UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PUBLIC CITIZEN, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant, CROSSROADS GRASSROOTS POLICY STRATEGIES, Intervenor-Defendant.	Civil Action No. 1:14-cv-00148 (RJL)

SUPPLEMENTAL ARGUMENT OF CROSSROADS GPS

Crossroads Grassroots Policy Strategies ("Crossroads GPS") respectfully submits this supplement to its August 2, 2016 oral argument opposing Public Citizen's motion for summary judgment and supporting its cross-motion for summary judgment and that of the Federal Election Commission ("FEC" or "Commission"). At the outset, it is useful to review what is undisputed.

- Because Crossroads GPS is not controlled by a candidate, it is not a political committee unless it has the major purpose of electing or defeating candidates. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986) ("*MCFL*"); *Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012).
- Such a major purpose must be so dominant that the group's activities "can be assumed to fall within the core area sought to be addressed by Congress" and "are, by definition, campaign related." *Buckley*, 424 U.S. at 79. The major-purpose test limits political committee status to "groups with the clearest electoral focus." AR 419.
- Crossroads GPS's foundational documents establish a social welfare organization operating under § 501(c)(4) of the Internal Revenue Code. AR401-02, 410-11. Last year, after a

comprehensive evaluation, the Internal Revenue Service ("IRS") recognized Crossroads GPS's status as a social welfare organization, a status not available to groups with the primary purpose of electoral activity. 26 C.F.R. § 1.501(c)(4)–1(a).

- Crossroads GPS's explicit formal objective since its founding has been to research, educate, and explain issues of public policy, including its "7 in '11 National Action Plan" that identified seven policy goals for legislative action in 2011. AR401-04.
- The FEC's Office of General Counsel ("OGC") and Public Citizen asserted that several media reports indicated that Crossroads GPS had the major purpose of electing candidates. The controlling FEC Commissioners considered those materials and found they were not persuasive, "especially in light of Crossroads GPS's explanations." AR409-12.
- A group's electoral spending may be "so extensive" that it overcomes a group's contrary statements and proves the group's singular and dominating major purpose is to elect or defeat candidates. *MCFL*, 479 U.S. at 262. In a key rulemaking on determining political committee status that took place a decade ago, the FEC concluded that a group's spending under the major-purpose test must be assessed on a case-by-case basis conducted in light of the purposes of the Federal Election Campaign Act of 1971, as amended ("FECA"). *See* 2007 Supplemental Explanation & Justification, 72 Fed. Reg. 5,595 (Feb. 7, 2007) ("E&J"). The controlling Commissioners expressly acknowledged the Commission's case-by-case standard in reaching their determination. AR405.
- Crossroads GPS was organized and began spending for advertisements in June 2010. The record showed it continued spending on advertisements after the November 2010 election, past the end of its first fiscal year in May 2011 and through the end of 2011. AR402-03.

During the administrative proceedings, Public Citizen did not submit any spending evidence or arguments applicable to Crossroads GPS's advertising expenditures after December 2010.

- OGC withdrew its First General Counsel's Report (June 22, 2011) and submitted a second First General Counsel's Report (November 21, 2012). In its second report, OGC argued for the first time that an entity's spending under the major-purpose test must be assessed on a calendar-year basis only, specifically Crossroads GPS's start-up months between June and December 2010.
- The controlling Commissioners rejected OGC's calendar-year argument. AR419-22. They gave several reasons:
    - A myopic focus on a single year was not compelled by the statute, was unreasonable, and was likely to exclude important evidence of a group's purpose. AR419-20.
    - The Commission had routinely considered a group's spending (or lack of spending) beyond a given calendar year. AR421-22 & n.89.
    - The Commission had given no public notice of a calendar-year standard, and retroactive application of a new standard would raise issues of due process. AR422.
- OGC argued that a broad range of Crossroads GPS's advertisements showed a purpose to elect candidates, including issue advocacy communications that could be deemed to promote, attack, support, oppose, or criticize a candidate. In assessing that argument and deciding what types of advertisements indicate an electoral purpose, the controlling Commissioners discussed the types of advocacy FECA subjects to regulation, AR417, FECA's legislative history, AR413, and judicial guidance, AR413-16.
- The controlling Commissioners readily concluded that advertisements expressly advocating the election or defeat of a clearly identified candidate indicate an electoral purpose. AR413.

No party disputes that conclusion here. But the controlling Commissioners also explained why they rejected a broader standard that included non-express advocacy advertising, based on considerations like the benefit of clarity to regulated parties and relevant judicial precedent. AR413-19.

