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

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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GLOSSARY

CPD: Commission on Presidential Debates

FEC: Defendant-Appellee Federal Election Commission

FECA: Federal Election Campaign Act

RNC: Republican National Committee

SUMMARY OF THE ARGUMENT

The FEC's brief typifies the arbitrary, capricious, and unlawful approach it has taken throughout these proceedings. At every stage, it has been unable to provide a coherent rationale for its decisions. And at every stage, it has resorted to inventing new rationales to justify its pre-ordained determination not to enforce the laws the CPD has been violating. This appeal continues that pattern. The agency now offers up a litany of improper *post hoc* rationalizations manufactured for this Court, discarding fundamental aspects of its post-remand decisions—which themselves had replaced the faulty reasoning of its original decisions.

The district court found that the FEC "stuck its head in the sand and ignored the evidence" in the original decisions. Post-remand, the agency buried it even deeper, replacing its original reasoning with equally indefensible justifications: identically-worded, boilerplate affidavits signed by CPD directors who unwittingly confirmed they had not reviewed Appellants' allegations; supposed anti-partisan CPD "policies" that mysteriously surfaced for the first time on remand, were withheld from the FEC, prohibited next to nothing and are not enforced by the CPD; a blatantly pretextual Westlaw news analysis in which the FEC manipulated the data to achieve its desired outcome; and its claim that when directors admitted the CPD was "bipartisan," they simply couldn't have meant what they said.

Now the FEC abandons these and other indefensible purported justifications for its illogical post-remand decisions, in favor of a "post hoc salvage operation[]" designed to "overcome the inadequacy of the Commission's" previous two bites at the apple. *KeySpan–Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1059 (D.C. Cir. 2003). This third effort to justify the outcome fares no better than the first two. The agency now repudiates its longstanding interpretation of its own regulation and claims that debate-qualifying criteria may be "objective" even if designed to exclude specific candidates from the debates; asserts that "organizations may change over time," without citing a single way the CPD has repudiated its partisan ways; claims a Supreme Court case permits biased debate-qualifying criteria, even though the FEC previously admitted that the same case required objective criteria; purports to "dispute" its own admission in its Answer that Ross Perot would not have qualified under the current CPD criteria; and, abandoning any pretense of objectivity and fairness towards independent candidates, simply declares that "bipartisan" means the same thing as "nonpartisan"; and the list goes on.

The FEC's inability to articulate any logically sound bases for its decisions—in its first try, again in its second, and now on appeal—shows that its reasoning is entirely pretextual. For three decades the FEC has refused to enforce its regulations against the CPD, and its appellate brief only confirms its ulterior motives. This Court should hold the FEC accountable for its derelict oversight of

the CPD. The CPD continues to accept millions in corporate contributions and expenditures, while refusing to play by the rules Congress and the FEC itself have set for corporate-funded debates. And the CPD exercises unchecked power to decide who may participate in the presidential debates and abuses that power by erecting insurmountable obstacles that ensure only Republican and Democratic candidates will participate. The judgment should be reversed.

I. THE FEC IS NOT ENTITLED TO DEFERENCE

The FEC is a bipartisan agency. Its decisions in this case typify its lengthy history of "sticking its head in the sand": the agency ignored Appellants' complaints and petition until a lawsuit was filed; then hastily issued conclusory dismissals that the district court found were contrary to law; then twisted itself in knots trying to reach the same result on remand; and now resorts to improper "*post hoc* rationalizations" on appeal. *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304–05 (D.C. Cir. 2000). The Court should "decline to defer" to the FEC and its revolving door of "convenient litigating position[s]." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019).

The FEC is unable to rebut that the cumulative effect of its bias, its pattern of rubber-stamping the CPD, and its shifting litigation positions vitiate any justification for deference.

1. The FEC remarkably claims, for the first time on appeal, that "bipartisan" and "nonpartisan" mean the same thing. (FEC.Br.26-27). The fallacy of this proposition is obvious, and it contradicts what the FEC itself said below. When attempting to explain away CPD directors' admissions that the CPD was "bipartisan," the FEC never claimed that "bipartisan" meant the same thing as "nonpartisan." Instead it unquestioningly credited one director's claim that she really meant "nonpartisan" when she said "bipartisan"; it also tried to distance the directors from their admissions, claiming the admissions did not "reflect [the directors'] respective views on the participation of independent candidates in CPD debates." (A-1352). But a person only equates "bipartisan" with "nonpartisan" if she assumes voters (and serious candidates) all identify with one of two parties, and dismisses independents as irrelevant to the political system. The FEC's new position thus reflects its true worldview and shows why it is inherently biased against independent candidates.

