No. _____

In the
Supreme Court of the United States

LEVEL THE PLAYING FIELD, PETER ACKERMAN, GREEN PARTY OF THE UNITED STATES, and LIBERTARIAN NATIONAL COMMITTEE, INC.

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
JACOB S. WOLF
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com
Counsel for Petitioners

November 9, 2020

QUESTIONS PRESENTED

1. Whether the partisan political activities of a debate-staging organization's decisionmakers bear upon whether the organization "endorse[s], support[s], or oppose[s] political candidates or political parties" in violation of 11 C.F.R. §110.13(a).

2. Whether criteria for determining which presidential candidates are invited to participate in general election debates are "objective" under 11 C.F.R. §110.13(c) if only major party candidates can satisfy the criteria.

PARTIES TO THE PROCEEDING

Level the Playing Field, Peter Ackerman, Green Party of the United States ("Green Party"), and the Libertarian National Committee, Inc. ("Libertarian Party") are the petitioners here and were the plaintiffs-appellants below.

The Federal Election Commission ("FEC") is the respondent here and was the defendant-appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Level the Playing Field is a not-for-profit organization incorporated under the laws of Virginia. Petitioner Libertarian Party is a not-for-profit organization incorporated under the laws of the District of Columbia. No petitioner has a corporate parent or a publicly-held company that owns 10% or more of its stock.

RELATED CASES

Level the Playing Field v. FEC, No. 15 Civ. 1397 (TSC), U.S. District Court for the District of Columbia. Judgment entered March 31, 2019.

Level the Playing Field v. FEC, No. 19-5117, United States Court of Appeals for the District of Columbia Circuit. Judgment entered June 12, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

INTRODUCTION

This case relates to an issue of paramount importance: who can participate in the presidential debates held before the general election every four years. No one can be elected president without participating in these debates, and 76% of Americans believe someone who is not a Democrat or Republican deserves serious consideration for the Presidency and should participate in the debates. Indeed, a plurality of Americans identify as independents, and 86% feel the two-party political system does not serve the interests of the American people.[1] Yet for decades, a small group of unelected, unaccountable Democratic and Republican party insiders have violated federal law by using the Commission on Presidential Debates to prevent Americans from hearing from an independent candidate. The CPD stifles competition through a selection criterion designed to create an insurmountable hurdle for any candidate other than the Democratic and Republican nominees. The result is that the only options ever presented to voters are the major-party nominees.

The CPD and its exclusionary debate-qualifying criterion violate federal election law. Under the Federal Election Campaign Act ("FECA") and its regulations, a debate-staging organization that, like the CPD, accepts corporate donations, must be nonpartisan: It may not "endorse, support, or oppose" any candidate or political party and must use "objective" criteria to determine which candidates are

---

[1] C.A.App.386, 606. "Independent candidate" refers to candidates who are either unaffiliated with any political party or affiliated with a third party.

invited to its debates. The CPD has violated these provisions ever since it was founded for the express purpose of "strengthening the role" of the two major parties. It is not *nonpartisan*; it is *bipartisan*, comprised entirely of Democratic and Republican insiders who endorse their own parties' candidates, host partisan fundraisers, donate massive sums to Republican and Democratic campaigns, and openly support the very Republicans and Democrats who appear in CPD-sponsored debates. Some have even admitted the CPD's goal was to "exclude third-party candidates" from the debates. And they have erected an insurmountable hurdle: a polling benchmark that no independent candidate has or could ever satisfy.

Yet the Federal Election Commission found no reason to believe the CPD violates FECA. This Court's intervention is needed because the D.C. Circuit—the only Circuit that can review FEC decisions—misconstrued both prongs of the governing regulation.

First, the D.C. Circuit held that only an express "organizational endorsement" of, or illegal direct contribution to, a party or its candidates violates federal law. It therefore upheld the FEC's categorical exclusion of (per the district court) a "mountain of submitted evidence" of CPD leaders' partisan activities—even though no organization would ever *formally announce* its own violation of the law. The D.C. Circuit's decision defies this Court's decisions insisting that such circumstantial evidence of bias cannot be categorically excluded—and gives corporate-funded debate sponsors carte blanche to violate the regulation but easily evade enforcement.

Second, the D.C. Circuit held that the CPD's debate-qualifying criterion is "objective" because it uses a percentage, restricting debates to candidates who have "a level of support of at least 15%...of the national electorate as determined by" five unspecified polls at an unspecified time. But using a number does not make a criterion objective. Plain meaning and the regulation's history dictate that a criterion that systematically excludes independent candidates is not objective, and as 2020 reaffirms, polling numbers can be wildly inaccurate. Experience in three-way gubernatorial races shows that independent candidates polling below 15% can win the general election *if* they are invited to debates. Yet legitimate contenders for the *Presidency* are excluded and even dissuaded from even running by the 15% rule.

These questions concern a matter of obvious and critical importance—who can meaningfully run for President of the United States. Without access to the debates, independent candidates are barred from consideration. The D.C. Circuit and FEC decisions violate the regulation they purport to interpret. And, by fortifying the two-party duopoly, they defy the wishes of the Founding Fathers, who deeply mistrusted an entrenched two-party system and correctly predicted that it would result in extremism that alienates citizens. Because federal courts in the D.C. Circuit have exclusive jurisdiction over FECA suits, there is no prospect of further percolation of this issue. Accordingly, this case is the ideal, and likely only, vehicle to address whether the CPD should be permitted to defy the popular will and the plain meaning of the regulation by willfully depriving the American people of choice in presidential elections.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 961 F.3d 462 and reprinted at App.1a–15a. The district court's opinions are reported at 381 F. Supp. 3d 78 and 232 F. Supp. 3d 130 and reprinted at App.16a–70a and 155a–190a. The FEC's enforcement decision is unreported and reprinted at App.71a–122a. The FEC's rulemaking decision is reported at 82 Fed. Reg. 15468-74, and reprinted at App.123a–154a.

JURISDICTION

The D.C. Circuit issued its opinion on June 12, 2020. On March 19, 2020, this Court issued an order extending the time to file petitions for certiorari by 150 days, making the deadline for this petition November 9, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at App.191a–195a.

STATEMENT OF THE CASE

A. Background

1. Petitioner Peter Ackerman is committed to reforming the democratic process in the United States and abroad. He has served as Chairman of the Board of Overseers of Tufts University's Fletcher School of Law and Diplomacy, and on the Board of Directors of the Council on Foreign Relations and multiple nonprofit organizations dedicated to promoting democracy and human rights. He founded Petitioner Level the Playing Field, a nonpartisan, non-profit

organization which promotes reforms to enhance competition and choice in federal elections.

The other petitioners are the Libertarian Party, which has nominated presidential candidates in every election since 1972, and the Green Party, which has nominated candidates in every presidential election since 2000.

Petitioners are supported by prominent amici from the government, academic and non-profit communities, including, *inter alia*, Admiral James Stavridis, former governor Christine Todd Whitman, former Senator Bob Kerry, and Admiral Dennis Blair. *See* C.A.Dkt.1808275, 1808194, 1808105.

2. The questions presented relate to the interpretation of an FEC regulation promulgated pursuant to FECA. The statute prohibits corporations from making a "contribution or expenditure in connection with" federal elections. 52 U.S.C. §30118(a). The purpose of this prohibition is to "limit *quid pro quo* corruption and its appearance." *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014). However, a safe harbor exempts corporate expenditures for "nonpartisan activity designed to encourage individuals to vote or to register to vote," which do not raise corruption concerns. 52 U.S.C. §30101(9)(B)(ii).

Corporate funding therefore may only be used to stage nonpartisan candidate debates. To lawfully receive and spend corporate funds, a debate-staging organization (1) cannot "endorse, support, or oppose political candidates or political parties," and (2) "must use pre-established objective criteria to determine which candidates may participate in a debate." 11

C.F.R. §§110.13(a), (c), 114.4(f). The FEC has confirmed that "pre-established objective criteria" cannot be "designed to result in the selection of certain pre-chosen participants." 60 Fed. Reg. 64,260-01 (Dec. 14, 1995); C.A.App.105, 133, 181, 249.

3. The CPD has used corporate funding to stage every general election presidential and vice-presidential debate since 1988. C.A.App.1095. These debates were previously sponsored by the League of Women Voters, but in 1985, the Democratic and Republican parties entered an "Agreement on Presidential Candidate Joint Appearances" providing that all future debates would be "jointly sponsored and conducted by the Republican[s] and Democrat[s]." C.A.App.850. The CPD was formed in 1987 to implement this agreement and "forge a permanent framework on which all future presidential debates *between the nominees of the two political parties* will be based." C.A.App.855 (emphasis added). The CPD's express purpose was "to inform the American electorate on the[] philosophies and policies" of "the Democratic and Republican parties" and to "strengthen the role of [these] parties" in presidential elections. C.A.App.850, 854-55. Republican Party chairman Frank Fahrenkopf indicated at the time that the CPD "was not likely to look with favor on including third-party candidates in the debates." C.A.App.857. His Democratic counterpart, Paul Kirk, agreed that "the [CPD] should exclude third-party candidates." *Id.*

Consistent with its self-described partisan purposes, the CPD has always been co-chaired by a prominent Republican and Democrat. Fahrenkopf has

been the co-chair since the CPD's inception, despite remaining deeply enmeshed in the Republican party. He has donated over $130,000 to Republican candidates, including two (George W. Bush and John McCain) who appeared in CPD-sponsored debates. *E.g.*, C.A.App.919-26. In 2011 he penned an op-ed addressed to Republicans extolling "our great party." C.A.App.929.

Kirk was the CPD's Democratic chair until 2009, when Michael McCurry, a longtime Democratic power broker and former press secretary to President Bill Clinton, replaced him. C.A.App.911, 914, 1097-98. McCurry donated over $110,000 to Democrats during his tenure at the CPD, including Barack Obama and Hillary Clinton close in time to their appearance in CPD debates.[2] *E.g.*, C.A.App.916.

The chairs have always stocked the CPD's board with equally powerful Democrats and Republicans, who have actively supported those parties and their presidential candidates while serving as CPD directors. C.A.App.911, 1094. For example, Richard Parsons donated more than $100,000 to Republican candidates and committees between 2008 and 2012 and gave the maximum contribution to Jeb Bush and Hillary Clinton in 2015. *E.g.*, C.A.App.916. Then-director Howard Buffett contributed to Barack Obama's 2008 presidential campaign in the same month that Obama appeared in a CPD debate. C.A.App.946. Democratic aide Newton Minow made at least 30 contributions to Democrats between 2008

[2] McCurry was replaced by Democrat Dorothy Ridings after the 2016 election. C.A.App.1286.

and 2016. C.A.Dkt.1807168, p.12. Former Democratic Congresswoman Jane Harman made 55 contributions during that same period and published a 2016 op-ed identifying Hillary Clinton as the presidential candidate best "equipped to lead us into the future." C.A.App.395-96. Former Republican Senator Olympia Snowe contributed over $8,000 to Republican candidates during the 2016 election cycle. C.A.App.396. Antonia Hernandez, former counsel to Ted Kennedy's Judiciary Committee, made the maximum contribution to Hillary Clinton prior to Clinton's appearance in CPD debates. C.A.Dkt.1807168, p.12. And former Republican Senator John Danforth, who endorses "whichever Republican is on the ballot," contributed $28,300 to Republican candidates in 2016-17. C.A.App.396.

The CPD has no oversight mechanism to curb this overt partisanship. Its conflict of interest rules do not address partisan political activities. C.A.App.1075-78. Nor does the CPD have an institutionalized process for nominating or selecting its board members, enabling the chairs to pack the board with fellow partisan politicos. The CPD now says it has an "informal policy…that Board Members are to refrain from serving in any official capacity with a political campaign." C.A.App.1297. This "policy," which conveniently surfaced for the first time in this litigation, is unenforceable by definition—no one need comply with an "informal" policy—and the CPD's leadership casually violates it. C.A.App.407. The CPD also claims it enacted a "formal 'Political Activities Policy'" *after* this litigation was filed, App.104a, but has refused to disclose the purported policy. Instead the CPD supplied a vague, one-

sentence description, which itself confirms that the "policy" prohibits nothing. App.104a-105a. As Amici Nonprofit Leaders, Scholars and Practitioners supporting petitioners have explained, these purported policies are "wholly inadequate to prevent actual conflicts of interest, much less the appearance thereof." C.A.Dkt.1808275, p.5.

4. The CPD's leadership has made no bones about its desire to exclude independent candidates from CPD-sponsored debates, and that is precisely what they have done. For example, former CPD director and Republican Senator Alan Simpson said the CPD's "purpose…is to try to preserve the two-party system," and that independent candidates should "not be included in the debates" because they "mess things up." C.A.App.26, 1165. Former CPD director and Democratic Representative John Lewis asserted that "the two major parties [have] absolute control of the presidential debate process." C.A.App.1165. Consequently, the only independent candidate to appear in a CPD-sponsored debate—Ross Perot in 1992—did so at the explicit request of the major party nominees, both of whom perceived an advantage to his participation. C.A.App.282, 700, 889-90. In 1996, the major parties changed their mind about Perot's debate participation, and the CPD accordingly excluded him. C.A.App.700.

In 2000, the CPD adopted new debate-qualifying criteria designed to exclude candidates other than the Democratic and Republican nominees. These criteria, which remain in effect, restrict the debates to candidates who have "a level of support of at least 15%...of the national electorate" as determined by five

unspecified "national…polling organizations" at an unspecified time in the September before the election. C.A.App.1118, 1308.[3]

This "15% rule" is designed to, and does, systematically exclude independent candidates, none of whom have been invited to the debates since it was instituted. Even Perot, who participated before the 15% rule, would not have qualified under the rule, because he was polling at less than 10% at the relevant time. C.A.App.367, 701.

There are numerous reasons why the 15% rule systematically excludes candidates other than the major-party nominees. Petitioners' expert evidence shows—and common sense dictates—that only a well-funded independent challenger could wrest such a substantial vote share from the major-party nominees. C.A.App.1034-35. Those nominees spend a combined $2-3 billion each election cycle, enjoy a default level of support from partisan voters, and benefit from the widespread media coverage of the major parties' presidential primaries. C.A.App.966. Independent candidates, by contrast, must rely on paid media to reach voters. Only a self-funded billionaire could realistically hope to compete as an independent, because participation in the debates is a prerequisite for victory, and few donors will fund candidates whose participation in the debates is uncertain.

That is just the first hurdle an independent candidate must overcome. The CPD also retains

---

[3] Participants must also be constitutionally eligible to serve as President and must appear on the ballot in enough states to garner 270 electoral votes. Petitioners do not challenge those criteria.

complete discretion about what polls to use, when the polls are conducted, and when to choose debate participants, enabling it to select polls that put independent candidates below the 15% threshold. C.A.App.1117-18, 1308-09. Indeed, the CPD sometimes uses polls that do not even include independent candidates. C.A.App.1127. Furthermore, polling in three-way races is subject to increased error rates. C.A.App.985. This means independents effectively need to poll at 25% to ensure that their support is measured at 15% by whichever polls the CPD chooses. C.A.Dkt.1808105, p.17. And independent candidates attract new voters who "are politically inactive or even unregistered until mobilized by a compelling candidate," and thus undercounted in polls. C.A.App.1044.

Meanwhile, three-way gubernatorial elections prove that independent candidates polling below 15% in September can easily come back to win the election—if they are allowed to debate. C.A.App.720. Indeed, Perot polled at under 10% before the 1992 debates, but earned nearly 20% of the popular vote. C.A.App.621, 873. It is therefore unsurprising that the American people strongly favor including more than two candidates in the general election debates. Barring independents prevents voters from choosing among potentially viable candidates for the nation's highest office. *See, e.g.*, C.A.App.761, 786. Yet the CPD's polling hurdle is so prohibitive that its mere existence dissuades prominent amici and other qualified prospective independent candidates from running in the first place, as these amici have explained. C.A.Dkt.1808194, pp.9-11.

5. The FEC is "inherently bipartisan," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981), and has expressly stated that it shares the CPD's "desire to strengthen party organizations," C.A.App.547. Not surprisingly, therefore, the FEC has summarily rejected every single one of many administrative challenges to the CPD's partisan structure and biased selection criteria. C.A.App.240-79. Indeed, in response to one such challenge, the FEC's own General Counsel concluded based on the extensive evidence of the CPD's partisanship that there was "reason to believe" that the CPD violated FECA and §110.13. The General Counsel recommended that the agency initiate an investigation into the CPD, but the FEC still refused to act. C.A.App.155-56, 162-63, 181.

B. Proceedings Before The FEC And District Court

1. Any person may file an administrative complaint alleging a FECA violation. 52 U.S.C. §30109(a)(1). If the FEC finds "reason to believe" that the party named in the complaint "has committed, or is about to commit, a violation," it must "make an investigation." *Id.* §30109(a)(2). "Any party aggrieved by" an FEC order dismissing an administrative complaint may challenge the FEC's decision (or failure to act within 120 days) in the U.S. District Court for the District of Columbia. *Id.* §30109(a)(8).

In 2014, petitioners filed administrative complaints against the CPD, its executive director, and the 11 directors who adopted the CPD's rules for the 2012 presidential election. C.A.App.40-42, 81, 664-739, 1223, 1229. The complaints alleged, *inter*

alia, that the CPD violated FECA's expenditure and contribution rules. The complaints were supported by 800 pages of evidence detailing the CPD leadership's partisan activities and expert analyses quantifying the obstacles imposed by the 15% rule.

The FEC ignored the complaints until after petitioners filed a lawsuit challenging the agency's failure to act within 120 days. *See Level the Playing Field v. FEC*, No. 15-CV-961 (D.D.C.), Dkt.1. After the action was filed, the FEC quickly dismissed the complaint and a related petition for rulemaking.[4] Its decision dismissing the complaint summarily concluded that there was no reason to believe the CPD or its leadership had violated FECA, ignoring petitioners' evidence and rotely citing the agency's dismissals of prior complaints against the CPD. C.A.App.1218-21, 1243-47. The dismissal of the rulemaking—over the dissent of two commissioners—was similarly conclusory: The FEC said enforcement was sufficient to deal with the problems petitioners identified—even though the agency for decades *refused* to enforce its regulation against the CPD. C.A.App.662-63.

2. On August 27, 2015, petitioners filed an action seeking review of the FEC's decisions. On February 1,

[4] The petition sought a rulemaking to amend the FEC's regulation and prohibit debate-stagers from using a polling threshold as the exclusive means of accessing the presidential general election debates. C.A.App.599-631. *All* of the petition's approximately 1,260 commenters (except for the CPD itself) supported opening a rulemaking. C.A.App.661. The questions presented in this petition concern only the interpretation of the FEC's existing regulation and do not implicate the denial of the rulemaking.

2017, the district court vacated the decisions as "arbitrary and capricious" and "contrary to law." App.183a-184a, 189a-190a. The court held that the FEC had relied on a legal standard "contrary to the plain text of the regulation" and that the FEC "did not provide any indication that it actually considered" the "mountain of submitted evidence" supporting petitioners' claims, even though the "weight of [this] evidence is…substantial." App.171a, 175a, 180a, 183a. Finding that the FEC had "stuck its head in the sand and ignored the evidence," the court remanded the matter to the agency to reconsider its decisions. App.189a-190a.

3. On March 29, 2017, the FEC issued new decisions reaching the same result. App.71a-154a. This time, in addressing the evidence of the CPD's deep partisan ties and favoritism toward the major parties, the FEC said that the CPD's leaders did not act in their "official capacity" when they endorsed or supported political parties or their candidates. App.103a; *see also* App.103a-104a ("there is no indication that they act on behalf of CPD" or "as agents of CPD"); App.99a (CPD director statements "are not indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties"). Rather, according to the FEC, those individuals "may wear 'multiple hats,'" and their partisan activities—even when supporting candidates who appear in CPD debates—are merely "personal." App.102a-103a.[5]

---

[5] The FEC also claimed that evidence related to the CPD's founding and earlier operation "d[id] not necessarily reflect the

The FEC also concluded that the CPD's biased candidate selection rule is "objective." App.105a-121a. The FEC agreed that to be "objective," criteria cannot be "designed to result in the selection of certain pre-chosen participants," but concluded that the CPD met this standard based on a series of demonstrably incorrect assertions. App.107a. For example, independent candidates must spend enormous amounts on paid media, because unlike major-party candidates they attract little news coverage. To counter this evidence, the FEC claimed that a Westlaw news database showed Libertarian Party candidate Gary Johnson received substantial press in 2016. App.137a. But the FEC counted numerous articles about other people named Gary Johnson, including athletes, chefs, museum presidents, doctors, lawyers, and musicians all named Gary Johnson. As another example, the FEC brushed aside one of petitioners' expert reports purportedly because the expert limited his analysis to polls conducted "at the early stages of the party primary process" App.134a, even though the report explicitly incorporated "late primary" and "general" election polling data. C.A.App.986.

Petitioners challenged the FEC's post-remand decisions in a Supplemental Complaint filed on May

---

organization's perspective" in 2012—without pointing to any evidence that the CPD leaders' partisan objectives have ever changed. App.97a-99a. The FEC also claimed it was "not clear" that this evidence reflected "an endorsement of, or support for, the Democratic and Republican Parties" (App.95a-96a), even though that is exactly what the evidence—such as Fahrenkopf's statement that the CPD "was not likely to look with favor on including third-party candidates in the debates"—demonstrates.

26, 2017. C.A.App.308. On March 31, 2019, the district court awarded summary judgment to the FEC. App.17a. The court's opinion restated the FEC's justifications, with virtually no serious attempt to evaluate whether they met the legal standard under FECA or the APA. App.45a-70a.

C. D.C. Circuit Decision

The D.C. Circuit affirmed. It did not dispute that, as the district court had initially concluded, a "mountain of evidence" established the partisanship of the CPD's leadership. Instead, the court held that it was "reasonable" for the FEC to conclude that this evidence was "not indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties and their candidates." App.7a. The court found that "individuals may support political candidates when acting in their personal capacities, even if they would be prohibited from doing so in their professional capacities." App.10a. The court purported to ground this conclusion in the law of agency, holding that "for an agent's statement to be attributable to the principal, the 'speaking must be done in the capacity of agent and connected with the business of the principal.'" App.10a (quoting Restatement (First) of Agency §288 cmt. b). Thus, the court concluded, it was dispositive that Fahrenkopf, McCurry and other CPD leaders were not acting in their "official capacity" when engaging in partisan political activity. App.9a-10a.

The court also held the CPD's 15% polling criterion "objective." The court agreed that there are "many reasons why it might be difficult for an independent candidate to achieve the support of 15%

of the electorate." App.14a. Yet it found these reasons irrelevant and concluded that the polling criterion "does not become 'subjective' merely because it is difficult to reach" for independents. *Id.*

REASONS FOR GRANTING CERTIORARI

I. Corporate-funded debate-staging organizations cannot "endorse," "support" or "oppose" political parties or their candidates. 11 C.F.R. §110.13(a). Partisan activities by the organization's leaders clearly bear on whether the organization itself has complied with this regulation. Indeed, this Court has repeatedly held that such circumstantial evidence can be as probative as direct evidence; that no plaintiff should be categorically prohibited from presenting it; and that circumstantial evidence is particularly important where, as here, the plaintiff is attempting to root out dishonesty or unlawful bias that defendants will inevitably deny. Yet the D.C. Circuit held that abundant evidence of partisan activities by the CPD's leaders was legally irrelevant to whether the organization violated the regulation. It held that the only acceptable form of proof of the organization's bias is direct evidence: *official* acts of partisanship by or formally on behalf of the organization.

That holding conflicts with this Court's decisions and reduces the regulation's nonpartisanship requirement to a nullity: It allows people to operate a corporate-funded debate staging organization for partisan purposes so long as they don't *officially* declare on the organization's letterhead or website that that is what they are doing, or write a check from the organization's bank account to a campaign. In other words, the D.C. Circuit's decision enables people

to violate the rule but easily evade enforcement. This Court should grant review to prevent that result and ensure that the nonpartisanship provision is enforceable.

II. To conclude that the CPD's 15% criterion is "objective," the D.C. Circuit and FEC turned the English language on its head and ignored all interpretive guides, including this Court's precedent and the FEC's stated rationale for the regulation. The court reasoned that the criterion is "objective" because it is facially neutral and ended its inquiry there. But this Court has made clear in other contexts that facial neutrality is not the touchstone of objectivity, and the FEC itself acknowledged as much when promulgating the regulation. The D.C. Circuit also completely ignored the subjectivity inherent in the CPD's unilateral power to select which polls to rely on, as well as the unreliable and subjective nature of polling itself. When applied, the CPD's 15% criterion functionally bars independents from the debates but guarantees entry to the major-party candidates. This Court should grant review to correct this flawed analysis and hold that a facially neutral criterion that has severe discriminatory effects cannot be "objective."

III. This petition raises issues of the utmost importance to American democracy. Participation in the general election debates is a prerequisite to winning the Presidency, yet the CPD has barred independents for decades, ensuring that only the major-party candidates are invited to debate. The ensuing major-party duopoly has bred hyper-partisanship that has destroyed public confidence in

government and brought about the dire consequences George Washington warned about in his Farewell Address. The Founders never wanted the United States to be governed by two warring political parties, and most Americans are desperate for alternative options. This petition may be the only chance to resolve whether an unelected, unaccountable entity comprised of career partisan political operatives can undermine the American experiment by setting up a barricade blocking independent candidates from the debate stage.

I. WHETHER THE PARTISANSHIP OF A DEBATE-STAGING ORGANIZATION'S LEADERS CAN BE ATTRIBUTED TO THE ORGANIZATION ITSELF

A. No corporate-sponsored debate-staging organization would formally announce its partisanship to the world or make a direct, blatantly illegal campaign contribution to a candidate. That would be tantamount to conceding a violation of FECA and the regulation prohibiting debate-staging organizations that "endorse," "support" or "oppose" political parties or their candidates from using corporate funds. 11 C.F.R. §110.13(a). Yet the D.C. Circuit's opinion requires exactly this sort of unattainable "smoking gun" proof; nothing short of an illegal direct campaign contribution by the organization, or an announcement on its letterhead formally endorsing a political party or candidate, will do. App.5a-7a. Indeed, the court went so far as to fault petitioners for not identifying "a single instance of a donation to a Democrat or Republican that was made by the CPD or one of its leaders acting in his or

her official capacity," App.9a-10a—even though FECA flatly prohibits direct corporate contributions, and there is no way for an individual to donate money to a candidate in a corporate capacity. By insisting upon proof of an admission or donation no organization would ever make, and categorically rejecting circumstantial evidence based on the conduct of the organization's leaders, the D.C. Circuit made it impossible to prove that a debate-staging organization is partisan, no matter how partisan the organization truly is.

Until this litigation, the FEC *agreed* that organizational bias could be established using circumstantial evidence. The FEC has adjudicated numerous administrative proceedings over the past two decades in which the CPD was accused of endorsing, supporting or opposing political parties or their candidates in violation of 11 C.F.R. §110.13(a). *See, e.g.*, C.A.App.240-79. At no point did the agency suggest that a formal endorsement would be required to substantiate these allegations. *Id*. To the contrary, the FEC *conceded* that at least some of the same circumstantial evidence petitioners presented here *did* "raise[] questions" about whether the "CPD is infected with bias against third party and independent candidates sufficient to disqualify it as a debate staging organization." C.A.App.266-68. It was only after the district court vacated and remanded the FEC's initial arbitrary and capricious dismissal of petitioners' complaints that the FEC suddenly reversed course and refused to consider this evidence because it concerned conduct by individual CPD leaders. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019) ("a court may not defer to a new

interpretation…that creates 'unfair surprise' to regulated parties").

The D.C. Circuit's affirmance of the FEC's new categorical refusal to consider this type of circumstantial evidence squarely conflicts with this Court's precedent. As the Court has explained, "in *any* lawsuit, the plaintiff may prove [its] case by direct *or* circumstantial evidence." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (emphasis added); *see also Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("inference from circumstantial evidence" is one of the "usual ways" to establish "mental state"). That is because "[t]he law makes no distinction between the weight or value to be given to either direct or circumstantial evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). Consequently, there is no "circumstance" in which this Court has "restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute." *Id.*

Circumstantial evidence is essential where, as here, the plaintiff is trying to root out bias or dishonesty, because a defendant will rarely provide a direct admission. As this Court has recognized, "circumstantial evidence" can "be quite persuasive" to expose hidden motivations such as "discriminatory purpose." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *see also United States v. Clarke*, 573 U.S. 248, 254–55 (2014) ("circumstantial evidence" can "suffice" to "rais[e] an inference of bad faith"). For example, in the gerrymandering context, this Court has recognized that "circumstantial evidence" may be a "compelling" way to establish

"unconstitutional racial" motive, and that "it may be difficult for challengers to find other evidence." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *accord Hunt v. Cromartie*, 526 U.S. 541, 547-49 (1999) (parties can establish an "impermissible racial motive" using "only circumstantial evidence"). The same is true here—an organization like the CPD will never willingly reveal its illicit bias, which is why in cases like this, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957).

Moreover, a non-profit corporation like the CPD is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989); *Shaffer v. Heitner*, 433 U.S. 186, 226 n.4 (1977) (corporation is "legal fiction"). The CPD can exhibit bias, if at all, only "through [the] employees" who work there. *Democratic Senatorial Campaign Comm.*, 454 U.S. at 33. And it "'believes,' if it can be said to believe anything, only what the people who found, own and/or manage the corporation believe." *Korte v. Sebelius*, 735 F.3d 654, 701 (7th Cir. 2013) (Rovner, J., dissenting). Yet the opinion below categorically excludes not just the evidence demonstrating the partisan bias of those who run the CPD, but additional evidence that their bias has corrupted the CPD and led it to adopt exclusionary debate-qualifying criteria.

B. Applying the correct standard, which permits consideration of this evidence, it is clear that the CPD

endorses, supports and opposes political parties and their candidates in violation of 11 C.F.R. §110.13(a). The CPD is led by staunch partisans who endorse Republican and Democratic candidates, lavish them with high-dollar contributions, served them as aides or high-priced consultants, mingle with partisan elites at exclusive fundraisers, and oversee hundreds of thousands of dollars of contributions to Democratic and Republican politicians as paid-for-hire lobbyists. These individuals endorse and contribute to their own parties' nominees even when these candidates appear in the very debates that the CPD itself sponsors. They have confirmed time and again that the CPD's goal is to ensure that only these nominees, and not any independent challengers, are invited to the presidential debates.

Fahrenkopf typifies the partisan CPD director. He founded the CPD *in his capacity* as chair of the Republican party and declared his intent to "forge a permanent framework" to hold "all future presidential debates between the nominees of the two political parties." C.A.App.855. He continued at the helm of the RNC while *simultaneously* serving as co-chair of the CPD for several years. After leaving the RNC, he has continued to serve as a prominent ambassador of the Republican party. While serving as co-chair and the public face of the CPD, he has (1) contributed substantial sums to the same Republicans who appeared in CPD-sponsored debates, showing that he favors including those particular candidates in the debates; (2) assumed Republican campaign roles; (3) told a Harvard audience that the "Commission on Presidential Debates" helps "rejuvenat[e]…bipartisanship"; and (4) conceded that

he is "not likely to look with favor on including third-party candidates in the debates." C.A.App.919-26, 395, 407, 857.

This proves not just that Fahrenkopf favors Republicans, but that his bias infects the CPD itself. Indeed, over the years, the CPD's leaders have *admitted* that their own partisan preferences are intertwined with the CPD's in precisely this way. One director opined that they use the CPD to "try to preserve the two-party system," and to prevent independent candidates from being "included in the debates." C.A.App.26. According to another, the CPD debates have been "entrust[ed]…to the major parties" in a way that "is likely to exclude independent…candidates." C.A.App.1165. And multiple directors have admitted that the CPD is "not really nonpartisan," as the FECA regulations require, and instead is "bipartisan." C.A.App.1165.

It is no accident that the CPD has refused to enact a single internal control that might curb its partisanship, because any organization that was serious about being nonpartisan would take pains to ensure that such policies were in place. The CPD alone decides who appears in the presidential debates. The leaders of an organization with such immense influence will be tempted to exclude candidates with disfavored viewpoints. But the law prohibits a corporate-funded debate-staging organization from doing so. The only way to ensure that it will is to enact and rigorously enforce policies prohibiting conflicts that might compromise the organization's nonpartisan mandate. Indeed, in the nonprofit community, it is considered essential that every

organization have a written, enforceable policy to prevent such conflicts. Nonprofit leaders appearing as amici below criticized the CPD's refusal to enact any policy because this "contravenes the basic standards and practices of good governance that are fundamental in the nonprofit community." C.A.Dkt.1808188, pp.7-16.

Yet the D.C. Circuit agreed with the FEC that, as a matter of law, none of this evidence could even conceivably inform the FEC's assessment of whether the CPD "endorses," "supports" or "opposes" political parties or their candidates. It relied principally on the law of agency, but the law of agency does not support its conclusion. The court observed that, "for an agent's statement to be attributable to the principal, the 'speaking must be done in the capacity of agent and connected with the business of the principal.'" App.10a (quoting Restatement (First) of Agency §288 cmt.b). But petitioners do not claim that the directors, as agents, made independently actionable partisan statements for which the CPD is liable as principal, nor should they need to make any such showing. The point is that the CPD directors' statements—as well as their extensive ties to the major parties and substantial contributions to partisan causes—are circumstantial *evidence* that the CPD itself supports those same causes. After all, the CPD is nothing more than a collection of the individuals who operate it. Where, as here, an organization that has no purpose other than to stage political debates is run by people who have dedicated their lives and careers to partisan politics, it stands to reason that—without an independent board or mechanism of corporate governance to override its leaders' partisanship—the

organization will behave in a partisan fashion. And the CPD's lengthy track record of excluding independents from the debates confirms that the CPD has done precisely what one would expect from such an organization. In short, it looks like a duck, swims like a duck, and quacks like a duck—but per the D.C. Circuit, none of that proves it's a duck.

If evidence of conduct by an organization's leaders cannot be considered to assess whether the organization has complied with the regulation, there will be no way to enforce the regulation: it will be completely toothless. Given the stakes for American democracy, and the inability of any other Circuit to weigh in, this Court's intervention is essential to ensuring the debate-staging regulation is enforceable as written.

II. WHETHER DEBATE-QUALIFYING CRITERIA THAT DISCRIMINATE AGAINST INDEPENDENT CANDIDATES CAN BE "OBJECTIVE"

A. A Criterion Is Not "Objective" When It Is Discriminatory In Practice

The D.C. Circuit held that a polling criterion can be "objective" within the meaning of §110.13(c) even though it systematically excludes independent candidates from participating in presidential debates. The court expressly found that the consequences of the criterion are irrelevant even if they dramatically disadvantage independents. It held that even if petitioners are "correct" that it is nearly impossible for an independent candidate to qualify, the CPD's criterion is nevertheless "objective." App.13a. The

court failed to even consider other reasons the criterion is not "objective": the CPD selects polls solely based on its subjective whims, and the polls themselves are unreliable and based on subjective choices made by pollsters. In essence, the D.C. Circuit's view is that it doesn't matter that the CPD's criteria always result in debates limited to the Democratic and Republican nominees because the criteria are not *explicitly* biased. But that reasoning is inconsistent with the meaning of the word "objective."

