**No. 19-5117-cv**

# United States Court of Appeals

*for the*

# District of Columbia Circuit

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

*Plaintiffs-Appellants*,

—v.—

FEDERAL ELECTION COMMISSION

*Defendant-Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## CORRECTED BRIEF FOR PLAINTIFFS-APPELLANTS

ALEXANDRA A.E. SHAPIRO
ERIC S. OLNEY
JACOB S. WOLF
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

*Attorneys for Plaintiffs-Appellants*

## CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Appellants certify as follows:

### A. Parties and Amici

The Appellants are Plaintiffs Level the Playing Field, Dr. Peter Ackerman, Green Party of the United States, and the Libertarian National Committee, Inc., which controls and manages the United States Libertarian Party. The Appellee is Defendant Federal Election Commission (the "FEC"). The amici below were Fairvote, Independent Voter Project, Norman R. Augustine, Dennis C. Blair, Scott Blackmun, Mary McInnis Boise, W. Bowman Cutter, James J. Fishman, Carla A. Hills, Daniel L. Kurtz, Vali R. Nasr, Nancy E. Roman, James Stavridis, Joseph Robert Kerry, Joseph I. Lieberman, Hon. Clarine N. Riddle, Hon. David M. Walker, Hon. Christine Todd Whitman, and the Commission on Presidential Debates.

The law firms that participated in the proceedings below are Shapiro Arato Bach LLP, Arnold & Porter Kaye Scholer LLP, Peace & Shea, LLP, the Law Office of Ann Wilcox, and Hopping Green & Sams.

### B. Ruling Under Review

The rulings under review, each entered by Hon. Tanya S. Chutkan, are (1) the Order, dated March 31, 2019 (Docket No. 111), denying Appellants' motion for summary judgment, denying Appellants' motion to supplement the record,

granting the FEC's motion for summary judgment, and granting in part and denying in part the FEC's motion to strike; and (2) the Memorandum Opinion, dated March 31, 2019 (Docket No. 110) addressing these motions, which appears at 381 F. Supp. 3d 78.

### C. No Related Cases

This case has not previously been before this Court or any other court except for the district court. Counsel for Appellants is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

Dated: September 18, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure and D.C. Cir. Rule 26.1, the undersigned counsel certifies that Appellant Level the Playing Field is a not-for-profit organization incorporated under the laws of Virginia. Its purpose is to promote reforms that allow for greater competition and choice in federal elections. Appellant Libertarian National Committee, Inc. is a not-for-profit organization incorporated under the laws of the District of Columbia. It serves as the national committee of the Libertarian Party of the United States. No Appellant issues stock, is publicly held or has parent companies.

Dated: September 18, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

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# GLOSSARY

**CPD**: Commission on Presidential Debates

**Dkt.**: District Court Docket

**DNC**: Democratic National Committee

**FEC**: Defendant-Appellee Federal Election Commission

**FECA**: Federal Election Campaign Act

**Green Party**: Plaintiff-Appellant Green Party of the United States

**Libertarian Party**: United States Libertarian Party

**League:** League of Women Voters

**LPF**: Plaintiff-Appellant Level the Playing Field

**RNC**: Republican National Committee

## INTRODUCTION

This case concerns an institution the Republican and Democratic parties created to exclude competition from independent candidates: the Commission on Presidential Debates. No one can win the presidency without participating in the general election debates. Yet for 30 years, the CPD has completely controlled who participates in those debates and has used its power to perpetuate the two major parties' duopoly. Its directors are unelected and unaccountable political insiders with extensive ties to the parties. The CPD is funded with millions of dollars from politically influential corporations that have spent years buying access to and influence over Republican and Democratic politicians and share the parties' interests in squelching independent candidacies.[1]

Under federal election law, corporate-funded debate sponsors like the CPD must be nonpartisan and must use objective criteria to determine who participates in debates. But the CPD complies with neither requirement. It is not remotely nonpartisan. The CPD was created by the Republican and Democratic Parties "to implement joint sponsorship" of debates between their nominees. Its leadership has always consisted of Republican and Democratic insiders—party chairs, former elected officials, top aides, party donors and lobbyists. These staunch partisans

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[1] "Independent candidates" include those unaffiliated with any political party or affiliated with third parties like the Green and Libertarian Parties.

endorse Republican and Democratic candidates, lavish them with high-dollar contributions, oversee even larger contributions as paid-for-hire lobbyists, and accept undisclosed contributions from corporations that buy influence with the major parties using the CPD as a conduit. The CPD's partisan directors have made no bones about their desire to keep independent candidates out of the presidential debates.

The CPD also uses debate-qualifying criteria designed to achieve this result that are not the least bit "objective." The centerpiece is a polling benchmark that no independent candidate has or could ever satisfy. Since it was instituted in 2000, only the Democratic and Republican nominees have come close to meeting it. No pre-2000 independent who did not first run in a major party primary could have done so either. Statistical analyses and other data show that this level of support is, in fact, virtually impossible for an independent candidate other than a self-funded billionaire to achieve, because of the enormous cost of paying to boost name recognition and because polling is fundamentally unreliable in ways that disadvantage independents. Highly qualified candidates are also dissuaded from even running as independents, because prospective donors and endorsers will not support a candidate whose participation in the debates is uncertain.

The FEC is supposed to enforce the laws and regulation the CPD is violating. However, because the FEC's own bipartisan makeup mirrors the CPD's,

the agency is fundamentally incapable of holding the CPD accountable. Consequently, for over two decades, it has looked the other way and brushed aside numerous well-grounded complaints.

This case continues that pattern of sweeping illegal CPD acts under the rug. Appellants filed administrative complaints against the CPD documenting its decades of election-law violations, and a related petition for rulemaking. The petition was supported by every one of over 1,200 commenters (except the CPD itself). Yet the FEC once again ignored how and why the CPD violates the law by excluding independent candidates, and summarily dismissed the complaints and the rulemaking petition.

After Appellants sought judicial review, the district court agreed that the agency's actions were arbitrary and capricious. It found that that the FEC had "stuck its head in the sand," "ignored" the "mountain of submitted evidence," and "refus[ed] to engage in thoughtful, reasoned decision-making," and remanded the matter to the agency.

Yet the FEC reached the exact same result on remand, in decisions that contradicted the prior ones and are transparently intended to justify a pre-ordained result. The FEC ignored most of the overwhelming evidence of the CPD's partisanship, and its analysis of the rest defied common sense. To take just one example, one CPD director who conceded that the CPD is "bipartisan" now claims

she really meant to say it was "nonpartisan." This is analogous to claiming that "biweekly" means "never," or that "bigamous" means "unwed." Yet the FEC rotely accepted her explanation and others like it.

The FEC's treatment of Appellants' expert evidence was equally unreasonable. This data shows that, among other things, it is so difficult for independent candidates to attract news coverage that they would need to spend enormous amounts they could never afford on paid media. The FEC claimed in response that Libertarian candidate Gary Johnson received substantial press in 2016. But the FEC's purported news "analysis" cited articles about dozens of *other* people named Gary Johnson, including athletes, chefs, museum presidents, criminals, doctors, lawyers, and musicians. The FEC also vastly understated the news coverage of the major party candidates to make it seem comparable to that of the independent candidates. The FEC even claimed that Gary Johnson received almost half as much coverage as Donald Trump, which is both facially preposterous and demonstrably false.

Yet after the remand, the district court inexplicably abdicated its gatekeeping function. The court acknowledged its obligation to engage in a "searching," "careful," and "substantial" inquiry into "the facts," but then conducted no inquiry at all. Instead, it held that the FEC could shield its decisions from review by merely providing an explanation, no matter how absurd that explanation might be.

Americans want more choice in presidential elections. Over 40% identify as independent, nearly 60% believe that the country needs a third major political party, and an overwhelming majority would prefer to have more than two candidates on stage in the general election debates. Yet the FEC perpetuates a rigged process that prevents American voters from hearing from the third alternative most of them prefer. The judgment should be reversed.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §1331 because this action arises under the Federal Election Campaign Act of 1971 ("FECA"), 52 U.S.C. §30101 *et seq.*, and the regulations promulgated thereunder. *See also id.* §30109(a)(8) (permitting actions challenging FEC's dismissal of administrative complaints). This Court has jurisdiction under 28 U.S.C. §1291 because this is an appeal from a final order entered March 31, 2019, denying Appellants' motion for summary judgment, denying Appellants' motion to supplement the record, granting the FEC's motion for summary judgment, and granting in part and denying in part the FEC's motion to strike. (A-596). Appellants filed a timely notice of appeal on April 22, 2019. (A-597).

## ISSUES PRESENTED

1. Whether ordinary deference principles apply to the FEC's dismissals of the administrative complaints and rulemaking petition, despite the agency's history

of biased decisionmaking in favor of the CPD, its initial pretextual dismissals of the administrative complaints and petition for rulemaking, and its contrived, *post-hoc* rationalization on remand.

2. Whether the FEC's dismissal of the administrative complaints was arbitrary and capricious, an abuse of discretion, or otherwise contrary to law because the agency ignored key evidence, manipulated its own data, made numerous unsupported assumptions that contradict the administrative record, and applied no scrutiny to the CPD's contrived explanations, all to justify a pre-ordained result.