- Moreover, the controlling Commissioners did not rest their decision on the express-advocacy standard. They assumed "arguendo" that spending for the "functional equivalent of express advocacy"—*i.e.*, candidate advocacy via clear implications rather than express language—also might indicate electoral purpose. AR414. The controlling Commissioners concluded that even applying this broader standard would not alter their finding that Crossroads GPS did not have the requisite major purpose for any time frame, AR414-15, including during Crossroads GPS's start-up months in calendar-year 2010, AR423-24.
- The controlling Commissioners rejected OGC's broad spending standard. They explained that such an expansive view was not required by the statute, was contrary to considerable judicial guidance, posed issues of vagueness, and regulated speech that otherwise was entirely outside the Commission's authority. AR413-19. But they did not rest their decision on this conclusion.
- Instead, the controlling Commissioners concluded that even adopting OGC's broad standard as to the types of communications to consider would not show that Crossroads GPS's major purpose was electoral. To the contrary, under either a fiscal-year timeframe or when considering all evidence of spending in the administrative record, Crossroads GPS's spending still would not show the major purpose of electing candidates. AR423-24. The controlling Commissioners said that the only way OGC's broad spending standard could alter the outcome was if the analysis also was limited to Crossroads GPS's spending during its

start-up months in 2010 alone. AR424. Public Citizen never disputes—in its oral argument or briefs—that, to prevail here, this Court must hold that the controlling Commissioners erred as to both the relevant timeframe and the relevant spending.

- Public Citizen does not dispute that (i) the FEC has a policy of dismissing stale complaints and (ii) in the past twenty years, the FEC has not authorized an enforcement proceeding where the underlying conduct occurred more than five years previously.

ARGUMENT

I. Public Citizen Seriously Distorts The Controlling Commissioners' Reasoning

Public Citizen's key arguments at the August 2 oral argument were (Tr. 5:11-15) that the Commission's dismissal of the administrative complaint was contrary to law because the controlling FEC Commissioners (i) "looked solely to . . . the organization's official statements of its purpose"; (ii) "limited themselves to looking at express advocacy only" based on a mistaken notion that they were "compelled" by the case law to so limit themselves; and (iii) considered communications made in 2011, a non-election year, without also considering communications made during 2012, an election year. These contentions fail at multiple levels.

i. It is simply not true that the controlling FEC Commissioners "looked solely" to Crossroads GPS's official statements of its purpose. To the contrary, the Commissioners undertook to evaluate all of Crossroads GPS's statements of purpose "in a fact-intensive inquiry, giving due weight to the form and nature of the statements, as well as the speaker's position." AR410. Noting that courts gave greatest weight to relatively formal statements of purpose, the controlling Commissioners began their inquiry with those. They found that "Crossroads GPS's organizational documents, mission statement, IRS tax status, and its primary political activities

since its inception have been focused on advancing public policy objectives," not electing candidates. AR410. But the Commissioners did not stop there.

Far from refusing to look at the media reports and other items offered by OGC and Public Citizen, the controlling Commissioners gave them careful attention. AR410-12. They pointed out serious weaknesses in the materials. They also found that Crossroads GPS "adequately explained" those materials, showing that "many of the articles conflate it with" a different group. AR411. They ultimately concluded that those articles "do not undermine" Crossroads GPS's official statements, "especially in light of Crossroads GPS's explanations." AR412. In sum, Public Citizen is simply wrong in its claim that the Commissioners "looked solely" at Crossroads GPS's formal statements. And, not only does Public Citizen fail to refute the detailed explanations that Crossroads GPS placed in the record, AR228-237, it also completely ignores the extremely deferential standard of review that applies to an agency's weighing of record evidence. *See, e.g.*, *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999).

ii. Nor is it true that the controlling FEC Commissioners only considered spending for express advocacy. To be sure, the Commissioners thought they "should not consider more than [spending for] express advocacy," based on judicial precedent, legislative history, the need for precise guidance for regulated parties, and the core concerns of FECA. AR416. But they did not rest on that conclusion. They also "assume[d] *arguendo*" they also could consider spending for "the functional equivalent of express advocacy"—that is, electoral advocacy based on clear implication rather than explicit "magic words." AR413-14.[1] They found that including such

[1] This is not a trivial expansion. *Buckley* defined "express advocacy" to require "magic words" of explicit candidate advocacy. *Buckley*, 424 U.S. at 44. Because it was possible for the sponsors of political advertising to imply a clear electoral message without using the magic words, the express advocacy standard alone historically had limited bite. *McConnell v. FEC*, 540 U.S. 93, 193-94 (2003). But extending regulation to speech that, via clear implication, functions as if it were express advocacy—as the controlling FEC Commissioners did here—eliminates circumvention and encompasses the clear candidate advocacy that is the core concern of FECA. *Id.* at 206.

spending still would not show that Crossroads GPS had the major purpose of electing candidates during any time frame covered by the administrative record. AR423-24.