Like "any law," a regulation is interpreted using "the 'traditional tools' of construction" including "the text, structure, history, and purpose of a regulation." *Kisor*, 139 S. Ct. at 2415. As to the text, "objective" means "based on externally verifiable phenomena" as well as "disinterested" and "[w]ithout bias." OBJECTIVE, Black's Law Dictionary (11th ed. 2019). It is synonymous with "equitable," "evenhanded," "fair," and "nonpartisan." *See* Merriam-webster.com/thesaurus/objective. Thus, it is not "objective" to apply an inherently discriminatory criterion even if it is facially neutral, because such a criterion is not "without bias" or "evenhanded." Nor is it "objective" to choose polls based on manipulable subjective criteria rather than "externally verifiable" facts.[6]

---

[6] The CPD chooses polls based on "recommendations" from pollster Frank Newport, "principally" based on his *subjective* "judgment" about "the quality of the methodology employed, the reputation of the polling organizations and the frequency of the polling conducted." C.A.App.1121-22.

The D.C. Circuit not only failed to analyze the meaning of the text, but also ignored that the FEC's own stated rationale for its regulation supports our textual reading. Corporations are barred from contributing or spending money in connection with federal elections unless, as relevant here, the money is used for "*nonpartisan activity* designed to encourage individuals to vote or to register to vote." 52 U.S.C. §30101(9)(B)(ii) (emphasis added). The FEC has interpreted this provision to permit corporate donations to "nonpartisan organizations" to defray the costs of staging "*nonpartisan* debates." 44 Fed. Reg. 76,734 (Dec. 27, 1979) (emphasis added); *see also Perot v. FEC*, 97 F.3d 553, 556 (D.C. Cir. 1996) (explaining that 11 CFR § 110.13 is the "current version" codifying FEC's original understanding). To ensure that corporate-sponsored debates are nonpartisan, the FEC enacted the "objectiv[ity]" rule to protect "the integrity and fairness of the [candidate-selection] process." 60 Fed. Reg. 64,260-01 (Dec. 14, 1995). The agency explained that the chosen criteria "must…not [be] designed to result in the selection of certain pre-chosen participants." *Id.*

This interpretation of "objective" is also consistent with this Court's precedents in analogous areas of the law. In other contexts, this Court has recognized that a law "may be grossly discriminatory in its operation" even where "[o]n its face [it] extends to all…an apparently equal opportunity." *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Where access is "contingent" upon circumstances only one group can satisfy, a facially-objective policy impermissibly "visit[s] different consequences on two categories of persons." *Id.; see also Griffin v. Illinois*, 351 U.S. 12, 17 n.11

(1956) ("[A] law nondiscriminatory on its face may be grossly discriminatory in its operation."). The Court's First Amendment jurisprudence is instructive. It is well-established that, just as the FEC regulation requires debate sponsors to select participants without partisan bias, the government cannot "'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)). "'The First Amendment mandates government neutrality between religion and religion…The State may not adopt programs or practices…which 'aid or oppose' any religion." *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). In other words, the government must be objective when it comes to religion.

In this analogous context, mere "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Indeed, "action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality," because the First Amendment "protects against…hostility which is masked, as well as overt." *Id.* Thus, "[e]ven if the plain language of…[a] policy [is] facially neutral" the government cannot "hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000).

At the expense of independent candidates, the FEC and D.C. Circuit have allowed the CPD to "hide behind…[its] formally neutral criteria" for years,

contrary to the clear meaning of "objective." This Court should grant review to ensure that the objectivity requirement is enforced as written.

B. This Case Is An Excellent Vehicle Because The 15% Criterion Is Not Objective

1. History demonstrates that the 15% criterion is not objective within the regulation's meaning, because no candidate who has not participated in a major party primary has ever satisfied, or could ever have satisfied it: No independent candidate has hurdled the CPD's 15% bar since it was adopted in 2000, and as explained (*supra* p.10), Perot would not have satisfied it. The only other examples of purportedly "independent" candidates the FEC cited were former Republican President Teddy Roosevelt in 1912, former three-term Republican governor and three-term Republican Senator Robert LaFollette in 1924, former Democratic Governor Strom Thurmond (who later served 48 years as a major-party Senator) in 1948, former Democratic Governor George Wallace in 1968, and 20-year Republican Congressman John Anderson in 1980. App.107a, 144a; *see also* App12a-13a. If anything, these outdated examples prove petitioners' point: All candidates started as prominent major-party politicians and obtained even more national attention by competing for the major-parties' presidential nominations before running as independents. C.A.App.332-33, C.A.App.367. They are the equivalent of, say, Pete Buttigieg running as an "independent" *after* losing the 2020 Democratic primary. And the cost of running for President has skyrocketed since those historical candidates ran—a

serious campaign now requires many hundreds of millions of dollars to compete, a sum no one can raise absent a legitimate chance of qualifying to debate. In short, the fact that no independent has satisfied this criterion demonstrates that it is not objective.

Moreover, it is obvious why it is impossible for any independent candidate (other than perhaps a self-funded billionaire) to ever hurdle the CPD's 15% rule, and why it systematically excludes independents. To make a serious run for President, a candidate needs (1) enormous sums of money and (2) to be known to prospective voters, because if voters don't know who a candidate is, they won't tell a pollster they support the candidate. Major-party candidates always receive extensive media coverage, and voters therefore hear about them through such "free" media, starting during the primaries. By contrast, the media pay little attention to independent candidates, so to become known to the public, they must raise and spend huge amounts of money on advertising. This creates a catch-22 for independent candidates: they can't be known and supported in polls without large sums of money, but their ability to garner such financial support will be hamstrung because they can't demonstrate to potential donors that they will appear in the debates.

These points are a matter of common sense, but petitioners also presented expert evidence demonstrating them through quantitative analysis. For instance, Clifford Young, a polling specialist, showed that, on average, a candidate must obtain name recognition of at least 60-80% among the American public to poll at 15%. App.11a. And

Douglas Schoen—a veteran pollster and campaign strategist—showed that because independent candidates have difficulty attracting earned media, they must raise at least $266 million to achieve the requisite name recognition. *Id.* (That was based on 2014 data; the figure would surely be much higher in 2020). Although not central to its holding, the D.C. Circuit deferred to the FEC's jerry-rigged critique of these data, App.12a-13a; but the FEC ignored or misstated the expert reports and relied upon demonstrably false assumptions. *See* C.A.Dkt.1807265, pp.46-51; C.A.Dkt.1817426, pp.21-28. Regardless, the historical evidence shows that no genuinely independent candidate has *ever* hurdled the CPD's polling criterion, which demonstrates that it cannot be objective; the expert evidence merely confirms some of the reasons *why* that is so.

2. As explained in Point II.A, an "objective" criterion must be "externally verifiable," like the solution to a math equation or a provable fact. Anyone can verify that 1+1=2, or that a company sold 1,000 widgets. But the mere fact that the criterion includes a number—15%—does not make it "objective." For one, the CPD retains complete discretion about what polls to use and when to choose debate participants, enabling it to manipulate the selection of polls to exclude independent candidates. C.A.App.1308-09. Thus, even if an independent candidate *could* reach 15% support in certain polls, the CPD could *still* exclude them by simply selecting a pollster whose methodology resulted in a different outcome. Indeed, the CPD has relied upon polls that only asked about the major party candidates and made no effort to assess the support for their independent competitors.

See, e.g., NBC/Wall Street Journal Poll, https://s.wsj.net/public/resources/documents/WSJNBCPoll-Mid-October-2020.pdf at p.10 (mid-October poll asking only about Biden and Trump). That is patently subjective.

Moreover, horse-race polling itself is unreliable, biased, and certainly not "objective." C.A.Dkt.1808105, pp.15-22. One need only look to the spectacular polling failures leading up to the 2020 and 2016 presidential elections to see the difference between a poll and a verifiable, objective fact. In both elections, pollsters "systemic[ally]" erred in predicting which voters would turn out and failed to account for "Shy Trump Voter[s]," who lied to pollsters about which candidate they supported. Alex Woodie, *Systemic Data Errors Still Plague Presidential Polling*, Datanami (Oct. 7, 2020).[7] Indeed, polls are mere estimates that face significant obstacles to accuracy, such as the decreased use of landlines, the lack of centralized databases for cell-phone numbers, and the likelihood of individuals not answering calls from unknown numbers. C.A.Dkt.1808105, pp.16-18. Polls frequently have significant margins of error as high as 5 to 10 percentage points. *Id.*

Even Ann Ravel—the FEC's Chair at the time the agency dismissed the complaints—has acknowledged that "the world may have a polling problem, and it is harder to find an election in which polls did all that well." D.Ct.Dkt.37, pp.22-23. It is absurd for an FEC Commissioner to acknowledge, on the one hand, that

---

[7] *Available at* https://www.datanami.com/2020/10/07/systemic-data-errors-still-plague-presidential-polling.

polls are unreliable indicators of voter support, yet see nothing wrong with the CPD's use of polls as supposedly "objective" measures "to identify those candidates…who have a realistic chance of being elected President of the United States." C.A.App.1308.

Even worse, polling errors are magnified in three-way races as opposed to two-way races. C.A.App.985. And, because the major-party candidates will always easily garner 15% support, C.A.App.966, only independent candidates are impacted by polling errors. Indeed, an independent could be excluded even though she *did* reach 15% support but, due to a 5% error rate, only registered 10% in the polls. This is particularly likely given that independent candidates often bring out new voters who "are politically inactive or even unregistered until mobilized by a compelling candidate," and therefore undercounted in polls (much like supporters of President Trump). C.A.App.1044. Polls are based on subjective decisions by pollsters which lead to frequent human error, and any such error can only result in harm to independents and not major-party candidates. Thus, by any definition of the word, the CPD's polling criterion is plainly not "objective." Accordingly, this case presents an excellent vehicle for reviewing whether criteria that discriminate against independent candidates can be "objective" within the meaning of the debate-staging regulation.

III. THE QUESTIONS PRESENTED ARE EXTREMELY IMPORTANT

It is hard to imagine a topic with greater stakes for the United States than ensuring a robust competition

for the Presidency. And no one can win the Presidency or be taken seriously as a presidential candidate without participating in the general election debates, which are typically viewed by enormous audiences. For example, in 2016, the first presidential debate drew a staggering 84 million viewers.[8] As the only presidential-debate sponsor, the CPD is a gatekeeper to the White House. Unfortunately, however, it uses its vast power to stifle political competition and cement the Democratic and Republican parties' duopoly control over the Presidency.

The pernicious effects of that duopoly and its stranglehold over political power in the United States have increased exponentially in recent years, as the lack of competition has driven each of the major parties to partisan extremes. The resulting polarization has ground government to a halt and left constituents out in the cold. This governmental dysfunction is precisely what the Founders warned would happen in a two-party system: "George Washington…warn[ed] against hyper-partisanship" in his farewell address, as he feared it would lead to the "alternate domination of one faction over another, sharpened by the spirit of revenge" which is "itself a frightful despotism." Lee Drutman, *America Is Now the Divided Republic the Framers Feared*, The Atlantic (Jan. 2, 2020).[9] Washington worried that parties

---

[8] *See* www.pewresearch.org/fact-tank/2020/08/28/5-facts-about-presidential-and-vice-presidential-debates/; *see also* cnn.com/2020/09/30/media/first-presidential-debate-tv-ratings/index.html (over 73 million watched first Biden-Trump debate).

[9] *Available at* www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213.

"become potent engines, by which cunning, ambitious and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reigns of government." George Washington, Farewell Address (Sept. 19, 1796).[10] John Adams also believed that "a [d]ivision of the republic[] into two great [p]arties…is to be dreaded as the great political [e]vil." Letter from John Adams to Jonathan Jackson (Oct. 2, 1780).[11]

A recent prominent Harvard Business School study confirms the Founders' assessment, explaining that "[i]n a duopoly" parties only "compete to create and reinforce partisan divisions, not deliver practical solutions." Katherine M. Gehl & Michael E. Porter, *Why Competition In The Politics Industry Is Failing America* (Sept. 2017), at 4.[12] In other words, the losers in a duopoly are average American citizens.

The current Congress exemplifies this problem. It is comprised nearly entirely of Democrats and Republicans, who rarely work together on any legislation; the result is typically either gridlock or, when one party has full control, controversial legislation that lacks broad support but is enacted based on pure party-line voting. Unsurprisingly, an astounding 80% of the public disapproves of "the way Congress is handling its job." *See* news.gallup.com/

---

[10] *Available at* www.founders.archives.gov/documents/Washington/99-01-02-00963.

[11] *Available at* www.founders.archives.gov/documents/Adams/06-10-02-0113.

[12] *Available at* https://gehlporter.com/wp-content/uploads/2018/11/why-competition-in-the-politics-industry-is-failing-america.pdf.

poll/1600/congress-public.aspx. Thus, a plurality of Americans (42%) consider themselves political independents, *see* news.gallup.com/poll/15370/party-affiliation.aspx, and a majority believe the two major parties "do such a poor job" of "representing the American people…that a third major party is needed." news.gallup.com/poll/244094/majority-say-third-party-needed.aspx.

Expanded debate access is not only what Americans want, it is also beneficial to the political process: Since the first CPD-sponsored debate in 1988, the debate that voters deemed most "helpful" "in deciding which candidate to vote for" was in 1992, the only time an independent (Ross Perot) joined the major party candidates on stage. *See* www.pewresearch.org/fact-tank/2020/08/28/5-facts-about-presidential-and-vice-presidential-debates/.

But in a duopoly, "rivals…understand that…they will both benefit from…limit[ing] the power of other actors, and increas[ing] barriers to entry." Gehl & Porter at p.4. This has borne out. These days, most major-party politicians seem to have only one goal: stymy any possible challenge to their own power and squash any dissent within their caucus. Whether it's Democrats blacklisting consultants who work with primary challengers to "protect all Members of the Democratic Caucus," *see* cnn.com/2019/03/31/politics/dccc-primary-challenger-rule/index.html, or Republican delegates denying renomination to a Congressman because he dared to break from party dogma by officiating a same-sex wedding, *see* cnn.com/2020/06/14/politics/virginia-5th-district-gop-convention-riggleman/index.html, the major parties

have closed ranks. This consolidation of partisan power leaves no room for independent ideas, nonpartisan coalition building, or consensus solutions to America's problems. Unfortunately, the CPD, comprised of these very same partisans, works to preserve this duopoly, as it caters to the major parties and denies the American people what they want: a third way forward.

This petition is the ideal—and perhaps only—chance for this Court to review the important legal questions presented here about the interpretation of the FEC's FECA-implementing debate rule. Because FECA permits judicial review only in the District Court for the District of Columbia, 52 U.S.C. §30109(a)(8)(A), there is no mechanism for further percolation of this issue. Absent this Court's review, the opinion below will likely remain the last word on the subject, allowing the "great political evil" that the Founders warned of to continue unabated.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

ALEXANDRA A.E. SHAPIRO
Counsel of Record
ERIC S. OLNEY
JACOB S. WOLF
SHAPIRO ARATO BACH LLP
500 FIFTH AVENUE
40th Floor
New York, NY 10110
(212) 257-4880
ashapiro@shapiroarato.com

Counsel for Petitioners

November 9, 2020

APPENDIX

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

No. 19-5117

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

v.

FEDERAL ELECTION COMMISSION,
Appellee.

Appeal from the United States District Court
for the District of Columbia (No. 1:15-cv-01397)

Argued February 24, 2020
Decided June 12, 2020

Alexandra A.E. Shapiro argued the cause for appellants. With her on the briefs were *Eric S. Olney* and *Jacob S. Wolf*.

Haven G. Ward argued the cause for appellee. With her on the brief were *Lisa J. Stevenson* and *Kevin Deeley*.

Before: PILLARD and KATSAS, *Circuit Judges*, and RANDOLPH, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* RANDOLPH.

RANDOLPH, *Senior Circuit Judge*: The Commission on Presidential Debates (the "CPD") is a private non-profit corporation. For more than thirty years, it has hosted televised debates among the leading candidates for President and Vice President of the United States. The CPD uses several factors to decide which candidates are eligible to participate in its debates. At the center of this controversy is the CPD's compliance with rules of the Federal Election Commission (the "Commission") for determining which candidates are, or will be, eligible to participate in the debates.

The Commission's regulations allow a non-profit organization to stage candidate debates in federal elections so long as the organization does not "endorse, support, or oppose political candidates or political parties." 11 C.F.R. § 110.13(a)(1). The debates must "include at least two candidates" and cannot be structured "to promote or advance one candidate over another." *Id*. at § 110.13(b). Staging organizations must use "pre-established objective criteria" to select eligible candidates, and for general election debates, cannot "use nomination by a particular political party as the sole objective criterion." *Id*. at § 110.13©.

The plaintiffs in this case are Level the Playing Field, a non-profit corporation created to promote independent candidates for elected office; Peter Ackerman, a registered voter from the District of Columbia; the Green Party; and the Libertarian National Committee, Inc. They argue that the CPD routinely endorses and supports Republican and Democratic nominees at the expense of third-party

candidates. They also contend that the CPD uses subjective and biased criteria for selecting debate participants.

Although the CPD is by definition involved in politics, it neither endorses nor opposes candidates for the Presidency. The government does not fund the CPD, nor does any political party, political action committee, or candidate. It is governed by an independent Board of Directors.

To participate in a CPD-sponsored debate, there are three requirements. The candidate must be qualified under the Constitution to be President. The candidate must be on the ballot of enough states to have a mathematical chance of winning a majority vote in the Electoral College. And the candidate must have a level of 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 the determination.

Plaintiffs began their case with two administrative complaints. The first challenged the 15% polling criterion, which the CPD used to determine eligibility for participation in the debates preceding the 2012 Presidential election. The Commission decided 5-0 (with one recusal) that the CPD's criterion did not violate the Commission's debate rules. The second complaint asked the Commission to initiate a rulemaking to change its rules to prohibit debate sponsors from using public opinion polls as a criterion for eligibility. The Commission rejected this request by

a vote of 4-2. Based on these votes, the Commission dismissed both administrative complaints.

Plaintiffs sought review in the district court, alleging that the dismissal of their complaints violated the Administrative Procedure Act. For reasons unnecessary to discuss, the district court remanded both administrative matters to the Commission for further consideration of the record. The Commission adhered to its original decision. On the return of the case to the district court, the court granted summary judgment in favor of the Commission. We agree with the district court's thorough and well-reasoned decision and, applying de novo review, we affirm.

I.

Judicial review of decisions by the Federal Election Commission is highly deferential. *Hagelin v. FEC*, 411 F.3d 237, 242 (D.C. Cir. 2005). We presume the validity of the Commission's decisions and will reverse them only if they are contrary to law, not supported by substantial evidence, or are arbitrary, capricious, or an abuse of discretion. *Id*.

Plaintiffs urge us to apply a less deferential standard of review, arguing that the Commission's decisions display a "pattern of suspect decisionmaking," "bias," and a "partisan agenda." But as we have previously explained, the "arbitrary and capricious and substantial evidence standards" are "fully adequate to capture partisan or discriminatory FEC behavior." *Hagelin*, 411 F.3d at 243. Indeed, decisions featuring unjustifiable bias or partisanship are precisely the types of agency actions that "would work a violation of the arbitrary-

and-capricious standard." *Id*. (citation, internal quotation marks and alteration omitted). Accordingly, we need not create a new standard of review to assess the appropriateness of the Commission's actions in this case.

II.

Plaintiffs believe that the CPD is an "overtly partisan" organization whose goal "is to exclude independent candidates." They argue that the Commission refused to recognize this bias, thereby ignoring the regulations that require debate sponsors not to endorse, support, or oppose political parties or their candidates.

As evidence of the CPD's purported partisanship, plaintiffs highlight various statements and campaign contributions made by the CPD's founders and leaders. For example, announcing the formation of the CPD in 1987, the Democratic and Republican National Committees "emphasiz[ed] the bipartisan nature" of the CPD and noted that the debates would be "party-sponsored." Frank Fahrenkopf, then chairman of the Republican National Committee and a current CPD co-chair, indicated that the CPD "was not likely to look with favor on including third- party candidates in the debates." Similarly, Paul Kirk, the chairman of the Democratic National Committee at the time and a former CPD co-chair, said he "personally believed that the [CPD] should exclude third-party candidates from the debates."

The Commission carefully considered these and other statements made when the CPD was created in 1987. It

found the statements to have "limited persuasive value" for three reasons. First, the Commission reasoned that decades-old declarations are not particularly probative of current bias, as organizations can change. Second, the early statements about the CPD must be understood in the context of trying to institutionalize televised debates as a "permanent part of the political process." And third, statements made by individuals do not necessarily reflect an organization's endorsement or support. Each of these explanations was reasonable.

Take the first explanation. The record supports the Commission's view that the CPD has changed over time, making "concerted efforts to be independent in recent years." After third-party candidate Ross Perot's exclusion from the 1996 debates, for instance, the CPD "adopted new candidate selection criteria and retained a polling consultant to ensure" "careful and thoughtful application" of the new criteria. The Commission also noted that the CPD "conducts a review after every presidential election of issues relating to the debates." In light of these changes and ongoing reviews, it was reasonable for the Commission to believe that statements made about the CPD in 1987 do not adequately describe the CPD as it exists today. *See Hagelin*, 411 F.3d at 244.

It was also reasonable for the Commission to place the early statements made by Fahrenkopf and others in context. For instance, the Commission credited a sworn declaration from Fahrenkopf explaining that when the CPD was first created, "the major impediment to" institutionalizing televised debates "was securing the commitment of both major party nominees to debate."

Thus, references to a "bipartisan" and "party-sponsored" organization were meant to convey only that the CPD would not favor one leading political party at the expense of the other. American politics has, for most of American history, been organized around two parties. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). So it is plausible that leaders of the newly-created CPD used terms like "bipartisan" and "party-sponsored" to assure and secure support from both major parties.

The Commission explained that "even if these written and oral statements did reflect more current sentiments, they are not indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties and their candidates. ..." The record supports this finding. The 1987 statement announcing the formation of the CPD, for instance, was released by the Democratic and Republican National Committees, and not by the CPD. Paul Kirk's statement that the CPD should exclude third-party candidates was based on his personal view, and he added that "he could not speak for the [C]ommission."

Plaintiffs characterize the Commission's explanations as "spurious" and attack the affidavits submitted by Fahrenkopf and others as "boilerplate" and "meaningless." But as the district court explained, that plaintiffs may disagree with the Commission's weighing of the evidence presented to it is not enough for the courts to overturn the Commission's decisions as arbitrary, capricious, or contrary to law. *See Level the Playing Field v. FEC*, 381 F. Supp. 3d 78, 101 (D.D.C.

2019). The Commission considered plaintiffs' submissions and articulated reasonable explanations for assigning the decades-old statements little probative value.

Plaintiffs also presented the Commission with contemporaneous evidence of the CPD's alleged bias. In 2015, for example, Fahrenkopf was interviewed by Sky News. During the interview he said that the CPD "primarily go[es] with the two leading candidates" from the "two political part[ies]." In 2011, Fahrenkopf wrote an op-ed in which he praised the Republican Party and described it as "our great party." And since 1997, Fahrenkopf has donated tens of thousands of dollars to Republican congressional and presidential candidates.

Michael McCurry is also a co-chair of the CPD. He previously served as President Bill Clinton's press secretary and as a director of communications for the Democratic National Committee. Since 2008, McCurry has given tens of thousands of dollars to Democrats. Plaintiffs claim that the statements and contributions made by Fahrenkopf and McCurry are illustrative of the CPD's partisan bias.

The Commission rejected this argument, again providing reasonable explanations supported by the record. For example, the Commission noted that during the 2015 Sky News interview, Fahrenkopf was asked "about the impact of multiple candidates (the questioner posited seven) on the educational value of debates." Fahrenkopf responded by lamenting the quality of primary debates, which can feature "seven or eight people on the stage," and which "people jokingly

say" are "less of a debate than a cattle show." He then said: "That's why in the general election debate, we have a system, and we . . . primarily go with the two leading candidates, it's between the two political party candidates . . . except for 1992 when Ross Perot participated in the debates." The context of the interview thus makes clear that Fahrenkopf was expressing a preference for smaller debates where the candidates with the most support are given more time to share their views with voters. He was not, as plaintiffs suggest, admitting that the CPD seeks to exclude independent candidates to benefit Democratic and Republican candidates. Considering Fahrenkopf's words in the appropriate context, the Commission justifiably concluded that plaintiffs' "interpretation is not dispositive."

With respect to Farenkopf's 2011 op-ed and the donations he and others have made to candidates from the two major political parties, the Commission stated that "individuals may wear multiple hats to represent multiple interests." And if this is permissible, the Commission reasoned, it follows that "an individual's 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."

Reviewing the record, the Commission found no evidence that Farenkopf's 2011 op-ed was written in his official capacity as a CPD co-chair or was intended in any way to represent the views of the organization. Similarly, plaintiffs cannot identify a single instance of a donation to a Democrat or Republican that was made

by the CPD or one of its leaders acting in his or her official capacity.

Plaintiffs' arguments, then, amount to a disagreement with the Commission's view that personal partisan activities do not necessarily reflect the views or biases of the organization for which a person works. But again, as the district court held, "such a disagreement does not discharge [p]laintiffs of their burden to establish that the [Commission's view] was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 381 F. Supp. 3d at 105. Plaintiffs have not met that burden. The Commission has consistently maintained that individuals may support political candidates when acting in their personal capacities, even if they would be prohibited from doing so in their professional capacities. *See, e.g.* FEC Advisory Op. 2007-05; Advisory Op. 2005-02; Advisory Op. 2003-10. And this position is well-founded. It is axiomatic that, for an agent's statement to be attributable to the principal, the "speaking must be done in the capacity of agent and connected with the business of the principal." Restatement (First) of Agency § 288 cmt. b (Am. Law Inst. 1933).

In sum, far from ignoring plaintiffs' evidence, the Commission thoughtfully evaluated the record. The Commission offered detailed explanations in support of its view that plaintiffs failed to show impermissible bias against independent candidates or in favor of candidates from the two major political parties. And though plaintiffs may disagree with these explanations, they have failed to show that the Commission's decisionmaking was arbitrary or unreasonable.

III.

Plaintiffs also contend that the CPD's use of a 15% polling requirement to select debate candidates is "subjective" and favors major-party candidates. This threshold, they argue, violates 11 C.F.R. § 110.13(c), which requires staging organizations to "use pre-established objective criteria to determine which candidates may participate in a debate." In support of this claim, plaintiffs presented the Commission with two expert reports. The first, written by Dr. Clifford Young, posits that "on average, an independent candidate must achieve a minimum of 60% name recognition, and likely 80%, in order to obtain 15% vote share." The second, prepared by Douglas Schoen, suggests that an independent candidate "should reasonably expect to spend approximately $266,059,803 to run a viable campaign capable of reaching 15% support in polls by September of the election year."

Plaintiffs argue that these studies show the 15% threshold is not objective because, while major party candidates "benefit from the widespread media coverage of the presidential primaries," independent candidates "have no analogous mechanism for generating name recognition." And if an independent candidate must spend over $260 million to achieve 15% support, plaintiffs reason, "[o]nly a self-funded billionaire could realistically hope to compete as an independent."

The Commission considered and rejected these arguments. Evaluating the expert reports, the Commission found several "limitations that undermine

their persuasiveness." The Young Report, for instance, "correlates polling results to name recognition alone," but as Dr. Young himself acknowledged, several other factors affect a candidate's poll numbers, including "fundraising, candidate positioning, election results, and idiosyncratic events." The Commission also noted that "neither the Young Report nor [plaintiffs] . . . ever establish that independent candidates do not or cannot meet 60-80 percent name recognition." The Commission cited as a counter-example a 2016 YouGov poll, which found that 63% of registered voters had heard of Libertarian candidate Gary Johnson, while 59% had heard of Green Party candidate Jill Stein.

These critiques of the Young Report are reasonable. The omission of relevant variables from a statistical analysis "may render the analysis less probative than it otherwise might be." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (per curiam) (Brennan, J., concurring). It is quite plausible that a factor like the unpopularity of major-party candidates could lead to a high degree of support for an independent candidate who has less than 60% name recognition. And the Commission reasonably relied on a YouGov poll to question the notion that independent candidates cannot achieve 60% name recognition. Though the Young Report posited 60% name recognition was necessary among the American public and the poll only shows name recognition among registered voters, the poll still suggests independent candidates may sometimes earn significant name recognition. *See also Buchanan v. FEC*, 112 F. Supp. 2d 58, 74 (D.D.C. 2000) (listing George Wallace, John Anderson, and Ross Perot as examples of independent

candidates who achieved at least 15% support in pre-election polling).

The Commission identified many reasons to discount the findings of the Schoen Report, too. For example, the Commission found that the $260 million estimate rests "on the assumption that independent candidates are unable to attract earned media (i.e., free coverage)." The Schoen Report also fails to account for the role of social media, which the Commission notes has "enabled the ubiquitous sharing of [candidates'] messages among vast global networks."

Again, these critiques are reasonable and well-supported. As the Commission highlights, Libertarian candidate Gary Johnson received extensive media coverage during the 2016 presidential election. And at least some of that coverage was not generated by the campaign's spending. *See, e.g.*, Jonah Bromwich, 'I Guess I'm Having an Aleppo Moment': Gary Johnson Can't Name a Single Foreign Leader, N.Y. Times, Sep. 28, 2016, available at https://www.nytimes.com/2016/09/29/us/politics/gary-johnson-aleppo-moment.html. The Commission similarly cited the example of the 2016 Trump campaign, during which "digital media reportedly replaced field offices," "thereby reducing another traditional campaign cost."

More broadly, we need not conclusively determine the validity or persuasiveness of the Young and Schoen reports to decide this case. Even if both reports are correct, and it takes a large amount of money and name recognition for a candidate to be viable, the 15% polling criterion is not impermissible.

All that is required is that the CPD use a "pre-established objective criteria" to determine debate eligibility. 11 C.F.R. § 110.13(c). Plaintiffs have identified many reasons why it might be difficult for an independent candidate to achieve the support of 15% of the electorate. But a threshold does not become "subjective" merely because it is difficult to reach. There is no legal requirement that the Commission make it easier for independent candidates to run for President of the United States. The Commission thus acted reasonably in determining that a 15% polling threshold is an objective requirement.

IV.

In addition to challenging the CPD's existing criteria, plaintiffs asked the Commission to initiate a rulemaking to revise and amend 11 C.F.R. § 110.13(c). Specifically, they believe the Commission's rules should preclude debate sponsors from using any polling threshold and should instead require the CPD to select some other unspecified "objective, unbiased criteria for debate admission."

The Commission rejected the request to change its regulations. Our review of a rulemaking denial is "extremely limited and highly deferential." *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (internal quotation marks and citation omitted). Federal agencies have "broad discretion to choose how best to marshal [their] limited resources and personnel to carry out [their] delegated responsibilities." *Id*. at 527.

Applying this even more deferential standard, we affirm the Commission's decision. Plaintiffs suggest that the Commission's rejection of their petition was arbitrary and capricious "for the same reasons" they challenge the Commission's decisions about the CPD's neutrality and the 15% polling criterion. Because we have found that the Commission acted reasonably in reaching those decisions, we hold that the Commission did not err by electing not to initiate a rulemaking.

For these reasons, the district court's grant of summary judgment to the Commission is affirmed.

So ordered.

APPENDIX B

United States District Court for the District of Columbia

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

v.

FEDERAL ELECTION COMMISSION,
Defendant.

Case No. 15-cv-1397 (TSC)

MEMORANDUM OPINION

This case concerns a highly visible element of our democratic electoral process: the presidential and vice-presidential debates held every four years by the Commission on Presidential Debates ("CPD").

Plaintiffs Level the Playing Field, Peter Ackerman, Green Party of the United States, and Libertarian National Committee, Inc. allege that, following this court's remand, Defendant Federal Election Commission ("FEC") again violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, in dismissing two administrative complaints regarding the CPD, and denying a petition to engage in rulemaking to change the FEC's regulations regarding debate staging organizations. (*See* ECF No. 76 ("Am. Compl.") ¶¶ 76–82.)

Before the court are Plaintiffs' motion for summary judgment (ECF No. 83), Defendant's cross-motion for summary judgment (ECF No. 90), Defendant's motion to strike (ECF No. 92), and Plaintiffs' motion to supplement the record (ECF No. 99). Upon consideration of the pleadings and the Administrative Record (ECF No. 105), Defendant's motion to strike is GRANTED in part and DENIED in part, Plaintiffs' motion to supplement the record is DENIED, Plaintiffs' motion for summary judgment is DENIED, and Defendant's cross-motion for summary judgment is GRANTED.

I. BACKGROUND

This is the second round of summary judgment briefing in this case. Because this court has already issued a detailed memorandum and opinion (ECF No. 60), for purposes of this ruling, the court will assume the parties' familiarity with the underlying record and recite only what is necessary to resolve the pending motions.

A. The Court's February 1, 2017 Memorandum and Opinion

On February 1, 2017, this court issued a memorandum and opinion finding that the FEC "acted arbitrarily and capriciously and contrary to law when it dismissed [Plaintiffs'] two administrative complaints" and "fail[ed] to provide a reasoned and coherent explanation" for its denial of Plaintiffs' rulemaking petition. (*Id*. at 28.)

In granting Plaintiffs' motion for summary judgment and denying the FEC's cross- motion for summary judgment, the court issued five main directives to the FEC in reconsidering Plaintiffs' submissions. The court ordered the FEC to: (1) "articulate its analysis in determining whether the CPD endorsed, supported, or opposed political parties or candidates" (*id*. at 14); (2) "demonstrate how it considered the evidence, particularly, but not necessarily limited to, the newly-submitted evidence of partisanship and political donations and the expert analyses regarding fundraising and polling" (*id*. at 18); (3) notify the ten remaining directors, address the allegations made against them, and consider the evidence presented against them (*id*. at 19); (4) demonstrate that it had considered the full scope of Plaintiffs' evidence as well as to explain how and why it rejected the evidence in deciding that CPD's polling requirement is an objective criterion (*id*. at 23); and (5) engage in thorough consideration of the presented evidence and explain its decision regarding Plaintiffs' rulemaking petition (*id*. at 27–28).

B. Plaintiffs' August 11, 2017 Amended Complaint

On August 11, 2017, Plaintiffs filed an amended complaint alleging that the FEC's post- remand decisions indicate that it failed to comply with any of the court's directives, and asking the court to take the following actions:

> Declare that the FEC's dismissals of Plaintiffs' administrative complaints were arbitrary,

> capricious, an abuse of discretion, and otherwise contrary to law, and direct the FEC, within 30 days, to find that the CPD has violated 11 C.F.R. § 110.13 by staging candidate debates in a partisan manner and without pre- established, objective criteria; violated 52 U.S.C. § 30118(a) by making prohibited contributions and expenditures; and violated 52 U.S.C. §§ 30103 and 30104 by failing to register as a political committee and by failing to make required reports and disclosures; and
>
> If the FEC fails to so act, authorize Plaintiffs to bring a civil action against the CPD, its executive director, and the directors who have participated in these violations of federal election law to remedy those violations; and
>
> Declare the FEC's denial of the petition for rulemaking was arbitrary, capricious, an abuse of discretion, and otherwise contrary to law, and order the FEC to open rulemaking to revise its rules governing presidential debates to ensure that debate sponsors do not unfairly exclude independent and third-party candidates from participating.

(*See* Am. Compl. ¶¶ 3, 9, 21.)

II. STANDARD

On a motion for summary judgment in a suit seeking APA review, the court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §

706(2). The court's review is "highly deferential" and begins with a presumption that the agency's actions are valid. *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). The plaintiff bears the burden of establishing the invalidity of the agency's action. *Id*.