"Bipartisan" and "nonpartisan" are plainly not synonyms. "Nonpartisan" means "not partisan"—in other words, the opposite of partisan. *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/nonpartisan (last visited Nov. 19, 2019). A "bipartisan" agency does not meet this definition because it "involve[s] members of two parties." *Id*. at http://www.merriam-webster.com/dictionary/bipartisan (last visited Nov. 19, 2019). An agency

comprised of two political parties is a "partisan" agency, plain and simple. A bipartisan agency certainly cannot be considered "nonpartisan" where, as here, the two parties in question work together to exclude *other* parties and unaffiliated candidates (who are members of no party) from the political process.

And there is no serious dispute that the FEC is a partisan agency. "Because the FEC is comprised of three Democratic appointees and three Republican appointees…all actions by the Commission occur on a bipartisan basis." *Citizens for Responsibility & Ethics in Wash. v. FEC*, 923 F.3d 1141, 1142 (D.C. Cir. 2019) (Griffith, J., concurring in denial of rehearing en banc); *id.* at 1143 (FEC has "bipartisan emphasis"); *accord, e.g.*, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("the Commission is inherently bipartisan"). The FEC's own website touts its "bipartisan" commitment.[1]

The FEC also tries to disavow its commissioner's admission that the agency "desire[s] to strengthen party organizations." (*See* Br.29-31). It claims that "pre-

[1] FEC, *Statement of Comm'r Ellen L. Weintraub*, https://www.fec.gov/resources/cms-content/documents/ELW-statement-on-FECs-opening-of-a-disclaimer-rulemaking.pdf (Nov. 16, 2017). The FEC says commissioner Steven Walther is independent (FEC.Br.27), ignoring that he previously served as counsel to Democratic Senate Leader Harry Reid, *see* Ed Vogel, *Recount Not Expected to Unseat Reid*, LAS VEGAS REV.-J. (Nov. 10, 1998), 1998 WLNR 534067, and was appointed to the FEC on Reid's recommendation as a "Democratic commissioner," *Senate Confirms New FEC Commissioners*, THE POLITICO (June 24, 2008), www.cbsnews.com/news/senate-confirms-new-fec-commissioners-ending-long-partisan-standoff/.

decisional deliberations…cannot be used to impeach an agency's final decision" (FEC.Br.30), but the Supreme Court recently held that "internal deliberative materials" may be used "to demonstrate pretext." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2573–76 (2019). And *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995 (D.C. Cir. 1999) (cited FEC.Br.30) is inapposite. The Court there considered whether particular predecisional statements established agency bias, but concluded that they didn't. *Id*. at 1001. Here, by contrast, the FEC's longstanding bias gave even the district court "reason to suspect that the agency's" decisionmaking did "not reflect [its] fair and considered judgment." (A-292). The commissioner's concession corroborates what the courts have already confirmed and the FEC boasts on its website: that the agency has a *bipartisan* objective, which explains why the FEC has repeatedly turned a blind eye to the CPD's illegal efforts to exclude independent candidates.

2. The FEC does not dispute that it repeatedly dismissed complaints against the CPD using a "control" standard that the district court found contravenes "the text of the agency's own regulations." (A-290; *see also* Br.19, 31). The agency makes no effort to defend that standard—and yet still claims its "consistent[]" reliance on that standard was somehow "reasonable." (FEC.Br.27-28). But courts may not defer to an agency's consistent interpretation of its own regulation (*see* FEC.Br.27-28) unless that interpretation is "permissible." *Kisor*, 139 S. Ct. at

2416-17; *see also id.* at 2414 ("not all reasonable [interpretations] of…truly ambiguous rules are entitled to deference"). Here, the FEC *misinterpreted* 11 C.F.R. §110.13's plain language by applying the *impermissible* "control" standard. (A-290-91). The FEC's longstanding use of this erroneous interpretation was patently unreasonable and supplies all the more reason to closely scrutinize its decisions here. *See, e.g.*, *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986) ("In deciding whether to defer…the courts look to…[the] validity" of the "agency's reasoning.").

3. Finally, the FEC argues that review is "not more strict" when the agency arrives at the same result on remand. (FEC.Br.28). It cites *Conkright v. Frommert*, but *Conkright* concerns ERISA plan administrators—not agencies—and expressly contemplates heightened scrutiny where the decisionmaker is acting "beyond the bounds of reasonable judgment" or has "not exercise[d] [its] discretion fairly." 559 U.S. 506, 514-15 (2010). The FEC disregards why that is the case here—the agency shares the CPD's political bias, consistently acts upon it, and has done so using an arbitrary and capricious standard of review. Moreover, the "consistency" of an agency's reasoning directly impacts "whether to defer." *Orloski*, 795 F.2d 164. At each stage of this litigation, the FEC has altered its justification for reaching the exact same result, and does so again on appeal. (*See infra* at 11, 13, 16-17, 19-22, 26). These are the types of "flip-flops" and "*post*

hoc rationalizations to which courts will not defer." *Akzo Nobel*, 212 F.3d at 1304–05; *accord Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) ("deference is…unwarranted" for "*post hoc* rationalization[s]").

