UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEVEL THE PLAYING FIELD, *et al.*,	)	
Plaintiffs,	)	Civ. No. 15-1397 (TSC)
v.	)	
FEDERAL ELECTION COMMISSION,	)	SUMMARY JUDGMENT MEMORANDUM
Defendant.	)	

FEDERAL ELECTION COMMISSION'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous

INTRODUCTION

Level the Playing Field ("LPF") and its co-plaintiffs again challenge the Federal Election Commission's ("FEC" or "Commission") handling of (1) their administrative complaints alleging certain campaign-finance violations by the Commission on Presidential Debates ("CPD") and a dozen individual respondents and (2) LPF's petition to change the Commission's debate regulation, 11 C.F.R. § 110.13. Plaintiffs' administrative complaints alleged that CPD and the other respondents violated the Federal Election Campaign Act ("FECA" or "Act") by making impermissible contributions and expenditures and by failing to register CPD with the Commission as a political committee and filing the reports required of such groups. LPF's rulemaking petition requested that the agency amend section 110.13(c) to preclude sponsors of presidential and vice-presidential debates from using a polling threshold to determine debate participation. Reviewing a previous challenge under FECA's relevant judicial review provision, 52 U.S.C. § 30109(a)(8), and the Administrative Procedure Act ("APA"), this Court found that deficiencies in the FEC's earlier dismissals of plaintiffs' administrative complaints and its denial of the rulemaking petition required remanding the matters to the agency for further consideration. *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130 (D.D.C. 2017) ("*LPF I*").

On remand, the Commission reconsidered plaintiffs' administrative complaints and the rulemaking petition in light of the Court's instructions and with particular focus on the evidence plaintiffs submitted in those administrative matters. Following that review, the FEC again dismissed plaintiffs' administrative complaints, explaining in a lengthy new Factual & Legal Analysis why plaintiffs' evidence did not provide reason to believe that CPD is ineligible as a debate sponsor or that its 15 percent polling threshold was not objective under the regulation. Similarly, the FEC detailed in a Supplemental Notice of Disposition the numerous shortcomings contained in the expert evidence plaintiffs submitted in support of the petition as well as the

reasons for the agency's decision not to initiate the requested rulemaking. Plaintiffs again contend that these decisions were contrary to law or arbitrary or capricious.

Plaintiffs' contentions are meritless. The Court must reject their request that it disregard longstanding and controlling authority requiring it to evaluate the FEC's actions under the extremely deferential standards of review that apply here. By vociferously advancing policy arguments about the benefits of forcing CPD, a private organization, to include uncompetitive candidates in their widely-viewed debates in order to give them a boost, plaintiffs profoundly misconceive the nature of this case. The Court's task is not to evaluate plaintiffs' policy agenda but to determine, based on the records that were submitted to the agency, whether plaintiffs have met their heavy burden of showing that the FEC acted contrary to law or arbitrarily. Plaintiffs' limited arguments addressed to this question are insubstantial. They may disagree with the Commission's assessment of the evidence, but the Commission's thorough explanations demonstrate that it fully complied with the Court's instructions by carefully considering, under the Commission's regulation, both whether CPD is nonpartisan and whether its polling criterion is objective. Because the Commission's conclusions that the evidence did not warrant initiation of enforcement investigations or rulemaking proceedings were neither contrary to law nor arbitrary, the Court should grant summary judgment to the Commission.

BACKGROUND

I. STATUTORY AND REGULATORY BACKGROUND

A. The FEC and Its Administrative Enforcement and Rulemaking Processes

1. The Commission

The FEC is a six-member, independent agency vested with statutory authority over the administration, interpretation, and civil enforcement of FECA. Congress authorized the Commission to "formulate policy" with respect to the Act, 52 U.S.C. § 30106(b)(1); "to make,

amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The FEC has exclusive jurisdiction to initiate civil enforcement actions for violations of FECA in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

2. FECA's Administrative Enforcement and Judicial-Review Provisions

Any person may file an administrative complaint with the FEC alleging a violation of the Act. *Id.* § 30109(a)(1). After considering an administrative complaint and any response, the FEC determines whether there is "reason to believe" that FECA has been violated. *Id.* § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find reason to believe, the FEC may investigate the alleged violation; otherwise, it dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2). If the FEC proceeds with an investigation, it then must determine whether there is "probable cause" to believe that FECA has been violated. *Id.* § 30109(a)(4)(A)(i). A probable cause determination also requires an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(4)(A)(i). If the Commission so votes, it is statutorily required to attempt to reach a conciliation agreement with the respondent. *Id.* The FEC's assent to a conciliation agreement requires an affirmative vote of at least four Commissioners. *Id.* If the FEC is unable to reach a conciliation agreement, FECA authorizes the FEC to institute a *de novo* civil enforcement action in federal district court, upon an affirmative vote of at least four Commissioners. *Id.* §§ 30106(c), 30109(a)(6)(A).

If, at any point in the administrative process, the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason, the complainant may file suit in this District against the Commission to obtain judicial review of the Commission's dismissal decision. 52 U.S.C. § 30109(a)(8)(A). The standard of review in such cases is whether the dismissal decision was "contrary to law." *Id.* § 30109(a)(8)(C).

3. The FEC's Rulemaking Petition Process

A person seeking amendments to the Commission's regulations may petition for a rulemaking under the APA. 5 U.S.C. § 553(e); 11 C.F.R. § 200; *Auer v. Robbins*, 519 U.S. 452, 459 (1997). If the petition meets requirements specified in 11 C.F.R. § 200.2, the Commission publishes a Notice of Availability in the Federal Register stating that the petition is available for public inspection, and that comments supporting or opposing the petition may be filed within a stated time period. 11 C.F.R. § 200.3. After consideration of the comments, the FEC decides whether to initiate a rulemaking. 11 C.F.R. § 200.4(a). If the FEC decides not to initiate a rulemaking, it gives notice of this action by publishing a Notice of Disposition ("NOD") in the Federal Register and sending a letter to the petitioner. The NOD will include a "brief statement of the grounds for the Commission's decision," except in an action affirming a prior denial. 11 C.F.R. § 200.4(b). Petitioners may submit a written request for reconsideration within 30 days after the date of the denial. *See* 11 C.F.R. § 200.4(c).

Under the APA, a petitioner dissatisfied with an agency's decision not to initiate a rulemaking may seek judicial review. 5 U.S.C. § 553(e). But "[a]n agency's refusal to institute rulemaking proceedings is at the high end of the range of levels of deference [courts] give to agency action under our arbitrary and capricious review." *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (internal quotation marks omitted).

B. FECA's Regulation of Debate Sponsoring Organizations and Candidate Debates Sponsored by Such Organizations

FECA does not permit corporations to make contributions to federal candidates. 52 U.S.C. § 30118(a). Although expenditures that are coordinated with candidates or their campaigns are deemed in-kind contributions, *id.* § 30116(a)(7)(B), the Act excludes "nonpartisan activity designed to encourage individuals to vote" from the definition of "[e]xpenditure," *id.*

§ 30101(9)(B)(ii). As relevant here, the Commission has construed these statutory provisions to mean that "[f]unds provided to defray costs incurred in staging candidate debates . . . are not contributions" and "not expenditures" if done so "in accordance with the provisions of 11 CFR 110.13 and 114.4(f)," additional Commission regulations regarding debates. 11 C.F.R. §§ 100.92, 100.154.

