IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION

Defendant.

Civil Action No.: 15-cv-1397 (TSC)

PLAINTIFFS LEVEL THE PLAYING FIELD, PETER ACKERMAN, GREEN PARTY OF THE UNITED STATES, AND LIBERTARIAN NATIONAL COMMITTEE, INC.'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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If there were any doubts about the arbitrariness of the FEC's post-remand decisions, its summary judgment brief puts them to rest. The FEC has abandoned large swaths of the flawed reasoning in those decisions that it now realizes there is no way to justify. Examples abound; to provide just one, the FEC does not even try to explain why it rotely accepted one director's claim that when she called the CPD "bi-partisan," she really meant "non-partisan," even though these words have opposite meanings. The FEC now pretends that it never relied on this frivolous claim. The FEC also concedes that the post-remand decisions mischaracterized key evidence in numerous ways. It is now undisputed, for example, that, contrary to what the post-remand decisions repeatedly said, the FEC falsified the results of its Westlaw news analysis; that almost every criticism of the Young report was based upon a mischaracterization of his data or conclusions; that making two appearances per month on C-SPAN does not qualify as "extensive media coverage"; and that Gary Johnson did not reach the 60-80% name recognition threshold.

Because the decisions themselves lack any defensible reasoning, the FEC has concocted a number of improper *post-hoc* justifications that are arbitrary and capricious as a matter of law. To the extent the FEC does try to justify the post-remand decisions, it largely regurgitates what they said without acknowledging, let alone addressing, the glaring problems Plaintiffs identified.

Enough is enough. The time has come to hold the FEC accountable for its derelict oversight of the CPD. For three decades the CPD has exercised unchecked power to decide who may participate in the presidential debates. It has abused that power by erecting insurmountable obstacles that ensure only Republican and Democratic candidates will be invited. In so doing, the CPD repeatedly violated FECA's restriction on corporate campaign contributions, and funneled millions of dollars in illegal contributions to the Republican and Democratic parties and

their presidential nominees. The FEC's frivolous post-remand decisions are just the latest example of its unwillingness to enforce its own regulations against the partisan CPD.

Since the FEC has repeatedly refused to hold the CPD accountable, this Court should authorize Plaintiffs to sue the CPD and direct the FEC to open a rulemaking. Any lesser remedy will be fruitless, given the FEC's long history of bias in favor of the CPD, laid bare yet again here. The CPD will plainly view any remedy putting the FEC in control of the next steps as a license to continue violating FECA, since it knows it can count on the FEC's complicity. It will then continue to prevent the American people from hearing from any candidates other than those anointed by the two major parties and their corporate sponsors.

Plaintiffs' summary judgement motion should be granted, and the FEC's motion denied.

I. THE FEC RADICALLY OVERSTATES ITS ENTITLEMENT TO DEFERENCE

The FEC goes out of its way to minimize the Court's role in reviewing the post-remand decisions, as if their additional girth somehow immunizes them from review. (*See, e.g.*, FEC Br. 18-21). The agency glosses over this Court's explicit requirement that the FEC "t[ake] a *hard look* at the evidence" and conduct a "*thorough*" inquiry that is "*searching[,] careful*" and "*thoughtful*." *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 140, 148 (D.D.C. 2017) ("LPF") (emphasis supplied). It disregards the command to the agency to "take into consideration *all* available information concerning the alleged wrongdoing." *Antosh v. FEC*, 599 F. Supp. 850, 855 (D.D.C. 1984) (emphasis supplied) (internal quotations omitted). The FEC likewise refuses to acknowledge that an agency acts arbitrarily and capriciously where, as here, it "misrepresent[s]" the facts, ignores "the relevant data," "cherry-pick[s]" the data on which it relies, or uses "non sequitur[s]" and "post-hoc rationalization[s]" to justify its dismissal of an administrative complaint or rulemaking petition. *Tenn. Gas Pipeline Co. v. FERC*, 824 F.2d 78,

84 (D.C. Cir. 1987); *Arizona Pub. Serv. Co. v. United States*, 742 F.2d 644, 651 (D.C. Cir. 1984); *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 533, 540 (D.D.C. 2016); *Resolute Forest Prod., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 122 (D.D.C. 2016). Put simply, even under ordinary principles governing judicial review of an agency decision, the Court cannot "meekly" accept "administrative pronouncements," *Antosh*, 599 F. Supp. at 853 (internal quotations omitted), and "[t]he deference owed to [an agency] cannot be allowed to slip into a judicial inertia," *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) (internal quotations omitted).

And this is no ordinary case. The FEC does not dispute that "[t]he stringency of [the] review, in a given case, depends upon analysis of a number of factors," and "[m]ore exacting scrutiny will be particularly useful when for some reason the presumption of agency regularity is rebutted." *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1050 & n.23 (D.C. Cir. 1979). As explained (Pl. Br. 18-19), the FEC should receive *no* deference under the circumstances here. An "inherently bipartisan" agency, the FEC has the same partisan loyalties as the CPD, so it is incapable of effectively policing the CPD's partisan bias. *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("DSCC").[1] That explains why the FEC has spent the past 17 years rubber-stamping the CPD's blatant partisanship. In case after case, it interpreted the regulations "contrary to the[ir] plain text" to shield the CPD from meaningful scrutiny. That

[1] This is not merely "Plaintiffs' characterization," as the FEC suggests (at 22). Both the Supreme Court and the D.C. Circuit have recognized the FEC's bipartisanship. *DSCC*, 454 U.S. at 37; *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015). The FEC says commissioner Steven Walther is independent, but he was a "Democratic pick[] for the bipartisan six-member commission" who previously served as the "spokesman" for Democratic Senator Harry Reid. http://www.washingtonpost.com/wp-dyn/content/article/2005/12/16/AR2005121601717.html; 1998 WLNR 6644529.

gave this Court "reason to suspect that the agency's interpretation does not reflect [its] fair and considered judgment." *LPF*, 232 F. Supp. 3d at 140. Its original decisions were patently deficient; its post-remand decisions reached the same result and only via a host of misstatements, mischaracterizations, and outright lies which the FEC now does not even try to defend.