The dubious nature of the FEC's reasoning casts further doubt on whether its decisions truly reflect the "fair and considered judgment" required for deference. *Kisor*, 139 S. Ct. at 2417. The FEC's countless errors and inconsistencies are detailed in the opening brief and below. Moreover, the FEC's post-remand decisions rely almost exclusively upon evidence post-dating the original dismissals. (*See* Br.32). Although "agencies may consider such evidence" (FEC.Br.29), the fact that it relied *almost exclusively* upon such evidence smacks of "*post hoc* rationalization." *Christopher*, 567 U.S. at 155.

* * * * * *

The FEC cites cases that involved only a single factor cutting against deference. *See, e.g.*, *Hagelin v. FEC*, 411 F.3d 237, 242-44 (D.C. Cir. 2005) (shared bias between agency and litigant, by itself, did not warrant departure from ordinary deference); *City of Los Angeles v. Dep't of Transp.*, 165 F.3d 972, 977-78 (D.C. Cir. 1999) (applying ordinary deference where agency reached same result on remand). None of these cases involve the "number of factors" described above which, when taken together, "rebut[]" "the presumption of agency regularity" and require "[m]ore exacting scrutiny." *Natural Res. Def. Council, Inc. v. SEC*, 606

F.2d 1031, 1049-50 & n.23 (D.C. Cir. 1979); *accord Kisor*, 139 S. Ct. at 2416-18 (in determining whether to award "deference," courts must consider entire "context" because the inquiry does not "reduce to any exhaustive test").

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

Even if ordinary deference applies, the FEC's post-remand decisions were arbitrary and capricious. In claiming otherwise, the FEC either parrots the reasoning in its decision without addressing what makes it arbitrary and capricious, abandons that reasoning altogether, or advances impermissible and equally meritless *post hoc* rationalizations.

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

It is obvious that the CPD is inherently partisan. No reasonable assessment of the record evidence could lead to any other conclusion. The CPD was created "by the Republican[s] and Democrat[s]" to "forge a permanent framework on which all future debates between the nominees of the two political parties w[ould] be based." (A-850, A-855). The CPD has always been led by diehard Republicans and Democrats who lavish their parties' candidates—including CPD debate participants—with substantial cash contributions; endorse these same candidates while simultaneously serving on the CPD board; support partisan causes in violation of the CPD's purported anti-partisan "policies"; lobby Republicans and

Democrats on behalf of the same corporations that bankroll the CPD; and routinely admit that the CPD is "not likely to look with favor on including third-party candidates in the debates." (*See* Br.10-13, 36-37). That explains why "only one non-major party candidate, Ross Perot, has [ever] participated" in a CPD debate, "and only then at the request of the two major parties," because he would not have otherwise satisfied the CPD's debate-qualifying criteria. (A-300).

Instead of acknowledging the obvious—that the CPD is partisan—the FEC offers up tortured logic to avoid this conclusion.

1. The FEC maintains that some of the evidence is "old" and that "organizations may change over time." (FEC.Br.32 (quoting A-1353)). But the FEC is unable to point to *any evidence* that the CPD's partisan loyalties have actually changed. Instead it asserts "there were 'significant indications that [the CPD] has made concerted efforts to be independent in recent years'"—without identifying what these "concerted efforts" supposedly were. (FEC.Br.32) (quoting A-1353). That is because the CPD has made no such efforts. *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 605-06 (D.C. Cir. 2007) ("arbitrary and capricious" for agency to rely upon "unsupported assertion"). Offering no specifics, the FEC's brief vaguely alludes to a page from its decision (A-1353) that does not purport to reflect any attempt to curb the CPD's partisanship. This page merely discusses how the CPD "adopted new candidate selection criteria" after "the 1996 debates"

(A-1353)—the same exclusionary criteria that no independent candidate has ever hurdled. It is absurd to suggest that the adoption of these criteria two decades ago reflects a "recent" and "concerted effort[] to be independent."

The unbroken chain of partisanship from the CPD's inception to the present explains its eleventh-hour decision to concoct supposed anti-partisan "policies," which only surfaced after the district court vacated the original FEC dismissals. Clearly, the CPD was trying to show that *something* had changed in recent years. But nothing has changed. The organization is intractably partisan and incapable of implementing meaningful reform. The purported "policies" were a sham: to the extent they even exist, they are unenforceable by definition and by design, have been violated without repercussion, and do not even purport to prohibit the vast majority of the CPD's partisan activities. (*See* Br.32-33, 41-43; *see also* Nonprofit.Amicus.Br.8-16).

