ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5117

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEVEL THE PLAYING FIELD, *et al.*,
Plaintiffs-Appellants,

v.

FEDERAL ELECTION COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

CORRECTED BRIEF FOR THE FEDERAL ELECTION COMMISSION

Lisa J. Stevenson
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

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Haven G. Ward
Attorney
hward@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), defendant-appellee Federal Election Commission ("Commission" or "FEC") hereby certifies as follows:

(A) Parties and Amici. Level the Playing Field, Peter Ackerman, Green Party of the United States, and Libertarian National Committee, Inc. are plaintiffs in the district court and appellants in this Court. The FEC is the defendant in the district court and the appellee in this Court. All amici appearing before the district court are listed in the Brief for Appellants. The following entities and individuals have appeared as amici before this Court: the Commission on Presidential Debates, FairVote, Independent Voter Project, Norman R. Augustine, Dennis C. Blair, Mary McInnis Boies, W. Bowman Cutter, James J. Fishman, Carla A. Hills, Vali R. Nasr, Nancy E. Roman, Admiral James Stavridis, Senator Joseph R. Kerrey, Senator Joseph I. Lieberman, The Honorable Clarine N. Riddle, The Honorable David M. Walker, The Honorable Christine T. Whitman, and the Coalition for Free and Open Elections.

(B) Ruling Under Review. Plaintiffs-appellants appeal the March 31, 2019 order of the United States District Court for the District of Columbia (Chutkan, J.), which denied appellants' motion for summary judgment, granted the FEC's cross-motion for summary judgment, granted in part and denied in part the FEC's motion to strike, and denied appellants' motion to supplement. The district court's order

appears in the Joint Appendix ("JA") at 596; the Memorandum Opinion is reported at *Level the Playing Field v. FEC*, 381 F. Supp. 3d 78 (D.D.C. 2019) and is reprinted at JA554-95.

(C) Related Cases. There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

Complainants	Level the Playing Field, the Green Party of the United States, the Libertarian National Committee, Inc., and Peter Ackerman
FEC or Commission	Federal Election Commission
FECA or Act	Federal Election Campaign Act
JA	Joint Appendix
Petitioner	Level the Playing Field
Sponsor	Commission on Presidential Debates

COUNTERSTATEMENT OF THE ISSUES PRESENTED

The court below held that the Federal Election Commission's ("FEC" or "Commission") dismissal of the administrative complaints filed by Level the Playing Field, the Green Party of the United States, the Libertarian National Committee, Inc., and an individual (collectively, "Complainants") against the Commission on Presidential Debates ("Sponsor") and individual respondents, as well as its denial of Level the Playing Field's ("Petitioner") petition to amend FEC's debate regulations, was not contrary to law or arbitrary or capricious because the Commission conducted an extensive analysis of Complainants' evidence, weighed it against the Sponsor and the individual respondents' competing evidence, and drew informed and reasonable conclusions.

The issues presented for review are:

1. Whether the district court correctly subjected the agency action to the well-established deferential standard of review and correctly applied that standard to conclude that the Commission's thorough analysis of the parties' competing evidence and determination to dismiss Complainants' administrative complaints were reasonable.

2. Whether, under the longstanding and even higher level of deference accorded rulemaking petition denials, the district court correctly upheld the

Commission's decision denying Complainants' rulemaking request.

STATUTES AND REGULATIONS

Applicable statutory and regulatory provisions are in Addendum One.

COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND REGULATORY BACKGROUND

A. Enforcement and Rulemaking

1. Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act ("FECA"). Congress authorized the Commission to "administer, seek to obtain compliance with, and formulate policy with respect to" FECA, 52 U.S.C. § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible FECA violations, *id.* § 30109(a)(1)-(2). The FEC has "exclusive jurisdiction" to initiate civil enforcement actions for FECA violations. *Id.* §§ 30106(b)(1), 30109(a)(6).

2. Enforcement and Judicial Review

Any person may file an administrative complaint alleging a FECA violation. *Id.* § 30109(a)(1). After considering any response, the FEC determines whether there is "reason to believe" that the respondent violated FECA. *Id.* § 30109(a)(2).

If the Commission so finds, then it conducts "an investigation of such alleged violation" to determine whether there is "probable cause to believe" that a FECA violation has occurred. *Id.* § 30109(a)(2), (4). If it finds probable cause, it is required to attempt to reach a conciliation agreement with the respondent. *Id.* § 30109(a)(4)(A)(i). If the Commission is unable to reach a conciliation agreement, FECA provides that the agency "may" institute a *de novo* civil enforcement action. *Id.* § 30109(a)(6)(A). At each stage, the affirmative vote of at least four Commissioners is required for the agency to proceed. *Id.* §§ 30109(a)(2), (a)(4)(A)(i), (a)(6)(A).

If the Commission dismisses the complaint, FECA provides a cause of action for certain "aggrieved" administrative complainants to seek judicial review. *Id.* § 30109(a)(8)(A); *CREW v. FEC*, 892 F.3d 434, 441 (D.C. Cir. 2018). If a reviewable dismissal decision is found "contrary to law," the court can "direct the Commission to conform" with its ruling "within 30 days." 52 U.S.C. § 30109(a)(8)(C). If, and only if, the Commission fails to conform, the complainant may bring "a civil action to remedy the violation involved in the original [administrative] complaint." *Id.*

3. Rulemaking Petitions

Any person may file a rulemaking petition. 5 U.S.C. § 553(e); 11 C.F.R. § 200. If the petition satisfies 11 C.F.R. § 200.2, the Commission publishes a Notice of Availability in the Federal Register soliciting comments within a stated time period. *Id.* § 200.3. After considering any other relevant information, the FEC decides whether to grant the petition. *Id.* §§ 200.4(a), 200.5. If it denies the petition, it notifies the petitioner and publishes a Notice of Disposition in the Federal Register. *Id.* § 200.4(b); *see also* 5 U.S.C. § 555(e). Petitioners may seek judicial review. 5 U.S.C. §§ 553(e), 702, 706.

B. Regulation of Corporate Sponsorship of Debates

FECA does not permit corporations to make "contributions" to federal candidates. 52 U.S.C. § 30118(a). Although "expenditures" that are coordinated with candidates or their campaigns are deemed in-kind "contributions," *id.* § 30116(a)(7)(B), the Act excludes "nonpartisan activity designed to encourage individuals to vote" from the definition of "[e]xpenditure," *id.* § 30101(9)(B)(ii).

For forty years, FEC regulations have permitted certain nonprofit organizations to stage candidate debates because they are "designed to educate and inform voters rather than to influence the nomination or election of a particular candidate." *Explanation & Justification for Funding & Sponsorship of Fed.*

Candidate Debates, 44 Fed. Reg. 76,734 (Dec. 27, 1979) ("1979 E&J").[1] If done in compliance with debate regulations, 11 C.F.R. §§ 110.13, 114.4(f), funds spent by or donated to a qualifying organization are not "contributions" or "expenditures." *Id.* §§ 100.92, 100.154.

To qualify, a nonprofit organization cannot "endorse, support, or oppose" political parties or candidates. *Id.* § 110.13(a)(1). While the structure is "left to the discretion of the staging organization(s)," debates must "include at least two candidates"; and cannot be structured "to promote or advance one candidate over another." *Id.* § 110.13(b). Staging organizations must use "pre-established objective criteria" when selecting debate candidates, and for general election debates, cannot "use nomination by a particular political party as the sole objective criterion." *Id.* § 110.13(c).

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Sponsor

The Sponsor is a nonprofit corporation, which has hosted presidential debates for every election since its establishment in 1987. (JA1340.) It was created in response to two studies, which "called upon the Democratic and Republican Parties to play a role in institutionalizing the debates in order to ensure

[1] Congress had previously rejected regulations that placed greater restrictions on corporate funding of debates. *Becker v. FEC*, 230 F.3d 381, 391 n.12 (1st Cir. 2000).

the participation of leading candidates who, as recent history had shown, at times had a disincentive to participate." (JA1340.) As one person involved explained:

> The most persistent and difficult impediment to debates, anywhere, is that the candidate who is ahead in the polls – and particularly an incumbent – will almost never want to debate, and for good reason. . . . The leader's potential for gain is small, while the potential for the challenger is great. . . . [S]o it was essential to find a way to bring pressure on the candidates to participate. The parties could do that.

(JA1340-41 n.10.)

Although the Sponsor conducts a review after each presidential election (JA1353), its debate criteria since 2000 have been: (1) constitutional eligibility; (2) qualification for enough state ballots to have a mathematical chance of winning; and (3) support of at least 15% of the national electorate "as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of determination." (JA1342 (quoting JA1118).) The Sponsor explained that this polling threshold "best balanced the goal of being sufficiently inclusive to invite those candidates considered to be among the leading candidates, without being so inclusive" that it "creat[ed] an unacceptable risk" of the top two candidates not attending, and "ensures that [the] debate itself is not 'hindered by the sheer number of speakers.'" (JA1345-46.)

B. Pre-Remand Administrative Proceedings

Complainants filed two administrative complaints alleging that the Sponsor

and twelve of its officers and directors violated FECA and debate regulations regarding the 2012 presidential debates. (JA122-34; JA665-734.) They alleged that the Sponsor violated 11 C.F.R. § 110.13 because (a) it endorsed and supported the Democratic and Republican parties and opposed third parties and independents; and (b) employed a "subjective" 15% polling threshold for candidate selection. (JA737.) Complainants alleged that funds received and expended by the Sponsor were thus prohibited corporate contributions under 52 U.S.C. § 30118(a), and the Sponsor violated FECA's political committee provisions, §§ 30103, 30104(a)-(b). (JA737.)

Complainants submitted the same evidence as in a similar prior challenge, where the court upheld the FEC's dismissal decision (JA293-95), as well as evidence containing some new material (JA295-96). *See Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000), *aff'd in part*, No. 00-5337, Order (Doc.#547029) (D.C. Cir. Sept. 29, 2000); *Nat. Law Party v. FEC*, 111 F. Supp. 2d 33 (D.D.C. 2000) (incorporating *Buchanan*), *aff'd in part*, No. 00-5338, Order (Doc.#547059) (D.C. Cir. Sept. 29, 2000).

The FEC found, by a vote of 5-0 (with one recusal), no reason to believe that the Sponsor or other respondents had violated FECA or FEC debate regulations, and dismissed the complaints. (JA1211-13; JA1236-37; JA1215-21.)

Petitioner had also filed a rulemaking petition to amend 11 C.F.R.

§ 110.13(c). (JA600-31.) Relying on the complaint evidence, Petitioner argued that a 15% polling threshold unfairly excluded independent candidates, and requested an amendment to eliminate polling thresholds. (JA631.) The Commission made the petition public and solicited comments. (JA635.) It then decided, by a vote of 4-2, not to initiate a rulemaking. (JA637; JA661-63; *see also* JA640-41, JA643-59.)

C. District Court's Remand Opinion

Complainants sought judicial review. (JA309-45.) The district court found that the Commission had not demonstrated that it had "carefully reviewed the evidence," particularly the new evidence, or sufficiently articulated its reasoning, and thus acted contrary to law and arbitrarily and capriciously. (JA293-307.) The court remanded the case for the Commission to (a) notify the Sponsor's officers and directors who were named in the administrative complaints, but not previously notified, and consider their responses; (b) reconsider the evidence submitted; and (c) thoroughly articulate its reasoning for its post-remand enforcement and rulemaking decisions. (*Id.*; *see also* JA555; JA1383-84.)

D. Post-Remand Administrative Proceedings

The Commission provided the requisite notice and reconsidered the entire administrative record. (JA1339 & n.2.) By a vote of 4-0 (with one recusal), it

dismissed the administrative complaints (JA1332-33); and by a vote of 4-1, decided not to initiate a rulemaking (JA1249).