The FEC claims it is entitled to deference for two reasons, neither of which has merit. First, it relies upon cases (at 21-23) in which only one of the numerous factors set forth above were present. *See, e.g.*, *Hagelin v. FEC*, 411 F.3d 237, 242-43 (D.C. Cir. 2005) (shared bias between agency and litigant, by itself, did not warrant departure from ordinary deference); *City of Los Angeles v. U.S. 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 confluence of factors described above which, when taken together, conclusively "rebut[]" "the presumption of agency regularity." *Natural Res. Def. Council*, 606 F.2d at 1050 n.23.

Second, the FEC argues that "the consistency of the FEC's view counsels *for*, not against, deference," citing *Decker v. Nw. Def. Cent.*, 568 U.S. 597 (2013) and *DSCC*, 454 U.S. at 37. (FEC Br. 23) (emphasis in original). But these cases afforded *Auer* deference to an agency's consistent "interpret[ation] [of] its own regulation" because that interpretation was "permissible." *Decker*, 568 U.S. at 613; *accord DSCC*, 454 U.S. at 36, 39-42 (deferring to FEC's "permissible construction of the Act").[2] Here, the FEC *misinterpreted* 11 C.F.R. § 110.13 for 17 years by "appl[ying] a 'control' standard that is contrary to the plain text of the regulation." *LPF*, 232 F. Supp. 3d at 140; Pl. Br. 8-9. Moreover, the FEC's misconstruction of Section 110.13 just so happened to favor the exact same party (the CPD) in every single case

[2] For reasons explained in the prior summary judgment motion (Dkt. 37 at 30 n.15), plaintiffs also challenge the continuing validity of the *Auer* doctrine.

brought against it. Neither *Decker* nor *DSCC* suggests that deference is owed to an agency that misinterprets a regulation for nearly two decades in order to avoid meaningfully scrutinizing the bias of a party whose partiality the agency itself shares.

II. THE DISMISSAL OF THE ADMINISTRATIVE COMPLAINTS WAS ARBITRARY, CAPRICIOUS AND CONTRARY TO LAW

A. The FEC Failed To Articulate The Standard It Used

The FEC still refuses to articulate the standard it used to determine whether the CPD "endorse[s], support[s], or oppose[s] political candidates or political parties." 11 C.F.R. § 110.13(a)(1). The Factual and Legal Analysis II purported to apply the "plain meaning" of these words without explaining what the plain meaning is. (Pl. Br. 20). The FEC's brief does the same thing, and merely regurgitates the deficient reasoning in the Factual and Legal Analysis II. (FEC Br. 24-25). The FEC thus continues to ignore this Court's admonition that the bare recitation of the regulation's language will not satisfy its obligation to "articulate what standard it used to determine whether the CPD" complied with the regulation. *LPF*, 232 F. Supp. 3d at 138.

The FEC readily acknowledges that, just like its original decision, the Factual and Legal Analysis II relies upon *Buchanan* and the prior actions. (FEC Br. 26). This Court previously found that the FEC's citations of "its past dismissals of administrative complaints involving the CPD" and "*Buchanan*" "strongly implie[d]" reliance on the improper "control" standard. *Id*. at 138-39. Yet the FEC provides *no* alternative explanation for why it again relied on the prior dismissals in the post-remand decision; why its decision expressly invokes *Buchanan* language requiring evidence that the parties "influence[d]" the CPD; or why it elsewhere relies upon the absence of control to justify dismissing Plaintiffs' administrative complaints. (Pl. Br. 20). The FEC's inability to provide any alternative explanation for its continued reliance upon these

arguments shows that it continues to apply the "control" standard, which contravenes the "plain text of the regulation" and is therefore contrary to law. *LPF*, 232 F. Supp. 3d at 140.

B. The FEC Did Not Carefully Consider The Evidence

1. The FEC Arbitrarily and Capriciously Disregarded The CPD's Partisanship

The FEC simply abandons many of its post-remand decision's arguments about the CPD's partisanship. For example, one reason we know the CPD is partisan is that CPD itself said so: it declared that "future [debates] should be principally and jointly sponsored and conducted by the Republican and Democratic" parties, and that "all future presidential debates" would be between those two parties' nominees. (AR2244, AR2249-50). The Factual and Legal Analysis II inexplicably denied that these partisan statements "constitute[d] an endorsement of, or support for, the Democratic or Republican Parties." (AR7216; Pl. Br. 21-22). The FEC's summary judgment submission makes no attempt to defend that frivolous argument. Nor does the FEC even try to explain why its post-remand decision accepted Vucanovich's frivolous claim that when she called the CPD "bipartisan," she really meant to say it was nonpartisan. (AR7216; Pl. Br. 22). The FEC's inability to defend positions in the decisions itself demonstrates its failure to "genuinely engage[] in reasoned decision-making." *Greater Boston*, 444 F.2d at 841.

That conclusion is further supported by what the agency does say in attempting to rationalize the positions it took in the Factual and Legal Analysis II: (1) that every partisan act by the CPD's leadership supposedly was undertaken in a "personal capacity"; (2) that Fahrenkopf's 2015 admission of the CPD's partisanship is not really an admission; and (3) that the CPD's belated disclosure of unenforceable "policies" which the CPD's leadership openly violate are somehow sufficient to police the CPD's partisanship.

