IN THE 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)

PLAINTIFFS' SUPPLEMENTAL BRIEF

The oral argument in this case on August 2, 2016, focused largely on the issue of *Chevron* deference and its application to this case. At the Court's invitation, plaintiffs submit this supplemental brief to clarify points addressed during the oral argument and further explain the importance and proper resolution of the *Chevron* issue and, ultimately, the merits.

The question of *Chevron* deference arises because the statement of reasons of the controlling group of Commissioners, which provides the rationale for the agency's decision that is subject to review by this Court, demonstrates that the decision not to investigate Crossroads GPS is based on legal and constitutional propositions about the nature of the "major purpose" test that determines whether Crossroads GPS is a political committee. *See* AR 404–24. Specifically, the controlling Commissioners concluded that, to determine an entity's major purpose, they must give primary weight to the organization's own statement of its purposes;

they must limit their consideration to its expenditures on express advocacy and the functional equivalent of express advocacy; and they must consider not only expenditures made in the calendar year or election cycle in which the entity is alleged to be a political committee, but also those made later in the entity's own fiscal year. The controlling Commissioners' view that Crossroads GPS was not a political committee in 2010 depended wholly on these legal conclusions.

Because the controlling Commissioners' rationale depended upon their view of the law concerning the major purpose test, the defense of their decision by the Commission and Crossroads GPS rests largely on invocation of *Chevron* deference for those legal views. Under *Chevron*, as reframed by the Supreme Court in *United States v. Mead Corp.*, 533 U.S. 218 (2001), a court defers to an agency's reasonable construction of an ambiguous statute "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226–27. The controlling Commissioners' interpretation of the major purpose test does not qualify for deference for two principal reasons.

First, the controlling Commissioners' determination is not an exercise of congressionally delegated authority to interpret ambiguous statutory terms, but instead reflects the controlling Commissioners' interpretation of case law construing a limit imposed on the statute by the Supreme Court to avoid First Amendment overbreadth. Courts "are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle." *Sierra Club v.*

FERC, __ F.3d. __, 2016 WL 3524262, at *8 (D.C. Cir. June 28, 2016) (quoting *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002)); *Okla. Gas & Elec. Co. v. FERC*, __ F.3d __, 2016 WL 3568086, at *3 (D.C. Cir. July 1, 2016).

Second, the controlling Commissioners' rationale does not reflect an exercise of authority to make "rules carrying the force of law." *Mead*, 533 U.S. at 227. It is undisputed that legal interpretations announced by the controlling Commissioners in a deadlocked Commission decision not to proceed with an investigation do not set forth a rule with the force of law: They determine only the outcome of the particular matter and do not bind regulated parties or the Commission in any other matter. Such determinations do not qualify for *Chevron* deference. *Fogo de Chão (Holdings) Inc. v. Dep't of Homeland Security*, 769 F.3d 1127, 1137 (D.C. Cir. 2014).

At the oral argument, the Commission and Crossroads GPS did not refute these central points. And absent *Chevron* deference, the controlling Commissioners' reasoning cannot be sustained, as explained in plaintiffs' briefs and at argument.

I. The controlling Commissioners' statement of reasons sets forth the rationale subject to review in this case.

As the Court suggested in the oral argument, it is unusual in administrative law practice for an agency to offer a statement of reasons for a non-enforcement decision reached as a result of a tie vote. The existence of such a statement here is the result of the provision in the Federal Election Campaign Act (FECA) for review of Commission orders dismissing complaints, *see* 52 U.S.C. § 30109(a)(8), as well as D.C. Circuit decisions that impose procedural requirements on the Commission in order to make that provision effective. In *Democratic Congressional Campaign*

Committee v. FEC, 831 F.2d 1131 (D.C. Cir. 1987) (*DCCC*), the court of appeals, in an opinion by then-Judge Ruth Bader Ginsburg, considered whether a Commission deadlock leading to dismissal of a complaint was subject to review under the Act, and, if so, how such review should proceed. The court held that "when, as in this case, the FEC does not act in conformity with its General Counsel's reading of Commission precedent, it is incumbent upon the Commissioners to state their reasons why. Absent an explanation by the Commissioners for the FEC's stance, we cannot intelligently determine whether the Commission is acting 'contrary to law.'" *Id*. at 1132; *see also id*. at 1135. The required statement of the three Commissioners whose votes dictated the outcome sets forth the rationale that is subject to judicial review under the principles of *SEC v. Chenery Corp*., 318 U.S. 80, 87 (1943), which limits a reviewing court to considering the validity of the reasons actually relied on by the agency for its action. *See DCCC*, 831 F.2d at 1135 n.6.