3. Whether the FEC's refusal to open a rulemaking to revise its rules governing presidential debates, which suffers from all of the same defects, was arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. *The Parties*

Dr. Peter Ackerman is managing director of private investment firm Rockport Capital, Inc. Dr. 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 the 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 LPF, a nonpartisan, nonprofit corporation whose purpose is to promote reforms that allow for greater competition and choice in federal elections. (A-683).

The Libertarian Party has nominated presidential candidates in every election since 1972 and will do so again in 2020. (A-1231). The Green Party has nominated candidates in every presidential election since 2000 and will do so again in 2020. (A-1225-26).

Appellants are supported by prominent amici from the government, academic and non-profit communities. (Dkts.85-2, 88).

The FEC is a federal agency charged with the administration and civil enforcement of FECA. It is composed of six presidentially-appointed Commissioners, no more than three of whom "may be affiliated with the same political party." 52 U.S.C. §30106(a)(1).

2. *Statutory And Regulatory Framework*

Nonpartisanship has been a core requirement for debate sponsors since the FEC first authorized corporate debate funding forty years ago. FECA generally prohibits corporations from making a "contribution or expenditure in connection with" federal elections. *See* 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, 198 (2014). However, a safe harbor exempts corporate contributions and

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).

The FEC recognizes that "the use of corporate funds to stage debates" may violate FECA. *Perot v. FEC*, 97 F.3d 553, 556 (D.C. Cir. 1996). Whereas "'nonpartisan debates…educate and inform voters,'" partisan debate sponsors intend "'to influence the nomination or election of a particular candidate.'" *Id.* (quoting 44 Fed. Reg. 76,734 (1979)). Thus, only corporate funding of the "costs incurred in staging nonpartisan debates" qualifies for the safe harbor exemption for corporate contributions and expenditures. *Id.* FECA regulations provide that, 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). The FEC concedes that "objective" criteria "must…not [be] geared to the selection of *certain pre-chosen participants*." (A-105 (emphasis supplied); *accord* 60 Fed. Reg. 64,260 (1995)). Thus, a criterion that "only the Democratic and Republican nominees could reasonably achieve" is not objective. *Buchanan v. FEC*, 112 F. Supp. 2d 58, 74 (D.D.C. 2000).

FECA permits any person who believes a violation of the Act has occurred

to file an administrative complaint with the FEC. 52 U.S.C. §30109(a)(1). A party aggrieved by the agency's disposition of the complaint may petition the district court for review of the decision. *Id*. §30109(a)(8)(A). If the district court "declare[s] that the dismissal of the complaint…is contrary to law," it "may direct the [FEC] to conform with such declaration within 30 days, failing which the complainant may bring…a civil action to remedy the violation [of FECA]." *Id*. §30109(a)(8)(C).

3. *The CPD's Partisan Origins And Composition*

The CPD is a debate-staging organization that has used corporate funding to stage every general election presidential debate since 1988. (A-1095). It was created after the 1984 election, when the Republican and Democratic parties decided to "take over [the] presidential debates" because of their dissatisfaction with the nonpartisan League of Women Voters, which had sponsored earlier general election debates. (A-852). In 1985, the parties' respective chairmen, Frank Fahrenkopf and Paul Kirk, entered an "Agreement on Presidential Candidate Joint Appearances" providing that all "nationally televised joint appearances by the presidential nominees of both parties" would be "jointly sponsored and conducted by the Republican[s] and Democrat[s]." (A-850).

The CPD is the direct outgrowth and implementation of this agreement. Announcing the CPD's formation in 1987, Fahrenkopf and Kirk explained that

their objective was to "forge a *permanent framework* on which *all future presidential debates* between the nominees of the *two political parties* will be based." (A-855) (emphasis supplied). The express purpose of these "party-sponsored debates" was "to inform the American electorate on the[] philosophies and policies" of "the Democratic and Republican parties" (A-854), and to "strengthen the role of [these] parties" in presidential elections (A-850). Fahrenkopf conceded that the CPD "was not likely to look with favor on including third-party candidates in the debates"; Kirk "believed the [CPD] should exclude third-party candidates." (A-857).

True to its partisan origins, the CPD has always been led by two chairs, one Republican and one Democrat. Fahrenkopf, the RNC's Chair from 1983 to 1989, has always held the Republican leadership slot and remains a staunch advocate for Republican causes. During his tenure as CPD chair, Fahrenkopf donated over $131,000 to Republican candidates, including two (George W. Bush and John McCain) who appeared in CPD-sponsored debates.[2] (*E.g.*, A-919-26). In 2011 he penned an op-ed calling for the Republican Party to find a "dynamic and

[2] Campaign contribution data for the 2016 election cycle is from FEC disclosures located on its website. *See* https://www.fec.gov/data/ (under "Find contributions from specific individuals"). Though outside the administrative record, the FEC conceded below that this data may be considered. (A-541 n.2).

hardworking new chairman" for "*our* great party." (A-929) (emphasis supplied).

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 Kirk. (A-911, A-914, A-1097-98). McCurry donated over $110,000 to Democrats during his tenure at the CPD, including contributions to Barack Obama and Hillary Clinton close in time to their appearance in CPD debates. (*E.g.*, A-916). Both Fahrenkopf and McCurry also serve as high-powered lobbyists who have overseen hundreds of thousands of dollars in corporate contributions to Democrats and Republicans, including contributions by the same corporations that sponsor the presidential debates. (A-916, A-931, A-934-35).[3]

The chairs have always stocked the CPD's board with partisan Democrats and Republicans—including ex-Congressmen, political aides and appointees, top donors, and lobbyists who are equally dedicated to their respective parties. (A-911, A-1094). The CPD's biggest bankroller of major party campaigns is director Richard Parsons, who donated more than $100,000 to Republican candidates and committees between 2008 and 2012, and gave the maximum contributions to Hillary Clinton and Jeb Bush in 2015. (*E.g.*, A-916). Former director Howard Buffett contributed to Barack Obama's 2008 presidential

[3] After this action was filed, the CPD replaced McCurry with Democrat Dorothy Ridings. (A-1286 ¶1).

campaign in the same month that Obama appeared in a CPD debate. (A-946). Newton Minow, a close aide to Adlai Stevenson, made at least 30 contributions to Democrats between 2008 and 2016. Former Democratic Congresswoman Jane Harman made 55 contributions during that same time period, and published a 2016 op-ed identifying Hillary Clinton as the presidential candidate best "equipped to lead us into the future." (A-394-95).

Former Republican Senator Olympia Snowe contributed over $8,000 to Republican candidates during the 2016 election cycle, while continuing her work at the "Bipartisan Policy Center," which "actively promotes bipartisanship" and engages in "aggressive advocacy" to "unite Republicans and Democrats." (A-395). Antonia Hernandez, who served as counsel to Ted Kennedy's Judiciary Committee, made the maximum contribution to Hillary Clinton prior to Clinton's appearance in CPD debates. Former Republican Senator John Danforth, who is known for endorsing "whichever Republican is on the ballot" (A-395), contributed $28,300 to Republican candidates in 2016 and 2017 alone. And CPD executive director Janet Brown is also a creature of partisan politics, having served as an aide to top Republicans. (A-860).

Many among this coterie of party elites have conceded their desire to exclude independent candidates from CPD-sponsored debates. For example, former director and Republican Senator Alan Simpson opined that 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." (A-026, A-1165). Former director and Democratic Representative John Lewis observed that "the two major parties [have] absolute control of the presidential debate process." (A-1165).

The CPD has no oversight mechanism to curb this overt partisanship. Its conflict of interest rules do not address partisan political activities. (A-1075-77). Nor does the CPD have an institutionalized process for nominating or selecting its board members, which is why the chairmen are allowed to pack the board with like-minded partisan elites.

Unsurprisingly, the CPD has hewn closely to Fahrenkopf and Kirk's vision of the organization as an instrument of the major parties and their candidates. Among other things, the CPD has capitulated to the major party candidates' wishes about who participates in the debates. The only independent candidate to appear in a CPD-sponsored debate—Ross Perot in 1992—did so at the request of the major party nominees. (A-282, A-889-90). In 1996, the CPD excluded Perot at their request. (*See* A-700).

4. *The CPD's Candidate Selection Criteria Are Not Objective*

In 2000, the CPD adopted new debate-qualifying criteria to limit participants to the Republican and Democratic nominees. These criteria, which have not since

changed, restrict the debates to candidates who 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."[4] (A-1118, A-1308). The CPD uses polls conducted "after Labor Day," but does not announce in advance any specific date for determining whether the 15% polling rule is satisfied. (*E.g.*, A-1118). The CPD also does not announce what polls it purports to rely on, either in advance of or even after it makes its determination. (*E.g.*, A-1117-18).

This "15% rule" systematically excludes independent candidates, none of whom have been invited to the debates since the criterion was instituted. Even Perot, who participated before the CPD adopted the 15% rule, would not have qualified under the 15% rule, because he was polling at less than 10%. (A-701, A-332 ¶52, A-367 ¶52). He was instead invited to participate by the George H.W. Bush and Clinton campaigns, which both perceived an advantage to Perot's participation. (A-890, A-700). As the current President observed in 2000, the 15%

[4] The CPD also requires participants to be constitutionally-eligible candidates who appear on enough state ballots to secure an Electoral College majority. (A-1117). Appellants do not challenge these criteria.

rule is intended "to keep [independents] out" of the debates and prevent "the American people from having a third choice." (A-395).