The controlling FEC Commissioners flatly rejected OGC's broadest position: counting speech that merely praised or criticized a candidate. AR415-19. The Commissioners maintained that such an expansive approach would unduly expand the reach of the definition of "political committee" that the major-purpose construction was adopted to narrow, AR415, and would regulate speech that is not "within the core area sought to be addressed by Congress." AR418; *see also* AR419 ("The major purpose limitation is intended [to restrict regulation] to groups with the clearest electoral focus."). Additionally, the controlling Commissioners noted that such an expansive view "would count spending wholly outside of the Commission's regulatory jurisdiction for the explicit purpose of asserting . . . regulatory jurisdiction over the organization." AR415. For example, a 2011 advertisement criticizing "Obamacare" could subject a group to political-committee regulation even though the advertisement would contain neither express advocacy nor qualify as an electioneering communication (because it had no proximity to an election).

Contrary to Public Citizen's assertions at oral argument, Tr. 14:18-21, the controlling Commissioners did not adopt an express-advocacy standard based on a mistaken notion that judicial precedent compelled them to do so. Rather, the controlling Commissioners thoughtfully explained the numerous reasons why an express-advocacy standard was preferable to a broader standard. *See* AR412-19. That other federal courts reached the same conclusion as the controlling Commissioners is additional support for the rationality of their approach and demonstrates why this approach could not have been contrary to law.

But the controlling FEC Commissioners also pointed out that the express-advocacy standard had limited effect in this case. So long as Crossroads GPS's spending was analyzed based on its first fiscal year or based on all of the evidence in the administrative record, not even the broadest standard would affect their conclusion that Crossroads GPS did not have the major purpose of federal election activity. Only if the Commission were compelled to apply the broadest speech standard to the narrowest timeframe would the outcome be different. AR424.

iii. Public Citizen also asserted at oral argument that, if the Commission considered Crossroads GPS's spending after 2010, it should not have limited itself to spending in 2011; the Commission should also have considered spending during the 2012 election year. Public Citizen did not attempt to explain why it is a sensible approach to consider one election cycle plus the busiest portion of the previous election cycle. Nor did Public Citizen explain why the Commission was required to address 2012 spending when Public Citizen did not exercise its option to supplement the administrative record with evidence from 2012. Ultimately, the record makes clear that the controlling Commissioners conducted a major-purpose analysis using a variety of timeframes, including an analysis that took into account all evidence in the record.

Because the Commission's dismissal of the administrative action simply does not rest on the legal grounds asserted by Public Citizen, Public Citizen's attacks on the controlling Commissioners' legal positions miss the point.[2] Nor, as we now show, are the controlling Commissioners' actual positions vulnerable to the arguments Public Citizen deploys.

[2] Public Citizen also asserted late in the briefing process that the Commission should have investigated Crossroads GPS because it made grants to organizations that engaged in electoral activities. Public Citizen did not press this point at oral argument, but, in any event, Public Citizen has offered no factual basis for the assertion that funds received by other entities from Crossroads GPS were used for electoral activities nor any evidence that Crossroads GPS made the grants with the purpose of supporting other organizations' electoral activities. Indeed, the evidence demonstrates that the opposite was true: Crossroads GPS made explicit agreements with recipients that grant funds would be used only for social welfare, not electoral, purposes. *See* Crossroads GPS Reply Br. at 19 (Dkt. #66).

II. The Controlling Commissioners' Reasons Command Deference.

The Supreme Court long ago cautioned that "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." *NLRB v. Hearst Pubs., Inc.*, 322 U.S. 111, 131 (1944). Such a determination stands if it "has warrant in the record and a reasonable basis in law." *Id.* (quotation marks omitted). This is the foundation of the familiar *Chevron* framework. Courts are required to defer to agencies' reasonable interpretations of ambiguous statutory terms because courts recognize that this exercise often involves a mix of law and policy, and the agency is typically best situated to construe statutory provisions with significant policy implications in its area of expertise. *See, e.g., Martin v. OSHRC*, 499 U.S. 144, 153 (1991) ("Because historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." (citations omitted)).