The court is "not empowered to substitute its judgment for that of the agency," *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (abrogated on other grounds), but instead must consider only "whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency considered the relevant factors," *Fulbright v. McHugh*, 67 F. Supp. 3d 81, 89 (D.D.C. 2014) (quoting *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995)). "A reviewing court, however, will accord a somewhat greater degree of scrutiny to an order that arrives at substantially the same conclusion as an order previously remanded by the same court." *Greyhound Corp. v. I.C.C.*, 668 F.2d 1354, 1358 (D.C. Cir. 1981). "The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result." *Food Mktg. Inst. v. I.C.C.*, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

III. ANALYSIS

A. Defendant's Motion to Strike and Plaintiffs' Motion to Supplement

The FEC moves to strike portions of Plaintiffs' memorandum of law, portions of Plaintiffs' counsel's declaration, and one of Plaintiffs' expert affidavits because the materials were not before the agency when it made its determinations and are not part of the administrative record. (*See* ECF 92 ("Def.'s Mot. to Strike") at 1.) The FEC also argues that Plaintiffs' use of a FEC Commissioner's pre-decisional statement is improper. (*See id*.) Plaintiffs oppose the motion to strike and move to supplement the administrative record with the objected to material. (See ECF No. 99 ("Pls.' Mot to Supplement") at 1–2.) Because the arguments in the motion to strike and the motion to supplement overlap, the court will assess them simultaneously with respect to each category of objected to material.

1. Extra-record Evidence

When reviewing agency actions such as FEC's decision here, courts review "the whole record or those parts of it cited by a party." 5 U.S.C. § 706; *Volpe*, 401 U.S. at 420 ("[R]eview is to be based on the full administrative record that was before the Secretary at the time he made his decision."). This includes "all documents and materials that the agency directly or indirectly considered" before deciding what action to take. *Pac. Shores Subdiv. Cal. Water Dist. v. U.S. Army Corps of Engr's*, 448 F.Supp.2d 1, 4 (D.D.C. 2006)

(internal quotation omitted). Judicial review is limited to the record because a court "should have before it neither more nor less information than did the agency when it made its decision." *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). Agencies bear the burden of compiling the materials and documents they considered, either directly or indirectly, and the compiled record "is entitled to a strong presumption of regularity." *Marcum v. Salazar*, 751 F.Supp.2d 74, 78 (D.D.C. 2010).

When, as here, a party seeks to add materials to the record that it does not contend the agency actually reviewed, courts have permitted such extra-record evidence in at least three "unusual circumstances." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). These are: (1) when "the agency 'deliberately or negligently excluded documents that may have been adverse to its decision,'" (2) when "background information [is] needed 'to determine whether the agency considered all the relevant factors,'" and (3) when "the 'agency failed to explain administrative action so as to frustrate judicial review.'" *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010) (quoting *Am. Wildlands*, 530 F.3d at 1002).

Plaintiffs contend that the extra-record materials identified in their motion for summary judgment can be divided into six categories that are permissible under one of the first two exceptions or for a separate reason. (See Pls.' Mot. to Supplement at 2–6.) However, three of the extra-record materials identified in the FEC's appendix—an article regarding a 2018 Senate bid, a

comment made after the 2016 election about the difficulty of selecting moderators, and an article concerning Ross Perot's independent candidacy in 1992—are not encompassed by any of the six categories delineated by Plaintiffs. For those materials, because Plaintiffs failed to address them, in accord with Local Rule 7(b), the court deems the FEC's motion as conceded, *see Hopkins v. Women's Div., Gen. Bd. of Glob. Ministries*, 238 F. Supp. 2d 174, 178 (D.D.C. 2002) (citing *FDIC v. Bender*, 127 F.3d 58, 67–68 (D.C.Cir.1997)) ("It is well understood in this Circuit that when a plaintiff files an opposition to a motion . . . addressing only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded."), and strikes those portions from the record. (See ECF No. 83 ("Pls.' Mot. Summ. J.") at 14, n.22; 16, n.30; 44, n.58.)

i. News Articles Regarding CPD Directors' Participation and Statements

Plaintiffs seek to supplement the record with two news articles that they allege demonstrate noncompliance with CPD's internal policies. The first article relays CPD Director Olympia Stowe's opinion that President Donald Trump was hurting the Republican brand. (*See* Pls.' Mot. Summ. J. at 14, n.18.) The second article states that CPD Director Frank Fahrenkopf co-chaired a fundraiser for Adam Laxalt, who was reportedly considering entering Nevada's gubernatorial race at the time. (*See id*. at 25, n.35.) Plaintiffs argue that the articles fall under the first and second Dania Beach exceptions, under which extra-record evidence may be considered because an

agency has deliberately or negligently excluded adverse documents, and extra-record evidence may be considered as needed background information. (*See* Pls.' Mot. to Supplement at 2–3.)

Having considered all arguments, the court finds that neither of the first and second *Dania Beach* exceptions apply to these articles. To prove that the articles fall within the first *Dania Beach* exception, Plaintiffs needed to make a "strong showing of [agency] bad faith." *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 55 (D.C. Cir. 2015) (quoting *James Madison Ltd. ex rel. Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C.Cir.1996) (alteration in original). Here, Plaintiffs proffered only "conclusory statements," which "'fall short' of that high threshold." *Id*. With respect to the second *Dania Beach* exception, Plaintiffs argue that the news articles should be made part of the record because they show "that the FEC failed to consider all relevant factors when relying upon the alleged [internal] policies." (*See* Pls.' Mot. to Supplement at 3.) But under *Dania Beach*, it is not enough that Plaintiffs cursorily allege the evidence shows a failure to consider all relevant factors; Plaintiffs must demonstrate that the evidence is "needed" by the court to make that determination. *Dania Beach*, 628 F.3d at 590. And in light of the FEC's explanation of the manner in which it relied on CPD's representation that it had two internal polices, as well as the voluminous record, the court is confident that the two news articles are not needed. *See e.g., Lee Mem'l Hosp. v. Burwell*, 109 F. Supp. 3d 40, 54 (D.D.C. 2015) (finding supplementation not needed where agency provided cogent explanation). Therefore,

Defendant's motion to strike the two news articles is GRANTED, and Plaintiffs' motion to supplement the record with them is DENIED.

ii. News Articles Regarding Media Sources Consulted by Voters

Plaintiffs next seek to admit four news articles under the first and second *Dania Beach* exceptions, arguing that the articles rebut the FEC's assertion that an independent candidate can significantly defray the cost of her campaign by reaching voters through social media. (*See* Pls.' Mot. Summ. J. at 30, nn.38–40; 31, n.46; Pls.' Mot to Supplement at 4.)

Here again, the court finds that neither the first nor second *Dania Beach* exceptions apply. Plaintiffs proffer no evidence of bad faith, and therefore cannot meet the first exception. *See Dist. Hosp. Partners, L.P.*, 786 F.3d at 55 (noting that to meet the first exception, plaintiffs must make a strong showing of bad faith on the part of the agency). And the second exception has not been met because the FEC's decision explains how it arrived at its finding that the Douglas Schoen expert report is undermined, in part, because the report did not consider the effect of digital and social media on media exposure avenues available to independent candidates. The proffered news articles are not needed to determine whether the FEC adequately considered all the relevant factors, including the extent to which voters rely on social media to learn about presidential candidates. *See e.g., Lee Mem'l Hosp.*, 109 F. Supp. 3d at 54 (finding supplementation not needed where agency provided cogent explanation). Accordingly, Defendant's motion

to strike the four news articles is GRANTED, and Plaintiffs' motion to supplement the record with them is DENIED.

iii. Articles, Books, Videos, and Websites regarding the 2016 Election

Of the FEC's two decisions—the initial decision was issued in 2015 and the second decision was issued in 2017—only the 2017 decision references the 2016 election in its analysis. In response to this reference in the 2017 decision, Plaintiffs seek to supplement the administrative record with extra-record evidence concerning the 2016 election. (*See* Pls.' Mot. Summ. J. at 1, n.2; 4, n.6; 13, nn.12–13 & 15–16; 14, nn.17, 19–21, & 23; 15, nn.24–26; 16, n.29; 33, n.49.) Plaintiffs argue that the court should either find that the evidence falls under the second *Dania Beach* exception or, at a minimum, take judicial notice of the evidence for purposes of background. (*See* Pls.' Mot. to Supplement at 5–6.) The court disagrees.

Plaintiffs' characterization of FEC as "conducting [its] own sua sponte analysis of the 2016 race," (*see id*. at 6), is a bit of an overstatement. The FEC's references to the 2016 election are cabined largely to three categories: (1) third party candidates' name recognition, media attention, and financial support; (2) the Democratic and Republican nominees' spending on digital marketing; and (3) a potential candidate's reported interest in running because of his personal wealth and name recognition. For each category, the FEC provides a cogent explanation of its reliance on the cited materials; thus, supplementation is not needed.

See e.g., *Lee Mem'l Hosp.*, 109 F. Supp. 3d at 54 (finding supplementation not needed where agency provided cogent explanation). With respect to Plaintiffs' alternative argument, because the content of some of the documents are subject to reasonable dispute and the court's focus at this stage is on the documents that can serve as the foundation for Plaintiffs' claims, the court declines to take judicial notice of the documents for background purposes. Defendant's motion to strike the articles, books, videos, and websites is GRANTED, and Plaintiffs' motion to supplement the record with them is DENIED.

iv. Name Recognition Polls Not Mentioned in FEC's Decisions

Plaintiffs also seek to supplement the record with a Gallup and a YouGov poll showing that Libertarian Party candidate Gary Johnson's name recognition was 36 percent and 37 percent respectively. (*See* Pls.' Mot. Summ. J. at 27, n.37.) According to Plaintiffs, the polls show that the FEC erred in relying solely on a subsequent YouGov poll, which indicated that Gary Johnson achieved 63 percent name recognition. (*Id.*) Plaintiffs argue that the court may take judicial notice of the polls or, in the alternative, find that the two polls fall under the first and second *Dania Beach* exceptions. (*See* Pls.' Mot. to Supplement at 3–4.) However, none of these three proposed avenues are appropriate here.

"[J]udicial notice is typically an inadequate mechanism for a court to consider extra- record evidence when reviewing an agency action." *Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32, n.14

(D.D.C. 2013), *aff'd sub nom. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015). This general rule rests on the premise that plaintiffs should not be permitted to exploit the standard for judicial notice to circumvent the strict standard for supplementing the administrative record. *See Banner Health v. Burwell*, 126 F. Supp. 3d 28, 62 (D.D.C. 2015), *aff'd in part, rev'd in part sub nom. Banner Health v. Price*, 867 F.3d 1323 (D.C. Cir. 2017) ("Plaintiffs cannot evade that strict standard by appealing to the standard for judicial notice."). And none of the cases relied upon by Plaintiffs involved an APA case. *See e.g., Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (reviewing public opinion polling data in death penalty appeal); *Owens v. Duncan*, 781 F.3d 360, 362 (7th Cir. 2015) (using website to determine when sunset and nautical twilight occurred on certain day in a habeas case). Therefore, in accord with other courts in this district, the court declines to take judicial notice of the two polls because, as discussed below, Plaintiffs have failed to prove that any of the Dania Beach exceptions apply. *See Riffin v. Surface Transp. Bd.*, No. 16-1147, 2016 WL 6915552, at *1 (D.C. Cir. Oct. 6, 2016) (unpublished) (rejecting plaintiff's effort to supplement the administrative record through judicial notice and explaining that none of the three exceptions to the rule against supplementation were met); *Silver State Land, LLC v. Beaudreau*, 59 F. Supp. 3d 158, 172 (D.D.C. 2014) (declining to take judicial notice in APA case where proposed document did not "qualify for supplementation of the administrative record or extra-record review"); *see also Dist. Hosp. Partners*, 971 F. Supp. 2d at 32 n.14 ("[J]udicial notice of an

adjudicative fact not part of the administrative record generally is irrelevant to the court's analysis of the merits. Instead, a court may only consider an adjudicative fact subject to judicial notice that is not part of the administrative record if it qualifies for supplementation as extra-record evidence.").

With respect to the first *Dania Beach* exception, in addition to their conclusory statement that the two polls undermine the FEC's argument and were deliberately or negligently excluded by the FEC, Plaintiffs cite to a D.C. Circuit decision permitting supplementation of the administrative record where the agency relied on a single memorandum from another program. *See Kent Cty., Delaware Levy Court v. U.S. E.P.A.*, 963 F.2d 391, 396 (D.C. Cir. 1992). However, in that case, the agency looked outside of its own files to support its decision, but neglected to examine its own files, which contained several documents "relat[ing] to the position of the agency's own experts on the question central to th[e] case." *Id*. Thus, the Court found the agency negligent for failing to review any of its internal documents and permitted plaintiff to supplement the administrative record. *Id*. Here, however, the poll relied upon by the FEC and the two polls proffered by Plaintiffs are all external documents. Thus, there is insufficient evidence to find that the FEC was either deliberate or negligent in not including them. Moreover, Plaintiffs seek to introduce a poll that was taken June 2–5, 2016 and another poll taken July 13–17, 2016. And because the YouGov poll in the record was taken over a month later, on August 25–26, 2016, it is not directly contradicted by the polls proffered by Plaintiffs, and it

is not clear that the polls are adverse to the FEC's decision.

Lastly, the second *Dania Beach* exception does not apply to the name recognition polls, neither of which provide insight into the FEC's findings nor assist the court in determining whether the FEC adequately considered the relevant factors. *C.f. Rhea Lana, Inc. v. U.S. Dep't of Labor*, No. 14-CV-00017 (CRC), 2016 WL 10932817, at *1 (D.D.C. Dec. 6, 2016) (finding proposed supplement provided needed background information where it included letters "shed[ding] light on the basis for [the agency's] decision"). The two proffered polls do not provide insight into the FEC's decision making because they do not reflect the thoughts or efforts of anyone who participated in the FEC's decision. And the court can consider any arguments about to what extent, if any, the FEC erred in relying only on the August YouGov poll without considering the two earlier polls that were not before the FEC. Thus, Defendant's motion to strike the name recognition polls is GRANTED, and Plaintiffs' motion to supplement the record with them is DENIED.

v. 2008 Polling Data for President Barack Obama

Plaintiffs also seek to supplement the record with a Real Clear Politics poll, which they allege plainly shows that President Barack Obama's polling received a boost after the 2008 Iowa caucuses. (*See* Pls.' Mot. Summ. J. at 42, n.55.) Plaintiffs assert that the court should take judicial notice of the poll, or consider it under the first *Dania Beach* exception, which permits consideration of

extra-record adverse evidence when an agency has deliberately or negligently excluded it. (*See* Pls.' Mot. to Supplement at 5.)

Plaintiffs have again failed to establish that supplementation is warranted. They submitted this poll because "[f]or the first time in its decisions, the FEC disputed whether President Obama's polling received a boost from the 2008 Iowa caucuses." (*Id*.) But the FEC's decision contains no such dispute; it simply notes that a polling expert found that President Obama did not "suddenly burst onto the political scene, polling shows that he was already reasonably well-known to voters in advance of the 2008 primaries." (A.R. 1934.)[1] Nevertheless, even if the decision did contain the dispute, Plaintiffs have not shown that the FEC deliberately or negligently excluded the poll, and judicial notice is inappropriate where none of the *Dania Beach* exceptions have been met. Accordingly, the court will not take judicial notice of the Real Clear Politics poll and will not consider it as part of the record in evaluating the cross-motions for summary judgment. Defendant's motion to strike the Real Clear Politics poll is GRANTED, and Plaintiffs' motion to supplement the record with it is DENIED.

vi. Douglas Schoen Affidavit

The administrative record in this case includes Douglas Schoen's expert report and a cover letter

---

[1] In this opinion, the "A.R." refers to the administrative record. The entire administrative record is contained in the "Second Joint Appendix," ECF No. 105.

advising Defendant that Schoen's complete data set could be provided upon request. Plaintiffs now seek to supplement the record with an affidavit from Schoen attaching the data set upon which he relied. (ECF No. 83-3.) Plaintiffs argue that the court should consider the affidavit and attachment under the second *Dania Beach* exception, which allows a court to supplement the record with evidence that provides needed background information. (*See* Pls.' Mot. to Supplement at 5.)

The court does not need the affidavit and the data set to determine whether the FEC considered the relevant factors. Generally, an administrative record need not be supplemented with underlying source documents where a document in the record provides detailed findings. *See Dist. Hosp. Partners*, 786 F.3d at 55 (finding supplementation unnecessary because source data did not constitute critical background information); *Todd v. Campbell*, 446 F. Supp. 149, 152 (D.D.C. 1978), *aff'd*, 593 F.2d 1372 (D.C. Cir. 1979) ("[T]he Court does not need to examine the raw data in order to determine whether or not the Commission decision was arbitrary and capricious or otherwise not in accordance with law."); *see also James Madison*, 82 F.3d at 1095–96 ("[T]he administrative record included detailed memoranda describing the examiners' findings and recommendations, and [the plaintiff] has given no reason why the district court should have looked beyond those memos."). This case does not present any reason to depart from this general understanding because the proposed supplement is, as Plaintiffs concede, "in many respects [] identical to what Schoen

said in his report." (Pls.' Mot. to Supplement at 5.) The duplicative nature of the supplement renders this case inapposite to the first case—*Oceana, Inc. v. Evans*, 384 F. Supp. 2d 203 (D.D.C. 2005)—upon which Plaintiffs rely. *Id*. at 217 n.17 (supplementing record with additional information from the creator of a scientific model because the proposed supplement explained how the agency misapplied the model). And Plaintiffs' second case is inapplicable because, contrary to Plaintiffs' representations to the court, the scientist's declaration in that case was stricken from the record. *See Sw. Ctr. For Biological Diversity v. Norton*, No. 98-CV-934 (RMU/JMF), 2002 WL 1733618, at *8 (D.D.C. July 29, 2002) ("In the end, the addition of Lande's declaration is a nonstarter, for it cannot be said to taint FWS' final decision.").

Moreover, to the extent Plaintiffs suggest that had the FEC requested the data set, it would have changed its finding that there is "no evidentiary basis" to credit the figures extracted from the data set, Plaintiffs are mistaken. The proposed data set—a one-page chart, entitled "National 18 Week Political Strategy Outline"—does not address any of the three issues identified in the FEC's rulemaking decision. It does not provide information on the underlying data or explain the circumstances under which a media firm offered these estimates. And lastly, it does not address or acknowledge the biases arising from a media firm's financial interest in estimating or promoting high media buy costs.

Accordingly, Defendant's motion to strike the Schoen Affidavit is GRANTED, and Plaintiffs' motion to supplement the record with it is DENIED.

2. Eric Olney Declaration

In support of their motion for summary judgment, Plaintiffs submitted a declaration from Eric Olney, an attorney in this matter. (ECF No. 83-2.) Attached to the declaration are several exhibits. The FEC does not object to the exhibits, but, in a footnote, it moves to strike the portions of the Olney declaration that contain "arguments by counsel" because arguments should be confined to the briefs. (*See* Def.'s Mot. to Strike at 5, n.2.) In response, Plaintiffs maintain that the declaration is "limited to a description of conversations and other acts performed by [the] law firm that could only be attested to in an attorney declaration." (*See* Pls.' Mot. to Supplement at 7.)

In moving to strike the portions of the Olney declaration, the FEC erred in three respects. It made its motion in a perfunctory manner in a footnote, and instead of identifying all instances of argument or providing an example of the objectionable argument, the FEC referred to the objected to material as "Portions of Declaration of Eric S. Olney." Then, in its reply brief, the FEC again confined its argument about the declaration to a footnote. While it is understandable that the five-page limit on the FEC's reply brief *may* justify relegating the argument to a footnote, the FEC's opening motion had no such page limitation and should have, at the very least, provided the court with an example of the objectionable argument. Accordingly,

the court declines to guess which portions of the declaration contain argument. *See Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (stating that the court "need not consider cursory arguments made only in a footnote"); *Huntington v. U.S. Dep't of Commerce*, 234 F. Supp. 3d 94, 101 (D.D.C. 2017) (deeming arguments made in footnote as forfeited and addressing only arguments made in briefs). Defendant's motion to strike unidentified portions of the Olney Declaration is DENIED.

3. Commissioner Ellen Weintraub's Remarks

In July 2015, the FEC held an open meeting during which it discussed Plaintiffs' rulemaking petition. Plaintiffs' motion for summary judgment includes remarks made by Commissioner Ellen Weintraub during the discussion. (*See* Pls.' Mot. Summ. J. at 8, n.8.) The FEC moves to strike Plaintiffs' use of the remarks because they constitute pre-decisional deliberations and are thus not properly considered part of the administrative record. (*See* Def.'s Mot. to Strike at 8–10.) Plaintiffs contend that the remarks are properly before the court to show institutional bias. (*See* Pls.' Mot. to Supplement at 7.) The court agrees with the FEC.

When reviewing an agency action, the agency's opinion and its pre-decisional deliberations are and should be handled differently. "Agency opinions, like judicial opinions, speak for themselves." *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C.Cir.1994). "Rendered at the conclusion of all the agency's processes and deliberations, they represent the agency's final

considered judgment upon matters of policy the Congress has entrusted to it." *PLMRS Narrowband Corp. v. F.C.C.*, 182 F.3d 995, 1001 (D.C. Cir. 1999). Accordingly, courts should review the agency's opinion with a view to determining whether the agency acted within the scope of its legal authority, explained its decision, relied on facts with some basis in the record, and considered the relevant factors. *Fulbright*, 67 F. Supp. 3d at 89. In contrast, predecisional deliberations are not final. Until the agency issues its opinion, commissioners are free to change their positions and the bases of their positions. *See Checkosky*, 23 F.3d at 489 ("Up to the point of announcement, agency decisions are freely changeable, as are the bases of those decisions."). Pre-decisional deliberations will not be effective if commissioners are concerned that "any slip of the tongue during an agency's decisionmaking process could be fatal." *PLMRS Narrowband Corp.*, 182 F.3d at 1001. Indeed, if commissioners' remarks were regularly deemed fair game for the administrative record, there could be a chilling effect on "candid and creative exchanges regarding proposed decisions and alternatives," "lead[ing] to an overall decrease in the quality of decisions." *Ad Hoc Metals Coal. v. Whitman*, 227 F. Supp. 2d 134, 143 (D.D.C. 2002). Thus, "[w]here an agency has issued a formal opinion or a written statement of its reasons for acting, transcripts of agency deliberations at Sunshine Act meetings should not routinely be used to impeach that written opinion." *Kan. State Network v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983).

In this case, Commissioner Weintraub's remarks were made during pre-decisional deliberations; thus, the presumption is against inclusion in the administrative record. In an attempt to rebut the presumption, Plaintiffs rely on a Third Circuit decision involving the termination of an employee's Employee Retirement Income Security Act benefits. *See Kosiba v. Merck & Co.*, 384 F.3d 58, 67 (3d Cir. 2004). Contrary to Plaintiffs' representations, *Kosiba* is not in any material way comparable to this case. In *Kosiba*, the district court found that the denial of benefits was not arbitrary and capricious. *Id*. at 61. The Third Circuit, when remanding the case, noted that the district court could supplement the record with "evidence of potential biases and conflicts of interest that is not found in the administrator's record" in order to determine whether a standard above the arbitrary and capricious standard should be applied. *Id*. at 67 n.5. The procedural posture and questions presented by the FEC's motion to strike are patently different from those presented in *Kosiba*, and therefore that case provides no basis for the court to supplement the record with Commissioner Weintraub's pre-decisional remarks. Defendant's motion to strike Commissioner Weintraub's remarks is GRANTED, and Plaintiffs' motion to supplement the record with it is DENIED.

B. Plaintiffs' and Defendant's Cross-Motions for Summary Judgment

Following this court's remand, the FEC reconsidered the allegations in both of Plaintiffs' complaints as well as those in Plaintiffs' petition for rulemaking. The FEC

subsequently issued two decisions again finding Plaintiffs' allegations unpersuasive. Plaintiffs now challenge the underpinnings of each decision.

1. FEC's Dismissals of Plaintiffs' Administrative Complaints

The FEC's Factual and Legal Analysis opened by explaining that the FEC uses the "plain meaning" of "endorse, support, and oppose" when determining whether the CPD qualifies as a staging organization that does not endorse, support, or oppose political candidates or political parties. (A.R. 7213.)

The FEC then analyzed evidence that it had previously reviewed in prior actions. In so doing, the FEC first relied on sworn declarations, from the individuals or organizations quoted in Plaintiffs' complaint, in which the individuals affirmed that the "statements attributed to them do not fairly or fully reflect their respective views on the participation of independent candidates in CPD debates." (A.R. 7216.) The FEC further found that even if the quotes in Plaintiffs' complaint were not cherry picked and indeed once represented the organization's perspective, "it would be inappropriate to rely on documents and statements that are more than 30 years old to ascertain CPD's present support or opposition to candidates and parties," because organizations change over time. (A.R. 7217.) And the CPD, in particular, conducts an internal review after every presidential election and has adjusted the process to be inclusive of independent candidates. (*Id*.) The FEC also found that the earlier documents and statements were of limited persuasive

value because each current CPD director swore that he or she had never observed a CPD board member conduct CPD business in a partisan fashion. (A.R. 7218.) Finally, the FEC reasoned that even if the earlier declarations reflected more current sentiments, they did not demonstrate that CPD endorsed, supported, or opposed any party or candidate. (*Id.*)

The FEC then addressed the evidence that had not been presented in prior complaints. It found that statements made in an interview by CPD Co-Chair Frank Fahrenkopf in his official capacity did not indicate any categorical support for or opposition to any candidates; they merely asserted the historical fact that, aside from Ross Perot, the debates have consisted of only Democratic and Republican candidates. (A.R. 7219.) The FEC also reviewed all other statements, financial contributions, and employment-related evidence to determine whether any were attributable to any CPD co-chair or director in his or her official capacity. (A.R. 7221.) The FEC then noted the CPD's recently adopted "Political Activities Policy" and an informal policy limited the risk that financial conflicts of interest could arise as a result of outside employment. (A.R. 7221–22.) Accordingly, the FEC found that the additional evidence failed to demonstrate that the CPD endorsed, supported, or opposed any political party or political candidate.

The FEC's Factual and Legal Analysis then addressed Plaintiffs' claim that the fifteen percent polling threshold is not objective and results in prohibited corporate contributions from CPD to debate participants. First, the FEC noted that, in another case,

the court concluded that "third party candidates have proven that they can achieve the level of support required by the CPD." (A.R. 7223–24.) Second, the FEC acknowledged that this case is different because Plaintiffs have presented new information in the form of expert reports.

The FEC took issue with Dr. Clifford Young's report, which found that to meet the 15 percent threshold, a candidate must achieve 60 and perhaps as much as 80 percent name recognition. (A.R. 7224.) The FEC claimed that by focusing solely on name recognition, Young oversimplified the study to the detriment of its usefulness. (AR. 7224–25.) Moreover, the Young report did not and cannot establish that it is impossible for independent candidates to reach the requisite name recognition because 63 percent of registered voters had heard of Libertarian Gary Johnson and 59 percent had heard of Green Party candidate Jill Stein. (AR.7225–26.)

The FEC then turned to political analyst Douglas Schoen's report, which stated that the cost to an independent candidate of achieving 60 percent name recognition would be over $266 million, including $120 million for paid media content production and dissemination. (A.R. 7224.) The FEC found that the report was flawed in large part because it was built on the Young report's premise that 60 to 80 percent name recognition is necessary to meet the 15 percent threshold. (A.R. 7226.) The FEC criticized the Schoen report for failing to consider that independent candidates can attract earned media (free coverage), that social media provides more economical avenues for

messaging, and that independent expenditure-only political committees pay for messaging in support of independent candidates. (A.R. 7226–28.)

Having identified significant limitations undermining the reports' persuasiveness, found that recent elections undermined the reports' findings, noted that independent candidates do not begin at zero percent name recognition, and acknowledged the judicial finding that independent candidates in the past have reached 15 percent in the polls, the FEC concluded that the expert reports did not provide reason to believe that the 15 percent threshold violated the requirement to use objective candidate-selection criteria for staging debates. (A.R. 7228–29.)

The FEC then addressed Plaintiffs' allegations that the CPD manipulates the selection of polls to favor Democratic and Republican candidates, and relies on inaccurate polls. The FEC found no evidence in the record that the CPD has manipulated the dates of the polls to favor any party. (A.R. 7230.) It relied on a sworn declaration from its independent polling expert stating, in part, that he has recommended which polls to use since 2000 based solely upon his professional judgment and without any partisan purpose or pre-determined result in mind. (*Id*.) With regard to Plaintiffs' allegations that polling in three-way races is subject to increased inaccuracy, the FEC gave greater weight to its own expert, finding that Young's conclusions about gubernatorial races were not equally applicable to presidential races and therefore could not support a reasonable inference that the CPD's criteria

for selecting debate participants was not objective. (A.R. 7231–32.)

Finally, the FEC dismissed Plaintiffs' remaining allegations as being grounded solely in policy and untethered from evidence. (A.R. 7233.)

In their motion for summary judgment, Plaintiffs assert that the FEC's conclusions were arbitrary, capricious, and contrary to law because the FEC: (1) applied the incorrect legal standard, (2) failed to properly consider the submitted evidence, and (3) ultimately reached the wrong conclusion regarding the objectivity of the CPD's debate requirement.

i. Legal Standard Adopted by the FEC

Plaintiffs argue that the FEC failed to articulate the standard it used in determining whether the CPD complied with the regulation prohibiting it from endorsing, supporting, or opposing political candidates or parties. (*See* Pls.' Mot. Summ. J. at 20.) They contend that the FEC's conclusory statement that it applied the plain meaning of each term is insufficient and offers no insight into its decision-making. (*Id*.) Further, Plaintiffs argue that the FEC applied the "control test" that this court instructed it not to use in *Level the Playing Field v. Fed. Election Comm'n*, 232 F. Supp. 3d 130 (D.D.C. 2017) ("LPF I"). (*Id*. at 20–21.)

In response, the FEC argues that not only does its articulation of the standard applied satisfy the court's instruction in *LPF I*, but it is also plainly reasonable and not contrary to law. (*See* ECF No. 90 ("Def.'s Resp. and Mot. Summ. J.") at 25.) The FEC notes, as it did in

its decision, that the Supreme Court determined in another context that two out of three of the terms—"support" and "oppose"—"provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (*Id*. (quoting *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 170 n.64 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).) In addition, the FEC contends that Plaintiffs' assertion that it applied an improper "control test" is belied by the record. (*Id*. at 26.)

The FEC has the better of this argument. Plaintiffs might prevail if the FEC had merely stated that it applied the plain meaning of "endorse," "support," and "oppose" without incorporating the application into its written analysis. But the FEC's discussion regarding its application demonstrates that it reviewed the evidence to determine whether it fell into one of three categories: (1) evidence that the CPD directly engaged in prohibited conduct, (2) evidence that CPD personnel engaged in prohibited conduct in an *official* capacity, and (3) evidence that CPD personnel engaged in prohibited conduct in a *personal* capacity. (A.R. 7213–22.) The FEC examined the evidence in the first two categories to determine whether it was persuasive enough to warrant a finding that the CPD violated the Federal Election Campaign Act ("FECA" or the "Act"). (A.R. 7214–20.) In so doing, the FEC used the plain meaning of the terms "endorse," "support," and "oppose." (A.R. 7213–22.) With respect to evidence in the third category, the FEC determined that it did not

violate the Act because an individual is permitted to wear "multiple hats" and "an individual's 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." (A.R. 7220–21.)

Moreover, to the extent that the FEC's decision contains a "control test," it is patently different from that in *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 63 (D.D.C. 2000). In *Buchanan*, the FEC looked for evidence demonstrating that the two major parties controlled the CPD, was involved in the CPD's operations, or had input in the CPD's debate decision. *Id*. at 70–71. The FEC's use of the control standard was deemed permissible to address the "specific contention . . . that the CPD was created to give the two major parties 'control over' the presidential debates." *Id*. at 70–71 n.8. Heeding *Buchanan*'s narrow holding, in *LPF I* this court advised the FEC that the *Buchanan* control standard was inapplicable to Plaintiffs' allegations because Plaintiffs "do not allege that the Democratic or Republican parties exercised control over the CPD, but instead that the CPD and its directors acted on a partisan basis to support those parties." *LPF I*, 232 F. Supp. 3d at 139. And on remand, the FEC made plain that it was not applying the *Buchanan* control standard, but a standard designed address whether the CPD was liable for its directors' actions. That is, in order for the FEC to address Plaintiffs' allegations that CPD directors were engaging in partisan activity that permeated the CPD and rendered it a partisan organization, the FEC needed to look to

the law of agency to assess the merits of Plaintiffs' claims.

The court therefore DENIES Plaintiffs' motion and GRANTS Defendant's cross- motion with respect to the appropriateness of the legal standard applied.

ii. FEC's Treatment of the Evidence

Plaintiffs argue that, for the second time, the FEC failed to adequately consider the evidence it presented in its two administrative complaints. (*See* Pls.' Mot. Summ. J. at 21–32.) In response, the FEC contends that Plaintiffs cannot meet their burden to show that the Commission acted contrary to law or in an arbitrary manner. (*See* Def.'s Resp. and Mot. Summ.J. at 28–41.) The FEC also notes that on remand, it heeded this court's directives and addressed each deficiency identified in LPF I. (*See id*. at 24–28.)

In reviewing the FEC's Factual and Legal Analysis, this court must assess whether the FEC considered the "relevant factors" and must "engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'" *Ethyl Corp. v. EPA*, 541 F.2d 1, 34–35 (D.C. Cir. 1976) (quoting *Volpe*, 401 U.S. at 415–16). However, in educating itself about "the intricacies of the problem before the agency," this court must be mindful that it is not a "superagency that can supplant the agency's expert decision-maker." *Id*. at 36. As such, this court must examine the administrative record only for a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Although Plaintiffs mount several challenges to the FEC's treatment of the evidence, for the reasons set forth below, none are availing.

a. Plaintiffs' disagreement with the FEC's findings regarding partisan evidence

In support of their allegations that the CPD is a partisan organization that has supported, endorsed, or opposed political parties or candidates, Plaintiffs submitted several categories of evidence for the FEC's review, none of which the FEC found persuasive.

1. Statements analyzed by FEC in prior matters

As discussed in *LPF I*, there is some overlap between the evidence submitted with Plaintiffs' complaints and evidence submitted with prior CPD-related complaints, including MURs 4987, 5004, and 5021, which were reviewed by the court in *Buchanan*. The court there noted that this evidence of the CPD's alleged partisanship was "not insubstantial" and "[a]n ordinary citizen might easily view the circumstances surrounding the creation of the CPD along with the evidence of major-party influence over the past three debates as giving some 'reason to believe' that the CPD always has supported, and still does support, the two major parties to the detriment of all others." *Buchanan*, 112 F. Supp. 2d at 72. However, it found that plaintiffs lacked "contemporaneous evidence" specifically relating to the CPD's decisions regarding the 2000 election debates at issue in that case. *Id*.