The FEC makes no serious effort to defend the purported CPD policies. Instead, apparently recognizing their bogus nature, it now protests that its "determination did not rise or fall with the policies." (FEC.Br.37). The FEC claims to have included "appropriate caveats" to show that its decision accounted for the CPD's failure to produce the policies, but the Court will search the decision in vain for any such caveats. (*See* Br.42; A-1357-58). The reality is that the FEC *expressly relied* upon the policies *despite* the CPD's failure to provide them. Its

decision said that Appellants had "not support[ed] a reasonable inference that CPD endorses supports or opposes political candidates or parties" precisely because the CPD supposedly "adopted a formal 'Political Activities Policy'" and an "'informal policy against Board members serving in any official capacity with a campaign.'" (A-1357-58). But why would the FEC bother to discuss the policies at all when it had no idea what they said? Why would the agency not ask to see the policies, and instead issue a decision regurgitating the cryptic, incomplete descriptions supplied by the very organization motivated to conceal their true nature? Because the FEC did not care what the policies said, whether they imposed any meaningful restrictions or whether the CPD had any intention of enforcing them. The agency's reliance upon the policies was "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).

2. The FEC claims that "only the [CPD] directors' actions in an official, as opposed to personal, capacity" are relevant. (FEC.Br.33). This (1) ignores the numerous admissions that the *CPD itself* is partisan (*see* Br.36-37 (collecting record citations)); and (2) impermissibly brushes aside the "mountain" of additional evidence tying the directors to the major parties (*see, e.g.* Br.9-13).

As to the first point, the FEC's decision did attempt to address several of the admissions. But its reasoning was frivolous (*see* Br.37-38), and—like the

policies—the FEC now abandons it (FEC.Br.33), which further underscores why the decision was arbitrary and capricious.

Nor can the FEC dodge the remaining evidence. The agency advances yet another new argument on appeal, claiming that the CPD is "liable [for] the statement" of a director only if the director made it in his capacity as the CPD's "agent." (FEC.Br.33). But "courts may not accept appellate counsel's *post hoc* rationalization for agency action…"; rather, agency action may be "upheld, if at all, on the same basis articulated in the [agency's] order." *Erie Brush & Mfg. Corp. v. NLRB*, 700 F.3d 17, 23 (D.C. Cir. 2012). The FEC's belated foray into the law of agency "is an off-limits *post hoc* rationalization." *Mozilla Corp. v. FCC*, 940 F.3d 1, 62 (D.C. Cir. 2019); *accord KeySpan–Ravenswood*, 348 F.3d at 1059.

And the argument is a non sequitur. Appellants do not claim that the directors, as agents, made independently actionable partisan statements for which the CPD is liable as principal. Appellants argue that the CPD directors' statements—as well as their extensive ties to the major parties and substantial contributions to partisan causes—are *evidence* that the CPD itself supports those same causes. After all, the CPD is nothing more than a collection of the staunch partisans who comprise it. Where, as here, an organization that stages political debates is run by people with a demonstrably partisan bent, it stands to reason

that—without an independent board or mechanism of corporate governance to override its leaders' partisanship—the organization will behave in a partisan fashion. As explained by the amicus group comprised of prominent leaders and scholars from the nonprofit sector, the CPD's failure to impose any such constraints "contravenes the basic standards and practices of good governance that are fundamental in the nonprofit community." (Nonprofit.Amicus.Br.8). And that is particularly true for a nonprofit organization that operates in a political setting and, having chosen to fund itself with corporate money, is required by law to adhere strictly to a nonpartisanship requirement.

Fahrenkopf illustrates why the evidence of CPD directors' partisan activities is highly relevant. He founded the CPD in his capacity as chair of the Republican party and declared his intent to "forge a permanent framework" to hold "all future debates between the nominees of the two political parties." (A-850). He continued at the helm of the RNC while simultaneously serving as co-chair of the CPD for several years. After leaving the RNC, he has continued to serve as a prominent ambassador of the Republican party. While serving as co-chair and public face of the CPD, he has (1) contributed substantial sums to the same Republicans who appeared in CPD-sponsored debates, showing that he favors including those particular candidates in the debates; (2) assumed Republican campaign roles in violation of the alleged CPD policy, thereby registering his disagreement with the

policy's purported goal of limiting partisanship at the CPD; (3) told a Harvard audience that the "Commission on Presidential Debates" helps "rejuvenat[e]…bipartisanship"; and (4) conceded that he is "not likely to look with favor on including third party candidates in the debates." (Br.9-11, 33 (collecting other examples of Fahrenkopf's partisan acts); A-395). This is evidence that *the CPD itself* is partisan. The FEC's "stunningly myopic" refusal to consider *any* of this evidence was arbitrary and capricious. *Haselwander v. McHugh*, 774 F.3d 990, 999 (D.C. Cir. 2014).