1. Dismissal Decision: "Endorse, Support, or Oppose"

When applying section 110.13(a)'s plain meaning to Complainants' evidence (JA1349 & n.54), the Commission grouped it into: (1) historical evidence; (2) recent evidence of Sponsor directors' activity in a personal capacity; and (3) recent evidence of Sponsor directors' activity in an official capacity. (JA1350-58.) After weighing this evidence against that submitted by the Sponsor and its directors, it dismissed Complainants' allegations that the Sponsor impermissibly endorsed, supported, or opposed parties/candidates for the 2012 debates. (JA1348-58.)

a. Historical Evidence

The Commission noted that the historical evidence must be understood in the context that major-party support was necessary to institutionalize presidential debates. (JA1352.) The mostly-former Sponsor directors who had made allegedly biased comments submitted declarations explaining that "statements attributed to them do not fairly or fully reflect their respective views on the participation of independent candidates in [the Sponsor] debates." (*Id.*)

But even assuming *arguendo* that information from the Sponsor's formation reflected opposition to inclusion of independent candidates, the Commission found

such information unpersuasive when analyzing the 2012 debates, 25 years later. (JA1353.) Twelve years ago, *Buchanan* had considered the same evidence: "[I]n the absence of any contemporaneous evidence of influence," "evidence of possible past influence [was] simply insufficient to justify disbelieving [the Sponsor]'s sworn statement . . . that [the Sponsor]'s 2000 debate criteria were neither influenced by the two major parties nor designed to keep minor parties out of the debates." (JA1351 (quoting *Buchanan*, 112 F. Supp. 2d at 72-73).)

Noting "[o]rganizations may change over time," the Commission found that "there are significant indications that [the Sponsor] has made concerted efforts to be independent in recent years." (JA1353.) For example, after some had alleged that Ross Perot was arbitrarily excluded from the 1996 debates,[2] "[the Sponsor] adopted new candidate selection criteria and retained a polling consultant to ensure its careful and thoughtful application." (*Id.*) The Sponsor's executive director "affirm[ed] that these criteria 'were not adopted with any partisan (or bipartisan) purpose' or 'with the intent to keep any party or candidate from participating.'" (*Id.*) Declarations from current and recent directors affirmed that the Sponsor is committed to including leading independent candidates and "has conducted its business in a strictly nonpartisan fashion." (JA1353-54.)

[2] The Commission found no credible evidence that this was true. (JA1114-15; JA1140; JA1153; JA1287.)

Finally, even if prior statements reflected the personal sentiments of current Sponsor directors, the Commission found they were not indicative of the Sponsor's *organizational* endorsement, support, or opposition to parties/candidates. (*Id.*)

b. Recent Director Activity in a Personal Capacity

The Commission recognized that — as in many other contexts — there is a distinction between a Sponsor director acting in their personal capacity, as opposed to in their official capacity on behalf of the Sponsor. (*E.g.*, JA1354 n.79.) Recognizing that "individuals may wear 'multiple hats' to represent the interests of multiple people or entities at different times," it concluded that taking a "leadership role in a given organization does not restrict his or her ability to speak freely on political issues or make contributions to political committees when he or she does so in his or her personal capacity." (JA1354 n.79; JA1356-57.)

The Commission found that Complainants' evidence largely consisted only of actions taken in the person's individual, not official, capacity. For example, Sponsor Co-Chair Frank Fahrenkopf's 2011 op-ed indicated his "personal allegiance to the Republican Party," not the Sponsor's. (JA1356-57.) Regarding political contributions, the Complainants did not suggest that "any of the contributions by [the Sponsor's co-chairs or directors] originated from [the Sponsor] resources or any source other than their respective personal assets." (JA1357.) Regarding employment, "most of the information presented involves

work that preceded — at times significantly — the individual's service for [the Sponsor]." (*Id.* & n.90.) "[T]o the extent officers or directors are currently employed by entities with ties to or interests in the success of the Democratic or Republican parties," "there is no indication that they act . . . on behalf of their employer while volunteering for [the Sponsor]." (JA1357.) Additionally, the Sponsor's conflict of interest policy "appear[s] to limit financial conflicts of interest that could arise as a result of outside employment." (JA1358; *see also* JA1075-78 (policy).)

The Commission concluded that Complainants' "information alleging partisan political activity on the part of [the Sponsor's] officers and directors *in their non-[Sponsor] capacities* . . . does not support a reasonable inference that [*the Sponsor*] endorses[,] supports or opposes political candidates or parties." (JA1358.)

c. Recent Director Activity in an Official Capacity

The only recent statement that could properly be imputed to the Sponsor is when Fahrenkopf, during a 2015 interview by Sky News in his capacity as Co-chair, stated that "[the Sponsor] has 'a system,' 'we . . . *primarily* go with the two *leading* candidates, it's been the two political party candidates . . . except for 1992 when [Perot] participated in the debates.'" (JA1355 (quoting JA1168) (emphasis added).) It did not persuade the Commission that the Sponsor impermissibly

endorses, supports, or opposes parties/candidates for the numerous reasons discussed below. (JA1355-56.)

2. Dismissal Decision: "Objective Criteria"

The Commission recognized the Sponsor's evidence that "the polling threshold provides an objective means of achieving its educational mission." (JA1346.) *Buchanan* had held relevant whether third party candidates can achieve the level of support required by the Sponsor and found that "several third party candidates *have* achieved over 15 percent support in polls at or around the time that the debates are traditionally held." (JA1359 (quoting *Buchanan*, 112 F. Supp. 2d at 73).)

The Commission considered Complainants' contrary evidence: (1) two expert reports regarding whether independent candidates can satisfy the 15% threshold; and (2) one expert's opinion regarding the reliability of polling data.

a. Ability of Independent Candidates to Reach 15%

Dr. Clifford Young opined that, "in order to obtain 15 percent of the vote share, a candidate must achieve name recognition" in 60-80% of the population. (*Id.*) Assuming this to be true, Douglas Schoen estimated the amount of money a candidate would need to achieve 60-80% name recognition: "over $266 million" of which approximately $120 million is for paid media. (*Id.*) Complainants argued this sum was cost prohibitive for independent candidates. (*Id.*)

The Commission found this evidence not persuasive due to several significant errors in the experts' analyses. (*Id.*) It identified two major flaws in Young's analysis. First, Young relied solely upon the correlation between name recognition and polling results and then drew "conclusions regarding hypothetical third-party-candidate performance based on that one factor." (JA1361.) But "polling results are not merely a function of name recognition — they are a much more complex confluence of factors." (*Id.*) Indeed, "no matter how recognizable a candidate is, the candidate may, nonetheless, be unpopular" due to other factors, "such as policy preferences or political missteps." (*Id.*) He also did "not account for forces that might increase the poll numbers of an otherwise unfamiliar independent candidate — such as high unfavorable ratings among major party candidates." (*Id.*) Young even admitted that "his report [did] not take into account a number of other factors that may affect polling results." (*Id.*)

Second, Young did not establish that "independent candidates do not or cannot meet 60-80 percent name recognition." (*Id.*) For example, an August 2016 YouGov poll found name recognition among registered voters to be: 63% for Gary Johnson and 59% for Jill Stein. (*Id.*)

Schoen's analysis was "similarly based on significant assumptions that reduce its value" for five primary reasons. (JA1362.) First, it assumed that Young's flawed analysis was correct.

Second, Schoen assumed that a candidate's ability to increase his name recognition was largely limited to traditional, expensive paid media and failed to sufficiently consider digital and social media as a cheaper alternative. (*Id.*) "Digital and social media have provided more economical avenues for candidates' messages," which can then be shared through "vast global networks." (JA1363.) Whereas "Hillary Clinton spent more than $200 million on television ads" in the last months of the election, "Donald Trump spent less than half of that, by focusing his spending on digital platforms like Facebook and Twitter." (*Id.*) Digital and social media also "generated earned [(free)] media when more traditional news outlets covered noteworthy tweets and posts," and reduced traditional campaign costs, such as field offices. (*Id.*) "This change in traditional campaign strategies . . . dramatically undermines Schoen's assumptions about the avenues of media exposure available to independent candidates and their associated costs." (*Id.*)

Third, Schoen assumed that independents will not receive any earned (*i.e.* free) media "until they are certainly in the debates." (JA1362.) The Commission found this assumption to be "unfounded." (*Id.*) Citing as an example certain media appearances, it found that Johnson and Stein "received extensive media coverage" without participating in the 2016 debates. (*Id.*)

Fourth, Schoen failed to account for the rise of super PACs, which have paid for media supporting independent candidates. (JA1363-64.) "Such independent

support likely increases a candidate's name recognition at no cost to the candidate, thereby reducing the total sum that the candidate must spend to achieve 60-80 percent name recognition." (JA1364.)

Fifth, "it [was] worth noting" that Schoen's assumptions that independents always begin with zero name recognition and funds was often incorrect in practice. (*Id.*) "That candidates may start with some name recognition or financial resources further belies the Complainants' critique about the onerous fundraising required to reach 60-80 percent name recognition and the 15 percent polling threshold." (JA1365.)

To illustrate the impact of Schoen's faulty assumptions: By August 2016, Johnson had 63% name recognition, yet had only spent $5.4 million since February 2016 — "a mere *2-3 percent* of the $266 million that Schoen estimates an independent candidate would need to achieve 60-80 percent name recognition." (*Id.*)

Because of the expert reports' flaws, as well as the "judicially upheld determination[] that independent candidates of the past *have* reached 15 percent in the polls," the Commission concluded that there was an insufficient basis to find the 15% polling threshold was not an objective criteria under the *Buchanan* analysis. (*Id.*)

b. Reliability of Polling Data

Complainants alleged that the polling threshold was subjective because: (1) the Sponsor can manipulate the polls it selects so as to favor the major party candidates; and (2) there is increased inaccuracy in polling for more than two candidates.

The Commission found that the first allegation lacked any supporting evidence. (JA1366-67.) The Sponsor utilizes an outside polling consultant, Frank Newport, Editor-in-Chief of the Gallup Organization, who attested that he selected polls "based solely upon [his] professional judgment." (JA1366.) Complainants' "speculation" was "unpersuasive in the face of Newport's sworn attestations." (JA1367.)

For the second allegation, the Commission weighed Complainants' evidence (Young Report) against the Sponsor's (Newport Declaration), and found Young's opinion unpersuasive for several reasons. First, his approach was fundamentally flawed because he calculated the "error" in the polls used as "the difference between the poll and the actual results on Election Day." (*Id.*) The Sponsor, however, uses the polls as "a reliable measure of candidates' support at a given moment in September." (*Id.*) And the Commission credited Newport's expert opinion that "there is no doubt that properly conducted polls remain the best

measure of public support for a candidate . . . at the time the polls are conducted." (*Id.* (internal quotation marks omitted).)

Second, Young relied ineffectively on "three-way gubernatorial election polling." (JA1368.) The national presidential election polls used by the Sponsor are "inherently more reliable" than the "low turn-out" election polls relied upon by Young, as polls in mid-term state elections are "generally more subject to sampling and non-sampling errors than national polls." (*Id.*) Even if true that such error disfavors "independent gubernatorial candidates," the FEC explained that "it is not clear that independent presidential candidates are similarly impacted." (*Id.*) Newport testified: "[N]othing about support for a significant third party[] candidate makes it more difficult to measure." (*Id.*) Additionally, any increased polling error was not partisan-based because it "may just as likely result in over inclusion of candidates shy of the 15 percent threshold" as exclude candidates just over the 15 percent threshold. (*Id.* (citing *Buchanan*, 112 F. Supp. 2d at 75).)

3. Rulemaking Petition Denial

In its Supplemental Notice of Disposition, the Commission reiterated the above reasons for finding Complainants' experts unpersuasive. (JA1253-59.) And it included additional flaws, such as Young's reliance on early primary polling, which failed to "address or account for differences in the size of the candidate fields" between then and September when the relevant polls are, and his

"extrapolat[ion] from data about name recognition of major party candidates at the early stages of the party primary process," which "may amplify polling errors." (JA1255.) It also found, *inter alia*, "reason to doubt" Schoen's "calculations regarding any extra benefit major party primary candidates receive from their media expenditures," and his failure to provide any "evidentiary basis for the Commission to credit" the third-party media cost estimate he relied on. (JA1256.) Both experts failed to explain how certain data "can be extrapolated from early major party primaries to three-way general elections," as well as Schoen's admission that "'it [is] wholly unclear whether the polling over- or underestimate[s] the potential of the third party candidates.'" (*Id.*)

While finding Complainants' evidence "demonstrate[d] certain challenges that independent candidates may face when seeking the presidency," it did "not lead the Commission to conclude that the [Sponsor's] use of [a 15% polling] threshold for selecting debate participants is *per se* subjective, so as to require initiating a rulemaking to amend" the regulations, as opposed to proceeding on a case-by-case basis. (JA1259.)

