort to complicate this case by stitching together out-of-context statutes, regulations, and case law should be rejected. Plaintiffs' identities should have been disclosed years ago, and Plaintiffs have no basis to prevent that disclosure now.

ARGUMENT

I. Plaintiffs Were Legally Required to Be Reported as Sources or Conduits for the $1.71 Million Contribution to Now or Never PAC.

Plaintiffs have no right to anonymity because Now or Never PAC was legally required to disclose that Plaintiffs were the sources of, or conduits for, the $1.71

million contribution it received. FECA requires that political committees report the identity of anyone who makes a contribution over $200. *See* 52 U.S.C. § 30104(b)(3)(A). That provision requires disclosure of the money's true source, not merely an intermediary who delivers the funds to the ultimate recipient. *See United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011) (holding that Congress's use of "contribution" in FECA refers to "the source of the gift, not any intermediary who simply conveys the gift from the donor to the donee"). For that reason, the FEC requires all political committees to report "the name and address of the original contributor" and "each conduit through which the earmarked contribution passed, including the name and address of the conduit."[2]

As part of the conciliation agreement that resolved the FEC's investigation in this matter, Now or Never PAC and its treasurer James C. Thomas III admitted they violated FECA's requirement that their campaign finance report "include, *inter alia*, the identification of each person who makes a contribution or contributions that have

[2] FEC Form 3X, Reports of Receipts and Disbursements for Other than an Authorized Committee 11, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf. The FEC's instructions on this form, which require all political committees to report the "original contributor" and "each conduit," were promulgated by an affirmative vote of four commissioners and have the force of law. *See* 52 U.S.C. § 30107(a)(8) ("The Commission has the power . . . to develop such prescribed forms and to make, amend, and repeal such rules as are necessary to carry out the provisions of this Act . . . .").

an aggregate amount or value in excess of $200 during an election cycle."[3] They also admitted to the following facts giving rise to the violation of their reporting obligations: (1) "[o]n or around October 31, 2012, GI LLC received $2.5 million from another source"; (2) "[o]n the morning of October 31, 2012, after GI LLC received the $2.5 million, GI LLC contributed $1.8 million from its account to ACU"; and (3) "[s]ubsequently, also on October 31, 2012, ACU contributed $1.71 million to Now or Never PAC. ACU would have had insufficient funds to make this contribution without the funds it received from GI LLC earlier that same day."[4]

It is undisputed that Plaintiffs are the "another source" from whom GI LLC received the $2.5 million that led to the contribution to Now or Never PAC. The FEC specifically stated as much to the district court, ECF No. 16 at 5-6, and Plaintiffs took no issue with that key factual proposition. This undisputed fact necessarily means that FECA required Plaintiffs' identities to be publicly disclosed as the source of the contribution, which is fatal to their *post hoc* request for anonymity.

[3] FEC, Conciliation Agreement at V.2 & VI.3, MUR 6920 (American Conservative Union *et al.*) (Nov. 3, 2017), https://www.fec.gov/files/legal/murs/6920/17044434756.pdf. Now or Never PAC and its treasurer separately admitted to violating the straw donor ban, 52 U.S.C. § 30122, by knowingly accepting a contribution made by one person in the name of another.

[4] *Id.* at IV.6, 7, 8.

For the first time on appeal, Plaintiffs vaguely suggest they might not have been the initial, "true source." Pls.' Br. at 52-53. They contend it is "erroneous and misleading" to say their status as the source of the contribution is "undisputed" because they "have not taken a position on this question." *Id.* at 9 & n.4. But not taking a position is the very definition of "undisputed." Plaintiffs cannot now manufacture a dispute over the single most important fact in the record of this matter by merely (and counterfactually) asserting to this Court that the fact is contested.