Nor are the CPD directors' First Amendment rights in jeopardy, as the FEC and CPD as amicus erroneously claim. (FEC.Br.33-34; CPD.Br.10-12). The directors are permitted under the First Amendment to run a partisan debate-staging organization, as they have for thirty years. But FECA prohibits such an organization from *accepting corporate contributions*. 52 U.S.C. §30118(a); 11 C.F.R. §110.13. Only a debate-staging organization that does not "endorse, support or oppose" the parties, and uses "objective" criteria, may pay for the debates using corporate money. 11 C.F.R. §110.13(a)(1), (c). The CPD is always free to turn that money away. By accepting the money, however, the CPD and its leadership also accept the prohibition on partisanship that comes with it.

3. The FEC only takes into account the director affidavits and Fahrenkopf's 2015 interview. (FEC.Br.34-39). This erroneously assumes that the agency was

free to ignore the "mountain" of additional evidence establishing the CPD's partisanship, including the new evidence of 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* Br.20). The FEC's arbitrary and capricious refusal to consider that evidence alone compels reversal. *See, e.g.*, *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 329–30 (D.C. Cir. 2006) ("Because FERC rested its determination, at least in part, on its infirm 'incomplete information' ground, we must…set [it] aside as arbitrary and capricious."); *Int'l Union, United Mine Workers v. Dep't of Labor*, 358 F.3d 40, 44–45 (D.C. Cir. 2004) (agency "failed to provide an adequate explanation for its decision" where "[t]wo of the three reasons it gave...would not support its decision").

Nor do the FEC's treatment of the affidavits and the interview pass muster. The FEC barely tries to justify its reliance on the affidavits. It merely labels them "first-hand accounts" that supposedly attest to the directors' "own beliefs, actions, and observations." (FEC.Br.38-39). Yet these labels appear nowhere in the FEC's decision, which had rotely accepted the affidavits without purporting to explain why. (A-1353-54). Appellate counsel's belated spin on the affidavits reflects another "off-limits *post hoc* rationalization" that compels reversal. *Mozilla Corp.*, 940 F.3d at 62. Moreover, the affidavits themselves directly undermine what the

FEC now claims. There is no dispute that *the CPD's lawyer* drafted them; that the lawyer distributed a form affidavit to all nine directors, most of whom immediately signed it, and none of whom made a single edit; that the affidavits confirm that no director even reviewed Appellants' allegations; and that the affidavits instead consist of a single page of identically-worded, boilerplate disclaimers that ignore the evidence specific to each director. (*Compare* FEC.Br.38-39 *with* Br.39-41). In other words, the affidavits are not a "first-hand account" of anything. They reflect the uninformed view of a CPD lawyer and his wholesale evasion of the evidence Appellants marshaled against his clients.

The sole piece of evidence the FEC analyzes in any detail is the Fahrenkopf interview. The FEC claims that is because it is "the only evidence that was both recent and official-capacity" (FEC.Br.34), but even that is not true. For example, Fahrenkopf submitted an affidavit post-remand in which he falsely claimed that "I have never observed any Board member ever approach any issue concerning the CPD or its mission from a partisan perspective." (A-1282 ¶5). In the very same affidavit, however, Fahrenkopf confirmed that one of his "goal[s]" at the CPD was to "secur[e] the commitment of both major party nominees to debate"—a decidedly "partisan perspective" that directly contradicts his prior claim that neither he nor any other board member had taken one. (A-1283 ¶10). Indeed, both Fahrenkopf and Paul Kirk announced, upon forming the CPD, that "the

Democratic and Republican parties" would be "jointly sponsoring" future debates to "strengthen the role of political parties in the electoral process." (A-854). Even though the affidavit represents "recent" and "official-capacity" evidence that Fahrenkopf's denials are less than trustworthy, the FEC accepted them rote, just as it did the other director affidavits. (A-1352).

And the FEC's superficial treatment of the 2015 interview simply ignores Appellants' arguments. (FEC.Br.34-36). The FEC's brief, parroting its decision, characterizes Fahrenkopf's statement as "an assertion of historical fact," without acknowledging that (1) he was responding to a question about "the prospects" of more than two participants in future presidential debates, and (2) he answered that question in the *present* tense, not the past tense: "we . . . primarily *go* with" the Republican and Democratic candidates. (A-1168). That Fahrenkopf mentioned Ross Perot later in his answer does not somehow transform this admission into "an assertion of historical fact."

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

The FEC's defense of its conclusion that the CPD's criteria are "objective" is equally unavailing. It (1) tries to replace its longstanding interpretation of §110.13(c) with a brand new one crafted for this litigation; (2) fails to identify any independent that has satisfied the 15% criterion; (3) fails to impugn Clifford

Young; and (4) ignores the pretextual justifications it used to reject Douglas Schoen's conclusions.