E. District Court Upholds Post-Remand Decisions

Complainants challenged the Commission's decisions. (JA309-45.) Despite the FEC's objections pre-remand (Objection to Pls.' Statement of Material Facts, Dkt.42-3 (May 4, 2016)), their summary judgment briefs again relied extensively

on extra-record information. The Commission filed a motion to strike (JA535-53); Complainants cross-moved to supplement the record (Dkt.99 (Nov. 10, 2017)). In relevant part, the court granted the Commission's motion, finding that Complainants had not satisfied their burden to overcome the presumption of limiting judicial review to the compiled administrative record. (JA557-70.)

Applying the deferential standard of review, the court upheld the Commission's post-remand decisions. For the dismissal, regarding the non-expert evidence, it found that the FEC had "in fact address[ed] each piece of evidence identified by [Complainants]," and "rationally decided" that each was "non-partisan, not representative of the current [Sponsor], or not indicative of" the Sponsor as an organization. (JA579-80; JA586.) Regarding the experts, it held: "Each of the FEC's evidentiary findings was informed and reasonable given the facts presented to it and the flaws identified[.]" (JA590.) For both, the court concluded that Complainants' mere disagreement about evidentiary weight was not a valid basis to find that the Commission acted contrary to law or arbitrarily. (JA580; JA586; JA589-90.) As to the rulemaking, it held: "[Complainants] have presented no basis upon which this court may find" that the petition denial was arbitrary. (JA595.)

SUMMARY OF THE ARGUMENT

As the district court correctly found, the Commission's detailed analyses readily withstand scrutiny under the well-established deferential standards of review. This Court should similarly reject Complainants' request to disregard longstanding and controlling authority and conduct *de novo* review.

Complainants' policy arguments about the benefits of forcing a private organization to include uncompetitive candidates in its debates merely to give those candidates an opportunity to increase their popularity (but which also may decrease it) should not be well-taken. The First Amendment forbids the Commission from interpreting FECA and FEC regulations merely to "level the playing field."

The Court's task instead is to determine, based on the administrative record, whether Complainants have met their heavy burden of showing that the FEC acted contrary to law or arbitrarily. Complainants' arguments addressing this question are, as the district court found, insubstantial. Any fair reading of the record demonstrates that the Commission extensively and reasonably evaluated the evidence before it. While Complainants may disagree with that assessment, their mere disagreement does not satisfy their burden to demonstrate the Commission

abused its discretion.

Accordingly, the district court's decision should be affirmed.

ARGUMENT

I. REGULATING FOR THE PURPOSE OF "LEVELING THE PLAYING FIELD" WOULD VIOLATE THE FIRST AMENDMENT

The Commission correctly recognized, as this Court must, that the FEC may only interpret, apply, and enact campaign finance rules like its debate regulation for purposes permissible under the First Amendment, primarily avoiding actual or apparent *quid pro quo* corruption. JA1253-54; JA1369; *McCutcheon v. FEC*, 572 U.S. 185, 191-92 (2014).

Like their amici, Complainants' challenge to the Commission's well-reasoned opinions demonstrates their fundamental misconception of the FEC's role in administering and enforcing campaign finance law. No matter how laudable Complainants' goals of increasing the number of presidential debate participants and promoting minor parties, the Commission may not regulate debate staging organizations simply to attain those ends. (JA1259; JA1369.) The Supreme Court has repeatedly stated:

> No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates.'

McCutcheon, 572 U.S. at 207 (quoting *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749 (2011); *Davis v. FEC*, 554 U.S. 724, 741-42 (2008); *Buckley v. Valeo*, 424 U.S. 1, 56 (1976)).

Complainants argue current debate regulation is undercutting FECA's purposes due to the Sponsor being "funded with millions of dollars from politically influential corporations," but do not contend corporate donors sought or obtained any *quid pro quo*. (Br. at 1.) Instead, Complainants posit, without evidence, that the corporations gained "access" and "influence" over officeholders. (*Id.*) Even if true, the Supreme Court has determined that would not establish constitutionally cognizable corruption. *McCutcheon*, 572 U.S. at 209; *Citizens United v. FEC*, 558 U.S. 310, 359 (2010).

"American politics has been, for the most part, organized around two parties since the time of Andrew Jackson[.]" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). Whatever the merits of a more pluralistic party system, courts are not required to undo "features of our political system — *e.g.*, single-member districts, 'first past the post' elections, and the high costs of campaigning — [that] make it difficult for third parties to succeed in American politics." *Id.* at 362. Complainants' arguments that independents must be included in debates sponsored by a private party so that they *become* a serious contender for the

presidency "puts the cart before the horse."[3] *Buchanan*, 112 F. Supp. 2d at 75; *contra* Br. at 16-17, 46. The Commission cannot interpret or revise debate staging regulations for a purpose like "level[ing] electoral opportunities," which is not "a legitimate government objective" whether addressing candidate wealth differences or otherwise. *Davis*, 554 U.S. at 741. So this Court cannot find that the Commission abused its discretion for its failure to so do.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE DISMISSAL WAS NOT CONTRARY TO LAW

A. Standard of Review

1. Review Is "Extremely Deferential"

This Court reviews district court orders granting summary judgment *de novo*. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). Dismissal of an administrative complaint cannot be disturbed unless it was "contrary to law," 52 U.S.C. § 30109(a)(8)(C), *i.e.*, based on an "impermissible interpretation of" FECA, or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

This standard simply requires that the Commission's decision was

[3] *Cf. Winpisinger v. Watson*, 628 F.2d 133, 139 (D.C. Cir. 1980) ("The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is 'fairly traceable' to any particular event.").

"sufficiently reasonable to be accepted." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 39 (1981) ("*DSCC*"). It need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the question initially had arisen in a judicial proceeding." *Id.* Instead, the Court "determine[s] only whether the [agency] examined 'the relevant data' and articulated 'a satisfactory explanation' for his decision, 'including a rational connection between the facts found and the choice made.'" *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) ("*Commerce*") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The contrary-to-law standard is "extremely deferential" to the Commission's decision and "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167.

2. Complainants' Arguments for Reduced Deference Are Contrary to Controlling Law

Complainants' pleas for ignoring this controlling authority (Br. at 29-34) are unavailing. First, this Court has already rejected their structural bias argument. *Hagelin*, 411 F.3d at 242-43. Presented with nearly identical evidence, *Hagelin* found "no basis for thinking that third-party complaints warrant more demanding review." *Id.* at 242. As this Court recognized, the Supreme Court has held that the "FEC is 'precisely the type of agency to which deference should presumptively be afforded,'" and that "the FEC's bipartisan structure is but one of several reasons

the Supreme Court cited in support of deferential review." *Id.* (quoting *DSCC*, 454 U.S. at 37, and listing other reasons). "Moreover, the arbitrary and capricious and substantial evidence standards seem to us fully adequate to capture partisan or discriminatory FEC behavior," since any "unjustifiably disparate treatment of third parties as compared to major parties" would violate those standards. *Id.* at 243 (internal quotation marks omitted); *see also N. Broward Hosp. Dist. v. Shalala*, 172 F.3d 90, 94 (D.C. Cir. 1999).

Complainants (Br. at 34 n.9) fail to distinguish *Hagelin*. It considered the same "long history," yet this Court "[found] no fault in the FEC's refusal to revisit the 'evidence of possible past influence,'" 411 F.3d at 240, 244 — which the Commission nonetheless did here (JA1350-54). *See also Buchanan*, 112 F. Supp. 2d at 71 n.8 (rejecting argument that the FEC applied the wrong standard). Further, the district court merely found that, pre-remand, "the FEC did not articulate what standard it used" when considering whether the Sponsor violated § 110.13(a)(1) (JA289), *not* that the Commission applied an improper standard (Br. at 31, 34). Post-remand, the court held that the Commission appropriately applied the correct standard, *i.e.*, the regulation's plain meaning. (JA574-76; JA1349 & nn.54-56.)

Second, the purported dichotomy between the terms "bipartisan" and "nonpartisan" is false. (Br. at 3-4, 30-31.) The definition of "nonpartisan"

includes "not controlled or influenced by, or supporting, any single political party," which is consistent with "bipartisan," *i.e.*, "of, representing, or supported by two parties." Webster's New World College Dictionary, at 149, 996 (5th ed. 2014); *see also Nonpartisan*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/nonpartisan (Nov. 2, 2019) ("not supporting one political party . . . over another"); 1979 E&J, 44 Fed. Reg. at 76,735-36 (previous regulation requiring "nonpartisan" debates, but permitting general-election debates based only on candidates' major party affiliation because "such debates are nonpartisan in that they do not promote or advance one candidate over another").

Commissioners' political affiliations do not establish bias. 52 U.S.C. § 30106(a)(3) (demanding Commissioners be chosen "on the basis of their experience, *integrity*, *impartiality*, and good judgment" (emphasis added); *cf. Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 916-17 (2004); *Karim-Panahi v. U.S. Cong., Senate & House of Representatives*, 105 F. App'x 270, 274 (D.C. Cir. 2004). FECA merely provides: no more than "3 members . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). Commissioner Steven Walther identifies as an Independent. https://www.fec.gov/about/leadership-and-structure/steven-t-walther/.

Third, prior dismissals do not demonstrate bias — particularly when the Commission's actions were upheld as reasonable. Agency consistency in its legal

interpretations counsels for, not against, deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417-18 (2019).

Fourth, whether an agency's decision is pre- or post-remand does not impact the standard of review. In *Conkright v. Frommert*, the Supreme Court rejected a "'one-strike-and-you're-out' approach." 559 U.S. 506, 513 (2010). It explained that, even when an interpretation was "found to be unreasonable," "the interests in efficiency, predictability, and uniformity — and the manner in which they are promoted by deference to reasonable [interpretation] — do not suddenly disappear simply because [an interpreter] has made a single honest mistake." *Id.* at 518. The same rationale applies here, particularly given the "presumption of honesty and integrity in those serving as [agency] adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

Consistent with *Conkright*, this Court has clarified that, despite some language indicating otherwise (*e.g.*, Br. at 30 (citing *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1358 (D.C. Cir. 1981)), its review is not "more strict given that the [agency] arrived at the same result on remand as it had reached in its initial decision." *City of Los Angeles v. DoT*, 165 F.3d 972, 977 (D.C. Cir. 1999). The FEC reaching the same outcome on remand is hardly an irregular agency action warranting the elimination of agency deference. Indeed, the Supreme Court has expressly recognized that the FEC is free to so do. *FEC v. Akins*, 524 U.S. 11, 25

(1998).

Fifth, consideration of "evidence post-dating the original dismissals" does not render its unanimous, post-remand decision "post hoc" and undeserving of deference. (Br. at 32.) Absent a "specific command" barring consideration of additional evidence on remand, agencies may consider such evidence. *Butte Cty. v. Chaudhuri*, 887 F.3d 501, 505-06 (D.C. Cir. 2018). Indeed, the court ordered the Commission to notify certain respondents, consider their responses, and reconsider Complainants' evidence. It thus was proper to consider additional evidence on remand.

Finally, it is flatly incorrect to state: "the FEC itself conceded its 'desire to strengthen party organizations'" in a way hostile to minor parties. (Br. at 30-31.) Complainants' only "evidence" is an out-of-context quote by a single Commissioner during a pre-decisional meeting that cannot even be considered, *infra*. (JA 390 (brief below quoting https://www.fec.gov/resources/updates/agendas/2015/transcripts/Open_Meeting_Captions_07_16_2015.txt).) Regardless, a single stray comment of the kind Complainants allege would fail to establish pretext, *see PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1001 (D.C. Cir. 1999), particularly as its speaker twice voted to open a rulemaking. (JA637;

JA1249.)

3. Review Is Limited to the Administrative Record

Complainants improperly rely upon evidence that is not in the administrative record and/or was stricken from the judicial record. (Addendum Two (providing list).) They have waived challenging the district court's scope-of-the-record order. It is not in their questions presented or standard of review. Fed. R. App. P. 28(a)(5), (8)(B); *Novartis Pharm. Corp. v. Leavitt*, 435 F.3d 344, 348 (D.C. Cir. 2006) (abuse of discretion). Complainants either do not acknowledge the cited evidence was stricken (*compare* Br. at 52, *with* JA562-65), or drop a cursory footnote claiming error (Br. at 31 n.7 & 33 n.8). Any challenge to the court's ruling thus has been waived. *Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015) (arguments not raised in opening brief are forfeited); *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) (same for conclusory arguments in footnotes).

