IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE 1, *et al.*, Plaintiffs, *v.* FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 17-cv-2694 (ABJ)

BRIEF OF CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON AND ANNE WEISMANN AS *AMICI CURIAE*

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Citizens for Responsibility and Ethics in Washington and Anne Weismann (collectively "CREW") respectfully submit this brief as *amici curiae* pursuant to the Court's Order of January 31, 2018.[1]

Defendant Federal Election Commission ("FEC") correctly notes that its own procedures governing closed enforcement matters require disclosure of plaintiffs' identities. But the Court need not reach the FEC's internal procedures to decide this case. The Federal Election Campaign Act ("FECA") itself mandates that plaintiffs' names and addresses be made available to the voting public. And because there is no First Amendment right to anonymously make or transfer significant campaign contributions, plaintiffs' claims to be constitutionally exempt from disclosure must fail.

ARGUMENT

I. FECA Requires Plaintiffs' Identities to Be Made Available to the Voting Public

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) (quotation marks omitted). 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*

[1] Pursuant to LCvR 7(o)(5) and Fed. R. App. P. 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 preparing or submitting this brief.

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 v. FEC*, 558 U.S. 310, 369-70 (2010) (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" (internal quotation marks omitted) (emphasis added)).

To effectuate these compelling public interests, FECA and the FEC mandate disclosure of anyone who makes a contribution over $200 to a political committee or acts as a conduit for a contribution. 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a); FEC, Reports of Receipts and Disbursements for Other than Authorized Committee (FEC Form 3X) at 11, https://www.fec.gov/resources/cms-content/documents/fecfrm3xi.pdf. That disclosure must identify the name and address of the contributor and each conduit who passes the funds along to the recipient. *Id*. FECA prohibits a contributor from making, or a political committee from accepting, a contribution that conceals the identity of the person or persons behind it. *See* 52 U.S.C. § 30122.

The dispositive fact in this case is that plaintiffs never deny that the FEC's investigative file correctly identified them as the sources of, or conduits for, a $1.71 million contribution to a federal political committee.[2] To the contrary, plaintiffs acknowledge that they are involved in this matter because of "their political activity," Pls.' Br. at 14, ECF No. 13, and the only such activity at issue here is the making of "a contribution to a Super PAC that made independent expenditures in support of candidates for federal office," *id*. at 2. Indeed, that activity is the basis for one of their claims here — that disclosure of their contribution activity would infringe

[2] Third General Counsel's Report, MUR 6920 (American Conservative Union *et al.*) (Sep. 15, 2017), http://eqs.fec.gov/eqsdocsMUR/17044435484.pdf.

on their First Amendment rights. *Id.* at 17. It is therefore undisputed that plaintiffs were the source of, or served as conduits for, the contribution, and they accordingly have no right to anonymity under FECA. This case should end there.

Unable to deny that their activities triggered mandatory disclosure under FECA, plaintiffs argue instead that they should be exempt from disclosure because the FEC did not find that plaintiffs violated the law. But disclosure of contributors and conduits is not triggered by the result of an FEC enforcement action, or even the existence of such an action. *Cf. Citizens United*, 558 U.S. at 368-69 (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 have their conduct adjudicated before the FEC. But under plaintiffs' theory that disclosure may be mandated only for law-breakers; each of the more than 99% of contributors who has acted lawfully is entitled to an injunction barring disclosure of its identity unless and until a complaint is filed with the FEC, investigated through the entire (multi-stage and lengthy) FEC enforcement process, and then litigated through a civil action brought by the FEC.[3] This would make a mockery of FECA's disclosure regime.

Disclosure of plaintiffs' identities became mandatory the moment they made or served as conduits for a federal contribution — conduct that they do not deny.[4]

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[3] The FEC does not have authority to find that the law has been violated; the FEC must either negotiate a voluntary agreement with the violator or bring a civil action against it. *See* 52 U.S.C. § 30109(a)(6).

