December 9, 2003

Lawrence H. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Dear Mr. Norton:

Attached is a Petition for Rulemaking concerning Public Access to Materials Relating to Closed Enforcement Cases. The petition is submitted on behalf of the Campaign Legal Center, the National Voting Rights Institute, the Center for Responsive Politics and Democracy 21.

We appreciate your attention to this matter and thank you in advance for your consideration.

Sincerely,

Glen Shor
FEC Program Director

BEFORE THE FEDERAL ELECTION COMMISSION

The Campaign Legal Center
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National Voting Rights Institute
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PETITION FOR RULEMAKING

PUBLIC ACCESS TO MATERIALS RELATING TO CLOSED ENFORCEMENT CASES

1. The Campaign Legal Center, the National Voting Rights Institute, the Center for Responsive Politics and Democracy 21 (collectively, "the Petitioners") hereby petition the Federal Election Commission ("the Commission") to initiate a rulemaking proceeding to adopt regulations providing for broad disclosure of materials relating to closed enforcement cases (including complaints or referrals, responses to complaints, General Counsel's reports and briefs, responses to General Counsel's reports and briefs, notifications of reason to believe findings, responses to such findings, conciliation agreements, certifications of Commission votes, opinions of Commissioners rendered in such cases, other relevant procedural materials and non-exempt 2 U.S.C. § 437g investigatory materials) without unnecessarily burdening First Amendment interests.

2. In *AFL-CIO v. FEC*, the U.S. Court of Appeals for the District of Columbia Circuit ("the Circuit Court") invalidated the Commission's longstanding "blanket" approach to releasing investigatory file materials relating to closed enforcement cases, codified in regulations requiring the release of all such materials except to the extent redacted by the Commission pursuant to exemptions from public disclosure under the Freedom of Information Act.

3. The Circuit Court's opinion held that the Commission failed with this closed enforcement case disclosure policy to undertake required tailoring aimed at avoiding unnecessarily burdening First Amendment interests.

4. The opinion, however, indicated that the Commission could release materials relating to closed enforcement cases in addition to those whose disclosure is expressly required by 2 U.S.C. § 437g(a)(4)(B)(ii) (*i.e.*, conciliation agreements, "determinations" that a person has not violated federal campaign finance law), pursuant to a disclosure policy tailored to avoid unnecessary First Amendment burdens.

5. Public disclosure by the Commission of materials relating to closed enforcement cases, including non-exempt 2 U.S.C. § 437g investigatory materials, can serve multiple governmental interests, among them the deterrence of violations of federal campaign finance law and promotion of the agency's public accountability.

6. Petitioners respectfully request that the Commission take up the invitation of *AFL-CIO v. FEC* and adopt regulations providing for disclosure of materials relating to closed enforcement cases (including complaints or referrals, responses to complaints, General Counsel's reports and briefs, responses to General Counsel's reports and briefs, notifications of reason to believe findings, responses to such findings, conciliation agreements, certifications of Commission votes, opinions of Commissioners rendered in such cases, other relevant procedural materials and non-exempt 2 U.S.C. § 437g investigatory materials) without unnecessarily burdening First Amendment interests. This "tailored" disclosure policy can and should provide for broad access to such materials for the public.

Parties

7. The Campaign Legal Center ("the Legal Center") is a non-profit, non-partisan organization established in January of 2002 to represent the public interest in strong enforcement of campaign finance and campaign media law. Through its legal staff, it participates in the administrative and legal proceedings in which the nation's campaign and media laws are interpreted and enforced. This includes participating in rulemaking and Advisory Opinion proceedings at the Commission to ensure that the agency is properly enforcing federal campaign finance law, as well as filing complaints with the Commission to request that enforcement actions be taken against individuals or organizations which appear to be violating the law. The Legal Center also educates the public as to the Commission's performance in enforcing federal campaign finance law. It relies considerably on campaign finance information disclosed to and by the Commission in carrying out these functions.

8. The National Voting Rights Institute ("NVRI") is a non-profit, non-partisan organization dedicated to protecting the constitutional right of all citizens, regardless of economic status, to equal and meaningful participation in every phase of electoral politics. Through litigation and public education, NVRI works to promote reform of our campaign finance system to ensure that those who do not have access to wealth are able to participate fully in the political process. NVRI has litigated numerous campaign finance cases throughout the country, and currently serves as lead counsel for the plaintiffs in *Alliance for Democracy v. FEC*, a case pending in the United States District Court for the District of Columbia in which the plaintiffs have challenged the Commission's failure to act on their complaint alleging serious campaign finance violations by the campaign committee and leadership PAC of current-Attorney General John Ashcroft during his 2000 Senate campaign.

