IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

EMERGENCY MOTION FOR A STAY
OR AN INJUNCTION PENDING APPEAL

Pursuant to Federal Rule of Civil Procedure 62(c), Plaintiffs John Doe 1 and John Doe 2 move for a stay of this Court's March 23, 2018 Order [ECF 46 & 47] entering judgment for Defendant FEC, or for the entry of an injunction pending the outcome of Plaintiffs' appeal. Such relief is "routinely granted in FOIA cases," where the disclosure of the information that is the subject of a dispute "would effectively moot any appeal." *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 217 F. Supp. 2d 58, 58 (D.D.C. 2002) (granting this relief and collecting authorities); *see also Ctr. For Int'l Envtl. Law v. Office of U.S. Trade Representative*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (same).

Plaintiffs seek a stay or an injunction pending appeal here so that the Court of Appeals has the opportunity to review the novel questions of statutory interpretation and constitutional law presented by this case, at least some of which, as this Court acknowledged in its Memorandum Opinion, are "not . . . easy . . . to resolve." Op. at 10. If such relief is not granted, the FEC will be permitted to publish documents identifying the Plaintiffs and describing their role in the matters under investigation, in violation of Plaintiffs' asserted statutory and constitutional rights. The publication of the Plaintiffs' names will render their appeal moot.

Given these mootness concerns, it is appropriate to grant the requested relief in order "to maintain the status quo of the parties pending the outcome of the appeal," which in this context means "that a controversy will still exist once the appeal is heard." Moore's Federal Practice - Civil § 62.06 (2017).

Pursuant to Local Rule 7(m), Plaintiffs have attempted in good faith to confer with counsel for the FEC but have been unable to ascertain their position on this motion, despite requesting that the FEC respond earlier this evening, given the emergency nature of this motion. Notably, the FEC consented to similar relief earlier in this case when the Commission agreed to Plaintiffs' proposal not to release Plaintiffs' names during the pendency of the litigation in this Court. A stay or preliminary injunction will maintain that status quo and allow the Plaintiff's to pursue appellate relief.

ARGUMENT

"To assess the propriety of a stay or an injunction pending appeal, the Court looks to four factors: '(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.'" *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. CV 16-1534 (JEB), 2017 WL 1402139, at *1 (D.D.C. Mar. 14, 2017) (quoting *Cuomo v. Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985)); *see also Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-44 (D.C. Cir. 1977).

The District Court should apply each of these factors "flexibly according to the unique circumstances of each case." *McSurley v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982). Accordingly, "the necessary 'level' or 'degree' of possibility of success will vary according to

the court's assessment of the other factors." *Washington Metro.*, 559 F.2d at 843-44 (rejecting "a wooden 'probability' requirement" in favor of "an analysis under which the necessary showing on the merits is governed by the balance of equities as revealed through an examination of the other three factors"). "A party does not necessarily have to make a strong showing with respect to the first factor (likelihood of success on the merits) if a strong showing is made as to the second factor (likelihood of irreparable harm)." *People for the Am. Way Found. v. U.S. Dep't of Educ.*, 518 F. Supp. 2d 174, 177 (D.D.C. 2007). To the contrary, "[p]robability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*." *Cuomo*, 772 F.2d at 974.

Here, where the Plaintiffs' appeal will be rendered moot if the FEC discloses Plaintiffs' identities, each of the four factors supports issuing an injunction pending appeal.

A. Plaintiffs Are Likely to Succeed on the Merits or, at the Very Least, Present a Substantial Case on the Merits.

Plaintiffs meet the first factor for the purposes of an injunction pending appeal, particularly in these novel circumstances. To demonstrate a likelihood of success, Plaintiffs need not "'show[] a mathematical probability of success'" but rather that they are pursuing challenging, serious legal questions that present a need for a "'more deliberative investigation.'" *Jewish War Veterans of U.S., Inc. v. Gates*, 522 F. Supp. 2d 73, 76 (D.D.C. 2007) (citing *Washington Metro.*, 559 F.2d at 844). Moreover, even if Plaintiffs cannot establish a likelihood of success on appeal, where there is a strong showing on irreparable harm, a stay is appropriate if they "have made out a 'substantial case on the merits.'" *Ctr. For Int'l Envtl. Law*, 240 F. Supp. 2d 21, 22 (D.D.C. 2003) (so holding "although the Court ultimately did not agree with defendants' position on the merits" (quoting *Washington Metro*. 559 F.2d at 843)).