1. The FEC argues that the CPD directors' partisan activities cannot be attributed to the CPD itself. (FEC Br. 31-34). Yet the FEC disregards the numerous *admissions* by these same directors that *the CPD itself is partisan*. (*See, e.g.*, (AR2252, 3099) (Fahrenkopf's admissions that the CPD will "not likely . . . look with favor on including third-party candidates in the debates," and that it has a "system" according to which "we . . . go with the two leading candidates" from "the two political part[ies]"); AR3095 (Alan Simpson's admission that the CPD consists of "Democrats and Republicans . . . that are interested in the American people finding out more about the two major candidates—not about independent candidates who mess things up"); *id*. (David Norcross and Barbara Vucanovich's admissions that the CPD is "not really nonpartisan. It's bi-partisan")).

As explained (Pl. Br. 5-7, 21-24), the FEC's position blinks reality. The CPD was created by the Republican and Democratic parties for the express purpose of asserting partisan control of the debates. It has always been run by diehard partisans with deep ties to the major parties and their causes, who have repeatedly endorsed and contributed hundreds of thousands of dollars to those parties' candidates, and funneled hundreds of thousands of additional contributions to their officials as lobbyists. And the CPD employs an exclusionary polling criterion which, unsurprisingly, only Republican and Democratic candidates have ever satisfied.

The FEC disregards all of this. Instead, to justify its conclusion that the CPD leadership's numerous partisan acts were merely "personal" acts by the individuals who perpetrated them, the FEC (1) cites four FEC opinions issued in unrelated matters that did not involve the CPD or the regulations at issue here; (2) draws a purported analogy to the law of recusal; and (3) claims that "the personal lives of the [CPD's] agents or employees" cannot be "restrict[ed]." (FEC Br. 33-35). These arguments are frivolous.

According to the FEC, "individuals may wear 'multiple hats' to represent the interests of multiple people or entities at different times." (FEC Br. 33). But the opinions it cites are inapposite, because they do not address whether an organization like the CPD can somehow avoid the partisan taint of its avowedly partisan leadership. They instead involve irrelevant scenarios, like whether a sitting U.S. Senator should be permitted to campaign for governor, or whether someone who raised federal campaign funds may later fundraise for a state party. (Advisory Ops. 2005-02, 2003-10; *accord* Advisory Op. 2007-05 (whether Congressional staffer could fundraise on behalf of state party); Advisory Op. 1984-12 (whether regents of American College of Allergists could belong to PAC)). Moreover, these "opinions" are just that—opinions of the FEC, the same organization that its own former chair admits has repeatedly allowed "major [FECA] violations" to be "swept under the rug."[3]

The FEC's recusal analogy is even more puzzling. The agency suggests that the CPD is like a judge asked to recuse herself because of favoritism toward a litigant. (FEC Br. 33-34). But this analogy directly undermines the FEC's position. Recusal would obviously be warranted if a judge had declared his or her allegiance to a litigant, spent decades advocating for its interests, donated hundreds of thousands of dollars to its affiliates, used his or her position as a lobbyist to funnel hundreds of thousands of additional dollars to them, stated publicly that the judge would not "look with favor" on the litigant's opponents who, in the judge's view, only "mess things up," and had consistently ruled in that same litigant's favor in multiple cases spanning two decades. *See* 28 U.S.C. § 455 (recusal mandated if "impartiality might reasonably be questioned" or judge has "prejudice" in favor of "a party"); *accord Liljeberg v. Health Servs.*

[3] https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf.

Acquisition Corp., 486 U.S. 847 (1988). For similar reasons, the CPD should have "recused" itself from the presidential debates long ago.

Finally, contrary to the FEC and CPD arguments (Dkt. 95 at 7-8), the individual rights of the CPD's directors are not in jeopardy. The directors are permitted under the First Amendment to run a partisan debate-staging organization, as they have for thirty years. FECA, however, prohibits such an organization from accepting corporate contributions. 52 U.S.C. § 30118(a); 11 C.F.R. 110.13. As this Court recognized, only a debate-staging organization that is "nonpartisan," does not "endorse, support or oppose" the parties, and uses "objective" criteria may pay for the debates using corporate money. *LPF*, 232 F. Supp. 3d at 135. That is why Plaintiffs brought this action: not to advance an "agenda," as the FEC claims (at 2), but to hold the CPD accountable for accepting corrupt corporate contributions despite its failure to satisfy FECA's requirements for a debate-staging organization. Indeed, it is noteworthy that the CPD's website recently stopped identifying *any* of its corporate sponsors; we know *nothing* about which companies used the CPD as a conduit to buy influence with President Trump. It is the CPD that for thirty years has trampled the speech of independent candidates that it shut out of the debates, not to mention the rights of the American people not to have their presidential candidates hand-selected by an unelected, unaccountable and illegal debate-staging organization.

2. Of the numerous partisan acts Plaintiffs identified, the FEC's brief addresses in detail only Fahrenopf's 2015 interview (*see* Pl. Br. 22-23). (FEC Br. 32-33). Again, the FEC ignores Plaintiffs' arguments about this interview. Its brief, parroting the Factual And Legal Analysis II, 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. (AR3099). That Fahrenkopf mentioned Ross Perot later in his answer does not somehow transform this admission into "an assertion of historical fact," particularly since Perot himself would not have satisfied the CPD's current polling criterion (Dkt. 76 ¶ 52, Dkt. 82 ¶ 52), and was only invited to the 1992 debate "at the request of the two major parties." *LPF*, 232 F. Supp. 3d at 144.