9. The Center for Responsive Politics ("CRP") is a non-profit, non-partisan research group based in Washington, D.C. that has been tracking money in politics, and

its effect on elections and public policy, since 1983. CRP conducts computer-based research on campaign finance issues for the news media, academics, activists, and the public at large. CRP publishes the results of its research on its Web site, www.OpenSecrets.org and www.FECWatch.org, as well as in numerous publications made available to the public. CRP's work is aimed at creating a more educated voter, an involved citizenry, and a more responsive government. Among CRP's projects is FEC Watch, which is dedicated to ensuring enforcement of the nation's campaign finance laws in furtherance of CRP's research analysis. CRP's and FEC Watch's work is dependent on the timely and accurate public disclosure of the enforcement activities of the Commission.

10. Democracy 21 is a non-profit, non-partisan public policy organization that works to eliminate the undue influence of big money in American politics and to ensure the integrity and fairness of our democracy. Democracy 21 supports campaign finance and other political reforms. It conducts public education efforts to accomplish these goals, participates in litigation involving the constitutionality and interpretation of campaign finance laws and other political reforms, and engages in efforts to help ensure that campaign finance laws are effectively and properly enforced and implemented. The implementation and enforcement efforts include filing complaints with the Commission, responding to Commission Advisory Opinion requests, commenting on and requesting Commission rulemaking proceedings and otherwise monitoring the activities of the Commission and related enforcement bodies to help ensure proper compliance and implementation of the nation's campaign finance laws.

Statutory Provisions

11. 2 U.S.C. § 437g(a) establishes the procedures under which the Commission pursues civil enforcement of federal campaign finance law.

12. 2 U.S.C. § 437g(a)(4)(B)(i) states that "[n]o action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission."

13. 2 U.S.C. § 437g(a)(4)(B)(ii) states:

> If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or 96 of title 26, the Commission shall make public such determination.

14. 2 U.S.C. § 437g(a)(12)(A) states that "[a]ny notification or investigation made under [2 U.S.C. § 437g] shall not be made public by the Commission or by any

person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made."

15. 5 U.S.C. § 552(a), among other things, describes information that an agency is required to place on the public record pursuant to the Freedom of Information Act, Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified as amended at 5 U.S.C. § 552).

16. 5 U.S.C. § 552(b) describes categories of information that are exempt from the public disclosure requirements of the Freedom of Information Act ("FOIA").

Commission Regulations

17. 11 C.F.R. § 4.2 states, in relevant part:

> (a) The Commission will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons contracting with the Commission with respect to trade secret and commercial or financial information entitled to confidential treatment, and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption.
>
> (b) All Commission records shall be available to the public unless they are specifically exempt under this part.

18. 11 C.F.R. § 4.4(a)(3) states, "Opinions of Commissioners rendered in enforcement cases, General Counsel's reports, and non-exempt 2 U.S.C. 437g investigatory materials shall be placed on the public record of the Agency no later than 30 days from the date on which all respondents are notified that the Commission has voted to close such an enforcement file."

19. 11 C.F.R. § 5.4 states, in relevant part:

> (a) In accordance with 2 U.S.C. 438(a), the Commission shall make the following material available for public inspections and copying through the Commission's Public Disclosure Division: . . .
>
> > (3) With respect to enforcement matters, any conciliation agreement entered into between the Commission and any respondent.
> >
> > (4) Opinions of Commissioners rendered in enforcement cases, General Counsel's reports, and non-exempt 2 U.S.C. 437g investigatory materials shall be placed on the public record of the Agency no later than 30 days from the date on

which all respondents are notified that the Commission has voted to close such an enforcement file.

20. 11 C.F.R. § 111.20 states, in relevant part:

(a) If the Commission makes a finding of no reason to believe or no probable cause to believe or otherwise terminates its proceedings, it shall make public such action and the basis therefore no later than thirty (30) days from the date on which the required notifications are sent to complainant and respondent.