Here, after acknowledging its earlier conclusions that the age of the documents and statements undermined their persuasiveness as evidence of current bias, the FEC reevaluated the evidence. (A.R. 7215–18.) In so doing, it first compared Plaintiffs' characterization of several statements with declarations submitted by the quoted individuals. (A.R. 7215.) For example, Plaintiffs submitted statements made by the then-chairmen of the Republican and Democratic parties, who entered into a 1985 Memorandum of Agreement that the debates "should be principally and jointly sponsored and conducted by the Republican and Democratic National Committees," and issued a 1987 press release stating that "while the two party committees will be sponsors for all future presidential general election debates between our party nominees, we would expect and encourage" the League of Women's participation as a sponsor. (A.R. 2244, 2249.) Plaintiffs view these statements as "incontestably partisan." (*See* Pls.' Mot. Summ. J. at 22.) However, the FEC credited a declaration from CPD Co-Chair Fahrenkopf that Plaintiffs' "cherry-picked quotes" must be understood from the perspective of two individuals working to procure "buy in" from the two major parties because "securing commitment of both major party nominees" was a "major impediment" to institutionalized debates. (A.R. 7058, 7216.) In another instance, Plaintiffs submitted a statement made by a then-former CPD board member, who in a 2001 interview stated that the then-CPD Executive Director was "extremely careful to be bi-partisan." (A.R. 7216.) Plaintiffs assert that "bi-partisan" refers to an agreement between two major political parties. (*See* Pls.' Mot. Summ. J. at 22.) The

FEC, however, credited a declaration from the quoted individual that the word "bi-partisan" was used "to mean not favoring any one party over another." (A.R. 7095, 7216.) These two instances are not anomalous. The FEC deferred to each declarant's attestation that the meaning Plaintiffs ascribed to their statements was inaccurate. (A.R. 7035–7161, 7216.)

The FEC next determined that even if the past statements did "suggest support for debates exclusively between Republicans and Democrats or opposition to the inclusion of independent candidates," they did not "necessarily reflect the organization's perspective at the time it sponsored the 2012 presidential debates at issue." (A.R. 7217.) The FEC noted that the CPD conducts an internal review after every presidential election, indicating that the CPD may change over time. (*Id*.) And it cited the fact that, following allegations that the 1996 debates arbitrarily excluded Ross Perot, the CPD studied the 1996 debates, adopted new candidate selection criteria, and retained a polling expert to ensure the new criteria were carefully and thoughtfully applied. (*Id*.) The FEC also relied on sworn declarations from every director, attesting that he or she has "never observed any [CPD] Board member ever approach any issue concerning the CPD or its mission from a partisan perspective and the CPD has conducted its business in a strictly nonpartisan fashion." (A.R. 7218.) (alteration in original)

Finally, the FEC reasoned that even if the past statements "did reflect more current sentiments, they are not indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties

and their candidates, or CPD's opposition to third party candidates" for two reasons. (*Id*. (emphasis in original).) It noted that two of the documents were not released by the CPD, but the Democratic and Republican National Conventions "as expressions of [their] commitment to a new custom for presidential debates." (*Id*.) There was also no evidence that the statements from the CPD officers and directors were made in their capacity as CPD representatives. (*Id*.)

The court finds the FEC's three-layer assessment sufficient. It "examine[s] the relevant data and articulate[s] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Tex. Neighborhood Servs. v. U.S. Dep't of Health & Human Servs*., 875 F.3d 1, 6 (D.C. Cir. 2017). The FEC rationally decided, based on evidence presented to it, that the statements were non-partisan, not representative of the current CPD, or not indicative of CPD's organizational endorsement, support, or opposition. That Plaintiffs or other like-minded individuals may disagree with the FEC's interpretation of these statements is not enough for the court to find that the FEC's decision is arbitrary, capricious, or contrary to law. *See, e.g., New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 133 (D.D.C.2010) ("[W]hile New Life may understandably disagree with HHS' determination, mere disagreement cannot discharge its burden of establishing that the determination was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). Therefore, in light of the FEC's reasoned explanations, this court finds that the FEC's

treatment of previously considered evidence was neither arbitrary nor contrary to law.

2. Statements analyzed by FEC for the first time

Plaintiffs next challenge the FEC's treatment of a 2015 interview that CPD Co-Chair Fahrenkopf gave to SkyNews. In the interview, Fahrenkopf was asked the following question:

> And, this time around, of course, together, the television companies wanting to do the two lead candidates, the three lead candidates, and then a four candidate debate, the conservative leader said he wouldn't do that, and we've ended up with a seven person, a seven party, debate. What do you think the prospects for that are?

(A.R. 3099.) Fahrenkopf responded:

> Well, you know the primary debates here in the United States, we often—and of course the Republicans three years ago, had seven or eight people on the stage and people jokingly say it's less of a debate than a cattle show, because there's such little time for each candidate to get across in the short period what their views are on issues. That's why in the general election debate, we have a system, and we, you know, as you know, primarily go with the two leading candidates, it's been the two political party candidates, save in except for 1992 when Ross Perot participated in the debates. So, seven people on the stage at one time is very difficult, it's going to take a very

> clever moderator to make sure that each candidate gets an opportunity to put forth their views.

(*Id*.)

Plaintiffs read this exchange to indicate that Fahrenkopf "admit[ted] that the CPD uses its 'system' to ensure that only the 'two leading candidates' can participate in the debates." (A.R.3094.) Plaintiffs therefore argued that the FEC should view the admission as confirmation of the CPD's bias and respondents' violation of federal law. (A.R. 3093.) Plaintiffs also asked the FEC to not afford significant weight to a portion of CPD Director Janet Brown's declaration that CPD's selection system is designed to be inclusive enough to draw the leading candidates without being so inclusive that leading candidates would refuse to participate, because Plaintiffs viewed it as contradicting Fahrenkopf's admission. (A.R. 3094.)

Upon review, the FEC found "no categorical support for Democrats or Republicans or opposition to independent candidates" because it viewed Fahrenkopf as referring to a trend. (A.R. 7219.) Then, as it had done with the statements discussed above, the FEC looked to Fahrenkopf's declaration, in which he averred that his remarks were not fairly construed by Plaintiffs. (A.R. 3120.) Specifically, the FEC agreed with Fahrenkopf's explanation that in responding to a question about a seven-candidate debate, he simply stated "the historical fact that in the United States, the general election debates usually have been between two candidates, who have been the major party nominees." (A.R. 3119–20.) Lastly, the FEC noted that Fahrenkopf's remarks about

the effect a seven-candidate debate would have on the "educational value of debates" is consistent with the CPD's statement that it "operates for the purpose of providing meaningful debates for the public benefit." (A.R. 7219–20.)

In moving for summary judgment on the FEC's treatment of the SkyNews interview, Plaintiffs contend that the FEC improperly accepted Fahrenkopf's "bogus explanation" that he was merely stating a historical fact, because the interviewer's "question on its face was prospective." (*See* Pls.' Mot. Summ. J. at 22.) Plaintiffs note that the statement "we . . .primarily go with" is present tense. (*See* ECF No. 97 ("Pls. Reply and Opp. Mot. Summ. J.") at 10 (emphasis and ellipsis in original).) Plaintiffs also accuse the FEC of sharing the CPD's partisan bias because the FEC espouses the "paternalistic view" that multiple candidates have a negative effect on the debates' educational value. (Pls.' Mot. Summ. J. at 23.)

Plaintiffs contend that because the interviewer posed a prospective question, the FEC should have read Fahrenkopf's entire answer as relating to the future. This argument goes too far. In answering a question about the future, it is not unusual to use the past as a frame of reference. Given Fahrenkopf's answer and declaration, it was reasonable for the FEC to find that a portion of his statement asserted a historical fact—"we . . . primarily go with the two leading candidates, it's been the two political party candidates"—and the other portion of his answer addressed the question about a seven candidate debate in the future—"[s]o, seven people on the stage at one

time is very difficult, it's going to take a very clever moderator to make sure that each candidate gets an opportunity to put forth their views." (A.R. 3099.) Accordingly, the court finds that the FEC's treatment of Fahrenkopf's 2015 interview was neither arbitrary nor contrary to law.

3. Policies implemented by CPD leadership

As an exhibit to their complaints, Plaintiffs included a document entitled "Commission on Presidential Debates: Conflict of Interest Policy," created to protect the CPD's interests "when it is contemplating entering into a transaction or arrangement that might benefit the private interests of an officer, director or senior manager of the Organization or might result in a possible excess benefit transaction." (A.R. 2768–71, 4017.)

On remand, the CPD submitted a declaration from its Executive Director explaining that there are two additional policies. The first is an "informal policy," which provides that "Board members are to refrain from serving in any official capacity with a political campaign or party while serving on the Board." (A.R. 7103.) The second is a "formal Political Activities Policy" that expands upon the informal policy and "is intended to deter CPD-affiliated persons from participating, even in a personal capacity, in the political process at the presidential level (including the making of campaign contributions) while serving on the Board, despite the fact no such policy is required by FEC regulations." (A.R. 7103–04.)

The parties' arguments with respect to this evidence are akin to two ships passing in the night. Plaintiffs argue that the FEC erred in relying only on the CPD's description of the two previously undisclosed policies instead of actually reviewing the policies. (*See* Pls.' Mot. Summ. J. at 24–26.) According to Plaintiffs, the CPD's cursory description of the policies demonstrate that they are ineffective at prohibiting partisan activity. (*Id*.) In response, the FEC highlights that Plaintiffs submitted the "Conflict of Interest Policy" for the FEC's review, and the FEC subsequently reasonably determined that the policy "appear[s] to limit financial conflicts of interest that could arise as a result of outside employment." (Def.'s Resp. and Mot. Summ. J. at 34.) This response, focusing solely on the previously disclosed policy, indicates that the FEC may have misunderstood Plaintiffs' contention regarding the two undisclosed policies.

Putting this apparent misunderstanding aside, the FEC's treatment of both undisclosed policies was appropriate given its earlier findings that political statements, contributions, and positions held by CPD leadership solely in their personal capacity were acceptable. Plaintiffs' argument that the FEC erred in considering the two undisclosed policies might have had more traction had the FEC solely or primarily relied on policies it had neither viewed nor questioned. However, the FEC's Factual & Legal Analysis makes clear that its determination did not rise or fall with the policies. Before mentioning the policies, the FEC stated that (1) the statements of consequence were those that "express the position of the CPD," (2) the contributions of

consequence were those that "originated from CPD resources," and (3) the only positions of consequence were those where the CPD officer and directors "acted as agents of CPD" in the course of the outside employment. (A.R. 7221.) The FEC then found that Plaintiffs failed to adduce any evidence suggesting that specific statements, contributions, or positions fell into any one of those three categories. (*Id*.) Next, the FEC found that most of the challenged work preceded the individual's CPD service and thus was not fairly attributable to the CPD. (*Id*.) The FEC then addressed its reliance on all three policies, and added appropriate caveats to show that it had accounted for the CPD's failure to provide the Political Activities Policy and the informal policy. (*See id*. ("Although not part of Respondents' submissions, the policy reportedly . . .").) Accordingly, the court finds that the FEC's treatment of the policies was neither arbitrary nor contrary to law.

b. Plaintiffs' contention that the FEC failed to consider key partisan evidence

Plaintiffs argue that the FEC's Factual and Legal Analysis failed to "specifically address" the following "evidence demonstrating the CPD's partisan bias." (See Pls.' Mot. Summ. J. at 23.)

- Fahrenkopf's 1987 statement that the CPD was "not likely to look with favor on including third-party candidates in the debates" (A.R. 2252);

- Former Senator Alan Simpson's 2002 comment that "Democrats and Republicans on the commission [] are interested in the American people finding out more about the two major candidates—not about independent candidates who mess things up" (A.R. 3136);
- Representative John Lewis' comment that "the two major parties [have] absolute control of the presidential debate process" (A.R. 3095);
- Congressional testimony that the Democratic and Republican parties determine who participates in the debates, Buchanan, 112 F. Supp. 2d at 71;
- Fahrenkopf's reference to the Republican Party as "our great party" (A.R. 2382–83);
- Cash contributions from CPD directors to Democratic and Republican campaigns (see, e.g., A.R. 2370, 2373–80, 2403–05, 2407–08); and
- CPD directors' lobbying efforts on behalf of industries that gave money to Democratic and Republican candidates (see, e.g., A.R. 2370, 2385).

(*Id*. at 23–24.)

The first four pieces of evidence are encompassed in the FEC's discussion of evidence that it has previously reviewed in connection with other administrative complaints. (A.R. 7214– 18.) As detailed above, the FEC

found that all the previously considered evidence was non- partisan, not representative of the current CPD, or not representative of the organization. In *LPF I*, this court stated that it "does not expect the FEC to discuss every single page of evidence in order to demonstrate that it had carefully considered the facts." 232 F. Supp. 3d at 142.

The last three pieces of evidence are encompassed in the FEC's discussion of more recent partisan evidence that it had not previously considered. (A.R. 7219–22.) As noted above, the FEC reviewed that evidence to determine whether it amounted to evidence that (1) the CPD directly engaged in prohibited conduct, (2) CPD personnel engaged in prohibited conduct in an *official* capacity, and (3) CPD personnel engaged in prohibited conduct in a *personal* capacity. (A.R. 7213–22.) Categorizing the evidence in this manner was a critical step in the FEC's analysis because prohibited conduct done solely in a personal capacity was deemed benign. The FEC found that each of the last three pieces of evidence fell within the benign category. Beginning with Fahrenkopf's article in which he referred to the Republican Party as "our great party," the FEC found that "there is no indication that Fahrenkopf wrote his op-ed in his official capacity as CPD co-chair, nor does the opinion piece express positions on behalf of CPD." (A.R. 7221.) With respect to the cash contributions made by CPD personnel to Democratic and Republican campaigns, the FEC found "no suggestion that any of the contributions . . . originated from CPD resources or any source other than their respective personal assets." (*Id*.) Lastly, with respect to the lobbying efforts, the

FEC found no information that the CPD directors acted "as agents of CPD in the course of outside employment," "on behalf of the CPD" in the course of lobbying efforts, or "on behalf of their employer while volunteering for CPD." (*Id.*)

Because the FEC did in fact address each piece of evidence identified by Plaintiffs, Plaintiffs' 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), and such a disagreement does not discharge Plaintiffs of their burden to establish that the decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Therefore, this court finds in favor of the FEC.

c. Plaintiffs' contention that the FEC and CPD Directors failed to give sufficient consideration to evidence that CPD Directors were participants in a "partisan scheme"

In *LPF I*, this court ordered that on remand, the FEC must notify the named directors that Plaintiffs' complaint alleged that the directors had committed a violation of the FECA, give the directors the opportunity to address the allegations, and consider the evidence against the directors. 232 F. Supp. 3d at 143. In accordance with this court's order, the FEC notified the directors and provided them with an opportunity to respond. Nine of the directors submitted sworn declarations containing nearly identical paragraphs. (A.R. 7143–61.)

Plaintiffs contend that the directors' responses demonstrate that neither they nor the FEC gave "any sufficient thought to the substantial evidence." Specifically, they contend that the declarations are meaningless because they are virtually identical and summarily deny the allegations. (*See* Pls.' Mot. Summ. J. at 32.) Plaintiffs also assert, using Alan Simpson's declaration as an example, that the declarations are flawed because they do not confirm that the directors reviewed the complaint or supporting evidence. (*Id*. at 32–33.) Plaintiffs therefore conclude that the FEC should have questioned their validity. (*Id*. at 33.)

The FEC responds that it was reasonable for it to give greater weight to the declarations because Plaintiffs' "cherry-picked quotes from CPD's directors were not made under oath and the quoted statements do not necessarily contradict respondents' declarations." (Def.'s Resp. and Mot. Summ. J. at 35.) The FEC uses Simpson's declaration to demonstrate that he did in fact directly address the statement that Plaintiffs accused him of ignoring. (*Id*.) As to Plaintiffs' argument that the FEC should have questioned the validity of the declarations, the FEC states that the Factual and Legal Analysis' robust discussion regarding the evidence's age, history, context, and legal significance demonstrates that it did not blindly accept the declarations. (ECF No. 104 ("Def.'s Reply") at 12–13.) In addition, the FEC argues that in the absence of the declarations, it would have reached the same conclusion because all the evidence—except for the remarks made in Fahrenkopf's 2015 interview—was "too old and/or only pertained to CPD directors'

non-official capacity and thus likely would not establish CPD liability." (*Id*. at 13.) Lastly, the FEC cites Circuit case law stating that it is not a valid objection that conflicts in the evidence might have been resolved differently or other inferences may have been drawn from the same record. (*Id*.)

The FEC determined that out of all of Plaintiffs' evidence, only one statement— Fahrenkopf's 2015 interview—was both recent and given in an official capacity. The FEC engaged in an in-depth analysis of that statement before finding that it did not evince partisan bias. For the remaining statements, the FEC deemed them benign because they were outdated or made in the individual's personal capacity, and therefore it was not unreasonable for the FEC to award greater weight to the more recent declarations. In addition, to the extent the FEC may have erred in relying on the declarations, such error was not prejudicial given that the FEC also separately identified critical imperfections in the statements. *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) ("The harmless error rule applies to agency action because '[i]f the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration.'"). The court therefore finds that Plaintiffs have not met their burden in establishing that the FEC's treatment of the nine declarations was arbitrary, capricious, or otherwise contrary to law.

d. Plaintiffs' disagreement with the weight afforded to their experts

Plaintiffs submitted two supporting expert reports, one of which was prepared by Clifford Young, and in which report he opined that "on average, an independent candidate must achieve a minimum of 60% name recognition, and likely 80%, in order to obtain 15% vote share." (A.R.2493.) Young arrived at this conclusion after noting, among other things, that there is a positive correlation between name recognition and vote share. (*Id*.) He also stated that three-way races are more error prone than two-way races, which could lead to an independent candidate's improper exclusion from the debate. (A.R. 2519.) The other expert report was authored by Douglas Schoen. Building on Young's finding that 60 percent name recognition is required to meet the 15 percent polling threshold, Schoen opined that an independent candidate should expect to spend $266,059,803 to run a campaign capable of meeting the 15 percent polling threshold, and that this level of financing is impossible for all but the major-party candidates. (A.R. 2555–56.) Schoen also declared that with respect to polling error, elections with more than two candidates are prone to distinct volatility that limits the predictive power of pre-election polling data. (A.R. 2556.) According to Plaintiffs, the two expert reports work in tandem to support their argument that the 15 percent threshold is not an objective criterion.

Because the FEC addressed the two expert reports at length in its Factual & Legal Analysis, Plaintiffs do not and cannot contend that the FEC did not take the expert reports into account. Instead, they argue that

the FEC erred in determining how much evidentiary weight to give the expert reports. But the fact that Plaintiffs 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.

With respect to Young's expert report, the FEC found that (1) the analysis was limited in its scope because it considers one factor—name recognition—to the exclusion of other key factors, such as fundraising, candidate positioning, election results, idiosyncratic events, policy preferences, and political missteps; (2) the report did not establish that independent candidates do not and cannot acquire 60 percent name recognition; (3) Young's metric for polling error—the difference between the poll and the actual result on election—was not useful because the CPD is concerned only with a candidate's support at a given moment; and (4) Young's reliance on three- way gubernatorial election polling was not useful in the presidential election polling context because presidential election polling is inherently more reliable than polling in low turn-out elections, such as gubernatorial races. (A.R. 7224–25, 7231–32.)

The FEC found that Schoen's report (1) was flawed because it built upon the Young report's flawed findings; (2) presumed that all independent candidates must pay for all of their media; a presumption which was unfounded because candidates are able to attract earned media; (3) failed to address the fact that digital and social media has enabled the sharing of campaign messaging at a much lower cost than more traditional

news outlets; (4) did not account for the fact that independent expenditure-only political committees are on the rise and are able pay for messaging, which reduces the amount the candidate must spend in order to reach 60 percent name recognition; and (5) incorrectly presumed that independent candidates begin with 0 percent name recognition and funding. (A.R. 7226–29.)

Each of the FEC's evidentiary findings was informed and reasonable given the facts presented to it and the flaws identified by the FEC. That Plaintiffs would have come to a different conclusion regarding the weight afforded to the reports does not render the FEC's findings arbitrary, capricious, or contrary to law. Moreover, the FEC was permitted to afford more weight to its expert, Gallup's Editor-in-Chief Frank Newport. *See Wis. Valley Improvement v. F.E.R.C.*, 236 F.3d 738, 746–47 (D.C. Cir. 2001) ("Given the presence of disputing expert witnesses," the court "'must defer to 'the informed discretion of the responsible federal agencies.'").

iii. FEC's Determination Regarding CPD's Polling Criterion

Finally, Plaintiffs argue that the FEC's dismissals were arbitrary and capricious because the agency "ignored or misconstrued the evidence that the CPD's polling criteria is not 'objective' and instead favors the major party nominees." (*See* Pls.' Mot. Summ. J. at 33.) The FEC regulations require that staging organizations such as the CPD "use pre-established objective criteria to determine which candidates may participate in a

debate," but does not define "objective criteria." 11 C.F.R. § 100.13(c); *see also Perot v. FEC*, 97 F.3d 553, 559–60 (D.C. Cir. 1996) (stating that regulation "does not spell out precisely what the phrase 'objective criteria' means," giving "the individual organizations leeway to decide what specific criteria to use"). In *Buchanan*, however, the court noted that "the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it." 112 F. Supp. 2d at 74.

Here, Plaintiffs bring two challenges. First, they take issue with the FEC's failure to dispute that if an independent candidate did reach 15 percent support, there is nothing to prevent the CPD from manipulating the selection of polls to exclude the independent candidate. (*See* Pls.' Mot. Summ. J. at 34.) Second, Plaintiffs contend that the FEC failed to address the fact that no independent candidate has satisfied the 15 percent criterion since it was instituted by the CPD. (*See id*.)

Plaintiffs' first challenge is based in conjecture, requiring the occurrence of two separate events: first, that an independent candidate reaches the 15 percent threshold, and second, that the CPD manipulates the selection of polls to exclude the independent candidate. Faced with such hypothetical scenarios, the FEC relied on its independent polling expert's sworn declaration that he recommends polls based on the quality of the methodology employed, the reputation of the polling organizations, and how often the polling is conducted. (A.R. 3045.) The expert further averred that he makes

recommendations based solely upon his professional judgment and without any partisan purpose or pre-determined result in mind, and that the CPD has always adopted his recommendations. (*Id*.) In light of this declaration, the FEC's decision to discount Plaintiffs' hypothetical misconduct cannot be construed as arbitrary.

With regard to Plaintiffs' second challenge, once the FEC determined that the Schoen and Young reports contained flaws that undermined their persuasive value, the FEC relied on a judicially-upheld finding that independent candidates have reached the 15 percent threshold in the past. Indeed, the *Buchanan* court stated:

> In view of the substantial deference I must accord to the FEC's interpretation of its own regulations, I cannot conclude that it was plainly erroneous or inconsistent with the regulation for the FEC to find that the 15% support level set by the CPD is "objective" for the purposes of 11 C.F.R. § 110.13(c). As Brown indicated in her declaration, several third party candidates have in the past achieved over 15% support in the polls taken at or around the time that the debates are traditionally held. For instance, by September of 1968, George Wallace had achieved a level of support of approximately 20% in the polls. John Anderson was invited by the League of Women Voters to participate in the 1980 presidential debates after his support level reached approximately 15%. Finally, in 1992, Ross Perot's standing in the polls was near 40% at some points and he ultimately

> received 18.7% of the popular vote that year. (Brown Decl. at ¶ 35.) Thus, third party candidates have proven that they can achieve the level of support required by the CPD. While a lower threshold of support might be preferable to many, such a reading is neither compelled by the regulation's text nor by the drafters' intent at the time the regulation was promulgated. Accordingly, deference to the FEC's interpretation is warranted.

112 F. Supp. 2d at 74. And because the FEC first discounted all newly submitted evidence purporting to show that the criterion was not objective, all that remained was the evidence that was considered in *Buchannan*, and thus the FEC's reliance on *Buchanan*'s findings that it was possible for a third party candidate to reach the polling threshold was reasonable.

Accordingly, the court concludes that the FEC's determination regarding the polling criterion was neither arbitrary nor capricious. The court therefore DENIES Plaintiffs' motion and GRANTS Defendant's cross-motion with respect to the FEC's determination regarding the polling criterion.

2. FEC's Decision to Not Engage in Rulemaking

Plaintiffs also move for summary judgment on its claim that the FEC's decision not to initiate rulemaking was arbitrary and capricious in violation of the APA. The court's review of an agency's decision not to engage in rulemaking is very limited, and that decision "is at the high end of the range of levels of deference we give

to agency action under our 'arbitrary and capricious' review." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (internal quotation omitted). The proper inquiry is "whether the agency employed reasoned decision- making in rejecting the petition." *Id*. In making this assessment, the court "must examine 'the petition for rulemaking, comments pro and con . . . and the agency's explanation of its decision to reject the petition." *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 817–18 (D.C. Cir. 1981)). An order overturning the agency's decision and requiring promulgation of a rule is reserved for only "the rarest and most compelling of circumstances." *WWHT*, 656 F.2d at 818. However, if the agency fails to provide a reasonable explanation for its decision, an appropriate remedy may be a remand to the agency for reconsideration and publication of a new decision or the commencement of rulemaking if the agency so decides. *See, e.g., Shays v. FEC*, 424 F. Supp. 2d 100, 116–17 (D.D.C. 2006).

> In its Petition for rulemaking, Plaintiffs requested the following:
>
> > The FEC should conduct a rulemaking to revise and amend 11 C.F.R. § 110.13(c), the regulation governing the criteria for candidate selection that corporations and broadcasters must use in order to sponsor candidate debates. The amendment should (A) preclude sponsors of general election presidential and vice-presidential debates from requiring that a candidate meet a polling threshold in order to be admitted to the debates;

> and (B) require that any sponsor of general election presidential and vice-presidential debates have a set of objective, unbiased criteria for debate admission that do not require candidates to satisfy a polling threshold to participate in debates.

(A.R. 0009–10.) In support of this request, Plaintiffs presented much of the same evidence, including the Young and Schoen reports, as they presented in support of their administrative complaint. Plaintiffs' basic argument is that the use of a single polling criterion to determine admission to candidate debates is particularly susceptible to excluding candidates and confining support to the two major party candidates, creating an appearance of corruption or unlawful conduct. Plaintiffs therefore argue that in the unique context of presidential and vice-presidential debates, which are run solely by the CPD, the FEC should continue permitting the CPD or future debate staging organizations to craft their own objective criteria but disallow the use of polling thresholds. (A.R. 0032.) The FEC received 1,264 comments, and only one—from the CPD— opposed the Petition. (A.R. 1903.)

When it remanded this case, this court identified several problems with the FEC's reasoning. For example, the FEC acknowledged that polling thresholds could be used to advance one candidate over another, and summarily stated that other mechanisms would detect the issue without explaining why alternative processes would be preferable. (A.R. 1905.) And the FEC assessed a nationwide prohibition on polling thresholds for every debate as opposed to Plaintiffs' requested prohibition on polling thresholds for only

presidential and vice president debates. (*Id*.) The court therefore directed the FEC to reconsider the rulemaking petition and issue an opinion addressing the court's concerns. *LPF I*, 232 F. Supp. 3d at 148.

Following the remand, the FEC again denied Plaintiffs' petition for rulemaking. Plaintiffs now move for summary judgment based on the FEC's treatment of its two expert reports. (*See* Pls.' Mot. Summ. J. at 36–43.) As Plaintiffs aptly note, the reasoning in the Supplemental Notice of Disposition "largely mirrors the arguments in the Factual and Legal Analysis" and adds a "handful of additional arguments." (*Id*. at 36.) And given 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 are sufficient. However, the court notes that the flaws identified by the FEC included: (1) Young's decision to measure name recognition at an early stage in each model may have amplified polling errors, which are higher earlier in the election cycle; (2) Young's analysis does not account for the fact that the September candidate field is smaller than the earlier stage that his analysis uses; (3) Young's report does not establish any causative effect between name recognition and vote share; (4) Young's report fails to provide any evidence that polling error is biased in a manner specific to party affiliation; (5) Schoen's report builds its conclusion through an extensive series of unsupported suppositions and assertions; (6) Schoen's report failed to explain the circumstances under which the leading corporate and political media buying firm

offered its estimate that an independent candidate would need $100 million for a media buy; and (7) Schoen's report does not account for any inherent biases held by the buying firm. (A.R. 1932–37.) These flaws vary in magnitude, but as discussed above, the other flaws were sufficient for the FEC to discount Plaintiffs' two proffered experts and rely on its own independent expert. Thus, Plaintiffs have presented no basis upon which this court may find that the FEC's decision not to engage in rulemaking was arbitrary, capricious, or otherwise contrary to law. The court therefore DENIES Plaintiffs' motion and GRANTS Defendant's cross-motion with respect to the FEC's decision not to engage in rulemaking.

IV. CONCLUSION

For the foregoing reasons, Defendant's motion to strike is GRANTED, in part and DENIED, in part, Plaintiffs' motion to supplement is DENIED, Plaintiffs' motion for summary judgment is DENIED, and Defendant's cross-motion is GRANTED.

An appropriate Order accompanies this Memorandum Opinion.

Date: March 31, 2019

/s/ Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

APPENDIX C

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MAR 31 2017

VIA CERTIFIED AND ELECTRONIC MAIL

Alexandra A.E. Shapiro, Esq.
Shapiro, Arato & Isserles LLP
500 Fifth Avenue, 40th Floor
New York, NY 10110

RE: MURs 6869R & 6942R Commission on Presidential Debates, *et al*.

Dear Ms. Shapiro:

The Commission previously notified you of its findings in MURs 6869 and 6942, which were generated by complaints you filed on behalf of Level the Playing Field and Dr. Peter Ackerman, and the Green Party of the United States and the Libertarian National Committee, Inc., respectively. In each matter, the Commission found that there was no reason to believe the Commission on Presidential Debates ("CPD") or Frank Fahrenkopf Jr. and Michael D. McCurry as co-chairs violated 52 U.S.C. §§ 30116(f) or 30118(a), and no reason to believe that CPD violated 52 U.S.C. §§ 30103 or 30104. Accordingly, the Commission closed each file.

You challenged the Commission's decisions in MURs 6869 and 6942 in *Level the Playing Field v. FEC*, No. 1:15-cv-01397. On February 1, 2017, the United States District Court for the District of Columbia ordered the Commission to issue a decision consistent with the court's opinion. Pursuant to the court's remand, these matters were reopened and numbered MUR 6869R and MUR 6942R.

On March 29, 2017, the Commission reconsidered the allegations in the complaints and found, on the basis of the information provided, that there is no reason to believe the Commission on Presidential Debates ("CPD"), Frank Fahrenkopf Jr. and Dorothy S. Ridings as co-chairs, or the ten named staff and board members violated 52 U.S.C. §§ 30116(f) or 30118(a) by making prohibited contributions and expenditures and accepting prohibited contributions, and no reason to believe that CPD violated 52 U.S.C. §§ 30103 or 30104 by failing to register and report as a political committee. Accordingly, on March 29, 2017, the Commission closed the files in MUR 6869R and 6942R.

Documents related to the cases will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 52 U.S.C. § 30109(a)(8). If you have any questions, please

contact Meredith McCoy, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

/s/ Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENTS : Commission on Presidential Debates
Frank Fahrenkopf Jr., Co-Chair
Dorothy S. Ridings, Co-Chair
Michael D. McCurry
Janet H. Brown
Howard G. Buffet
John C. Danforth
John Griffen
Antonia Hernandez
John I. Jenkins
Newton N. Minow
Richard D. Parsons
Alan K. Simpson
MURs: 6869R; 6942R

I. INTRODUCTION

These matters are before the Commission on remand from the United States District Court for the District of Columbia following its decision in *Level the Playing Field v. FEC,* No.1 :15-cv-01397 (D.D.C. Feb. 1, 2017). At issue in the case was the Commission's prior determination that there is no reason to believe the Commission on Presidential Debates ("CPD") and its then-co-chairs, Frank Fahrenkopf Jr. and Michael D. McCurry, made or accepted prohibited corporate contributions by failing to comply with the Commission's regulations on debate sponsorship in hosting its 2012 presidential and

vice-presidential general elections debates. The court also reviewed the Commission's finding that there is no reason to believe CPD failed to register and report as a political committee. The district court concluded that the Commission acted "arbitrarily and capriciously in its enforcement decisions by failing to address evidence or articulate its analysis" and ordered the Commission to issue a new decision consistent with its Opinion.[1]

In accordance with the court's instructions, the Commission has reconsidered the full scope of the available information.[2] On the basis of that review,

---

[1] *Level the Playing Fieldv. FEC*, No. l:15-cv-01397, 2017 WL 437400 at *13 (D.D.C. Feb. 1, 2017).

[2] *See* Compl., MUR 6869 (Sept. 11, 2014) ("6869 Compl."); Resp. of CPD, Fahrenkopf, and McCurry, MUR 6869 (Dec. 15, 2014) ("6869 CPD Resp."); First Supp. Compl., MUR 6869 (Nov. 25, 2014) ("6869 Supp. Compl.# l "); Second Supp. Compl., MUR 6869 (Apr. 15, 2015) ("6869 Supp. Compl. #2"); Supp. Resp. of CPD, Fahrenkopf, and McCurry, MUR 6869 (May 26, 2015) ("6869 Supp. CPD Resp."); *see also* Compl. MUR 6942 (June 17, 2015) ("6942 Compl."); Resp. of CPD, Fahrenkopf, and McCurry, MUR 6942 (July 1, 2015) ("6942 CPD Resp."); Supp. Compl., MUR 6942 (Oct. 21, 2015) ("6942 Supp, Compl."); Supp, Resp, of CPD, Fahrenkopf, and McCurry, MUR 6942 (Nov. 18, 2015) ("6942 Supp. CPD Resp.").

Consistent with the court's instructions, the Commission also notified ten CPD board and staff members that had been named as respondents in these matters but not previously notified and provided each with an opportunity to respond. Janet H. Brown, Howard G. Buffet, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, N, Minow, Richard D. Parsons, Dorothy S. Ridings, and Alan K. Simpson responded jointly on March 6, 2017. Resp. of Janet H. Brown, Howard G. Buffet, John

the Commission has concluded that the available information does not support a reasonable inference[3] that CPD "endorses, supports, or opposes" federal candidates or political parties or failed to use "objective criteria" in selecting its 2012 debate participants. Accordingly, the Commission finds no reason to believe that CPD, Fahrenkopf and Dorothy S. Ridings as co-chairs, and the ten named staff and board members (collectively, "Respondents") violated 52 U.S.C. §§ 30116(f) or 30118(a) by making prohibited contributions and expenditures and accepting prohibited contributions, and no reason to believe that CPD violated 52 U.S.C. §§ 30103 or 30104 by failing to register and report as a political committee.

II. FACTUAL BACKGROUND

CPD is a nonprofit corporation formed under Section 501(c)(3) of the Internal Revenue Code[4] to "organize, manage, produce, publicize and support debates for the candidates for President of the United

---

C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, N. Minow, Richard D. Parsons, Dorothy S. Ridings, and Alan K. Simpson, MURs 6869R & 6942R (Mar. 6, 2017) ("CPD Dir. Resp."), and this analysis reflects the information presented therein.

[3] *See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg, 12545, 12546 (Mar. 16, 2007)(explaining circumstances supporting a no-reason-to-believe finding).

[4] 26 U.S.C. § 50l(c)(3).

States."[5] The organization derives its funding from a variety of sources, including corporations, foundations, universities, and private donations.[6]

According to information presented by both the Complainants and Respondents, CPD was created in response to the recommendations of two studies on presidential debates from the Georgetown University Center for Strategic and International Studies and the Harvard University Institute of Politics.[7] Both studies observed the educational value of presidential debates and proposed mechanisms to guarantee them as a permanent part of the electoral process.[8] Among other

---

[5] 6869 Compl. Ex. 100 (IRS Form 1023, *Application for Recognition of Exemption for the Commission on Presidential Debates* (Mar. 5, 1987)); 6942 Compl. Ex. 100 (same). The CPD also staged three presidential debates and one vice-presidential debate in the 2016 election cycle. CPD Dir. Resp. Ex. 4 (Supp. Declaration of Janet H. Brown) ("Supp. Brown decl.").

[6] 6869 Compl. Ex. 4 (CPD: *Our Mission*, COMM'N. ON PRESIDENTIAL DEBATES, http://www.debates.org//index.php?page=about-cpd (last visited Mar. 1, 2017)); 6942 Compl. Ex. 4 (same).