However, as the Commission itself has explained, such statements of reasons do not establish rules or precedents binding on either the Commission or those subject to its jurisdiction, because three-member blocs of Commissioners lack authority to establish Commission rules, precedents, or policies. "[T]hese required statements from declining-to-go-ahead Commissioners in three-three dismissals are '*not law*' and … 'would not be binding legal precedent or authority for future cases.'" FEC Reply in Support of Motion to Dismiss, at 4, *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 14-1419, Dkt. No. 12 (D.D.C. Dec. 16, 2014) (FEC *CREW* Reply) (emphasis added by FEC) (quoting *Common Cause v. FEC*, 842 F.2d

436, 449 & n.32 (D.C. Cir. 1988)). Neither the Commission nor Crossroads GPS has contended otherwise in their briefs or at the oral argument.

II. The controlling Commissioners' statement of reasons makes clear that their decision rests on their interpretation of the judicially imposed "major purpose" requirement.

In *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), the Supreme Court held that FECA's definition of a political committee must be limited to organizations that have the "major purpose" of nominating or electing candidates in order to avoid constitutional problems of vagueness and overbreadth. It is undisputed in this case that the controlling Commissioners' statement of reasons in this case (AR 400–28) is based entirely on their interpretation of the major purpose test, as Crossroads GPS otherwise met the statutory requirements for political committee status: It made "expenditures aggregating in excess of $1,000 during [the] calendar year" 2010. 52 U.S.C. § 30101(4). As the Commission itself acknowledged in its cross-motion for summary judgment in this case, the controlling Commissioners were "applying the major-purpose test" established in "*Buckley* and its progeny." Dkt. No. 32, at 34.

The controlling Commissioners' heavy reliance on case law concerning the major purpose test and the constitutional principles that, in the Commissioners' view, must inform application of the test is evident from their statement of reasons. The statement's "Legal Analysis" occupies 21 of its 29 pages (AR 404–24) and is dominated by analysis of judicial decisions construing the major purpose test and addressing First Amendment limits on campaign finance legislation. Specifically, the Commissioners relied on their interpretation of court decisions to support their view that the determination of a group's purpose must be based in the first instance

on its formal organizing documents, statements of purpose, and official communications, to the exclusion of other sources bearing on the organization's purpose. AR 409–10. Moreover, the Commissioners' analysis of whether the organization's actual activities were consistent with its stated purpose rested on their legal determination, based on their review of judicial case law, that the Commission is required to limit its consideration to expenditures on express advocacy or its functional equivalent. AR 412–19. The controlling Commissioners expressly stated that their position on this issue was compelled by their reading of "judicial application of the law." AR 416. Finally, the Commissioners' decision to consider expenditures through the end of Crossroads' fiscal year rather than focusing on the calendar year and election cycle in which it was alleged to have been a political committee rested on their views of the purposes of the major purpose test as set forth in "*Buckley* and its progeny." AR 419. Throughout, the controlling Commissioners' reasons reflected their views about what the Commission "must" do to "heed the limiting constructions that courts have placed on the definition of 'political committee.'" AR 400.

III. The controlling Commissioners' reasons are not entitled to *Chevron* deference.

At oral argument, the Commission's defense of the decision not to proceed against Crossroads GPS rested centrally on a plea for deference. Because the validity of the controlling Commissioners' action (that is, whether it is contrary to law) depends on the correctness of their legal analysis of the major purpose test, the

Commission's request for deference depends on whether that analysis meets the conditions for *Chevron* deference. For two reasons, it does not.