Regardless, it is black-letter law that judicial review is limited to the administrative record. *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013). "The district court did not abuse its discretion in adhering to this well-established principle." *Id.* It is "fundamental" that pre-decisional deliberations generally cannot be used to impeach an agency's final decision. *PLMRS Narrowband*, 182 F.3d at 1001; *contra* Br. at 31 n.7. *Commerce* is inapposite because the government stipulated to including pre-decisional documents in the

administrative record. 139 S. Ct. at 2573. Additionally, "[a]n agency conducting an informal adjudication has no statutory obligation to prematurely disclose the materials on which it relies so that affected parties may pre-rebut the agency's ultimate decision." *Sw. Airlines Co. v. TSA*, 650 F.3d 752, 757 (D.C. Cir. 2011); *contra* Br. at 33 n.8.

B. The District Court Correctly Held that the Post-Remand Dismissal Was Not Contrary to Law

On remand, the Commission conducted a searching and careful review of the evidence before it and, in a thorough and thoughtful opinion, explained the bases for its conclusions. This explanation demonstrates that it weighed Complainants' evidence against that submitted by the Sponsor, considered its policy choices, and brought its expertise to bear when deciding to dismiss the administrative complaints.

Applying the appropriate standard of review, the district court correctly upheld this dismissal decision as both rational and supported by substantial evidence. (JA576-92.) Contrary to Complainants' claims (Br. at 43), that court demonstrated it would not act as a mere "rubber stamp." (JA293.) Their arguments that the district court and the Commission *could* or *should* have reached a different result does not satisfy their burden to demonstrate that "the evidence before the [agency] . . . led ineluctably to just one reasonable course of action." *Commerce*, 139 S. Ct. at 2571.

1. The "Endorsed, Supported, or Opposed" Allegations Were Reasonably Dismissed

After weighing the evidence, the Commission — as the district court held — rationally dismissed Complainants' allegations that the Sponsor endorsed, supported, or opposed any parties/candidates. (JA574-88.)

First, the Commission reasonably determined that evidence more than 10 years — and often more than 20 years — old was not probative of whether the Sponsor recently violated debate regulations, as "[o]rganizations may change over time." JA1353; *cf. FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (recognizing that a group's major purpose may change). Complainants cite no law establishing that this determination was an abuse of discretion. Indeed, courts and agencies regularly disregard old evidence as too remote in time to be probative. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 232 (1947) (finding reasonable agency's exclusion of evidence it determined to be too remote to be probative); *United States v. Whitmore*, 359 F.3d 609, 617 (D.C. Cir. 2004) (similar); *BE&K Constr. Co. v. NLRB*, 133 F.3d 1372, 1376 n.10 (11th Cir. 1997) (agency erred by relying on evidence over twelve years old because, without a link to the present dispute, it is "too remote in time to be relevant"). And there were "significant indications that [the Sponsor] has made concerted efforts to be independent in recent years[.]" (JA1353.) The Commission reasonably concluded that the historical information did not establish unlawful action by the Sponsor in 2012.

Second, it reasonably concluded that only the Sponsor's directors' actions in an official, as opposed to personal, capacity could be used to establish the *Sponsor*'s liability. It is widely recognized that, for a principal to be found liable based on the statement of an agent, "it is not enough that the principal is willing or permits the agent to speak"; rather, "[t]he speaking must be done in the capacity of agent and be connected with the business of the principal." Restatement (Second) of Agency § 288 cmt. c (1958); *see also, e.g.*, *IRS Tax Guide for Churches & Religious Orgs.*, IRS Pub. 1828, 2012 WL 8144695, at *7 (July 17, 2012) (drawing distinction between a religious leader's political actions in a personal versus official capacity). And the Commission regularly so holds. (*E.g.*, JA1357 n. 89.)

Complainants cite no law establishing that applying this well-established law was unreasonable. *DSCC* (Br. at 39) recognized and respected the distinction between principals and agents. 454 U.S. at 33, 36. Their arguments regarding direct versus circumstantial evidence do not demonstrate otherwise. (Br. at 38-39 (citing *Commerce*, 139 S. Ct. at 2573-76 (considering undisputedly official agency action); *Palmer v. Shultz*, 815 F.2d 84, 90 (D.C. Cir. 1987) (same)).)

Far from being unreasonable, it is not even clear that the Commission *could* — constitutionally — punish a private organization, like the Sponsor, for its employees' personal political speech. *See Lane v. Franks*, 573 U.S. 228, 237 (2014) (First Amendment protects public employee's statements made "as a

citizen," not as part of "official duties"). Moreover, "the Supreme Court has favored narrow interpretations of FECA requirements that implicate first amendment political speech." *Common Cause v. FEC*, 842 F.2d 436, 445 (D.C. Cir. 1988). The Commission therefore did not abuse its discretion.

Third, as the district court correctly held (JA582), the Commission reasonably concluded that the ***only*** evidence that was both recent and official-capacity, a 2015 interview with Fahrenkopf (JA1167-70), did not establish the Sponsor violated §110.13(a). (JA1356.) Unlike the cited case involving undisputed evidence, *Haselwander v. McHugh*, 774 F.3d 990, 992 (D.C. Cir. 2014) (Br. at 38), this evidence was disputed. In a declaration sworn under penalty of perjury, Fahrenkopf explained that he had "not intended to convey" that the Sponsor's criteria are "designed to limit participation to the nominees of the Democratic and Republican parties." (JA1176-77.) The Commission did not "rote[ly] accept[]" this declaration (Br. at 41), but analyzed the interview and other related evidence (JA1355-56), and had multiple reasons for finding Fahrenkopf's interpretation more persuasive.

By stating the Sponsor "*primarily* go[es] with the two leading candidates" and then "immediately indicating the exceptions to that trend," the Commission found Fahrenkopf was not "categorical[ly]" endorsing or opposing particular candidates. (JA1355.) This was reasonable because "primarily" does not mean

"only" or "exclusively," as underscored by his immediate example where major-party candidates were not the only participants.

The Commission also found that "the statement appears to be more an assertion of historical fact than an admission that [the Sponsor] favors candidates from the two major political parties over others." (JA1355.) As the district court recognized, this was not "illogical." (Br. at 38; JA582.) When someone is speaking about what they "primarily do," it stands to reason that they are speaking from past experience, as repeated past experiences are a necessary predicate to determine what you do most of the time (*i.e.*, primarily) — as underscored by immediately following with: "[I]t's *been* the two political party candidates, save in except for *1992* when [Perot] participated in the debates." (JA1168 (emphasis added).) Although the interviewer's question may have been prospective, as the district court recognized, when "answering a question about the future, it is not unusual to use the past as a frame of reference." (JA582.)

The Commission also found that the statement was "in the context of a broader point about the impact of multiple candidates (the questioner posited seven) on the educational value of debates" generally and how limiting the number of participants increases the debate's value. (JA1355.) This was reasonable since the statement was bookended by Fahrenkopf discussing seven-candidate primary debates, which can be "less of a debate than a cattle show," and explaining that the

Sponsor had preferred debates with fewer participants so candidates had a clear opportunity to convey their views. (JA1168.) This interpretation was "consistent with Respondents' repeated attestations that [the Sponsor] operates for the purpose of providing meaningful debates" and limits the number of candidates for the purpose of doing so. (JA1355-56; JA1346 ("[The Sponsor's] limiting criterion also ensures that debate itself is not 'hindered by the sheer number of speakers.'").) Complainants have submitted no law or evidence demonstrating this was an unreasonable conclusion. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681 (1998) ("On logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates would actually undermine the educational value and quality of debates." (internal quotation marks omitted)).

In sum, the district court correctly found that "the FEC's treatment of Fahrenkopf's 2015 interview was neither arbitrary nor contrary to law." JA582; *see also FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016) (courts cannot "ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives").

* * *

Accordingly, Complainants did not submit ***any*** evidence that the Commission abused its discretion by rejecting their endorse/support/oppose

allegations. This alone is reason enough to uphold the dismissal, as Complainants have the burden of establishing that there is reason to believe a violation occurred. As the district court correctly recognized (JA580), courts cannot "substitute our judgment for that of the agency or evaluate *de novo*" its factual findings. *Partington v. Houck*, 723 F.3d 280, 291 (D.C. Cir. 2013).

2. The District Court Correctly Rejected Complaints Regarding the Sponsor's Policies and Declarations

The district court correctly rejected Complainants' red-herring arguments regarding Sponsor policies and "boilerplate" declarations. (*Compare* JA582-84, JA586-88, *with* Br. at 32-33, 30-43.)

Whether the Sponsor had certain prophylactic internal policies regarding political activities of affiliated persons is not required evidence. Whether a policy has been issued is not affirmative evidence demonstrating that the Sponsor actually committed a violation — much less that the Commission abused its discretion in not so finding.[4] While the Sponsor may, at its discretion, discourage certain personal political activities through its internal policies, it cannot be held liable for personal activities regardless. (*Supra*; *see also* JA583.) The Commission's analysis "makes clear that its determination did not rise or fall with the policies."

[4] The Sponsor submitted a pre-remand declaration regarding the "informal policy." (JA1084 n.3; JA1098; *contra* Br. at 32-33.) Farenkopf and Kirk's major-party positions ended in 1989, and no other directors have simultaneously held a party position since. (JA1283; *contra* Br. at 33.)

(*Id.*) In any event, it included "appropriate caveats to show that it had accounted for the [Sponsor's] failure to provide [the policies]." (JA584.)

As to the declarations, excepting the 2015 interview, *none* of the statements purportedly establishing the Commission abused its discretion by crediting allegedly "conclusory" declarations are both recent and official. *Supra*. Because neither those statements nor the 2015 interview establish liability, *id.*, any alleged error is harmless. JA588 (finding any error harmless); *see also Air Canada v. DoT*, 148 F.3d 1142, 1156 (D.C. Cir. 1998) (issues not essential to agency decision do not establish prejudicial error).

Moreover, it is demonstrably incorrect to argue that the FEC merely "[hung] its hat on boilerplate affidavits." (Br. at 39.) As the district court held, "the FEC did in fact address each piece of evidence identified by [Complainants]." (JA586; *see also, e.g.*, *supra* p. 20.)

Further, the declarants testified to their own beliefs, actions, and observations when, on behalf of the Sponsor, selecting the 2012 debate criteria. (JA1313-30.) *Tripoli Rocketry Ass'n v. BATFE* (Br. at 41), addressing an affidavit not considered by the agency and containing only an outside expert's opinion, is inapposite. 437 F.3d 75, 83 (D.C. Cir. 2006). Any insinuation that the declarants committed joint perjury merely because their declarations were similarly worded is unconvincing and, regardless, does not establish the Commission abused its

discretion. *Compare* Br. at 40, *with* 18 U.S.C. § 1621(2) (up to five years imprisonment for perjury in a declaration). It was reasonable to rely upon first-hand accounts of the Sponsor's actions in 2012, sworn on penalty of perjury, over unofficial quotes from mostly second-hand sources dated mostly over ten years ago. (JA587-88 ("[I]t was not unreasonable for the FEC to award greater weight to the more recent declarations.").)

* * *

The FEC's dismissal decision "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167. The Commission's thorough, reasonable analysis of the evidence pertaining to Complainants' "endorse, support, or oppose" allegations easily satisfies this standard. It considered not only Complainants' evidence, but also detailed declarations by Sponsor personnel who made no allegedly improper statements (*e.g.*, JA1340-41 n.10 (Co-chair Dorothy Ridings); JA1353 (Executive Director Janet Brown)), declarations specifically addressing the purportedly problematic statements (*e.g.*, JA1352 n.68; *contra* Br. at 40), and declarations from persons with first-hand knowledge of the Sponsor's actions regarding the 2012 debates. And when weighing this evidence, it reasonably considered, *inter alia*, the timeliness of the evidence, the Sponsor's directors' First Amendment rights, and long-established principals of agency law.

"Because the FEC did in fact address each piece of evidence identified by [Complainants], [their] contention is reduced to a simple disagreement with the FEC's decision (as opposed to their representation that the FEC ignored a mountain of evidence)." (JA586.) "[S]uch a disagreement does not discharge [Complainants] of their burden to establish that the decision was arbitrary [and] capricious." *Id.*; *see also D.C. Transit Sys. Inc. v. Wash. Metro. Area Transit Comm'n.*, 466 F.2d 394, 414 (D.C. Cir. 1972) ("[I]t is not a valid objection that conflicts in the evidence might conceivably have been resolved differently, or other inferences drawn from the same record."). Accordingly, this Court should affirm the district court's decision upholding the Commission's dismissal of Complainants' "endorse, support, or oppose" allegations.