The FEC's principal regulation regarding sponsorship of debates, 11 C.F.R. § 110.13, provides that "[n]onprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section . . . ." *Id.* § 110.13(a)(1). "[T]he structure of debates staged in accordance with" the regulation "is left to the discretion of the staging organizations(s) [sic], provided that: (1) Such debates include at least two candidates; and (2) The staging organization(s) does not structure the debates to promote or advance one candidate over another." *Id.* § 110.13(b). In addition, other requirements apply to the selection of debate participants: "For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." *Id.* § 110.13(c). The FEC's debate regulations have been upheld as "easily fall[ing] within the reasonable ambit of the statutory terms." *Becker v. FEC*, 230 F.3d 381, 397 (1st Cir. 2000).

The Commission's Explanation and Justification for these debate rules explains that "the purpose of section 110.13 . . . is to provide a specific exception so that certain nonprofit organizations and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates." FEC, *Corporate and*

Labor Org. Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,261 (Dec. 14, 1995) ("1995 E&J"). The FEC observed that "[t]his exception is consistent with the traditional role these organizations have played in the political process." *Id.*

C. Prior FEC Administrative Complaints Involving CPD

Between the enactment of the Commission's current debate regulations in 1996 and 2004, nine administrative complaints were filed with the FEC alleging violations by the Commission on Presidential Debates ("CPD") in connection with its general election debates held in 1996, 2000, and 2004.[1] Five of these administrative complaints were filed by minor parties such as the Green Party, their presidential/vice-presidential nominees, and/or those candidates' campaign committees.

All nine administrative complaints alleged that CPD had violated what is now 52 U.S.C. § 30118(a) by making prohibited corporate contributions to the Republican and Democratic Party presidential candidates or their campaign committees. The complainants alleged that CPD was partisan and therefore not a qualified "staging organization," that CPD's candidate selection criteria did not satisfy 11 C.F.R. § 110.13, or both. In each matter and without dissent, the Commission voted to find no reason to believe that CPD and the other respondents violated the Act and therefore dismissed the administrative complaints.[2] The complainants in the five administrative enforcement matters initiated by minor party plaintiffs sought judicial review under 52 U.S.C. § 30109(a)(8), but all those cases were dismissed or decided in the FEC's favor.

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[1] *See* FEC Statement of Reasons in Matters Under Review ("MUR") 4451 and 4473 (April 6,1998); First General Counsel's Reports in MURs 4897, 5004 and 5021 (Jul. 13, 2000), MUR 5207 (Aug. 2, 2002), MUR 5378 (Mar. 12, 2004), MUR 5414 (Dec. 7, 2004), and MUR 5530 (May 4, 2005). Documents from these matters are available on the FEC's website.

[2] Certifications of Commission Action in MURs 4451 and 4473 (Feb. 25, 1998), MURs 4987, 5004 and 5021 (July 19, 2000), MUR 5207 (Aug. 8, 2002), MUR 5378 (Mar. 18, 2004), MUR 5414 (Dec. 13, 2004), and MUR 5530 (May 9, 2005). The votes for these dismissals were 6-0, 5-0, or 4-0, with certain Commissioners not voting or recused. *Id.*

See, e.g., *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996) (per curiam); *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000); *Natural Law Party v. FEC*, 111 F. Supp. 2d 33 (D.D.C. 2000); *Hagelin v. FEC*, 411 F.3d 237, 244 (D.C. Cir. 2005) (concluding that substantial evidence supported the FEC's finding that CPD's exclusion of third-party candidates from debate audience was not to endorse a particular party and upholding FEC's decision not to revisit the evidence from *Buchanan*).

II. FACTUAL BACKGROUND

A. The Commission's Previous Dismissals of Plaintiffs' Administrative Complaints, Notice of Disposition, and the Court's Remand

In 2014 and 2015, plaintiffs filed lengthy administrative complaints with the FEC alleging that the CPD and twelve of its officers and directors had violated the Commission's debate staging regulations and other provisions of the Act in connection with the general election debates that CPD sponsored during the 2012 presidential election. (AR 2001-2771; AR 4001-4775.) These matters were designated Matters Under Review ("MUR") 6869 and 6942. (*Id.*) Plaintiffs' administrative complaints alleged that, during the 2012 presidential election cycle, CPD was not a nonpartisan debate staging organization under 11 C.F.R. § 110.13(a)(1) because it endorsed, supported, or opposed certain political parties, and that therefore the debates held in 2012 were prohibited corporate contributions to the campaigns of the participating 2012 candidates in violation of 52 U.S.C. § 30118(a). (*E.g.*, AR 2073; AR 4077.) Plaintiffs further alleged that CPD was a political committee and had violated FECA by failing to register with the FEC and comply with the Act's reporting requirements for such committees. (*Id.*) On July 13, 2015 and December 10, 2015, respectively, the FEC resolved MURs 6869 and 6942 by votes of 5-0 (with one Commissioner recused). (AR 3172-73; AR 5000-01.) In both matters, the FEC found no reason to believe that CPD or the other respondents had made prohibited contributions,

or that CPD had violated FECA's political committee requirements. (*Id.*) The FEC explained these dismissals in its Factual & Legal Analyses for the MURs. (AR 3175-81; AR 5003-10.)

On the same day it filed the administrative complaint in MUR 6869, LPF filed a petition for rulemaking with the FEC regarding the agency's debate sponsorship regulation, 11 C.F.R. § 110.13. (AR 0001-0281.) Relying on much of the same evidence submitted in connection with the administrative complaint, LPF argued that the CPD's use of a 15% polling threshold to select debate participants unfairly excluded third party and independent candidates and requested that the Commission amend section 110.13(c) "to (A) preclude sponsors of general election presidential and vice-presidential debates from requiring that a candidate meet a polling threshold in order to be admitted to the debates; and (B) require that any sponsor of" such debates "have a set of objective, unbiased criteria for debate admission that do not require candidates to satisfy a polling threshold to participate in debates." (AR 0032.) On July 16, 2015, following the notice-and-comment period, the Commission decided by a vote of 4-2 not to initiate the requested rulemaking. (AR 1871.) On November 6, 2015, the Commission approved a NOD explaining its reasoning for denying LPF's petition. (AR 1885; AR 1903-05.)

Plaintiffs sought judicial review of the decisions dismissing their administrative complaints and denying LPF's petition for rulemaking. After briefing and argument, the Court remanded to the agency for further consideration of whether to initiate enforcement proceedings and a rulemaking and directed the agency to conform with its opinion. *LPF I*, 232 F. Supp. 3d at 145, 148.