A. Agency interpretations of judicial decisions and constitutional principles receive no *Chevron* deference.

As explained above, the controlling Commissioners' analysis of Crossroads GPS's major purpose reflected rules they purported to glean from judicial case law based on First Amendment considerations. Because the premise of *Chevron* is that an agency is entitled to deference when it exercises discretionary authority delegated by Congress to interpret ambiguous statutory mandates, *Chevron* deference is inapplicable when an agency instead acts because it believes it is bound to take a particular action by judicial decisions or the constitutional concerns they reflect. *See*, *e.g.*, *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (citing *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc), *vacated on other grounds*, 524 U.S. 11 (1998)). The D.C. Circuit applied this principle—derived from its ruling in the *Akins* case that the FEC's major-purpose determinations are not entitled to deference, *see id*.—most recently in two cases decided just this year. *See Sierra Club*, 2016 WL 3524262, at *8; *Okla. Gas*, 2016 WL 3568086, at *3; *see also Banner Heart Hosp. v. Burwell*, __ F. Supp. 3d __, 2016 WL 4435174, at *5 (D.D.C. 2016) ("However, while the agency enjoys deference in the area of its expertise—including its interpretation of statutes it is tasked with enforcing—the agency's interpretation of judicial precedent is entitled to no deference.").[1]

[1] Likewise, when an agency acts because it believes a statute *requires* it to do so, it receives no deference because it is not purporting to exercise interpretive discretion, *see*, *e.g.*, *Arizona v. Thompson*, 281 F.3d 248, 253–54 (D.C. Cir. 2002),

In the oral argument, the Commission contended that because there is no dispute that the major purpose test applies here, the controlling Commissioners' reliance on it cannot be contrary to law and necessarily receives *Chevron* deference. Tr. 25–26. The Commission's argument overlooks that the issue is not *whether* the major purpose test *applies*, but *what* the test *means* as a legal matter. Specifically, the issue is whether the controlling Commissioners were correct to conclude that judicial decisions construing the test require the FEC to consider only express advocacy spending or its functional equivalent, compel it to reject its own General Counsel's recommendation that it base its determination on Crossroads GPS's spending during the 2010 calendar year, and prohibit it from looking at indicia of the organization's purpose other than its official statements. The Commission has identified no support for its position that the controlling Commissioners' construction of judicial precedents setting forth the major purpose test receives *Chevron* deference.

Indeed, the Commission's citation (Tr. 25) of the D.C. Circuit's decision in *Unity08 v. FEC*, 596 F.3d 861 (D.C. Cir. 2010), undermines its argument that the controlling Commissioners' interpretation of the major purpose test is entitled to *Chevron* deference. In *Unity08*, as here, it was undisputed that the major purpose test applied, and the question was whether the Commission's legal determination

---

just as an agency that believes it is bound by judicial decisions or the Constitution has not engaged in an exercise of authority meriting deference.

about the scope of the test was contrary to law.[2] The D.C. Circuit rejected the Commission's application of the major purpose test as a matter of law, without affording it *Chevron* deference; the court did not even mention *Chevron*, but simply disagreed with the Commission's interpretation of the applicable judicial precedents. 596 F.3d at 867–69. Far from supporting its *Chevron* argument, the Commission's invocation of *Unity08* confirms that the controlling Commissioners' major purpose analysis does not qualify for *Chevron* deference.

Crossroads GPS contends that because the major purpose test is not necessarily constitutionally compelled, but is a limiting construction of a statute, the controlling Commissioners' interpretation of that limiting construction has the same status as an agency's exercise of delegated authority to construe statutory ambiguity. Tr. 34. But the limiting construction was imposed by the courts and is not an interpretation of statutory ambiguity, and the controlling Commissioners expressly cast their decision as one based on their reading of the case law, not on their exercise of their own discretion to fill a statutory gap. *Chevron* does not apply.

B. The controlling Commissioners' interpretation of the major purpose test lacks the force of law.

Under *Mead*, an agency legal interpretation is entitled to *Chevron* deference only "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226–27

[2] Specifically, the question in *Unity08* was whether an entity that intended to support a not-yet-selected candidate had the requisite major purpose to be a political committee under *Buckley*'s limiting construction of the statute.

(emphasis added). The interpretation of the major purpose test in the controlling Commissioners' statement of reasons also fails to meet that prerequisite for *Chevron* deference because it was not promulgated in the exercise of the Commission's authority "to make rules carrying the force of law." Although the Commission undoubtedly has such authority, it can exercise that authority only through adjudicatory decisions or rulemaking proceedings supported by a majority vote of the Commission, as its lawyers have pointed out. FEC *CREW* Reply, at 4 (citing 52 U.S.C. §§ 30106(c) & 30107(a)(8)).

