No. 13-772

In The Supreme Court of the United States

FREE SPEECH,

Petitioner,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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ARGUMENT

Pursuant to Supreme Court Rule 15(8), Petitioner Free Speech files this brief of supplemental authority concerning a recent development in the Federal Election Commission's ("FEC's") approach to regulating Political Action Committee's ("PACs"). Based on this development, it appears the Commission has made non-public certain public documents that define regulatory standards in relation to PAC rules. In doing so, the FEC has erased a significant element of the law.

As explained in the Petition for a Writ of Certiorari, the FEC relies on a confusing hodgepodge of factors to determine whether a group must register as a PAC under federal election law. One assumption steadily advanced by the Commission's attorneys in considering this approach is that the elements relied upon by the FEC are made public and bear some consistency. With the release of a recent Supplemental Statement of Reasons by three Commissioners, it is evident these assumptions are incorrect. *See* Matter Under Review ("MUR") 6396 (Crossroads Grassroots Policy Strategies), Supplemental Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (FEC March 25, 2014), *available at* http://eqs.fec.gov/eqsdocsMUR/14044352011.pdf (attached as App. 1).

Under current law, factors that may trigger the need to register as a PAC arise on a case-by-case

basis. Citizens interested in knowing whether they must register and report as a PAC must consult "the public files for the Political Committee Status Matters and other closed enforcement matters, as well as advisory opinions and filings in civil enforcement cases." Political Committee Status 2, 72 Fed. Reg. 5595, 5604 (FEC Feb. 7, 2007). Thus, regulatory criteria defining PAC status are found in the regulations themselves, the FEC's Explanation and Justification ("E&J") for its policy, and its voluminous administrative record that itself carries the weight of law.

So, before speaking a local non-profit or advocacy group must decide whether to register and report with the FEC by consulting a sizeable set of enforcement matters, court filings, and advisory opinions issued by the Commission. This alone is problematic because it conditions the exercise of First Amendment freedoms on citizens mastering prolix and confusing administrative and legal filings of the Commission. *Citizens United v. FEC*, 558 U.S. 310, 335 (2010). But it gets worse.

On March 25, 2014, three FEC Commissioners issued a Supplemental Statement of Reasons in MUR 6396. This MUR considered the very legal issue involved in this case – that is, what standards dictate when groups must register as a PAC. These commissioners issued the supplemental statement because the agency's attorneys had issued a First General Counsel's Report ("FGCR") in the matter, but then issued a "second First General Counsel's Report" and prevented the earlier report from public review,

despite the three commissioners' reliance on the first FGCR. FGCRs are important to understanding the law because they set forth the factors, considerations, and reasoning of the Commission in deciding PAC status.

Based on the March 25 Supplemental Statement, the FGCRs are fundamentally contradictory in their treatment of timing considerations for deciding whether a group must register and report as a PAC. For the FEC's case-by-case approach to work, the documents revealing the Commission's reasoning, important factors weighing for or against regulation, and illumination of legal standards must at least be publicly available. Secret, here-today, gone-tomorrow standards do little to inform the public about how to comply with the law. Furthermore, the FEC's selective elimination of some FGCRs appears to be in violation of its own policy from 2009, which provided that "all First General Counsel's Reports [should be placed] on the public record." 74 Fed. Reg. 66132 (FEC Dec. 14, 2009).

The FEC holds an important public trust in overseeing regulations that abut sensitive First Amendment freedoms. It is problematic enough to demand average citizens consult a bizarrely complicated patchwork of administrative material and legal filings to comply with the law; hiding these documents from public review while portraying federal election law as consistent and easy to comply with is deeply offensive to the Due Process and First Amendment rights of every American.

The recently filed Supplemental Statement of Reasons in MUR 6396 only buttresses the need for review in *Free Speech v. FEC*. Permitting the FEC to oversee a shifting – sometimes secret – set of speech criteria for regulatory compliance only deepens the damage done to Free Speech and our national political debate. When it comes to the FEC, hidden documents, shifting regulatory targets, and utter confusion are the norm.[1] This circuitous muddle of discerning PAC status leaves many Americans unable to engage in meaningful electoral participation – an injury that desperately needs review by this Court.