[7] 6869 Compl. Ex. 20 (Excerpts from NEWTON N. MINOW AND CRAIG L. LAMAY, INSIDE THE PRESIDENTIAL DEBATES 62-63 (2008)) ("MINOW & LAMAY"); 6942 Compl. Ex. 20 (same); 6869 CPD Resp. Ex. I (Declaration of Janet H. Brown) ("Brown Decl."); 6942 CPD Resp. Ex. I (same); CPD Dir. Resp. Ex. 1 (Decl. of Frank J. Fahrenkopf) ("Supp. Fahrenkopf Decl."); CPD Dir. Resp. Ex. 2 (Decl. of Dorothy S. Ridings) ("Ridings Decl.").

[8] MINOW & LAMAY, *supra* note 7, at 63; Brown Decl., *supra* note 7, 9; Supp. Fahrenkopf Decl., *supra* note 7, ¶¶ 7-9.

recommendations, the studies called upon the Democratic and Republican Parties to play a role in institutionalizing the debates in order to ensure the participation of leading candidates[9] who, as recent history had shown, at times had a disincentive to participate.[10] In response, the then-chairmen of the

---

[9] MINOW & LAMAY, *supra* note 7, at 63; Brown Decl., *supra* note 7, ¶¶ 10; Supp. Fahrenkopf Decl., *supra* note 7, ¶¶ 7-9.

[10] MINOW & LAMAY, *supra* note 7, at 62. Minow has been a CPD board member since the organization's founding after previously serving as co-chair of presidential debates for the League of Women Voters and a member of the Harvard debate study. *Id*. This exhibit, provided by Complainants, is an excerpt from his book on presidential debates, which provides a first-hand history of the formation of the CPD. In it, he and his co-author write:

> The most persistent and difficult impediment to debates, any where, 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. . . . But I thought the voters benefit from debates and so it was essential to find a way to bring pressure on the candidates to participate. The parties could do that.

Id. This conclusion followed Minow's experience co-chairing the League's 1980 presidential debates. That year, President Jimmy Carter had refused to participate in a debate hosted by the League after the organization invited both Republican nominee Ronald Reagan and independent candidate John B. Anderson. MINOW & LAMAY, *supra* note 7, at 56; Ridings Decl., *supra* note 7, ¶¶ 9-12, Tab A. With the hope of enticing Carter's participation, the League

Democratic and Republican National Committees, Paul G. Kirk Jr. and Frank J. Fahrenkopf Jr., respectively, jointly called for the creation of the independent Commission on Presidential Debates, which was incorporated on February 19, 1987.[11]

Since its founding, CPD has staged almost every general election presidential debate including three presidential debates in the 2012 election cycle. [12]CPD purports to stage its debates pursuant to the safe harbor provision of the Federal Election Campaign Act of 1971, as amended (the "Act"), that exempts from the definition of "expenditure" any "nonpartisan activity designed to encourage individuals to vote or

---

subsequently offered to host a two-way debate between Carter and Reagan if all three candidates agreed to participate in a three-way debate afterward. MLNOW & LAMAY, *supra* note 7, at 56; Ridings Decl., *supra* note 7, Tab A. Reagan refused and the plan was scrapped. Ultimately, after Anderson dropped below the League's 15 percent polling threshold, Carter and Reagan agreed to a two-way debate. MLNOW & LAMAY, *supra* note 7, at 57; Ridings Decl. ¶ 11, Tab A.

[11] MINOW & LAMAY, *supra* note 7; Brown Decl., *supra* note 7, 11., supra note 7; Brown Decl., supra note 7, ¶ 11.

[12] 6869 Compl. Ex. 4 (CPD: *Our Mission*, COMM'N. ON PRESIDENTIAL DEBATES, http://www.debates.org /index.php?page=about-cpd (last visited Mar. I, 2017)); 6942 Compl. Ex. 4 (same). CPD has also hosted every vice-presidential debate since 1988, including one in the 2012 election cycle. *See CPD: Our Mission*, COMM'N. ON PRESIDENTIAL DEBATES, http://www.debates.org/ index.php?page=about-cpd.

to register to vote."[13] Although the Act generally prohibits corporations from making contributions to federal candidates,[14] this exemption permits 501(c)(3) and 501(c)(4) organizations that do not "endorse, support, or oppose political candidates or political parties" to stage candidate debates,[15] provided the events abide by certain standards, including the use of "pre-established objective criteria" to determine which candidates may participate.[16]

On October 20, 2011, CPD adopted three criteria that candidates would be required to satisfy in order to participate in the 2012 general election debates. CPD required participants to: (1) satisfy the eligibility requirements for president under the U.S. Constitution; (2) qualify for enough state ballots to have a mathematical chance of securing an Electoral College majority; and (3) obtain the support of at least 15 percent 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

---

[13] 52 U.S.C. § 30101(9)(B)(ii).

[14] 52 U.S.C. § 30118(a); *see also* 52 U.S.C. § 30116(f).

[15] 11 C.F.R. § 110.13(a); Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg, 76,734 (Dec. 27, 1979) ("1979 E&J"); *see also Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 64,260 (Dec, 14, 1995) ("1995 E&J").

[16] 11 C.F.R, § 110.13(b), (c).

determination."[17] CPD applied the same participation criteria in 2000, 2004, 2008, and 2016.[18]

Applying these criteria to the 2012 candidate field, CPD determined that Democratic nominee President Barack Obama and Republican nominee Mitt Romney were eligible to participate in the three presidential debates.[19] CPD also determined that Vice President Joe Biden and Representative Paul Ryan qualified for the

---

[17] 6869 Compl. Ex. 8 (CPD: 2012 *Candidate Selection Criteria*, COMM'N. ON PRESIDENTIAL DEBATES, http://www.debates.org/index.php?page=candidate-selection-process (last visited March I, 2017)) ("2012 Debate Criteria"); 6942 Comp!. Ex. 8 (same).

[18] 2012 Debate Criteria, *supra* note 17.

[19] 6869 Compl. Exs. 9 (2012 *Application of Criteria*, COMM'N. ON PRESIDENTIAL DEBATES (Sept. 21, 2012), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=42&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01 returnid=80), 11 (20l 2 *Application of Criteria - Second Presidential Debate*, COMM'N, ON PRESIDENTIAL DEBATES (Oct.12,2012),http://www.debates.org/index.php?mact=News,cntnt0l,detail,0&cntnt0larticleid=46&cntnt0lorigid=27&cntnt0ldetailtemplate=newspage&cntnt0lreturnid=80), and 12 (2012 *Application of Criteria - Third Presidential Debate*, COMM'N. ON PRESIDENTIAL DEBATES (Oct. 19, 2012),http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt0larticleid=47&cntnt0lorigid=27&cntnt0ldetailtemplate=newspage&cntnt01returnid=80); 6942 Compl. Exs. 9 (same), 11 (same), and 12 (same).

vice presidential debate.[20] CPD concluded that no 2 other candidates satisfied the criteria for inclusion in its 2012 debates.[21]

III. PROCEDURAL BACKGROUND

On September 11, 2014, Level the Playing Field, Inc. ("LPF") and Dr. Peter Ackerman filed the complaint in MUR 6869. The Complaint, which includes over 100 exhibits, makes two principal allegations. First, Complainants allege that CPD is a partisan organization that "endorses" and "supports" political candidates and political parties, to wit, the Democratic and Republican Parties and their respective presidential nominees.[22] Broadly, Complainants provide three categories of information in support of this claim: (I) documents and statements from CPD officers and directors suggesting that CPD was formed as a partisan organization;[23] (2) information suggesting that

---

[20] 6869 Compl. Ex. 9 (2012 *Application of Criteria*, COMM'N, ON PRESIDENTIAL DEBATES (Sept. 21, 2012), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=42&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80); 6942 Compl. Ex. 9 (same).

[21] 6869 Compl. Exs. 9, 11, and 12, *supra* note 19; 6942 Compl. Exs. 9, 11, and 12, *supra* note 19.

[22] 6869 Compl. at 14-32.

[23] *Id*. EXS. 20 (MINOW & LAMAY, *supra* note 7), 22 (Memorandum of Agreement on Presidential Candidate Joint Appearances (Nov. 26, 1985)) ("1985 MOU"), 23 *(G.O.P. Seeks a City for '88*, N.Y. TIMES (Jan. 26, 1986)), 24 (Press Release, News from the Democratic and Republican National Committees (Feb.

CPD continues to promote the interests of the two major parties in the present day;[24] and (3) records of officers' and directors' connections and financial contributions to major party committees and candidates.[25] These exhibits, they argue, demonstrate

---

18, 1987)) ("1987 DNC/RNC Press Release"), 25 (Phil Gailey, *Democrats and Republicans Form Panel to Hold Presidential Debates*, N.Y. TIMES (Feb. 19, 1987)), and 32 (Excerpts from H. Comm. on H. Admin., *Presidential Debates: Hearing Before the Subcomm. On Elections of the H. Comm. on H. Admin*. at 50-51, I 03d Cong., pt Sess., June 17, 1993); *see also* LPF at *7.

[24] 6869 Supp. Compl. #2 Ex. A (Transcript, Frank Fahrenkopflnterview, SKY NEWS (Apr. I, 2015)) ("Fahrenkopf Interview Transcript").

[25] 6869 Compl. Exs. 43 (*Michael D. Mccurry*, PUBLIC STRATEGIES WASHINGTON INC., http://www.psw-inc.com /team/member/michael-d.-mccurry), 44 (Press Briefing by Mike McCurry, WHITE HOUSE (Sept. 23, 1996), available at http://www.presidency.acsb.edu/ws/?pid=48827), 45 (Harrison Wills, *Debate Commission's Own Hot Topic*, OPEN SECRETS (Oct. 2, 2012), https://www.opensecrets.org/news/2012/l 0/debate-commission), 46 (List of Frank Fahrenkopflndividual Contributions, FEC (retrieved Sept. 4, 2014)) ("List ofFahrenkopfContributions"), 47 (Frank Fahrenkopf and Jim Nicholson, *Don't Repeat Error of Picking Steele*, POLITICO (Jan. 12, 2011, 4:37 a.m.), http: //www.po l itico.com/new s/stories/O 111 /47440.html) ("Fahrenkopf Editorial"), 48 (2012 Two-Year Summary of American Gaming Association Political Action Committee, FEC (retrieved Sept. 4, 2014)), 49 (*What We Do*, PUBLIC STRATEGIES WASHINGTON INC., http:// www.psw-inc.com/what), 53 (Andrea Saenz, *Former MALDEF Chief Antonia Hernandez Speaks at HLS*, HARV. L. RECORD (Nov. 16, 2007)), 54 (List of Howard Buffett Individual Contributions, FEC (retrieved Sept. 4, 2014) ("List of Buffett Contributions"), 55

that CPD was formed by the Democratic and Republican Parties for partisan gain,[26] has consistently supported Democrats and Republicans to the exclusion of third party or independent candidates,[27] and continues to be led by individuals with partisan interests.[28]

Respondents deny the allegation. CPD and its leaders maintain that there is no evidence the organization "endorses" or "supports" major party candidates or "opposes" independent candidates, within any plain meaning of those terms.[29] The organization asserts that the Complaint's information on CPD's formation and practices is not relevant, has been rejected by the Commission and the courts, and has been taken out

---

(List of Dorothy Ridings Individual Contributions, FEC (retrieved Sept. 4, 2014) ("List of Ridings Contributions"), 56 (*CPD Elects Six New Directors*, COMM'N, PRESIDENTIAL DEBATES (Apr, 16, 2014),http: //www.debates.or g/index.php?mact=N ews,cntnt01 ,detail01&cntnt01articleid=52&cntnt01origid=15&cntnt01det ailtemplate=newspage&cntnt01returnid=80), 60 (Jonathan D. Salant, *Former Democratic Party Leader Paul Kirk Backs Obama*, BLOOMBERG (May 2, 2008 2:22 p.m.), http://www.bloomberg .com/apps/news?pid=newsarchive&sid=aBtdfy DJEwZM&refer=home), and 61 (Abby Goodnough & Carl Hulse, *Former Kennedy Aide Is Appointed to Fill His Senate Seat*, N.Y. TIMES (Sept. 24, 2009)).

[26] 6869 Compl. at 16-20.

[27] *Id*. at 20-25; 6869 Supp. Compl. #2 at 1-4.

[28] 6869 Compl. at 25-32.

[29] 6869 CPD Resp. At 4; CPD Dir. Resp. At 2.

of context to create a "false narrative" about CPD.[30] Further, the CPD's leadership asserts that the personal allegiances or actions of officers and directors in their individual capacities are not evidence of CPD's *organizational* endorsement of or support for the major parties.[31] Respondents argue that to insist otherwise is unconstitutional and practically unworkable.[32]

Second, the Complaint contends that the CPD's 15 percent threshold is not an "objective criterion," but rather designed to ensure the participation of Republican and Democratic nominees to the exclus'ion of virtually all independent candidates.[33] In support, Complainants primarily offer two expert reports from Dr. Clifford Young and Douglas Schoen, respectively. Young concludes that, in order to meet CPD's 15 percent polling threshold, candidates must obtain name recognition among 60-80 percent of the electorate.[34] Young also opines that the type of polling relied upon by CPD systematically disfavors independent candidates due to increased inaccuracy in three-way races. Following on Young's conclusions, Schoen submits that, in order to obtain 60-80 percent name

---

[30] CPD Dir. Resp. at 2-8.

[31] 6869 CPD Resp. at 4-5; CPD Dir. Resp. at 6.

[32] CPD Dir. Resp. at 6-7.

[33] 6869 Compl. at 32-47.

[34] *Id*. Ex. 62 (Expert Report of Dr. Clifford Young) ("Young Report").

recognition, an independent candidate must raise over $266 million, including almost $120 million for paid media content production and dissemination.[35] Complainants argue that these requirements are prohibitively high for independent candidates who do not enjoy the same exposure and resources of major party candidates. On this basis, the Complaint concludes that CPD's 15 percent threshold is so high that only major party candidates could reach it and therefore not an objective means of selecting debate participants.[36]

Respondents also deny this allegation. CPD argues that Commission regulations afford debate sponsors broad discretion to determine participant selection criteria and point out that the Commission and the courts have affirmed the 15 percent threshold as an objective condition.[37] Noting that the 15 percent threshold was originally a requirement of CPD's predecessor in debate sponsorship, the League of Women Voters.[38] Respondents contend that the polling threshold provides an objective means of achieving its educational mission. Specifically, the organization argues that the 15 percent threshold:

---

[35] *Id*. Ex. 70 (Expert Report of Douglas Schoen) ("Schoen Report").

[36] *Id*. at 37-38.

[37] 6869 CPD Resp. at 7-11; CPD Dir. Resp. at 9.

[38] 6869 CPD Resp. at 9; *see also* Ridings Deel., *supra* note 7, ¶ 9, Tab A.

> best balanced the goal of being sufficiently inclusive to invite those candidates considered to be among the leading candidates, without being so inclusive that invitations would be extended to candidates with only modest levels of public support, thereby creating an unacceptable risk that leading candidates with the highest levels of public support would refuse to participate.[39]

Likewise, the limiting criterion also ensures that debate itself is not "hindered by the sheer number of speakers."[40] Respondents also argue that the allegations about potential manipulation of polling data are speculative and unfounded.[41]

The Complaint concludes that the Respondents' alleged noncompliance with the debate sponsorship regulations resulted in corporate contributions to and expenditures on behalf ofdebate participants in violation of 52 U.S.C. § 30118(a). In addition, the Complaint alleges that because CPD had a "major purpose" of promoting the election of the Democratic and Republican Party nominees in 2012 and made expenditures in excess of $1,000 during the calendar year, CPD qualified as a "political committee" under the Act. Accordingly, the Complaint asserts that CPD violated 52 U.S.C. §§ 30103 and 30104 by failing to register and report with the FEC as a political

---

[39] Brown Deel., *supra* note 7,¶ 32; CPD Dir. Resp. at 9-13.

[40] CPD Resp. at 11.

[41] CPD Resp.at 7-11; CPD Dir. Resp. at 13-17.

committee and that CPD, its co-chairs, and ten officers and directors violated 52 U.S.C.§ 30 l l 6(f) by accepting contributions from corporate sponsors.

Submissions filed by the Green Party of the United States ("Green Party") and the Libertarian National Committee ("LNC") on June 15 and 18, 2015, incorporated the allegations of MUR 6869 into a new matter designated by the Commission as MUR 6942.[42]

On July 13, 2015 and December 10, 2015, the Commission voted on MURs 6869 and 6942, respectively. Relying on the Commission's dismissal of nine previous similar matters alleging that CPD is partisan and uses subjective participation criteria, the Commission found no reason to believe Respondents had violated the Act's prohibition on corporate contributions or political committee registration and reporting requirements in both matters.[43] The Commission decided each case by a vote of 5-0 (with one commissioner recused), approved

---

[42] The original Complaint in MUR 6942 was a copy of the Complaint in MUR 6869 and asserted no additional allegations; however, on October 13, 2015, the 6942 Complainants submitted supplemental material on the reliability of polling data, 6942 Supp. Compl., and Respondents were afforded an opportunity to respond, *see* 6942 Supp. CPD Resp.

[43] First General Counsel's Report, MUR 6869 (June 17,2015); First General Counsel's Report, MUR 6942 (Dec. 1, 2015).

nearly identical Factual & Legal Analyses, and closed each file.[44]

LPF and the other Complainants challenged the Commission's decisions in federal district court under 52 U.S.C. § 30109(a)(8). The district court concluded that the Commission had acted arbitrarily and capriciously and contrary to law by: (1) failing to articulate the standard it used to determine whether CPD had endorsed, supported, or opposed political candidates or parties under 11 C.F.R. § 110.13(a); (2) not demonstrating its consideration of the evidence before it, particularly that relating to alleged partisanship and political donations by CPD's officers and directors and two expert analyses on polling and fundraising; (3) failing to notify and solicit responses from ten respondents; and (4) concluding that CPD's 15 percent polling criteria is objective under 11 C.F.R. § l10.13(c) without adequately discussing the plaintiffs' evidence and arguments or providing a legal analysis applying the regulation to the evidence and arguments[45] On these bases, the court granted the plaintiff's motion for summary judgment and ordered the Commission to reconsider the evidence and allegations and issue a new

---

[44] Certification, MUR 6869 (July 13, 2015); Certification, MUR 6942 (Dec. I 0, 2015).

[45] *LPF* at *6, *8, *9, and *11. The court also found that the Commission had acted arbitrarily and capriciously by deciding not to initiate a rulemaking on whether to revise and amend 11 C.F.R. § 110.13(c), which the plaintiffs had challenged at the same time. *Id*. at * 13.

reason-to-believe decision in these matters within 30 days.[46]

IV. LEGAL ANALYSIS

A. CPD Qualifies as a Staging Organization that Does Not Endorse, Support, or Oppose Political Candidates or Political Parties

The Act prohibits any corporation from making contributions or expenditures in connection with an election.[47] Likewise, the Act bars political committees from knowingly accepting corporate contributions.[48] "Contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value"[49] and "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value,"[50] but exempts "nonpartisan activity designed to encourage individuals to vote or to register to vote."[51]

---

[46] *LPF* at *11. On February 10, 2017, the court granted the Commission an additional 30 days to make a reason to believe determination in these matters. *Level the Playing Field v. FEC*, No. 1: l 5-cv-01397, slip op. at 3 (Feb. I 0, 2017).

[47] 52 U.S.C. § 30118(a).

[48] *Id*. § 30116(f); 30118(a).

[49] *Id*.§ 30101(8)(A).

[50] *Id*. § 30 IO I (9)(A)(i).

[51] *Id*.§ 30101(9)(B)(ii).

Pursuant to this exemption, the Commission has promulgated rules permitting "[n]onprofit organizations described in 26 U.S.C. § 50l(c)(3) or 501(c)(4) and which do not endorse, support or oppose political candidates or political parties" to stage candidate debates in accordance with 11 C.F.R. §§ 110.13 and 11 4.4(f)[52] The purpose of this rule was to "provide a specific exception so that certain nonprofit organizations and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in the debate."[53]

As noted by the *LPF* court, neither the Act nor Commission regulations define what it means for a debate sponsor to "endorse, support, or oppose" candidates or parties.[54] However, the meaning of this

---

[52] 11 C.F.R. § 110.13(a)(l); 1979 E&J, *supra* note 15.

[53] 1995 E&J, *supra* note 15, at 64,261.

[54] In response to specific allegations that CPD was "controlled by" the two major parties and that the parties "had input in" or were "involved in" CPD's operations and debate decisions, the court in *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000), concluded that CPD did not "endorse, support, or oppose" candidates or parties, 112 F. Supp. 2d at 71 n.8.; however, such a standard is inapplicable here where no such allegations have been offered. *LPF* at *6 ("[U]nlike in *Buchanan*, there are no control-specific factual allegations here to warrant applying a control standard.").

standard is plain on its face.[55] And indeed, in reviewing the Act's use of "support" and "oppose" in another context, the United States Supreme Court found that "[t]hese words provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."[56]

Therefore, applying the plain meaning of these words, the Commission must evaluate whether Complainants' evidence on the formation and evolution of CPD and on the alleged partisanship of CPD officers and directors either demonstrates directly or supports a reasonable inference that the CPD has endorsed or supported the Democratic and Republican Parties and their respective presidential nominees (or opposed third parties or independent candidates).

1. Documents and Statements from CPD Officer and Directors Allegedly

---

[55] *See LPF* at* 12, n. 6 ("According to the Oxford Dictionary,'endorse' means to 'declare one's approval of; 'support' means 'contributing to the success of or maintaining the value of; and 'oppose' means to 'set oneself against' or 'stand in the way of."').

[56] *McConnell v. FEC*, 540 U.S. 93, n. 64 (2003) (rejecting a challenge to the meaning of the words "promote, attack, support, or oppose" as used in the definition of"federal election activity" in 52 U.S.C. § 30101(20)(A)(iii) (then 2 U.S.C. § 431(20)(A)(iii)); *see also, e.g.*, Factual & Legal Analysis, MUR 6072 at 5 (Northland Regional Chamber of Commerce) (Apr. 27, 2009) (applying "endorse, support, or oppose").

Suggesting that CPD Was Formed as a Partisan Organization

Complainants first allege that information from the time of CPD's founding in 1987 indicates that CPD had bipartisan (rather than *non*partisan) origins and therefore was formed with the intent to endorse or support the Democratic and Republican Parties and their respective nominees. Among the documents presented in support of this allegation are a 1985 Memorandum of Understanding[57] (" 1985 MOU") and a 1987 joint press release from the then-chairmen of the Democratic National Committee ("DNC") and Republican National Committee ("RNC"), Frank Fahrenkopf Jr. and Paul Kirk, respectively, who subsequently became the first co-chairs of CPD.[58] The 1985 MOU addresses the necessity of institutionalized debates and describes their "bipartisan view" on the need for "joint appearances" of the presidential and vice-presidential nominees of the "two major political parties."[59] Similarly, the press release, which announces the formation of the CPD, describes the organization as a "bipartisan" entity "formed to implement joint sponsorship of general election presidential and vice presidential debates. . . by the national Republican and

---

[57] 1985 MOU, *supra* note 23.

[58] 1987 DNC/RNC Press Release, *supr*a note 23.

[59] 1985 MOU, *supra* note 23.

Democratic committees between their respective nominees."[60]

The Complaints also submit various past statements from CPD officers and directors reportedly indicating CPD's support for the major parties and opposition to independent candidates,[61] including a news article describing Fahrenkopf s reported sentiment that CPD "was not likely to look with favor on including third-party candidates in the debates" and another from Kirk that "he personally believed the panel should exclude third-party candidates,[but] could not speak for the commission."[62]

As noted by the *LPF* court in its recent decision, this information is "identical to evidence submitted with prior CPD-related complaints, including MURs 4987, 5004, and 502 l. Those matters, which pertained to CPD's sponsorship of the 2000 general election presidential debates, were reviewed by the court in *Buchanan* [*v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000)]."[63] In *Buchanan*, the court upheld the Commission's conclusion that such information does not provide a reason to believe the CPD endorses or

---

[60] 1987 DNC/RNC Press Release, *supra* note 23.

[61] 6869 Compl. at 18-19; *see also* LPF at *7.

[62] 6869 Compl. Ex. 25 (*G.O.P. Seeks a City/or '88*, N.Y. TIMES (Jan. 26, 1986)); 6942 Compl., Ex. 25(same).

[63] *LPF* at *7.

supports political candidates or parties.[64] The *Buchanan* court deferred to the Commission, writing "it is apparent from the report that in the absence of any contemporaneous evidence of influence by the major parties over the 2000 debate criteria," "evidence of possible past influence [was] simply insufficient to justify disbelieving the CPD's sworn statement . . . that the CPD's 2000 debate criteria were neither influenced by the two major parties nor designed to keep minor parties out of the debates."[65] Four years later, in 2004, the Commission further emphasized that the increasing age of these documents and statements undermines their persuasiveness as evidence of current bias.[66] Evaluating the statements in the present matters, we reach a similar conclusion.

At the outset, it is not clear that, in context, these documents and past statements constitute an endorsement of, or support for, the Democratic and

---

[64] *Buchanan*, I 12 F. Supp. 2d at 72.

[65] *Id* at 72-73.

[66] First General Counsel's Report, MUR 5414 (Dec. 7, 2004) ("Not only did challenges based on Fahrenkopfs and Kirk's leadership of the CPD not carry the day when they were fresh [in MURs 4987, 5004, and 5021], but as neither man has been a party official since 1989, the passage of time has rendered such assertions less persuasive."); *see also* Certification, MUR 5414 (Dec. 13, 2004) (finding no reason to believe CPD violated 52 U.S.C. § 30118(a) – then 2 U.S.C. § 441b(a) – without approving a separate Factual & Legal Analysis, consistent with Commission policy at the time in cases finding no reason to believe a violation occurred).

Republican Parties and their candidates or opposition to independent candidates. In a recently submitted declaration, Fahrenkopf insists that these "cherry-picked quotes" must be understood as reflections on the greater goal of ensuring debates as a permanent part of the political process:

> When the CPD was formed, the goal was to institutionalize general election televised debates for the good of the public, and the major impediment to achieving that goal was securing the commitment of both major party nominees to debate. References to the CPD as bipartisan at the time of its formation must be understood with reference to this challenge and the huge stride forward that forming the CPD represented.[67]

Declarations from others similarly insist that statements attributed to them do not fairly or fully reflect their respective views on the participation of independent candidates in CPD debates.[68] For example, Barbara Vucanovich, a CPD board member between 1987 and 1997 who was quoted as praising CPD's executive director for being "extremely careful to be bi-partisan" clarifies that she "used the word 'bi-partisan,' as many do, to mean not favoring any one

---

[67] Supp. Fahrenkopf Decl., *supra* note 7, 10.

[68] CPD Dir. Resp. Ex. 3 (re-submitting sworn declarations from current and former CPD board members Alan K. Simpson, Newton Minow, Barbara Vucanovich, John Lewis, and David Norcross previously submitted in MUR 5414) ("MUR 5414 Declarations").

party over another."[69] Vucanovich and others have previously affirmed their view that "CPD's debates should include the leading candidates for president and vice-president, regardless of party affiliation" but "should not include candidates who have only marginal national electoral support."[70]

Assuming *arguendo* that such statements do suggest support for debates exclusively between Republicans and Democrats or opposition to the inclusion of independent candidates, they do not necessarily reflect the organization's perspective at the time it sponsored the 2012 presidential debates at issue. Organizations may change over time.[71] And given this, it would be inappropriate to rely on documents and statements that are more than 30 years old to ascertain CPD's present support or opposition to candidates and parties. Indeed, there are significant indications that CPD has made concerted efforts to be independent in recent years and reaffirm its commitment to an educational mission. For example, according to Janet Brown, Executive Director of CPD, the organization conducts a review after every presidential election of issues relating to the debates.[72] After its study of the 1996

---

[69] CPD Dir. Resp. Ex. 3 (Declaration of Barbara Vucanovich).

[70] MUR 5414 Declarations, *supra* note 68.

[71] *See Citizens for Responsibility and Ethics in Washington v. FEC*, No. 1:14-cv-01419, slip op. at *11 (D.D.C. Sept. 19, 2016).

[72] Brown Decl., *supra* note 7, 29.

debates – which some alleged had arbitrarily excluded independent candidate Ross Perot – CPD adopted new candidate selection criteria and retained a polling consultant to ensure its "careful and thoughtful application."[73] CPD believed the new criteria would be "faithful to the long-stated goal of the CPD's debates – to bring before the American people, in a debate, the leading candidates for the Presidency and Vice Presidency."[74] Brown affirms that these criteria "were not adopted with any partisan (or bipartisan) purpose" or "with the intent to keep any party or candidate from participating. . ."[75] Declarations from current and recent CPD directors similarly affirm the organization's recent commitment to including "any independent or non-major party candidate if that candidate is properly considered a leading candidate."[76] In the same sworn affidavits, each director swears that he or she has "never observed any [CPD] Board member ever approach any issue concerning the CPD or its mission from a partisan perspective and the CPD has conducted its business in a strictly nonpartisan

---

[73] *Id*. ¶ 30, 34-35.

[74] *Id*. ¶ 30.

[75] *Id*. ¶ 31..

[76] CPD Dir. Resp. Ex. 6 (submitting sworn declarations from Michael D. McCurry, Howard G. Buffet, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, Newton Minow, Richard Parsons, and Alan K. Simpson) ("CPD Dir. Declarations").

fashion."[77] Thus, the early documents and statements are of limited persuasive value in evaluating CPD's recent support for or opposition to political parties or candidates.

Finally, even if these written and oral statements did reflect more current sentiments, they are not indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties and their candidates, or CPD's opposition to third party candidates. The 1985 MOU and 1987 press release were each executed by the DNC and RNC – not the CPD itself – as expressions of those organizations' commitment to a new custom for presidential debates. Indeed, according to both the Georgetown and Harvard studies on presidential debates, such support was critical to the success of institutionalized debates among the leading candidates for president.[78] Likewise, there is no indication that the statements from officers and directors were made in their official capacity as representatives of CPD.[79] Thus, the historical

---

[77] *Id*.

[78] *See* MINOW & LAMAY, *supra* note 7.

[79] In fact, in his reported statement to the *New York Times* expressing opposition to independent candidates in the debates, Kirk explicitly distinguished between his own feelings and the organization's position, noting that "he *personally* believed the panel should exclude third-party candidates, [but] *could not speak for the commission*." 6869 Campl. Ex. 25 *(G.O.P. Seeks a City for '88*, N.Y. TIMES (Jan. 26, 1986) (emphasis added)); 6942 Campl. Ex. 25 (same). The Commission has repeatedly concluded that individuals may wear "multiple hats" to represent the interests

documents and statements do not indicate the CPD's organizational support for any candidate or party or opposition to others.

2. Recent Statements by Fahrenkopf in His Official Capacity as Co-Chair of CPD

In an attempt to buttress its claim that CPD endorses, supports, or opposes candidates or parties, the MUR 6869 Complainants supplemented their submission with excerpts from a 2015 interview Fahrenkopf gave to Sky News[80] In the interview, Fahrenkopf stated that CPD has "a system," "we. . . primarily go with the two leading candidates, it's been the two political party candidates. . . except for 1992 when Ross Perot participated in the debates."[81] The Complainants argue that this is an "admission" from Fahrenkopf in his official capacity representing CPD, that CPD systematically supports major party candidates over independent candidates.[82]

Complainants' interpretation is not dispositive, however. Fahrenkopf's statement indicates no categorical support for Democrats or Republicans or opposition to independent candidates, stating clearly that CPD "*primarily* go[es] with the two leading

---

of multiple people or entities at different times. *See, e.g.*, Advisory Op. 2005-02 (Corzine); Advisory Op. 2003-10 (Reid).

[80] Fahrenkopf Interview Transcript, *supra* note 24.

[81] *Id*.

[82] 6869 Supp. Compl. #2 at 1-2.

candidates," while immediately indicating the exceptions to that trend. Moreover, as Fahrenkopf averred in a declaration responding to this allegation,[83] the statement appears to be more an assertion of historical fact than an admission that CPD favors candidates from the two major political parties over others.[84] Furthermore, Fahrenkopf makes his statement in the context of a broader point about the impact of multiple candidates (the questioner posited seven) on the educational value of debates.[85] Thus, Fahrenkopf s interview is consistent with Respondents' repeated attestations that CPD operates for the purpose of providing meaningful debates for the public benefit. Accordingly, these statements are not persuasive indicators that CPD endorses, supports, or opposes political candidates or parties.

---

[83] 6869 Supp. Resp. Ex. A (Fahrenkopf Decl.) ("Fahrenkopf Decl.").

[84] Fahrenkopf Decl., *supra* note 84, ¶ 4.

[85] The Sky News interviewer states". . . we've ended up with a seven person, a seven party debate. What do you think the prospects for that are?" to which Fahrenkopf responds with a description of the crowded 2012 Republican primary debates stating "people jokingly say it's less of debate than a cattle show, because there's such little time for each candidate to get across in the short period what their views are on issues." Fahrenkopf lnterview Transcript, *supra* note 24. Fahrenkopf continued, "seven people on the stage at one time is very difficult, it's going to take a very clever moderator to make sure that each candidate gets an opportunity to put forth their view. *Id*.

3. Exhibits Regarding Alleged Partisanship and Political Activity of CPD Co-Chairs and Board Members

The Complaints have supplemented the information presented in past matters with new information alleging more recent partisanship and political activity by CPD's co-chairs and directors. Notably, the Complaints identify the recent personal contributions of Fahrenkopf, McCurry, and several other directors to various candidates and political committees.[86] The Complaints also submit a 2011 op-ed by Fahrenkopf indicating a personal allegiance to the Republican Party and information on board members' "ties" to officeholders and political parties, including former employment. Finally the Complaints attach information on Fahrenkopf and McCurry's work as lobbyists on behalf of various corporations and trade associations that are allegedly "heavily invested in currying favor with the two major political parties."[87]

The Complainants urge the Commission to infer that individuals' statements, recent contributions, and outside employment render the CPD itself a partisan organization. As noted above, however, the Commission has previously opined that individuals may wear "multiple hats" to represent multiple interests.[88] It

---

[86] See *supra* note 25.

[87] 6869 Compl. at 27-28.

[88] *See, e.g.*, Advisory Op. 2007-05 (Iverson) (opining that an individual may serve as chairman ofa state party committee and

follows then, that an individual's 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.[89]

Here, there is no indication that Fahrenkopf wrote his op-ed in his official capacity as CPD co-chair, nor does the opinion piece express positions on behalf of CPD. Likewise, the Complaints make no suggestion that any of the contributions by Fahrenkopf, Mccurry, or CPD board members originated from CPD resources or any source other than their respective personal assets. Finally, the available information does not show that Fahrenkopf, McCurry, or other CPD officers and directors have acted as agents of CPD in the course of outside employment. At the outset, most of the information presented involves work that preceded -at times significantly -the individual's service for

---

solicit, direct, and spend non-federal funds on its behalf while continuing to serve as chief of staff to a member of Congress); Advisory Op. 2005-02 (Corzine) (describing circumstances under which a U.S. Senator may raise non-federal funds for his state gubernatorial campaign and other state candidates and committees); Advisory Op. 2003-10 (Reid) (concluding, *inter alia*, that an individual may, at different times, act in his capacity as an agent on behalf of a state party and in his capacity as an agent on behalf of a U.S. Senator).

[89] *See* Advisory Op. 1984-12 (American College of Allergists) (recognizing the ability of organization leaders, acting in their individual capacities, to establish and govern a separate entity).