Neither in their briefs nor at oral argument have the Commission or Crossroads GPS argued that the interpretations in the controlling Commissioners' statement of reasons establish a rule with legal effect binding on the Commission or regulated entities. The Commission, however, argues that it is enough that the dismissal resulting from the controlling Commissioners' vote has legal effect with respect to the proceedings involving Crossroads GPS. Tr. 22–23. The Commission's argument, however, confuses a *ruling* with a *rule*. A *ruling* may have legal effect as to specific parties before the agency, but it is not entitled to *Chevron* deference unless it establishes a *rule* with the force of law binding the agency and third parties. That is the holding of *Mead* itself, which involved a ruling with legal effect on the affected party (a tariff classification that determined how much Mead would pay to import day planners) but that did not establish a rule that was binding with respect to third parties. 533 U.S. at 233. That the ruling had no binding effect beyond the immediate parties was what the Supreme Court referred to when that it

held that the ruling was not an exercise of authority to establish "rules carrying the force of law." *Id*. at 227; *see id*. at 231–34.

The D.C. Circuit's ruling in *Fogo de Chão* makes the point even more explicit by holding that, under *Mead*, *Chevron* deference does not apply to "non-precedential" rulings—i.e., those that do not establish rules that are binding on the agency and third parties but instead, like the decision here, are "conclusive only as between [the agency] itself and the [petitioner] to whom it was issued." 769 F.3d at 1137 (alteration in original) (quoting *Mead*, 533 U.S. at 233).[3]

At oral argument, both the Commission and Crossroads GPS asserted that *Fogo de Chão* is inapplicable because the lack of formal adjudication was decisive in that case. Tr. 23–24, 33. That argument disregards what both *Mead* and *Fogo de Chão* actually said, which is that the distinction between formal and informal adjudication is not determinative as to *Chevron* deference: Either type of proceeding can produce a rule with the force of law that merits deference. *See Mead*, 533 U.S. at 230–31; *Fogo de Chão*, 769 F.3d at 1136–37. What counts is whether Congress authorized the agency to establish rules with the force of law through a particular procedure *and* whether the agency in fact exercised that authority. *Mead*, 533 U.S. at 227. Thus, what was "conclusive[]" in *Fogo de Chão* was not the formality or

[3] As *Fogo de Chão* makes clear, any suggestion in the D.C. Circuit's pre-*Mead* decision in *In re Sealed Case*, 223 F.3d 775, 780 (D.C. Cir. 2000), that a deadlocked non-enforcement decision could receive *Chevron* deference because it had "legal effect" limited to the subject of the investigation cannot survive *Mead*'s holding that *Chevron* deference is not available for rulings that are conclusive only between an agency and a single party. We rely on our previous briefs for other reasons why *Sealed Case* is not applicable to the circumstances here. *E.g.*, Dkt. No. 38, at 3–5.

informality of the procedures, but the "non-precedential nature of the … decision." 769 F.3d at 1137. As the court put it, "[h]aving disclaimed any intent to set a rule of law with any force beyond the petition at issue, the [agency] cannot … now claim to have promulgated its decision as an exercise of any authority it had to make such rules." *Id*. Likewise, having disclaimed any argument that the controlling Commissioners' decision establishes a rule with any force beyond the investigation of Crossroads GPS, the Commission cannot claim that its decision was an exercise of authority to establish a rule entitled to deference.

Moreover, even if the formality of the decisional process were decisive, the fact that FEC enforcement matters generally involve formal adjudication would not suffice, because one element of formality that is required for the Commission to establish a rule through a formal adjudication is that the adjudication be decided by a majority vote. As the Commission itself has emphasized, it can only establish policies and rules through majority vote. FEC *CREW* Reply, at 4.[4]

IV. The controlling Commissioners' statement of reasons is contrary to law.

Absent *Chevron* deference, the court must resolve legal issues as to the scope of the major purpose test for itself, giving the controlling Commissioners' reading of the relevant case law only so much weight as their interpretation merits. *See Mead*, 533 U.S. at 234. Under that standard, the controlling Commissioners' reading of the

[4] As our briefs have explained, to the extent there is a Commission decision with the requisite formality, it is the 2007 Supplemental Explanation and Justification concerning political committee status, which was adopted by the Commission as a whole in the exercise of its rulemaking authority. *See* Political Committee Status, 72 Fed. Reg. 5595 (Feb. 7, 2007).