Plaintiffs also contend that no formal FEC finding has been issued identifying them as the true source. *Id.* at 9. This misses the point. Even the Commissioners who declined to take action against Plaintiffs acknowledged that Plaintiffs provided the funds to GI LLC. *See, e.g.*, JA 208 (Statement of Reasons of Vice Chair Caroline C. Hunter & Comm'r Lee E. Goodman, noting that Plaintiffs "ma[de] a contribution in the name of an LLC" but stating whether that violated 52 U.S.C. § 30122 was an open question); *see also* JA 204 (Statement of Reasons of Comm'r Weintraub) (noting that Plaintiffs "transferred $2.5 million to GI"); JA 124 (Third Gen. Counsel's Report) (noting that "[o]n or very shortly before October 31, 2012, [Plaintiffs] wired $2.5 million to GI LLC. On October 31, 2012, Thomas emailed consultants for Now or Never PAC, stating '[t]he 2.5 million is here. I am about to wire $1.8 million to American Conservative Union.'" (second bracket in original; footnote omitted)). There is no dispute that GI LLC received the funds from

Plaintiffs. While it may be that Plaintiffs first received the funds from another source, that would have no bearing on Now or Never PAC's obligation to report Plaintiffs as a conduit of the funds. *See supra* note 2.

Moreover, in the course of (groundlessly) seeking to preserve their anonymity through a First Amendment claim, Plaintiffs acknowledge that they transferred the funds to GI LLC as a way to "engag[e] in political participation." Pls.' Br. at 3; *see also id.* at 1-2 (warning of "discouraging political activity"); *id.* at 44 (asserting that revealing their identities would "plainly threaten[ ] *open participation* in the electoral process" (emphasis added)).[5] By admitting that their transfer of funds to GI LLC was a means to "participate in the political process," *id.* at 50, Plaintiffs necessarily admit that the purpose of their transfer of funds to GI LLC was to make a political contribution. Because it is undisputed that Plaintiffs were either the original contributor, or at least a conduit of the contribution, Now or Never PAC was legally required to report Plaintiffs' identities on FEC Form 3X. Plaintiffs thus have no legal basis to claim anonymity.

Plaintiffs' arguments to the contrary are misplaced. Plaintiffs contend that the question of whether FECA required the disclosure of their contribution is "beyond the scope of this case" because they say the conciliation agreement was limited to

[5] There is considerable irony in parties who identify themselves as "John Doe 1" and "John Doe 2" expressing concern about "open participation in the electoral process."

whether the various transferors of the funds should be held liable for violating FECA's straw donor ban, 52 U.S.C. § 30122, and because "[t]he Commission has not reached a definitive conclusion or made a finding regarding the true source of the contribution." Pls.' Br. at 52. Therefore, Plaintiffs contend, the "proper disclosure of [the $1.71 million] contribution is not at issue," and the only relevant question "is with respect to Plaintiffs as third parties identified in an FEC investigative file." *Id.* at 53. Plaintiffs are wrong on the facts and law.

The conciliation agreement was not merely about whether any particular link in the chain should be held responsible for violating the straw donor ban, 52 U.S.C. § 30122, as Plaintiffs mistakenly contend, Pls.' Br. at 52; it rather explicitly described Now or Never PAC's and its treasurer's violations of their *reporting* obligations under 52 U.S.C. § 30104(b)(3)(A). *See supra* note 3. The conciliation agreement specifically identified the $2.5 million transfer to GI LLC as a source of the contribution. *Id*. As such, Plaintiffs' identities, included throughout the FEC's investigative record as the source of funds used by GI LLC, are plainly part of the "basis" for the FEC's "action" with respect to Now or Never PAC and its treasurer in conciliating their violation of the reporting statute. *See* 11 C.F.R. § 111.20(a) (requiring disclosure of basis for FEC action when it terminates its proceedings).[6]

[6] Plaintiffs are wrong to contend that their identities do not form the basis of a Commission "action" because the Commission did not "act" with respect to Plaintiffs' alleged violation of 52 U.S.C. § 30122. Regardless of whether the FEC's