There are numerous reasons why the 15% rule systematically excludes independent candidates. *First*, statistical analysis confirms that a candidate needs name recognition of at least 60%, and more likely 80% or more, to have any realistic chance of achieving 15% voter support. (A-959 ¶10, A-970 ¶¶29-30, 32). Reaching that level of name recognition is substantially harder for independents than major party candidates. Because of their partisan affiliation, Republicans and Democrats have a default level of support from voters who always support candidates in their party. (A-966 ¶21). Major party candidates also benefit from the widespread media coverage of the presidential primaries. Independent candidates have no analogous mechanism for generating name recognition. (A-713).

Independent candidates instead must rely on paid media to reach voters. Appellants' expert analysis demonstrated that, as of 2014, an independent campaign would need to spend at least $266 million on advertising and other media exposure to achieve the requisite name recognition. (A-1034-35). The amounts spent on the 2016 presidential race—upwards of $1 billion for each major party nominee—dwarf that estimate. Only a self-funded billionaire could realistically hope to compete as an independent, because few donors will fund

candidates whose participation in the debates is uncertain. (*See, e.g.*, Dkt.37 at 3 (Bernie Sanders explaining that he "ha[d] to run with the Democratic Party" in 2016 because "you need [t]o be a billionaire" to succeed as an independent)).

*Second*, using polling as the sole measure of a candidate's viability fundamentally disfavors independent candidates, which is why no independent candidate has ever satisfied the CPD's 15% hurdle. Polling in three-way races is subject to increased error rates. (A-981-82 ¶¶55, 58). This means independents effectively need to poll at 23% to ensure that their support is measured at 15%. By contrast, Republican and Democratic nominees will always poll well over 15%, so the increased error rate will never lead to their exclusion. Moreover, independent candidates often bring out new voters who "are politically inactive or even unregistered until mobilized by a compelling candidate," and thus undercounted in polls. (A-1044). The CPD also retains complete discretion about whom to poll, when to poll, what polls to use, and when to choose debate participants, all of which allows it to pick and choose polls that put independent candidates below the 15% threshold. (A-1308-09).

*Finally*, the mid-September timing of the CPD's 15% determination disadvantages independent candidates. They cannot be certain they will be eligible for the debates until the CPD makes its determination two months before the election. But participation in the debates is a prerequisite for victory. This creates

a Catch-22: Independent candidates must campaign and fundraise for months without even knowing whether or not they will ultimately be eligible for the debates and thus have a shot at winning. Yet donors, volunteers, and voters are much less likely to support, and the media much less likely to cover, any candidate whose participation in the debates is still up in the air.

The CPD pretends to re-evaluate its debate-qualifying criteria "after every…election" (A-1353), but these purported "re-evaluations" are a farce. The criteria never change, nor does the result—the complete exclusion of independent candidates.

5. *The CPD's Corporate Sponsorship*

The CPD takes in millions of dollars of corporate contributions each presidential cycle, serving as a convenient gateway for corporations to contribute to the two major parties simultaneously. (A-801, A-828-29). The CPD's sponsors, including the Anheuser-Busch Companies, AT&T, 3Com, Ford Motor Company, IBM, and J.P. Morgan, have for decades invested heavily to purchase influence with the two major parties. Like the CPD, they have a vested interest in propping up the two-party duopoly, and they disfavor independent candidates who dilute the value of their contributions to Republicans and Democrats.

6. *For Over Two Decades, The FEC Has Consistently Refused To Enforce FECA Against The CPD*

Because of its structure, the FEC is "inherently bipartisan," rather than

nonpartisan. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Indeed, in the administrative proceedings below, the FEC conceded its "desire to strengthen party organizations," even though this partisan goal has nothing to do with its statutory authority and is inconsistent with its mandate to enforce FECA. (A-547). And in recent years the FEC's "dysfunction," as described by former Chair Ann Ravel, has ground its enforcement efforts to a halt. (A-390). The agency's commissioners routinely ignore the laws enacted to protect the integrity of elections such that "[m]ajor [FECA] violations are swept under the rug" and "violators of the law are given a free pass."[5] (*Id.*).

These are among the reasons why the FEC has summarily rejected every administrative challenge to the CPD's biased selection criteria. The first such challenge was brought in 1996. In response, the FEC's 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, and recommended that the Commissioners initiate an investigation into the CPD. (A-155-56, A-162-63). Yet the FEC rejected its Counsel's advice and refused to act. (A-181).

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[5] A spate of resignations has deprived the FEC of the quorum required even to vote on whether FECA has been violated, rendering the agency entirely "nonfunctional." https://www.nytimes.com/2019/08/26/us/politics/federal-election-commission.html?.

In 2000, after the CPD adopted the 15% rule, the FEC dismissed a new round of administrative complaints alleging that the CPD and its new polling criterion were biased in favor of the major party candidates. *See Buchanan*, 112 F. Supp. 2d at 62. The agency said that the CPD did not "endorse, support or oppose" candidates or parties under §110.13 because the complainants offered no "evidence that the CPD is *controlled by* the DNC or the RNC." (A-180 (emphasis supplied)). The FEC admitted that this was not an interpretation of its regulation, but "simply a response to the allegations plaintiffs had made" that the major parties "control…the presidential…debates." (A-228-29). The district court reviewing the dismissals agreed that the FEC was merely "refuting the specific contention made in Appellants' administrative complaints," and was not adopting a "standard." *Buchanan*, 112 F. Supp. 2d at 71 n.8.

The FEC ignored this and dismissed all subsequent administrative complaints because the CPD is not "controlled" by the parties, regardless of whether the complainant claimed that it was. (*See, e.g.*, A-240-79). Yet the CPD obviously does not need to be controlled by the parties to "endorse," "support," or "oppose" them. The district court here thus confirmed that the FEC's "control" standard is "contrary to the plain text of the regulation." (A-292). But that did not stop the FEC from summarily dismissing every challenge to the CPD over the next 15 years using a legally erroneous standard.

### B. Procedural History

#### 1. *Initial Administrative Proceedings*

In 2014, Appellants filed administrative complaints against the CPD, its executive director Janet Brown, and the 11 directors who participated in adopting the CPD's rules for the 2012 presidential election: Fahrenkopf, McCurry, Buffett, Danforth, Hernandez, Minow, Parsons, Ridings, Simpson, John Griffen, and John Jenkins.[6] (A-040 ¶88, A-042 ¶98, A-081 ¶88, A-083 ¶98, A-664-739, A-1223, A-1229). The complaints were supported by 800 pages of exhibits containing evidence spanning the CPD's entire history, including extensive recent evidence not presented in prior complaints. This new evidence included the CPD leadership's recent partisan activities, its concessions about the CPD's partisanship, and expert analyses quantifying the obstacles imposed by the 15% rule. (*See, e.g.*, A-741-99, A-916-41, A-943-51, A-953-1045).

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). Here, the FEC initially ignored Appellants'

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[6] Since the administrative complaints were filed, the CPD's leadership has changed in ways that do not affect the outcome of this action. Simpson, Buffet and McCurry departed while Harman, Snowe, Jim Lehrer, Charles Gibson, and Ken Wollack recently joined.

complaints, and only responded because Appellants initiated an action in the district court challenging the FEC's failure to act within 120 days. *See Level the Playing Field v. FEC*, No. 15-CV-961 (D.D.C.). And the decisions it issued were patently deficient. The FEC ignored the evidence and summarily concluded that there was no reason to believe that the CPD or its leadership violated FECA. (A-084 ¶¶100-01). The agency's decision contained almost no substance, and instead rotely cited the dismissal of prior complaints against the CPD. (A-1218-21, A-1243-46).

Together with its administrative complaint, LPF also filed a petition for rulemaking with the FEC, asking the FEC to revise 11 C.F.R. §110.13(c) to prohibit debate-staging organizations from using a polling threshold as the exclusive means to accessing the presidential general election debates. (A-599-631). The FEC received comments from approximately 1,260 individuals and entities. (A-632-634, A-085 ¶106). All but one of them—the CPD itself—requested that the FEC open a rulemaking. (A-043 ¶106, A-085 ¶106).

The FEC voted 4-2 to deny the rulemaking petition. (A-086 ¶107). Like the decision dismissing the administrative complaints, the FEC's dismissal of the rulemaking petition lacked meaningful analysis. (A-661-63). Two Commissioners voted to grant the petition, observing that "[i]t has been over twenty years since the Commission has taken a serious look at its rules on candidate debates," and that

"[s]uch a re-examination is long overdue." (A-641). They further noted that although "nomination by a major party may not be the sole objective criterion to determine who may participate in a debate," the CPD's 15% polling threshold "seem[s] to have accomplished the same result by different means." (*Id*.).

2. *The District Court Ruled That The FEC's Decisions Were Arbitrary And Capricious*

On August 27, 2015, Appellants petitioned the district court for review of the FEC's decisions. On February 1, 2017, the district court vacated them as "arbitrary and capricious" and "contrary to law." (A-302). The court held that the "the FEC's reliance on its past dismissals…strongly implies that it has effectively adopted or relied on the control test it articulated in those past dismissals," even though that test "is contrary to the plain text of the regulation." (A-290, A-292). The court also found that the FEC's summary decisions "did not provide any indication that it actually considered" the "mountain of submitted evidence" supporting Appellants' claims, even though the "weight of [this] evidence is…substantial." (A-296, A-299, A-302). Because the FEC had "stuck its head in the sand and ignored the evidence," the district court remanded the matter to the agency to reconsider its decisions. (A-306-07).