With respect to the enforcement matters, after finding that the Commission had "effectively adopted or relied on [a] control test" the agency had articulated in prior dismissals and that "appear[ed] to be contrary to the text of the agency's own regulations," the Court

ordered the FEC "to articulate its analysis in determining whether the CPD endorsed, supported, or opposed political parties or candidates." *Id.* at 139-40. The Court next concluded that the Commission's legal analyses did not demonstrate that it had considered the evidence plaintiffs had submitted, and ordered the Commission to "demonstrate how it considered the evidence, particularly, but not necessarily limited to, the newly-submitted evidence of partisanship and political donations and the expert analyses regarding fundraising and polling." *Id.* at 142. The Court also found that in failing to provide notice of plaintiffs' complaints to certain respondents, namely ten of CPD's officers and directors, the FEC had erred. *Id.* at 143. The Court directed the FEC to "notify these ten remaining directors, address these allegations, and consider the evidence presented against these respondents." *Id.* The Court further found that the analyses regarding CPD's objectivity contained two flaws: (1) failing to discuss plaintiffs' "substantial and lengthy evidence and arguments" and (2) "little to no legal analysis applying the agency's regulation." *Id.* at 145. The Court ordered the FEC to "demonstrate that it actually considered the full scope of this evidence, including the CPD chairmen's and directors' partisan political activity and the expert reports, as well as explain how and why it rejected this evidence in deciding that the CPD's polling requirement is an objective criterion." *Id.*[3]

Regarding the rulemaking petition, the Court found that the FEC "acted arbitrarily and capriciously by refusing to engage in rulemaking without a thorough consideration of the presented evidence and without explaining its decision." *Id.* at 148. The Court remanded the rulemaking petition to the agency for further consideration. *Id.*

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[3] The Court subsequently clarified that, on remand, the FEC was required "to notify respondents, consider their written responses, consider the full evidence submitted by Plaintiffs, determine whether there is reason to believe any of the respondents has violated the Act, and issue a new statement of reasons in support of that determination." Order at 1-2 (Feb. 10, 2017) (Docket No. 64). It granted the FEC's request to extend the time to act on plaintiffs' administrative complaints to April 3, 2017. *Id.* at 2-3.

B. The FEC's Dismissal of Plaintiffs' Administrative Complaints on Remand

One day after receiving the Court's opinion in *LPF I*, the Commission sent notice of plaintiffs' allegations to the ten CPD officers and directors who had been named as respondents in the original matters but not previously notified. (AR 7001-20; AR 7203 n.2.) These respondents submitted a response dated March 3, 2017. (AR 7035-53.) On March 29, 2017, within the timeframe established by the Court, the Commission considered plaintiffs' administrative complaints anew and concluded, by a vote of 4-0, that there was no reason to believe that CPD, its co-chairs, or the ten named officers and directors had violated section 30116(f) or 30118(a) by making prohibited contributions and expenditures or accepting prohibited contributions, that there was no reason to believe that CPD had violated section 30103 or 30104 by failing to register and report as a political committee, and that the matters should be closed. (AR 7198-99.)

The FEC explained its reconsidered decision in a new Factual & Legal Analysis. (AR 7202-234.) It first summarized the Court's remand opinion (AR 7202-03; AR 7211-12), the evidence submitted by plaintiffs and respondents, and the procedural history (AR 7204-11).

Turning to 11 C.F.R. § 110.13(a)'s prohibition on an exempt debate sponsor "'endors[ing], support[ing], or oppos[ing]' candidates or [political] parties," the FEC explained that it was not applying a control-based standard. (AR 7213 & n.54.) Rather, it applied the plain meaning of the regulation's terms. (AR 7213.) To evaluate whether CPD endorsed, supported, or opposed candidates or parties, the Commission loosely grouped plaintiffs' evidence into three categories: (1) evidence regarding CPD's formation as a partisan organization; (2) evidence indicating that CPD currently promotes the Democratic and Republican parties; and (3) evidence

of CPD directors' and officers' connections with and contributions to the Democratic and Republican parties and their candidates. (AR 7207; AR 7213.)

As to CPD's formation in 1987, the Commission expressed doubt that, when viewed in context, this evidence had the negative connotation plaintiffs sought to impart. (AR 7216.) Rather, it was necessary for "the Democratic and Republican Parties to play a role in institutionalizing the debates in order to ensure the participation of leading candidates who, as recent history had shown, at times had a disincentive to participate." (AR 7204 (footnotes omitted).) Moreover, the Commission explained that the evidence did not indicate CPD's *organizational* endorsement, support, or opposition to any party. (*Id.*) Indeed, one CPD respondent made this distinction explicit, stating that "'he *personally* believed the panel should exclude third-party candidates, [but] *could not speak for the commission*.'" (AR 7218 n.79.)

The Commission further found that the documents did not establish CPD's bias as to the 2012 debates. (AR 7215; AR 7217.) After summarizing the 2000 *Buchanan* decision, 112 F. Supp. 2d 58, the Commission found plaintiffs' evidence to be even less persuasive with respect to the 2012 presidential debates, which post-dated that decision by more than a decade. (AR 7215; AR 7217.) The Commission found that declarations from current and recent directors affirmed CPD's commitment to including leading independent candidates and "conduct[ing] its business in a strictly nonpartisan fashion." (AR 7217-18.)

With respect to the more recent statements, plaintiffs' principal submission was a 2015 interview between CPD co-chair Frank Fahrenkopf and Sky News in which he said that CPD "'primarily go[es] with the two leading candidates, it's been the two political party candidates . . . except for 1992 when Ross Perot participated in the debates.'" (AR 7219.) The Commission found that the statement itself "indicates no categorical support for Democrats or Republicans or

opposition to independent candidates." (*Id.*) Rather, it merely recited historical facts about the participants in prior debates, which was confirmed by Fahrenkopf's declaration. (*Id.*) Moreover, the statement's context was within a broader point about "the [negative] impact of multiple candidates (the questioner posited seven) on the educational value of debates," not singling out any party or person over another. (*Id.*)

As for alleged recent partisanship and political activity by CPD's officers and directors, the Commission recognized — as it has in many other contexts — that there is a distinction between someone acting in his or her personal capacity as an individual, as opposed to in an official capacity on behalf of an organization. (AR 7218 n.79 (collecting examples); AR 7220 & n.88 (collecting examples); AR 7221 n.89 (providing example).) The FEC explained that a CPD director thus retains "his or her ability to speak freely on political issues or make contributions to political committees when he or she does so in his or her personal capacity." (AR 7220-21.)

Examining plaintiffs' evidence, the Commission concluded that it consisted only of actions taken in the persons' individual capacities, not in any official CPD capacities. For example, although an op-ed authored by Fahrenkopf may have indicated his "personal allegiance to the Republican Party," the Commission concluded that "there is no indication that Fahrenkopf wrote his op-ed in his official capacity as CPD co-chair, nor does the opinion piece express positions on behalf of CPD." (AR 7220; AR 7221.) Regarding political contributions, the Commission found that plaintiffs "make no suggestion that any of the contributions by [CPD's co-chairs or directors] originated from CPD resources or any source other than their respective personal assets." (AR 7221.) Turning to employment, the Commission found that "there is no indication that [any directors] act . . . on behalf of their employer while volunteering for CPD." (AR 7221.) Accordingly, the Commission concluded that plaintiffs' "information alleging

partisan political activity on the part of CPD's officers and directors *in their non-CPD capacities* . . . does not support a reasonable inference that *CPD* endorses[,] supports[,] or opposes political candidates or parties." (AR 7222.)