Plaintiffs easily meet this standard. As Plaintiffs have already explained and as this Court now agrees, the FEC identifies no source of authority that ***requires it*** to disclose Plaintiffs' identities. The agency relied on 52 U.S.C. § 30109(a)(4)(B)(ii) for such authority, but that provision only requires release of FEC "determinations" as to violations of the Federal Election Campaign Act ("FECA"), and as this Court reasoned, the FEC made no such determination as to Plaintiffs here. Op. at 9-10.

The question for this Court then becomes whether the FEC can justify this discretionary disclosure in accord with the D.C. Circuit's opinion in *AFL-CIO v. FEC*, 333 F.3d 174 (D.C. Cir. 2003); its Disclosure Policy; and the Freedom of Information Act. Contrary to this Court's conclusion, this discretionary disclosure is likely improper for a number of reasons.

First, the Court's conclusion that any First Amendment interests that Plaintiffs possess are overwhelmed by the FEC's disclosure policy is incorrect. Op. at 18-19. However Plaintiffs' conduct with MUR 6920 can be described, it is undisputed that there has been no finding that such conduct required any report of Plaintiffs' identities to be made under FECA. Accordingly, it was erroneous for the Court to conclude that the interests justifying the disclosure provisions in FECA also justified the FEC's disclosure policy, as applied to Plaintiffs. As Plaintiffs argued in their Response to the FEC's Surreply, in the absence of any finding that Plaintiffs were required to report their identities to the FEC in connection with MUR 6920, the governmental interests justifying FECA's disclosure provisions have not been triggered. ECF 42 at 9 n.6.

Next, there are also two opinions from this district, which are still good law,[1] that recognize the FEC must not disclose materials that are exempt from disclosure under Exception

[1] Plaintiffs recognize that the Court has noted that the D.C. Circuit affirmed the *AFL-CIO* district court decision on different grounds, Op. at 11, but it in no way cast doubt on that Court's separate analysis as to why disclosure was impermissible.

7(C). *See AFL-CIO v. FEC*, 177 F. Supp. 2d 48, 61-63 (D.D.C. 2001); *Tripp v. Dep't of Defense*, 193 F. Supp. 2d 229, 239 (D.D.C. 2002). In one of those cases, *AFL-CIO*, the district court applied Exemption 7(C) to prohibit disclosure of names of individuals in an FEC investigative file, 177 F. Supp. 2d at 61-63, the same situation presented in this case, at the least for John Doe 1. These district court opinions rely on, among other authorities, *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991), which broadly restricts access to the names of subjects of law enforcement investigations. The Court's opinion does not even address one of these cases, *Tripp*, and has created an intra-district split on the question of whether a party that was a witness, or at most, an uncharged target of a law enforcement investigation can prevent release of his or her name with a reverse FOIA action.

Relatedly, this Court's only analysis as to John Doe 1 is that his privacy interest is diminished because he was only subpoenaed in his official capacity. Op. at 23. But this observation misses the point that it is John Doe 1's real name, not his official title of "trustee," that will be disclosed: the disclosure very much affects John Doe's ***personal privacy*** interests, which are well recognized, including in *Tripp*, as precluding disclosure by the FEC here.

Finally, Plaintiffs' appeal will also, at the least, present numerous serious issues related to the statutory construction of FECA and First Amendment rights that warrant preserving the status quo in order to allow for appellate review of this Court's judgment. The Court of Appeals has not considered the constitutional and statutory interpretation questions implicated in this case since the decision in *AFL-CIO v. FEC*, 333 F.3d 174 (D.C. Cir. 2003), in which the Court invalidated the FEC's prior disclosure policy and instructed the agency to devise a new policy. Thus, this is a case of first impression that will present the Court of Appeals with its initial opportunity to address the legality of that new policy. And the same statutory and constitutional

questions raised by *AFL-CIO* are at issue in this case, including how the FEC's disclosure policies interact with the statutory scheme envisioned under FOIA, and whether the FEC's planned disclosure of Plaintiffs' names would be consistent with the same First Amendment associational and privacy rights that were asserted by the plaintiffs in *AFL-CIO*. At the very least, these are difficult and novel questions that present "a substantial case" on the merits: again, as this Court observed, there are questions raised by this case that are "not . . . easy . . . to resolve." Op. at 10." Coupled with the prospect of irreparable harm to the Plaintiffs, and the practical result that their appeal will become moot unless an injunction is issued, the circumstances presented here favor the entry of a stay or injunctive relief pending appeal.