3. *The FEC Reached Identical Results On Remand*

On March 29, 2017, the FEC issued new decisions reaching the exact same results. (A-1235-59, A-1338-70). The FEC continued to ignore the vast majority

of the evidence demonstrating the CPD's deep partisan ties and favoritism toward the major parties. It instead cited new boilerplate affidavits from the CPD's directors, none of which meaningfully addressed Appellants' allegations, and some of which directly contradicted the affiants' prior admissions. (A-1352-53, A-1355). For example, Alan Simpson previously conceded that "Democrats and Republicans on the commission… are interested in the American people finding out more about the two major candidates" and "not about independent candidates who mess things up" (A-1165), but now asserts that the CPD is "strictly nonpartisan" and that "[i]t has long been [his] view that the CPD's debates should include any independent…considered a leading candidate" (A-1330 ¶¶4-5).

The FEC also claimed that the directors' partisan conduct was "personal" and could not be attributed to the CPD, even though the directors previously had admitted that *the CPD itself* is partisan (A-2357-58) and the FEC had never previously suggested that the directors' partisan activities and statements were irrelevant. Indeed, in one prior decision, the FEC even admitted that Simpson's statements about excluding independent candidates *did* "raise[] questions" concerning the CPD's bias. (A-268). And the FEC here mindlessly accepted the CPD's revelation of supposed longstanding "policies" intended to curb some of the directors' partisan endeavors—even though the FEC has no idea whether the policies exist or what they say because the CPD withheld them, and the directors

continue to engage without repercussion in the few activities that are supposedly prohibited. (A-1357-58).

The FEC's analysis of the 15% rule was equally superficial, especially when purporting to address Appellants' expert evidence explaining why the rule is not objective. The FEC ignored that no independent candidate has satisfied the criterion and brushed aside the insurmountable hurdles it imposes. The FEC instead purported to rely upon Libertarian Gary Johnson's candidacy to justify the 15% polling criterion, even though Johnson never polled anywhere close to 15% (A-1255, A-1361); cited the 2016 election as evidence that fundraising is unimportant in modern presidential campaigns, even though that race cost the candidates over $3 billion (A-1363); and egregiously misrepresented news coverage of independent candidates in the 2016 campaign which, according to the FEC's own data, virtually ignored those candidates (A-1255 n.6, A-1362).

4. *The District Court Conclusorily Adopted The FEC's Pretextual Justifications And Awarded Summary Judgment to the FEC*

Appellants filed a Supplemental Complaint petitioning for review of the FEC's post-remand decisions. (A-308). In September and October 2017, the parties filed cross-motions for summary judgment. Briefing was completed in December 2017. Sixteen months later, on March 31, 2019, the district court awarded summary judgment to the FEC. (A-554, A-596).

The court's opinion simply restated the FEC's justifications, with virtually no analysis or serious attempt to address what makes them arbitrary and capricious. (A-576-95). Whereas the district court had previously acknowledged the need to engage in a "searching and careful" inquiry into the facts, and to avoid "rubber-stamp[ing] the agency['s] decision" (A-293), that is precisely what the court did the second time around, applying a "highly deferential" standard of review. (*See* A-556, A-576-95).

## SUMMARY OF THE ARGUMENT

In reviewing whether the FEC's decisions were arbitrary, capricious, and contrary to law, this Court should afford the agency no deference. The FEC is a bipartisan agency that admits sharing the CPD's partisan objectives and has a lengthy history of shielding the CPD from meaningful review, using a legal standard that directly contradicts the FEC's own regulations. The FEC continued its longstanding pattern of favoritism toward the CPD by summarily dismissing the administrative complaints and rulemaking petition here using the same impermissible standard. After the district court vacated these decisions, the FEC bent over backwards to reach the same result on remand, using exactly the type of pretext and contorted reasoning that vitiates the justification for deference.

The post-remand decisions cannot stand even under ordinary deference principles. The FEC ignored the overwhelming majority of the evidence,

mischaracterized what evidence it did address, and relied on demonstrably false factual premises and tortured illogic in a result-oriented, jerry-rigged analysis.

*First*, Appellants presented overwhelming evidence that the CPD blatantly violates FECA and its implementing regulations by hosting partisan debates using corporate sponsors. Appellants demonstrated that: The CPD was created for the sole purpose of ensuring that Republicans and Democrats decide who participates in the debates. The CPD is and always has been staffed by lifelong partisans who staunchly advocate for partisan causes, contribute vast sums to Democrats and Republicans, and funnel even greater sums on behalf of their corporate clients. Partisanship is what drives the CPD's candidate-selection criteria and is the reason why those criteria are intended to and do exclude independent candidates.

The FEC's response to all of this was the very opposite of reasoned decisionmaking. It claimed the evidence reflects only the personal predilections of the CPD's leaders, ignoring that those same individuals have admitted that the CPD itself is partisan and flaunted their partisanship on the CPD's behalf. The FEC also relied upon empty, boilerplate affidavits and illusory "policies" that the CPD ginned up for purposes of this litigation, all of which underscore both the CPD's partisan bias and the FEC's willingness to disregard it. The Supreme Court and this Court have consistently struck down agency decisionmaking where, as here, the agency disregards or misrepresents critical evidence and its reasoning is

contrived or pretextual. There is simply no way a reasoned, unbiased assessment of this record can lead to the conclusion that the CPD satisfies FECA's nonpartisanship requirement. The FEC's attempt to characterize the CPD as nonpartisan was arbitrary, capricious and contrary to law.

*Second,* Appellants showed that the CPD violates the separate, additional requirement that corporate-funded debate sponsors use "pre-established objective criteria to determine which candidates may participate in a debate." 11 C.F.R. §110.13 (c). The 15% rule is not "objective" because its purpose is to shield the Republican and Democratic nominees from outside competition. Here again, the FEC acted arbitrarily and capriciously in concluding otherwise. It ignored the most damning fact of all: that no independent candidate has ever satisfied the 15% rule. The FEC instead pointed to a handful of independent candidacies from half-a-century ago or more, some of which predate television, and none of which are apposite, because they all used the Democratic or Republican parties as a vehicle to generate name recognition before running as independents.

And the FEC twisted itself in knots attempting to explain the expert evidence demonstrating that 15% is simply too high and that polling is fundamentally unreliable and disadvantages independent candidates. The FEC largely ignored or mischaracterized this evidence. Instead, the FEC made assumptions that directly contradict the record and are demonstrably false. The

FEC also purported to conduct "analyses," but recklessly or intentionally misrepresented its data in ways that illustrate that the agency cared only about reaching a specific, predetermined result. In reality, the FEC's own data amply demonstrate why the 15% rule is not objective.

The district court abdicated its responsibility to meaningfully scrutinize the FEC's decisions. It adopted the agency's reasoning wholesale, ignoring or glossing over the obvious flaws that render the decisions arbitrary and capricious. The judgment should be reversed, and summary judgment awarded to Appellants.

## STANDARD OF REVIEW

"On appeal from the district court's grant of summary judgment," this Court reviews the FEC's decision "*de novo*." *Jicarilla Apache Nation v. Dep't of Interior*, 613 F.3d 1112, 1118 (D.C. Cir. 2010). The FEC's dismissal of an administrative complaint must be overturned if it is "contrary to law." 52 U.S.C. §30109(a)(8)(C). A dismissal may be contrary to law if: (1) "the FEC dismissed the complaint as a result of an impermissible interpretation of [FECA]," or (2) "the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

A decision is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision

that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This Court should correct improper administrative fact-finding "if [it] becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making." *Greater Boston Television v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970). If the agency's "stated rationale was pretextual" or "contrived," it must be struck down as "arbitrary and capricious." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2569, 2576, 2579 (2019).

Similarly, a reviewing court must overturn a refusal to initiate rulemaking "if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." *EMR Network v. FCC*, 391 F.3d 269, 272-73 (D.C. Cir. 2004); *see also WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014). An agency's failure to take a "hard look" at the evidence also requires reversal. *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981).

## ARGUMENT

### I. THE FEC IS NOT ENTITLED TO DEFERENCE

Though courts typically defer to agency action, various factors require enhanced scrutiny in the unique circumstances of this case. They include agency

"bias," *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979); a pattern of suspect decisionmaking, *see, e.g.*, *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1358 (D.C. Cir. 1981); taking "convenient litigation positions." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012); and "*post-hoc* rationalization[s]," *id*.

The FEC's partisan agenda mirrors the CPD's. Its commissioners obtained their positions because of their loyalty to one of the major parties. Consequently, every "action [the FEC] takes is bipartisan." *Combat Veterans for Congress Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). This would not evince bias in a run-of-the-mill FEC proceeding in which the agency's bipartisan composition could enhance its objectivity. For instance, having commissioners from both parties safeguards against political bias when considering a complaint against a Republican or Democrat. By contrast, in the unique context here, the two parties have the same interest in excluding independent candidates and protecting the CPD from scrutiny. In other words, "bipartisan" is quite different from nonpartisan, and bipartisanship reflects a decided bias in favor of the two major parties and against their competitors. And the FEC itself conceded its "desire to strengthen party organizations" in the

proceedings below. (A-390).[7] This explains the agency's lengthy track record of rubber-stamping the CPD. It also explains why the FEC did so using the "control" standard, which the district court itself found "contrary to the text of the agency's own regulations." (A-290). The FEC's inherent partisanship and its two decades of covering for the CPD using an impermissible standard, against its own General Counsel's advice, suggest an "undue bias towards" the CPD that requires "[m]ore exacting scrutiny." *Natural Res. Def. Council*, 606 F.2d at 1049 n.23.