The Commission next turned to plaintiffs' allegation that CPD did not employ "pre-established objective criteria to determine which candidates may participate in a debate." (AR 7222 (quoting 11 C.F.R. § 110.13(c)). In so doing, the Commission addressed the two expert reports plaintiffs submitted. After considering this evidence, the Commission found it to be unpersuasive due to several significant limitations in the experts' analyses. (*Id.*)

Plaintiffs' first expert, Dr. Clifford Young, opined that "in order to obtain 15 percent of the vote share, a candidate must achieve name recognition" in 60-80% of the population. (AR 7224) He also alleged an increased inaccuracy of three- versus two-way polling. (*Id.*) The Commission found that his analysis suffered from several flaws. First, Young relied solely upon the correlation between name recognition and polling results and then drew "conclusions regarding hypothetical third-party-candidate performance based on that one factor." (AR 7225.) But, as the Commission found, "polling results are not merely a function of name recognition — they are a much more complex confluence of factors." (*Id.*)

Second, Young did not establish that "independent candidates do not or cannot meet 60-80% name recognition." (*Id.*) "To the contrary, during the 2016 presidential election, a YouGov poll taken at the end of August found that 63 percent of registered voters had heard of Libertarian Gary Johnson and 59 percent had heard of Green Party candidate Jill Stein." (*Id.*)

Third, regarding the inaccuracy of three-way polling, the Commission concluded that Young's approach was fundamentally misconceived by defining "polling error" to be "the difference between the poll and the actual results on Election Day." (AR 7231.) CPD uses the

polls as "a reliable measure of candidates' support at a given moment in September," however, not to predict election results. (*Id.*) As CPD's expert, Frank Newport, Editor-in-Chief of the Gallup Organization, affirmed: "'[T]here is no doubt that properly conducted polls remain the best measure of public support for a candidate . . . at the time the polls are conducted.'" (*Id.* (quoting Newport Decl. ¶ 21).)

Fourth, the FEC found that Young inappropriately relied upon gubernatorial elections as the basis for his conclusions. (AR 7231-32.) National presidential election polling, by contrast, is "'inherently more reliable'" than the "'low turn-out'" election polls relied upon by Young. (AR 7232 (quoting Newport Decl. ¶ 19).) And according to Newport, "'nothing about support for a significant third party[] candidate makes it more difficult to measure.'" (AR 7232 (quoting Newport Decl. ¶ 21).) The FEC thus concluded that Young did not persuasively demonstrate that independent presidential candidates are disproportionally impacted by polling errors. (*Id.*)

Plaintiffs' other expert, Douglas Schoen, opined that it would cost an independent candidate over $266 million to exceed 60% name recognition, including approximately $120 million for paid media, which, in turn, he viewed as prohibitively high for independent candidates. (AR 7228) The Commission found that Schoen's analysis was "similarly based on significant assumptions that reduce its value" for five primary reasons. (AR 7226.) First, it assumed that Young's analysis was correct, which itself was flawed.

Second, Schoen assumed that independent candidates will not receive earned (*i.e.*, free) media "'until they are certainly in the debates'" — an assumption that was "unfounded." (*Id.* (quoting Schoen Report at 3, 5)) In 2016, Gary Johnson and Jill Stein received extensive media coverage despite the fact that they did not participate in CPD's presidential debates. (*Id.* (citing Supp. Brown Decl. ¶ 16).)

Third, Schoen assumed that a candidate's ability to increase his or her name recognition was largely limited to traditional, expensive paid media, and failed to sufficiently consider digital and social media as cheaper alternative avenues for increasing name recognition. (*Id.*) As the FEC explained, whereas "Hillary Clinton spent more than $200 million on television ads" in the last months of the election, "Donald Trump spent less than half of that, by focusing his spending on digital platforms like Facebook and Twitter." (AR 7227) Digital and social media also "generated earned [(free)] media when more traditional news outlets covered noteworthy tweets and posts," and reduced other traditional campaign costs, such as field offices. (*Id.*)

Fourth, Schoen also failed adequately to account for the rise of independent-expenditure-only committees, or "super PACs," which can pay for media supporting a candidate. (AR 7227-28.) "Such independent support likely increases a candidate's name recognition at no cost to the candidate, thereby reducing the total sum that the candidate must spend to achieve 60-80 percent name recognition." (AR 7228.)

The Commission used the most recent election to illustrate the impact of Schoen's failure to adequately consider the impact of digital and social media and super PACs. (*Id.*) Gary Johnson reached 63% name recognition at the end of August 2016, yet had only spent $5.4 million since February 2016 — "a mere *2-3 percent* of the $266 million that Schoen estimates an independent candidate would need to achieve 60-80 percent name recognition." (*Id.*)

Fifth, Schoen's assumptions that candidates would begin with zero name recognition and funds was unsupported. "That candidates may start with some name recognition or financial resources further belies the Complaints' critique about the onerous fundraising required to reach 60-80 percent name recognition and the 15 percent polling threshold." (AR 7229)

Lastly, the Commission considered plaintiffs' allegations that CPD's polling threshold was not objective because CPD can manipulate its selection of polls and dates. The Commission concluded that plaintiffs' allegations were speculative, lacking supporting evidence, and "unpersuasive in the face of Newport's sworn attestations" to the contrary. (AR 7230-31.)

In sum, "[h]aving carefully weighed and considered the analyses of the parties' respective experts," as well as its "judicially upheld determination[] that independent candidates of the past *have* reached 15 percent in the polls," the Commission concluded that there was not "a sufficient basis to conclude that CPD's 15 percent participation threshold is a level of support so high that only the Democratic and Republican nominees could reasonably achieve it" and thus was not an objective criteria for debate participation. (AR 7229-32.)

C. The FEC's Supplemental NOD Regarding LPF's Petition for Rulemaking

In addition to reconsidering plaintiffs' administrative complaints, the Commission also completed its reconsideration of LPF's petition for rulemaking. On March 23, 2017, the FEC voted 4-1 not to initiate a rulemaking to revise 11 C.F.R. § 110.13(c). (AR 1929.) The agency then published a Supplemental Notice of Disposition ("Supplemental NOD"), further explaining the FEC's decision not to initiate the rulemaking and to continue addressing issues regarding debate sponsors' compliance with the existing regulation's participation criteria on a case-by-case basis. (AR 1931-37.)

After overviewing the Court's remand opinion and the purpose of the Commission's debate regulation, the Commission's Supplemental NOD summarized LPF's arguments for changing the regulation and the evidence it had submitted. (AR 1931-32.) Assessing the petition's factual submissions, the Commission first examined whether a 15 percent threshold cannot be reached by independent and third-party candidates. (AR 1932-35.) As in the Factual

& Legal Analysis, the Commission explained that Young's expert report was problematic in several respects, including its one-dimensional focus on name recognition to the exclusion of other relevant factors, its reliance upon data from the early stages of the primary process, and its conclusion's tension with the actual experience of Libertarian candidate Gary Johnson. (AR 1932-33.) Additionally, because Schoen's report was based upon the foundation of Young's report, the Commission questioned whether Schoen's report "possesse[d] any meaningful evidentiary value." (AR 1933.) Nevertheless, it further identified a series of additional concerns with Schoen's analysis, including his assertions that "'the media will not cover'" a candidate who is not "'certainly in the debates,'" that independent and third-party candidates start with "zero percent name recognition," and that earned media is unavailable to such candidates, as well as his assumptions that outside groups such as super PACs do not support independent and third-party candidates and that digital modes of communication could not more inexpensively get a candidate's name out. (AR 1933-35.)

Next, the Commission again considered whether polls are unreliable or systematically disfavor independent and third-party candidates. (AR 1935-36.) It was unpersuaded for two reasons: (1) polling error does not mean that debate staging organizations are acting subjectively and (2) there is no evidence that polling error is biased against independent and third-party candidates. (*Id.*) Lastly, the Commission addressed LPF's policy arguments, explaining why LPF's arguments are "inconsistent with the purposes of the existing regulations." (AR 1936.)