(b) If a conciliation agreement is finalized, the Commission shall make public such conciliation agreement forthwith.

(c) For any compliance matter in which a civil action is commenced, the Commission will make public the non-exempt 2 U.S.C. 437g investigatory materials in the enforcement and litigation files no later than thirty (30) days from the date on which the Commission sends the complainant and the respondent(s) the required notification of the final disposition of the civil action.

21. 11 C.F.R. § 111.21 states, in relevant part:

(a) Except as provided in 11 CFR 111.20, no complaint filed with the Commission, nor any notification sent by the Commission, nor any investigation conducted by the Commission, nor any findings made by the Commission shall be made public by the Commission or by any person or entity without the written consent of the respondent with respect to whom the complaint was filed, the notification sent, the investigation conducted, or the finding made.

(b) Except as provided in 11 CFR 111.20(b), no action by the Commission or by any person, and no information derived in connection with conciliation efforts pursuant to 11 CFR 111.18, may be made public except upon a written request by respondent and approval thereof by the Commission.

Analysis

Closed Enforcement Case Disclosure Policy Prior to District Court's *AFL-CIO v. FEC* Decision

22. Pursuant to 2 U.S.C. § 437g(a)(12)(A), the Commission does not publicly disclose complaints, notifications, investigations, and other information concerning "open" or ongoing enforcement matters without the written consent of the subjects of such enforcement matters.

23. Prior to the decision of the U.S. District Court for the District of Columbia in *AFL-CIO v. FEC*, 177 F.Supp.2d 48 (D.D.C. 2001), the Commission interpreted the confidentiality requirement of 2 U.S.C. § 437g(a)(12)(A) to apply only while an enforcement case was pending. As such, it provided in its regulations that, shortly after closure of an enforcement case, opinions of Commissioners rendered in the case, General Counsel's reports, and non-exempt 2 U.S.C. § 437g investigatory materials were to be placed on the public record. 11 C.F.R. § 5.4(a)(4); *see also* 11 C.F.R. §§ 4.4(a)(3) and 111.20(c). Prior to placing such investigatory files on the public record, the Commission's Office of General Counsel would review the files to redact information exempt from public disclosure under the Freedom of Information Act. *See* Brief for the Federal Election Commission at 5, *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) (No. 02-5069).

District Court's *AFL-CIO v. FEC* Decision: FECA Precludes All Closed Enforcement Case Disclosures Except those Expressly Authorized

24. Following its July 11, 2000 dismissal of the enforcement action it had commenced against the AFL-CIO, Democratic National Committee (DNC), and other respondents on June 17, 1997 (on which date it had found reason to believe respondents had violated 2 U.S.C. § 441b(a)), the Commission proceeded in accordance with its longstanding disclosure regulations for closed enforcement cases to release to the public approximately 6,000 pages of investigative files in this case (including the complaints, responses, correspondence and notifications, factual and legal analyses, certifications of Commission votes, redacted motions, redacted General Counsel's reports and memoranda, a conciliation agreement with one respondent, subpoenas and orders, redacted discovery requests, redacted subpoena negotiation correspondence, and a statement of reasons by one Commissioner). *See* Brief for the Federal Election Commission at 5-6, *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003) (No. 02-5069). After a brief period of public availability, the materials were withdrawn at the request of the AFL-CIO and DNC. *Id.* at 6.

25. The AFL-CIO petitioned the Commission to withhold virtually all the records in this case from public disclosure, arguing that such disclosure would violate the confidentiality requirement of 2 U.S.C. § 437g(a)(12)(A) and other statutes. *Id.* at 6-7. The Commission rejected the AFL-CIO's requests in accordance with its longstanding closed enforcement case disclosure policy. *Id.* In turn, the AFL-CIO filed a complaint with the U.S. District Court for the District of Columbia ("the District Court"), seeking to enjoin public disclosure of the disputed documents on the grounds that such disclosure would violate the confidentiality requirement of 2 U.S.C. § 437g(a)(12)(A), the Freedom of Information Act, other statutes and the First Amendment. *See AFL-CIO v. FEC*, 177 F. Supp. 48, 51-52 (D.D.C. 2001).

26. With the consent of the parties, the District Court entered a preliminary injunction on July 17, 2001, which prohibited disclosure of the disputed documents. *Id.* at 54.