Here the FEC followed its usual routine when confronting complaints about the CPD. In the district court's words, the agency "stuck its head in the sand," disregarded the "mountain of submitted evidence" against the CPD, and issued "threadbare" dismissals that "fail[ed] to cite or discuss virtually any of the evidence submitted with [Appellants'] complaints." (A-292-93, A-296, A-306). The FEC's original decisions rotely "cite[d] [to its] past practice" and deployed the erroneous "control" standard to rationalize yet another whitewash of the CPD's illegal conduct. (A-306).

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[7] The district court refused to consider this concession because it was "made during pre-decisional deliberations." (A-568-70). But agency deliberations are fair game where, as here, they go directly to agency bias or pretext. *See Dep't of Commerce*, 139 S. Ct. at 2573-76 (striking down "pretextual" agency decision that was "incongruent with what the record reveals about the agency's…decisionmaking process").

The post-remand decisions likewise demonstrate that the FEC was "so committed to" the original result that it "resist[ed] engaging in any genuine reconsideration of the issues." *Greyhound*, 668 F.2d at 1358. A "greater degree of scrutiny" should be applied where, as here, the agency "arrives at substantially the same conclusion as an order previously remanded." *Id.*; *accord Chamber of Commerce v. SEC*, 443 F.3d 890, 899 (D.C. Cir. 2006). For one thing, these decisions largely rely upon evidence post-dating the original dismissals. This smacks of "*post-hoc* rationalization." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417, 2421 (2019) ("a court may defer to only an agency's considered judgments"; "[n]o *ad hoc* statements or p*ost hoc* rationalizations need apply"); *accord Christopher*, 567 U.S. at 155 (same).

Nor does this new evidence support the result, as explained in Point II. For example, on remand, the CPD claimed that "[i]t has long been the informal policy of the CPD that Board Members are to refrain from serving in any official capacity with a political campaign." (A-1297, A-1357). In the previous two decades of litigation concerning its partisanship, the CPD had never thought to mention this supposed "informal policy," which conveniently surfaced for the first time on

remand here. And an "informal" policy is unenforceable by design; the FEC ignored evidence showing that Fahrenkopf himself casually violates it. (A-407).[8]

Moreover, a policy directed only to those serving in an "official capacity" on a "campaign" does not even purport to prohibit the vast majority of the partisan activities at issue here. Examples of conduct that remain permissible under the purported "policy" include campaign contributions, endorsements, attendance at campaign functions, campaign fundraising, "unofficial" support for candidates, and support for parties that is not "officially" connected to a particular campaign. The "informal policy" would even allow one to serve as chairman of the Republican or Democratic party, as Fahrenkopf and Kirk did during their longstanding tenure on the CPD. Yet the FEC blithely accepted the CPD's assurance that the "informal policy" imposes meaningful limitations on the CPD's partisan activities. (A-1357-58).

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[8] The district court declined to consider publicly-available evidence of Fahrenkopf's 2016 campaign work, as well as other directors' 2016 endorsements, because it was not part of the administrative record. But the evidence did not exist when Appellants filed their administrative complaints, and the CPD's "informal policy" was revealed for the first time in the FEC's post-remand decisions. (*See, e.g.*, A-1361-63). Appellants therefore lacked the opportunity to rebut this alleged policy before the agency, meaning this Court may review Appellants' rebuttal evidence. *See, e.g.*, *Kent Cty. v. EPA*, 963 F.2d 391, 395-96 (D.C. Cir. 1992) (supplementing record where plaintiff "never knew the documents existed until after the EPA issued its decision").

This Court should "decline to defer to" such "'convenient litigating position[s]' [and] '*post hoc* rationalization[s].'" *Kisor*, 139 S. Ct. at 2417. In its first summary judgment ruling, the district court did not "defer to the FEC's analysis" because the agency refused to meaningfully address the evidence and had long applied a standard that "is contrary to the plain text of the regulation." (A-292-93). But post-remand, the court inexplicably assumed that the FEC is capable of applying the plain meaning of the regulation, even though it had previously found the FEC incapable of this very task. (*See* A-292-93). The district court erred as a matter of law by reverting to a "highly deferential" standard of review in the second summary judgment ruling. (A-556).[9]

## II. THE FEC'S DISMISSAL OF THE ADMINISTRATIVE COMPLAINTS WAS ARBITRARY AND CAPRICIOUS

Even under ordinary deferential review, the FEC's post-remand decisions would be arbitrary, capricious, and contrary to law. To lawfully receive corporate funding, a debate sponsor must not (1) "endorse, support or oppose" parties or their candidates, or (2) use subjective criteria to determine which candidates participate

[9] *Hagelin v. FEC*, 411 F.3d 237, 242-44 (D.C. Cir. 2005), rejected an argument that the FEC is biased because of its bipartisan structure alone. But *Hagelin* did not involve the host of additional factors present here, including the CPD's recent concessions of partisan bias, the FEC's long history of dismissing similar challenges using a pretextual standard, its use of that same standard in the original decisions here, and its frivolous justifications for reaching the exact same result on remand.

in the debates. *See* 11 C.F.R. §§110.13(a)(1), (c); 60 Fed. Reg. at 64,262 (FEC intended to bar criteria "designed to result in the selection of certain pre-chosen participants"). The CPD meets neither requirement, and its acceptance of corporate funding therefore violates FECA. *See id*. §§110.13, 114.4(f). The CPD itself also makes illegal corporate campaign contributions by providing candidates with free televised fora to reach voters and makes illegal expenditures in providing those fora. *See* 52 U.S.C. §30118(a). The CPD further violates FECA by failing to register as a political committee and to make required reports and disclosures. *See id*. §§30103-04.

The FEC disregarded these violations. It failed to meaningfully evaluate the troves of evidence demonstrating both the CPD's partisanship and its use of subjective debate-qualifying criteria. The FEC instead went to "great lengths" to circumvent this evidence, resulting in "contrived" decisions that are "incongruent with…the record." *Dep't of Commerce*, 139 S. Ct. at 2575. And the district court abdicated its gatekeeping function, holding that *any* agency rationale—no matter how contrived or pretextual—is sufficient to shield the agency from judicial review. This compels reversal.

### A. The FEC's Refusal To Acknowledge The CPD's Partisanship Was Contrary To Law

1. The FEC is the antithesis of a nonpartisan debate sponsor. It was created for the express purpose of holding partisan debates and has never deviated from

this purpose. The CPD's overtly partisan leadership supports Democratic and Republican candidates—including those who appear in CPD debates—with campaign contributions and endorsements. The dense network of ties between the CPD and the parties make them virtually indistinguishable from one another. The CPD's directors have confirmed on multiple occasions that the Democratic and Republican parties decide who participates in the debates and that the CPD's goal is to exclude independent candidates. It is therefore unsurprising that the CPD has established debate-qualifying criteria designed to achieve that goal.

Facing this "mountain" of evidence, the FEC responded with (1) the spurious claim that the personal biases of CPD's leadership do not taint the CPD itself; (2) boilerplate affidavits from the CPD directors that contradict their own prior statements; and (3) the illusory CPD "policies." These specious arguments highlight how the FEC has willfully blinded itself to the CPD's partisanship.

The FEC primarily claims that the CPD leadership acts in a "personal" rather than "official" capacity when exhibiting partisan bias, such that its partisanship should not be attributed to the CPD. (A-1356-58). But the CPD and its directors have repeatedly admitted that *the CPD itself* is partisan. (*See, e.g.*, A-857 (CPD is "not likely to look with favor on including third-party candidates in the debates"); A-854 (CPD's "party-sponsored debates" are a "permanent part of the presidential process"); A-1165 (CPD directors characterizing the CPD as

"bipartisan"); A-1168 (CPD's "system…primarily go[es] with the two leading candidates" from "the two political part[ies]"); A-1192 (CPD invites only "the two major candidates" and not "independent candidates who mess things up"); A-1165 ("[T]he two major parties [have] absolute control of the presidential debate process….").

The FEC mostly ignored this evidence, and what it did say is the antithesis of reasoned decisionmaking. Fahrenkopf and Kirk agreed at the inception that "future [debates] should be principally and jointly sponsored and conducted by the Republican and Democratic National Committees," and include "the nominees of the two political parties," in order "to inform the American electorate on [the parties'] philosophies and policies." (A-850). The FEC protested that "it is not clear that, in context, these…statements constitute an endorsement of, or support for, the Democratic and Republican parties." (A-1352). But these statements are incontestably partisan, and the FEC did not and could not explain how the "context" would somehow deprive them of their obvious meaning. The FEC instead cited a March 2017 affidavit by Fahrenkopf which *confirms* that his "goal was [to] secur[e] the commitment of both major party nominees to debate"—a quintessentially partisan objective. (A-1283 ¶10, A-1352). The FEC's purported explanation thus "blinks reality" and proffers evidence that "actually corroborates [Appellants'] point," both hallmarks of arbitrary and capricious decisionmaking.

*Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 744-45 (D.C. Cir. 2017).

The FEC's "analysis" of former CPD director Barbara Vucanovich's characterization of the CPD as "bi-partisan" is equally specious. The FEC cited an affidavit from Vucanovich claiming that when she "used the word 'bi-partisan,'" she really meant "non-partisan." (A-1352). But "bipartisan" means "cooperation, agreement, and compromise between two major political parties." *Merriam-Webster's Collegiate Dictionary* 125 (11th ed. 2014). That is the opposite of "nonpartisan," and it was "arbitrary and capricious" for the FEC to rotely accept Vucanovich's "utterly illogical" attempt to equate these terms. *Haselwander v. McHugh*, 774 F.3d 990, 992-93 (D.C. Cir. 2014).

The same is true for Fahrenkopf's 2015 admission that the CPD has a "system" that "primarily go[es] with the two leading candidates" from "the two political part[ies]." (A-1355-56). Fahrenkopf was responding to a question about "the prospects" of including an independent, and he answered in the present tense—the CPD "goes" with Republicans and Democrats. (A-1168). Yet the FEC credits Fahrenkopf's claim that this answer makes only "an assertion of historical fact" (A-1176-77, A-1355)—yet another "illogical" basis for the FEC's conclusion. *Haselwander*, 774 F.3d at 992-93.

Direct admissions like these are not required to establish organizational bias anyway. *See Dep't of Commerce*, 139 S. Ct. at 2573-76 (striking down

"pretextual" agency decision based on circumstantial evidence); *cf. Palmer v. Shultz*, 815 F.2d 84, 90 (D.C. Cir. 1987) (proof of organization's "unlawful bias…need not be direct"). And the indirect evidence of bias here is just as damning as the direct admissions. The CPD's ability to operate in a nonpartisan manner is compromised by its leaders' severe conflicts of interest. An entity like the CPD can only "act through its employees and agents." *Democratic Senatorial Campaign Comm.*, 454 U.S. at 33. The CPD was created by party insiders—some of whom remain at the organization—for indisputably partisan purposes, and their copious partisan activity continues unabated. (*See supra* at 9-13). The FEC downplayed some of Appellants' evidence as "old" (A-1353), but cited no evidence remotely suggesting that the CPD's partisan loyalties have changed over time, or that it has implemented any genuine reforms. The unbroken timeline of CPD partisanship unequivocally shows that nothing has changed at the FEC since its founding.

2. Unable to explain this evidence, the FEC hangs its hat on boilerplate affidavits that the CPD directors signed for this litigation. In response to the administrative complaints, the CPD initially failed to notify most of the directors that they had been named as respondents or solicit their responses to the complaints. (A-297-98). The district court's first summary judgment ruling therefore ordered these directors to "address" the "allegations made against" them.

(A-298). In response, nine directors signed a short, identically-worded affidavit with the exact same Microsoft Word identifier in the footer ("232792 v.1"); seven signed it the exact same day. (A-1313-30). In other words, one person simultaneously distributed a form affidavit to all nine directors, most of whom immediately signed it, and none of whom made a single substantive change.

The affidavits are meaningless. They do not specifically respond to Appellants' allegations. No director's affidavit even addresses Appellants' evidence against him or her. Instead, the directors summarily deny those allegations in five conclusory paragraphs reprinted verbatim in all nine affidavits. (A-1313-30). None of the directors even confirmed that they *reviewed* the complaint or the evidence supporting it. (*See* A-1313 ¶3 ("Contrary to what *I understand* the complainants have claimed…") (emphasis supplied).[10] Instead the affidavits flatly contradict the directors' prior admissions, and other evidence of their partisanship, without attempting to reconcile the obvious discrepancies. As explained *supra* (at 23), Simpson's affidavit both ignores and contradicts his prior concession that the CPD opposes independent candidacies. Minow similarly ignores his prior concession that "other candidates could be included" in the debates only if "the Democratic and Republican nominees agreed." (*Compare*

[10] *Accord* A-1315 ¶3, A-1317 ¶3, A-1319 ¶3, A-1321 ¶3, A-1323 ¶3, A-1325 ¶3, A-1327 ¶3, A-1329 ¶3.

A-1165 *with* A-1325-27; *see also* A-1165, A-1313-18, A-1321-23, A-1327-28 (similar evidence for other directors)).

An "affidavit" consisting merely of "conclusory assertion" "proves nothing of consequence" in the face of detailed evidence contradicting it. *Tripoli Rocketry Assoc., Inc. v. Bureau of Alcohol, Tobacco Firearms & Explosives*, 437 F.3d 75, 83 (D.C. Cir. 2006) (vacating administrative decision despite conclusory affidavit supporting it). The FEC's rote acceptance of the director affidavits was arbitrary and capricious. *See id.*; *accord Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605-06 (D.C. Cir. 2007) (rejecting rationale "contradicted by evidence [the agency] had before it").

3. The FEC also unquestioningly accepted the CPD's belated claims about two CPD "policies" purportedly enacted to restrict partisan activity, both of which conveniently surfaced for the very first time on remand. (A-1357). Of course, if the CPD's partisan activities were truly blameless, there would be no need for any such policies. That they suddenly materialized in the middle of this litigation demonstrates precisely why some mechanism to curb the CPD's rampant partisanship is necessary to put it in compliance with FECA.

The "policies" are window dressing—if they even really exist. The first is the supposed "informal policy" which prohibits next to nothing and is neither observed nor enforced by the CPD. (*See supra* at 32-33). The other is a so-called

"formal political activities policy," supposedly enacted in October 2015, which the CPD claims is "intended to deter CPD-affiliated persons from participating, even in a personal capacity, in the political process at the presidential level." (A-1357 (citing A-1297-98 ¶7)). But the CPD has never supplied this alleged policy to the FEC; the FEC was apparently content to rely upon the one-sentence description quoted above, which is all it received. (A-1357). The FEC merely "ask[s] the court to trust" the "missing [policies]," but "that is not how judicial review works." *Flyers Rights*, 864 F.3d at 746. The CPD cannot "hide the evidentiary ball"; the alleged policy's absence from the record means that, as a matter of law, it "provide[s] no evidentiary support for the [FEC's] conclusion." *Id*. at 745; *accord Butte Cty.*, 613 F.3d at 195 ("totally irrational" for agency to rely upon report despite having "never looked at it").

Moreover, even the CPD's cursory description of the missing policy reveals that it does not actually prohibit partisan activities and is at most "intended to deter" them. (A-1357). And the CPD is conveniently circumspect as to how it might do so. In fact, nothing has been deterred, because the CPD directors ignored the alleged policy and "participated" in the 2016 election by supporting major party candidates, both financially and otherwise. The alleged policy is also limited to "presidential" races, permitting all other partisan endeavors to continue unabated—and they have, as demonstrated by the $42,500 donated to Democratic

and Republican candidates and PACs by seven directors since 2017. *See supra* n.2. It is wholly "implausible" that this "policy" provides any meaningful safeguard against the CPD's organizational partisanship. *State Farm*, 463 U.S. at 43.

4. The district court unthinkingly rubber-stamped the FEC's spurious decisionmaking. Courts reviewing agency action cannot "simply accept whatever conclusion an agency proffers." *Tripoli*, 437 F.3d at 77. They must instead ensure that "the process by which [the agency] reaches that result [is] logical and rational," *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998), and that the agency's reasoning is not "pretextual" or "contrived," *Dep't of Commerce*, 139 S. Ct. at 2569 (courts may not "exhibit a naiveté" about agency's true motives). "Courts enforce this principle with regularity when they set aside agency" action that is "not supported by the reasons that the agencies adduce." *Allentown*, 522 U.S. at 374. "To do otherwise would reduce judicial review to a rubber stamp." *Flyers Rights*, 864 F.3d at 747.

The district court acknowledged the need to "assess whether the FEC considered the relevant factors" and "engage in a substantial inquiry into the facts, one that is searching and careful." (A-576). Yet the court performed no such inquiry, and instead regurgitated what the FEC said without applying any scrutiny at all. For example, the opinion simply quotes the FEC's conclusion that there is

no evidence of the "'CPD's *organizational* endorsement of or support for the Democratic and Republican Parties.'" (A-579 (quoting A-1354)). Like the FEC, the court failed to reconcile this statement with the directors' admissions that the CPD is partisan, and disregarded the other reasons why the board's partisan predilections are indistinguishable from the organization's. The court similarly observed that "[t]he FEC…relied on sworn declarations from every director," and restated the FEC's purported rationale for relying on them, without addressing whether it made any sense. (A-579, A-586-88). The court admitted that the FEC "misunderstood" the CPD policies and didn't even try to defend the FEC's reliance on them. (A-583-84).

"Deference does not mean acquiescence." *Presley v. Etowah Cty. Comm'n*, 502 U.S. 491, 508 (1992). The law requires more from a court reviewing agency action. "[An] 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. ICC*, 587 F.2d 1285, 1290 (D.C. Cir. 1978). The FEC reached just such a result here, but the district court applied *no* scrutiny, let alone the requisite "searching and careful" scrutiny, to the arbitrary and capricious reasoning that underlies that result. This compels reversal.