[4] As the FEC correctly notes, FECA also requires disclosure of plaintiffs' identities upon the conclusion of the enforcement action. *See* 52 U.S.C. § 30109(a)(4)(B)(ii); FEC Surreply at 8-13. Plaintiffs raise a convoluted argument that this statute applies only to entities that the FEC finds to have either violated or not violated the statute, not to entities whose cases are resolved on other grounds. *See* Pls.' Br. at 9-10, ECF No. 13; Pls.' Reply at 7-10, ECF No. 25. But it would be exceedingly odd if FECA were construed to require that an entity unanimously found to have *not* engaged in activity requiring reporting must have its name revealed in the FEC's investigative file, while the identity of an entity dismissed from enforcement simply because a non-majority of the Commission chose not to investigate it or clarify the law need not be revealed.

II. There Is No First Amendment Right to Make Anonymous Campaign Contributions

Although FECA unambiguously mandates disclosure of their identities, plaintiffs nonetheless ask this court to grant them an unprecedented exemption under the First Amendment. *See* Pls.' Br. at 13-16. The specific First Amendment interest that plaintiffs assert is their desire to serve as anonymous sources of or conduits for a contribution to federal political committee. *See* Pls.' Br. at 2 (identifying First Amendment activity as "a contribution to a Super PAC"). Their argument fails for the simple reason that the First Amendment does not grant a right to make campaign contributions anonymously.

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. *See, e.g.*, *Citizens United*, 558 U.S. at 368-70; *McConnell*, 540 U.S. at 194-99; *Buckley*, 424 U.S. at 66-68; *see also Speechnow.org v. FEC*, 599 F.3d 686, 696-98 (D.C. Cir. 2010) (en banc) (upholding mandatory disclosure of contributions to what are now known as super PACs). As noted above, the Court has identified numerous compelling interests that are directly furthered by such disclosure and has consistently concluded that those interests outweigh the attenuated First Amendment burdens arising from committees not being allowed to hide the sources of their funds. *See supra* at 1-2.

Nor is the public's interest in disclosure limited to "two interests" of agency accountability and deterrence discussed in *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003), as plaintiffs contend, Pls.' Reply at 18. Rather, the court was evaluating the two offered justifications, *id.* at 178; it did not purport to call into question the long line of cases beginning with *Buckley* that recognized the public's interest in knowing details of campaign-related spending. Moreover, unlike "confidential internal materials" (of an entity whose identity was itself disclosed), *see AFL-CIO*, 333 F.3d at 177, the information at issue here is the identities of

two parties indisputably involved in reportable campaign activity: the very information to which the public is legally entitled.

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 do not even attempt to present evidence that such threats, harassment, or reprisals will ensue if their identities are disclosed. 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 satisfying their evidentiary burden under existing law, plaintiffs attempt to create new categories of disclosure exemptions from whole cloth: they allege that making their identities known would constitute "invasion of privacy," cause "harm to their reputations," and place a "chill [on] the future exercise of their free speech rights." Pls.' Br. at 14-15. None of these claims has First Amendment merit in the campaign finance context. The plaintiffs could not have had any reasonable expectation of privacy in their activity as conduits for a federal contribution, *see Disner v. United States*, 888 F. Supp. 2d 83, 88 (D.D.C. 2012) (holding that plaintiff had no reasonable expectation of privacy in funds that plaintiff voluntarily transferred to third party), *aff'd mem.*, 2013 WL 1164502 (D.C. Cir. Feb. 20, 2013), particularly given that disclosure of such activity is mandated by longstanding federal law, *see Stewart v. Evans*, 351 F.3d 1239, 1244 (D.C. Cir. 2003) ("When the threat of mandatory disclosure accompanies the transfer of documents to a third party, little reasonable expectation of privacy exists.") (citing

Couch v. United States, 409 U.S. 322, 335 (1973)).[5] Plaintiffs cite no case law for the proposition that the First Amendment protects against alleged reputational harm — nor has *amici*'s research disclosed any such precedent — and in any event plaintiffs have abandoned this claim.[6] And the Supreme Court has repeatedly held that the theoretical chill from disclosure of such contributions is outweighed by the public's interest in disclosure. *See, e.g.*, *Buckley*, 424 U.S. at 68 (upholding mandatory disclosure to further public interests even though "[i]t is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute"); *Citizens United*, 558 U.S. at 369-70 (rejecting argument that disclosure unconstitutionally chills contributions because the public's "informational interest . . . is sufficient" to justify disclosure absent evidence of reasonable probability of "threats, harassment, or reprisals").