B. Absent Injunctive Relief, Plaintiffs Will Be Irreparably Harmed.

There appears to be little dispute among the parties that Plaintiffs will suffer irreparable harm absent an injunction pending appeal. If this Court rejects the requested relief and Plaintiffs' names are disclosed to the public, then "the very rights [they] seek[] to protect will have been destroyed." *Council on Am. Islamic Relations v. Gaubatz*, 667 F. Supp. 2d 67, 76 (D.D.C. 2009). That is because the "irreparable harm to [Plaintiffs] lies in the fact that '[o]nce [their identities are divulged] pursuant to the lower court's order, confidentiality will be lost for all time. The status quo could never be restored. . . . Failure to grant a stay will entirely destroy appellants' rights to secure meaningful review.'" *Ctr. For Int'l Envtl. Law*, 240 F. Supp. 2d 21, 23 (D.D.C. 2003) (quoting *Providence Journal Co. v. FBI*, 595 F.2d 889 (1st Cir. 1979)). Even the FEC has "acknowledge[d] the unique mootness danger posed by immediate disclosure" of Plaintiffs' names, ECF 16 at 4, and thus the Commission did not object to refraining from disclosure during the pendency of the litigation before this Court. Those same mootness concerns fully apply during the pendency of Plaintiffs' appeal.

C. Granting the Requested Injunctive Relief Will Neither Substantially Injure Any Other Party nor Harm the Public's Interest.

A stay or injunction pending appeal also will not substantially harm the FEC or the public, for at least several reasons. First, the FEC has already acquiesced to Plaintiffs litigating under assumed names as John Doe 1 and John Doe 2, effectively conceding that no immediate harm will result from the nondisclosure of their names. Second, in denying the motion to intervene filed by Citizens for Responsibility and Ethics in Washington, this Court already has rejected the proposition that allowing Plaintiffs to continue to use pseudonyms while litigating this case would cause harm to third parties. *See* ECF 44 at 6. Third, the FEC itself was deadlocked on whether Plaintiffs' conduct triggered a "reason to believe" they should be subject to further FEC investigative scrutiny. While a minority of the FEC's commissioners now seek to publish Plaintiff's names in the face of that deadlock, thereby harming Plaintiffs' professional reputations, another group of commissioners have stated that the FEC's conduct in this case itself raises "serious due process concerns . . . ." Ex. A to Reply at 0116.[2] This intra-agency dispute about the proper course of action that the FEC should adopt (or should have adopted) with respect to Plaintiffs precludes any finding that there is a strong public interest to be served by denying the requested injunctive relief. By contrast, the Plaintiffs here assert associational and privacy rights under the First Amendment, and "there is always a strong public interest in the exercise of free speech rights otherwise abridged by an unconstitutional regulation." *Pursuing America's Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016). Finally, even if these two factors did not decidedly favor Plaintiffs' request for injunctive relief pending appeal, such a finding alone would not overcome Plaintiffs' showing of a substantial case on the merits and

[2] Plaintiffs recognize that the Court has placed less weight on these concerns. Op. at 22 n.7. Regardless, the fact of the matter is that due process concerns were expressed by these commissioners.

irreparable injury if such relief is denied. *See Ctr. For Int'l Envtl. Law*, 240 F. Supp. 2d at 23 (so holding).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that their motion be granted and that this Court stay its Order of March 23, 2018, or enter an injunction pending appeal precluding the FEC from publishing Plaintiffs' names until the Court of Appeals has resolved Plaintiffs' appeal from that Order.

March 23, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd of March, 2018, I filed the foregoing papers using the Court's CM/ECF system, which served the foregoing on all counsel of record.

/s/ William W. Taylor, III
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