Seeking to avoid the Scylla of the arbitrary and capricious standard on the one hand, and the Charybdis of *Chevron* deference on the other, Public Citizen tries to tease out several legal rulings from the FEC's dismissal of the administrative complaint and then argue that, based on several theories, *Chevron* deference does not protect those rulings. The effort is unavailing.

A. The Controlling Commissioners Speak For The Commission.

Public Citizen's first theory is that, although Congress expressly and carefully gave controlling effect to the negative votes where less than a majority of FEC Commissioners vote to pursue an enforcement action, and this Circuit expressly requires those casting negative votes to

explain their votes to provide a basis for judicial review, the controlling Commissioners do not speak for the Commission. The theory is not intuitive, and Public Citizen's counsel commented that he had difficulty maintaining that pretense. Tr. 16:3-6. In any event, Public Citizen's theory is flatly rejected by *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000). There, in precisely analogous circumstances, the court repeatedly and explicitly treated the decision and explanation of the three Commissioners voting not to proceed in an enforcement action as the views of the FEC:

> In light of the Commission's statutory interpretation, both theories flunk; the collapsing of entities is unjustified, and the substantive element of the first theory (treating a loan repayment as a "contribution") is false.
>
> Because the Commission has in effect spoken to both theories, we start by considering whether we should defer to Commission interpretations in the context presented here—where the Department of Justice in a criminal case relies on an interpretation of the relevant statutes that has been rejected by the Commission in a 3–3 decision that, under the statutory voting mechanism, 2 U.S.C. § 437g(a)(4)(A)(i) (requiring affirmative vote of four commissioners), controls Commission enforcement.

Id. at 779 (emphases added).

In short, the actions and rulings of the three controlling FEC Commissioners here are those of the Commission. Public Citizen's burden is to show that the FEC could not lawfully act as the three controlling Commissioners acted here.

B. Those Views Merit *Chevron* Deference

Sealed Case explicitly held that the reasons the three controlling FEC Commissioners gave for not proceeding with an enforcement action were entitled to *Chevron* deference. *Id.* at 780. Public Citizen mistakenly asserts that this holding was implicitly overruled by *United States v. Mead Corp.*, 533 U.S. 218 (2001) and *Fogo De Chao (Holdings) Inc. v. U.S. Dep't of*

Homeland Security, 769 F.3d 1127 (D.C. Cir. 2014), but Public Citizen seriously misreads those cases. And, even if Public Citizen's readings were arguable—they are not—that would not be an adequate basis for this Court to refuse to follow squarely applicable circuit precedent. *See Brooks v. Grundmann*, 748 F.3d 1273, 1279 (D.C. Cir. 2014) ("The doctrine of *stare decisis* compels district courts to adhere to a decision of the Court of Appeals of their Circuit until such time as the Court of Appeals or the Supreme Court of the United States sees fit to overrule the decision.").

Public Citizen claims that *Mead* and *Fogo de Chao* hold that *Chevron* deference does not apply unless an agency's decision binds third parties not involved in the proceeding. *See* Tr. 7-8. Not so. Those cases both state the general rule that *Chevron* primarily protects agency decisions that flow from a formal notice-and-comment or adjudicative process authorized by Congress. *Mead*, 533 U.S. at 229-30; *Fogo de Chao*, 769 F.3d at 1136-37. They further state that sometimes *Chevron* does not require such a formal process if other special considerations justify deference, such as when an informal but reliable process produces a rule of law that binds third parties. *Mead*, 533 U.S. at 230-31; *Fogo de Chao*, 769 F.3d at 1137. However, *Chevron* does not apply where there is neither a formal process nor a general rule of law. *Id.*

Sealed Case follows this same analysis. It holds that the FEC's formal statutory process for evaluating and dismissing complaints is adjudicative in nature, thus constituting the type of formal decision-making procedure to which *Chevron* deference typically applies. 223 F.3d at 780. It further holds that, in the context of such formal decision-making, the protection a negative Commission vote provides a respondent against further enforcement is a sufficient legal effect to invoke *Chevron*. *Id.* That analysis fits very comfortably with *Mead* and *Fogo de Chao.*

Certainly, neither of these cases overruled *Sealed Case*'s analysis. *Sealed Case* is controlling here.

