No. 09-AA-182

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

DAVID J. MALLOF, *et al.*,

Petitioners,

v.

DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS,

Respondent.

On Petition for Review of a Decision of the
District of Columbia Board of Elections and Ethics

REPLY BRIEF FOR THE PETITIONERS

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August 19, 2009

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SUMMARY OF ARGUMENT

1. Petitioners, as complainants before the Office of Campaign Finance, had standing to seek Board of Election review of the OCF's decision that Councilmember Evans had not violated D.C. law by using government resources to support his campaign. The Board's brief does not argue that petitioners did not suffer injury-in-fact; it argues, rather, that their injury was not "fairly traceable" to the OCF decision, and that the Board could not redress it, because by the time the OCF issued its decision the election had come and gone. But it is well established that the occurrence of an election does not moot election-law cases, and in any event petitioners' injury is continuing, as the OCF decision (and the Board's refusal to review it) gives Councilmember Evans a green light to use the same advertisement—or another obtained in the same manner—in future election campaigns. And the Board could redress petitioners' injury by reviewing the OCF's decision and determining that Councilmember Evans did violate D.C. law by using government resources to support his campaign.

2. The Board's argument that its own interpretation of the regulation is entitled to *Chevron* deference is misplaced, because the source of that interpretation—an unpublished, nonprecedential decision—does not satisfy the prerequisites of *Chevron*. Rather, the Board's interpretation is entitled only to such deference as its persuasiveness justifies, which is not much, as its own brief shows that the regulations were designed to allow OCF complainants to obtain Board review.

3. The Board's counsel seek affirmance of its decision here on grounds other than the grounds on which the Board ruled, but that argument contravenes the *Chenery* principle—the fundamental rule that that an administrative order cannot be sustained on the grounds not relied on by the agency. Because the Board's brief does not seek affirmance on the ground relied upon by the Board (absence of injury-in-fact), the decision must be reversed.

ARGUMENT

I. PETITIONERS SATISFY ALL STANDING REQUIREMENTS

The Board claims that in order to have standing to seek review of an action of the Office of Campaign Finance, a petitioner "must establish[]: 1) a distinct and palpable injury-in-fact that is 2) traceable to the respondent's conduct and 3) redressab[le] by the relief requested." Resp. Br. at 8. The Board does not dispute that petitioners were injured in fact. *See id.* at 10 (summarizing petitioners' claimed injuries; the Board's brief never argues that these injuries are not real). With regard to causation, the Board argues that petitioners could not have been injured by the OCF order because "it was issued nearly three months after the September 2008 Primary Election [and] could not have injured Petitioners' efforts to either participate in or affect this election." *Id.* at 11. The Board then argues that it cannot redress petitioners' injuries because candidate Evans stopped running the campaign ad during the course of the election and because sanctions would be an impermissible restraint on speech. *Id.* at 11-12.

Assuming the Board states the proper test for standing (a subject discussed in petitioners' opening brief), petitioners easily satisfy these requirements. First, petitioners demonstrated in their opening brief (at 6-12), and the Board does not dispute, that petitioners suffered an injury-in-fact. Second, it is plain that petitioners' injury—which is continuing—is traceable to the OCF decision dismissing their complaint. Finally, the Board could redress petitioners' continuing injury by reviewing OCF's decision and determining whether the Evans advertisement violated D.C. law.

A. Petitioners' injuries are "fairly traceable" to the OCF Order.

The Board asserts that petitioners' "alleged injuries . . . are not 'fairly traceable' to the OCF Order," Resp. Br. at 11, because the OCF issued its order "nearly three months after the September 2008 Primary Election." *Id.* But that conclusion is erroneous, for two reasons.