1. In 1995, the Commission provided an "Explanation and Justification" for the objectivity requirement, which was published in the Federal Register. *See* 60 Fed. Reg. 64,260-01, 1995 WL 735941 (Dec. 14, 1995). There the FEC confirmed, *inter alia*, that "objective criteria" cannot be "designed to result in the selection of certain pre-chosen participants." *Id*. at 64,262. For over two decades, the FEC consistently adhered to this interpretation. (*See* A-105, A-133, A-181, A-249). Until now. In yet another "post hoc salvage" exercise, *KeySpan–Ravenswood*, 348 F.3d at 1059, the FEC now jettisons its longstanding interpretation of the regulation and claims that criteria geared to the selection of preferred candidates may nevertheless be considered "objective."[2] This argument defies the plain text of the regulation, its own prior interpretation, and the controlling authorities.

The agency purports to ground its new interpretation of the regulation in the "regulatory text." (FEC.Br.43). Yet conspicuously absent from the FEC's brief is any discussion of the text itself. *See BedRoc Ltd., LLC v. United States*, 541 U.S.

[2] One will search the district court's first decision in vain to find what the FEC claims was an "instruct[ion]" to adhere to its prior interpretation. (FEC.Br.41).

176, 183 (2004) (statutory "inquiry begins with the statutory text, and ends there as well if the text is unambiguous"); *Kisor*, 139 S. Ct. at 2415 (same for regulations). Objectivity requires the absence of "personal feelings," "prejudices," or "subjective factors." *Merriam-Webster Online Dictionary*, http://www.merriam-webster.com/dictionary/objective#h1 (last visited Nov. 19, 2019). Criteria "designed to result in the selection of…pre-chosen participants" are not objective because they permit the use of "personal feelings," "prejudices," and other "subjective factors" to select candidates.

The FEC purports to rely on *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998) (FEC.Br.41-42), but that case actually supports this conclusion. To understand why, this Court need look no further than the FEC's own prior decisions, which cited *Forbes* in *support* of the requirement that "objective…selection criteria must…not [be] geared to the selection of certain pre-chosen participants." (A-104-05). As the FEC correctly reasoned at the time, under *Forbes*, "objective" criteria must "not be based on the speaker's viewpoint," 523 U.S. at 682; this is why criteria crafted to exclude all but the Democratic and Republican nominees are not "objective" under 11 C.F.R. §110.13(c).[3] *See also*

[3] The issue in *Forbes* was whether "all ballot qualified candidates" for Congress had a First Amendment right to appear in debates. 523 U.S. at 681. The Supreme Court held that candidates like the *Forbes* plaintiff—who did not have a "campaign headquarters other than his house"—had no such

Nat'l Gypsum Co. v. EPA, 968 F.2d 40, 43 (D.C. Cir. 1992) (vacating agency decision for taking "inconsistent" positions).

The FEC also argues that the election laws should not be used to steer voters to particular candidates. (FEC.Br.43). We could not agree more. The American people favor including more than two candidates in the general election debates. (*See, e.g.*, A-761, A-786). Yet the CPD—an unelected and unaccountable coterie of party insiders—actively works to steer voters to the two major party candidates and to prevent voters from hearing from the third alternative most of them prefer. It is the CPD that has abused the election laws to rig the process in favor of Republicans and Democrats and to steer voters away from any other candidate.

2. No truly independent candidate has ever satisfied the 15% criteria. (Br.45-46). There is no dispute that Anderson, Wallace, Thurmond, LaFollette and Roosevelt all rose to prominence as Republicans and Democrats before turning independent, affording them the enhanced name recognition that true independents do not receive. (*See* Br.46; FEC.Br.45). The FEC therefore focuses on the independent presidential campaign of Ross Perot, a self-funded billionaire. But in doing so, the agency advances more *post hoc* rationalizations. First, the FEC

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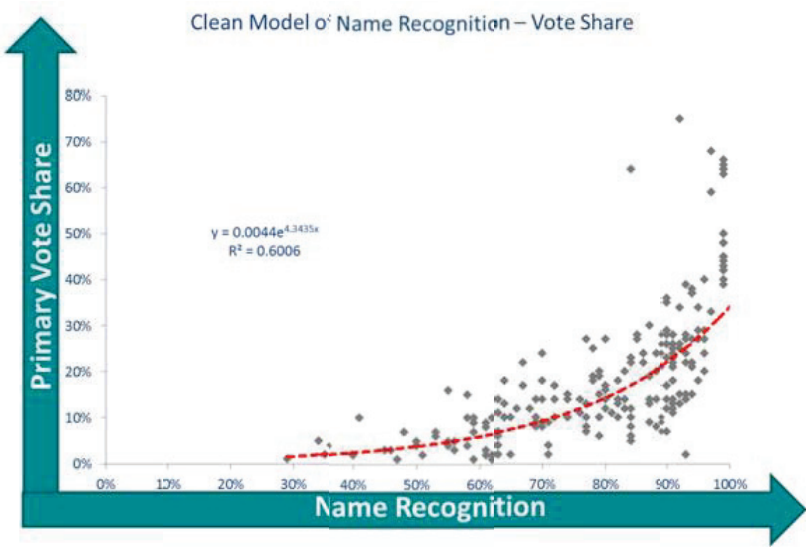
right. *Id*. at 682-83. Appellants here neither suggest that such candidates should appear in the presidential debates nor assert an infringement of their constitutional rights.