CPD.[90] And, to 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 CPD in the course of such employment, or alternatively, on behalf of their employer while volunteering for CPD. Moreover, the organization has recently adopted a formal "Political Activities Policy" that is "intended to deter CPD-affiliated persons from participating, even in a personal capacity, in the political process at the presidential level (including the making of campaign contributions) while serving on the Board."[91] Although not part of Respondents' submissions, the policy reportedly builds on a previous "informal policy against Board members serving in any official capacity with a campaign while also serving on the CPD Board" and "reflects CPD's view that a debate staging organization better serves the public when it not only conducts its operations in a strictly nonpartisan manner, but when it also adopts and adheres to balanced policies designed to prevent even the potential for an erroneous appearance of

---

[90] For example, the Complaint notes that Brown "is a creature of partisan politics, having served as an aide to top Republicans before taking over her present office [as Executive Director of CPD] in *1987*." 6869 Compl. at 28 (emphasis added). The Complainants likewise note that board member Newton Minow was a "close aide to Adlai Stevenson and a Kennedy appointee to the Federal Communications Commission" and that board member Antonia Hernandez served as counsel to the Senate Judiciary Committee when it was led by the late Ted Kennedy. *Id*.

[91] Supp. Brown Deel., *supra* note 5, ¶ 7.

partisanship."[92] The Political Activities Policy supplements CPD's Conflict of Interest Policy, which would appear to limit financial conflicts of interest that could arise as a result of outside employment.[93] Complainants' information alleging partisan political activity on the part of CPD's officers and directors *in their non-CPD capacities* therefore does not support a reasonable inference that CPD endorses supports or opposes political candidates or parties. For the reasons stated above, the inference that LPF asks the Commission to draw is legally baseless and factually unworkable.

The Complaints offer no additional information to demonstrate that CPD itself has endorsed, supported, or opposed any political party or political candidate. Accordingly, CPD would appear to be a permissible debate sponsor under 11 C.F.R. § 110.13(a).

B. CPD's 15 Percent Threshold Constitutes an Objective Criterion

Commission regulations require staging organizations like CPD to use "pre-established objective criteria to determine which candidates may participate in a debate."[94] In adopting this requirement, the

---

[92] *Id*.

[93] 6869 Compl. Ex. 101 (Conflict of Interest Policy, COMM'N. PRESIDENTIAL DEBATES); 6942 Campi. Ex. 101 (same).

[94] 11 C.F.R. § 110.13(c). The Complainants do not question whether the debate criteria is "pre-established," therefore we will not address this requirement further.

Commission reasoned, "[g]iven that the rules permit corporate funding of candidate debates it is appropriate that staging organizations use pre-established objective criteria to avoid the real or apparent potential for *a quid pro quo*, and to ensure the integrity and fairness of the process."[95]

The regulation does not define "objective criteria;" however, the courts have said it does not "mandate[ ] a single set of objective criteria all staging organization must follow, but rather [gives] the individual organizations leeway to decide what specific criteria to use."[96] The *Buchanan* court concluded that "[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."[97] To that end, the Commission has previously made clear that a requirement of "reasonableness is implied" and stated that "[s]taging organizations must be able to show that their objective criteriamwere used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants."[98]

---

[95] 1995 E&J, *supra* note 15, at 64,262.

[96] *Buchanan*, 112 F. Supp. 2d at 73 (citations and internal quotations omitted); *see also* 1995 E&J, *supra* note 15 at 64,262 ("The choice of which objective criteria to use is largely left to the discretion of the staging organization.").

[97] *Buchanan*, 112 F. Supp. 2d at 73.

[98] 1995 E&J, *supra* note 15, at 64,262.

In specifically considering – and upholding – CPD's 15 percent threshold as applied to the 2000 debates, the *Buchanan* court opined that "the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it." But the court also noted that several third party candidates *have* achieved over 15 percent support in polls at or around the time that the debates are traditionally held:

> For instance, by September 1968, George Wallace had achieved a level of support of approximately 20% in the polls. John Anderson was invited by the League of Women Voters to participate in the 1980 presidential debates after his support level reached approximately 15%. Finally, in 1992, Ross Perot's standing in the polls was near 40% at some points and he ultimately received 18.7% of the popular vote that year.[99]

Accordingly, the court concluded that "third party candidates have proven that they can achieve the level of support required by the CPD."[100] The Complainants now present new information in support of their contention that the 15 percent threshold is not objective and results in prohibited corporate contributions from CPD to debate participants.

---

[99] *Buchanan*, 112 F. Supp. 2d at 73.

[100] *Id*.

1. Expert Reports on the Purported Impracticability of Independent Candidates Reaching CPD's 15% Polling Threshold

Complainants present two expert reports in support of their argument that the 15 percent threshold is designed to result in the exclusion of all candidates but those nominated by the Democratic and Republican Parties. The first, by Dr. Clifford Young, opines that in order to obtain 15 percent of the vote share, a candidate must achieve name recognition among at least 60 percent of the population and perhaps as much as 80 percent.[101] The second, from political analyst Douglas Schoen, estimates that the cost to an independent candidate of achieving 60 percent name recognition would be over $266 million, including almost $120 million for paid media content production and dissemination.[102] The Complainants argue that such a sum is prohibitive for independent and third-party candidates, who do not have the benefit of participating in a much-watched primary season or of garnering a minimum vote share in a general election by virtue of being associated with a major party.[103] Thus, Complainants conclude, the 15 percent threshold is systematically out of reach for independent candidates and therefore not "objective" within the meaning of the regulations.

---

[101] *See generally* Young Report, *supra* note 34.

[102] *Id*.

[103] *Id*. at 12-13 (discussing the "party halo effect").

The expert reports relied upon by Complainants contain significant limitations that undermine their persuasiveness. Young's analysis is limited in its scope: It correlates polling results to name recognition alone and draws conclusions regarding hypothetical third-party- candidate performance based on that one factor. But polling results are not merely a function of name recognition – they are a much more complex confluence of factors. Indeed, as Young acknowledges, his report does not take into account a number of other factors that may affect polling results, including "fundraising, candidate positioning, election results, and idiosyncratic events."[104] In so doing, the report minimizes the very salient fact that, no matter how recognizable a candidate is, the candidate may, nonetheless, be unpopular. For example, the report does not take into consideration forces that might decrease the poll numbers of an independent candidate who has become well-recognized – such as policy preferences or political missteps. Conversely, it also does 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. This is a significant limitation that undermines the practical application of the data to our analysis of CPD's debate participation criterion.

---

[104] *Id.*.at 12-13; *see also*, *e.g.*, Nate Silver, *A Polling Based Forecast of the Republican Primary Field*, FIVETHIRTYEIGHT POLITICS (May 11, 2011) (noting that, more than name recognition, "laying the groundwork for a run quite early on," including efforts to "hire staff, cultivate early support, brush up[] media skills" predicts later electoral success).

In addition, the Complaint appears to draw misguided conclusions from the Young Report's data. Notably, neither the Young Report nor the Complaints and their voluminous exhibits ever establish that independent candidates do not or cannot meet 60-80 percent name recognition. To the contrary, during the 2016 presidential election, a YouGov poll taken at the end of August found that 63 percent of registered voters had heard of Libertarian Gary Johnson and 59 percent had heard of Green Party candidate Jill Stein.[105] Thus, there is no information in the record to show that 60-80 percent name recognition is a prohibitively high bar for independent candidates to meet or, put another way, that a criteria which purportedly requires achievement of 60-80 percent name recognition is designed to exclude independent candidates.

Instead, the Complainants appear to use Young's name recognition threshold as a springboard to another argument: that the cost of achieving 15 percent vote share is prohibitively high for independent candidates. Indeed, the Schoen Report starts from the premise that 60-80 percent name recognition is necessary to gain a 15 percent vote share and estimates the amount of money that an independent candidate would need to spend to reach 60-80 percent name recognition. This

---

[105] *Poll Results.·Third Party Candidates*, YOUGOV (Aug. 25-26, 2016), *available at* https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/wc35k48hrs/tabs_HP_Third_party_Candidates_ 20160831.pdf.

approach is similarly based on significant assumptions that reduce its value.

Notably, the Schoen Report bases its estimation of campaign and media costs on the assumption that independent candidates are unable to attract earned media (*i.e.*, free coverage). Schoen presumes that "the media will not cover an independent candidate until they are certainly in the debates. Thus, they must pay for all their media. . ."[106] This premise is unfounded. Notably, media coverage from the most recent presidential election demonstrates that the two leading independent candidates – Libertarian Gary Johnson and Green Party candidate Jill Stein received extensive media coverage.[107]

Furthermore, Schoen's supposition is based in part on research published in 1999,[108] which seems entirely inappropriate, given the rise of digital and social media and independent expenditure-only political committees ("IEOPCs") in the years that have followed.

---

[106] Schoen Report, *supra* note 35, at 3, 5.

[107] *See, e.g.*, Supp. Brown Decl., *supra* note 5, ¶ 16 (identifying over 60 appearances by Johnson and Stein in media outlets including ABC, CBS, CNN, Fox, MSNBC, CNBC, PBS, C-SPAN, *USA Today*, *Time*, *People*, the *New York Times*, and others).

[108] Schoen Report, *supra* note 35, at 4 (citing Paul Herrnson & Rob Faucheux, *Outside Looking In: Views of Third Party and Independent Candidates*, CAMPAIGNS & ELECTIONS (Aug. 1999)).

Digital and social media have provided more economical avenues for candidates' messages, while social media has also enabled the ubiquitous sharing of those messages among vast global networks.[109] The most recent election especially highlighted the impact of changing media. In the final months of the 2016 election, Hillary Clinton spent more than $200 million on television ads; Donald Trump spent less than half of that, by focusing his spending on digital platforms like Facebook and Twitter.[110] Digital and social media not only served as a cheaper avenue for paid media, but also generated earned media when more traditional news outlets covered noteworthy tweets and posts.[111] In addition, digital media reportedly replaced field offices for the Trump campaign, thereby reducing another traditional campaign cost.[112] This change in traditional campaign strategies – a phenomena that

---

[109] 6869 Resp. n.4 (citing Clair Cain Miller, *How Obama's Internet Campaign Changed Politics*, N.Y. TIMES (Nov. 7, 2008); Derek Prall, *The Social Soapbox: How Social Media and Data Analytics are Helping Grassroots Candidates Gain Legitimacy*, AM. CITY & COUNTY (Oct. 22, 2014)); 6942 Resp. n.4 (same).

[110] *See* Issie Lapowsky, *Here's How Facebook Actually Won Trump the Presidency*, WIRED (Nov. 15, 2016), https://www.wired.com/2016/11/facebook-won-trump-election-not-just-fake-news/.

[111] *Id.*

[112] Matthew Tyson, *How Digital Marketing Helped Donald Trump Win*, HUFFINGTON POST (Dec. 19, 2016), http://www.huffingtonpost.com/matthew-tyson/how-digital-marketing-hel_b_13721224.html.

intensified in 2016, but began in earnest in the 2008 election cycle[113] – dramatically undermines Schoen's assumptions about the avenues of media exposure available to independent candidates and their associated costs.

Furthermore, with the rise of IEOPCs – several of which supported Libertarian candidate Gary Johnson in 2016[114] – paid media in support of a particular candidate may be created and distributed by entities other than the candidate and his or her principal campaign committee. 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. In addition, IEOPCs may raise unlimited funds from individuals and from sources, like corporations, otherwise prohibited under the Act. Thus, the existence of IEOPCs also undermines the dated Schoen Report's conclusions about the number of

---

[113] Claire Cain Miller, *How Obama's Internet Campaign Changed Politics,* N.Y. TIMES (Nov. 7, 2008), https://bits.blogs.nytimes.com/2008/11/07/how-obamas-internet-campaign-changed-politics/?_r=0; Sarah Lai Stirland, *Propelled by Internet, Barack Obama Wins Presidency*, WIRED (Nov. 4, 2008), https://www.wired.com/2008/11/propel led-by-in/.

[114] *See* Independent Expenditures in Support or Opposition to Gary Johnson, 2016 Cycle, OPEN SECRETS, https://www.opensecrets.org/pres16/outside-spending?id=N00033226 (last visited March 8, 2017) (listing six IEOPCs that reported independent expenditures supporting Johnson in 2016, including two that spent over $1 million).

individual donations needed to reach Young's 60-80 percent name recognition threshold.[115]

The most recent elections demonstrate how Complainants' failure to consider recent developments undermines their conclusions. As noted above, Libertarian candidate Gary Johnson achieved 63 percent name recognition shortly before Labor Day 2016. This was a significant increase from just 34 percent three months earlier.[116] Yet to reach 63 percent name recognition, Johnson raised only $7.9 million and spent only $5.4 million,[117] a mere *2-3 percent* of the $266 million that Schoen estimates an independent candidate would need to achieve 60-80 percent name recognition.

Finally, it is worth noting that independent candidates frequently do not start from zero in terms of either name recognition or fundraising. Notably, Gary Johnson and George Wallace, who ran as an

---

[115] Schoen Report, *supra* note 35, at 24-25 (estimating independent candidate's "hypothetical average donation").

[116] *Poll Results: Gary Johnson*, YouGov (May 25-26, 2016), *available at* https://today .yougov.com/news/2016/08/31/poll-resu Its-third-party-candidates/.

[117] February Monthly Rpt. of Gary Johnson 2016, FEC (Feb. 20, 2016); Amended Mar. Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 2016); Amended Apr. Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 2016); Amended May Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 2016); June Monthly Rpt. of Gary Johnson 2016, FEC (June 20, 20 I 6); Amended July Monthly Rpt. of Gary Johnson 2016, FEC (Aug . 20, 2016); Aug. Monthly Rpt. of Gary Johnson 2016, FEC (Aug. 20, 2016); Sept. Monthly Rpt. of Gary Johnson 2016, FEC (Sept. 20, 2016),

independent candidate in 1968, were both governors before running for president and presumably enjoyed at least regional recognition. Similarly, several independent candidates – including Ross Perot – have been independently wealthy and able to fund significant preexisting name recognition[118] and significant personal wealth were among the qualities that drew him significant attention as a potential independent candidate in 2016.[119] That candidates may start with some name recognition or financial resources further belies the Complaints' critique about the onerous fundraising required to reach 60-80 percent name recognition and the 15 percent polling threshold.

In sum, the reports by Young and Schoen do not provide a sufficient basis to conclude that CPD's 15 percent participation threshold is a level of support so high that only the Democratic and Republican nominees could reasonably achieve it. Taken together with the Commission's judicially upheld determinations that independent candidates of the past have reached 15

---

[118] *See* Michelle Hackman, B*loomberg Wants to Save Everyone from Trump. But a Lot of People Don't Know Who He Is*, VOX (Jan. 23, 2016), http://www.vox.com/2016/l/21/10810624 /michael-bloomberg-third-party-bid (reporting on a poll finding that, contrary to the title's characterization, roughly 57 percent of voters had an opinion on Bloomberg).

[119] *See* Alexander Burns and Maggie Haberman, *Bloomberg, Sensing an Opening, Revisits a Potential White House Run*, N.Y. TIMES (Jan. 23, 2016), https://www.nytimes .com/2016/01/24/nyregion/bloomberg-sensing-an-open ing-revisits-a-potential-white-ho use-run. html.

percent in the polls,[120] the Complainants' reports do not provide reason to believe that CPD's 15 percent criteria violated the requirement to use objective candidate-selection criteria for staging debates.

2. Evidence on Purported Unreliability of Polling Data

Finally, Complainants allege that CPD's 15 percent threshold is not objective because the fact that CPD selects both the cutoff date for the application of its debate criteria and the polls to consider allows CPD to manipulate the criteria favor of Democratic and Republican interests.[121] Citing the Young Report, Complainants also contend that polling in races with more than two candidates is subject to increased inaccuracy.[122] As to the first allegation, there is no information in the Complaint suggesting that CPD has manipulated the dates on which it applies its criteria to reach a particular result. Likewise, there is no information in the record to indicate that any candidates have been excluded by virtue of the polling deadline or that past independent candidates would have been admitted to a debate had CPD relied on different polling sources.

With regard to the selection of polls, CPD's independent polling expert, Frank M. Newport,

---

[120] *Buchanan*, 112 F. Supp. 2d at 73.

[121] 6869 Compl. at 41-45.

[122] *ld*. at 41-42

Editor-in-Chief of Gallup Organization, affirms in a sworn declaration that he has recommended which polls CPD should use in every election since 2000, based on, "the quality of the methodology employed, the reputation of the polling organizations and the frequency of the polling conducted."[123] Newport states that he made the recommendations based solely "upon my professional judgement and without any partisan purpose or pre-determined result in mind" and that CPD has always adopted his recommendations.[124] The Newport declaration further lists the polls selected in each cycle between 2000 and 2012, and indicates that, with few exceptions, CPD relied on the same five polling organizations, thus lending a relative degree of predictability to the polling used. Newport also affirms that "it is neither feasible nor appropriate to include every candidate's name in a public opinion poll," but that based on his experience, "it is extraordinarily unlikely that a poll would fail to identify and include among the candidates listed in polling questions a candidate whose level of support is anywhere near 15

---

[123] 6869 Resp. Ex. 2 (Declaration of Frank M. Newport) ("Newport Deel."). Among the polls used between 2000 and 2012 were those conducted by ABC News and the *Washington Post*, NBC News and the *Wall Street Journal*, CBS News and the *New York Times*, Fox News and Opinion Dynamic, and CNN, *USA Today* and Gallup. *Id*. According to Newport, "these organizations' polls would be conducted in a responsible and professional manner that meets the industry standards and reflects the then-current advances in polling methodology." *Id*.

[124] *Id*.

percent of the national electorate."[125] The Complaint's speculation about the possibility of an independent candidate being excluded by CPD's selection of polls is unpersuasive in the face of Newport's sworn attestations.

Lastly, relying on the Young Report, the Complaints suggest that polling in three-way races is subject to increased inaccuracy, as compared to polling in two-way races.[126] In particular, the Young Report concludes that sampling (*i.e.*, sample size) and non-sampling (*e.g.*, coverage bias, election salience, and strategic voting) errors are greater in three-way gubernatorial races studied[127] and that the error rates are especially high for candidates on the cusp of CPD's 15 percent thresh old.[128]

Reliance on this conclusion is problematic for several reasons. First, Young's metric for polling error appears to be based on the difference between the poll and the actual results on Election Day.[129] However, CPD does not purport to use the polls as predictors of what will

---

[125] *Id*.

[126] 6869 Compl. at 42.

[127] Young Report, *supra* note 34, at 18-28.

[128] *Id*. at 18.

[129] *Id*. at 25-26. Young uses as his metric the "average absolute difference" ("AAD") – a measure of the average difference between each candidate's actual result on Election Day and his or her polled vote share in a given poll.

occur on Election Day, but as a reliable measure of candidates' support at a given moment in September. Indeed, as the Newport Declaration notes, "[p]olls are estimates and imperfect predictors of future events" but, according to Newport, "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."[130]

Newport further disagrees with the Young Report's reliance on three-way gubernatorial election polling to draw conclusions about the effect of sampling error on independent presidential candidates on the cusp of CPD's 15 percent threshold. Specifically, Newport states that presidential election polling is "inherently more reliable than is polling in low turn-out elections," as polls in mid-term state elections are "generally more subject to sampling and non-sampling errors than national polls which are used by CPD in presidential elections."[131] Newport further asserts that "nothing about support for a significant third party-candidate [sic] [ ] makes it more difficult to measure."[132]

Having carefully weighed and considered the analyses of the parties' respective experts, we do not believe the available information is sufficient to conclude that the polling data employed by CPD are not an objective means of measuring public support

---

[130] Newport Deel., *supra* note 123, ¶ 21.

[131] *Id*. ¶ 19.

[132] *Id*. ¶ 21.

for presidential candidates at a moment in time. In particular, we note that all candidates must abide by the same polls, and thus equally endure whatever errors may be present. Moreover, as the court noted in *Buchanan*, such error may just as likely result in over inclusion of candidates shy of the 15 percent threshold.[133] And although the Complainants present information suggesting that independent gubernatorial candidates may be disproportionately impacted by polling errors, it is not clear that independent presidential candidates are similarly impacted.

In conclusion, the new information presented to the Commission asserting the impracticability of the 15 percent threshold for independent candidates and on the unreliability of polling are not sufficient to support a reasonable inference that the CPD's criteria for selecting its debate participants are not objective within the meaning of 11 C.F.R. § 110.13(c).

3. Complainants Policy Arguments

Much of the remaining information included with the Complaints pertains to policy arguments about the particular challenges that independent candidates face in the two-party dominant system, the reasons why independent candidates should be included in debates, or the benefits of alternative selection criteria. However, these points, no matter how compelling, do not bear on the Commission's consideration of whether or not the 15 percent threshold is an objective criterion and, most fundamentally, whether CPD's use of such a

---

[133] *Buchanan*, 112 F. Supp. 2d at 75.

criteria results in prohibited in-kind corporate contributions from CPD to debate participants.

As the Commission has previously explained in related rulemaking proceedings, "the rule at section l10.13(c). . . is not intended to maximize the number of debate participants; it is intended to ensure that staging organizations do not select participants in such a way that the costs of a debate constitute corporate contributions to the candidates taking part."[134] Thus, the relevant inquiry is not whether CPD's 15 percent threshold "den[ies] voters a viable alternative to the Republican and Democratic parties that Americans increasingly feel have failed the nation,"[135] as Complainants urge, but whether that threshold is objective and thereby "avoids the real or apparent potential for a *quid pro quo*"[136] between a corporate debate sponsor and a party or candidate. As described above, there is insufficient information to support a reasonable inference that CPD's criteria are not objective, which ends the Commission's inquiry in this allegation.

V. CONCLUSION

For the reasons stated above, the Commission finds no reason to believe CPD, Fahrenkopf, and Ridings as co-chairs, and the ten named officers and board

---

[134] *Candidate Debates*, 80 Fed. Reg. 72,616, 72,617 (Nov. 20, 2015).

[135] 6869 Compl. at 2.

[136] 1995 E&J, *supra* note 15, at 64,262.

members violated 52 U.S.C. §§ 30116(f) or 3011 S(a) by making prohibited contributions and expenditures and accepting prohibited contributions, and no reason to believe that CPD violated 52 U.S.C. §§ 30103 or 30104 by failing to register and report as a political committee.

APPENDIX D

FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463

March 29, 2017

Alexandra A.E. Shapiro, Esq.
Jeremy Licht
Shapiro, Arato & Isserles LLP
500 Fifth Avenue, 40th Floor
New York, NY 10110

Dear Ms. Shapiro and Mr. Licht:

On March 23, 2017, the Commission voted not to initiate a rulemaking to revise its regulations at 11 CFR 110.13(c) as proposed in the Petition for Rulemaking filed by Level the Playing Field on September 11, 2014.

Please see the enclosed Supplemental Notice of Disposition, which the Commission approved at its open meeting of March 23, 2017, and was published in the Federal Register on March 29, 2017 (82 Fed. Reg. 15468).

Sincerely,

/s/ Adav Noti
Adav Noti
Associate General Counsel

Proposed Rules
Federal Register
Vol. 82 No.59
Wednesday, March 29, 2017

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate In the rule making prior to the adoptio11 of the final rules.

FEDERAL ELECTION COMMISSION
11 CFR Part 110
[Notice 2017-09]
Candidates Debates

AGENCY: Federal Elecxtion Commission

ACTION: Supplemental Notice of Disposition of Petition for Rulemaking

SUMMARY: On February 1, 2017, the U.S. District Court for the District of Columbia ordered the Commission to reconsider its disposition of the Petition for Rulemaking filed by Level the Playing Field and to issue a new decision consistent with the Court's opinion. The Petition for Rulemaking asks the Commission to amend its regulation on candidate debates to revise the criteria governing the inclusion of candidates in presidential and vice presidential general election debates. In this supplement to the Notice of Disposition, as directed by the Court, the Commission provides further explanation of its decision to not initiate a rulemaking at this time.

DATES: March 29, 2017.

ADDRESSES: The petition and other documents relating to this matter are available on the Commission's Web site, *www.fec.gov/fosers* (reference REG 2014–06), and in the Commission's Public Records Office, 999 E Street NW., Washington, DC 20463.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: On participating candidates, requires staging organizations to ''use pre- established objective criteria to determine which candidates may participate in a debate'' and further specifies that, for general election debates, staging organizations ''shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.'' 11 CFR 110.13(c). The petition asks the Commission to amend 11 CFR 110.13(c) in two respects: (1) To preclude sponsors of general election presidential and vice presidential debates from requiring that a candidate meet a polling threshold in order to be included in the debate; and (2) to require sponsors of general election presidential and vice presidential debates to have a set of objective, unbiased criteria for debate participation that do not require candidates to satisfy a polling threshold. The petition included, in addition to legal arguments, reports and other evidence in support of its position.

Procedural History

The Commission published a Notice of Availability seeking comment on the petition on November 14, 2014. Candidate Debates, 79 FR 68137. The Commission received 1264 comments in response to that notice, including one from the Petitioner that included updated and additional factual submissions. On November 20, 2015, the Commission published in the **Federal Register** a Notice of Disposition in which it explained why it would not initiate a rulemaking. Candidate Debates, 80 FR 72616.

The Petitioner and others sued on the basis that the Commission's failure to initiate a rulemaking was arbitrary and capricious in violation of the Administrative Procedure Act. *See Level the Playing Field v. FEC*, No. 15–cv–1397, 2017 WL 437400 at *1 (D.D.C. Feb. 1, 2017) (citing 5 U.S.C. 706). On February 1, 2017, the U.S. District Court for the District of Columbia concluded that the Commission acted arbitrarily and capriciously by failing to thoroughly consider the presented evidence and explain its decision; the Court ordered the Commission to reconsider its disposition of the petition and issue a new decision consistent with the Court's opinion. *See id.* at *13. In particular, the Court concluded that the Commission had not adequately addressed evidence concerning the 15% vote share polling threshold used by the Commission on Presidential Debates (''CPD'') as a criterion for inclusion in presidential general election debates. *See id.* at *12 (noting that ''for thirty years [CPD] has been the only debate staging organization for

presidential debates'' and concluding that Commission had arbitrarily ignored evidence particular to CPD's polling criterion). The Court declined to ''take the extraordinary step of ordering promulgation of a new rule,'' but instead remanded for the Commission to ''give the Petition the consideration it requires'' and publish a new reasoned disposition or the commencement of rulemaking ''if the Commission so decides.'' *Id*. at *11, *13 (citing *Shays v. FEC*, 424 F. Supp. 2d 100, 116–17 (D.D.C. 2006)).

In accordance with the Court's instructions, the Commission has reconsidered the full rulemaking record. On the basis of this review, the Commission again declines to initiate a rulemaking to amend 11 CFR 110.13(c) at this time. The analysis below is intended to supplement, rather than replace, the analysis that the Commission provided in its original Notice of Disposition. 80 FR 72616.

Purpose and Requirements of Existing Candidate Debate Regulation

As the Commission stated in adopting the current candidate debate regulation in 1995, ''the purpose of section 110.13. . . is to provide a specific exception so that certain nonprofit organizations. . . and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates.'' Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 FR 64260, 64261

(Dec. 14, 1995).[1] Accordingly, the Commission has required that debate ''staging organizations use pre-established objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process.'' *Id*. at 64262. In discussing objective selection criteria, the Commission has noted that debate staging organizations may use them to ''control the number of candidates participating in . . . a meaningful debate'' but must not use criteria ''designed to result in the selection of certain pre-chosen participants.'' *Id*. The Commission has further explained that while ''[t]he choice of which objective criteria to use is largely left to the discretion of the staging organization,'' the rule contains an implied reasonableness requirement. *Id*. Within the realm of reasonable criteria, the Commission has stated that it ''gives great latitude in establishing the criteria for participant selection'' to debate staging organizations under 11 CFR 110.13.[2] First General Counsel's Report at n.5, MUR 5530 (Commission on Presidential Debates) (May 4, 2005), *http://eqs.fec.gov/eqsdocsMUR/ 000043F0.pdf*.

---

[1] *See also* Funding and Sponsorship of Federal Candidate Debates, 44 FR 76734 (Dec. 27, 1979) (explaining that, through candidate debate rule, costs of staging multi-candidate nonpartisan debates are not contributions or expenditures); 11 CFR 100.92 (excluding funds provided for costs of candidate debates staged under 11 CFR 110.13 from definition of ''contribution''); 11 CFR 100.154 (excluding funds used for costs of candidate debates staged under 11 CFR 110.13 from definition of ''expenditure'').

[2] *See* Candidate Debates and News Stories, 61 FR 18049 (Apr. 24, 1996) (quoting H.R. Rep. No. 93–1239 at 4 (1974)).

In the first major enforcement action under this regulation almost two decades ago, the Commission found that CPD's use of polling data (among other criteria) did not result in an unlawful corporate contribution, with five Commissioners observing that it would make ''little sense'' if ''a debate sponsor could not look at the latest poll results even though the rest of the nation could look at this as an indicator of a candidate's popularity.'' MUR 4451/ 4473 Commission Statement of Reasons at 8 n.7 (Commission on Presidential Debates) (Apr. 6, 1998), *http://www.fec.gov/disclosure data/mur/ 4451.pdf#page=459.* Citing this statement, one court noted with respect to the use of polling thresholds as debate selection criteria that ''[i]t is difficult to understand why it would be unreasonable or subjective to consider the extent of a candidate's electoral support prior to the debate to determine whether the candidate is viable enough to be included.'' *Buchanan v. FEC*, 112 F. Supp. 2d 58, 75 (D.D.C. 2000). Nonetheless, the Commission has noted that while it cannot reasonably ''question[ ] each and every . . .candidate assessment criterion,'' it can evaluate ''evidence that [such a] criterion was 'fixed' or arranged in some manner so as to guarantee a preordained result.'' MUR 4451/4473 Commission Statement of Reasons at 8–9 (Commission on Presidential Debates).

The Arguments for Changing the Regulation

The petition and many of the comments supporting it essentially argue that CPD's 15% threshold is a non-objective criterion because it is unreliable and/or intended to unfairly benefit major party candidates at

the expense of independent and third-party candidates. The Court summarized the petition's arguments as attempting to establish, first, that ''CPD's polling threshold is being used subjectively to exclude independent and third-party candidates'' and, second, that ''polling thresholds are particularly unreliable and susceptible to . . . subjective use at the presidential level, undermining the FEC's stated goal of using 'objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process.''' *Level the Playing Field*, 2017 WL 437400 at *12.

In essence, the petition argues that there are biases against third-party and independent candidates in accurate polling, and therefore that a polling threshold requirement like CPD's presents these candidates with a Catch-22 scenario:

> [A polling threshold] effectively institutionalizes the Democratic and Republican candidates as the only options with which the voters are presented. A third- party or independent candidate who is excluded from the debates loses the opportunity to take the stage against the major party nominees and demonstrate that he or she is a better alternative; the media does not cover the candidate; and the candidate does not get the public exposure necessary to compete. The ''determination'' that a [third-party or independent] candidate is not viable because he or she lacks a certain amount of support becomes a self-fulfilling prophecy.

Petition at 3. The petition argues that inclusion of independent and third- party candidates in presidential general election debates furthers voter education and voter turnout, which, the petition asserts, are policy purposes underlying the regulation.

Summary of Petition Evidence in Support of Changing the Regulation

In support of the argument that polling thresholds have the purpose or effect of favoring major party candidates over third-party or independent candidates, the petition presents facts and analysis regarding the name recognition required to poll at CPD's 15% threshold and the amount of money required to gain that level of name recognition. The petition provides further factual submissions that, according to the petition, show that the unreliability of polling—both generally and with respect to independent and third-party candidates—renders the 15% threshold unattainable and unreasonable for independent and third- party candidates.

The crux of the petition's factual submissions consists of two reports that purport to show that CPD's 15% threshold is designed to result in the exclusion of independent or third-party candidates. The first report, by Dr. Clifford Young, concludes that in order to reach a 15% threshold, a candidate must achieve name recognition among 60–80% of the population.[3] The second, by Douglas Schoen, estimates that the cost to a third-party or independent candidate of achieving 60%

---

[3] Petition Ex. 3 (''Young Report'').

name recognition would be over $266 million, including almost $120 million for paid media content production and dissemination, which the report concludes is not a reasonably reachable figure for a non-major-party candidate.[4] Additionally, both the Young and Schoen reports conclude that polling in three-way races is inherently unreliable and not, therefore, an objective measure of the viability of third-party and independent candidates. In reaching their conclusions, both the Young and Schoen reports assert that third-party and independent candidates are disadvantaged by the fact that they do not benefit from a ''party halo effect'' by which Democratic and Republican candidates — regardless of name recognition — may garner a minimum vote share in polling merely for being associated with a major party, in addition to benefitting from increased name recognition from media coverage of the major party primary season.[5]

The Commission's Assessment of the Petition's Factual Submissions

1. *Submissions Regarding Whether a 15% Threshold Cannot Be Attained by (and Therefore Excludes) Independent and Third-Party Candidates*

The Young Report's conclusion that third-party and independent candidates require a 60–80% name recognition to meet CPD's 15% threshold does not provide a persuasive basis for changing the candidate

---

[4] Petition Ex. 11 (''Schoen Report'').

[5] *See* Young Report at ¶¶ 21–22.

debate regulation. Dr. Young acknowledges that his report's analysis is one-dimensional; it correlates polling results to name recognition alone, and then it draws conclusions regarding hypothetical third-party candidate performance based on that one factor. More specifically, Dr. Young acknowledges that polling results are not merely a function of name recognition—they are a much more complex confluence of factors. *See* Young Report at ¶¶ 10, 20(d) (listing other factors, beyond name recognition, affecting candidate vote share, including ''fundraising, candidate positioning, election results, and idiosyncratic events''); *see also* Nate Silver, *A Polling Based Forecast of the Republican Primary Field*, FiveThirtyEight Politics (May 11, 2011) (attached to Petition as Exhibit 20) (noting that, more than name recognition, ''laying the groundwork for a run quite early on,'' including efforts to ''hire staff, cultivate early support, brush up [ ] media skills,'' predicts later vote share success). Due to the Young Report's focus on this one correlative factor, the report does not purport to establish any causative effect between name recognition and vote share, and it does not account for how external forces apart from name recognition—such as fundraising, candidate positioning, election results, and idiosyncratic events—may influence vote share. For example, the report does not take into consideration forces that might increase the vote share of an otherwise unfamiliar independent candidate—such as high unfavorable ratings among major party candidates—or forces that might decrease the vote share of an independent candidate who has become well-recognized — such as policy preferences or political missteps.

Because it largely omits analysis of all other factors beyond name recognition, the Commission is not persuaded that the Young Report's conclusions are a sufficient basis on which to determine that a 15% polling threshold is so inherently unreachable by non-major- party candidates that the Commission should provide that sponsors of general election presidential debates must be *prohibited as a matter of law* from using it in order to fulfill the statutory prohibition on corporate contributions.

Moreover, even within the confines of name recognition, the Young Report is only weakly applicable to the debates at issue, which are presidential general election debates. The Young Report reaches its 60–80% name recognition result through three models, all of which extrapolate from data about name recognition of major party candidates at the early stages of the party primary process (*i.e.*, before the Iowa caucuses) because, the report explains, ''party halo effects'' may be lower during early primary polling. Young Report at ¶ 22. The decision to measure name recognition at this extraordinarily early stage in all three models, even if only in part, may amplify polling errors, which the report notes are higher earlier in the election cycle than during the later ''election salience'' period—from one day to several months before election day—during which people start paying more attention to the election. *Id*. at ¶¶ 43(g), (i). Additionally, the use of the early party primary stage as the point of comparison for third-party or independent candidates' name recognition in September does not address or account for differences in the size of the candidate fields at

those points in time. Thus, the Young Report's observations regarding early primary candidates provide little or no persuasive evidence as to the effect of a polling threshold on presidential general election candidates.