For this reason, the entire premise of Plaintiffs' brief—that the FEC seeks to "public[ly] sham[e]" them and "brand [them] as federal election law violators," Pls.' Br. at 1, by releasing their identities—is wrong. Now or Never PAC and its treasurer have *admitted* to violating 52 U.S.C. § 30104(b)(3)(A) by failing to properly disclose the identity of the contributor of the $1.71 million. Their failure to report Plaintiffs' identities on FEC Form 3X (as either the original contributor or a conduit) was not a violation of § 30104(b)(3)(A) by *Plaintiffs*, but rather a violation of the law by Now or Never PAC and its treasurer.[7] Therefore, Plaintiffs' contention that whether "Plaintiffs violated FECA by failing to report their identities to the FEC . . . [is] beyond the scope of this case," Pls.' Br. at 52, is irrelevant. The *contributor* has no reporting obligations; the *recipient* does, and those obligations were indisputably violated here.[8] Thus, regardless of whether the Plaintiffs also violated the law, there

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public disclosure regulation applies based upon the Commission's decisions with respect to *Plaintiffs'* culpability, it plainly applies with respect to Now or Never PAC's admitted violation by failing to report its contributors, Plaintiffs included.

[7] This is a distinct issue from whether Plaintiffs violated § 30122's straw donor ban, and if so, whether the FEC acted contrary to law by declining to pursue such a violation. Whether Plaintiffs were "federal election law violators" will be determined, if at all, on remand from *amici's* separate suit against the FEC under 52 U.S.C. § 30109. Nothing about the release of Plaintiffs' identities as part of the record of the FEC's separate determination that Now or Never PAC and its treasurer violated *their* reporting obligations under § 30104(b)(3)(A) will "brand" Plaintiffs as "federal election law violators."

[8] Plaintiffs are therefore incorrect to assert that "the ultimate person required to report the contribution remains unsettled as a matter of both law and fact." Pls.' Br. at 52.

is no dispute that they are the source of or conduits for the funds contributed to Now or Never PAC via GI LLC and ACU, and that FECA mandates the disclosure of their identities.[9]

Moreover, the fact that the Commission did not act on OGC's recommendation to find reason to believe Plaintiffs violated the straw donor ban has no bearing on the propriety of releasing their names in connection with Now or Never PAC's admitted failure to report the identity of its contributors. The controlling bloc's decision not to enforce against Plaintiffs—based in large part on the rapidly approaching statute of limitations, *see* JA 210-11—means that Plaintiffs were not pursued for FECA violations. That says nothing about Now or Never PAC's admitted failure to report its contributors. Nor does releasing Plaintiffs' identities wrongfully incriminate them; it merely makes public the information Now or Never PAC should have made available to voters in the first place.[10]

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[9] Nor are there any "due process" concerns with releasing Plaintiffs' identities. First, the FEC is not an adjudicatory body and has no authority to effect deprivations of "liberty or property" that would trigger due process ramifications. *See* 52 U.S.C. § 30109(a)(4)(A)(i) & (a)(6)(A) (providing that Commission cannot impose penalties in enforcement matters without voluntary agreement of respondent). Second, the unredacted presence of Plaintiffs' identities among the FEC's files does not deprive Plaintiffs of any cognizable liberty or property interest. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry . . . is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'").

[10] FECA requires that campaign finance "designation[s], statement[s], "report[s] [and] notification[s]" be made public. *See* 52 U.S.C. § 30104(a)(11)(B). Plaintiffs cannot plausibly contend that the FEC is powerless under FECA, its regulations, and its disclosure policy to release information it would have been required to make

In any event, mandatory disclosure of contributors and conduits cannot be conditioned upon an FEC finding that the contributors broke the law. *Cf. Citizens United v. FEC*, 558 U.S. 310, 368-69 (2010) (rejecting argument that disclosure can be required only for activity that is also legally restricted or banned). Millions of contributors make federal contributions and are therefore subject to disclosure; almost none of those contributors has his or her conduct investigated by the FEC. But as Plaintiffs would have it, political committees could simply refuse to identify the original sources and conduits of all of their contributions and, so long as the FEC makes no findings with respect to the legality of those sources' or conduits' actions, their identities would be *legally mandated* to be hidden from the public. This turns FECA's disclosure regime upside down.

Now or Never PAC was required to disclose Plaintiffs' identities upon receipt of the $1.71 million contribution. Plaintiffs' effort to sidestep this fundamental issue—and instead paint themselves as merely "third parties identified in an FEC investigative file," Pls.' Br. at 53—should be rejected. Plaintiffs' identities are included in the FEC's file as sources or conduits of a contribution that the recipient admitted it unlawfully failed to properly report. There is no basis to shield the disclosure of Plaintiffs' identities.