3. The FEC largely ignores the reasons the CPD's alleged "policies" are meaningless and the agency's reliance upon them was arbitrary and capricious. (*See* Pl. Br. 24-26). It is now undisputed that neither of these policies is even enforceable. Nor does the FEC deny that even if they were enforced, the alleged "policies" would still permit the vast majority of the partisan conduct at issue. The FEC offers no explanation for why it nevertheless relied upon the alleged "policies," even though the CPD withheld them from the FEC and the FEC therefore has no idea what, if anything, they actually say. The FEC ignores the amicus brief submitted by leaders of the non-profit community who show that the CPD's supposed "policies" violate corporate governance norms, and who are appalled at the FEC's lack of oversight. (Dkt. 88). Nor does the FEC address the curious timing of the CPD's disclosure of these alleged policies, or attempt to explain why, if they really do exist, the CPD never thought to mention them until this Court remanded the actions to the FEC earlier this year. For these reasons alone, it was "implausible," and thus "arbitrary and capricious," for the FEC to rely on the "policies." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

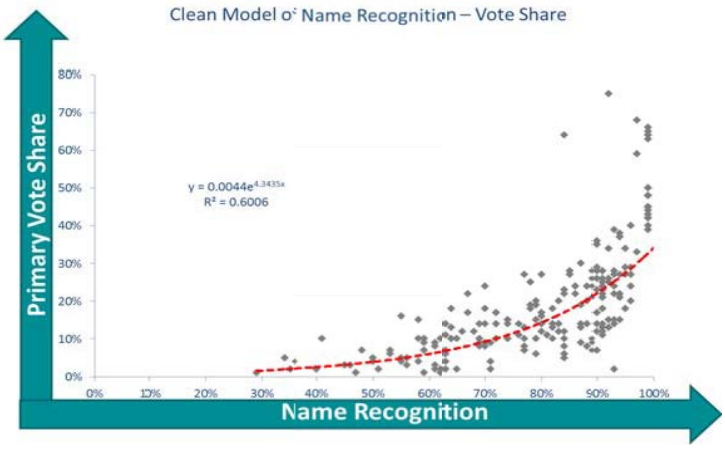
All the FEC's brief does is complain that the evidence showing that the CPD's directors violated the alleged "policies" is "outside the record." (FEC Br. 34-35). But that is only because, when the CPD disclosed the "policies" to the FEC on remand without Plaintiffs' knowledge, the FEC never bothered to check the CPD's compliance, and thus omitted the

repeated violations from its post-remand decision.[4] Now the FEC seeks to capitalize upon its own dereliction by claiming that this Court, like the FEC, should willfully blind itself to those violations. That is not the law. Because "the agency deliberately or negligently excluded documents that may have been adverse to its decision," the Court should consider those documents. *Beyond Nuclear v. U.S. Dep't of Energy*, 233 F. Supp. 3d. 40, 48 (D.D.C. 2017) (internal quotations omitted); *accord Kent Cnty., Del. Levy Court v. U.S. E.P.A.*, 963 F.2d 391, 395-96 (D.C. Cir. 1992).

2. The FEC Arbitrarily and Capriciously Misconstrued The Expert Reports

a. Clifford Young

Young showed that a candidate needs at least 60-80% name recognition among the "American public" in order to potentially achieve 15% in the polls. Young calculated the precise correlation between name recognition, on the one hand, and vote share, on the other, in arriving at the 60-80% range. (AR2502-05 ¶¶ 24-32). Young depicted these results graphically in the chart below, with data points demonstrating how vote share increases with name recognition:



[4] *See, e.g.*, 2017 WLNR 13678202; http://bangordailynews.com/2016/04/01/opinion/contributors/olympia-snowe-says-donald-trump-is-damaging-the-republican-party-brand/; http://www.presidency.ucsb.edu/ws/index.php?pid=91621.

(AR2504).

The FEC presents no evidence undermining these calculations. It offers no competing study or opposing expert, let alone one relying upon different data or showing that the name recognition minimum is lower than 60-80%. Nor does the FEC identify *any* candidate with less than 60% name recognition who *ever* reached 15% in the polls. The FEC instead focuses exclusively on other factors that may cause even a "recognizable" candidate to "be unpopular." (FEC Br. 37). But these factors actually *undermine* the FEC's position, because they show that it is more difficult to satisfy the 15% rule than even Young and Schoen suggest. As these experts showed, it is hard enough—indeed, virtually impossible—for an independent candidate to achieve the name recognition needed to poll at 15%. By conceding that *other* factors make it even *harder* to attain a 15% vote share, the FEC itself provides yet another reason why the 15% rule unlawfully excludes independent candidates because they could never hope to satisfy it.

The FEC also argues (at 37, 39) that Gary "Johnson reached 63% name recognition," ignoring the reasons why that is neither true nor relevant. (*See* Pl. Br. 27). Specifically, the FEC does not dispute that Young's analysis requires 60-80% name recognition among "the American public," of which registered voters are merely a subgroup. (AR2502-05 ¶¶ 24-32; FEC Br. 37-38). Nor does the FEC dispute that even in the "YouGov" poll it cites, Johnson's name recognition among "the American public" was well below 60%, and was even lower (36-37%) in the two polls the FEC conveniently omitted from its decision. [5] (Pl. Br. 27). Put simply,

[5] The FEC argues that these polls are outside the record, but this Court should consider them because they are documents "adverse to [the FEC's] decision" that the FEC "deliberately or negligently excluded" from its analysis, *Beyond Nuclear*, 233 F. Supp. 3d at 48, or because the Court can take judicial notice of public opinion polls, *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002). Plaintiffs' response to the FEC's motion to

"[a]gency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard." *City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991).

Nor does the FEC even try to show why Johnson's name recognition would matter to Young's analysis. As explained above (*see also* Pl. Br. 27), Young never said that name recognition *guarantees* vote share; it is merely a necessary condition that will not be sufficient if other factors lower the candidate's popularity. Thus, even if Johnson surpassed the 60% name recognition threshold, his failure to poll at 15% in no way undermines Young's conclusions.