Accordingly, the Supplemental NOD concluded that LPF's evidence about the alleged impracticality of reaching the 15% polling threshold and on the unreliability of polling did "not lead the Commission to conclude that the CPD's use of such a threshold for selecting debate participants is per se subjective, so as to require initiating a rulemaking to amend" the debate

regulation. (AR 1937.) Though the Young and Schoen reports and the historical polling and campaign finance data presented with the petition "demonstrate[d] certain challenges that independent candidates may face when seeking the presidency," the FEC concluded "these submissions do not demonstrate either that the threshold is so high that only Democratic and Republican nominees could reasonably achieve it, or that the threshold is intended to result in the selection of those nominees to participate in the debates." (AR 1937.)

D. Post-Remand Procedural History

Following the FEC's post-remand decisions, plaintiffs supplemented their complaint, including by adding plaintiffs challenging the FEC's disposition of LPF's rulemaking petition. The FEC has answered and filed certified supplemental lists of the administrative record documents in the enforcement and rulemaking contexts. (Docket No. 81.)[4] Plaintiffs filed their motion for summary judgment on September 15, 2017. (Docket No. 83.)

ARGUMENT

The Commission's post-remand evaluations of plaintiffs' administrative complaints and LPF's rulemaking petition should be sustained. The FEC's Factual & Legal Analysis and Supplemental NOD are free from the deficiencies identified in the Court's remand opinion and are not otherwise contrary to law or arbitrary or capricious. In its Factual & Legal Analysis, the Commission fully considered plaintiffs' evidence — including the materials purporting to show that CPD is not a nonpartisan organization and that its 15 percent polling criterion is not objective — and carefully articulated its finding that plaintiffs' administrative complaints did not provide reason to believe that CPD or the individual respondents violated FECA by making or receiving improper contributions or expenditures. Under the extremely deferential standard of

[4] Supplemental rulemaking documents begin with page number AR 1906. Supplemental enforcement documents begin with page number AR 7001.

review that applies to plaintiffs' claims pursuant to 52 U.S.C. § 30109(a)(8), the Commission's dismissal was plainly not contrary to law or arbitrary. The FEC's Supplemental NOD similarly demonstrates the Commission's reasonable, detailed review of LPF's evidence supporting its rulemaking petition. Plaintiffs' insubstantial objections to the Commission's evaluation of their expert reports fall far short of their high burden in challenging the agency's decision not to initiate a rulemaking. The Court should grant summary judgment to the Commission.

I. THE COMMISSION'S DISMISSAL OF PLAINTIFFS' ADMINISTRATIVE COMPLAINTS CONFORMS WITH THE COURT'S REMAND OPINION AND IS NOT OTHERWISE CONTRARY TO LAW

The Commission's comprehensive 33-page Factual & Legal Analysis conforms with the Court's remand opinion and demonstrates that the agency took a hard look at plaintiffs' evidence. The dismissal decision is plainly not contrary to law or arbitrary or capricious.

A. Standard of Review For Dismissal of Plaintiffs' Administrative Complaints

1. Section 30109(a)(8)'s Contrary to Law Standard of Review Is "Limited" and "Extremely Deferential"

In section 30109(a)(8), Congress mandated that the judicial task in reviewing the Commission's dismissal of plaintiffs' administrative complaints is to determine whether it was "contrary to law." 52 U.S.C. § 30109(a)(8)(C). Well-settled, controlling decisions construing section 30109(a)(8) make clear that such review is "limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988). As plaintiffs acknowledge (Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. at 17 (Docket No. 83-1) ("Pls.' Mem.")), the FEC's dismissal of an administrative complaint cannot be disturbed unless it was based on an "impermissible interpretation of" FECA or was otherwise "arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). Under this standard, the Commission's decision need not be "the only reasonable one or even the" decision "the [C]ourt would have reached" on its own "if the

question initially had arisen in a judicial proceeding." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) ("*DSCC*").

Furthermore, where, as here, the FEC is interpreting its own regulations in connection with a dismissal decision, deference to the agency is even greater than that ordinarily applying under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *E.g.*, *Consarc Corp. v. U.S. Treasury Dep't, Office of Foreign Assets Control*, 71 F.3d 909, 915 (D.C. Cir. 1995) ("[A]n agency's application of its own regulations, receives an even greater degree of deference than the *Chevron* standard." (internal quotation marks omitted)). As this Court previously recognized, "[c]ourts are to be 'exceedingly deferential' when reviewing an agency's construction of its own regulations . . . ." *LPF I*, 232 F. Supp. 3d at 139-40 (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). The Supreme Court has instructed that an agency's interpretation of its own regulations must be upheld "unless that interpretation is plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 613 (2013) (internal quotation marks omitted).

In order to demonstrate that the FEC's decision was arbitrary, capricious, or an abuse of discretion, plaintiffs must show that "the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As the D.C. Circuit has consistently held, the standard for determining whether an FEC determination "was arbitrary or capricious or otherwise an abuse of discretion" under section 30109(a)(8) is "extremely deferential" and "*requires affirmance* if a rational basis for the agency's decision is shown." *Orloski*, 795 F.2d at 167 (emphasis added);

Van Hollen v. FEC, 811 F.3d 486, 495 (D.C. Cir. 2016) ("*State Farm* entails a very deferential scope of review that forbids a court from substitut[ing] its judgment for that of the agency." (citation and internal quotation marks omitted)).

2. Plaintiffs' Arguments for Reduced Deference are Contrary to Controlling Supreme Court and D.C. Circuit Decisions, as well as the Court's Own Remand Opinion

Plaintiffs acknowledge that "review of agency decisionmaking is typically deferential." (Pls.' Mem. at 18.) They nevertheless urge (*id.* at 18-19) the Court to ignore the foregoing controlling authority requiring deference here for three reasons, all of which are meritless.

First, despite plaintiffs' claim of the FEC's inherent "bias" (*id.* at 18), the Supreme Court and D.C. Circuit have uniformly held that the "FEC 'is precisely the type of agency to which deference should presumptively be afforded.'" *LPF I*, 232 F. Supp. 3d at 140 (quoting *DSCC*, 454 U.S. at 37). In *Hagelin v. FEC*, the D.C. Circuit rejected a similar argument that the FEC cannot be trusted "to deal fairly with third-party complaints," concluding that there is "no basis for thinking that third-party complaints warrant more demanding review." 411 F.3d 237, 242 (D.C. Cir. 2005).[5] Deference to the FEC is warranted not only because of its nonpartisan nature resulting from the fact that "no more than three of its six voting members may be of the same political party," but also due to the FEC's "'primary and substantial responsibility for administering and enforcing [FECA],'" its authority to formulate general policy with respect to administration of the Act, and its "'sole discretionary power' to determine in the first instance

[5] *See also N. Broward Hosp. Dist. v. Shalala*, 172 F.3d 90, 94 (D.C. Cir. 1999) (rejecting the argument that "we should deny an agency *Chevron* deference because of our judicial assessment that it has been 'hostile' to certain ideas"); *United Steelworkers of Am, AFL-CIO v. Marshall*, 647 F.2d 1189, 1209 (D.C. Cir. 1980) ("To disqualify administrators because of opinions they expressed or developed in earlier proceedings would mean that experience acquired from their work . . . would be a handicap instead of an advantage." (citation and internal quotation marks omitted)).

whether or not a civil violation of the Act has occurred." *DSCC*, 454 U.S. at 37 (quoting *Buckley v. Valeo*, 424 U.S. 1, 109, 112 n.153 (1976).[6] The Court rejected plaintiffs' bias argument when it did not adopt plaintiffs' claims regarding deference to the FEC before, *see LPF I*, 232 F. Supp. 3d at 140, 145-146, 147, and the Court should do so again.