claims that Perot polled at "40%" at an unspecified time during his campaign. (FEC.Br.45). Yet the FEC admitted in its answer to the complaint that he "would not have satisfied the CPD's current rule, because he was polling at or below 10%" in late-September, which is when the CPD chooses debate participants. (A-332 ¶52, A-367 ¶52; *see also* A-701). The FEC now tries to dispute its own concession, in violation of the well-settled rule that "admissions in the pleadings are binding." *Nat'l Ass'n of Life Underwriters, Inc. v. Comm'r of Internal Revenue*, 30 F.3d 1526, 1530 (D.C. Cir. 1994).

Second, the FEC also argues for the first time that Perot "ultimately received 18.7% of the popular vote that year." (FEC.Br.45). This directly undermines the FEC's position and demonstrates Appellants' point. Perot was polling between "7 to 10%" in September, but his participation in the debates doubled his support. Put simply, polling drastically undercounts both the actual support and true potential of independent candidates. Examples from gubernatorial elections prove that independent candidates polling below 15% in September can easily come back to win the election—if they are granted access to the debates. (A-720). That is why the CPD goes out of its way to exclude these candidates.

3. Clifford Young showed that a candidate needs at least 60-80% name recognition among the "American public" to potentially achieve 15% in the polls. (*See* Br.47, 52-53). The FEC does not seriously dispute the causal relationship

between name share—how many people know who the candidate is—and vote share—how many people will vote for the candidate. It is obvious that no one will vote for a candidate they do not know. Young depicted this phenomenon graphically, in the chart below, with data points showing how vote share increases with name recognition:



(A-970). Candidates cannot reach 15% in the polls unless close to two thirds of the American people have heard of them. So, while the FEC quibbles about other things candidates can do to increase their popularity (FEC.Br.46-47), achieving name recognition is the bare minimum requirement. A candidate who does not achieve widespread name recognition plainly has no chance at appearing in a CPD debate. It "blinks reality," and is "arbitrary [and] capricious," for the agency to suggest otherwise. *Flyers Rights Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 743-44 (D.C. Cir. 2017).

The FEC also admits that it had no business criticizing Young for using "early stage" primary data, because his report expressly relied upon "late primary" and "general election" data. (*Compare* Br.52 *with* FEC.Br.52). The agency's superficial critiques leave Young's central thesis—that a candidate needs 60-80% name recognition to reach 15%—entirely unscathed.

Young separately showed that polling error could lead to the erroneous exclusion of an independent candidate. This, too, is indisputable, and the FEC does not seriously suggest otherwise.

The FEC now concedes that Young properly corrected for his use of gubernatorial data in three-way races, and that its decisions erroneously criticized him for using it (*Compare* Br.49 *with* FEC.Br. 51). *See Safe Extensions, Inc.*, 509 F.3d at 605. The FEC had also claimed that "Young's metric for polling error appears to be based on the difference between the poll and 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 a candidates' support at a given moment in September." (A-1367). That was simply false. The CPD admits that the "purpose" of the polling criterion is "to identify those candidates…who have a realistic chance of being elected President," not to measure support in September. (A-1308). The FEC refuses to accept responsibility for this error, but still offers nothing resembling a coherent

explanation (FEC.Br.50-51), creating "a significant mismatch between the decision the [agency] made and the rationale [it] provided." *Dep't of Commerce*, 139 S. Ct. at 2575.

Finally, there is no dispute that polling error only disadvantages independent candidates polling close to the 15% threshold, because no Democratic or Republican candidate would ever be excluded from a debate. (*See* A-983 ¶66). But according to the FEC, the CPD has no obligation to "level the playing field" for independent candidates who cannot meet the CPD's criteria. (FEC.Br.52). This argument lays bare the FEC's institutional partisan bias. It assumes that only Republicans and Democrats should be invited to debate, and that independents would be lucky to receive an invitation. Yet the FEC's regulations require that debate-qualifying criteria be devised *without* any "pre-chosen participants" in mind. The FEC's "level the playing field" argument is thus premised upon the very partisan bias that the regulations prohibit. And the FEC's attempt to invoke democratic institutions falls flat (*see* FEC.Br.23 (arguing that "American politics" is "organized around two parties")), because the American people have been clamoring for the inclusion of an independent candidate in the debates. Appellants are not asking the FEC for any special favors. They are seeking to enforce the plain meaning of the agency's own regulations which, it so happens, is perfectly aligned with the popular will.