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public had Now or Never PAC properly reported the source and conduits for the contribution.

II. Plaintiffs Have No First Amendment Right to Make Anonymous Campaign Contributions.

Plaintiffs have no First Amendment right to anonymously make campaign contributions. Although FECA and FEC regulations unambiguously required Now or Never PAC to disclose Plaintiffs' identities on its campaign finance report, Plaintiffs nonetheless ask this Court to grant them an unprecedented exemption under the First Amendment. That request should be rejected.

An unbroken, forty-year string of Supreme Court decisions emphatically refutes Plaintiffs' claim that the First Amendment should be interpreted to bar mandatory disclosure of the identities of those engaged in campaign-related spending. The Supreme Court has explained that disclosure of the source and path of contributions to federal candidates is necessary to protect "the free functioning of our national institutions." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976). Such disclosure "allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." *Id.* at 67. Disclosure "deter[s] actual corruption and avoid[s] the appearance of corruption" because "[a] public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return." *Id.* And disclosure provides "an essential means of gathering the data necessary to detect violations" of other parts of federal campaign finance law. *Id.* at 68; *see also McConnell v. FEC*, 540 U.S. 93, 196 (2003) (reaffirming "the important

state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements"); *Citizens United*, 558 U.S. at 369-70 (upholding disclosure of candidate-related spending so that "citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests" and "*who* is speaking about a candidate" (emphasis added)). The Court has consistently held that these interests outweigh the attenuated First Amendment burdens arising from committees not being allowed to hide the sources of their funds.

The Supreme Court has recognized one—and only one—constitutional exception to campaign disclosure: when disclosure of a donor's identity gives rise to a reasonable probability that the donor will be subject to "threats, harassment, or reprisals." *Citizens United*, 558 U.S. at 370 (citing *McConnell*, 540 U.S. at 198); *see also Buckley*, 424 U.S. at 74. Plaintiffs did not contend this exception applied before the district court, JA 276, and so have waived any such argument on appeal, *see United States v. Gewin*, 759 F.3d 72, 78 (D.C. Cir. 2014); *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084 (D.C. Cir. 1984). Plaintiffs do not even attempt to present evidence that such threats, harassment, or reprisals will ensue if their identities are disclosed. *See* Pls.' Br. at 50 n.12 (stating that "facts prove" harassment would be likely but providing no such facts).[11] Even if Plaintiffs had not

[11] The closest Plaintiffs come to identifying any such evidence is their objection to the statement of Commissioner Weintraub. But there is nothing in the record of this case regarding the types of reprisals—such as death threats, termination of

waived their right to make this argument, it would fail for being insufficiently briefed. *See Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). Accordingly, their claim for a First Amendment exemption to disclosure must fail. *See Citizens United*, 558 U.S. at 370 (rejecting claim for exemption where entity subject to mandatory disclosure "offered no evidence that its members may face . . . threats or reprisals").

Rather than confront this precedent, Plaintiffs instead proceed as if this were not a case about the disclosure of the identity of a campaign contributor, but instead were about the identities of mere bystanders engaged in political activity for which the First Amendment protects anonymity, unwittingly swept up in an unrelated FEC investigation. *See* Pls.' Br. at 47-53. In doing so, Plaintiffs contend that this Court's decision in *AFL-CIO v. FEC*, 333 F.3d 168, 176 (D.C. Cir. 2003), requires the FEC to keep their identities secret. Not so.