Young also showed that polling error fundamentally disfavors independents by creating the risk that they will be wrongfully excluded from the debates. (AR2516-18 ¶¶ 59-68). As explained (Pl. Br. 27-29), the FEC arbitrarily and capriciously rejected this conclusion by (1) misrepresenting the CPD's stated justification for the polling criterion; (2) observing that the criterion is "just as likely to result in overinclusion of candidates shy of the 15 percent threshold," without explaining why that matters; and (3) ignoring the corrections Young made for the difference between gubernatorial and presidential data. (AR7231-32). The FEC now largely abandons these positions and replaces them with equally frivolous and improper "post hoc rationalizations." It "is well-established that an agency's actions must be upheld, if at all, on the basis articulated" in the agency's decision. *State Farm*, 463 U.S. at 50.

First, the Factual and Legal Analysis II claimed that the "CPD does not purport to use the polls as predictors of what will occur on Election Day, but as a reliable measure of candidates'

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strike is detailed in their opposition to that motion. Although the motion lacks merit, Plaintiffs should prevail on summary judgment even if it is granted, because the record evidence on its own amply demonstrates that the FEC acted arbitrarily and capriciously.

support at a given moment in September." (AR7231). But that is false. (Pl. Br. 28). In the very materials the CPD supplied to the FEC, on which the FEC purported to rely, the CPD explained that "[t]he purpose of the [polling] criteria is to identify those candidates . . . *who have a realistic chance of being elected President of the United States*." (AR7114) (emphasis supplied).

Now the FEC takes the following position: "[P]laintiffs' attempt to draw out a conflict . . . between whether a candidate is leading at the time of the debates in September, on the one hand, and whether a candidate has a realistic chance of becoming president, on the other, hardly demonstrates arbitrariness given the close overlap between those candidate groups." (FEC Br. 38). But it was the *FEC*, and not Plaintiffs, that drew this distinction in the first place. (AR7231). The Factual and Legal Analysis II claimed it was "problematic" that "Young's metric for polling error appears to be based on the difference between the poll and the actual results on Election Day" rather than "candidates' support at a given moment in September." (*Id*.). Now the FEC not only admits that that there is nothing "problematic" about this, but that the distinction is meaningless, because of the "close overlap" between "candidate[s] [who are] leading at the time of the debates in September" and "candidate[s] [who have] a realistic chance of becoming president."[6] (FEC Br. 38). The agency's "about-face is inexplicable and, under well-settled principles of law, stands condemned as arbitrary and capricious." *Nat'l Coal. Against The Misuse of Pesticides v. Thomas*, 809 F.2d 875, 884 (D.C. Cir. 1987).

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[6] The FEC suggests (at 38) that this aspect of its decision was based upon a 2014 declaration of Frank Newport, which was omitted from the record it submitted to Plaintiffs. We identified what appears to be a copy of this declaration attached to a CPD submission on the FEC's website. *See* http://sers.fec.gov/fosers/showpdf.htm?docid=310982. There, Newport never disputed the CPD's reasons for using the polling criterion; rather, this submission *confirms* that the CPD's goal is "to determine whether a candidate ha[s] a realistic chance of election" (*id*. at 18), which the CPD itself reaffirmed after Newport submitted his declaration (AR7114).

Second, as we explained in the opening brief (at 28), Democratic and Republican candidates are never excluded by the 15% rule. Conversely, polling error could easily result in the wrongful exclusion of independent candidates (AR2517), which is why the 15% criterion disfavors them. Our opening brief (at 28) discredited the Factual and Legal Analysis II's contention that polling "error may be just as likely result in over inclusion of [independent] candidates." (*See* AR7232; Pl. Br. 28). Now, in its summary judgment brief, the FEC appears to have abandoned that argument. (FEC Br. 38). Instead the FEC baldly claims that "all candidates . . . equally endure whatever errors may be present" (*id.*), thus ignoring the blatant inequality detailed in the Young report (AR2517) and explained in our opening brief (Pl. Br. 28). Indeed, Young *quantified* this disparity by showing that a hypothetical candidate with 17% of voter support would nonetheless be falsely excluded by the CPD's 15% rule over 40% of the time, whereas a candidate with 42% support would be falsely excluded only .04% of the time. (AR2517 ¶ 66). The FEC disregards these calculations and otherwise ignores the fundamental reasons why polling error disfavors independent candidates. "An agency's decision is not deliberative," and thus is "arbitrary and capricious," where, as here, the agency "fails to 'respond meaningfully to" plaintiffs' presentation. *Salazar*, 117 F. Supp. 3d at 532 (quoting *BNSF Ry. Co. v. Surface Transp. Bd.*, 741 F.3d 163, 168 (D.C. Cir. 2014)).

Finally, Young recognized that the gubernatorial data on which he relied was more "more error prone" than data from presidential races, and explicitly "adjusted" for this difference. (AR2515-16 ¶¶ 57-58). The Factual and Legal Analysis II failed to acknowledge this adjustment, let alone contest its accuracy. (Pl. Br. 28-29; AR7232).

The FEC's summary judgment brief does the exact same thing. (FEC Br. 14, 38). It summarily claims that "Young inappropriately relied upon gubernatorial elections," without

addressing the corrections explicitly set forth in Young's report. (FEC Br. 14). As above (at n.6), the FEC suggests that it was relying upon a Newport declaration. (FEC Br. 38). This document shows that Newport committed the identical error as the FEC: he claims presidential polling is "inherently more reliable" than gubernatorial polling without acknowledging that Young addressed this issue or refuting the manner in which Young corrected for it. (AR7232; http://sers.fec.gov/fosers/showpdf.htm?docid=310982). Here too, the FEC acted contrary to law by failing to "'respond meaningfully" to Plaintiffs' claims. *Salazar*, 117 F. Supp. 3d at 532.

b. Douglas Schoen

The FEC barely tries to defend its critique of Schoen's report. It devotes little more than a page of superficial analysis to Schoen, and tacitly recognizes that its rejection of his conclusions, like its treatment of Young, was arbitrary and capricious. (FEC Br. 39-40).