In addition, the petition appears to draw inapposite conclusions from the Young Report's data. Critically, neither the Young Report nor other evidence submitted with the petition or comments establishes that third-party or independent candidates do not or cannot meet 60–80% name recognition. In fact, at least one third-party candidate was reported to achieve over 60% name recognition in the most recent presidential campaign prior to the general election debates. *See Poll Results: Third Party Candidates*, YouGov (Aug. 25–26, 2016), *available at https://d25d2506sfb94s.cloudfront.net/cumulus uploads/document/wc35k48hrs/tabs HP Third Party Candidates 20160831.pdf* (showing Gary Johnson and Jill Stein having 63% and 59% name recognition among registered voters, respectively). Thus, there is no information in the rulemaking record showing that 60–80% name recognition is a prohibitively high bar for independent candidates. In other words, even if the Commission were to assume *arguendo* that 60–80% name recognition correlates with 15% vote share, there is no information in the record demonstrating that these thresholds inherently function to exclude third-party or independent candidates because of their party status.

Instead, the petition uses Dr. Young's name recognition threshold as a springboard to the primary

argument of the Schoen Report: That the cost of achieving 15% vote share is prohibitively high for independent candidates. The Schoen Report starts from the premise that 60–80% name recognition is necessary to gain a 15% vote share and proceeds to estimate the amount of money that an independent candidate would need to spend to reach 60–80% name recognition. For the reasons stated above, the Commission does not find that this premise is adequately established by the Young Report, and therefore the Commission questions whether the Schoen Report possesses any meaningful evidentiary value. But even assuming that a candidate must reach 60–80% name recognition to achieve a 15% threshold in vote share, the Commission finds the Schoen Report not to provide a reasoned evidentiary basis for amending the rule at issue.

The Commission is unpersuaded by the Schoen Report primarily because the report builds its conclusion through an extensive series of unsupported suppositions and assertions. For example, to explain a significant portion of its calculations, the report states that ''the media will not cover an independent candidate until they are certainly in the debates.'' Schoen Report at 3. But the report provides no basis for this assertion other than an unexplained reference to the number of publications ''follow[ing]'' one particular candidate (id. at 5), and the Commission is aware of at least three non-major-party candidates who did not

participate in the general election debates but received significant media attention in 2016.[6]

In another premise that the report uses to build its later conclusions, the Schoen Report asserts that independent candidates are disadvantaged because they ''must resort to launching a massive national media campaign'' while major party candidates ''by competing

---

[6] Searches of the Thompson Reuters Westlaw ''Newspaper'' database for mentions in 2016 of independent and third-party 2016 presidential candidate names (''Gary Johnson,'' ''Jill Stein,'' and ''Evan McMullin'') show thousands of results. Moreover, the number of results for references to these independent candidates was comparable to the number of results for references to several major party candidates during comparable time periods.Using as a baseline the 277 days from the lead up to the first Republican party primary debate until Donald Trump was determined to be the presumptive nominee (August 1, 2015, to May 4, 2016), and the similar 277-day period of September 4, 2015 (before the first Democratic primary debate) to June 7, 2016 (when Hillary Clinton became the presumptive Democratic nominee), the Commission looked at mentions for independent candidates during the 277 days before the general election (February 5–November, 7, 2016). Those results show that Gary Johnson (with 3,001 results) was comparable to Bobby Jindal and Mike Huckabee (with 2,894 and 3,274 results, respectively); Jill Stein (with 1,744 results) was comparable to Rick Perry and Martin O'Malley (with 2,278 and 2,566 results, respectively); and Evan McMullin (with 353 results) was comparable to Lincoln Chafee, Jim Webb, and George Pataki (with 424, 521, and 937 results, respectively). And, while searches for Donald Trump's and Hillary Clinton's names returned significantly more results (7,451 and 7,404, respectively), those results were in line with other candidates who did not achieve high vote share in the party primaries, such as Jeb Bush with 7,102 results.

in small state primaries, can build their name recognition without the costs of running a national campaign.'' *Id*. In support of this statement, the report states that ''Obama's 2008 victory in the Iowa caucuses catapulted him to national prominence.'' *Id*. In fact, polling expert Nate Silver has noted that ''contrary to the conventional wisdom, which holds that Barack Obama suddenly burst onto the political scene, the polling shows that he was already reasonably well-known to voters in advance of the 2008 primaries, largely as a result of his speech at the 2004 Democratic National Convention. His name was recognized by around 60 percent of primary voters by late 2006, and that figure quickly ramped up to 80 or 90 percent after he declared for the presidency in February, 2007.'' Nate Silver, *A Brief History of Primary Polling, Part II*, FiveThirtyEight (Apr. 4, 2011),*https://fivethirtyeight.com/features/a-brief-history-of-primary-polling-part-ii/*. The only other basis that the report provides for this portion of its conclusion is the statement that Senator Rick Santorum ''spent only $21,980 in [Iowa], or 73 cents per vote'' in 2012. Schoen Report at 5. It is not clear how the newspaper article cited by the report derived this figure, and Schoen (despite having access to all relevant financial data through the FEC's Web site) does not appear to have assessed its accuracy. In fact, reports filed with the Commission for the period ending three days before the Iowa caucus show that Senator Santorum made disbursements of $1,906,018. Rick Santorum for President, FEC Form 3P at 4 (Jan. 31, 2012), *http://docquery.fec.gov/pdf/317/12950383317/12950383317.pdf*. While not all of these disbursements were targeted to Iowa, the candidate's

total spending in relation to the caucuses in that state was far higher than $21,980. Even looking at only reported disbursements to Iowa payees (and, therefore, not including payments to media buyers and others outside of Iowa for activities targeted towards Iowa), the filings shows that Santorum spent over $112,000 in Iowa between October 1 and December 31, 2011, for purposes including rent, payroll, lodging, direct mail, advertising, communication consulting, and coalition building. *Id*. Thus, the Schoen Report's use of unexplained second-hand analysis undercuts its credibility, and the facts demonstrated by the public record give the Commission reason to doubt the Schoen Report's calculations regarding any extra benefit major party primary candidates receive from their media expenditures.

In addition, the Schoen Report states that media costs to accomplish 60% name recognition are higher in three- way races due to increased competition, and the report increases its cost estimate accordingly.[7] But the 60% figure is apparently drawn from the Young Report, which, as discussed above, addresses the very earliest stages of major party primaries. Like the Young Report, the Schoen Report does not explain why or how this 60% figure can be extrapolated from early major party primaries to three-way general elections.

---

[7] Schoen Report at 3; *see also id*. at 10 (asserting, without supporting data or sources, that costs will likely be ''significantly'' higher ''in an election year featuring three viable candidates'' and, therefore, adding 5% premium to report's earlier cost estimates).

The Schoen Report ultimately adopts an estimated cost of at least $100 million for a media buy that an independent candidate would require to gain the name recognition to meet the 15% threshold. Schoen Report at 6. Not only does this figure rely upon the faulty assumptions that the Commission has already noted, it is also unreliable for at least four additional reasons.

First, the $100 million figure is taken from an estimate from ''a leading corporate and political media buying firm,'' without any underlying data and without any explanation of the circumstances under which the firm purportedly offered that estimate. Nor does the report address (or even acknowledge) any biases in that estimate that may stem from a media buying firm's financial interest in estimating or promoting high media buy costs. The Schoen Report simply provides no evidentiary basis for the Commission to credit this third-person estimate.

Second, the $100 million estimate presumes that a candidate must go from zero percent name recognition to 60% name recognition, without noting the likelihood of a candidate starting from zero or otherwise explaining this assumption. The Schoen Report suggests, by consistently comparing the hypothetical independent candidate's position with the positions of his ''two'' (and only two) major party candidate competitors, that this zero percent baseline occurs at some point after the major parties have established presumptive nominees. *See, e.g.*, Schoen Report at 10–11 (discussing ''the two major party campaigns'' with whom hypothetical independent candidate needing 60% name recognition will be competing for ad buy

time); *id*. at 15 (same). A hypothetical situation in which a person with zero percent name recognition decides to run for president in approximately June of the election year and must raise name recognition from nothing to 60% within the three months before CPD looks at polls in September is unrelated to the realities of presidential elections. Presidential candidates — major party and third-party alike — generally begin campaigning a full year or more before the election, *see, e.g.*, Jill Stein, FEC Form 2 (July 6, 2015) (declaring candidacy for president in 2016 election cycle), and they rarely start with zero name recognition, *see, e.g.*, Petition Ex. 13 (Gallup report showing 11 candidates (including Libertarian Gary Johnson) with over 10% name recognition in January 2011). The Schoen Report's scenario — and the conclusions that the report draws from it — therefore provides no persuasive support for the petition's assertion that the candidate debate regulation must be revised.

Third, the Schoen Report bases its estimate of campaign and paid media costs on the assertion that independent candidates are unable to attract news media coverage. *See* Schoen Report at 4. But the report's assertion, based primarily on research published in 1999,[8] seems particularly antiquated in the

---

[8] Schoen Report at 4 (citing Paul Herrnson & Rob Faucheux, *Outside Looking In: Views of Third Party and Independent Candidates, Campaigns & Elections* (Aug. 1999)). The assertion also appears to be in tension with the statutory exclusion of the news media coverage from legal treatment as campaign spending. See 52 U.S.C. 30101(9)(B)(i) (excluding ''any news story . . .distributed through the facilities of any broadcasting station,

age of digital and social media. *See* Farhad Manjoo, *I Ignored Trump News for a Week. Here's What I Learned*, NY Times, Feb. 22, 2017, *https://www.nytimes.com/2017/02/22/ technology /trump-news-media-ignore.html* (discussing news media coverage during and since 2016 presidential election campaign in light of social media pressures). The Commission declines to promulgate rules that will govern the 2020 presidential election and beyond on the basis of opinions that are premised on such obsolete data.

Fourth, the Schoen Report's media cost estimates do not appear to take account of media purchases in support of a candidate by outside groups, including independent expenditure- only political committees (''IEOPCs''). IEOPCs may create, produce, and distribute communications in support of, but independently of, a particular candidate, and in 2016 several IEOPCs Johnson in just that way.[9] In addition, IEOPCs may raise unlimited funds from individuals and from sources, like corporations, otherwise prohibited under the Federal Election Campaign Act, 52 U.S.C. 30101–46. Thus, the existence and rise of IEOPCs undermine the Schoen Report's assumptions about the

---

newspaper, magazine, or other periodical'' from definition of ''expenditure'').

[9] *See* Open Secrets, *Independent Expenditures, Gary Johnson, 2016 cycle, https://www.opensecrets.org/pres16/outside-spending?id=N00033226* (listing six ''Super PACs'' or IEOPCs supporting Johnson, two of which spent over $1 million in support) (last visited Feb. 24, 2017).

amount of the average contribution to a candidate, as well as the report's extrapolations about the number of individual contributions needed and total sum necessary to reach Dr. Young's 60–80% name recognition threshold. *See* Schoen Report at 24–25 (estimating third-party candidate's ''hypothetical average donation'' on basis of ''assumption for average donation'' of ''plurality'' of Obama and Romney contributors under $2600 maximum).

Ultimately, the unreliability of the Schoen Report's conclusions is most clearly demonstrated by the fact that third-party candidate Gary Johnson reached 60% name recognition by August 31, 2016.[10] In the 2016 election cycle through August 31, Johnson had spent almost $5.5 million; this amount represents total disbursements for all purposes, including, but not limited to, media buys.[11] According to the Schoen Report, such a result should have been impossible: Johnson should not have been able to achieve 60%

---

[10] *See* Ariel Edwards-Levy, *Third-Party Candidates are Getting a Boost in Name Recognition*, Huffington Post (Aug. 31, 2016) (noting Johnson's name recognition)*; Poll Results: Third Party Candidates*, YouGov (Aug. 25–26, 2016), available at *https://d25d2506sfb94s.cloudfront.net/cumulus uploads/document/wc35k48hrs/ tabs HP Third Party Candidates 20160831.pdf* (showing Gary Johnson and Jill Stein having 63% and 59% name recognition among registered voters, respectively).

[11] *See* Gary Johnson 2016, FEC Form 3P at 3–4 (Sept. 20, 2016), *http://docquery.fec.gov/pdf/391/201609209032026391 /201609209032026391.pdf* (showing receipts of $7,937,608 and disbursements of $5,444,704).

name recognition until he spent at least $266 million—fifty times more than he actually did.[12]

For all of the foregoing reasons, the Commission finds the Schoen Report unpersuasive.

Finally, the petition acknowledges that a number of third-party presidential candidates have performed sufficiently well that they were included or would have been included in debates with 15% thresholds. *See* Petition at 15–16. Indeed, the petition notes that as many as six candidates would apparently have satisfied this requirement at some point during their campaigns: Roosevelt in 1912, LaFolette in 1924, Thurmond in 1948, Wallace in 1968, Anderson in 1980, and Perot in 1992. *Id*. The petition asks the Commission to categorically disregard these examples because they predate the Internet, and in some cases, the television. Petition at 16.[13] As discussed above, the Commission

---

[12] The Young and Schoen Reports do not address a circumstance in which a candidate, like Gary Johnson, reaches at least 60% name recognition but does not reach a 15% threshold. The Commission notes, though, that this circumstance (in which name recognition does not translate to high vote share) might be explained by the other factors beyond name recognition that affect vote share, including ''fundraising, candidate positioning, election results, and idiosyncratic events,'' mentioned in the Young Report. *See* Young Report at ¶¶ 10, 20(d). Moreover, the circumstance in which name recognition does not translate to high vote share is not unique to third party candidates. *See* note 6, above (discussing Jeb Bush).

[13] The petition also asks the Commission to disregard the strong polling results of third-party or independent candidates, like George Wallace and John Anderson, who have a prior affiliation

agrees that pre-Internet candidacies provide only a relatively weak basis assessing how easy or difficult it would be for candidates to achieve 15% vote share in a modern election. But to the extent that the availability of Internet communication has changed this calculus, the Commission notes that advertising on the Internet can cost significantly *less* money than advertising in more traditional media that was available to those pre-Internet independent candidates. *See, e.g.* Internet Communications, 71 FR 18589, 18589 (Apr. 12, 2006) (describing Internet as ''low-cost means of civic engagement and political advocacy'' and noting that Internet presents minimal barriers to entry compared to ''television or radio broadcasts or most other forms of mass communication''); Associated Press, *Here's How Much Less than Hillary Clinton Donald Trump Spent on the Election*, Fortune (Dec. 9, 2016), *http://fortune.com/2016/12/09/hillary-clinton-donald-trump-campaign-spending/* (comparing Hillary Clinton's ''more traditional'' television-heavy advertising strategy in campaign's last weeks—$72 million on TV ads and about $16 million on Internet ads—with Donald Trump's ''nearly $39 million on last-minute TV ads and another $29 million on

---

with a major political party. Petition at 15. The Commission is not persuaded that disregarding those polling results would be reasonable in the context of assessing, as required by the court, whether the CPD's 15% threshold under the current candidate debate regulation acts ''subjectively to exclude independent and third-party candidates,'' since the threshold would apply to all third-party and independent candidates, regardless of prior affiliation. *Level the Playing Field*, 2017 WL 437400 at *12.

digital''); *see also* Bill Allison et al., *Tracking the 2016 Presidential Money Race*, Bloomberg Politics (Dec. 9, 2016), *https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising/* (noting that Trump's spending to ''target[ ] specific groups of Clinton backers with negative ads on social media to lower Democratic turnout . . . may have been a factor in Trump's performance in battleground states'').

In sum, the Commission concludes that the petition does not present credible evidence that a 15% threshold is so unobtainable by independent or third-party candidates that it is per se subjective or intended to exclude them.

2. *Submissions Regarding Whether Polls are Unreliable and Systematically Disfavor Independent and Third-Party Candidate*

The Young Report's examination of polling error in three-way races with independents seeks to determine, essentially, if the threshold is drawn in the right place to identify candidates that actually have a 15% vote share. Young Report at ¶ 60. The Young Report concludes that polls in three-way races have greater errors than polls in two- way races. Specifically, the Young Report extrapolates from gubernatorial election polls taken two months before the general election (the point at which CPD uses polls as a debate inclusion criterion) where there is an 8% error rate in three-way races compared to a 5.5% error rate in two-way races. *Id*. at ¶¶ 52–56. Adjusting for the fact that gubernatorial race polling is ''more error prone'' than

presidential race polling, the Young Report concludes that the applicable error rate is 6.04%. *Id*. at ¶¶ 57–58. The Young Report continues to extrapolate the effect of this error on candidates, such as independent or third-party candidates, that poll close to the 15% threshold; for these candidates, the Young Report concludes that there is an approximately 40% chance that a third-party or independent candidate who holds the support of 15% of the population would be excluded. *Id*. at ¶¶ 59–66.

The Commission is unpersuaded by this analysis for two fundamental reasons. First, as the Commission noted in its original notice of disposition, the fact that polling data can be erroneous does not mean that a debate staging organization acts subjectively in using it. 80 FR at 72618 n.6. By way of analogy, consider a school district with a policy of canceling school if a majority of local television news stations predict at least six inches of snow for the next day. That policy would be facially objective, even though such weather forecasts are known to be significantly inaccurate. The policy would be subjective only if the inaccuracy in the forecast were systematically biased for or against the condition being triggered (e.g., if the local weather forecasters regularly used high-end estimates of snow to drive viewer interest). But this demonstrates the second reason the Commission is unpersuaded by the petition's submissions regarding polling unreliability: The petition provides no evidence that the polling error is biased in a manner specific to party affiliation, that is, that polling is biased against third-party or independent candidates. Indeed, the petition explicitly

acknowledges that ''it [is] wholly unclear whether the polling over- or underestimate[s] the potential of the third party candidate.'' Petition at 19 (quoting Schoen Report at 28). Thus, the Commission concludes that the petition does not demonstrate that statistical errors in polling data render the use of such data subjective or show that it is intended to exclude third-party candidates.[14]

---

[14] Because this data, even as cited by the petition, does not show that the regulation should be amended, the Commission need not further assess the data's validity. Nonetheless, the Commission notes that there are significant structural differences between the state polls cited by Dr. Young and national presidential polls. *See, e.g.*, Young Report at ¶¶ 41 (explaining differences between reputable national and state or local polls, with respect to both number of interviews and margins of error), 57 (showing significant differences between state and federal polling at different points in time). Although Dr. Young adjusts the state-poll results before applying them to his national analysis, (*see id*. ¶ 58), the manner in which the adjustment is described leaves unexplained whether the adjustment accounts for all of the relevant differences between state and national polls.

The Petitioner also submitted in response to the Notice of Availability a comment with additional data concerning ''grossly inaccurate'' polling in 2014 midterm Senate and gubernatorial elections. Level the Playing Field, Comment at 1 (Nov. 26, 2014), *http://sers.fec.gov/fosers/showpdf.htm?docid=310980*. However, attachments to the comment note that ''midterm polling biases in Senate elections are far worse than in presidential elections.'' *Id*. at Exhibit A. And a chart created by the Petitioner for the comment shows that, of ten races with purportedly high polling errors in races without a ''viable third-party or independent candidate,'' the two races included in the chart with the lowest polling error are, in fact, the only two races that include a third-party or independent candidate.

The petition does imply that third-party and independent candidates are at a disadvantage because ''there is no requirement that pollsters test third-party and independent candidates,'' and therefore the CPD might ''cherry pick from among the myriad polls that exist in order to engineer a specific outcome.'' Petition at 17–18. But the petition presents no evidence that such manipulation has ever occurred, and the Commission is unwilling to predicate a rule change on unsupported speculation of wrongdoing. A debate sponsor who took actions to manipulate the ''pre-established'' and ''objective'' selection criteria so as to ''select[ ] certain pre- chosen participants'' by cherry-picking polls that excluded other candidates would violate the existing rule.

The petition further argues that lowering the polling threshold is insufficient to solve polling error problems. As an initial matter, the Commission notes that the Young Report does not conclude that any and all polling thresholds are unreliable. On this point, in addition to the Young and Schoen Reports discussed above, Petitioner cites an article from Nate Silver on Republican primaries for the conclusion that ''a simple

---

Compare Level the Playing Field, Comment at 3 (showing Georgia and North Carolina Senate races with the lowest final polling errors of those entries in chart) to Level the Playing Field, Comment at Exhibit C (showing Georgia and North Carolina Senate as only races included in chart that involved three-way race polling). For all of these reasons, the Commission is not persuaded that the Petitioner's submissions regarding state and Senate polls indicate any systematic, anti-third-party flaw in the polls at issue here, which are presidential general election polls.

poll does not capture a candidate's potential.'' Petition at 17 (citing Nate Silver, *A Polling Based Forecast of the Republican Primary Field*, FiveThirtyEight Politics (May 11, 2011) (attached to Petition as Exhibit 20)). The cited article, though, concludes what appears to be the opposite of the point for which it is cited; it starts by explaining that it will prove the author's contention that ''polls have enough predictive power to be a worthwhile starting point.'' Petition, Ex. 20. In fact, that article was part four of a four part series. The second sentence of part one of that series explained that the series was intended to show that ''national polls of primary voters—even [nine months] out from the Iowa caucuses and New Hampshire primary—do have a reasonable amount of predictive power in informing us as to the identity of the eventual nominee.'' Nate Silver, *A Brief History of Primary Polling, Part I*, FiveThirtyEight (Mar. 31, 2011), *https://fivethirtyeight.com/features/a-brief-history-of-primary-polling-part-i/*. Moreover, polls like those used in September by CPD are not ''inaccurate'' or ''unreliable'' simply because their assessments of vote share do not match the final vote share on Election Day; such polls are ''designed to measure the true level of public support at the time the poll is administered,'' not ''to measure the true level of public support on Election Day.'' Commission on Presidential Debates, Comment at Ex. 2 ¶ 20 (Declaration of Frank M. Newport, Editor-in-Chief, Gallup Organization) (Dec. 15, 2014), *http://sers.fec.gov/fosers/showpdf.htm?docid=310982*. As the Newport Declaration notes, ''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*. at Ex. 2 ¶ 21.

3. *Submissions Regarding the Desirability of Expanding Debate Participation*

The petition and most of the commenters who support it rely primarily on policy arguments that polling thresholds are inconsistent with the purposes of the existing regulations and that those purposes would be better served by, in essence, including more voices on the debate stage.[15] The Commission explained in its

---

[15] A substantial majority of the comments that the Commission received on the petition were cursory and consisted of a single sentence expressing support for the petition. *See, e.g.*, Comment by Amanda Powell, REG 2014–06 Amendment of 11 CFR 110.13(c) (Dec. 15, 2014) (''I support the petition.''), *http://sers.fec.gov/fosers/showpdf.htm?docid=310989*. Additionally, the League of Women Voters ''does not support amending the FEC regulation to preclude sponsors of general election presidential and vice presidential debates from requiring that a candidate meet a polling threshold in order to be included in the debate,'' but did generally support opening a rulemaking, though without supporting or proposing any specific proposal. Comment by League of Women Voters, REG 2014–06 Amendment of 11 CFR 110.13(c) (Dec. 15, 2014), *http://sers.fec.gov/fosers/showpdf.htm?docid=310985*. The comment did not, however, present any substantial justification for doing so. Moreover, such an open-ended inquiry was not the focus of the petition for rulemaking.

Another commenter, FairVote, indicated that it ''do[es] not oppose the use of polling as a debate selection criterion so long as candidates have an alternative means of qualifying for inclusion.'' *See* Comment by FairVote, REG 2014–06 Amendment of 11 CFR 110.13(c) (Dec. 15, 2014), http://sers.fec.gov/fosers/showpdf.htm?docid=310974. That commenter emphasized the

original Notice of Disposition why it was not persuaded by the petition's "arguments in favor of debate selection criteria that would include more candidates in general election presidential and vice presidential debates." 80 FR at 72617. As the Commission explained, "The rule at section 110.13(c) . . . is not intended to maximize the number of debate participants; it is intended to ensure that staging organizations do not select participants in such a way that the costs of a debate constitute corporate contributions to the candidates taking part." Id. That is the only basis on which the Commission is authorized to regulate in this area. The Commission has no independent statutory basis for regulating the number of candidates who participate in debates, and the merits or drawbacks of increasing such participation—except to the limited extent that they

---

Commission's recognition of the educational purpose of candidate debates and advocated that including additional candidates in debates would ''broaden the substantive discussion within the debates.'' *Id*. As explained *supra*, however, the main purpose of the *regulation* at issue is to clarify when money spent on debate sponsorship is exempt from the FECA's definition of ''contribution.'' The Commission's recognition of the educational value of debates does not alter its view that the determination of which candidates participate in a given debate should generally be left to the organizations sponsoring such events. See supra. In addition, while the Commenter supported Petitioner's proposed alternative to select a third debate participant based upon the number of signatures gathered to obtain ballot access, the existing rule already permits this alternative and thus amending the rule is not required to allow for that approach. *See id*.

implicate federal campaign finance law — are policy questions outside the Commission's jurisdiction.

Conclusion

The evidence presented to the Commission in the petition and comments on the impracticability of independent candidates reaching the 15% threshold and on the unreliability of polling do not lead the Commission to conclude that the CPD's use of such a threshold for selecting debate participants is per se subjective, so as to require initiating a rulemaking to amend 11 CFR 110.13(c). While the reports by Dr. Young and Mr. Schoen, in addition to the historical polling and campaign finance data presented with the petition, demonstrate certain challenges that independent candidates may face when seeking the presidency, these submissions do not demonstrate either that the threshold is so high that only Democratic and Republican nominees could reasonably achieve it, or that the threshold is intended to result in the selection of those nominees to participate in the debates.

For all of the above reasons, in addition to the reasons discussed in the Notice of Disposition published in 2015, see Candidate Debates, 80 FR 72616, and because the Commission has determined that further pursuit of a rulemaking would not be a prudent use of available Commission resources, see 11 CFR 200.5(e), the Commission declines to commence a rulemaking that would amend the criteria for staging candidate debates in 11 CFR 110.13(c) to prohibit the use of a polling threshold to determine participation in presidential general election debates

.

On behalf of the Commission,

Dated: March 23, 2017

Steven T. Walther,
Chairman, Federal Election Commission
[FR Doc. 2017–06150 Filed 3–28–17; 8:45 am]

APPENDIX E

United States District Court
for the District of Columbia

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

v.

FEDERAL ELECTION COMMISSION,
Defendant.

Case No. 15-cv-1397 (TSC)

MEMORANDUM OPINION

This case concerns a highly visible element of our democratic elections: the presidential and vice-presidential debates held every four years by the Commission on Presidential Debates ("CPD"). Plaintiffs allege that the Federal Election Commission ("FEC") has violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, in dismissing two administrative complaints regarding the CPD and in denying a petition to engage in rulemaking to change the FEC's regulations regarding debate staging organizations.

Before the court are Plaintiffs' motion for summary judgment (ECF No. 37) and Defendant's cross-motion for summary judgment (ECF No. 42). Upon consideration of the motions, the Administrative Record (ECF No. 58), and the arguments at the hearing held on

January 5, 2017, Plaintiffs' motion is GRANTED, and Defendant's cross-motion is DENIED.

I. BACKGROUND

A. The Parties

The four Plaintiffs in this case are Level the Playing Field ("LPF"), Green Party of the United States, Libertarian National Committee, Inc., and Dr. Peter Ackerman. LPF is a nonpartisan, nonprofit corporation whose purpose is to promote reforms that allow for greater competition and choice in federal elections. (Administrative Record ("AR") 2019 (ECF No. 58)). The Green Party is a political party that has nominated candidates in every presidential election since 2000. (AR 4003–04). The Libertarian Party is the third largest political party in the U.S. and has nominated presidential candidates in every election since 1972. (AR 4781–82). Dr. Peter Ackerman is a citizen and voter who is an active participant in efforts to reform elections and encourage third-party or independent candidates to seek office. (AR 2020; Tr. of Mot. Hr'g (Jan. 5, 2017) at 7:18–8:7 (ECF No. 59)).

Defendant FEC is charged with the administration and civil enforcement of the Federal Election Campaign Act ("FECA" or "Act"), 52 U.S.C. § 30101 *et seq*. Of the FEC's six commissioners, no more than three "may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). The FEC is authorized to "formulate policy with respect to" the FECA, including through promulgating regulations. 52 U.S.C. § 30106(b)(1). The

agency is also authorized to investigate potential violations of the FECA. 52 U.S.C. § 30109(a)(1)–(2).

B. The Commission on Presidential Debates

The CPD, though not a party to this case, is centrally involved in this litigation and has submitted an amicus brief. (See ECF No. 45).[1] The CPD is a nonprofit corporation that has staged every general election presidential debate since 1988, including the four debates in the 2012 election. (AR 2144, 2882–83 ¶¶ 3–4). It accepts corporate donations to help with the costs associated with staging the debates. (AR 2883 ¶ 5).

Since its creation in 1987, the CPD has been led by two co-chairmen: one Republican (former Republican National Committee Chair Frank Fahrenkopf, Jr.) and one Democrat (originally former Democratic National Committee Chair Paul G. Kirk, Jr., and then in 2009 Michael D. McCurry, former press secretary to President Bill Clinton). (AR 2360, 2885–86 ¶ 11, 2363). The CPD is "bipartisan" by its own description: the press release announcing its formation stated that it was a "bipartisan . . . organization formed to implement joint sponsorship of general election presidential and vice-presidential debates . . . by the national Republican and Democratic committees between their respective nominees." (AR 2249). Moreover, Fahrenkopf has

---

[1] Two additional parties filed amicus briefs in support of Plaintiffs' motion: Independent Voter Project (ECF No. 38) and FairVote (ECF No. 39).

stated that the CPD was not likely to look with favor on including third-party candidates in the debates, and Kirk has stated that he personally believed the CPD should exclude third-party candidates from the debates. (AR 2252).

Since 1988, the CPD's debates have included a third-party candidate—*i.e.*, a candidate not affiliated with the Democratic or Republican parties—just once, in 1992, when the campaigns of Bill Clinton and George H. W. Bush requested that the CPD include Ross Perot in the presidential debates. (AR 2288–89, 2303–04). Beginning with the 2000 election, the CPD has relied on the following criteria to determine whether a candidate may participate in its debates: (1) he/she must be constitutionally eligible to hold office; (2) he/she must appear on enough state ballots to secure an Electoral College majority; and (3) he/she must have "a level of 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 the determination." (AR 2917–18).

C. Statutory and Regulatory Framework

The FECA prohibits "any corporation whatever, or any labor organization, [from] mak[ing] a contribution or expenditure in connection with any election at which presidential and vice presidential electors . . . are to be voted for." 52 U.S.C. § 30118(a). Contributions include "any gift, subscription, loan, advance, or deposit of money or anything of value," 52 U.S.C. § 30101(8)(A), and expenditures include "any purchase, payment,

distribution, loan, advance, deposit, or gift of money or anything of value," but exempt is "nonpartisan activity designed to encourage individuals to vote or to register to vote," 52 U.S.C. § 30101(9)(A)(i), (B)(ii). "Contributions" are defined as any "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 52 U.S.C. § 30116(7)(B)(i).

Pursuant to the FECA, the FEC has promulgated various regulations, including those concerning political candidate debates. Under the law, corporations may not give contributions to or make expenditures on behalf of political candidates or campaigns, but they may donate to organizations that stage debates featuring those candidates because the FEC's regulations provide that any "[f]unds 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" and are also "not expenditures." 11 C.F.R. §§ 100.92, 100.154. Organizations that stage debates must be nonprofit entities and cannot "endorse, support, or oppose political candidates or political parties." 11 C.F.R. § 110.13(a)(1).[2] Staging organizations "must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging

---

[2] If the debate is staged by a broadcaster, newspaper, or magazine, the organization may stage debates "provided that they are not owned or controlled by a political party, political committee or candidate." 11 C.F.R. § 110.13(a)(2).

organizations(s) [sic] shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. § 110.13(c). The regulation does not define "objective," but the FEC stated when it promulgated the rule that the use of objective criteria is intended "to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process," and therefore criteria cannot be "designed to result in the selection of certain pre-chosen participants," and "the rule contains an implied reasonableness requirement." 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995).

The debate staging regulation thus acts as an exemption to the general ban on corporate contributions to or expenditures on behalf of political campaigns or candidates. To prevent debate staging organizations such as the CPD from operating as conduits for corporate contributions made to benefit only one or two candidates from the Democratic and Republican parties—via the much-watched prime-time debates—the regulations require these organizations to (1) be nonpartisan, (2) not endorse, support, or oppose candidates or campaigns, and (3) use pre-established, objective criteria. If a debate staging organization fails to comply with the regulations, such as failing to use objective criteria in determining which candidates participate in its debates, then the value of the debate is actually a contribution or expenditure made to the participating political campaigns in violation of the Act.

The Act provides that any person who believes a violation of the Act has occurred may file an

administrative complaint with the FEC. 52 U.S.C. § 30109(a)(1). The FEC is required to review the complaint and any responses filed by respondents and determine whether there is "reason to believe" the Act has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the six FEC commissioners vote that they find there is reason to believe a violation has occurred, then the FEC may investigate the allegations; otherwise, the complaint is ordinarily dismissed. *Id*. If the commissioners find there is reason to believe a violation has occurred, the next step is determining whether there is probable cause to believe that the Act has been violated; if so, the FEC is required to attempt to remedy the violation first through conciliation and then, if unsuccessful, through litigation. 52 U.S.C. § 30109(a)(4)(A)(i), (a)(6).

The Act further provides that parties "aggrieved by an order of the Commission dismissing a complaint filed by such a party . . . may file a petition with the United States District Court for the District of Columbia," which "may declare that the dismissal of the complaint or failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint." 52 U.S.C. § 30109(a)(8)(A), (C).

D. Procedural History and the Present Litigation

1. Administrative Complaints

Plaintiffs filed two administrative complaints with the FEC alleging that the CPD and twelve of its directors violated the FEC's debate staging regulations and the FECA in connection with the 2012 general election debates.[3] (AR 2001–75, 4001–05, 4778–83). These complaints were labeled Matters Under Review ("MUR") 6869 (filed by LPF and Peter Ackerman in September 2014) and 6942 (filed by the Green Party and Libertarian Party in June 2015).[4] Both complaints alleged that in the 2012 presidential election the CPD was not a nonpartisan debate staging organization under 11 C.F.R. § 110.13(a)(1) because it endorsed, supported, or opposed certain political parties, and that therefore the debates held in 2012 were prohibited corporate contributions and expenditures to the campaigns of the 2012 candidates in violation of 52 U.S.C.§ 30118(a). Further, the complainants—now Plaintiffs—alleged that because the CPD made these contributions and expenditures, it was functioning as a

---

[3] These directors included executive director Janet Brown, chairmen Frank Fahrenkopf, Jr. and Michael McCurry, and Howard G. Buffett, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, Newton N. Minow, Richard D. Parsons, Dorothy Ridings, and Alan K. Simpson.

[4] The Green Party and Libertarian Party each filed individual requests to join MUR 6869, but these requests were denied and instead combined as a new administrative complaint, MUR 6942.

political committee under the FECA and violated 52 U.S.C. §§ 30103 and 30104 by failing to register and report its contributors and contributions with the FEC. (AR 2027–73).