First, the law is clear that in election-law cases, the occurrence of an election does not moot an otherwise proper case. *See, e.g., Majors v. Abell*, 317 F.3d 719, 722 (7th Cir. 2003) (district court did not err in refusing to dismiss candidate's challenge to political advertising statute for lack of standing the day after the election); *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981) ("standing exists [in election rights cases] even though the election has already occurred"); *Schiaffo v. Helstoski*, 492 F.2d 413, 416-28 (3d Cir. 1974) (candidate had standing to challenge his opponent's unlawful campaign activities after the election); *Natural Law Party of the United States v. FEC*, 111 F. Supp. 2d 33, 50 (D.D.C. 2000) ("if the passage of the election were enough to deprive plaintiffs of standing, election cases would, as a practical matter, be unreviewable"). Even if the OCF had acted quickly and issued a decision before the primary election, the election would likely have been over before the Board would have acted on an appeal. Thus, in the Board's view, the decision of the OCF should almost always be the final word on matters that arise in the course of a campaign, despite the regulations' provision for review by the Board. That makes little sense. Petitioners' complaint raised important legal issues about the scope of the prohibition on using government resources in political campaigns under the D.C. election laws. Those issues should not be swept under the rug simply because the OCF failed to act swiftly.

Second, the Board's argument that petitioners do not have standing because the OCF order was issued after the election also fails because petitioners continue to suffer injury as a result of OCF's order. "Past exposure to illegal conduct satisfies [standing] where it is accompanied by continuing adverse effects." *Natural Law Party*, 111 F. Supp. 2d at 43 (citing FEC v. Akins, 524 U.S. 11 (1998)). Because of the continuous nature of the electoral process, courts consistently have relied on the continuing effects doctrine to find that "standing exists [in

election rights cases] even though the election has already occurred." *Owen v. Mulligan*, 640 F.2d 1130, 1133 (9th Cir. 1981); *see also Schiaffo v. Helstoski*, 492 F.2d 413, 416-28 (9th Cir. 1974) (finding that a candidate had standing to challenge his opponent's unlawful campaign activities and that his suit was not mooted by the election because he "may well continue to oppose, personally or otherwise, the incumbency").

In *Shays v. Federal Election Commission*, 414 F.3d 76, 90 (D.C. Cir. 2005), for example, the D.C. Circuit reviewed an action brought by two members of Congress to invalidate the Federal Election Commission's rules implementing the Bipartisan Campaign Finance Reform Act because the rules exposed them to competition intensified by practices banned by the Act. The court determined that the plaintiffs suffered a concrete injury even though there was not an active election at the time of suit because they "face reelection every two years." *Id.* at 92. The court then determined that the congressmen satisfied the causation and redressability requirements because their injuries were fairly traceable to the rules and an invalidation of the rules would "vindicate [their] right to BCRA-compliant [reelections]." *Id.* at 95.

Similarly, in *Natural Law Party*, the court heard an independent political party's challenge to the presidential debate committee's decision to invite only the Democratic and Republican nominees to the *past election's* presidential debates. Defendant FEC argued that the plaintiffs did not have standing because the "debates and election cycle were over long before the complaint was filed." *Id.* at 47. The court disagreed, noting that, "if the passage of the election were enough to deprive plaintiffs of standing, election cases would, as a practical matter, be unreviewable." *Id.* at 48. The court found that the plaintiffs suffered a continuing injury because they were "more than likely to field a presidential candidate in the 2000 election." *Id.* at 45. The court then determined that causation was satisfied because "injurious private conduct is

fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality." *Id.* at 45, 47 (internal quotation marks omitted). Finally, the court found that "plaintiffs' injury can still be redressed by an FEC determination that the 1996 debate selection criteria was unlawful, because as long as plaintiffs run for office, they will continue to be subjected to debate selection criteria." *Id.* at 50.