Disclosure of plaintiffs' identities, as required by law, is entirely consistent with the First Amendment.

III. FOIA Exceptions Are Not Relevant to this FECA Case

Plaintiffs raise a number of arguments under FOIA. But in denying *amici*'s motion to intervene, the Court noted that FOIA and its associated case law are inapposite here. ECF No. 44 at 7-8 ("[W]hile plaintiffs have cited FOIA case law in various pleadings, they are relying on the language of the Federal Election Campaign Act, and this is not a reverse FOIA case. The decision here will turn on different legal principles . . . ."). Furthermore, the trust plaintiff has no

[5] The fact that plaintiffs might have expected their coconspirators to help keep plaintiffs' identities secret does not change this analysis: An expectation of privacy "typically evaporates when information is 'revealed to a third party, even if the information is revealed on the assumption that it will be used only for a limited purposed and the confidence placed in the third party will not be betrayed.'" *Townsend v. United States*, 236 F. Supp. 3d 280, 323 (D.D.C. 2017) (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)).

[6] *See* Pls.' Reply at 6 (alleging only "privacy and free speech rights"); Pls.' Surreply at 10 (alleging only "privacy and speech interests").

privacy interest cognizable under FOIA. *See FCC v. AT&T*, 562 U.S. 397, 408-09 (2011). Nor can the trustee plaintiff bootstrap an interest for the trust: the disclosure of any corporate or other entity will necessarily disclose its human agents, so such an entity cannot rely on its human agents' privacy interests without rendering the *FCC* decision a nullity. Finally, Exemption 7(C) requires balancing, *CREW v. DOJ*, 746 F.3d 1082, 1091 (D.C. Cir. 2014), and against the plaintiffs' complete lack of cognizable privacy interest, *see supra* at 5-6, the public's immense interest at stake here, *see infra* at 9-10, easily prevails. The FEC was investigating compliance with a disclosure regime, and plaintiffs are involved only because they engaged in activity that obliges the release of their identities. Releasing their names therefore does not implicate the concerns behind Exemption 7(C).

IV. Plaintiffs Cannot Satisfy the Additional Requirements for a Permanent Injunction

In addition to meeting its burden of proof on the merits of its claims, a plaintiff seeking a permanent injunction must show "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Morgan Drexen, Inc. v. CFPB*, 785 F.3d 684, 694 (D.C. Cir. 2015) (quotation marks omitted). Plaintiffs satisfy none of these requirements.

First, plaintiffs have suffered and will suffer no cognizable injury from release of the unredacted FEC documents. As noted above, they constructively consented to the disclosure of their names when they agreed to serve as the source of, or as conduits for, a contribution to a federal political committee. The FEC files do nothing more than identify them in relation to a reportable contribution. The release of the FEC's investigative file inflicts no injury upon them — irreparable or even cognizable — given disclosure is what FECA already mandates for the

activity plaintiffs do not dispute that they engaged in. Because plaintiffs' sole claim of injury is that their First Amendment rights would be infringed by the disclosure of their identities — a meritless claim as discussed above — they face no risk of irreparable injury. *See, e.g.*, *Archdiocese of Wash. v. Wash. Metro. Area Transit Auth.*, No. 17-2554 (ABJ), __ F. Supp. 3d __, __, 2017 WL 6314142, at *19 (D.D.C. Dec. 8, 2017) ("Plaintiff's [claim of irreparable harm] is its assertion that the loss of First Amendment freedoms constitutes irreparable injury. Since plaintiff alleges no other harm that it seeks to avert, its irreparable harm argument rises and falls with its merits arguments." (citation omitted)).

Second, because plaintiffs will not be injured at law by the unredaction of the investigative file, the issue of monetary damages is moot.