The complainants submitted over one hundred supporting exhibits, including information, statements, and press releases relating to the founding of the CPD, information on the recent political contributions and political activity of the CPD's directors, the expert report of Dr. Clifford Young regarding the ability of third-party or independent candidates to meet the CPD's fifteen percent polling criterion, and the expert report of Douglas Schoen regarding the financial cost to achieve the name recognition necessary to meet the CPD's polling requirement, and the financial difficulty in doing so. (AR 2076–771).

In July 2015, the FEC voted 5-0 (with one recusal) to find no reason to believe that the CPD or its co-chairs violated these regulations or statutes, thus dismissing MUR 6869. (AR 3172–73). In December 2015, the FEC again voted 5-0 to make the same determination regarding MUR 6942. (AR 5000–01). In the Factual & Legal Analyses provided by the FEC to the Plaintiffs in its dismissals of their complaints, the FEC noted that past administrative complaints—MURs 4987, 5004, 5021, 5207, 5414, and 5530—had "made similar allegations," and that in those cases the FEC had found no reason to believe that the CPD and its co-chairs had violated regulations or the FECA. The FEC also pointed out that its past decisions analyzing the objectivity of the CPD's fifteen percent requirement had been reviewed and upheld in *Buchanan v. FEC*, 112 F. Supp.

2d 58 (D.D.C. 2000) (reviewing MURs 4987, 5004, 5021). (AR 3175–81; AR 5003–10).

2. Petition for Rulemaking

In September 2014, on the same day it filed its administrative complaint, LPF also filed a Petition for Rulemaking with the FEC under 5 U.S.C. § 553(e) of the APA. (AR 0002–32). The Petition asked the FEC to revise 11 C.F.R. § 110.13(c) to specifically bar debate staging organizations from using a polling threshold as the sole criterion for accessing general election presidential and vice-presidential debates. LPF submitted many of the same exhibits, including the Young and Schoen expert reports, in support of its arguments.

In November 2015, the FEC published in the Federal Register its Notice of Disposition that it was not initiating rulemaking in response to the Petition. (AR 1903–05; 80 Fed. Reg.72,616 (Nov. 20, 2015)). The agency noted that "[b]ecause the regulation at issue is designed to provide debate sponsors with discretion within a framework of objective and neutral debate criteria, and because the Commission can evaluate the objectivity and neutrality of a debate sponsor's selection criteria through the enforcement process, the Commission finds that the rulemaking proposed by the petition is not necessary at this time." (AR 1904; 80 Fed. Reg.72,617). The FEC also wrote: "In these enforcement matters, the Commission has carefully examined the use of polling thresholds and found that they can be objective and otherwise lawful selection criteria for candidate debates." (*Id*.).

3. Present Litigation

Plaintiffs filed this lawsuit in August 2015, challenging the dismissal of their administrative complaint, MUR 6869, and the agency's decision not to engage in rulemaking. (See Compl. (ECF No. 1)). In October 2015, Plaintiffs filed an Amended Complaint adding a claim that the FEC's failure to act on MUR 6942 within 120 days was arbitrary and capricious. (See Am. Compl. (ECF. 17)). In January 2016, after the FEC dismissed MUR 6942, Plaintiffs filed their Second Amended Complaint adding a challenge to the dismissal. (*See* Second Am. Compl. (ECF No. 25)). The parties filed cross-motions for summary judgment (ECF Nos. 37, 42), on which a hearing was held on January 5, 2017.

II. SUMMARY JUDGMENT STANDARD

On a motion for summary judgment in a suit seeking APA review, the court must set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). The court's review is "highly deferential" and begins with a presumption that the agency's actions are valid. *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). The court is "not empowered to substitute its judgment for that of the agency," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), but instead must consider only "whether the agency acted within the scope of its legal authority, whether the agency has explained its decision, whether the facts on which the agency purports to have relied have some basis in the record, and whether the agency

considered the relevant factors." *Fulbright v. McHugh*, 67 F. Supp. 3d 81, 89 (D.D.C. 2014) (quoting *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 105 (D.D.C. 1995)). The plaintiff bears the burden of establishing the invalidity of the agency's action. *Id*.

III. DISCUSSION

A. FEC's Dismissals of Plaintiffs' Administrative Complaints

Plaintiffs argue that Defendant's dismissals of their two administrative complaints— MURs 6869 and 6942—violated the APA because they were contrary to law and were arbitrary and capricious. They assert that the FEC: (1) applied a legal standard contrary to the text of the regulations; (2) failed to properly consider the submitted evidence; (3) failed to consider the allegations raised against most of the respondents; and (4) ultimately reached the wrong conclusion regarding the objectivity of the CPD's debate requirement.

1. Legal Standard Adopted by the FEC

Plaintiffs first argue that the FEC adopted and applied a legal standard that is contrary to the text of the regulation. In their administrative complaints, Plaintiffs alleged that the CPD "endorse[d], support[ed], or oppose[d] political candidates or political parties" in violation of 11 C.F.R. § 110.13(a) because it acted with partisan bias, its chairmen and directors were active partisans and political donors to the Democratic and Republican parties and their candidates, and its fifteen percent polling threshold for participation in the presidential debates was designed

to bar any third party or independent candidate from participation. (*See* AR 2002–75). In its Factual & Legal Analyses, the FEC did not articulate what standard it used to determine whether the CPD had endorsed, supported, or opposed political parties—indeed, it did not mention these terms at all except in quoting the regulation and the respondents' denials that they had endorsed, supported, or opposed political parties. When asked at oral argument *how* the FEC actually engaged in an analysis to determine whether the CPD endorsed, supported, or opposed political campaigns or parties, FEC's counsel responded simply, though unhelpfully, that "[t]he FEC applied the endorsed support opposed standard that's in the regulation." (Tr. at 28:2–3).

In support of its decisions, the FEC cited its past dismissals of administrative complaints involving the CPD—including MURs 4987, 5004, and 5021—as well as the single prior district court decision that considered the denials, *Buchanan v. FEC*[5] In those dismissals, the FEC described the legal standard it applied:

---

[5] The FEC also repeatedly claims that its decisions regarding the CPD were reviewed and upheld in *Natural Law Party v. FEC*, Case No. 00-cv-2138. That case was a companion to Buchanan, and the final order, issued fifteen days after the complaint was filed, includes no separate analysis. *See* Order (Sept. 21, 2000) (granting summary judgment "[f]or the reasons set forth in Part II of the September 14, 2000 Memorandum Opinion in" *Buchanan*). The FEC also repeatedly cites to another opinion in *Natural Law Party*, 111 F. Supp. 2d 33 (D.D.C. 2000). That decision was explicitly limited to whether plaintiffs had standing to challenge the FEC's actions, an issue not before the court here.

> [Complainants] have not provided evidence that the CPD *is controlled by the DNC or the RNC*. There is no evidence that *any officer or member of the DNC or the RNC is involved in the operation* of the CPD. Moreover, there does not appear to be any evidence that the DNC and the RNC *had input into the development* of the CPD's candidate selection criteria for the 2000 presidential election cycle. Thus, it appears that the CPD satisfied the requirement of a staging organization that it not endorse, support or oppose political candidates or political parties. 11 C.F.R. § 110.13(a).

(FEC Mem. at 21 (quoting First General Counsel's Report in MURs 4897, 5004, and 5021 (July 13, 2000)) (emphasis added)). The FEC asserted in *Buchanan* that this "control" standard was in response to a "specific contention" involved in those administrative complaints, and the court agreed that the control standard was "geared toward refuting [that] specific contention." 112 F. Supp. 2d at 71 n.8. However, Plaintiffs argue that by citing to these past MURs and the *Buchanan* case in its most recent dismissals, the FEC is effectively adopting this "control" standard *sub silentio*, as it has not articulated any other standard. The FEC responds that there is "no instance in which the agency *actually said* it was adopting a 'control over' test." (FEC Mem. at 28 (emphasis in original)), and adds that the control test "in any event . . . indisputably is also a helpful aid in determining whether a group's activities are nonpartisan." (*Id*. at 28–29).

The court agrees with Plaintiffs that, in the absence of any articulated standard or analysis, the FEC's

reliance on its past dismissals and the *Buchanan* case strongly implies that it has effectively adopted or relied on the control test it articulated in those past dismissals. However, such a test appears to be contrary to the text of the agency's own regulations. The FEC's regulations do not define "support, endorse, or oppose" as used in 11 C.F.R. § 110.13(a)(1), and the FEC did not define them in its Factual & Legal Analyses.[6] However, the regulations suggest that, whatever these terms do mean, they do not mean "control," for that is the standard given in the regulation's subsequent subsection, 11 C.F.R. § 110.13(a)(2), applying to broadcasters, as opposed to nonprofit organizations. That subsection permits only broadcasters that "are not owned or controlled by a political party, political committee or candidate" from staging debates. 11 C.F.R. § 110.13(a)(2). Therefore, the FEC's own regulations create a distinction between the control test, which applies to broadcasters, and an endorse-support-oppose test, which applies to nonprofit organizations.

The FEC heavily relies on the district's court 2000 decision in *Buchanan*, which permitted the agency's control test as applied to the CPD. As described above, that test assessed whether the CPD was "controlled by" the two major parties, whether either party was

---

[6] According to the Oxford Dictionary, "endorse" means to "declare one's approval of"; "support" means "contributing to the success of or maintaining the value of"; and "oppose" means to "set oneself against" or "stand in the way of." *See* Oxford, *The New Shorter Oxford English Dictionary* 818, 3153, 2009 (4th ed. 1993).

"involved in" the CPD's operations, or whether those parties "had input in" CPD's debate decisions. However, the court in *Buchanan* simply noted that the control standard was used to refute the specific control-specific facts alleged in that case. 112 F. Supp. 2d at 71 n.8. Here, Plaintiffs' do not allege that the Democratic or Republican parties exercised control over the CPD, but instead that the CPD and its directors acted on a partisan basis to support those parties. Therefore, unlike in *Buchanan*, there are no control-specific factual allegations here to warrant applying a control standard an incorrect construction of the regulation. Moreover, as noted above, a plain reading of the regulation in the context of the following subsection does not support applying a control standard, and to do so may be an incorrect construction of the regulation.

Courts are to be "exceedingly deferential" when reviewing an agency's construction of its own regulations, and the court "is not to decide which among several competing interpretations best serves the regulatory purpose." *Thomas Jefferson Uni. v. Shalala*, 512 U.S. 504, 512 (1994); *Trinity Broadcasting of Fla., Inv. v. FCC*, 211 F.3d 618, 625 (D.C. Cir. 2000). The court must defer to the FEC unless the agency fails to meet the "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) (quoting *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)); *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)

(FEC "is precisely the type of agency to which deference should presumptively be afforded"). However, deference is not appropriate "when the agency interpretation is plainly erroneous or inconsistent with the regulation" or "when there is reason to suspect that the agency's interpretation does not reflect the agency's fair and considered judgment." *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

The *Buchanan* court was satisfied that while the FEC's "terse explanation could have been more clear and thorough," the court could still determine what legal analysis was "apparent from the report." 112 F. Supp. 2d at 72. This court is not as willing to read thoughtful consideration into the FEC's threadbare Factual & Legal Analyses. Here, the FEC either applied a "control" standard that is contrary to the plain text of the regulation, or it possibly applied no analytical standard at all, given that it articulated none. Therefore, the court cannot defer to the FEC's analysis and further concludes that the FEC acted arbitrarily and capriciously and contrary to law when it determined that the CPD did not endorse, support, or oppose political parties in the 2012 election.

The court therefore GRANTS Plaintiffs' motion and DENIES Defendant's cross- motion with respect to the appropriateness of the legal standard applied. On remand, the FEC is ORDERED to articulate its analysis in determining whether the CPD endorsed, supported, or opposed political parties or candidates.

2. FEC's Alleged Failure to Give Evidence a Hard Look

Plaintiffs next argue that the FEC failed to adequately consider the evidence it presented with its two administrative complaints. Courts must assess whether agencies have considered the "relevant factors" and must "engage in a 'substantial inquiry' into the facts, one that is 'searching and careful.'" *Ethyl Corp. v. EPA*, 541 F.2d 1, 34 (D.C. Cir. 1976) (quoting *Overton Park*, 401 U.S. at 415). While the court's review is deferential, it is not required to "rubber-stamp the agency decision." *Id*. Here, the court finds that the FEC's Legal & Factual Analyses do not provide any evidence that the FEC considered the relevant factors or took a hard look at the evidence. Indeed, the FEC fails to cite or discuss virtually any of the evidence submitted with Plaintiffs' complaints.

a. Evidence Submitted With Past Complaints

The parties agree that some of evidence submitted with the complaints in this case was identical to evidence submitted with prior CPD-related complaints, including MURs 4987, 5004, and 5021, which were reviewed by the court in *Buchanan*. In those complaints, Plaintiffs presented evidence that the CPD was created by the then-chairmen of the Republican and Democratic parties, who entered into a Memorandum of Agreement that the debates "should be principally and jointly sponsored and conducted by the Republican and Democratic National Committees," and that the press release announcing the CPD's

formation stated it was a "bipartisan . . . organization." (AR 2244, 2249).

Plaintiffs also submitted numerous statements by the CPD chairmen and directors, including: the CPD was not likely to look with favor on including third-party candidates in the debates (CPD Co-Chairman Fahrenkopf, AR 2252); the CPD should exclude third-party candidates from the debates (CPD Co-Chairman Kirk, AR 2252); "Democrats and Republicans on the commission [] are interested in the American people finding out more about the two major candidates—not about independent candidates who mess things up" (CPD Director Alan Simpson, AR 3095); "[t]here's no question" that "the two major parties [have] absolute control of the presidential debate process" (CPD Director John Lewis, AR 3095); "responsibility for [the debates] should rest with the political system—with the Democratic and Republican Parties . . . [and] if the Democratic and Republican nominees agreed, other candidates could be included" (CPD Director Minow, AR 3095); the CPD "is not really nonpartisan[;] [i]t's bipartisan" (CPD Director Norcross, AR 3095); and the CPD is "extremely careful to be bi-partisan" (CPD Director Vucanovich, AR 3095).

Finally, Plaintiffs submitted evidence from the 1993 Congressional testimony of Bobby Burchfield, who served as General Counsel of President Bush's re-election campaign in 1992, that the CPD did not want to invite Ross Perot to participate in the 1992 election debates, but "the Bush campaign insisted, and the Clinton campaign agreed, that Mr. Perot and

Admiral Stockdale be invited to the debates," after which Perot was included. (AR 2299–304).

The court in *Buchanan* noted that this evidence of the CPD's alleged partisanship was "not insubstantial" and "[a]n ordinary citizen might easily view the circumstances surrounding the creation of the CPD along with the evidence of major-party influence over the past three debates as giving some 'reason to believe' that the CPD always has supported, and still does support, the two major parties to the detriment of all others." 112 F. Supp. 2d at 72. However, the court found that Plaintiffs lacked "contemporaneous evidence" specifically relating to the CPD's decisions regarding the 2000 election debates at issue in that case. *Id*.

b. Plaintiffs' New Evidence

In this case, Plaintiffs submitted new evidence in addition to the evidence described above. Much of this evidence pointed to the recent partisanship of the CPD's chairs and directors. According to the submitted materials, CPD Chairman Fahrenkopf donated more than $23,000 between 2008 and 2012 and $35,000 between 2012 and 2014 to the Republican Party. (AR 2370, 2373–80). Similarly, CPD Chairman McCurry donated almost $85,000 to Democrats between 2008 and 2012. (AR 2370). Additionally, several of the CPD directors contributed tens of thousands of dollars to the two major political parties and candidates. (AR 2370, 2403–05, 2407–08). CPD directors also have engaged in active partisanship. For example, in 2011, Fahrenkopf referred to the Republican Party as "our great party,"

and in April 2015, he stated that the CPD "primarily go[es] with the two leading candidates" in its debates. (AR 2382–83, 3099).

Plaintiffs also submitted the reports of two experts: Dr. Clifford Young, who discussed the ability of third-party or independent candidates to meet the CPD's fifteen percent polling criterion (AR 2487–526); and Douglas Schoen, who discussed the financial obstacles to achieving the name recognition necessary for a third-party or independent candidate to meet the CPD's polling requirement (AR 2552–82). Finally, in support of their argument that using polling as the single criterion for admission into the debates is not objective or fair, Plaintiffs in MUR 6942 submitted evidence that Gallup was no longer polling during the 2016 presidential election, because polling "has become inherently unreliable." (AR 4946–76).

c. FEC's Consideration of the Evidence

In its two Factual & Legal Analyses, the FEC addressed just two items from this mountain of submitted evidence: the April 2015 quote from Fahrenkopf that the CPD goes with the two leading candidates in its debates (AR 3180; AR 5008–09), and Gallup's decision to not conduct polling during the 2016 election (AR 5003 n.1).[7] The FEC accepted on its face

[7] The court notes with concern that the Fahrenkopf interview quote was presented to the FEC in April 2015 as an amendment to the original September 2014 complaint (*see* AR 3093–96), and the Gallup information was similarly submitted in an amendment in October 2015 (*see* AR 4852–54), rather than with the initial submission of evidence. The FEC's decision to address

Fahrenkopf's declaration that he was merely stating a historical fact (AR 3180; AR 5008–09), and similarly accepted the statement in a declaration submitted by Gallup's Editor-in-Chief that the polling decision was "based on allocation of resources[,] not any lack of confidence in Gallup's ability to conduct accurate polls" (AR 5003 n.1).

At oral argument, when asked why the FEC had only mentioned these two items of evidence, counsel for the FEC stated that this was the only other evidence that "required [a] separate response." (Tr. at 31:2–14). A casual reader of the Factual & Legal Analyses would get the distinct impression that these two pieces of evidence were all that Plaintiffs had even submitted. Certainly, the court does not expect the FEC to discuss every single page of evidence in order to demonstrate that it had carefully considered the facts, but here the FEC *did not even mention* the vast majority of the substantive evidence submitted regarding partisanship, party support, and the non-objectivity of the CPD's fifteen percent threshold. While the court hopes that the FEC carefully reviewed the evidence submitted by Plaintiffs before thoughtfully reaching its conclusions, the two Factual & Legal Analyses provide no basis whatsoever for the court to reach that conclusion. Therefore, the court GRANTS Plaintiffs' motion and DENIES Defendant's cross-motion with respect to whether the FEC acted arbitrarily and capriciously and

---

only these stray, supplemental pieces of submitted evidence suggests that the FEC may not have considered or even reviewed the originally submitted evidence at all.

contrary to law by not reasonably considering the evidence before it. On remand, the FEC must demonstrate how it considered the evidence, particularly, but not necessarily limited to, the newly-submitted evidence of partisanship and political donations and the expert analyses regarding fundraising and polling.

3. FEC's Failure to Include CPD Directors as Respondents

Plaintiffs' two administrative complaints were filed against the CPD, its two co- chairmen, and ten other directors. The FECA requires that "[w]ithin 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation." 52 U.S.C. § 30109(a)(1). Despite the Act's dictate, the FEC only notified the CPD and the two chairmen, only solicited responses from them, and mentioned only them in its Factual & Legal Analyses. Plaintiffs argue that the FEC's failure to notify the ten other respondents and to consider the evidence and allegations made against them is further indication that the agency's dismissals were arbitrary and capricious. Despite its clear violation of the Act's procedural requirements, the FEC maintains that this failure amounted to no more than harmless error because this failure "is almost always harmless error." (Def. Mem. at 30).

In support, the FEC cites *Nader v. FEC*, 823 F. Supp. 2d 53, 67–68 (D.D.C. 2011), which found that under the facts of that case the agency's failure to notify respondents was indeed harmless error because the

plaintiff did not "identify the harm to him." Here, while Plaintiffs' allegations against the ten un-notified respondents were the same as those against the CPD, Fahrenkopf, and McCurry, Plaintiffs did submit new evidence specific to those ten directors regarding their partisan financial contributions and partisan political activity. Whether the FEC considered this evidence is essential in assessing the FEC's final determination as to whether the CPD has supported, endorsed, or opposed political parties or candidates.

The FEC may ultimately decide that its conclusions would be the same regarding these ten directors as with the CPD and two chairmen, but from the record before the court, it appears that the FEC did not even consider this evidence or these allegations. The court cannot brush aside this procedural violation of the Act and determine that it was harmless error, because there is no way for the court to determine that Plaintiffs experienced no harm from having their evidence ignored. Therefore, the court GRANTS Plaintiffs' motion and DENIES Defendant's cross-motion with respect to whether it was arbitrary and capricious and contrary to law to ignore the allegations made against ten of the CPD's directors in violation of the Act's notification requirements. On remand, the FEC must notify these ten remaining directors, address these allegations, and consider the evidence presented against these respondents.

4. FEC's Conclusion that the CPD's Polling Criterion Was Objective

Finally, Plaintiffs argue that the FEC's dismissals were arbitrary and capricious because the agency unreasonably found that the CPD's fifteen percent polling criterion was "objective" under the regulation. The regulation requires that staging organizations such as the CPD "use pre-established objective criteria to determine which candidates may participate in a debate," but does not define what it means for criteria to be "objective." 11 C.F.R. § 100.13(c); *see also Perot v. FEC*, 97 F.3d 553, 559–60 (D.C. Cir. 1996) (regulation "does not spell out precisely what the phrase 'objective criteria' means," giving "the individual organizations leeway to decide what specific criteria to use"). In *Buchanan*, however, the court noted that "the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it." 112 F. Supp. 2d at 74.

In support of their assertion that the fifteen percent requirement was not objective, but instead designed to keep third-party or independent candidates out of the CPD's debates, Plaintiffs submitted evidence that no non-major party nominee had or would have qualified under this requirement since the CPD began staging debates in 1988, as well as the reports of two experts, one of whom found that polling is not inherently reliable, particularly in races with more than two candidates, and the other who concluded that achieving fifteen percent support in polls requires spending about $266 million before the debates even take place. The

FEC gave this evidence only glancing attention, writing in a footnote in both its Factual & Legal Analyses, without reference to any specific evidence or how it came to this conclusion, that "[e]ven if CPD's 15% polling criterion may tend to exclude third-party and independent candidates, the available information does not indicate—as the available information in previous complaints did not indicate—that the CPD failed to use pre-established, objective criteria." (AR 3181 n.4; AR 5010 n.5).

As discussed above, the court is faced with the difficult task of determining the reasonableness of the FEC's analysis when the FEC did not provide any indication that it actually considered the submitted evidence and engaged in any reasoned decision-making. This task is made all the more difficult by the fact that the evidence unaddressed—or outright ignored—by the FEC is quite substantial. Dr. Clifford Young's expert report concluded that for a third-party or independent candidate to achieve fifteen-percent approval in polls, she "must achieve a minimum of 60% [national] name recognition, and likely 80%," (AR 2493), while participation in the Republican or Democratic party primary process affords greater name recognition and even greater reported support in polls due to the "party halo effect" (AR 2500–01). Dr. Young's report also concluded that election polling, particularly involving third-party candidates, suffers from "sampling and non-sampling error," including "coverage bias and measurement error," which make polling of "three-way races [] more error prone than two-way races." (AR 2518–19). He also calculated that, due to these polling

errors, a hypothetical independent candidate with a seventeen percent level of support had a thirty-seven to forty-one percent likelihood of reporting as under fifteen percent support and thus being excluded from the debates. (AR 2519).

Douglas Schoen's report discussed the realities of modern media markets and campaign spending, and concluded that to achieve name recognition of sixty percent and support of fifteen percent, an independent candidate "should reasonably expect to spend" approximately 266 million dollars on her campaign—*before* the debates—including "broadcast, cable, and digital media placement costs." (AR 2555). To reach the eighty percent name recognition Dr. Young found was "likely" necessary to achieve fifteen percent support, Schoen determined that an independent candidate would have to spend nearly forty million additional dollars, bringing the total to over $300 million—just to hope to gain access to the CPD's debates, a *de facto* prerequisite for competing in the presidential election. (*See* AR 2564). In Schoen's opinion, such a spending threshold "is, for all practical purposes, impossible for all but the major-party candidates" in part because of competition with the nominating processes of the major parties, the potential lack of ties with media networks and broadcast companies, and a lack of media interest in third-party candidates prior to the debates. (AR 2556).

Given these expert analyses, the evidence that since 1988 only one non-major party candidate, Ross Perot, has participated in the debates, and only then at the request of the two major parties, and the evidence that

the CPD's chairmen and directors are actively invested in the partisan political process through large donations, the court is perplexed that the full extent of the FEC's analysis consisted of no more than a footnote stating that even if the fifteen percent threshold excluded third-party candidates, this still did not indicate that it was not an objective criterion. (*See* AR 3181 n.4; AR 5010 n.5). This begs the question: if under these facts the FEC does not consider the fifteen percent polling criterion to be subjective, what would be? Unfortunately, the FEC articulated no analysis, and the court cannot discern the FEC's reasoning.

In its briefs on this issue, the FEC again relies heavily on the district court's decision in *Buchanan* sixteen years ago. In that case, the court found that the FEC's conclusion that the CPD's polling threshold was objective was not arbitrary and capricious. 111 F. Supp. 2d at 76. As the court in *Buchanan* noted, the record before it regarding the objectivity of the polling threshold was limited to the plaintiffs' arguments that federal funding eligibility for presidential candidates is tied to a much lower five percent threshold, that polling is inexact because "even the best polls have significant margins of error," and that pre-debate polls fail to reflect the level of support that could result from participation in the debates themselves. *See id*. at 73–76. Here, however, the record is far more developed and involves different and considerably stronger evidence. The FEC's reliance on the holding in *Buchanan* is thus misplaced.

With regard to Plaintiffs' arguments on the objective criteria, the FEC's Factual & Legal Analyses suffer

from two notable flaws. First, there is no discussion, or even mention, of Plaintiffs' substantial and lengthy evidence and arguments. Second, there appears to be little to no legal analysis applying the agency's regulation. Missing from the single footnote that the FEC devoted to this issue is any explanation as to how it reached its conclusion, what it considered, what analysis it engaged in, and any other information that would allow the court to find the FEC's conclusions were the result of reasoned decision-making. The court therefore GRANTS Plaintiffs' motion and DENIES Defendant's cross-motion as to whether the FEC's analysis of the criterion's objectivity was arbitrary and capricious and contrary to law. While the court cannot and does not mandate that the FEC reach a different conclusion on remand, the court notes that the weight of Plaintiffs' evidence is substantial, and the FEC must demonstrate that it actually considered the full scope of this evidence, including the CPD chairmen's and directors' partisan political activity and the expert reports, as well as explain how and why it rejected this evidence in deciding that the CPD's polling requirement is an objective criterion.

In sum, with respect to Plaintiffs' allegation that the FEC acted arbitrarily and capriciously and contrary to law when it dismissed their two administrative complaints, this court agrees and grants their motion for summary judgment and denies Defendant's cross-motion. Pursuant to the Act, 52 U.S.C. § 30109(a)(8)(C), the FEC is ORDERED to reconsider the evidence and allegations and issue a new decision consistent with this Opinion "within 30 days, failing

which the complainant[s] may bring, in the name of such complainant[s], a civil action to remedy the violation involved in the original complaint."

B. FEC's Decision to Not Engage in Rulemaking

LPF also moves for summary judgment on its claim that the FEC's decision not to initiate rulemaking was arbitrary and capricious in violation of the APA.[8] The court's review of an agency's decision not to engage in rulemaking is very limited, and that decision "is at the high end of the range of levels of deference we give to agency action under our 'arbitrary and capricious' review." *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (internal quotation omitted). The proper inquiry is "whether the agency employed reasoned decision-making in rejecting the petition." *Id*. In making this assessment, the court "must examine 'the petition for rulemaking, comments pro and con . . . and the agency's explanation of its decision to reject the petition." *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (quoting *WWHT, Inc. v. FCC*, 656 F.2d 807, 817–18 (D.C. Cir. 1981)). An order to

---

[8] The FEC contends that the Green Party is barred from challenging the FEC's refusal to engage in rulemaking following the denial of the Petition because "it previously litigated the question" of whether 11 C.F.R. § 110.13 is contrary to the FECA. (FEC Mem. at 35). The court disagrees. The claim here is about the refusal to engage in rulemaking, not whether a regulation is unlawful under the Act, and more importantly, this claim is brought by LPF alone, not by the Green Party. (*See* Second Am. Compl. ¶¶ 142–44; Pls. Rep. at 17 n.6).

overturn the agency's decision and require promulgation of a rule is reserved for only "the rarest and most compelling of circumstances." *WWHT*, 656 F.2d at 818. However, if the agency fails to provide a reasonable explanation for its decision, an appropriate remedy may be a remand to the agency for reconsideration and publication of a new decision or the commencement of rulemaking if the agency so decides. *See, e.g., Shays v. FEC*, 424 F. Supp. 2d 100, 116–17 (D.D.C. 2006).

> In its Petition requesting rulemaking, LPF requested the following:
>
> The FEC should conduct a rulemaking to revise and amend 11 C.F.R. § 110.13(c), the regulation governing the criteria for candidate selection that corporations and broadcasters must use in order to sponsor candidate debates. The amendment should (A) preclude sponsors of general election presidential and vice-presidential debates from requiring that a candidate meet a polling threshold in order to be admitted to the debates; and (B) require that any sponsor of general election presidential and vice-presidential debates have a set of objective, unbiased criteria for debate admission that do not require candidates to satisfy a polling threshold to participate in debates.

(AR 0009–10). In support of this request, LPF presented much of the same evidence, including the Young and Schoen reports, as it presented in support of its administrative complaint. LPF's basic argument is that the use of a single polling criterion to determine

admission to candidate debates is particularly susceptible to excluding candidates and lending support to the two major party candidates, creating an appearance of corruption or unlawful conduct. LPF therefore argues that in the unique context of presidential and vice-presidential debates, which are run solely by the CPD, the FEC should continue permitting the CPD or future debate staging organizations to craft their own objective criteria but disallow the use of polling thresholds. The FEC received 1,264 comments, and only one—from the CPD—opposed the Petition. (AR 1903). FEC published its Notice of Disposition in the Federal Register, notifying the public that it had declined to engage in rulemaking and stating its reasoning.

In its Notice, the FEC first noted that "the purpose of section 110.13 . . . is to provide a specific exception so that certain nonprofit organizations . . . and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates." (AR 1904). It stated that "debate staging organizations may use [objective selection criteria] to control the number of candidates participating in . . . a meaningful debate but must not use criteria designed to result in the selection of certain pre-chosen participants," and "[t]he choice of which objective criteria to use is largely left to the discretion of the staging organization." (*Id*. (internal quotations omitted)). Moreover, the agency stated that the regulation "is not intended to maximize the number of debate participants" but instead "is intended to ensure that staging organizations do not select participants in

such a way that the costs of a debate constitute corporate contributions to the candidates taking part." (*Id.*). The FEC therefore found "that section 110.13(c) in its current form provides adequate regulatory implementation of the corporate contribution ban and is preferable to a rigid rule that would prohibit or mandate use of particular debate selection criteria in all debates." (*Id.*).

In response to the specific evidence that CPD's use of the fifteen percent polling threshold has the result of excluding third-party and independent candidates, the FEC stated only that "[t]he use of polling data by a single debate staging organization for candidate debates for a single office . . . does not suggest the need for a rule change." (AR 1905). It further acknowledged that a "polling threshold could be used to promote or advance one candidate (or group of candidates) over another," but noted that "this would already be unlawful under the Commission's existing regulation," and "the Commission can evaluate the objectivity and neutrality of a debate sponsor's selection criteria through the enforcement process." (AR 1904–05). The FEC did not explain why the enforcement process was preferable.

The FEC also did not explain why it was rejecting the Petition's request for a specific debate rule for presidential and vice-presidential debates. Instead, it responded to the Petition as if it requested a general rule change (which the Petition did not), only stating, again without any additional explanation or analysis, that "[i]n the absence of any indication that polling thresholds are inherently unobjective or otherwise

unlawful as applied to all federal elections . . . the Commission declines to initiate a rulemaking that would impose a nationwide prohibition on the use of such thresholds." (AR 1905).

As with the above review of the FEC's dismissals, the court must accord substantial deference to the agency's decisions. However, the court is again concerned at the agency's cursory treatment of Plaintiff LPF's Petition, its arguments, and its evidence. LPF clearly argued, and attempts to establish with significant evidence, that in presidential elections CPD's polling threshold is being used subjectively to exclude independent and third-party candidates, which has the effect of allowing corporations to channel money to the CPD's expenditures to the campaigns they would be prohibited from giving the campaigns directly. It further argued and presented evidence that polling thresholds are particularly unreliable and susceptible to this type of subjective use at the presidential level, undermining the FEC's stated goal of using "objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process." In its Notice, the FEC brushed these arguments aside, describing the practice as "[t]he use of polling data by a single debate staging organization for candidate debates for a single office." (AR 1905). This characterization makes little sense. Referring to the CPD as just "a single debate staging organization" ignores the fact that for thirty years it has been the only debate staging organization for presidential debates; similarly, referring to the presidential debates as simply "debates for a single office" ignores that the entire

Petition is aimed at the unique characteristics of presidential elections and debates.

In light of the court's conclusions above that the FEC acted arbitrarily and capriciously in its enforcement decisions by failing to address evidence or articulate its analysis, the court views with some skepticism the FEC's assertion that rulemaking is unnecessary because the agency has chosen to root out subjective debate criteria through the enforcement process. By citing past practice—and the *Buchanan* decision—as its only response to LPF's Petition, the FEC appears to have stuck its head in the sand and ignored the evidence that its lack of rulemaking and lack of enforcement may be undermining the stated purpose of its regulations and the Act. This is not the reasoned decision-making that is required of all agencies. Therefore, despite the deferential standard of review, this court concludes from reviewing the Petition and Notice of Disposition that the FEC acted arbitrarily and capriciously by refusing to engage in rulemaking without a thorough consideration of the presented evidence and without explaining its decision.

The decision in *Shays v. FEC* is instructive, and the court reaches a similar conclusion here. The FEC's failure to provide a reasoned and coherent explanation for its decision requires remand for reconsideration. However, the court will not order the FEC to promulgate the rule requested in the Petition based on the record here. Such a remedy is appropriate in "only the rarest and most compelling of circumstances." *WWHT*, 656 F.2d at 818. The D.C. Circuit has found such circumstances when an agency refused rulemaking

despite new evidence and behavior that "strongly suggest[ed] that it ha[d] been blind to the nature of [its] mandate from Congress." *Am. Horse Prot. Ass'n*, 812 F.2d at 7. While the FEC's refusal to engage in thoughtful, reasoned decision-making in either enforcement or rulemaking in this case may strike some, including Plaintiffs, as being "blind to the nature of [its] mandate from Congress," this court will not take the extraordinary step of ordering promulgation of a new rule, but instead will permit the FEC a second opportunity to give the Petition the consideration it requires.

LPF's motion is therefore GRANTED as to its rulemaking petition, and Defendant's cross-motion is DENIED. The FEC is ORDERED to reconsider the Petition for Rulemaking and issue a new decision consistent with this Opinion within sixty days.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' motion for summary judgment is GRANTED in full, and Defendant's cross-motion is also DENIED.

Date: February 1, 2017

/s/ Tanya S. Chutkan
TANYA S. CHUTKAN
United States District Judge

APPENDIX F

1. 11 C.F.R. § 110.13 provides**:**

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.

* * * * *

2. 11 C.F.R. § 114.4 provides:

Disbursments for communications by corporations and labor organizations beyond the restricted class in connection with a Federal Election.

* * * * *

(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).

3. 52 U.S.C. § 30101 provides:

Definitions.

* * * * *

(B) The term "expenditure" does not include–

* * * * *

(ii) nonpartisan activity designed to encourage individuals to vote or to register to vote;

* * * * *

4. 52 U.S.C. § 30118 provides:

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.

* * * * *