Shays and *Natural Law Party* are directly applicable to the facts of this case. First, petitioners continue to suffer injury that is fairly traceable to the OCF's failure to find that the Evans advertisement violated D.C. law. Mr. Evans was reelected and continues to serve as a Councilmember, and the petitioners continue to oppose him.[1] Elected officials undergo constant public scrutiny and the question whether Mr. Evans violated the election laws will continue to affect public opinion, which in turn has an ongoing impact on the electoral process. For example, public opinion affects candidate decisions to run for reelection and opposing candidate decisions to challenge an incumbent. As a result, the OCF's decision that Mr. Evans did not violate the law continues to adversely affect petitioners' efforts to oppose him—for example, by undermining their ability to inform the public, between elections or in the next election, that his action was unlawful, or through efforts to recruit other candidates to challenge him in the next election. Moreover, under the OCF's decision that Evans' advertisement did not violate the law, he has been given a green light to use that ad again, or to use comparable advertisements

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[1] Petitioners need not demonstrate that a favorable OCF outcome would have changed the outcome of the election. "Given the multiplicity of factors bearing on elections and the extreme political sensitivity of judgments about what caused particular candidates to win, requiring candidates to establish that but for certain [agency actions] they could have won an election" would be unreasonable. *Shays*, 414 F.3d at 91.

Likewise, petitioners need not demonstrate at this stage that the OCF decision was wrong, or that the Board would necessarily find that the Evans advertisement violated the law. The question is only whether petitioners can obtain Board review.

involving other public officials, in future elections, to the detriment of petitioners and others who will oppose his candidacy.

B. Petitioners' injuries are redressable by the Board.

The Board's position that petitioners' injuries cannot be redressed because the 2008 election is over is wrong for the same reasons. As explained in *Natural Law Party*, a favorable Board decision would redress petitioners' injuries "because as long as [Evans] run[s] for office," 111 F. Supp. 2d at 50, he will be able to reuse the same campaign ad or others like it. A finding that the ad was unlawful would, at a minimum, deter Evans from running it in future elections or from making similar use of other "personal" photographs. And if he did use the same ad, the public would know that it was unlawful (at least in the Board's view).[2]

The Board also argues that redress is not possible because the OCF "requested that, pending the outcome of the investigation, Councilmember Evans' campaign committee discontinue the use of the ad," Resp. Br. at 2, and that this request "caused the campaign ad which had offended the Petitioners to stop running prior to the September 2008 Primary Election." *Id.* at 11. But the Board fails to explain why OCF's request, or the campaign's voluntary discontinuance, precludes a ruling on the merits. Voluntary cessation of an activity following the filing of a complaint does not eliminate standing. *See Mbakpuo v. Ekeanyanwu*, 738 A.2d 776, 782 (D.C. 1999) ("[I]t is well established that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case") (internal quotations marks omitted). Indeed, the OCF did not dismiss petitioners' complaint on the ground that the issue was moot; it issued a ruling on the merits. The issue is no more moot now than it was when the OCF ruled, which was also well after the campaign had discontinued

[2] If the Board ruled that the ad was unlawful, then Mr. Evans could, of course, obtain judicial review of that ruling and thereby obtain an authoritative determination of the legal issue.

running the ad. If it would now be improper for the Board to rule on the merits, then it was improper for the OCF to rule on them when it did—which it was not.

Finally, the Board argues that petitioners cannot seek redress because the Board "may not regulate core political speech . . . [and] any sanction levied in response to the injuries Petitioners complain of would be inappropriate." Resp. Br. at 12. This is a remarkable assertion by the Board that the statutory prohibition on the use of D.C. government resources in partisan political campaigns is unconstitutional. Sanctions based on the content of political speech would indeed be unconstitutional. But petitioners did not complain about the content of candidate Evans' speech—they complained about his alleged use of government resources in his campaign, and there is nothing unconstitutional about prohibiting such use, or sanctioning it when it occurs.