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[1] *See, e.g.*, Dave Levinthal, *FEC releases election law documents after subpoena threat*, Politico (May 23, 2012), http://www.politico.com/news/stories/0512/76684.html; Memorandum from Vice Chairman Donald F. McGahn to the Federal Election Commission, "Background Information Regarding Proposed Enforcement Manual," (FEC July 25, 2013), http://www.hvjlaw.com/wp-content/uploads/2013/07/mtgdoc_13-21-k.pdf; FEC Advisory Opinion 2010-25 (RG Entertainment Ltd.), http://saos.fec.gov/aodocs/AOR%202010-25%20(RG%20Entertainment%20et%20al)%20Closeout%20Letter%20(1.6.11).pdf (where the Commission could not decide upon the application of the Act's media exemption to the costs of producing, disseminating, and marketing a film); FEC Advisory Opinion 2010-20 (National Defense PAC), http://saos.fec.gov/aodocs/AO%202010-20.pdf (the Commission was unable to provide an opinion regarding a non-connected PAC's fundraising and record keeping requirements after *Citizens United*); FEC Advisory Opinion 2008-15 (National Right to Life Committee, Inc.), http://saos.fec.gov/aodocs/AO%202008-15.pdf (where the Commission was unable to issue an opinion about the application of the Act to a proposal to fund a radio advertisement).

See McCutcheon v. FEC, 134 S.Ct. 1434, 1440-41 (2014) (there is "no right more basic" than electoral participation).

Respectfully submitted,

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[SEAL] **FEDERAL ELECTION COMMISSION**
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Crossroads Grassroots Policy Strategies	)	MUR 6396
	)	

SUPPLEMENTAL STATEMENT OF REASONS OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN

On January 8, 2014 we issued our Statement of Reasons ("Statement") in this matter, explaining the basis for our votes not to adopt the Office of the General Counsel's ("OGC") recommendations.[1] As explained in our Statement, OGC issued two First General Counsel's Reports in this matter. The initial First General Counsel's Report, dated June 22, 2011, was withdrawn and later replaced by a second First General Counsel's Report, dated November 21, 2012, which introduced a new legal norm: that a calendar year and only a calendar year is the necessary time frame for determining an organization's political committee status.[2] Because OGC's legal test was evolving

[1] MUR 6396 (Crossroads Grassroots Policy Strategies), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen ("Statement"), *available at* http://eqs.fec.gov/eqsdocsMUR/14044350970.pdf.

[2] OGC did seek to incorporate this analysis into other reports prepared roughly contemporaneously with the second First

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behind closed doors while this enforcement matter was under review, the Respondent and other similarly situated organizations did not have clear prior notice that their respective major purposes would be analyzed by OGC under a single calendar-year rule.

We attached the withdrawn First General Counsel's Report, along with an accompanying Factual and Legal Analysis, to our Statement to illuminate the introduction of this new legal norm.[3] As a matter of custom and courtesy, we provided our Statement to our colleagues and OGC before making it public. At that time, OGC and several of our fellow Commissioners expressed their viow that the withdrawn First General Counsel's Report might be privileged and should be withheld from the public record. Because the Complainant, the Respondent, and the public deserve an explanation for official actions, particularly in a high profile matter such as this one, we agreed to redact the first report pending further Commission discussions in order to make the rest of the Statement public. We do not believe that these redactions are necessary or consistent with the Commission's Disclosure Policy, discussed more fully below.

As we explained in our Statement, the withdrawn First General Counsel's Report in this matter

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General Counsel's Report in this matter. *See*, *e.g.*, MUR 6081 (American Issues Project), First General Counsel's Report. Nevertheless, OGC did not and could not root this novel legal theory in prior Commission actions or interpretations.