First, the only political activity at issue here is Plaintiffs' transfer of the funds that formed the campaign contribution at issue in this case. Plaintiffs vaguely

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employment, and physical violence—that led the Supreme Court to recognize a First Amendment disclosure exemption as applied to groups like the NAACP in the 1950s and the Socialist Workers Party in the 1980s. *See NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958); *Brown v. Socialist Workers 74' Campaign Comm.*, 459 U.S. 87, 100-101 (1982). Moreover, a Commissioner's view that the law required one's disclosure in the first place cannot possibly constitute evidence of a risk of threats, harassment, or reprisals. Were it otherwise, every time any Commissioner explained his or her vote in an enforcement matter to find that FECA had been violated, the contributor would be legally entitled to anonymity.

reference their "political activity," Pls.' Br. at 1, 49, "political participation," *id.* at 3, "open participation in the electoral process," *id.* at 44, and "First Amendment-protected activity," *id.* at 50, but never explain to the Court what specific activity—other than participating as a source or conduit of a campaign contribution—would be unconstitutionally disclosed by the release of their identities. As discussed above, the Supreme Court has already decided that the First Amendment poses no barrier to the mandatory disclosure of campaign contributors. *AFL-CIO* is inapposite because the materials sought to be protected in that case—member lists, employee lists, strategy documents, and operating procedures—all involved political activity and associational rights unrelated to a contribution for which the law already compels mandatory disclosure. Because Now or Never PAC was required to report Plaintiffs' identities pursuant to a disclosure regime that the Supreme Court has repeatedly upheld as consistent with the First Amendment, Plaintiffs' claims to a First Amendment right to anonymity are baseless.

Second, *AFL-CIO* did not create a rule that the identities of an organization's personnel must remain anonymous, as Plaintiffs seem to contend.[12] *See* Pls.' Br. at

[12] Much of Plaintiffs' argument hinges on their contention that they were mere witnesses, not respondents in the FEC's proceeding. But even if that were true, then *AFL-CIO* undermines their reliance on FECA's confidentiality provision. *See* 333 F.3d at 178 (noting that subsection (a)(12)(A)'s requirement that notification of investigation only be made with consent means that "Congress was concerned about protecting the targets of Commission investigations, not the agency's sources of information").

47. Indeed, the court labeled the risk of chilled participation by "members and officials" as a "marginal" First Amendment interest. *AFL-CIO*, 333 F.3d at 178. Because the FEC's then-extant disclosure policy had not been tailored, it was unnecessary for the court to engage in any balancing analysis to see whether those "marginal" interests were outweighed by the "valid" governmental interests advanced by the FEC. *Id.* As the FEC explains, *see* FEC Br. at 26-33, the current disclosure policy has been narrowly tailored to account for First Amendment interests, and thus any purported First Amendment burdens must be balanced against the government's compelling interest in disclosure.

Third, disclosure of Plaintiffs' identities advances several compelling governmental interests. To begin, it advances all the interests, including preventing actual or apparent corruption, already identified by the Supreme Court in its decisions upholding disclosure laws. *See supra*; *see also AFL-CIO*, 333 F.3d at 178 (describing deterrence of FECA violations as "valid" FEC interest in disclosure). For example, without knowing the identities of the contributors, it is impossible to know whether the elected officials who benefitted from their spending have since rewarded the contributors with any *quid pro quo* benefits. Disclosure of Plaintiffs' identities will deter these and other violations by political committees who are legally required to report the sources and conduits of their contributions. As the Supreme Court has explained, disclosure of contributors is necessary so that

"citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests." *Citizens United*, 558 U.S. at 370. But if the identity of a source or conduit must remain secret every time the FEC declines—for whatever reason (*e.g.*, an expiring statute of limitations period or resource limitations)—to separately pursue that source's or conduit's potential FECA violations, a dangerous reporting loophole will be created. Disclosing the sources and conduits at the end of an FEC investigation into a reporting violation by the recipient political committee appropriately and constitutionally deters recipients from violating FECA's reporting requirements in the first place.

Disclosure of Plaintiffs' identities will likewise promote "the [FEC]'s own public accountability." *AFL-CIO*, 333 F.3d at 178. It will enable the public to determine whether the Commissioners who decided this matter acted for partisan or other improper reasons. Similarly, it ensures accountability in the event the particular conduits or sources have a conflict of interest with particular Commissioners who have declined to find reason to believe a violation has occurred. Disclosure here places a check on the potential for such abuses of discretion. *Cf. Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004) (explaining that it is "a structural necessity in a real democracy" for "citizens to know 'what their Government is up to.'").