Second, the D.C. Circuit has rejected plaintiffs' argument (Pls.' Mem. at 18-19) that an agency's post-remand decisions that reach the same result are subject to greater scrutiny. In *City of Los Angeles v. U.S. Department of Transportation*, D.C. Circuit held that subjecting an agency to stricter review on this basis would be "flatly inconsistent with the *Chenery* doctrine," which requires review of agency action on the basis of contemporaneous explanation and anticipates fresh consideration on remand. 165 F.3d 972, 977 (D.C. Cir. 1999). It further explained that, despite "some support" in plaintiffs' lead case, *Greyhound Corp. v. Interstate Commerce Commission*, 668 F.2d 1354, 1358 (D.C. Cir. 1981), "*as we have more recently explained*, . . . our review is still a matter of determining whether the agency's final decision was based on a consideration of the relevant factors and whether there has been a *clear error* of judgment." *City of Los Angeles*, 165 F.3d at 977-78 (internal quotation marks omitted) (emphases added); *accord Conkright v. Frommert*, 559 U.S. 506, 513 (2010) (holding that a pension plan administrator's interpretation of the plan on remand receives the same deference as its initial determination); *Hannon v. Clark*, 70 F. App'x 519, 523-24 (10th Cir. 2003) ("The mere fact that the agency arrived at the same conclusion after remand that it did initially does not, by itself, demonstrate bias or require a stricter standard of review."). Plaintiffs' attempt to distinguish *City of Los*

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[6] Plaintiffs' characterization of the FEC as "'bipartisan'" (Pls.' Mem. at 18) is also inaccurate. FECA provides that no more than "3 members of the Commission . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). One of the five current members of the Commission is an Independent, not a Republican or a Democrat. Carlin E. Bunch, *New Commissioners Join the FEC*, FEC Record, Feb. 2006, at 2, https://www.fec.gov/resources/record/2006/feb06.pdf.

Angeles on the grounds that the FEC has reached a similar result in prior matters (Pls.' Mem. at 19 n.31) fails because the consistency of the FEC's view counsels *for*, not against, deference. *E.g.*, *Decker*, 568 U.S. at 614 (holding that consistency is a reason to accord deference to an agency's view); *DSCC*, 454 U.S. at 37 (holding that "thoroughness, validity, and *consistency* of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling" (emphasis added)).

Third, plaintiffs' claim that the Commission has engaged in "post-hoc rationalization" (Pls.' Mem. at 19) to reach the same result it did previously contradicts their principal argument that the FEC "again stuck its head in the sand and refused to actually consider the evidence" (*id.* at 2 (internal quotation marks omitted)). The Court remanded these matters in part so that the Commission could further consider "the evidence, particularly, but not necessarily limited to, the newly-submitted evidence of partisanship and political donations and the expert analyses regarding fundraising and polling." *LPF I*, 232 F. Supp. 3d at 142. The FEC's thorough evaluation of this evidence, including evidence provided by the newly-noticed respondents, was not post-hoc rationalization. It was a fresh consideration, precisely as instructed.

3. The Court Cannot Consider Evidence That Was Not Before the FEC

Plaintiffs also err in relying on numerous extra-record materials in their summary judgment motion. It is "black-letter administrative law that . . . a reviewing court should have before it neither more nor less information than did the agency when it made its decision." *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (citation and internal quotation marks omitted). This record rule ensures that the Court's review of the FEC's action is conducted fairly, because to "review more than the information before the [agency] at the time [it] made [its] decision risks . . . requiring administrators to be prescient or allowing them to take advantage of post hoc rationalizations." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d

788, 792 (D.C. Cir. 1984). The rule also enables agencies to consider information that challengers to agency action deem relevant. *See id.* Here, plaintiffs' extra-record evidence, as well as their arguments premised on such material, should be disregarded and stricken for the reasons set forth in the Commission's separate motion to strike.

B. The Commission's Dismissal Decision Is Not Contrary to Law

The FEC's Factual & Legal Analysis conforms with the Court's remand opinion by thoroughly considering all of the evidence plaintiffs submitted in support of their allegations. Under the deferential standard of review under section 30109(a)(8), the Commission reasonably concluded that there was no reason to believe that CPD had endorsed, supported, or opposed, any political party or candidate and that its 15 percent polling threshold constituted an objective criterion. Plaintiffs' extended policy arguments to the contrary misperceive the question before the Court, and their contentions that the FEC arbitrarily analyzed the evidence are meritless.

1. The FEC's Dismissal Decision Conforms With the Court's Remand Opinion and Is Not Contrary to Law or Arbitrary

The Commission's Factual & Legal Analysis directly addressed the deficiencies the Court identified in its remand opinion. Responding to the Court's concern that, "in the absence of any articulated standard," the Commission may have applied an inapplicable "control test" when determining whether CPD endorsed, supported, or opposed any candidate or party, *LPF I*, 232 F. Supp. 3d at 139, the Commission clarified that it was not applying a control test, but instead applying the plain meaning of 11 C.F.R. § 110.13(a)(1) (AR 7212-13). Noting that a control standard would be "inapplicable here," where plaintiffs have made no allegations that CPD is controlled by "the two major parties and that the parties 'had input in' or were 'involved in' CPD's operations and debate decisions," the Commission applied the "plain meaning of the [regulation's] words" endorse, support, or oppose. (AR 7213 & n.54.) This plain meaning

analysis required it to "evaluate whether" plaintiffs' "evidence on the formation and evolution of CPD and on the alleged partisanship of CPD officers and directors either demonstrates directly or supports a reasonable inference that the CPD has endorsed or supported the Democratic and Republican Parties and their respective presidential nominees (or opposed third parties or independent candidates)." (AR 7213.)

Not only does the Commission's articulation of the standard it employed in evaluating whether the CPD endorsed, supported, or opposed candidates satisfy the Court's instruction that the Commission "articulate its analysis" on remand, *LPF I*, 232 F. Supp. 3d at 140, but that standard is plainly reasonable and not contrary to law. Indeed, the FEC's conclusion that the meaning of endorse, support, or oppose is "plain on its face" accords with the Court's own observations. (AR 7213 n.55 ("According to the Oxford Dictionary, 'endorse' means to 'declare one's approval of'; 'support' means 'contributing to the success of or maintaining the value of'; and 'oppose' means to 'set oneself against' or 'stand in the way of.'" (quoting *LPF I*, 232 F. Supp. 3d at 139 n.6)).) And the Supreme Court itself has held in another context that the words "support" and "oppose" "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (AR 7213 and n.56 (quoting *McConnell v. FEC*, 540 U.S. 93, 170 n. 64 (2003), *overruled in other part by Citizens United v. FEC*, 558 U.S. 310 (2010).) The Commission's interpretation of section 110.13(a)(1)'s plain meaning is therefore not "plainly erroneous [n]or inconsistent with the regulation," *Decker*, 568 U.S. at 613 (citation and internal quotation omitted), and unquestionably satisfies the deferential review that applies here. *Accord United States v. Dickson*, 816 F.2d 751, 752 (D.C. Cir. 1987) (per curiam) ("Where the language is plain and

admits of no more than one meaning, the duty of interpretation does not arise . . . ." (citation and internal quotation marks omitted)).