3. The Debate Criteria Are "Objective" Under § 110.13(c)

Section 110.13(c) "does not spell out precisely what the phrase 'objective criteria' means." *Perot v. FEC*, 97 F.3d 553, 560 (D.C. Cir. 1996). As this Court has recognized, "[t]he authority to determine what the term 'objective criteria' means rests with the agency . . . and to a lesser extent with the courts that review agency action." *Id.*

Since the first matter following the regulation's enactment to today, the Commission has appropriately, and unanimously, focused its inquiries under § 110.13(c) to ensuring that, when determining which candidates have "a realistic

chance," the Sponsor's selection process was neutral and not based on the "use of its own personal opinions," absent "specific evidence that a candidate assessment criterion was 'fixed' or arranged in some manner so as to guarantee a preordained result." (JA1157-59.) This approach is consistent with *Forbes*. Based on the candidate's "objective lack of support," such as Arkansas voters and news organizations not considering him "a serious candidate," the Supreme Court concluded that the debate sponsor "excluded [the candidate] because the voters lacked interest in his candidacy, not because [the sponsor] itself did." *Forbes*, 523 U.S. at 682-83.

Based solely on a purported "strong suggestion" that it inferred from the regulation's promulgation history, one district court opinion, *Buchanan*, moved beyond the common definition and held that "objective criteria" meant that a debate sponsor could not "select[] a level of support so high that only the Democratic and Republican nominees could reasonably achieve it." *Buchanan*, 112 F. Supp. 2d at 74.

While the Commission here did as instructed on remand to apply *Buchanan* (and was upheld), the regulation itself does not contain such a requirement nor did the Commission itself interpret the regulation before *Buchanan* as requiring such an analysis. It is true that, when enacting the regulation, the Commission explained that "objective criteria" must be "reasonable" and "not designed to result

in the selection of certain pre-chosen participants." (JA1359 (quoting *Corporate & Labor Org. Activity; Express Advocacy & Coordination with Candidates*, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995)).) But *Buchanan* recognized that its interpretation was not mandated by the Commission's explanation. 112 F. Supp. 2d at 74 (only "strongly suggest[ed]").

Particularly as a private organization, the Sponsor has the right to limit its debates to candidates who "realistically are considered to be among the principal rivals for the Presidency." JA1117; *see Johnson v. Comm'n of Presidential Debates*, 869 F.3d 976, 981 (D.C. Cir. 2017) (noting potential First Amendment implications). The Supreme Court held that even a public institution hosting a debate has the right to exclude a candidate who has "generated no appreciable public interest." *Forbes*, 523 U.S. at 682-83.

15% favorability close to the election is a manifestly reasonable gauge of whether a candidate may have a "realistic chance." Indeed, when the League of Women Voters — which Complainants described as a "strictly nonpartisan organization" (JA693) — was adopting its 15% polling threshold, it explained: "The fifteen percent level of support standard was at the low end of the range considered by the League for the purpose of identifying the leading candidates." (JA1288; *see also* JA1400; JA1345-46; JA1278 at n.12 ("We are unaware of any example in presidential election history in which a candidate who could not even

muster 15 percent support a few weeks before the election ever has been elected, or for that matter, even won a single Electoral College vote.").)

Yet *Buchanan* effectively held that § 100.13(c) mandates that independent candidates *without* a realistic chance, *i.e.*, polling below 15%, be invited to the debates. The prohibition on corporate contributions does not, however, require courts or the Commission to provide such a specific dictate to debate sponsors on the scope of presidential candidates who must be invited. "[I]t is a dangerous business for [the Commission] to use the election laws to influence the voters' choices." *Davis*, 554 U.S. at 742. The Commission has been embroiled in enforcement matters and litigation regarding whether independents can meet the 15% threshold ever since *Buchanan*, including here. (JA298-302 (remanding, *inter alia*, to reconsider evidence under *Buchanan*'s requirement).)

Since *Buchanan* was handed down, the Supreme Court has emphasized that interpretation begins with the statutory or regulatory text. *E.g.*, *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). In *Buchanan*, as here, the court held that the Commission did not abuse its discretion when finding that complainants failed to establish partisan bias or otherwise manipulated of the polling threshold criteria. (112 F. Supp. 2d at 71-73, 76; JA576-87; JA591.) As *Buchanan* acknowledged, a 15% polling threshold "satisf[ies] at least the common definition of an objective requirement." 112 F. Supp. 2d at 74; *see also id.* at 73

(collecting cases). There, as here, that should have been the end of the court's inquiry.

4. The "Objective Criteria" Allegations Were Reasonably Dismissed

Even under *Buchanan*'s interpretation, the Commission's review of Complainants' expert evidence was thorough and reasonable. The district court found: "Each of the FEC's evidentiary findings was informed and reasonable given the facts presented to it and the flaws identified by the FEC." (JA590.) The court also recognized that, like this Court, it could not evaluate the evidence *de novo*, but rather must defer to the FEC unless the agency did not satisfy its "minimal burden of showing a coherent and reasonable explanation [for] its exercise of discretion." *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (internal quotation marks omitted). The Commission's detailed analysis readily passes this standard. Therefore, "the fact that [Complainants] disagree with how the FEC treated the evidence is not actionable because the FEC provided a sound and reasoned basis for discounting both expert opinions." (JA589.) As the court below found, Complainants have not met their burden to show that the Commission's dismissal of their "objective criteria" allegations was arbitrary.

a. The District Court Correctly Upheld the Finding that Prior Independents Crossed the 15% Threshold

As history demonstrates, if and when the American people find an independent candidate compelling, that candidate can reach the 15% polling threshold for inclusion in the presidential debates. *Buchanan* found: "[T]hird party candidates have proven that they can achieve the level of support required by the [Sponsor]." 112 F. Supp. 2d at 74. For example, George Wallace was polling around 20% by September 1968. *Id.*; *see also* JA1106. After applying its own 15% polling threshold, the League of Women Voters invited John Anderson to a 1980 presidential debate. *Buchanan*, 122 F. Supp. 2d at 74; *see also* JA1288-89.

In 1992, Perot was polling around 40% before he dropped out of the race. *Buchanan*, 122 F. Supp. 2d at 74 (citing declaration from Janet Brown (JA873)). And Perot "ultimately received 18.7% of the popular vote that year." *Buchanan*, 122 F. Supp. 2d at 74; *see also* JA1103. Whether Perot had 15% on debate selection day, which was disputed (Br. at 14; JA1103), is beside the point due to his unusual withdrawal and re-entrance into the race. He undisputedly twice demonstrated that an independent can cross the 15% threshold. Though there are limits to the usefulness of more distant events, history provides further examples: Theodore Roosevelt, Robert LaFolette, Henry Wallace, and Strom Thurmond. (JA724; JA1257.)

Complainants' argument that it was unreasonable to rely on these candidacies because some of them were wealthy or not "true independents" is unavailing. (Br. at 24, 27, 45-47.) *Buchanan*, which created the "new requirement," *supra*, credited much of the same information. 112 F. Supp. 2d at 74.

Rather, as the district court held, the FEC's reliance on "judicially-upheld findings" that "it was possible for a third party candidate to reach the polling threshold was reasonable." (JA591-92; *see also* JA1359-60.)

b. The District Court Correctly Sustained the Commission's Conclusions Regarding the Young Report

The Commission rationally concluded that Young's report was unpersuasive for numerous reasons. (JA589-90.) Though some level of name recognition is of course needed to secure approval in polls and votes, Complainants inappropriately posit a virtually direct connection as name recognition increases.

First, Young's regression model is based on a single factor, name recognition. Complainants fail to cite even a single case where a single-variable regression analysis like Young's was so probative that it was arbitrary to disregard it. Nor could they.

Young admitted: "Multiple factors, many of them beyond a candidate's control, influence a candidate's vote share." (JA958.) And the Commission found he ignored several significant variables impacting vote share. (JA1255; JA1361 &

n.104.) Young's failure to account for numerous important variables is itself an appropriate and rational reason to accord little-to-no weight to his analysis.

It is well-established that "the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 804 (D.C. Cir. 1998). Where an expert disregards numerous significant variables such as those identified by the FEC — as Young himself acknowledges he did — the regression analysis can be "so incomplete as to be inadmissible as irrelevant." *Bazemore*, 478 U.S. at 400 n.10. Young's failure to include any variable other than name recognition thus is itself a sufficient reason to uphold the FEC's determination that his analysis was insufficiently probative. *Love v. Johanns*, 439 F.3d 723, 731-32 (D.C. Cir. 2006) (finding unpersuasive expert analysis that did not account for important variables); *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 275 (D.C. Cir. 1998) (finding regression analysis to be "flawed as a matter of law" where it failed to account for an important variable).

Second, Complainants incorrectly argue that "there must be a causal relationship" between name recognition and vote share. (Br. at 53.) Young never opined about causation, offering instead only an opinion about the "correlation" between the two — and not even a very strong correlation at that. (JA959; JA968-69; JA970.)

Complainants nevertheless maintain (Br. at 47, 53, 58) their "obviously flawed" argument "equati[ng] . . . correlation with causation." *Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1, 10 (D.C. Cir. 2015). Consistent with this elementary principle, the Commission found: "[N]o matter how recognizable a candidate is, the candidate may, nonetheless, be unpopular." (JA1361; *see also* JA1255; JA1257 n.12 (providing example of known candidates not correlating to vote share).) Not only was this analysis plainly "rational," *Orloski*, 795 F.2d at 167, Complainants' contrary argument is irrationally based on a well-recognized error.[5] *In re Navy Chaplaincy*, 738 F.3d 425, 429 (D.C. Cir. 2013) ("Correlation is not causation." (internal quotation marks omitted)).

Because Young failed to demonstrate that increased name recognition causes vote share to increase, Complainants' ***entire*** argument that it is necessary to pay $266 million (which they allege is prohibitively high for independents) to attain 60-80% name recognition to achieve 15% vote share collapses — as the 2016 election demonstrated. *See infra* p. 54.

Third, Young failed to establish that "independent candidates do not or cannot meet 60-80% name recognition." (JA1361.) Johnson, who reached 63%

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[5] *United States v. Valencia*, 600 F.3d 389, 425 (5th Cir. 2010) ("Evidence of mere correlation, even a strong correlation, is often spurious and misleading when masqueraded as causal evidence, because it does not adequately account for other contributory variables.").

name recognition among registered voters by late-August 2016, proved this to be false; and Stein was close with 59%. (JA1361 & n.105.)

Complainants appear to contest this finding. (Br. at 52.) But the poll cited did in fact find this. (JA1361 n.105 (citing *Poll Results; Third Party Candidates*, YOUGOV (Aug, 25-26, 2016), at 5).[6]) Complainants appear to inappropriately incorporate by reference an argument raised in a footnote in their brief below regarding name recognition among registered voters (63%) versus total population (53%). (Br. at 52 (citing JA409); JA409 n.36).) This argument was not adequately presented and thus is waived. *CTS Corp.*, 759 F.3d at 64; *Fox*, 794 F.3d at 29. Moreover, registered voters plainly are a relevant group when it comes to election polling, which is why Young used such data. And the polls the Sponsor relies upon, which are close to the election, include registered voters and generally do not include "all Americans." (JA961 ("General election ballot questions most commonly use samples of registered or likely voters. However, in earlier time periods, samples of all Americans are also present.").)

Complainants also accuse the FEC of ignoring two other polls. (Br. at 52.) Even if the Court could consider the two polls cited (JA409 & n.37) — which it cannot, *supra* — those polls are from June 25-26 and July 13-17, 2016. (*See also*

[6]https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/wc35k48hrs/tabs_HP_Third_Party_Candidates_20160831.pdf.

JA563-64 (rejecting Complainants' "conclusory statement that the two polls . . . were deliberately or negligently excluded").) There is no evidence that these polls accurately reflected Johnson's name recognition over six and eight weeks later, respectively, much less that they rendered it arbitrary for the FEC to rely on an August 25-26 poll, which was closer to the Sponsor's polling analysis. (JA564 ("[B]ecause the YouGov poll in the record was taken over a month later . . . , it is not directly contradicted by the polls proffered by [Complainants.]"); JA977 (Complainants' expert recognizing that, "at the early stages of the electoral cycle, people are not paying attention to the candidates and issues").) Accordingly, it was not arbitrary for the Commission to rely upon the August 25-26, 2019 poll when finding Young's report unpersuasive.