case law cannot be sustained if it lacks "power to persuade." *Id.* at 228 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

The Commission asserts, however, that the controlling Commissioners' views "can't have been contrary to law" if no court has ever held that the Commission *must* consider non-express advocacy in making a major purpose determination. Tr. 27. The Commission has it backwards. Under the *Chenery* principle, whether the Commission's dismissal of the Crossroads GPS complaint can be sustained by this Court depends on whether the reason the controlling Commissioners gave for their votes is contrary to law. 318 U.S. at 87, 94. Where, as here, the stated reason for an agency's action is that judicial precedents compel a particular result, the action's "validity must likewise be judged on that basis." *Id.* at 87. The agency's action is thus contrary to law if the precedents that it claimed dictated the outcome do not in fact do so. *See id.* at 88–89.

The *Chenery* rule has repeatedly been applied by the D.C. Circuit to hold that agency actions based on an agency's mistaken view that it is compelled to reach a particular result cannot be sustained. *See*, *e.g.*, *Transitional Hosps. Corp. of La. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000). As Judge Bates has put it, "deference is only appropriate when the agency has exercised its own judgment. When … the agency's decision is based on an erroneous view of the law, its decision cannot stand." *Coal. for Common Sense in Gov't Procurement v. United States*, 671 F. Supp. 2d 48, 52–53 (D.D.C. 2009) (citations and internal quotation marks omitted). Or, to quote *Chenery*, "if the action is based upon a determination of law as to which the

reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law." 318 U.S. at 94.

For the reasons stated in our previous briefs, the controlling Commissioners' view that case law *required* them to limit their consideration to Crossroads GPS's official statements of purpose and its expenditures on express advocacy or its functional equivalent was erroneous. Indeed, the Commission itself had previously prevailed in litigation establishing that it was *not* limited to considering express advocacy in determining an entity's political committee status. *See Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 555–58 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 841 (2013). By contrast, as demonstrated most fully in our memorandum opposing Crossroads GPS's motion for summary judgment (Dkt. No. 62, at 20–25), none of the case law cited by the controlling Commissioners or by the Commission and Crossroads GPS in defending their reasoning in fact supports the view that only express advocacy or its equivalent may be considered. And, again, because the controlling Commissioners staked the outcome on the proposition that the case law does not *permit* them to consider anything but express advocacy and its equivalent, their decision cannot be sustained if the precedents do not in fact support that view.

For the reasons explained at oral argument, the controlling Commissioners' misreading of the law with respect to whether the Commission may consider only express advocacy or its equivalent in making the major purpose determination is in itself sufficient to require that the decision be set aside and the case remanded to the Commission. *See* Tr. 16–17, 42–43. In addition, as explained in our briefs, the

controlling Commissioners' decision is an arbitrary departure from the Commission's own 2007 Explanation and Justification. Moreover, the controlling Commissioners' decision to look at the time frame most calculated to obscure the extent of Crossroads GPS's electoral activity was arbitrary and capricious and unsupported by the law, *see* Tr. 17–18, 42–43, as was their choice to blind themselves to evidence, outside of Crossroads GPS's official statements, that the organization was formed to influence elections. The Commission's and Crossroads GPS's efforts in the oral argument to minimize these choices as appropriately "flexible" (*e.g.*, Tr. 31, 44) are unavailing.

The effect of the controlling Commissioners' reasoning was to allow evasion of political committee disclosure requirements on a massive scale. That decision cannot claim the protective cloak of *Chevron* deference.

CONCLUSION

For the foregoing reasons, and those set forth in our briefs and at oral argument, the Court should grant the plaintiffs' motion for summary judgment and deny the cross-motions of the Commission and Crossroads GPS.

Dated: September 6, 2016

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson (DC Bar No. 413548)
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

J. Gerald Hebert (DC Bar No. 447676)
Paul S. Ryan (DC Bar No. 502514)
Tara Malloy (DC Bar No. 988280)
Megan P. McAllen (DC Bar No. 1020509)
CAMPAIGN LEGAL CENTER
1411 K Street NW
Washington, DC 20005
(202) 736-2200

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Supplemental Brief was served on all parties through the Court's electronic filing system on September 6, 2016.

/s/ Scott L. Nelson
Scott L. Nelson