27. On December 19, 2001, the District Court granted the AFL-CIO's motion for summary judgment. It concluded that the plain meaning of the confidentiality requirement of 2 U.S.C. § 437g(a)(12)(A) prohibited disclosure of the disputed investigatory file materials at any time (contrary to the FEC's longstanding practice of disclosing such materials upon closure of an enforcement case). *Id.* at 55-60. The court determined that the Commission could disclose only the information expressly required to be disclosed under 2 U.S.C. § 437g(a)(4)(B)(ii) (*i.e.*, a signed, agreed-to conciliation agreement and a "determination" by the Commission that a person has not violated federal campaign finance law). *Id.* at 57.

28. On account of the District Court's decision in *AFL-CIO v. FEC*, the Commission, upon closure of an enforcement case, generally disclosed to the public only its "Certification" of its decisions in those cases, the General Counsel's report and Commissioners' Statements of Reasons, as well as any conciliation agreements.

Circuit Court's *AFL-CIO v. FEC* Decision: Properly Tailored Disclosures of Closed Enforcement Case Files are Permissible

29. On February 15, 2002, the Commission appealed the District Court's decision in *AFL-CIO v. FEC* to the U.S. Court of Appeals for the District of Columbia Circuit ("the Circuit Court"). *See* Press Release, Federal Election Commission, Commission Appeals Ruling in *AFL-CIO v. FEC* (Feb. 15, 2002) (available at http://www.fec.gov/press/20020215afl-cio.html). The Circuit Court reviewed the District Court's grant of the AFL-CIO's motion for summary judgment *de novo*. *See AFL-CIO v. FEC*, 333 F.3d 168, 172 (D.C. Cir. 2003).

30. The Circuit Court disagreed with the District Court's conclusion that the plain meaning of the confidentiality requirement of 2 U.S.C. § 437g(a)(12)(A) prohibited disclosure of the disputed investigatory file materials at any time. Rather, the Circuit Court determined that "the Commission may well be correct that subsection (a)(12)(A) is silent with regard to the confidentiality of investigatory files in closed cases and that Congress merely intended to prevent disclosure of the fact that an investigation is pending." *Id.* at 174.

31. Proceeding to "step two" of analysis under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Circuit Court noted that "[w]hen facing a constitutional challenge to a disclosure requirement, courts . . . balance the burdens imposed on individuals and associations against the significance of the government interest in disclosure and consider the degree to which the government has tailored the disclosure requirement to serve its interests." *Id.* at 176 (citing *Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976); *Block v. Meese*, 793 F.2d 1303, 1315-16 (D.C. Cir. 1986)).

32. Under this analysis, the Circuit Court accepted the validity of the rationales offered by the Commission to justify its longstanding closed enforcement case

disclosure policy: deterrence of federal campaign finance law violations and promotion of the agency's own public accountability. *Id.* at 178. Nonetheless, it concluded, without engaging in a "detailed balancing analysis," that the Commission's "blanket" approach to releasing investigatory file materials relating to closed enforcement cases (unless exempted by FOIA) was impermissible, because "the Commission made no attempt to tailor its policy to avoid unnecessarily burdening the First Amendment rights of the political organizations it investigates." *Id.*

33. In reaching this conclusion, the Circuit Court did not bar the Commission from disclosing materials relating to closed enforcement cases in addition to those whose disclosure is expressly required by 2 U.S.C. § 437g(a)(4)(B)(ii) (*i.e.*, conciliation agreements and "determinations" that a person has not violated federal campaign finance law). Rather, it indicated that, to deter future violations and promote its own accountability, the Commission could publicly disclose more information relating to such cases than that described in 2 U.S.C. § 437g(a)(4)(B)(ii), pursuant to a disclosure policy tailored to avoid unnecessary First Amendment burdens. *Id.* at 179.

Procedural History Following Circuit Court's *AFL-CIO* Decision

34. On August 4, 2003, the Commission petitioned for rehearing and rehearing *en banc* of the Circuit Court's *AFL-CIO v. FEC* decision. On September 5, 2003, the Commission's petition for rehearing and rehearing *en banc* of this decision was denied. Kenneth P. Doyle, *D.C. Circuit Turns Down FEC's Request for Rehearing in AFL-CIO Documents Case*, BNA MONEY & POLITICS REPORT, Sept. 15, 2003.