Fourth, the Commission reasonably found Young's polling-error analysis to be fatally flawed because it incorrectly focused on the difference between polling results and election results. (JA1367.) Complainants' claim that this was unreasonable because it contradicts the Sponsor's statement that its polling criteria "is to identify those candidates . . . who have a realistic chance of being elected President." (Br. at 48 (quoting JA1308).) But these statements are not contradictory. The same page states: the polling criterion "requires that the candidate have a level of support of at least 15% . . . *at the time of the determination*." (JA1308 (emphasis added).) Just because a particular candidate

has, at a particular point in time, a realistic chance of being elected President in the future does not mean that, at that point in the future, they will have an identical chance or in fact be elected President — and the Sponsor nowhere says that it does. (JA1124.)

As Newport explained, "[n]one of Complainants' arguments or supplemental data . . . support the notion that polls in three-way races will disproportionately misrepresent any candidate's public support *at the time the poll is administered*." (JA1124.) And according to him, "'nothing about support for a significant third party[] candidate makes it more difficult to measure'" when administered. (JA1368.) Although imperfect, "'there is no doubt that properly conducted polls remain the best measure of public support for a candidate . . . at the time the polls are conducted.'" (JA1367 (quoting JA1124).)

Because the FEC found Young's polling error analysis fundamentally misconceived, no amount of "adjustment" was going to fix the problem. (Br. at 48; JA585 (an agency need not "discuss every single page of evidence in order to demonstrate that it had carefully considered the facts").) This fatal flaw alone suffices as a reason to find that the Commission did not abuse its discretion by finding Young's polling error analysis unpersuasive.

Sixth, the Commission identified even more errors. For example, there was "no evidence that the polling error is biased in a manner specific to party

affiliation, that is, polling is biased *against* [independents]." (JA1258.) Complainants' response that it is necessarily biased against independents because major-party candidates will easily clear the 15% threshold again misses its target. (Br. at 16.) That is just recycling their argument that the polling threshold is generally more difficult for independent candidates. But, again, the FEC cannot act merely to "level the playing field." Since "some degree of imprecision is inevitable in almost any measurement," "[s]uch imprecision alone does not make a predictor subjective such that it favors one group of candidates over another." *Buchanan*, 112 F. Supp. 2d at 75. Schoen acknowledged: "it [is] wholly unclear whether the polling over- or underestimate[s] the potential of the third party candidate," so the purported error may sometimes help independents. JA1042; *see also Buchanan*, 112 F. Supp. 2d at 75. The Commission thus did not abuse its discretion by failing to find that the polling threshold was not "objective."

Seventh, Complainants' defense of Young as also relying on later polling is mere distraction (Br. at 52), as he found early primary polling superior and based his conclusions on it "even if only in part." (JA1255; *see also* JA967-70.)

Finally, nothing Complainants cite to attack Newport's credibility demonstrates that the Commission abused its discretion by relying upon his expert opinion. There can be no real dispute that Newport is well-credentialed. (JA1120-21.) The Commission considered, *inter alia*, Complainants' allegations "regarding

Gallup's decisions and motivations" when deciding not to conduct polls in 2016 and reasonably found them to "be speculative" and "rebutted by a sworn declaration." (JA1240 n.1; *compare* Br. at 48-49, *with* JA1391-92.)

"That [Complainants] would have come to a different conclusion regarding the weight afforded to the reports does not render the FEC's finding arbitrary[.]" (JA590.) "Given the presence of disputing expert witnesses," the court "'must defer to the informed discretion of the responsible federal agencies.'" *Wisc. Valley Improvement v. FERC*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (explaining that the presence of conflicting expert opinions is a "classic example of a factual dispute" implicating agency expertise and requires deference) (quoting *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 376 (1989)).

In sum, the district court correctly concluded that Complainants have failed to show that finding Young's report unpersuasive was unreasonable.

c. The District Court Correctly Found the FEC's Analysis of the Schoen Report Reasonable

The Commission reasonably found Schoen's analysis unpersuasive for numerous reasons. (JA589-90.) Young's opinion (*i.e.*, 60-80% name recognition is necessary to reach 15% vote share) is a necessary predicate of Schoen's report. (JA1361.) Because it permissibly found Young's opinion to be flawed, *supra*, the Commission's conclusion regarding Schoen's report is reasonable on that ground alone.

But the Commission identified yet another fatal flaw. Schoen opined that independents must spend at least $266 million to reach at least 60% name recognition. (JA1360) Yet Johnson achieved 63% name recognition, while having "spent only $5.4 million." (JA1364.)

> [This is] a mere ***2-3 percent*** of the $266 million that Schoen estimates an independent candidate would need to achieve 60-80% name recognition.

(*Id.*) Schoen's analysis was not slightly off as tested by an actual, recent independent candidate — it was radically off. This fact alone is also sufficient to demonstrate that the Commission did not err by finding the analysis unpersuasive. The report's two fatal flaws warrant affirmance of the agency's review. *Air Canada*, 148 F.3d at 1156.

Though the Court need not reach additional questions about the Schoen report, the Commission identified flaws that *further* lessened its persuasiveness. Those include the report's failure to adequately account for free digital media and assumptions that a candidate would receive no super PAC support, would begin with zero name recognition, and would receive no free media.[7]

First, particularly given now-President Trump's success from employing digital media at less than half the cost of the traditional media Clinton used, the

[7] By choosing not to provide Schoen's underlying data initially or on remand, Complainants deliberately excluded it from the administrative record. (Br. at 49 n.11.)

Commission's finding that Schoen likely over-estimated media costs is reasonable. (JA1363.) Rather than contesting that traditional media is significantly more expensive than digital media, Complainants instead argue that major-party campaigns and their supporters spent a lot of money on paid digital advertising. (Br. at 51.) But the question is not how much would an independent candidate need to spend in order to become President. It is whether it was arbitrary for the FEC to be unpersuaded by Schoen's opinion that a candidate must spend approximately $106 million on paid media, of which 95% is traditional media, in order to reach 60+% name recognition. The Trump/Clinton example relied upon by the FEC reasonably calls into question Schoen's opinion on this point by illustrating how cheaper digital media can contribute to a candidate's success.

Second, Schoen assumed that super PACS only contribute to major-party candidates. The Commission's finding that there *were* super PACs spending millions advocating for independent candidates undercuts the persuasiveness of Schoen's premise that independents must alone bear the costs of increasing name recognition. (JA1363.) Since Schoen opined that increased expenditures translate into increased name recognition, it was rational to find that super PAC expenditures "would [also] somehow help independent candidates." (Br. at 50.)

Third, Schoen assumed that independent candidates would begin with zero name recognition. But the Commission correctly observed this was frequently not

the case. (JA1364.) It noted, for example, that "Gary Johnson and George Wallace . . . were both governors before running for president and presumably enjoyed at least regional recognition." *Id.*; *see also Van Hollen v. FEC*, 811 F.3d 486, 497-98 (D.C. Cir. 2015) (sustaining reasonability of agency decision based on common sense); JA1256 (citing early 2011 poll Johnson at over 10% name recognition among Republican voters).

Based only on the use of the word "presumably," Complainants argue that the FEC "presume[ed] that independent candidates begin their campaign with meaningful name recognition." (Br. at 51.) As the sentence itself demonstrates, the Commission did not. It merely recognized that independents often start with some level of name recognition, which — reasonably — calls into question Schoen's assumption that independent candidates start from zero name recognition.

Next, Complainants state that the Commission claimed that it is possible for an independent candidate to start with "sufficient preexisting name recognition to forego media expenditures." (Br. at 50.) Tellingly, they fail to cite where the Commission made this asserted claim — because it has not. It is *Complainants*' argument — which the Commission disagrees with — that $109 million must be spent on media to achieve 60-80% name recognition, which in turn causes a candidate to reach 15% in the polls. To the extent anyone can be seen to be

arguing that, if candidates are already at 60-80% name recognition then they can forego media expenditures to reach 15%, it is themselves.

Fourth, Schoen assumed that independents receive *no* earned (*i.e.*, free) media. (*E.g.*, JA1255 ("[T]he media will not cover an independent candidate until they are certainly in the debates.").) The Commission cited examples of earned media Johnson and Stein received. (JA1362; JA1255 n.6.) Complainants do not dispute that Johnson and Stein did, in fact, earn free media. The fact that there was *some* free coverage demonstrates Schoen's premise that independent candidates would receive no free media to be inaccurate, and thus a valid basis for finding his report less persuasive.

Complainants' extensive focus on a footnote by the agency (*compare* Br. at 53-58, *with* JA1255 n.6) does not substitute for the acknowledged error in Schoen's report. And the accusations of intentional misrepresentation are unfounded. What matters is that Schoen was wrong in claiming that the media "will not" cover independents not in the debates. And it was not arbitrary for the Commission to recognize this fact.

Complainants contend that the Commission disputed that "independent candidates have difficulty attracting earned media." (Br. at 53.) To the contrary, the Commission expressly recognized that Complainants' evidence "demonstrate[d] certain challenges that independent candidates may face[.]"

(JA1259.) It just was not persuaded that Complainants' evidence provided reason to believe the Sponsor violated the law.

In any event, Complainants' dispute about the ***size*** of Schoen's error (*e.g.*, Br. at 50-51) fails to demonstrate that he did not err, much less that the Commission abused its discretion. Especially in light of the numerous other errors in Schoen's report, Complainants' focus on whether his mistake was small, medium, or large is insufficient to show that the FEC's conclusions lacked any basis in the record. And to the extent there was any error, it was harmless. *Air Canada*, 148 F.3d at 1156. As the district court held: "[G]iven this court's finding that the FEC's treatment of the Young and Schoen report were neither arbitrary nor contrary to law, there is no need to assess whether the FEC's additional reasons for discounting the expert reports is sufficient." (JA594.)

The FEC's analysis of Schoen's report — including his reliance on Young's flawed report and the fact that a real candidate demonstrated Schoen's conclusion to be grossly inaccurate — was thorough and demonstrates that the Commission had a rational basis for finding Schoen's report not credible, as the district court found.

d. The District Court Correctly Rejected as Mere "Conjecture" Complainants' Manipulation Allegations

The Commission did not abuse its discretion when rejecting Complainants' wholly speculative claim that the Sponsor has or will "manipulate the selection of

polls to exclude independent candidates," or would refuse to invite an independent candidate who met the polling threshold. (*Compare* Br. at 16, 46, *with* JA1365-66.) An independent expert selects the polls and submitted a sworn declaration denying manipulation; Complainants provided no evidence to the contrary. (JA1365-66.) The 1992 debates indicate the Sponsor's willingness to invite independents who satisfy its debate criteria. Accordingly, "the FEC's decision to discount [Complainants'] hypothetical misconduct cannot be construed as arbitrary." (JA591.)

* * *

For all these reasons, it was reasonable for the Commission — even under *Buchanan*'s standard — to conclude: "Taken together with the Commission's judicially upheld determinations that independent candidates of the past *have* reached 15 percent in the polls, the Complainants' [expert] reports do not provide reason to believe" that the Sponsor violated the debate regulations. (JA1365; *see also* JA1368.)

Complainants "cannot contend that the FEC did not take the expert reports into account." (JA589.) And "the FEC provided a sound and reasoned basis for discounting both expert opinions." (*Id.*) This Court thus should affirm the district court's decision that, "because the FEC first discounted [the expert] evidence purporting to show that the criterion was not objective," "the FEC's reliance on

Buchanan's finding that it was possible for a third party candidate to reach the polling threshold was reasonable." (JA592.)

II. DENIAL OF THE RULEMAKING PETITION WAS NOT ARBITRARY OR CAPRICIOUS

A. Review Is "Extremely Limited"

While reviewed under arbitrary and capricious review, "such review [of a rulemaking denial] is extremely limited and highly deferential." *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (internal quotation marks omitted).

B. Review Is Limited to the Administrative Record

This Court is "bound on review to the record that was before the agency at the time it made its decision." *Def. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008). Complainants' extra-record evidence thus cannot be considered.

To the extent they have not waived any argument to the contrary (Br. at 33 n.8), petitions for rulemaking are not subject to the Administrative Procedure Act's notice-and-comment requirements for rulemakings already underway, so Complainants have no right to "rebuttal." *Compare* 5 U.S.C. §§ 553(b)-(c), *with* 5 U.S.C. §§ 553(e), 555(e), 11 C.F.R. §§ 200.3, 200.4, *Wisc. Elec. Power Co. v. Costle*, 715 F.2d 323, 328-29 (7th Cir. 1983).