Plaintiffs present no serious argument to the contrary. Their claim that the FEC continued to rely on a control test "while pretending not to," based upon the Commission's citation of *Buchanan* in other portions of its analysis (Pls.' Mem. at 20) is belied by more than eight pages of continuous analysis of plaintiffs' evidence in the Commission's Factual & Legal Analysis specifically addressing plaintiffs' claim that CPD is partisan. (AR 7214-22.)

That analysis, combined with the FEC's equally thorough analysis of plaintiffs' claim that CPD's 15 percent criterion is not objective (AR 7222-33), also satisfies the Court's requirements that the Commission "demonstrate how it considered the evidence," including "the CPD chairmen's and directors' partisan political activity and the expert reports" and why the Commission "rejected this evidence in deciding that the CPD's polling requirement is an objective criterion," *LPF I*, 232 F. Supp. 3d at 142, 145. In evaluating plaintiffs' evidence regarding CPD's formation, the Commission relied upon the context provided by respondents' submissions showing that plaintiffs had cherry-picked quotes that "do not fairly or fully reflect their respective views" (AR 7214-16), and that, with respect to the Sky News interview with Fahrenkopf that plaintiffs highlighted, the statement about which candidates had participated in debates did not controvert respondents' "repeated attestations that CPD operates for the purpose of providing meaningful debates for public benefit" (AR 7219-20). The Commission further reasoned that, even if such evidence indicated a degree of partisanship, organizations "may change over time" and distinguished the activities of CPD's officers and directors from the organization's activities, a distinction underscored by CPD's adoption of a "formal 'Political Activities Policy'" aimed at deterring CPD-affiliated persons from certain conduct, even in a

personal capacity. (AR 7216-18; AR 7220-22.) Evaluating this evidence, the FEC reasonably concluded that plaintiffs' "information alleging partisan political activity on the part of CPD's officers and directors *in their non-CPD capacities* therefore does not support a reasonable inference that CPD endorses supports or opposes political candidates or parties." (AR 7222.)

The Commission's analysis of CPD's 15 percent polling threshold was also reasonable. The Commission explained that it "has previously made clear that a requirement of 'reasonableness is implied,'" has stated that "'[s]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants,'" and had previously upheld CPD's 15 percent threshold in connection with the 2000 presidential debates. (AR 7223 (quoting 1995 E&J, 60 Fed. Reg. at 64,262).)

Turning to plaintiffs' new evidence, the Commission determined that "[t]he expert reports relied upon by Complainants contain significant limitations that undermine their persuasiveness." (AR 7224.) Young's report was limited in scope and inconsistent with the conclusions plaintiffs drew from it. In particular, the FEC noted that, contrary to plaintiffs' assertions, "during the 2016 presidential election, a YouGov poll taken at the end of August found that 63 percent of registered voters had heard of Libertarian Gary Johnson and 59 percent had heard of Green Party candidate Jill Stein." (AR 7225 & n.105.) Schoen's report, dependent upon Young's, also contained numerous deficiencies: it was based upon the erroneous assertion "that independent candidates are unable to attract earned media"; it was based on outdated research; it failed to account for the rise in digital media or super PACs; and, perhaps most importantly, it was contradicted by Libertarian candidate Gary Johnson's actual experience. AR 7226-29; *see supra* pp. 13-16.

The Commission further considered plaintiffs' concerns about the unreliability of polling, finding no suggestion of manipulation by CPD or concerns about the polling organizations it used, and ultimately agreeing with CPD's expert, Newport, on the issue of the reliability of three-way polling. (AR 7229-32.) The Commission also considered plaintiffs' policy arguments but found that they had framed the issue incorrectly around the desirability of viable alternatives to candidates from the Republican and Democratic parties, rather than the applicable issue of limiting the potential for actual or apparent quid pro quo arrangements. (AR 7223.) This thorough analysis satisfied the Court's instruction to take a hard look at plaintiffs' evidence.

Lastly, the Commission conformed with the Court's instruction to "notify the[] ten remaining directors" who had not been previously notified and to address and "consider the evidence presented against these respondents." *LPF I*, 232 F. Supp. 3d at 143. After notifying these respondents, *see supra* p. 10, the FEC carefully considered plaintiffs' allegations regarding them. (AR 7203 n.2.) For example, the FEC considered and relied upon sworn affidavits submitted by these respondents stating that none of them ever "'observed any [CPD] Board member ever approach any issue concerning the CPD or its mission from a partisan perspective and the CPD has conducted its business in a strictly nonpartisan fashion.'" (AR 7218.)

2. Plaintiffs Cannot Meet Their Burden to Show that the Commission Acted Contrary to Law or Arbitrarily

The FEC not only conformed with the Court's remand opinion but its dismissal decision was reasonable and not arbitrary. Plaintiffs have failed to show otherwise.

a. Plaintiffs' Policy-Based Arguments Misperceive the Issues Before the Court

As an initial matter, plaintiffs' extended focus on the "American people['s]" supposed clamoring "for an alternative to the major party candidates," as well as the "squander[ing]" of

opportunities to address what plaintiffs view as the "harm that CPD is inflicting upon our democratic institutions" (*e.g.*, Pls.' Mem. at 4), misapprehends the purpose of the FEC's debate regulation and distorts the nature of the Court's review under 52 U.S.C. § 30109(a)(8). The FEC's regulation in section 110.13 is crafted in light of the Act's goals of limiting the appearance and actuality of corruption by providing "a specific exception so that certain nonprofit organizations and the news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in debates." 1995 E&J, 60 Fed. Reg. at 64,261. Plaintiffs' and their amici's preference that the FEC interpret the regulation to give their preferred candidates access to CPD's popular debates — in furtherance of CPD's mission to bring the leading candidates to the American people — is not supported by the FEC's distinct and Congressionally-authorized purpose in regulating campaign finance. *Cf. McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (explaining, in the context of evaluating FECA's aggregate contribution limits, that "[n]o matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equaliz[e] the financial resources of candidates'" (citation omitted)).

Furthermore, by suggesting that this Court should use the force of law to impose plaintiffs' views about the desirability of giving independent and third-party candidates more visibility, plaintiffs stray from the actual question confronting the Court in this case. The question for the Court is not whether it would be better for the country if CPD would turn over its broad platform to relatively uncompetitive independent or third-party candidates, but, far more precisely, whether the FEC acted contrary to law in applying its debate regulation not to find reason to believe that the CPB is partisan or that its debate selection criteria were not

objective.[7] Though not required to demonstrate a violation of FECA's prohibition on corporate contributions, notably absent from plaintiffs' appeal to underlying principles and thousands of pages submitted to the Commission is any argument that permission for CPD's existing criterion means that illegal quid pro quos involving the Democratic or Republican parties or their respective candidates are more likely to occur. In arguing their policy preferences, plaintiffs have utterly failed to carry their burden of identifying any law that is "contrary" to the Commission's dismissal decision. 52 U.S.C. § 30109(a)(8)(C).

b. The Commission's Evaluation of Plaintiffs' Evidence Allegedly Demonstrating CPD's Partisanship Was Not Arbitrary