In any event, the question whether sanctions are appropriate is a merits determination unrelated to the current appeal. The Board denied petitioners relief because it concluded that they lacked standing, not because it deemed sanctions inappropriate. The Supreme Court made clear in *FEC v. Akins*, 524 U.S. at 25 that a party appealing an agency's interpretation of law satisfies the redressability prong of standing even if the relevant agency might on remand rule against plaintiff on other grounds. The Court stated that, if an "agency misinterpreted the law, [the court must] set aside the agency's action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Id.* Accordingly, the question of what remedy (if any) is appropriate is irrelevant to the current petition for review. The Board's first, and major, task on remand will be to determine whether the ad violated D.C. law by using government resources.

II. THE BOARD'S DEFINITION OF "ADVERSELY AFFECTED" IS NOT ENTITLED TO *CHEVRON* DEFERENCE

Petitioners explained in their opening brief (at 13-16) that the Board erred by assuming, without analysis, that standing to seek *administrative* review of the OCF order required petitioners to demonstrate injury-in-fact, because administrative agencies are not bound by Article III's standing requirements. The Board does not dispute that petitioners would prevail if the Board's "injury-in fact" requirement were lifted. Instead, it devotes significant space (Resp. Br. at 4-10) to arguing that the Board's interpretation of the term "adversely affected" is entitled to *Chevron* deference under this Court's decision in *Allen v. District of Columbia Board of Elections & Ethics*, 663 A.2d 489, 495 (D.C. 1995).[3]

However, subsequent to this court's decision in *Allen*, the Supreme Court issued its decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001). In *Mead*, the Court explained that an informal agency action is not entitled to *Chevron* deference. *Id.* at 227-28. Instead, courts should apply the lower level of deference provided for in *Skidmore v. Swift* & Co., 323 U.S. 134 (1944). *Mead*, 533 U.S. at 234. Under *Skidmore* deference, "the [agency's'] ruling is eligible to claim respect according to its persuasiveness." *Id.* at 221. "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* at 228 (quoting *Skidmore*, 323 U.S. at 140).

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[3] "*Chevron* deference" refers to the deference federal courts accord certain agency actions under the Supreme Court's decision in *Chevron, U.S.C. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). This Court recognizes the scheme outlined by the Supreme Court. *See Allen*, 663 A.2d at 495 (recognizing *Chevron*); *see also Estenos v. PAHO/WHO-FCU*, 952 A.2d 878, 892 n.15 (D.C. 2008) (recognizing *Skidmore* deference, more properly applied in this case).

This Court recognized and followed this distinction in *Estenos v. PAHO/WHO-FCU*, 952 A.2d 878, 892 n.15 (D.C. 2008), noting that an agency compliance manual was not entitled to *Chevron* deference. *See also River St. Donuts, LLC v. Napolitano,* 558 F.3d 111, 116 (1st Cir. 2009) (no *Chevron* deference to an unpublished decision); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1013 (9th Cir. 2006) (declining to accord *Chevron* deference because "[t]he unpublished designation of the decision . . . makes it clear that it was not issued pursuant to the BIA's authority to make rules that carry the force of law"). In *Garcia-Padron v. Holder*, 558 F.3d 196, 199 (2d Cir. 2009), for example, the Second Circuit determined that an agency's definition of a phrase in the statute it administered was not entitled to *Chevron* deference where "'the challenged [agency] decision is unpublished.'"

The Board's order in this case is just such an unpublished decision. Moreover, nothing in the D.C. election statute contemplates that the Board may issue formal, precedential orders in adjudicative matters such as this that would entitle them to *Chevron* deference. *See Mead*, 533 U.S. at 229-30. Given the non-authoritative nature of the Board's ruling, and the fact that defining the term "adversely affected" does not call on any special expertise possessed by the Board, its ruling can only "claim respect according to its persuasiveness." *Id.* at 221. And given the Board's misguided analysis (as explained in petitioners' opening brief), this Court should not follow the Board's interpretation of the regulation. A more appropriate interpretation of the phrase "adversely affected" is the one advanced by petitioners in their opening brief: a party is "adversely affected" by an OCF order if the party participated in the agency's proceeding and has "an opposing or contrary interest, concern, or position." *See* Pet.'rs Br. at 14 (citing Black's Law Dictionary (8th ed. 2004) (definition of "adverse")).