First, the FEC apparently recognizes how absurd it was for the Factual and Legal Analysis II to claim that Gary Johnson and Jill Stein received "extensive media coverage." (FEC Br. 39). It does not dispute that its own evidence shows these candidates made just over two media appearances per month, many of which ran only on C-SPAN (Pl. Br. 29; AR7226 n.107; AR7107-09), and that this level of exposure is patently insufficient to achieve anywhere close to the requisite name recognition. (*Id.*). Consequently, there is no dispute—or at least no serious one—that independents must pay for the requisite media exposure, as Schoen confirmed.

Second, the FEC repeats its claim that "Trump achieved efficiencies" "by focusing his spending on digital platforms like Facebook and Twitter" (FEC Br. 40), without disputing that Trump's "efficiently run" campaign cost close to $1 billion, almost four times Schoen's $266 million estimate. (Pl. Br. 30-31). Nor does the FEC dispute that advertising on social media will not meaningfully reduce these astronomical costs. The FEC's own data show that Trump

devoted a mere fraction of his $1 billion warchest to digital advertising, and it ignores additional data showing the relative insignificance of advertising on social media.[7] (Pl. Br. 31).

Third, the FEC concedes that the vast majority of Super PAC money goes to Republicans and Democrats, not independents. For example, it is undisputed that in 2016, $700 million was contributed to Republican and Democratic Super PACs, in contrast to the paltry $1.4 million given to their independent counterparts. (Pl. Br. 30). The FEC does not dispute that this massive disparity merely adds to the preexisting multi-billion dollar fundraising disadvantage independents face. Instead, the FEC simply argues that outside funding sources (including Super PACs) contributed "over $1 million" to Gary Johnson. (AR7227 n.114; FEC Br. 39-40). But that is a minute fraction of the $266 million an independent candidate must raise, and thus only serves to underscore Plaintiffs' point: Super PACs, like social media, are patently insufficient to relieve independent candidates of their fundraising burden.[8]

Finally, the FEC admits that its decision supplied *no* evidence of an independent candidate who started out with significant name recognition (other than billionaire Michael Bloomberg). (*See* Pl. Br. 31-32; FEC Br. 40). Instead the FEC merely "presum[ed]" this was the case (FEC Br. 40 (quoting AR7228)), even though the only poll cited in either of its post-remand decisions shows otherwise (Pl. Br. 31 n.47).

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[7] Though outside the record, the Court may consider this additional data because it shows that the FEC failed to consider "all the relevant factors" when it erroneously concluded that advertising on social media would significantly defray the cost of a presidential campaign. *Beyond Nuclear*, 233 F. Supp. 3d at 48; *accord Nat'l Mar. Safety Ass'n v. Occupational Safety & Health Admin.*, 649 F.3d 743, 753 & n.14 (D.C. Cir. 2011) (court may consider "background information" to determine whether agency adequately considered the relevant factors).

[8] The FEC erroneously claims that Gary "Johnson reached 63% name recognition" despite raising less than $266 million. (FEC Br. 39). As explained above, this argument relies upon both the FEC's "cherry-picking" a single poll and misrepresenting its results, and therefore is "arbitrary and capricious." *Salazar*, 177 F. Supp. 3d at 533, 540.

3. The FEC Failed To Meaningfully Consider The Evidence Against The CPD Directors

The directors' belated response to the administrative complaints confirms neither they nor the FEC "consider[ed] the evidence presented against" them. *LPF*, 232 F. Supp. 3d at 143. As explained (Pl. Br. 32-33), nine directors submitted identically-worded affidavits that they probably didn't study before signing. The affidavits address none of Plaintiffs' allegations specifically and ignore the evidence specific to these directors. They instead simply deny those allegations in identical and conclusory fashion. The affidavits concede that none of these directors even bothered to review the administrative complaints or the evidence supporting them. (Pl. Br. 32 n.48). By rotely accepting these meaningless affidavits, the FEC shirked its duty to give them the "searching[,] careful" and "thoughtful" consideration demanded by this Court. *LPF*, 232 F. Supp. 3d at 140.

The FEC's brief reveals its fundamental misunderstanding of this duty. It argues the directors' submission of affidavits that "were nearly identical does not itself render them . . . [in]admissibl[e]." (FEC Br. 35-36). It also purports to invoke the "sham affidavit rule," which governs whether an affidavit "creat[es] an issue of material fact by contradicting prior sworn testimony." (FEC Br. 35) (internal quotations omitted). But the question is not whether the affidavits are admissible or create an issue of material fact; indeed, the typical Rule 56 summary judgment standard "does not apply" when the motion challenges "agency action." *Stuttering Found. of Am. v. Springer*, 498 F. Supp. 2d 203, 207 (D.D.C. 2007). The question instead is whether the FEC "thoughtfully" considered them and gave them the "hard look" that the law requires. *LPF*, 232 F. Supp. 3d at 140. The FEC's attempt to circumvent this requirement by invoking irrelevant doctrines only reinforces the conclusion that it disregarded the requirement.

Indeed, our opening brief presented numerous examples of evidence specific to the directors that that their own affidavits ignored. (Pl. Br. 32-33). The FEC addresses only the evidence related to Alan Simpson, and its treatment of that evidence is disingenuous at best. As we explained, Simpson's affidavit both ignores his admission that the CPD wants "the American people [to] find[] out more about the two major candidates—not about independent candidates" (AR3095), and contradicts that statement in numerous ways. (AR7160-61 ¶¶ 3-5). In response, the FEC disregards this affidavit, and instead relies upon another affidavit Simpson submitted *13 years ago* in a *different* action involving the CPD. (AR3142-43). And that prior affidavit *confirms* Simpson's partisan bias. There, Simpson tried to justify the above-quoted description of the CPD's partisanship by claiming that "he was not told" by the person who recorded it "that the purpose of [the] interview was to press a claim against the CPD." (AR3142 ¶ 3). In other words, Simpson admitted that he would not have presented his true beliefs about the CPD had he known his statement would be used in the litigation. That was precisely the approach that he and his CPD colleagues took when the signed the bogus affidavits submitted here.

4. The FEC Arbitrarily And Capriciously Concluded That The CPD's Polling Criterion Was Objective

For all of these reasons, the 15% polling criterion is not "objective"; it was intended to, and does, promote the interests of the Republican and Democratic nominees by excluding their competitors from the presidential debates. The FEC's brief does not seriously suggest otherwise. Instead, it erroneously claims that the criterion (1) is "objective" because two candidates who ran for president four and six decades ago, respectively, would have satisfied it; and (2) "balance[s] the goal of being sufficiently inclusive" against the "risk that leading candidates with the highest levels of public support would refuse to participate." (FEC Br. 40-41).

No independent has satisfied the 15% criterion since it was instituted by the CPD nearly

two decades ago. *LPF*, 232 F. Supp. 3d at 144. The FEC identifies only *two candidates* in the past *century*—John Anderson and George Wallace—who polled at or above 15% during the relevant time period. (FEC Br. 41).[9] The FEC concedes that Anderson and Wallace participated in their parties' primaries before launching independent campaigns in the general election. (Dkt. 76 ¶ 52; Dkt. 82 ¶ 52). As Schoen explained, major party primaries "draw[] immense and free national media" which "gives underfunded campaigns the chance to build name recognition affordably." (AR2559). Independent candidates, by contrast, are largely ignored by the press, which is why they need to spend more money than they could ever hope to raise in order to generate the requisite name recognition. That the two "independent" candidates to reach 15% first participated in the major party primaries thus *supports* Plaintiffs' point; *no* truly independent candidate would have *ever* satisfied the CPD's current polling criterion. (Pl. Br. 34). The FEC brushes aside this argument (at 41), but a debate-qualifying criterion that requires a candidate to participate in a major party primary is, by definition, partisan. It is not the kind of "objective" criterion that debate-staging organizations funded by corporate money must employ.

And it is preposterous to suggest, as the FEC does, that the current debate-qualifying criteria are "sufficiently inclusive." *No independent candidate has ever qualified under these criteria*; they are, by definition, *exclusive*.[10] Nor does the FEC adequately explain its purported concern about major party nominees who might "refuse to participate" if a third candidate were

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[9] The FEC suggests (at 41) that Ross Perot would have qualified, but admitted in its answer that he "would not have satisfied the CPD's current rule, because he was polling at or below 10% prior to the 1992 debates." (Dkt. 76 ¶ 52; Dkt. 82 ¶ 52).

[10] The CPD claims to "careful[ly]" consider alternatives to the 15% rule—and yet it always seems to choose the exact same criterion, which just so happens to have excluded every independent candidate from every debate since the criterion was introduced. The League of Women Voters, on which the CPD purports to rely, actually supports Plaintiffs' efforts to change the CPD's debate-qualifying criteria. (AR0402-06).

invited to the debates. (FEC Br. 41). The regulation requires criteria that are "objective." 11 C.F.R. § 110.13(c). It does not require—indeed, it does not permit—criteria that cater to Republican and Democratic nominees who might throw a temper tantrum if, as the vast majority of Americans want, the debates were more inclusive. And because the debates are now institutionalized events that voters expect the presidential candidates to attend, there is no real risk that a candidate would abstain. Yet the CPD has consistently defied the popular will and violated the regulation's objectivity requirement using this nonexistent risk as a pretext. And the FEC has yet again stuck its head in the sand and refused to rectify the CPD's FECA violations.

III. THE FEC'S REFUSAL TO OPEN A RULEMAKING WAS ARBITRARY AND CAPRICIOUS

A. The Treatment Of The Young Report Was Arbitrary And Capricious

The rulemaking decision erroneously claimed that Young analyzed only "data about name recognition of major party candidates at the early stages of the party primary process." (AR1933). As explained (Pl. Br. 36), his report explicitly relies upon polling data from *all* stages of the election, including late primary and general election polling. (AR2520). The FEC now concedes mischaracterizing the report, and admits that Young analyzed "late primary polling." (FEC Br. 43). It argues that "the page in the Administrative Record plaintiffs cite does not actually show any use of general election polling" (*id.*), but that is simply false. Plaintiffs cited AR2520 (Pl. Br. 36), and on that page, Young is clear that his conclusions are based upon both "general" and "primary" election polling. It thus appears that the FEC *still* has not bothered to read the report in sufficient detail to determine what data Young relied upon, violating this Court's command that the agency "thorough[ly]" examine the "Young . . . report." *LPF*, 232 F. Supp. 3d at 146-48. Because the FEC now concedes that it "misrepresent[ed]" Young's analysis and ignored "the relevant data" on which he relied, there is no doubt that the rulemaking decision

was "arbitrary and capricious." *Salazar*, 177 F. Supp. 3d at 533, 540; *Resolute Forest*, 187 F. Supp. 3d at 122.

The FEC continues to deny the causal relationship between name recognition and vote share. (FEC Br. 43). But it does not dispute that voters cannot like a candidate until they know who the candidate is. (AR2492 ¶ 7). Because name recognition is a necessary condition to vote share, there *must* be causal relationship between these two variables. The FEC argues that other factors may diminish a candidate's vote share, using Gary Johnson's answer to a question about Aleppo as an example, but that is a red herring. (FEC Br. 43). To understand why, take the example of a marathon runner. To run a marathon requires training; in other words, there is a causal relationship between the runner's training and her performance in the marathon. But there are other factors that may also influence her performance. For example, she may suffer an injury during the race that prevents her from completing the marathon. That does not somehow negate the causal relationship between training and performance. Injuries are simply another variable that may affect the outcome. Similarly, in an election, there are numerous factors that may impact a candidate's standing in the polls but, as Young explained, those factors do not even come into play unless voters first know who the candidate is. (AR2492 ¶¶ 7-8). That conclusively establishes a causal relationship between name recognition and vote share, and the FEC offers no legitimate explanation for its persistent refusal to acknowledge this relationship.

B. The Treatment Of The Schoen Report Was Arbitrary And Capricious

It is now undisputed that the FEC blatantly misrepresented the results of its Westlaw news analysis in an attempt to conceal the paltry coverage received by independent candidates in 2016. (FEC Br. 44). The FEC does not contest that (1) in reality, the newspapers it analyzed

rarely mentioned the independent candidates[11]; (2) the FEC overstated coverage of independent candidates by, *inter alia*, including numerous articles about Gary Johnsons who were not the presidential candidate, and articles that did not increase or sustain the candidates' name recognition; (3) the FEC radically understated coverage of the major party candidates, and rigged the date ranges it searched, in order to make that coverage appear comparable to that of the independent candidates; (4) the FEC minimized coverage of the major party primary candidates by searching time periods when they were not running for president; and (5) comparing news coverage of the independent and major party candidates when their candidacies overlapped reveals that the press overwhelmingly favored the major party candidates. (Pl. Br. 37-42).

The FEC now tries to downplay the rulemaking decision's falsification of the Westlaw news results (FEC Br. 44), but its significance cannot be overstated. The premise of Schoen's report is that independent candidates are "[d]eprived of free media attention"; this is why they would need to spend hundreds of millions of dollars on paid media in order to satisfy the CPD's polling criterion. (AR2558). The rulemaking decision tried to undermine this premise by claiming that the independent candidates "received significant media attention in 2016." (AR1933). Not only was this claim false, but the FEC advanced this falsehood by *intentionally* gerryrigging its analysis to achieve a preordained result. For example, it is no accident that the FEC rigged the date ranges it searched to minimize results for major party candidates and inflate the results for the independents. And the FEC could not have actually believed that Gary Johnson received almost half as much news coverage as Donald Trump. (*See* Pl. Br. 39). The

[11] It is undisputed that most independent candidates were mentioned only *once every two weeks* by each newspaper. (Pl. Br. 38). The FEC baldly insists that these candidates "received significant media attention" (FEC Br. 44), without attempting to explain how the paltry attention they actually received could possibly be described as "significant."

agency said this only because it supported the outcome it wanted to reach. The FEC has been caught red-handed displaying both its own partisanship and its intent to reach a "preordained" result, rendering its decision "arbitrary and capricious." *Kelly v. United States*, 34 F. Supp. 2d 8, 12 (D.D.C. 1998)

The FEC's remaining arguments about Schoen need not detain this Court long. (FEC Br. 44-45). The FEC now concedes its rulemaking decision overlooked the "recent . . . articles" on which Schoen relied to demonstrate why independent candidates have difficulty attracting free media. (*See* Pl. Br. 42; FEC Br. 44). Likewise, the decision ignores Plaintiffs' showing that Obama benefitted from the exposure he received during the Democratic primaries. (Pl. Br. 42).

The FEC continues to misconstrue Schoen's point about Rick Santorum—that Santorum was able to substantially increase his name recognition during the Republican Iowa causes despite spending less than $22,000 on his "media campaign" in that state. (AR2558). The FEC argues that "Santorum spent over $112,000 in Iowa" (FEC Br. 44), but even that figure, which includes non-media expenditures, is miniscule compared to what an independent candidate lacking the media attention afforded to major party primary contestants would need to spend.

Finally, although the data underlying Schoen's estimates was readily available to the FEC, it offers no excuse for its failure to review that data. (FEC Br. 44-45). Nor does the agency dispute that, because it now admits an "economically" run presidential campaign costs close to *$1 billion*, Schoen's $266 million estimate is, if anything, understated. (*See* Pl. Br. 43).

CONCLUSION

This Court should not only award summary judgment to Plaintiffs and deny the FEC's cross-motion for summary judgment, but also fashion a remedy ensuring that the FEC and the CPD will not evade compliance. The courts' experience with the Bipartisan Campaign Reform

Act ("BCRA") illustrates the need for an airtight remedy. As the BCRA's co-sponsors, Chris Shays and Martin Meehan, explained in a recent op-ed,[12] they had to sue the FEC after it refused to enact the strong campaign finance reform regulations required by the BCRA. The lawsuit succeeded in part, but the courts' remedy was to "rely solely on the FEC to enforce the law." Because the FEC "ha[d] no interest in such enforcement," it "refused to obey" court orders and "repeatedly refused to write proper regulations." The result was "six years of litigation overs several election cycles," in which Shays and Meehan kept returning to court because the FEC "continually ignor[ed] not just the law, but the orders of the court." *Id.*; *see also Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004); *Shays v. FEC*, 340 F. Supp. 2d 39 (D.D.C. 2004); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005); *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007); *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

To avoid a similar problem here, Plaintiffs should be permitted to sue the CPD directly, so that a court could then force the CPD to comply with FECA. The Court should also require the FEC to open a rulemaking. As the FEC has proven through three decades of shameless dereliction, nothing short of an explicit court order demanding these remedies will suffice.

[12] https://www.thedailybeast.com/two-former-congressmen-explain-why-the-federal-elections-commission-cant-be-trusted.

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