C. The District Court Correctly Held that Denial of the Rulemaking Petition Was Not Arbitrary or Capricious

Complainants' challenge to the rulemaking decision must be rejected for all the reasons stated above.[8] Additionally, Complainants have failed to account for the even higher level of deference the Commission receives regarding rulemaking petitions. *Gutierrez*, 532 F.3d at 919 (rulemaking petition denials receive "the high end of the range of levels of deference" (internal quotation marks omitted)).

Petition denials are generally only granted where a statutory provision mandates regulation, *EPA*, 549 U.S. at 533, or health and safety are at risk, *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 910-11 (D.C. Cir. 2004). This case presents neither. In short, "[Complainants] have presented no basis upon which this court may find that the FEC's decision not to engage in rulemaking was arbitrary[.]" (JA595.)

CONCLUSION

The Commission respectfully requests that the district court's judgment be affirmed.

[8] On remand, the FEC supplemented, not abandoned, its reasoning. (Br. at 59; JA1253.)

Respectfully submitted,

Lisa J. Stevenson
Acting General Counsel
lstevenson@fec.gov

Kevin Deeley
Associate General Counsel
kdeeley@fec.gov

November 5, 2019

/s/ *Haven G. Ward*
Haven G. Ward
Attorney
hward@fec.gov

FEDERAL ELECTION COMMISSION
1050 First Street NE
Washington, DC 20463
(202) 694-1650

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify, on this 5th day of November, 2019, that:

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/s/ *Haven G. Ward*
Haven G. Ward

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of November, 2019, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the D.C. Circuit by using the Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ *Haven G. Ward*
Haven G. Ward

ADDENDUM ONE

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52 U.S.C. § 30118. Contributions or expenditures by national banks, corporations, or labor organizations

(a) In general

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) Definitions; particular activities prohibited or allowed

(1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79l(h) of title 15,1 the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 30101 of this title, and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject; (B) nonpartisan registration and get-

out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful-

(A) for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4)

(A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful-

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the

expenses incurred thereby, to a labor organization representing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(c) Rules relating to electioneering communications

(1) Applicable electioneering communication

For purposes of this section, the term "applicable electioneering communication" means an electioneering communication (within the meaning of section 30104(f)(3) of this title) which is made by any entity described in subsection (a) of this section or by any other person using funds donated by an entity described in subsection (a) of this section.

(2) Exception

Notwithstanding paragraph (1), the term "applicable electioneering communication" does not include a communication by a section 501(c)(4) organization or a political organization (as defined in section 527(e)(1) of title 26) made under section 30104(f)(2)(E) or (F) of this title if the communication is paid for exclusively by funds provided directly by individuals who are United States citizens or nationals or lawfully admitted for permanent residence (as defined in section 1101(a)(20) of title 8). For purposes of the preceding sentence, the term "provided directly by individuals" does not include funds the source of which is an entity described in subsection (a) of this section.

(3) Special operating rules

(A) Definition under paragraph (1)

An electioneering communication shall be treated as made by an entity described in subsection (a) if an entity described in subsection (a) directly or indirectly disburses any amount for any of the costs of the communication.

(B) Exception under paragraph (2)

A section 501(c)(4) organization that derives amounts from business activities or receives funds from any entity described in subsection (a) shall be considered to have paid for any communication out of such amounts unless such organization paid for the communication out of a segregated account to which only individuals can contribute, as described in section 30104(f)(2)(E) of this title.

(4) Definitions and rules

For purposes of this subsection-

(A) the term "section 501(c)(4) organization" means-

(i) an organization described in section 501(c)(4) of title 26 and exempt from taxation under section 501(a) of such title; or

(ii) an organization which has submitted an application to the Internal Revenue Service for determination of its status as an organization described in clause (i); and

(B) a person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement.

(5) Coordination with title 26

Nothing in this subsection shall be construed to authorize an organization exempt from taxation under section 501(a) of title 26 to carry out any activity which is prohibited under such title.

(6) Special rules for targeted communications

(A) Exception does not apply

Paragraph (2) shall not apply in the case of a targeted communication that is made by an organization described in such paragraph.

(B) Targeted communication

For purposes of subparagraph (A), the term "targeted communication" means an electioneering communication (as defined in section 30104(f)(3) of this title) that is distributed from a television or radio broadcast station or provider of cable or satellite television service and, in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

(C) Definition

For purposes of this paragraph, a communication is "targeted to the relevant electorate" if it meets the requirements described in section 30104(f)(3)(C) of this title.

11 C.F.R. § 100.92. Candidate debates

Funds provided to defray costs incurred in staging candidate debates in accordance with the provisions of 11 CFR 110.13 and 114.4(f) are not contributions.

11 C.F.R. § 100.154. Candidate debates

Funds used to defray costs incurred in staging candidate debates in accordance with the provisions of 11 CFR 110.13 and 114.4(f) are not expenditures.

11 C.F.R. § 110.13. Candidate debates

(a) Staging organizations

(1) Nonprofit organizations described in 26 U.S.C. 501 (c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 CFR 114.4(f).

(2) Broadcasters (including a cable television operator, programmer or producer), bona fide newspapers, magazines and other periodical publications may stage candidate debates in accordance with this section and 11 CFR 114.4(f), provided that they are not owned or controlled by a political party, political committee or candidate. In addition, broadcasters (including a cable television operator, programmer or producer), bona fide newspapers, magazines and other periodical publications, acting as press entities, may also cover or carry candidate debates in accordance with 11 CFR part 100, subparts B and C and part 100, subparts D and E.

(b) Debate structure

The structure of debates staged in accordance with this section and 11 CFR 114.4(f) is left to the discretion of the staging organizations(s), provided that:

(1) Such debates include at least two candidates; and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) Criteria for candidate selection

For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organizations(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.

11 C.F.R. § 114.4. Disbursements for communications by corporations and labor organizations beyond the restricted class in connection with a Federal election

(a) General

A corporation or labor organization may communicate beyond the restricted class in accordance with this section. Communications that a corporation or labor organization may make only to its employees (including its restricted class) and their families, but not to the general public, are set forth in paragraph (b) of this section. Any communications that a corporation or labor organization may make to the general public under paragraph (c) of this section may also be made to the corporation's or labor organization's restricted class and to other employees and their families. Communications that a corporation or labor organization may make only to its restricted class are set forth at 11 CFR 114.3. The activities described in paragraphs (b) and (c) of this section may be coordinated with candidates and political committees only to the extent permitted by this section. For the otherwise applicable regulations regarding independent expenditures and coordination with candidates, see 11 CFR 100.16, 109.21, and 114.2(c). Voter registration and get-out-the-vote drives as described in paragraph (d) of this section must not include coordinated expenditures as defined in 11 CFR 109.20, coordinated communications as defined in 11 CFR 109.21, or contributions as defined in 11 CFR part 100, subpart B. See also note to 11 CFR 114.2(b), 114.10(a). Incorporated membership organizations, incorporated trade associations, incorporated cooperatives, and corporations without capital stock will be treated as corporations for the purpose of this section.

(b) Communications by a corporation or labor organization to employees beyond its restricted class -

(1) Candidate and party appearances on corporate premises or at a meeting, convention or other function

Corporations may permit candidates, candidates' representatives or representatives of political parties on corporate premises or at a meeting, convention, or other function of the corporation to address or meet its restricted class and other employees of the corporation and their families, in accordance with the conditions set forth in paragraphs (b)(1)(i) through (b)(1)(viii) of this section. Other guests of the corporation who are being honored or speaking or participating in the event and representatives of the news media may be present. A corporation

may bar all candidates, candidates' representatives and representatives of political parties from addressing or meeting its restricted class and other employees of the corporation and their families on corporate premises or at any meeting, convention or other function of the corporation.

(i) If a candidate for the House or Senate or a candidate's representative is permitted to address or meet employees, all candidates for that seat who request to appear must be given a similar opportunity to appear;

(ii) If a Presidential or Vice Presidential candidate or candidate's representative is permitted to address or meet employees, all candidates for that office who are seeking the nomination or election, and who meet pre-established objective criteria under 11 CFR 110.13(c), and who request to appear must be given a similar opportunity to appear;

(iii) If representatives of a political party are permitted to address or meet employees, representatives of all political parties which had a candidate or candidates on the ballot in the last general election or which are actively engaged in placing or will have a candidate or candidates on the ballot in the next general election and who request to appear must be given a similar opportunity to appear;

(iv) The candidate's representative or party representative (other than an officer, director or other representative of a corporation) or the candidate, may ask for contributions to his or her campaign or party, or ask that contributions to the separate segregated fund of the corporation be designated for his or her campaign or party. The candidate, candidate's representative or party representative shall not accept contributions before, during or after the appearance while at the meeting, convention or other function of the corporation, but may leave campaign materials or envelopes for members of the audience. A corporation, its restricted class, or other employees of the corporation or its separate segregated fund shall not, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party in conjunction with any appearance by any candidate or party representative under this section, and shall not facilitate the making of contributions to any such candidate or party (see 11 CFR 114.2(f));

(v) A corporation or its separate segregated fund shall not, in conjunction with any candidate, candidate representative or party representative appearance under this section, expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party and shall not promote or encourage express advocacy by employees;

(vi) No candidate, candidate's representative or party representative shall be provided with more time or a substantially better location than other candidates, candidates' representatives or party representatives who appear, unless the corporation is able to demonstrate that it is clearly impractical to provide all candidates, candidates' representatives and party representatives with similar times or locations;

(vii) Coordination with each candidate, candidate's agent, and candidate's authorized committee(s) may include discussions of the structure, format and timing of the candidate appearance and the candidate's positions on issues, but shall not include discussions of the candidate's plans, projects, or needs relating to the campaign; and

(viii) Representatives of the news media may be allowed to be present during a candidate, candidate representative or party representative appearance under this section, in accordance with the procedures set forth at 11 CFR 114.3(c)(2)(iv).

(2) Candidate and party appearances on labor organization premises or at a meeting, convention or other function

A labor organization may permit candidates, candidates' representatives or representatives of political parties on the labor organization's premises or at a meeting, convention, or other function of the labor organization to address or meet its restricted class and other employees of the labor organization, and their families, in accordance with the conditions set forth in paragraphs (b)(1) (i) through (iii), (vi) through (viii), and paragraphs (b)(2) (i) and (ii) of this section. Other guests of the labor organization who are being honored or speaking or participating in the event and representatives of the news media may be present. A labor organization may bar all candidates, candidates' representatives and representatives of political parties from addressing or meeting its restricted class and other employees of the labor organization and their families on the labor

organization's premises or at any meeting, convention or other function of the labor organization.

(i) The candidate's representative or party representative (other than an official, member or employee of a labor organization) or the candidate, may ask for contributions to his or her campaign or party, or ask that contributions to the separate segregated fund of the labor organization be designated for his or her campaign or party. The candidate, candidate's representative or party representative shall not accept contributions before, during or after the appearance while at the meeting, convention or other function of the labor organization, but may leave campaign materials or envelopes for members of the audience. No official, member, or employee of a labor organization or its separate segregated fund shall, either orally or in writing, solicit or direct or control contributions by members of the audience to any candidate or party representative under this section, and shall not facilitate the making of contributions to any such candidate or party. See 11 CFR 114.2(f).

(ii) A labor organization or its separate segregated fund shall not, in conjunction with any candidate or party representative appearance under this section, expressly advocate the election or defeat of any clearly identified candidate(s), and shall not promote or encourage express advocacy by its members or employees.

(c) Communications by a corporation or labor organization to the general public -

(1) General

A corporation or labor organization may make independent expenditures or electioneering communications pursuant to 11 CFR 114.10. This section addresses specific communications, described in paragraphs (c)(2) through (c)(7) of this section, that a corporation or labor organization may make to the general public. The general public includes anyone who is not in the corporation's or labor organization's restricted class. The preparation, contents, and distribution of any of the communications described in paragraphs (2) through (6) below must not include coordinated expenditures as defined in 11 CFR 109.20, coordinated communications as defined in 11 CFR 109.21, or contributions as defined in 11 CFR part 100, subpart B. See also note to 11 CFR 114.2(b), 114.10(a).