The Board suggests that the OCF exercises broad discretion whether or not to pursue a complaint. Resp. Br. at 6. But on the very next page, the Board's brief cogently explains that OCF's discretion is not broad at all, noting that the regulation providing for review of OCF decisions by the Board was adopted "in response to a concern" that "some individuals *who file complaints*" could be adversely affected by "the administrative dismissal of [their] complaint." *Id.* at 7. The Board also points out that the OCF must provide "written findings of fact and conclusions of law" to the Board when it dismisses any investigation, in order to facilitate review. *Id.* (quoting D.C. Mun. Regs. tit. 3, § 3705.2). The Board's concession that review of OCF decisions is available to OCF complainants as well as OCF respondents effectively concedes this case, for the petitioners here are no less adversely affected by the dismissal of their complaint than any other complainant would be.[4]

III. AT A MINIMUM, THE BOARD'S DECISION CANNOT BE AFFIRMED ON THE GROUNDS ARGUED BY ITS COUNSEL

As noted above, the Board's brief does not dispute that petitioners were injured in fact—the *sole* ground upon which the Board based its decision to dismiss petitioners' claim. "It is a basic principle of appellate jurisprudence that points not urged on appeal are deemed to be waived." *Rose v. United States*, 629 A.2d 526, 535 (D.C. 1993); *see also Ramos v. United States*, 569 A.2d 158, 162 n.5 (D.C. 1990). The Board fails to argue in its brief that petitioners did not suffer concrete injury and, as a result, has waived this issue on appeal, and with it any grounds for affirmance of the Board's decision.

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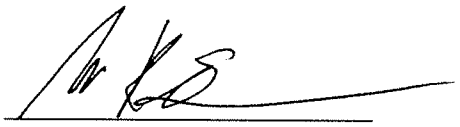
[4] The stringent requirements of standing in federal courts derive from the constitutional rule that federal courts may decide only "cases and controversies"; advisory opinions are prohibited. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). By contrast, the Board is *specifically authorized* to issue advisory opinions on questions regarding the campaign finance laws. *See* D.C. Code § 1-1103.05(c). It is difficult, then, to see what goal the Board believes it is serving with its effort to force petitioners to meet Article III requirements of standing. Perhaps its goal is a desire to avoidance of having to consider whether a powerful incumbent Councilmember violated the law.

This Court may not affirm the Board's decision based on its appellate counsel's other arguments about causation and redressability, because the Board did not address those issues in its decision. It is a basic tenet of administrative law that "[a]n administrative order can only be sustained on the grounds relied on by the agency." *Kralick v. D.C. Dep't of Employment Servs.*, 842 A.2d 705, 713 (D.C. 2004) (internal quotations marks omitted). In other words, the basis "upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *see also Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 469 (D.C. Cir. 1998) ("[W]e may consider only the regulatory rationale actually offered by the agency during the development of the regulation, and not the post hoc rationalizations of its lawyers."). As a result, this Court may not affirm the Board's decision based on these *post hoc* grounds raised for the first time by appellate counsel.

CONCLUSION

For the reasons explained above and in petitioners' opening brief, the decision of the Board of Elections and Ethics should be reversed and the case remanded to the Board so that it may review the decision of the Office of Campaign Finance on its merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby Certify that a copy of the foregoing Consent Motion for Enlargement of Time was served by first-class mail, postage pre-paid, this 19th day of August, 2009, upon:

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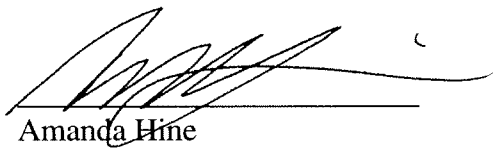

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