35. The Commission made no recommendation to the U.S. Department of Justice concerning whether the Circuit Court's *AFL-CIO v. FEC* decision should be appealed to the U.S. Supreme Court. Kenneth P. Doyle, *FEC Makes No Recommendation to DOJ On Appealing AFL-CIO Case to High Court*, BNA MONEY & POLITICS REPORT, Nov. 7, 2003.

36. Press accounts indicate that the U.S. Solicitor General has decided not to appeal the Circuit Court's *AFL-CIO v. FEC* decision to the U.S. Supreme Court. Associated Press, *Gov't won't seek union, Dem case review*, Dec. 4, 2003, *available at* http://seattlepi.nwsource.com/national/apwashington_story.asp?category=1155&slug=FEC%20Democrats.

Interests Served by Disclosure

37. Public disclosure by the Commission of materials relating to closed enforcement cases, including non-exempt 2 U.S.C. § 437g investigatory materials, can serve multiple governmental interests.

a. Disclosure of campaign activity is a foundational element of our systems of campaign finance regulation and governance. *See Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 223 (O'Connor, J.,

dissenting) (""[T]otal disclosure'" has been recognized as the "'essential cornerstone'" to effective campaign finance reform . . . and 'fundamental to the political system'") (citations omitted). The Commission's general regulatory statement regarding its disclosure policies reflects the centrality of disclosure to the purposes of federal campaign finance law and to the agency's mission. See 11 C.F.R. § 4.2(a) ("The Commission will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons contracting with the Commission with respect to trade secret and commercial or financial information entitled to confidential treatment, and the need for the Commission to promote free internal policy deliberations and to pursue its official activities without undue disruption.").

b. Public access to such materials is essential to meaningful review and monitoring of the agency's enforcement of federal campaign finance law. *See generally Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936) ("[I]nformed public opinion is the most potent of all restraints upon misgovernment."). Indeed, the Federal Election Campaign Act of 1971 expressly anticipates active citizen oversight of the enforcement role of the Commission. It specifically authorizes citizens to file a petition with the U.S. District Court for the District of Columbia protesting the Commission's dismissal of complaints they have filed with the agency or its failure to act on such complaints within 120 days of filing. 2 U.S.C. § 437g(a)(8)(A). In the event the court finds that the Commission's actions in this regard were contrary to law, it may direct the agency to conform to such declaration within 30 days (and if it does not do so, authorize the complainant to bring his or her own enforcement action). 2 U.S.C. § 437g(a)(8)(C). In shedding light on the Commission's reasoning for dismissing complaints and the evidence it has garnered, public access to such materials facilitates wise and effective use of the enforcement authority afforded to citizens under 2 U.S.C. § 437g(a)(8).

c. Public disclosure of such materials can serve as a deterrent to violations of federal campaign finance law. *See* 122 CONG. REC. S3517 (daily ed. Mar. 16, 1976) (remarks of Sen. Cannon) (describing "public disclosure of the Commission's success or failure at obtaining compliance with the campaign financing laws" as an "effective deterrent against abuses"); *see generally Buckley v. Valeo*, 424 U.S. 1, 67 (1976) ("[E]xposure [of large contributions and expenditures to the light of publicity] may discourage those who would use money for improper purposes either before or after the election. 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.").

Petitioners' Request/Conclusion

38. In light of the governmental interests served by public disclosure of materials relating to closed enforcement cases, and the Circuit Court's ruling in *AFL-CIO v. FEC* that the Commission could release such materials (in addition to 2 U.S.C. §

437g(a)(4)(B)(ii) materials) pursuant to a disclosure policy tailored to avoid unnecessarily burdening First Amendment interests, Petitioners respectfully request that the Commission commence a rulemaking concerning its public disclosure policy with respect to such materials.

39. Through this rulemaking, the Commission should adopt regulations providing for disclosure of materials relating to closed enforcement cases (including complaints or referrals, responses to complaints, General Counsel's reports and briefs, responses to General Counsel's reports and briefs, notifications of reason to believe findings, responses to such findings, conciliation agreements, certifications of Commission votes, opinions of Commissioners rendered in such cases, other relevant procedural materials and non-exempt 2 U.S.C. § 437g investigatory materials) without unnecessarily burdening First Amendment interests. This "tailored" disclosure policy can and should provide for broad access to such materials for the public.