[3] There were other material changes to OGC's analysis of the Respondent's major purpose as well.

informed our decision in this matter.[4] Thus, it should have been publicly released so that it could be available

[4] It is incumbent upon us to provide such a statement, because in the event a lawsuit is filed (as has occurred here), a court undertakes judicial review of our decision. *See Public Citizen v. FEC*, Case No. 14-cv-00148 (D.D.C. filed Jan. 31, 2014); *see also* 2 U.S.C. § 437g(a)(8)(A) ("Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia."). When Commissioners fail to adapt the recommendations of the Office of the General Conned, those Commissioners explain their views in statements that become an essential part of subsequent litigation, if any. *See Democratic. Congressional Campaign Committee v. FEC,* 831 F.2d 1131, 1132 ("[W]hen . . . 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' " (citation omitted)); *FEC v. National Republican Senatorial Committee,* 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under § 437g(a)(8). . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."). Since it lays out the position of the Commission, this statement is entitled to full judicial deference. *See id.* ("[The Supreme Court observed] in upholding (against a complainant's § 437g(a)(8) challenge) the Commission's unanimous dismissal of a complaint, 'that the Commission is precisely the type of agency to which deference should presumptively be afforded.' *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.,* 454

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to a reviewing court and litigants as part of the administrative record in this matter.

Although the specific question of the public release of a withdrawn First General Counsel's Report may be new, Commissioners have previously released materially similar documents with neither redactions by OGC nor a vote of the Commission.[5] The nondisclosure here deviates from past practice and from current policy. Not releasing the report to the public contravenes the Commission's Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record.[6] In 2009, the Commission determined that "[i]n the interest of promoting transparency, the Commission is resuming the practice of placing *all* First General Counsel's Reports on the public record, whether or not the recommendation in these First General Counsel's Reports are adopted by the Commission" (emphasis added). Here, OGC has taken the position that when a First General Counsel's Report is withdrawn and replaced, it is essentially, erased from the administrative record as if that prior document never existed, even if it has been

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U.S. 27, 37, 102 S.Ct. 38, 44-45, 70 L.Ed.2d 23 (1981) (*DSCC*). Though our *DCCC* opinion limited itself to its facts, we have since expanded it to control generally situations in which the Commission deadlocks and dismisses.").

[5] *See, e.g.,* MUR 5842 (Economic Freedom Fund), Statement of Reasons of Commissioners Cynthia L. Bauerly and Ellen L. Weintraub, *available at* http://eqs.fec.gov/eqsdocsMUR/29044241152.pdf (attaching an OGC Factual and Legal Analysis).

[6] 74 Fed. Reg. 68132 (Dec. 14, 2009), *available at* http://www.fec.gov/law/cfr/ej_compilation/2009/notice_2009-28.pdf.

voted on and considered by the Commission. Even if disclosure was not mandated by the explicit language of the policy – and we believe it is – non-disclosure clearly frustrates the purpose of the policy to provide greater transparency to agency decisions.

The report at issue was first prepared and styled as a First General Counsel's Report. Thus, it was clearly prepared with an expectation that it would be reviewed by Commissioners and the general public, per Commission policy and practice. The report was circulated by the Commission Secretary for a vote and was voted on as a First General Counsel's Report. Objections were made and, pursuant to Commission directive, the matter was placed on the Commission's September 27, 2011 Executive Session. The report was thus styled as a "First General Counsel's Report" on the agenda for the executive session, discussed at a Commission meeting, and referenced in the approved minutes for the session.

Even assuming *arguendo* that the report is privileged as OGC has argued, we asked our colleagues to support the public release of that First General Counsel's Report and the accompanying proposed Factual and Legal Analysis in the interests of public transparency and full disclosure. We moved to release the document but the vote failed.[7]

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[7] MUR 6396 (Crossroads GPS): Redactions in the Statement of Reasons Written by Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, Certification (March 20, 2013).

We respect it when our colleagues approach the law or individual matters from a different perspective and earnestly want to work with them to move forward in areas where we can find common ground. We recognize that the question of publicly releasing this first report after it was withdrawn involves a delicate balance between withholding privileged material and the public's interest in government transparency. However, particularly in a matter subject to litigation implicating the First Amendment and Due Process rights of citizens, and in furtherance of the Commission's 2009 Disclosure Policy, we voted in favor of transparency.

/s/	Lee E. Goodman	3/25/14
	LEE E. GOODMAN Chairman	Date
/s/	Caroline C. Hunter by ESB	3/25/14
	CAROLINE C. HUNTER Commissioner	Date
/s/	Matthew S. Petersen (JDB)	3/25/14
	MATTHEW S. PETERSEN Commissioner	Date