Third, the balance of equities tips steeply towards rejecting plaintiffs' desired injunction. Plaintiffs' briefs make no mention of equitable considerations; their equitable claim seems to be no more than a fervent wish that the law not mandate disclosure of their identities. Plaintiffs themselves suffer no hardship as their identities are already subject to mandatory disclosure under the FECA due to the activity they concede they engaged in. On the FEC's side of the scale, an injunction would cast into doubt the FEC's enforcement disclosure procedures — procedures that reflect careful consideration of statutory mandates, judicial opinions, and the need to provide sufficient notice to the regulated community of the agency's interpretations of law. *See* FEC Br. at 6-7; FEC Surreply at 18-21. And the FEC's enforcement regime for nondisclosure of contributions would be upended as well, with donors having a new judicial path to proactively prevent their identities from being made public, or at least to delay such disclosure until a point when it is of little value to the voting public. Finally, the Court should consider the hardship to *amici*, who will lose their right to receive information subject to disclosure under the

FECA and FOIA, which they need to pursue their claims in other proceedings. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 30-32 (2008) (reversing entry of preliminary injunction and holding that granting permanent injunction would be abuse of discretion where district court failed to account for the harm that injunction would cause to important governmental operations).

Finally, the interests of the public would be severely disserved by a permanent injunction. Plaintiffs concede that their conduct is "a matter of significant interest to the public." Pls.' Br. at 15. The public has a statutory right to receive the information that Congress and courts have determined is necessary to free governance; therefore, each of the FEC's interests mentioned above is also a public interest, as the public is the ultimate beneficiary of the disclosed information. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("[A]ssessing the harm to the opposing party and weighing the public interest . . . merge when the Government is the opposing party."); *U.S. Ass'n of Reptile Keepers, Inc. v. Jewell*, 103 F. Supp. 3d 133, 163 (D.D.C. 2015). Indeed, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339. That information includes the identity of "who is speaking about a candidate" through contributions to PACs, *id.* at 369, and the names of the "candidate's most generous supporters" whether through direct contributions or independent advocacy, *Buckley*, 424 U.S. at 67. Yet the source and path of the $1.71 million that ended up in federal elections remain unknown to the public, and plaintiffs seek to ensure by gag order that the public is permanently deprived of that knowledge. The public would also be harmed by an injunction because it would hinder prompt disclosure of FEC investigative files, which is necessary for journalists and watchdogs (such as *amici*) to identify and disseminate information from those

files that might be of interest to voters. And regular redaction of investigative files would harm administrative complainants' ability to seek judicial review of the FEC's non-enforcement decisions. *See* FEC Br. at 7; FEC Surreply at 11 (citing 52 U.S.C. § 30109(a)(8)).[7]

V. CONCLUSION

Plaintiffs acknowledge that this case concerns "a matter of significant interest to the public: the conduct of elections and political speech." Pls.' Br. at 15. Indeed, the public interest at stake in this case is fundamental to the American democratic system. This interest is not merely some voyeuristic curiosity regarding the subjects of a government investigation; rather, it goes to the heart of the voters' right to know who was responsible for routing a major contribution to influence the result of a federal election. That interest — as statutorily implemented by FEC and constitutionally upheld by the Supreme Court — compels the rejection of plaintiffs' claims.

Accordingly, and for the reasons stated above, plaintiffs' motion for an injunction should be denied and final judgment should be entered for the FEC.[8]

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[7] *Amici* respectfully disagree with the Court's conclusion in its January 31 Order that such litigation can be conducted effectively using pseudonyms. As the record in this case demonstrates, redacting a case file to conceal a respondent's identity entails removing much more material than just the respondent's name. Once all of the identifying information is redacted, the relevant portions of key documents are often essentially impossible to decipher.

[8] By filing this brief in compliance with the Court's Order of January 31, 2018, *amici* do not waive their right to appeal that Order within the time provided by Fed. R. App. P. 4.

Respectfully submitted,

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February 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2018, I caused the foregoing Brief of Citizens for Responsibility and Ethics in Washington and Anne Weismann as *Amici Curiae* to be served on the following through the Court's electronic case filing system:

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