4. Douglas Schoen's basic point is incontestable—it takes a lot of money to run a competitive modern presidential campaign, particularly without the benefit of a major party affiliation. (Br.49-50). To dispute this point would be disingenuous, to say the least. But the FEC disputes it.

The most revealing aspect of the FEC's response is what it does not say about the fabricated results of its Westlaw news analysis. The analysis was supposed to show that major party and independent candidates receive comparable news coverage—which itself would have proven little, because even major party candidates require massive expenditures to fund a serious campaign. But in any event, major party candidates receive substantially more coverage than their independent counterparts. So the FEC grossly underreported the search hits for the major party candidates to make them seem comparable to the independents'; pretended every Gary Johnson in the country was running for president to make it seem like candidate Gary Johnson received more coverage than he actually did; ran searches for major party candidates when they were not even running for president; and so on. (Br.53-57).

The FEC has no response (FEC.Br.57), because it has abandoned the Westlaw analysis in favor of its rationale *du jour*. That is this case in a nutshell. The FEC is unconcerned with whether its own analyses can withstand the slightest scrutiny, how many times it flip-flops and to what lengths it must go to protect the

CPD. This directly violates "[t]he reasoned explanation requirement of administrative law" which, as the Supreme Court recently confirmed, "is meant to ensure that agencies offer genuine justifications for important decisions…that can be scrutinized by courts and the interested public." *Dep't of Commerce*, 139 S. Ct. at 2575-76. Were this Court to merely "[a]ccept[] contrived reasons" like the ones the FEC now advances, "judicial review" would be reduced to "an empty ritual." *Id*. at 2576.

The FEC's remaining responses to Schoen are equally "contrived" and do not rescue the agency from its Westlaw debacle. First, the FEC falsely asserts that Gary Johnson exceeded the 60% name recognition threshold. (FEC.Br.48-49, 54). The poll on which the FEC purports to rely actually puts Johnson almost 10% below the threshold; the 63% figure cited by the FEC involved Johnson's name recognition among *a subset* of the population.[4]

Otherwise the agency provides what amount to a handful of unhelpful campaign cost-saving tips. (FEC.Br.54-55). It suggests independents could meet Schoen's $266 million figure using PACs, even though PACs donated $700

[4] *See* A-968 ¶24 (Young requires "name recognition…in excess of 60% of *the American public*"); https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/wc35k48hrs/tabs_HP_Third_Party_Candidates_20160831.pdf, at 2 (poll indicates 53% of the American public have heard of Gary Johnson; he has 63% name recognition among registered voters).

million to major party candidates and $1.4 million to independents in 2016. (*See* Br.50; FEC.Br.55). The FEC also advises them to spend money like Donald Trump, who had a $1 billion warchest and devoted $90 million of it to social media—amounts no independent has ever raised. (*See* Br.51; FEC.Br.54-55). And the FEC posits that an independent candidate might start the race with meaningful name recognition, apparently in the hopes that Oprah Winfrey or Tom Brady might someday launch an independent bid for the presidency. (FEC.Br.55).

Since Schoen provided his $266 million figure five years ago, the cost of campaigning has skyrocketed. (Br.49). But even if that figure were somehow overstated, the amount necessary to launch a serious bid for the presidency is undoubtedly substantial. Yet the FEC is content to squabble about the minutiae of Schoen's calculations while ignoring the real issue—that the 15% criterion imposes an impossible fundraising burden on non-billionaire independent candidates. Meaningfully lowering the polling threshold and introducing other debate-qualifying criteria, for example, would immediately make an independent candidate viable in eyes of prospective donors, enable that candidate to raise the funds necessary to run for president, and facilitate his or her entry to the debates.

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

The FEC also failed to undertake the "searching and careful" inquiry necessary to determine whether to "institute[] rulemaking proceedings." *WWHT,*

Inc. v. FCC, 656 F.2d 807, 817 (D.C. Cir. 1981). It downplays what is at stake in this litigation (FEC.Br.61), but this case directly impacts how Americans select the leader of the free world, the importance of which should go without saying. Otherwise, in attempting to explain its refusal to open a rulemaking, the FEC merely repeats the same meritless arguments addressed above. As explained, the FEC's "unsubstantiated representations," "vacuous" reasoning and "fail[ure] to provide a plausible evidentiary basis" for its conclusions compel reversal. *Flyers Rights*, 864 F.3d at 743-45, 747 (reversing agency denial of rulemaking petition); *accord Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 515 (D.C. Cir. 2009) (same where denial of petition was "contrary to law and unsupported by adequately reasoned decisionmaking").

CONCLUSION

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

Dated: New York, New York
November 25, 2019

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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)(B)(ii) that the foregoing brief contains 6,476 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), 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: November 25, 2019

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

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 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
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