(2) Voter registration and get-out-the-vote communications

(i) A corporation or labor organization may make voter registration and get-out-the-vote communications to the general public.

(ii) Disbursements for the activity described in paragraph (c)(2)(i) of this section are not contributions or expenditures, provided that:

(A) The voter registration and get-out-the-vote communications to the general public do not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party; and

(B) The preparation and distribution of voter registration and get-out-the-vote communications is not coordinated with any candidate(s) or political party.

(3) Official registration and voting information

(i) A corporation or labor organization may distribute to the general public, or reprint in whole and distribute to the general public, any registration or voting information, such as instructional materials, that has been produced by the official election administrators.

(ii) A corporation or labor organization may distribute official registration-by-mail forms to the general public. A corporation or labor organization may distribute absentee ballots to the general public if permitted by the applicable State law.

(iii) A corporation or labor organization may donate funds to State or local government agencies responsible for the administration of elections to help defray the costs of printing or distributing voter registration or voting information and forms.

(iv) Disbursements for the activity described in paragraphs (c)(3)(i) through (iii) of this section are not contributions or expenditures, provided that:

(A) The corporation or labor organization does not, in connection with any such activity, expressly advocate the election or

defeat of any clearly identified candidate(s) or candidates of a clearly identified political party and does not encourage registration with any particular political party; and

(B) The reproduction and distribution of registration or voting information and forms is not coordinated with any candidate(s) or political party.

(4) Voting records

(i) A corporation or labor organization may prepare and distribute to the general public the voting records of Members of Congress.

(ii) Disbursements for the activity described in paragraph (c)(4)(i) of this section are not contributions or expenditures, provided that:

(A) The voting records of Members of Congress and all communications distributed with it do not expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party; and

(B) The decision on content and the distribution of voting records is not coordinated with any candidate, group of candidates, or political party.

(5) Voter guides

(i) A corporation or labor organization may prepare and distribute to the general public voter guides, including voter guides obtained from a nonprofit organization that is described in 26 U.S.C. 501(c)(3) or (c)(4).

(ii) Disbursements for the activity described in paragraph (c)(5)(i) of this section are not contributions or expenditures, provided that the voter guides comply with either paragraph (c)(5)(ii)(A) or (c)(5)(ii)(B)(1) through (5) of this section:

(A) The corporation or labor organization does not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide,

and no portion of the voter guide expressly advocates the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party; or

(B)

(1) The corporation or labor organization does not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide;

(2) All of the candidates for a particular seat or office are provided an equal opportunity to respond, except that in the case of Presidential and Vice Presidential candidates the corporation or labor organization may choose to direct the questions only to those candidates who -

(i) Are seeking the nomination of a particular political party in a contested primary election; or

(ii) Appear on the general election ballot in the state(s) where the voter guide is distributed or appear on the general election ballot in enough states to win a majority of the electoral votes;

(3) No candidate receives greater prominence in the voter guide than other participating candidates, or substantially more space for responses;

(4) The voter guide and its accompanying materials do not contain an electioneering message; and

(5) The voter guide and its accompanying materials do not score or rate the candidates' responses in such a way as to convey an electioneering message.

(6) Endorsements

(i) A corporation or labor organization may endorse a candidate, and may communicate the endorsement to the restricted class and the general public. The Internal Revenue Code and regulations promulgated thereunder should be consulted regarding restrictions or prohibitions on endorsements by nonprofit corporations described in 26 U.S.C. 501(c)(3).

(ii) Disbursements for announcements of endorsements to the general public are not contributions or expenditures, provided that:

(A) The public announcement is not coordinated with a candidate, a candidate's authorized committee, or their agents; and

(B) Disbursements for any press release or press conference to announce the endorsement are de minimis. Such disbursements shall be considered de minimis if the press release and notice of the press conference are distributed only to the representatives of the news media that the corporation or labor organization customarily contacts when issuing non-political press releases or holding press conferences for other purposes.

(iii) Disbursements for announcements of endorsements to the restricted class may be coordinated pursuant to 114.3(a) and are not contributions or expenditures provided that no more than a de minimis number of copies of the publication that includes the endorsement are circulated beyond the restricted class.

(7) Candidate appearances on educational institution premises -

(i) Rental of facilities at usual and normal charge. Any incorporated nonprofit educational institution exempt from federal taxation under 26 U.S.C. 501(c)(3), such as a school, college or university, may make its facilities available to any candidate or political committee in the ordinary course of business and at the usual and normal charge. In this event, the requirements of paragraph (c)(7)(ii) of this section are not applicable.

(ii) Use of facilities at no charge or at less than the usual and normal charge. An incorporated nonprofit educational institution exempt from federal taxation under 26 U.S.C. 501(c)(3), such as a school, college or

university, may sponsor appearances by candidates, candidates' representatives or representatives of political parties at which such individuals address or meet the institution's academic community or the general public (whichever is invited) on the educational institution's premises at no charge or at less than the usual and normal charge, if:

(A) The educational institution makes reasonable efforts to ensure that the appearances constitute speeches, question and answer sessions, or similar communications in an academic setting, and makes reasonable efforts to ensure that the appearances are not conducted as campaign rallies or events; and

(B) The educational institution does not, in conjunction with the appearance, expressly advocate the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party, and does not favor any one candidate or political party over any other in allowing such appearances.

(d) Voter registration and get-out-the-vote drives -

(1) Voter registration and get-out-the-vote drives permitted. A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.

(2) Disbursements for certain voter registration and get-out-the-vote drives not expenditures. Voter registration or get-out-the-vote drives that are conducted in accordance with paragraphs (d)(2)(i) through (d)(2)(v) of this section are not expenditures.

(i) The corporation or labor organization shall not make any communication expressly advocating the election or defeat of any clearly identified candidate(s) or candidates of a clearly identified political party as part of the voter registration or get-out-the-vote drive.

(ii) The voter registration drive shall not be directed primarily to individuals previously registered with, or intending to register with, the political party favored by the corporation or labor organization. The get-out-the-vote drive shall not be directed primarily to individuals currently

registered with the political party favored by the corporation or labor organization.

(iii) These services shall be made available without regard to the voter's political preference. Information and other assistance regarding registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.

(iv) Individuals conducting the voter registration or get-out-the-vote drive shall not be paid on the basis of the number of individuals registered or transported who support one or more particular candidates or political party.

(v) The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(2)(iii) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.

(e) Incorporated membership organizations, incorporated trade associations, incorporated cooperatives and corporations without capital stock

An incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock may permit candidates, candidates' representatives or representatives of political parties to address or meet members and employees of the organization, and their families, on the organization's premises or at a meeting, convention or other function of the organization, in accordance with the conditions set forth in paragraphs (b)(1) (i) through (viii) of this section.

(f) Candidate debates

(1) A nonprofit organization described in 11 CFR 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under paragraph (f)(3) of this section to defray costs incurred in staging candidate debates held in accordance with 11 CFR 110.13.

(2) A broadcaster (including a cable television operator, programmer or producer), bona fide newspaper, magazine or other periodical publication may use its own funds to defray costs incurred in staging public candidate debates held in accordance with 11 CFR 110.13.

(3) A corporation or labor organization may donate funds to nonprofit organizations qualified under 11 CFR 110.13(a)(1) to stage candidate debates held in accordance with 11 CFR 110.13 and 114.4(f).

ADDENDUM TWO

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Extra-Record Evidence

Page in Brief	Text and Citation
12	"Former Democratic Congresswoman Jane Harman . . . published a 2016 op-ed identifying Hillary Clinton as the presidential candidate best 'equipped to lead us into the future.'" citing: JA394-95 (Complainants' Summary Judgment Brief) in turn quoting (JA395 n.17): https://www.washingtonpost.com/opinions/clinton-displays-her-foreign-policy-bonafides/ 2016/06/03/5eba91f6-29c5-11e6-ae4a-3cdd5fe74204_story.html?utm_term=.ef3785da378d
12	"Former Republican Senator Olympia Snowe . . . continu[ed] her work at the 'Bipartisan Policy Center,' which 'actively promotes bipartisanship' and engages in 'aggressive advocacy' to 'unite Republicans and Democrats.'" citing: JA395 (Complainants' Summary Judgment Brief) in turn quoting (JA395 n.19): https://bipartisanpolicy.org/about/who-we-are/
12	"Former Republican Senator John Danforth . . . is known for endorsing 'whichever Republican is on the ballot[.]'" citing: JA395 (Complainants' Summary Judgment Brief) in turn quoting (JA395 n.20): http://www.pitch.com/news/blog/20832766/john-danforth-continues-his-electionyear-tradition-ofendorsing-candidates-he-purports-to-despise

14-15	"As the current President observed in 2000, the 15% rule is intended 'to keep [independents] out' of the debates and prevent 'the American people from having a third choice.'" citing: JA395 (Complainants' Summary Judgment Brief) in turn quoting (JA395 n.20): http://www.nydailynews.com/archives/news/debate-bar-raised-3rd-party-choice-article-1.874058; http://www.cnn.com/TRANSCRIPTS/0001/07/se.03.html
16	"Bernie Sanders explain[ed] that he 'ha[d] to run with the Democratic Party' in 2016 because 'you need [t]o be a billionaire to succeed as an independent" (some alterations in original). citing: Dkt.37 at 3 (Complainants' Pre-Remand Summary Judgment Brief) (ECF Dkt. 37 page 11 of 80) in turn quoting (Dkt. 37 at 3 n.4): http://www.politico.com/blogs/2016-dem-primary-live-updates-and-results/2016/03/bernie-sanders-independent-media-coverage-220747?lo=ap_b1
18	"Indeed, in the administrative proceedings below, the FEC conceded its 'desire to strengthen party organizations,' even though this partisan goal has nothing to do with its statutory authority and is inconsistent with its mandate to enforce FECA." citing: JA547 (Exhibit to FEC's Motion to Strike) in turn quoting (JA390 (Complainants' Summary Judgment Brief) & n.8)): http://www.fec.gov/agenda/2015/documents/transcripts/Open_Meeting_Captions_07_16_2015.txt

18	"And in recent years the FEC's 'dysfunction,' as described by former Chair Ann Ravel, has ground its enforcement efforts to a halt." citing: JA390 (Complainants' Summary Judgment Brief) in turn quoting (JA390 n.9): https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf
18	"The agency's commissioners routinely ignore the laws enacted to protect the integrity of elections such that '[m]ajor [FECA] violations are swept under the rug' and 'violators of the law are given a free pass.'" citing: JA390 (Complainants' Summary Judgment Brief) in turn quoting (JA390 n.9): https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf
18 n.5	"A spate of resignations has deprived the FEC of the quorum required even to vote on whether FECA has been violated, rendering the agency entirely 'nonfunctional.'" quoting: https://www.nytimes.com/2019/08/26/us/politics/federalelection-commission.html?
30-31	"And the FEC itself conceded its 'desire to strengthen party organizations' in the proceedings below." citing: JA390 (Complainants' Summary Judgment Brief) in turn quoting (JA390 n.8): http://www.fec.gov/agenda/2015/documents/transcripts/Open_Meeting_Captions_07_16_2015.txt

33	"And an 'informal' policy is unenforceable by design; the FEC ignored evidence showing that Fahrenkopf himself casually violates it." citing: JA407 (Complainants' Summary Judgment Brief) in turn quoting (JA407 n.35): Zach C. Cohen, Laxalt D.C. Fundraiser Being Held at Ricketts Home, The Hotline (May 3, 2017), 2017 WLNR 13678202
46	"This, in turn, discourages qualified independent candidates from running in the first place." citing: Dkt. 85-2 at 13 (Brief of Amicus Curiae Independent Voter Project, *et al.* (relying on extra-record evidence))
48	"FEC Commissioner Ann Ravel recognized that 'the world may have a polling problem, and it is harder to find an election in which polls did all that well.'" citing: Dkt. 37 ¶24 (Plaintiffs' "Statement of Material Facts as to Which Plaintiffs Contend There Is No Genuine Issue") (ECF Dkt. 37 page 58 of 80) in turn quoting: http://www.fec.gov/agenda/2015/documents/transcripts/Open_Meeting_Captions_07_16_2015.txt
52	"And the FEC ignored two other polls showing Johnson's name recognition to be considerably lower (36% and 37%, respectively)." citing: JA409 in turn citing (JA409 n.37): http://www.gallup.com/poll/194162/third-party-candidates-johnson-stein-largely-unknown.aspx; https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/c5v3fxj0ct/econTabReport.pdf