### B. The FEC Arbitrarily And Capriciously Found The CPD's Exclusionary Polling Criterion To Be "Objective"

The CPD's use of a subjective polling criterion to determine which candidates participate in the debates also requires reversal. The district court's first summary judgment ruling aptly summarized the reasons why: given "the evidence that since 1988 only one non-major party candidate…has participated in the debates, and only then at the request of the two major parties," it is "perplex[ing]" that the FEC is so quick to deem the CPD's criteria "objective." (A-300-01). "This begs the question: if under these facts the FEC does not consider the fifteen percent polling criterion to be subjective, what would be?" (A-301). The FEC has no answer to this question. Nor did its decision dismissing the administrative complaints grapple with the reasons why virtually no independent candidate could satisfy the CPD's polling criterion. The FEC's rulemaking decision focused on that criterion and mostly parroted the same frivolous justifications for finding the 15% rule "objective." To the extent it included additional points, they further illustrate just how arbitrary and capricious the FEC's decisions were.

1. Debate-staging criteria designed to ensure the selection of pre-chosen candidates and only the Democratic and Republican nominees can realistically satisfy are not "objective." (A-105); *Buchanan*, 112 F. Supp. 2d at 74. Yet no independent candidate has satisfied the 15% criterion since it was adopted nearly two decades ago. Indeed, no truly independent candidate would ever have satisfied

it. Ross Perot was invited to the 1992 debates before the CPD adopted the criterion, but he was polling below 10% during the relevant time period. (A-701, A-332 ¶52, A-367 ¶52). The FEC pointed to a handful of much older candidacies—Teddy Roosevelt in 1912, Robert LaFolette in 1924, Strom Thurmond in 1948, George Wallace in 1968, and John Anderson in 1980—which do not support the FEC's position either. (A-1359; *accord* A-1257). The FEC presented no evidence that, Anderson aside, these candidates actually polled above 15%. Each of these candidates also rose to prominence within a major party before the modern era and competed in major party primaries before running as an independent, which afforded them the enhanced name recognition that truly unaffiliated candidates do not receive. (A-332-33 ¶52-53, A-367 ¶52-53).

Furthermore, the cost of running for president back then paled in comparison to today's $1 billion price tag. Present-day independents cannot raise money and garner support from potential donors and endorsers who lack certainty whether the candidate will participate in the debates. This, in turn, discourages qualified independent candidates from running in the first place. (*See, e.g.*, Dkt.85-2 at 13).

And even an independent candidate who reaches 15% support in the polls is not guaranteed admission to the debates. The CPD retains complete discretion about what polls to use and when to choose debate participants, allowing the CPD to manipulate the selection of polls to exclude independent candidates. (A-1308-

09). These are among the reasons why no true independent ever has or would qualify under the 15% rule, and why the rule is not "objective."

2. Appellants' experts, Clifford Young and Douglas Schoen, quantified the obstacles independent candidates face. Young is a polling specialist whose statistical analyses show that a candidate must, on average, obtain name recognition of at least 60-80% among the American public to have any realistic chance at achieving 15% in the polls. (A-968-71 ¶¶24-32). The FEC's response is riddled with "non sequiturs," *Haselwander*, 774 F.3d at 1000, and "pretextual" justifications, *Dep't of Commerce*, 139 S. Ct. at 2569, which do not withstand the slightest scrutiny.

The FEC claimed that "polling results are not merely a function of name recognition," because there are other things that could make a candidate "popular" or "unpopular." (A-1361). So what? If nobody knows who the candidate is, then nobody will support that candidate. Once the candidate is known, then of course other factors will influence his or her popularity. Young's point is that name recognition is the essential first step, and independent candidates are unable to surpass even that. To this the FEC has no response.

Young identified a separate and independent reason why the 15% criterion disfavors independents: because polling conducted in three-way races is more error-prone than in two-way races, an independent candidate could easily be

excluded from the debates due to polling error. (A-982-85 ¶¶59-68). The FEC claims that "Young's metric for polling error appears to be based on the difference between the poll and the actual results on Election Day. However, CPD does not purport to use the polls as predictors of what will occur on Election Day, but as a reliable measure of candidates' support at a given moment in September." (A-1367). This directly contradicts how the CPD itself justifies its polling criterion. The CPD press release announcing this criterion states that its "purpose…is to identify those candidates…*who have a realistic chance of being elected President of the United States*." (A-1308) (emphasis supplied). It was "arbitrary and capricious" for the FEC to contradict the CPD's explanation and rely instead upon its own conflicting "*post hoc* rationalization." *Kisor*, 139 S. Ct. at 2417.

And polling's inherent unreliability undermines the CPD's exclusive reliance upon a polling criterion to determine who it considers to be "electable." FEC Commissioner Ann Ravel recognized that "the world may have a polling problem, and it is harder to find an election in which polls did all that well." (Dkt.37 ¶24). The experience of Gallup, the organization headed by CPD pollster Frank Newport, is emblematic. After the 2012 election, Nate Silver criticized Gallup for "three poor elections in a row," and for having "among the worst [2012] results" of all polling firms. (Dkt.58-10 at 3). Because Gallup had no "definitive

answer" for these errors, it withdrew from "horse race" polling for the 2016 presidential elections. (Dkt.105-7 at 65, 70-71).

Young's analysis of three-way races relied upon data from gubernatorial races because of "the relative paucity of three-way races at the presidential level." (A-980 ¶52). He recognized that "gubernatorial races are more error prone" and "adjusted" for this difference. (A-981-82 ¶¶57-58). The FEC took issue with his use of gubernatorial data, but neither acknowledged that Young corrected for this nor refuted the manner in which he did so. (A-1368). Here again, the FEC "ignore[d] important…evidence" demonstrating why the CPD's polling criterion is biased, which epitomizes its "arbitrary and capricious" treatment of Young. *Natural Res. Def. Council*, 822 F.2d at 111.

3. Appellants' other expert, Douglas Schoen, is a veteran pollster and campaign strategist. He showed that because independent candidates have difficulty attracting earned media, they must raise at least $266 million to achieve the requisite 60-80% name recognition.[11] (A-1034-35). This is not hard to believe, in light of the billions spent by the major party nominees in the 2016 race. If

[11] The FEC now complains that it lacked access to the data underlying Schoen's estimates. (A-1256). In fact, his report provided a lengthy, item-by-item explanation (A-1022-27), and the FEC ignored Appellants' offer to supply additional data at the administrative stage (A-665).

anything, an independent would need to spend substantially more than Schoen's conservative estimate in order to keep pace.

Yet the FEC claims: (1) Gary Johnson and Green Party candidate Jill Stein received media coverage comparable to their major party counterparts in the 2016 election; (2) Super PAC money (99% of which goes to major party candidates) and social media advertising (which major party candidates buy in quantities independents could never afford) would somehow help independent candidates; (3) independent candidates theoretically might begin the race with sufficient preexisting name recognition to forego media expenditures; and (4) Gary Johnson supposedly exceeded Young's 60% threshold. (A-1255, A-1361). These are not serious contentions.

The FEC says Johnson and Jill Stein received "extensive" media coverage because, between them, they made just over two media appearances per month during their respective campaigns. (A-1362 n.107, A-1301-03). That is simply absurd, particularly since many of these appearances ran only on C-SPAN, a television station most Americans take pains to avoid. (A-1302-03).

Super PACs and social media do not help independents, as the FEC claims; they make the problem worse. In 2016, Super PACs and other outside funding sources raised over $700 million for Democratic and Republican candidates, and only $1.4 million for their independent counterparts (Johnson, Stein, and

McMullin). (A-327-28 ¶42, A-365 ¶42). Most of that $700 million went to the two major party nominees, demonstrating that Super PAC donors contribute to candidates they think can win, and not to candidates who will be excluded from the debates.

Nor did the FEC seriously suggest that independent candidates can overcome this massive fundraising gap on social media. The FEC's own purported examples of how social media can relieve a candidate's fundraising burden—the 2016 Trump campaign and the Obama presidential campaigns—show the opposite. (A-1363). Trump and outside groups supporting him spent close to $1 billion in 2016, with $90 million devoted to social media advertising; Obama spent even more, with comparable social media expenditures. If this is how a campaign is run "economical[ly]" using social media, as the FEC claims (A-1363), Schoen's $266 million fundraising estimate for an independent campaign is modest by comparison.

The FEC cited no evidence to support its presumption that independent candidates begin their campaign with meaningful name recognition. (A-1364). Independently wealthy candidates are the only ones realistically able to launch a serious independent campaign, and the FEC points to Michael Bloomberg as the only recent example of a well-known public figure contemplating an independent run. (A-1365). On this we agree with the FEC: if you are the 10th richest person

in the world, you can run for President of the United States as an independent candidate. The problem is that virtually no one else can.

Nor did Gary Johnson achieve the requisite name recognition. The only poll the FEC cited puts him below the 60% threshold (at 53%). (A-409, A-1361, A-1255). And the FEC ignored two other polls showing Johnson's name recognition to be considerably lower (36% and 37%, respectively). (A-409); *accord City of Dania Beach v. FAA*, 628 F.3d 581, 590 (D.C. Cir. 2010) (court may consider evidence agency "negligently excluded" from the record). It is "arbitrary and capricious" for an agency to cite "misleading" data, *Darrell Andrews Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 296 F.3d 1120, 1134–35 (D.C. Cir. 2002), and to "cherry-pick" data supporting its position, *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008), in order to engineer its desired outcome.