C. Major Purpose Is A Statutory Concept

Public Citizen's last-gasp argument is that *Chevron* does not apply because the doctrine only protects an agency's construction of its statute, and the major-purpose test is a non-statutory creation of the Supreme Court. This contention is groundless. When the Supreme Court applies the canon of constitutional avoidance, it does not legislate. Instead, the Court interprets a statute in a way that avoids serious constitutional questions, in light of the presumption that Congress did not intend an alternative construction that raises serious constitutional questions. This exercise is "a means of giving effect to congressional intent," *Clark v. Martinez*, 543 U.S. 371, 382 (2005) and requires taking into account the statute's language, structure, purpose, and history.[3]

The Supreme Court made explicit the statutory basis for its ruling in the very paragraph of *Buckley* that formulated the major-purpose construction. In that paragraph, the Court avoided First Amendment concerns by narrowly construing two statutory terms, "political committee" and "expenditure." *Buckley*, 424 U.S. at 78-79. It construed the term "expenditure" to require explicit words of express candidate advocacy. *Id.* at 79-80. When Congress later sought to regulate a different and broader category of speech, the Court approved. *McConnell v. FEC*, 540 U.S. 93, 193–94 (2003). It explained that the express-advocacy standard was not something it

[3] The D.C. Circuit affords deference to agencies' interpretations of Supreme Court precedent bearing on statutory provisions over which the agencies have regulatory jurisdiction. In *Public Utilities Commission of California v. FERC*, 900 F.2d 269 (D.C. Cir. 1990), for example, the D.C. Circuit explained that deference is owed to FERC's conclusion that the pipelines at issue were "high-pressure" within the meaning articulated by the Supreme Court in *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1950). 900 F.2d at 275-76 & n.5. The court also described this decision as "a mixed question of fact and law." *Id.* at 275 n.5.

had invented but, instead, represented an "endpoint of statutory interpretation" that Congress could alter like any other statute. *Id.* at 190.

Likewise, the major-purpose standard results from a statutory construction of FECA's definition of "political committee." Of course, the Commission must construe the statute to embody the major-purpose standard.[4] But, to the extent the statute remains ambiguous, it remains the FEC's primary duty to give it content. Indeed, at one point the courts held the FEC was legally bound to flesh out the major-purpose concept. *Shays v. FEC*, 424 F. Supp. 2d 100 (D.D.C. 2006). And the courts ultimately approved the Commission's decision not to provide a clarifying rule only because the FEC said it would flesh out the concept in case-by-case adjudication. *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007).

Application of the major-purpose test clearly depends upon the FEC's familiarity with FECA and the campaign finance universe it regulates. Indeed, the Supreme Court made clear that the necessary major purpose is one that implicates the "core area [of electoral advocacy] sought to be addressed by Congress." *Buckley*, 424 U.S. at 79. This exercise is well within the Commission's area of expertise and its authority to administer FECA. In exercising this authority, the FEC's legal rulings command full *Chevron* deference, and its factual findings prevail so long as they are not arbitrary and capricious in light of the record.

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[4] Public Citizen asserts that, in *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996), *vacated by FEC v. Akins*, 524 U.S. 11 (1998), the D.C. Circuit "declined to give *Chevron* deference to the Commission's view of the contours of the major-purpose test." Tr. 10:20-21. But the court in *Akins* made clear that its decision reached only the question of "*whether* the Court established a major purpose test," and not "*how* such a test is to be implemented." *See Akins*, 101 F.3d at 740-41 (emphases in original). This case, by contrast, involves how the major-purpose test is to be implemented. This question directly implicates the FEC's authority to "formulate general policy with respect to the administration of" the FECA, authority for which deference is "presumptively . . . afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Indeed, the D.D.C. ratified the FEC's decision to use case-by-case adjudication to apply the major-purpose test precisely because the inquiry is so "complex" and "multifaceted." *Shays v. FEC*, 511 F. Supp. 2d 19, 30–31 (D.D.C. 2007). Unlike the question of whether the major-purpose test applies in the first place, which was disputed in *Akins*, the question of how to apply the major-purpose test to a particular entity is a second-level question with significant, policy-based dimensions that demand the agency bring its expertise to bear. *Chevron* deference is warranted for such a question.

CONCLUSION

Because the controlling FEC Commissioners' reasoning is not contrary to law under any standard of review, this Court should uphold the Commission's dismissal of Public Citizen's complaint.

Respectfully submitted,

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