Disclosure also promotes accountability by enabling *amici* to effectively avail themselves of their statutory right to challenge the FEC's decision not to take enforcement action against Plaintiffs in the underlying case. *See* 52 U.S.C. § 30109(a)(8). Unlike most law enforcement agencies, the FEC's decision not to take action on a complaint is subject to judicial review; the complainant can file suit to challenge such a decision. *Id*. To prevail in that suit, *amici* will need to show that the FEC's failure to enforce—as explained by the statement of two of the three FEC Commissioners who voted not to investigate Plaintiffs' conduct[13]—was contrary to law. *See* 52 U.S.C. § 30109(a)(8)(C). As part of that showing, *amici* will need to demonstrate that the factual record before the Commission regarding the donors did not support the legal conclusions reached in the Commissioners' statement. *See CREW v. FEC*, 209 F. Supp. 3d 77, 88 (D.D.C. 2016) (noting standard of review in challenges to FEC's failure to enforce).

Plaintiffs' proposed secrecy rule would significantly impede CREW's—or any other complainant's—statutory right to challenge FEC's inaction. For example, below are three excerpts showing the extensive redactions to the Third General

[13] Statement of Reasons of Vice Chair Caroline C. Hunter & Comm'r Lee E. Goodman, MUR 6920 (American Conservative Union *et al.*), https://www.fec.gov/files/legal/murs/current/100487859.pdf. The third Commissioner who voted not to enforce, Commissioner Matthew S. Petersen, did not issue a statement in the matter.

Counsel's Report, which had recommended the Commission find reason to believe that Plaintiffs violated FECA's straw donor prohibition.

JA 123

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funded GI LLC, wiring it $2.5 million only seven weeks after the LLC's formation.[19]

B. Subpoena and Order to

JA 124

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liability without obtaining further information from

[22] OGC has informed and GI LLC of the need for further fact-finding—*i.e.*, in the form of Subpoena and Order response—as well as Commission approval,

C. Contribution to Now or Never PAC

JA 131

C. Alternatively, the Record Likewise Supports a Reasonable Inference that Assisted in Making a Contribution in the Name of Another

Even if currently unknown facts were to suggest that GI LLC, and not was the true source of the funds, the record provides a reasonable inference that assisted in making a contribution in the name of another. The Commission has noted that the regulation prohibiting assisting in the making of a contribution in the name of another applies to those who "initiate or instigate or have some significant participation" in making such a contribution.[44]

Further, has refused to respond to the Commission's Subpoena and Order seeking information as to its relationship with and involvement in GI LLC, allowing the Commission to draw an adverse inference regarding the level of involvement and had in the activities of GI LLC.[45] Such involvement suggests that as trustee, may have played a significant role in assisting GI LLC in making the contribution. Further, transferred funds to GI LLC

The redactions needed to conceal Plaintiffs' identities render this document and other key pieces of the administrative record effectively unusable. CREW cannot genuinely exercise its right to challenge the Commission's decision if it is kept in the dark about the facts upon which the Commission acted. CREW is entitled to know Plaintiffs' identities in order to exercise its statutory right to challenge the FEC's action with respect to its administrative complaint.

* * *

This case is simple. Plaintiffs made a reportable campaign contribution to a PAC that admits it failed to report the identity of its contributors. The law requires

disclosure of everyone who contributes over $200; Plaintiffs transferred 12,500 times that amount. There is no statutory basis for Plaintiffs' attempt to hide their contribution from voters and the public, and there is no First Amendment right to make anonymous campaign contributions. For these reasons, and in light of the Supreme Court's uniform holdings that disclosure furthers interests critically important to the functioning of our democratic system, Plaintiffs' identities must be disclosed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: June 21, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 4,860 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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

/s/ Adav Noti
Counsel for *Amici*

CERTIFICATE OF SERVICE

Pursuant to D.C. Circuit Local Rule 25(c), I hereby certify that on this 21st day of June, 2018, I electronically filed the foregoing with the Court using the CM/ECF system. All parties to the case have been served through the CM/ECF system.

/s/ Adav Noti
Counsel for *Amici*