4. The rulemaking decision, which also addressed the 15% rule, contains a handful of additional arguments that highlight the pretextual nature of the FEC's decisionmaking. (A-1254-59). First, that decision erroneously claims that Young limited his analysis to polls conducted "at the early stages of the party primary process" (A-1255), even though his expert report explicitly incorporated "late primary" and "general" election polling data. (*See, e.g.*, A-986). Here again the agency's stated rationale is directly "contradicted by evidence the [agency] had

before it." *Safe Extensions*, 509 F.3d at 605; *accord National Gypsum Co. v. EPA*, 968 F.2d 40, 43-44 (D.C. Cir. 1992) (vacating decision based on "unsupported assumptions").

Second, while apparently acknowledging the strong correlation between name recognition and vote share, the FEC suggested that the relationship is not "causative." (A-1255). That is absurd. Voters obviously cannot like a candidate unless they first know who the person is. (A-958 ¶7). Consequently, there must be a causal relationship between name recognition—whether voters have even heard of the candidate—and vote share—whether voters have decided to vote for that person. The FEC again "blinks reality" when claiming otherwise. *Flyers Rights*, 864 F.3d at 744.

Finally, the rulemaking decision's criticism of Schoen is equally frivolous. The decision disputes his conclusion that independent candidates have difficulty attracting earned media, purportedly based upon an "analysis" of newspaper coverage of the 2016 election. (A-1255 n.6). In reality, this "analysis" directly undermines the FEC's position and demonstrates why it is pretextual. The FEC claims to have searched Westlaw's "major newspaper" database to determine how many stories mentioned the candidates. It purportedly searched the database for "Gary Johnson," "Jill Stein," and independent "Evan McMullin" February 5, 2016 and November 7, 2016. The FEC claimed that these searches yielded 3,001 hits

for Johnson, 1,744 hits for Stein, and 353 hits for McMullin. (A-1255 n.6). The FEC also searched for stories that mentioned certain Republican and Democratic candidates for earlier periods: August 1, 2015 to May 4, 2016 for the Republicans, and September 4, 2015 to June 7, 2016 for the Democrats. The FEC asserted that the results for Donald Trump and Hillary Clinton were 7,451 and 7,404, and that the results for other primary candidates were lower. (A-1255 n.6).

But how could the coverage the FEC claimed the independent candidates received be remotely sufficient to attract 15% support in the polls? Though the total number of articles mentioning them may appear sizeable, the independent candidates in reality received very little press because the FEC searched at least 46 newspapers over a 9-month period. Stein and McMullin were mentioned on average about once every two weeks by each paper, Johnson was mentioned only once or twice a week, and most of the articles mentioned the candidates only in passing. (A-431 ¶¶9-10, A-506-30). This confirms that independent candidates have considerable difficulty attracting earned media. (A-1020-21).

The FEC also misrepresented the search results for Gary Johnson. Because Gary Johnson is a common name, many of the articles were not even about the presidential candidate and were instead about a different person named Gary Johnson. Examples include: dozens of obituaries; articles about Hawaiian chef Gary Johnson and Gary "Big Hands" Johnson of the NFL's San Diego Chargers;

property listings for homeowners named Gary Johnson; an article about Missouri real estate agent Gary Johnson's collection of hand-painted earthenware; articles recounting Texas Longhorn power forward Gary Johnson's dramatic last-second bankshot to win the NCAA Maui Invitational; and results for golf, bowling, bass fishing, and other tournaments in which amateur athletes named Gary Johnson participated. (A-430-31 ¶8, A-455-504). These articles obviously did not advance the candidacy of Libertarian nominee Gary Johnson, but the FEC cited them as evidence that his campaign received adequate press coverage.

At the same time, the FEC grossly underreported newspaper coverage of the Republican and Democratic candidates to create the false impression that it was comparable to coverage of the independents. Appellants conducted their own searches of the Westlaw database, and confirmed that during the periods the FEC allegedly searched, Trump had at least 49,500 stories (not 7,541), and Clinton had at least 39,608 (not 7,404). (A-430 ¶7). Using the corrected numbers, the chart below shows the actual number of mentions per week of the candidates in each newspaper:

| Candidate | Average Mentions Per Week |
|---|---|
| Stein | 0.6 |
| Johnson | 1.6 |
| McMullin | 0.6 |
| Trump | 34.1 |
| Clinton | 27.8 |

(A-431 ¶10). The FEC has not disputed the accuracy of these corrected figures.

That is not all. The FEC also rigged the date ranges it searched to make it seem like coverage of the other major party candidates was comparable to coverage of the independent candidates. For Republicans it searched between August 2015 and May 2016, and for Democrats it searched between September 2015 and June 2016. But there is no dispute that the primary candidates used in its comparison ended their campaigns long before May or June 2016. (A-337-38 ¶64, A-371 ¶64). For example, Rick Perry ended his campaign on September 11, 2015, meaning he was only running for president for the first month of the nine-month period for which his name was searched. The FEC set up the searches this way to minimize the search results for these candidates, when in reality they were simply not running for president for most of the 9-month period that the FEC searched.

Conversely, the FEC went out of its way to inflate the results for the independent candidates. It did not search for press coverage of those candidates

during the same time period it examined for the major party candidates. Instead, it compared apples to oranges, examining a later time period for the independent candidates (February 5, 2016 to November 7, 2016) throughout which (1) both Johnson and Stein had active candidacies and (2) coverage of *all* candidates increased as the general election neared. To correct this error, Appellants conducted a comparison for the time periods when the independent candidacies overlapped with the major party candidacies. This apples to apples comparison reveals the true disparity in press coverage:

| **Major Party Candidate** | **Search Hits** | **Third-Party Candidate** | **Search Hits** |
|---|---|---|---|
| Huckabee | 3,557 | Stein | 17 |
| Jindal | 2,668 | Stein | 11 |
| Perry | 1,719 | Stein | 5 |
| Pataki | 948 | Stein | 15 |
| Webb | 581 | Stein | 9 |
| Chafee | 564 | Stein | 10 |
| O'Malley | 3,128 | Stein | 17 |
| Huckabee | 447 | Johnson | 17 |
| O'Malley | 525 | Johnson | 17 |

(A-432-33 ¶11).

Thus, the FEC's own data confirms Schoen's common-sense conclusion that the vast majority of independent candidates cannot attract sufficient earned media, requiring substantial expenditures to gain notoriety. In reaching a contrary

conclusion, the FEC manipulated the data *and* misrepresented the results of its purported "analysis."

5. Here too the district court shirked its responsibilities by accepting the FEC's justifications at face value and making no serious effort to grapple with Appellants' arguments. Its opinion simply lists the FEC's conclusions about the CPD's polling criterion and states that they were "informed and reasonable given the facts presented to it and the flaws identified by the FEC." (A-589-90, A-594-95). But the FEC's findings made no sense, and the district court ignored the reasons why. For example, the court rotely accepted the FEC's finding that Young measured name recognition at an early stage—which is patently false—and that there is no causative effect between name recognition and vote share—which is absurd. (A-594-95). And the court ignored the Westlaw news "analysis" altogether, even though it directly contradicts the FEC's conclusion.

Courts "cannot examine the agency's proffered evidence in isolation; [they] must also consider 'whatever in the record fairly detracts from its weight.'" *Epsilon Electronics, Inc. v. Dep't of Treasury*, 857 F.3d 913, 925 (D.C. Cir. 2017); *accord Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 961-62 (D.C. Cir. 2003) (court must "tak[e] into account contradictory evidence or evidence from which conflicting inferences could be drawn"). The district court here ignored *everything* in the record undermining the FEC's conclusion that the 15% rule is objective. *See*

*Morall v. DEA*, 412 F.3d 165, 167 (D.C. Cir. 2005) (reversing where district court "fail[ed] to consider contradictory record evidence" even though the "evidence [was] precisely on point"). This "stunningly one-sided" assessment "cannot withstand review," and therefore should be reversed. *Id.*; *accord Butte Cty.*, 774 F.3d at 999 ("myopic" agency decision was "devoid of reasoned decisionmaking").

## III. THE FEC'S DISMISSAL OF THE RULEMAKING PETITION WAS ARBITRARY AND CAPRICIOUS

This Court should also reverse the district court's award of summary judgment as to the FEC's post-remand dismissal of the rulemaking petition. Before remand, the FEC rationalized this outcome by arguing that the CPD's bias could be rooted out "through the enforcement process" (A-287), even though it has repeatedly declined to use that very process against the CPD. It "brushed…aside" the bias inherent in the 15% rule as the mere "use of polling data by a single debate staging organization for candidate debates for a single office." (A-305-06). Now the FEC abandons these arguments in favor of entirely new justifications for its refusal to open a rulemaking. As explained, these justifications largely overlap with those used to dismiss the administrative complaints, and are arbitrary and capricious for the same reasons. (A-1254-59). And the handful of additional arguments as to the rulemaking are equally frivolous for the reasons set forth *supra* in Point II.B.4.

## CONCLUSION

For the foregoing reasons, the judgment should be reversed, and summary judgment awarded to Appellants.

Dated: New York, New York
September 18, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Eric S. Olney
Jacob S. Wolf
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

*Attorneys for Plaintiffs-Appellants*

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT**

1. The undersigned counsel of record for Plaintiff-Appellants certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 12,984 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: September 18, 2019

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

## CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2019, I caused the foregoing document to be electronically filed with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served.

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro