ORAL ARGUMENT SCHEDULED FOR MAY 9, 2005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5312

JOHN HAGELIN, *et al.*

Plaintiffs-Appellees,

v.

FEDERAL ELECTION COMMISSION,

Defendant-Appellant.

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

BRIEF FOR THE FEDERAL ELECTION COMMISSION

STATEMENT OF JURISDICTION

This court has jurisdiction to review the final judgment of the United States District Court for the District of Columbia under 28 U.S.C. 1291, 1294(1). The district court's jurisdiction was based upon 28 U.S.C. 1331 and 2 U.S.C. 437g(a)(8).

STATEMENT OF THE ISSUE PRESENTED

Whether the Federal Election Commission's dismissal of the plaintiffs' administrative complaint in Matter Under Review 5378 under 2 U.S.C. 437g(a) was contrary to law.

APPLICABLE STATUTES AND REGULATIONS

Selected statutory and regulatory provisions are reproduced in an addendum bound with this brief.

STATEMENT OF THE CASE

A. THE STATUTORY AND ADMINISTRATIVE FRAMEWORK

The Federal Election Commission ("Commission" or "FEC") is an independent agency with exclusive jurisdiction to administer, interpret and civilly enforce the Federal Election Campaign Act ("FECA" or "the Act"), 2 U.S.C. 431-455. See generally 2 U.S.C. 437c(b)(1), 437d(a), and 437(g). The Commission is authorized to "formulate policy with respect to" the Act, 2 U.S.C. 437c(b)(1), and to promulgate "such rules . . . as are necessary to carry out the provisions" of the Act, 2 U.S.C. 437d(a)(8).

The Act permits any person to file an administrative complaint with the Commission alleging a violation. 2 U.S.C. 437g(a)(1). Upon receipt, the Commission assigns a Matter Under Review ("MUR") number to each complaint for administrative purposes. After reviewing the complaint and any response filed

by the respondents, the Commission may vote on whether there is "reason to believe" that a violation has occurred. 2 U.S.C. 437g(a)(2). If at least four members of the Commission vote to find "reason to believe," the Commission can institute an investigation. 2 U.S.C. 437g(a)(2). After the investigation, the General Counsel can recommend that the Commission vote on whether there is "probable cause" to believe the law has been violated. 2 U.S.C. 437g(a)(3). The General Counsel must notify the respondents of his recommendation and provide them with a brief stating his position on the issues. Id. The respondents are entitled to at least 15 days to file a responsive brief. Id. The General Counsel then prepares a report to the Commission concerning what action should be taken in light of the briefs and the investigations. 11 C.F.R. 111.16. If at least four members of the Commission vote to find probable cause to believe that a violation has occurred, 2 U.S.C. 437g(a)(4)(A)(i), the Commission must attempt for at least 30 days to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondents. Id. If these informal methods of conciliation fail, the Commission may, "upon an affirmative vote of 4 of its members," file a de novo civil enforcement suit in district court. 2 U.S.C. 437g(a)(6)(A).

If the Commission dismisses the administrative complaint, the complainant can seek judicial review of that determination pursuant to 2 U.S.C. 437g(a)(8)(A).

If the Court declares that the Commission's dismissal was "contrary to law," it can order the Commission to conform to the Court's declaration within 30 days. 2 U.S.C. 437g(a)(8)(C). If the Commission fails to conform to the declaration, the complainant can obtain a private right of action against the administrative respondents. Id. See FEC v. National Conservative Political Action Comm., 470 U.S. 480, 488 (1985).

The Act generally prohibits corporations and labor unions from making contributions or expenditures in connection with Federal elections, and it prohibits political committees and candidates from accepting such contributions. 2 U.S.C. 441b(a). However, both the Act and the Commission's regulations provide exceptions to this general prohibition. One such exception provides that "expenditures" do not include "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. 431(9)(B)(ii). This "safe harbor" provision includes, inter alia, candidate debates that meet the requirements of the Commission's debate regulations, 11 C.F.R. 110.13 and 114.4(f). Only media organizations, and non-profit organizations described in 26 U.S.C. 501(c)(3) or 501(c)(4) that do not endorse, support, or oppose political candidates or political parties, can stage candidate debates under this regulatory exemption. 11 C.F.R. 110.13(a)(1). The debates must include at least two candidates, and not be structured to promote or advance one candidate over another. 11 C.F.R.

110.13(b)(1) and (2). Organizations that stage candidate debates must use pre-established objective criteria to determine which candidates may participate in the debate. 11 C.F.R. 110.13(c). With respect to general election debates, staging organizations may not use the nomination by a particular political party as the sole objective criterion to determine whether to invite a candidate to a debate. Id.

If a nonprofit corporation stages a debate in accordance with 11 C.F.R. 110.13, the money spent by that sponsoring corporation to defray costs incurred is exempt from the definitions of contribution and expenditure. 11 C.F.R. 114.4(f)(1). See also 11 C.F.R. 100.92, 100.154, 114.1(a)(2)(x). As long as the sponsoring nonprofit corporation complies with 11 C.F.R. 110.13, funds provided to the sponsoring corporation to defray expenses incurred in staging the debate are not contributions under the Act. 11 C.F.R. 114.4(f)(3). See also 11 C.F.R. 100.92, 100.154.[1]

B. ADMINISTRATIVE PROCEEDINGS

On July 17, 2003, appellees John Hagelin, Ralph Nader, Patrick Buchanan, Howard Phillips, Winona LaDuke, the Green Party of the United States, the

[1] After these regulations were promulgated, Congress amended the FECA in the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002). BCRA did not disturb any of these regulations, but rather built upon them by providing that a "communication which constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission" would not be considered an "electioneering communication" subject to certain funding restrictions and disclosure requirements. 2 U.S.C. 434(f)(3)(B)(iii).

Constitution Party (collectively "Hagelin"), and another entity filed an administrative complaint with the FEC, which was designated MUR 5378.[2] Joint Appendix ("JA") 10-48. The complaint to the FEC alleged that the Commission on Presidential Debates ("CPD") had violated the FECA "during the 2000 elections" and that the alleged violations "directly concern the 2004 federal elections." JA 10. The administrative complaint alleged that CPD is not eligible to stage candidate debates under the Commission's regulations because it is not a nonpartisan organization. Without acknowledging that the Commission had previously rejected such allegations about CPD, in decisions summarily affirmed by this Court,[3] the complaint alleged that "newly obtained evidence" regarding CPD's exclusion of third-party candidates for President or Vice President from the debate audience in 2000 shows that CPD unlawfully favored the Republican and Democratic candidates.

---

[2] While the administrative complaint was first received by the FEC on June 17, 2003, it did not conform to the requirements for an administrative complaint set out in 2 U.S.C. 437g(a)(1) and 11 C.F.R. 111.4(b) in that it did not include the full name and address of each complainant, and the original notarized signatures of most of the complainants were not included. These defects were remedied in full by July 17, 2003.

[3] Buchanan v. FEC, 112 F.Supp.2d 58, 69-76 (D.D.C. 2000), aff'd in part, No. 00-5337 (D.C. Cir. Sept. 29, 2000); Natural Law Party of the United States v. FEC, Civ. Act. No. 00-2138 (D.D.C. Sept. 21, 2000), aff'd in part, No. 00-5338 (D.C. Cir. Sept. 29, 2000).

In particular, the complaint alleged that CPD "was founded, and is controlled by the Republican and Democratic Parties and their representatives[,]" and that it "operates as a partisan organization" because CPD "decided to exclude all third-party candidates from attending the presidential debates as audience members." JA 13-14. Complainants submitted as an exhibit a "face-book" prepared by CPD "of prominent third-party presidential and vice-presidential candidates ... so that CPD personnel ... could recognize the candidates and deny them access[.]" JA 14, 31-34. Complainants asserted that CPD took this action "to deny these candidates and their parties any 'campaigning' opportunities ... [and] deny third-party candidates any media coverage in the debate hall[,]" thus providing the Republican and Democratic parties and their candidates "with valuable benefits that it denied to all other third-party candidates and their parties[.]" JA 15.

The complaint then alleged that: (a) because CPD is "partisan," it did not qualify to stage debates, and therefore made illegal corporate contributions under 2 U.S.C. 441b(a) to the Republican and Democratic parties by spending funds to stage the 2000 debates; (b) because CPD raised "millions of dollars" from corporations and other donors, it met the definition of "political committee" in the Act (see 2 U.S.C. 431(4)(A)), but did not register and report as a political committee (see 2 U.S.C. 433 and 434), and it accepted excessive contributions and

made illegal contributions and expenditures (see 2 U.S.C. 441a(a) and 441a(f)); and (c) because CPD planned to sponsor presidential and vice-presidential debates in the 2004 elections and would solicit financial support to do so from corporations and others, "[f]or the same reasons these activities were unlawful for the 2000 debates, they are unlawful now and in the future, and must be stopped immediately[.]" JA 16-17.

On March 18, 2004, the Commission dismissed the administrative complaint. The First General Counsel's Report, prepared for the Commission based upon both the administrative complaint and the response submitted by CPD, summarized the claims and evidence presented by complainants and respondent. JA 242-250. The General Counsel noted that some of the claims regarding CPD's foundation and governance had been considered by the Commission in previous MURs, and the Commission's finding of no reason to believe in those cases had been upheld in court challenges pursuant to 2 U.S.C. 437g(a)(8). JA 243, 245. After summarizing the facts presented regarding the CPD's decision to exclude Ralph Nader and other third-party candidates from the debate audience in the 2000 debates, and the complainants' and respondent's arguments and explanations regarding the reasons for that decision, the General Counsel concluded that there was insufficient evidence to conclude that CPD's decision was made for partisan reasons. JA 246-249. Therefore, since there was no additional evidence of

"partisan" behavior beyond that already weighed and found in prior decisions to be insufficient to support a finding of reason to believe that CPD was ineligible to sponsor candidate debates, the General Counsel recommended a finding of no reason to believe in MUR 5378. JA 249. The Commission voted unanimously (with one recusal) to adopt this recommendation, found no reason to believe, and closed the administrative file. JA 251-252.[4]

C. PROCEEDINGS IN THE DISTRICT COURT

On May 5, 2004, Hagelin filed a complaint in the district court against the Commission, pursuant to 2 U.S.C. 437g(a)(8). The parties filed cross-motions for summary judgment. On August 12, 2004, the district court granted in part and denied in part each party's motion for summary judgment. See Hagelin v. FEC, 332 F. Supp. 2d 71 (D.D.C. 2004) (JA 307-319). The district court found that the Commission's dismissal of MUR 5378 "was contrary to law because the FEC ignored record evidence that CPD's exclusion of third party candidates from the debates was unrelated to a subjective or objective concern of disruption, and was therefore partisan." 332 F.Supp.2d at 77 (JA 313). The court reversed the

---

[4] When, as here, the Commission follows the General Counsel's recommendation and does not write its own statement of reasons, "the General Counsel's report … is sufficient to support the Commission's dismissal of a complaint" and "the staff report provides the basis for the Commission's action." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 38 n.19 (1981) ("DSCC") (internal citation omitted); see also Carter/Mondale Presidential Committee, Inc. v. FEC, 775 F.2d 1182, 1186 n.2 (D.C. Cir. 1985).

Commission's determination in MUR 5378, and "remand[ed] the case to the FEC for further proceedings" under the procedures of 2 U.S.C. 437g(a). Id. at 81-83 (JA 317-319). The district court then granted part of the FEC's motion for summary judgment by denying Hagelin's request to order the Commission to proceed to a vote regarding "probable cause to believe" within 30 days of the district court's decision. The court held that it could not order the Commission to disregard the statutorily-mandated procedures by which administrative complaints must be addressed under the Act. 332 F.Supp.2d at 81-83 (JA 317-319).

On August 31, 2004, the Commission moved the district court for a stay of its decision pending appeal. The court granted that motion nunc pro tunc on October 6, 2004.

SUMMARY OF ARGUMENT

The Federal Election Commission did not abuse its discretion when it dismissed an administrative complaint filed by Hagelin alleging that the Commission on Presidential Debates is a partisan organization ineligible to sponsor candidate debates. Under 2 U.S.C. 437g(a)(8), the Commission's decision to dismiss an administrative complaint may not be overturned by a court unless the dismissal was "contrary to law," a standard of review that affords the Commission substantial deference.

The Commission acted within its discretion when it determined that there was no reason to believe that CPD's adoption of a policy of excluding non-debating candidates from the audience of the 2000 presidential debates contravened the Commission's debate regulations. The Commission examined the evidence before it and reasonably concluded that CPD had acted out of fear of disruption of the live televised debates. The relevant question before the Commission was not whether CPD's decision was wise or appropriate, but simply whether CPD's actions "endorse[d], support[ed], or oppose[d] political candidates or political parties[,]" 11 C.F.R. 110.13(a)(1). Because there was no affirmative evidence before the Commission (and none identified by the district court) that CPD excluded candidates from the debate audience in an effort to hurt their chances of election, it was reasonable for the Commission to credit CPD's explanation that its exclusion policy was based upon its fear of disruption rather than upon any partisan political reason. In fact, the district court agreed that the record supported CPD's assertion that it excluded two of the third-party candidates, Ralph Nader and Patrick Buchanan, because of a fear of disruption.

Nevertheless, the district court held that the Commission's dismissal was contrary to law because the court believed CPD's exclusion of other third-party candidates was not supported by adequate evidence of a substantial danger of disruption. In so holding, the district court improperly substituted its own

judgment for the Commission's. Based upon all of the evidence, it was reasonable for the Commission to conclude that CPD simply treated all third-party candidates the same because their failure to qualify to debate might motivate them to disrupt the proceedings, and specific deposition testimony supported that conclusion. The fact that the Commission did not discuss every piece of evidence it reviewed, or that other inferences could also have reasonably been drawn from the evidence, was insufficient to justify a reversal of the Commission's reasonable determination that there was no "reason to believe" that CPD's actions contravened the debate regulations. The district court should have deferred to the Commission's view of the credibility of the evidence, and the decision below should be reversed.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of a grant of summary judgment is de novo. Apotex, Inc. v. FDA, ___ F.3d ___, 2004 WL 2937247 at *6 (D.C. Cir. Dec. 21, 2004); United We Stand America, Inc. v. IRS, 359 F.3d 595, 598 (D.C. Cir. 2004). Where, as in this case, the facts are undisputed, this Court's "task is to ensure that the District Court correctly applied the relevant law to the undisputed facts." Apotex, 2004 WL 2937247 at *6, quoting Beckett v. Air Line Pilots Ass'n, 995 F.2d 280, 284 (D.C.Cir.1993). See also Reed v. NLRB, 927 F.2d 1249, 1250 (D.C. Cir. 1991), cert. denied, 502 U.S. 1047 (1992).

This case was brought under 2 U.S.C. 437g(a)(8), a provision that permits a party "aggrieved by an order of the Commission dismissing a complaint" to petition for judicial review. Under 2 U.S.C. 437g(a)(8) "[a] court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of the Act ... or was arbitrary or capricious, or an abuse of discretion.'" Common Cause v. FEC, 108 F.3d 413, 415 (D.C. Cir. 1997) (quoting Orloski v. FEC, 795 F.2d 156, 161 (D.C. Cir. 1986)). "Highly deferential, [the arbitrary and capricious] standard presumes the validity of agency action, requiring us to determine whether the agency has considered the relevant factors and 'articulate[d] a rational connection between the facts found and the choice made.'" AT&T Corp. v. FCC, 220 F.3d 607, 616 (D.C. Cir. 2000), quoting Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotation marks omitted). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26, 37 (D.C. Cir.) (en banc), cert. denied, 479 U.S. 923 (1986).

The Supreme Court has held that the Commission, which is authorized to "formulate policy" under the Act and which has exclusive jurisdiction over the administration and civil enforcement of the Act, 2 U.S.C. 437c(b)(1), "is precisely the type of agency to which deference should presumptively be afforded." FEC v.

Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981) ("DSCC"). Thus, "in determining whether the Commission's action was 'contrary to law,' the task for the [Court is] not to interpret the statute as it [thinks] best but rather the narrower inquiry into whether the Commission's construction [is] 'sufficiently reasonable' to be accepted by a reviewing court." Id. at 39 (citations omitted). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." DSCC, 454 U.S. at 39. Unless "Congress has directly spoken to the precise question at issue," the Court must defer to a reasonable construction by the Commission. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-844 (1984).

This case, moreover, involves construction of the Commission's own regulations rather than the statute itself, and "when the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." Udall v. Tallman, 380 U.S. 1, 16 (1965). Courts "'look to the administrative construction of the regulation if the meaning of the words used is in doubt.' That construction is given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" FEC v. National Republican Senatorial Committee ("NRSC"), 966 F.2d 1471, 1475-76 (D.C. Cir. 1992) (citations

omitted). See also Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618, 625 (D.C. Cir. 2000); Buchanan, 112 F.Supp.2d at 70.

II. THE COMMISSION'S DETERMINATION THAT THERE WAS NO REASON TO BELIEVE THE ACT HAD BEEN VIOLATED, OR WOULD BE VIOLATED, IS NOT CONTRARY TO LAW

The only substantive issue before the Court is whether the Commission abused its discretion by concluding that CPD's exclusion from the debate audience of the same candidates it had already excluded from participating in the debate itself did not establish that CPD "endorse[s], support[s] or oppose[s] political candidates or political parties" so as to make CPD ineligible to sponsor candidate debates under 11 CFR 110.13(a)(1). Hagelin does not contest here that, as the Commission found in an earlier case affirmed by the district court (see p. 6 & n.3, supra), CPD relied upon permissible pre-established objective criteria, rather than their party affiliations, to exclude him and the other plaintiffs from the 2000 presidential debates. The Commission's regulations do not even address how a sponsoring organization determines who is admitted to the audience for a debate, and CPD merely excluded from the audience the same group of candidates that it had previously excluded from the debates themselves on the basis of pre-established objective criteria. CPD did not make any statements endorsing or supporting the candidates that qualified to participate in the debates, or opposing the candidates who did not qualify to participate.

The district court did not identify any affirmative evidence that CPD had endorsed or opposed a candidate, or that it excluded the candidates from the debate audience in an effort to hurt their chances of election. Instead, the district court discredited CPD's stated reason for the exclusion – a fear that public statements by two of the candidates indicated that resentment over exclusion from participation in the debates might lead a disappointed candidate to try to disrupt the debates. But the issue for the court under section 437g(a)(8) is not whether CPD's action was reasonably justified, but only whether the Commission's decision to credit CPD's claim that its subjective motivation was a fear of disruption, which even if unreasonable was not based upon partisan electoral concerns, was arbitrary and capricious. Under the extremely deferential review mandated by section 437g(a)(8), the district court's substitution of its own view of the evidence for the Commission's is an inadequate basis for reversing the Commission's decision, even if the district court's conclusions were thought to be more compelling.

A. THE COMMISSION DID NOT ACT CONTRARY TO LAW WHEN IT DETERMINED THAT THERE WAS INSUFFICIENT EVIDENCE TO CONCLUDE THAT CPD WAS A PARTISAN ORGANIZATION BECAUSE IT RESTRICTED ATTENDANCE AT THE 2000 DEBATES

The Commission examined the evidence before it concerning CPD's exclusion of certain third-party candidates from the audience at the 2000 debates and explained that the "issue presented by the complaint is not whether CPD's exclusion decision was a good one, or even whether its fears of disruption were

well-founded[;]" rather, the "issue is whether there is a sufficient basis to conclude the decision may have been animated by partisanship. There is not." JA 248. The Commission found that CPD's decision to exclude non-debating candidates was not made to "endorse, support or oppose" any candidate or political party, in the words of 11 C.F.R. 110.13(a)(1), and this was the salient question under the Act and Commission regulations.

As summarized in the General Counsel's Report, "[t]he crux of complainants' claim is that the CPD's decision to exclude third-party candidates from the 2000 debate audiences was a partisan maneuver." JA 246. The principal evidence offered by Hagelin to support this expansive claim was excerpted deposition testimony given by the CPD's general counsel, Lewis K. Loss, and by one of its co-chairs, Frank J. Fahrenkopf, Jr., together with a copy of a "face book" containing photos of several third-party candidates. JA 31-44. Hagelin's assertions rested heavily upon a single sentence from the last moments of Loss's deposition: "Our [the CPD's] concern was that if a third-party candidate who had not qualified for participation in the debate went to the trouble to get a ticket and attend the debate that it would be for the purpose of campaigning in some way, which seemed to imply the potential for disruption." See JA 15, 39; JA 246.

As summarized in the General Counsel's Report, CPD pointed out "that the Commission's regulations do not suggest that eligibility to sponsor candidate

debates depends on who is permitted to sit in the debate audience and that the federal election laws do not oblige the CPD to admit candidates not qualifying for participation in the debates to the audience so that they can engage in campaigning." JA 247. CPD also represented that "it is evident that the decision alleged in the [administrative] complaint was made for the purpose of preventing disruption of the live international television broadcast of the debate," and "had nothing to do with partisanship." JA 247.

CPD went on to elucidate the circumstances surrounding its decision not to admit to the audience third-party candidates who had not qualified to debate. "'[I]n the period leading up to the first presidential debate in 2000, Mr. Nader and his supporters engaged in conduct that reasonably led the CPD to be concerned about the risk of disruption of the live internationally televised debate,' including large rallies, cries of 'Let Ralph Debate,' certain public statements by Mr. Nader, and protests outside of, and a break-in into the CPD's Washington, D.C. offices by Nader supporters." JA 247-248.

The General Counsel's Report reasoned that the "isolated reference in the Loss testimony to 'campaigning' does not appear to be partisan, particularly where Mr. Loss links it to 'the potential for disruption'; 'disruption' indicates disorderly conduct, not a mere presence in an audience or access to reporters." JA 248. The General Counsel's decision to credit CPD's representation that under the

circumstances presented before the first presidential debate in October 2000, its decision not to admit third-party candidates into the audience "was based on concerns of potential disruption during live television broadcasts, not partisanship," JA 248, was supported by testimony by Loss (see JA 37, 39; complete transcript available at JA 138-241) about his concerns regarding the potential for disruption by candidates who had been excluded from the presidential debate, and similar testimony by Fahrenkopf, see JA 44.[5] Weighing the "substantial information" provided by the CPD against the "single word, divorced from context" relied upon by the complainants, the General Counsel's Report concluded that there was no basis for disbelieving the CPD's claim that it was motivated by a concern about the potential for disruption rather than an interest in harming the excluded candidates' electoral chances, see JA 248-249, and the Commission adopted this conclusion when it voted to find no reason to believe.

In the proceedings below, Hagelin asked the district court to second-guess the Commission's decision, shifting the focus from the question of whether CPD's actions violated the debate regulations to whether CPD's fears of disruption were

[5] The General Counsel's Report quoted Loss, who "'had some serious reservations about a scenario of admitting such a candidate and trying to control the disruption in the context of this particular event with a live television broadcast,'" and Fahrenkopf, who "thought Mr. Nader might 'stand up in the audience, stand up on a chair and say, oh, I could be on that stage, why won't you let me on the stage. That's what I was concerned about. And I felt that would be extremely disruptive.'" JA 248.

objectively justified, and whether its response to such fears was excessive or reasonable. As the General Counsel's Report (JA 248) explained, however, whether CPD's "fears of disruption were well-founded" is beside the point under the Commission's regulations. What matters is whether CPD's actions were taken for partisan purposes — in the words of the regulation, whether CPD's actions constituted "endorse[ment], support, or oppos[ition]" to political candidates or political parties. 11 C.F.R. 110.13(a)(1). The Commission reasonably credited the substantial evidence before it that CPD's actions were instead motivated by its interest in reducing the potential for disruption during a live television broadcast of an extremely important event being watched by millions of concerned American voters. "[T]he FEC is expected to weigh the evidence before it and make credibility determinations in reaching its ultimate decision. As long as the FEC presents a coherent and reasonable explanation of [its] decision, it must be upheld." Buchanan, 112 F.Supp.2d at 72 (citing Orloski, 795 F.2d at 168; Carter/Mondale, 775 F.2d at 1185).

B. THE DISTRICT COURT ERRED BY REPLACING THE FEC'S ANALYSIS AND CONCLUSIONS WITH ITS OWN

In reversing the FEC's decision that there was no "reason to believe" CPD had violated the Act or Commission regulations, the district court improperly substituted its own judgment for the Commission's. The question the Commission had to answer was not whether CPD's response to the public candidate statements

about possible disruption of the debates was reasonable, excessive, or even foolish, but whether the actual subjective purpose or motivation of CPD's decision was to "endorse, support or oppose political candidates or political parties." (11 C.F.R. 110.13(a)(1)). See JA 248. Contrary to the district court's analysis, the Commission had no burden to demonstrate affirmatively that CPD's decision to exclude all third-party candidates was supported by substantial evidence of fear of disruption by each of them. Under the applicable standard of review, the burden of proof was on Hagelin, and under the applicable regulations the Commission's determination of whether CPD had acted for partisan reasons turned on its evaluation of the evidence about CPD's subjective motivation, not whether its action was objectively justified. The district court's conclusion that CPD's decision was not supported by adequate evidence that there was in fact a substantial danger of disruption by the excluded candidates was insufficient to justify a reversal of the Commission's conclusion that the evidence did not demonstrate that CPD was actually motivated by partisanship.[6]

---

[6] The district court also reasoned that, even though there is no legal requirement that a debate sponsor admit non-qualifying candidates to the audience, "[s]uch exclusions could be evidence of partisan bias." 332 F. Supp. 2d at 77-78 (JA 313-314). However, since Hagelin did not contest that the candidates' exclusion from the debate was properly based upon pre-existing objective criteria, 11 C.F.R. 110.13(c), it is hard to understand why the selection of those same candidates for exclusion from the audience must have been based upon partisanship, rather than those same objective criteria. In any event, it is unclear why the district court thought a decision barring non-debating candidates from the

The court reasoned that "the FEC's dismissal was contrary to law because the FEC ignored record evidence that CPD's exclusion of third party candidates from the debates was unrelated to a subjective or objective concern of disruption, and was therefore partisan." 332 F.Supp.2d at 77 (JA 313). However, the court actually agreed with the Commission: "[t]he record does support the assertion that CPD excluded Ralph Nader and Pat Buchanan … from the 2000 debates for fear of disruption." Id. at 78 (footnote omitted) (JA 314). In essence, the district court's ruling thus rests upon a conclusion that CPD was unlawfully partisan not because of its actions regarding Nader and Buchanan, but only because of its actions regarding other third-party candidates.

However, there was no evidence presented to the Commission (and none identified by the district court) to suggest that CPD's decision focused in any way on candidates other than Nader and Buchanan, nor on political parties at all, much less in a partisan manner. Based upon the evidence before the Commission, it was reasonable to draw the inference that CPD simply lumped all of the third-party candidates together, not due to partisan considerations, but because it feared that their failure to qualify to debate might motivate them to disrupt the proceedings,

---

audience could be an action to "endorse, support or oppose political candidates or political parties," 11 C.F.R. 110.13(a)(1), since the ability to sit in the audience does not constitute an endorsement by the debate sponsor. Likewise, the district court did not explain how the debating candidates would have been supported or endorsed by the mere absence of other candidates from the audience.

just as the district court found that public statements by Nader and Buchanan indicated they might have been so motivated. Indeed, deposition testimony cited by the district court supports the Commission's conclusion that CPD's decision was not made for partisan reasons, but was a hastily-formulated response to a specific perceived threat by adopting a policy of "general application." 332 F. Supp. 2d at 79 (JA 315).

Moreover, the district court seemed to fault CPD's decision for being both too broad and too narrow: too broad because it applied to candidates other than Nader and Buchanan, but too narrow because CPD did not also bar third-party supporters who might have attempted to disrupt the debate. 332 F. Supp. 2d at 80 (JA 316). But the lower court did not explain why CPD's more measured response, focusing on persons similarly situated to Nader or Buchanan, was less appropriate or more partisan than a policy that on its face would have applied to hundreds or thousands of people. Moreover, CPD could easily identify the candidates it had excluded from the debate, but it had no way to identify which, if any, ticket-holders to the debate might be supporters of one of the excluded candidates.

The Commission found no affirmative evidence of partisan motivation in the record and neither did the district court. Instead, the lower court relied upon a negative inference that "the sole criteria [*sic*] CPD used to exclude people from the

debate halls in 2000 … was their status as third party presidential or vice presidential candidates … not their individual potential to disrupt the debates," 332 F. Supp. 2d at 80 (JA 316), even though the court had earlier conceded that record evidence supported CPD's fears regarding Nader and Buchanan, id. at 78 (JA 314). It would not be irrational for an organization anxious to avoid even the potential for disruption of a live televised debate to be concerned that some of the other candidates excluded from the debates might have a similar response. As CPD's general counsel explained, out of an abundance of caution, CPD simply made a decision that "was of general application to third-party candidates." JA 37, 187.

On such a record, even if the district court's negative inference might have been adequate to support a reason to believe finding, the Commission's contrary inference that fear of disruption was the more likely motivation for CPD's actions satisfies the deferential standard of review. See Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) ("The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence"). It is well settled that "where 'the facts permit the drawing of diverse inferences,' the finder of fact 'alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.'" New Valley Corp. v. Gilliam, 192 F.3d 150, 156 (D.C. Cir. 1999) (quoting O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.,

380 U.S. 359, 361-62 (1965)). See also Schoenbohm v. F.C.C., 204 F.3d 243, 246 (D.C. Cir.) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence") (quoting Consolo v. Fed. Maritime Comm'n, 383 U.S. 607, 620 (1966)), cert. denied, 531 U.S. 968 (2000).

Opining that the FEC could only have reached a conclusion contrary to its own by ignoring record evidence that CPD did not have a basis for fearing disruption by any third-party candidate other than Nader or Buchanan, the court inferred that the Commission must not have reviewed the entire record, and concluded that "[f]ailure to consider relevant record evidence is arbitrary, capricious and contrary to law." 332 F. Supp. 2d at 81 (JA 317). There is no requirement in administrative law, however, that an agency's explanation for its decision must recite or discuss each piece of evidence, whether supportive or adverse, that formed part of the record. See, e.g., United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 529 (1946) ("the Commission is not compelled to annotate to each finding the evidence supporting it"); cf. BellSouth Corp. v. FCC, 162 F.3d 1215, 1224 (D.C. Cir. 1999) ("the agency is not required to author an essay for the disposition of each application") (quoting KCST-TV, Inc. v. FCC, 699 F.2d 1185, 1191-92 (D.C. Cir. 1983)). Thus, the Commission was not required to state explicitly that it had read and understood any particular piece of

deposition testimony, so long as it adequately explained why it reached the conclusion it reached based on the record before it. The Commission is entitled to a presumption of regularity in its administrative decisionmaking, see, e.g., Hercules, Inc. v. EPA, 598 F.2d 91, 123 (D.C. Cir. 1978), and it is clear from the record in any event that the Commission in fact reviewed the relevant deposition testimony. See JA 246-249.

In sum, the district court's opinion did not identify any relevant factors that the Commission failed to consider, but simply disagreed with the Commission's view of the credibility of the evidence indicating that partisanship was not CPD"s actual motivation for excluding third party candidates. The Commission may have drawn different inferences from that evidence than the district court would have, but that is far different from failing to consider relevant factors and thereby abusing its discretion. See, e.g., County Produce, Inc. v. United States Dep't of Agric., 103 F.3d 263, 266 (2d Cir. 1997) ("[W]e disagree with [plaintiff's] contention that the Secretary 'failed to consider' these [allegedly mitigating] circumstances. The record indicates that these circumstances were in fact considered although ultimately rejected by the Secretary.").

Under the deferential standard of review applied to agency decisions, the district court overstepped its role when it replaced the FEC's determination with its own. As this court has affirmed, the arbitrary or capricious standard "requires

affirmance if a rational basis for the agency's action is shown." Orloski, 795 F.3d at 167. The General Counsel's Report provided the reasoning behind the Commission's determination, and its analysis provides much more than a rational basis for the FEC's action in finding there was no "reason to believe" in MUR 5378.

In sum, since Hagelin's "new evidence" about CPD's exclusion of non-qualified candidates from the debate audience in 2000 added nothing to the claim that CPD "operates as a partisan organization," JA 14, it provided no reason for the Commission to alter its prior determinations that CPD was eligible under the Commission's regulations to sponsor candidate debates. Accordingly, the district court's conclusion that the Commission acted arbitrarily, capriciously or contrary to law when it dismissed the allegation that CPD was a partisan organization that failed to meet the criteria to be a debate staging organization should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's decision below and find that the Commission did not act contrary to law when it dismissed Hagelin's administrative complaint.

Respectfully submitted,

Lawrence H. Norton
General Counsel

Richard B. Bader
Associate General Counsel

David Kolker
Assistant General Counsel

Erin K. Monaghan
Attorney

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

January 25, 2005