As for the portions of plaintiffs' argument addressing the agency's consideration of the evidence, plaintiffs merely disagree with some of the Commission's evidentiary findings. Rather than demonstrating that "the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or [wa]s so implausible that it could not be ascribed to a difference in view or the product of agency expertise," *State Farm*, 463 U.S. at 43, plaintiffs themselves entirely fail to meet their burden. None of plaintiffs' arguments regarding the evidence, Fahrenkopf's Sky News interview, the CPD officers and directors' personal activities, CPD's policies, or the declarations on which the Commission relied remotely demonstrates that the Commission did not rationally connect its conclusions to the evidence. Its decision should be upheld. *Tex. Neighborhood Servs. v. U.S. Dep't of Health & Human Servs.*, 172 F. Supp. 3d 236, 243 (D.D.C. 2016), *aff'd*, No. 16-5150, 2017 WL 3389275 (D.C. Cir. Aug. 8, 2017) (holding that a reviewing

[7] CPD's right to limit its debates to "leading" candidates cannot seriously be questioned. *See Johnson v. Comm'n of Presidential Debates*, 869 F.3d 976, 981 (D.C. Cir. Aug. 29, 2017) (noting "'substantial argument'" that any order "stating [that] the [CPD] is not entitled to exclude particular individuals from its debate" would violate the First Amendment) (quoting *Perot*, 97 F.3d at 599 (D.C. Cir. 1996)).

court "will not disturb the decision of an agency that has examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made" (internal quotation marks omitted)).

The Commission's analysis belies plaintiffs' claim (Pls.' Mem. at 21-26) that the FEC ignored evidence of the CPD directors' partisanship and political donations. As this Court previously recognized, the FEC is not required "to discuss every single page of evidence in order to demonstrate that it had carefully considered the facts." *LPF I*, 232 F. Supp. 3d at 142. Like the Court, *see id.* at 140-42, the Commission distinguished between older evidence and plaintiffs' new evidence (AR 7214-22). With respect to the former category, the Commission observed that organizations may change over time, and that, accordingly, "it would be inappropriate to rely on documents and statements that are more than 30 years old to ascertain CPD's present support or opposition to candidates and parties." AR 7217; *accord United States v. Whitmore*, 359 F.3d 609, 614 (D.C. Cir. 2004) (upholding district court's exclusion of reputational evidence "too remote in time to be relevant").

With respect to the newer evidence, plaintiffs assert (Pls.' Mem. at 23-24) that the Commission failed to address a 2011 Politico op-ed that Fahrenkopf co-authored, the CPD directors' political contributions, and certain CPD directors' employment, including as lobbyist for separate, unaffiliated entities. But plaintiffs are wrong. The Commission expressly and specifically addressed this evidence. (AR 7220-21.) As to the 2011op-ed, the Commission found that there was "no indication" that Fahrenkopf wrote it "in his official capacity as CPD co-chair, nor does the opinion piece express positions on behalf of CPD." (AR 7221.) As to the contributions, the Commission found that plaintiffs "make no suggestion that any of the contributions . . . originated from CPD resources or any source other than their respective

personal assets. (*Id.*) And as to outside employment, the Commission found that "most of the information presented involves work that preceded — at times significantly — the individual's service for CPD." (*Id.*) Janet Brown stopped being a Republican aide in 1987, Newton Minow was President Kennedy's appointee to the Federal Election Commission whose term ended in 1963, and Antonia Hernandez worked on the Senate Judiciary Committee over 20 years ago. (AR 7221 n.90 (citing AR 2041 (citing AR 2222, 2400)). As the Commission explained, "to the extent officers or directors are currently employed by entities with ties to or interests in the success of the Democratic or Republican parties, there is no indication that they act on behalf of CPD in the course of such employment, or alternatively, on behalf of their employer while volunteering for CPD." (AR 7221.)

Plaintiffs' assertion (Pls.' Mem. at 22 (quoting AR 7219-20)) that the FEC "rotely accept[ed] Fahrenkopf's bogus explanation for why he said the CPD has a 'system' that 'primarily go[es] with the two leading candidates' from 'the two political part[ies]'" is also contrary to the record. The FEC analyzed Fahrenkopf's statement in great detail. It found that, by stating that CPD "*primarily* go[es] with the two *leading* candidates" and then "immediately indicating the exceptions to that trend," Fahrenkopf was not "categorical[ly]" supporting Democratic and Republican candidates or opposing independent candidates. (AR 7219.) The FEC also concluded that "the statement appears to be more an assertion of historical fact than an admission that CPD favors candidates from the two major political parties over others," a point Fahrenkopf confirmed in his sworn declaration. (*Id.*) The reasonableness of this assessment is confirmed by Fahrenkopf's subsequent summary of historical practice: "'It's *been* the two political party candidates . . . except for *1992* when Ross Perot participated in the debates.'" (*Id.* (citation omitted)) Further, the FEC examined the circumstances of Fahrenkopf's statement and

found that it was made "in the context of a broader point about the impact of multiple candidates (the questioner posted seven) on the educational value of debates," and thus was "consistent with Respondents' repeated attestations that CPD operates for the purpose of providing meaningful debates for the public benefit" by focusing on leading candidates. AR 7219-20; *accord Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 681 (1998) ("On logistical grounds alone, a public television editor might, with reason, decide that the inclusion of all ballot-qualified candidates would actually undermine the educational value and quality of debates." (internal quotation marks omitted)).

In addition, in objecting to the Commission's distinction between the actions of the CPD officers and directors in their personal and official capacities (Pls.' Mem. at 24), plaintiffs urge upon the court a view that is contrary to many areas of law. As the Commission recognized, "individuals may wear 'multiple hats' to represent the interests of multiple people or entities at different times." (AR 7218 n.79 (citing FEC advisory opinions); AR 7220 & n.88 (explaining that "an individual may serve as chairman of a state party committee and solicit, direct, and spend non-federal funds on its behalf while continuing to serve as chief of staff to a member of Congress"; "describing circumstances under which a U.S. Senator may raise non-federal funds for his state gubernatorial campaign and other state candidates and committees"; and concluding "that an individual may, at different times, act in his capacity as an agent on behalf of a state party and in his capacity as an agent on behalf of a U.S. Senator"); AR 7221 n.89 (quoting FEC Advisory Ops. 2007-05, 2005-02 and 2003-10 ("recognizing the ability of organization leaders, acting in their individual capacities, to establish and govern a separate entity" (quoting FEC Advisory Op. 1984-12))).) Consistent with the Commission's analysis, the law recognizes a broad range of contexts in which a person's personal activities are distinguished from official

ones. *E.g.*, *Sataki v. Broad. Bd. of Governors*, 733 F. Supp. 2d 54, 68 (D.D.C. 2010) ("[N]either the fact that the undersigned was appointed by the former Clinton administration nor the Court's alleged connection to the Democratic party warrant or require recusal in the instant case."); *Klayman v. Judicial Watch, Inc.*, 628 F. Supp. 2d 84, 93 (D.D.C. 2009) ("[E]ven assuming that Magistrate Judge Kay is a 'liberal' and/or a 'Democrat,' these facts by themselves do not warrant disqualification."). Indeed, the Hatch Act — the purpose of which is to eliminate even the appearance of partisanship by federal employees — permits administrative law judges like many other federal employees to make political contributions and express personal opinions about political parties and candidates outside of work. 5 U.S.C. § 7323; 5 C.F.R. §§ 734.402, 734.404; *U. S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973).

Here, section 110.13 is limited on its face to debate staging organizations and does not purport to restrict the personal lives of the organization's agents or employees. The Commission thus reasonably explained that "an individual's leadership role in a given organization does not restrict his or her ability to speak freely on political issues or make contributions to political committees when he or she does so in his or her personal capacity." AR 7220-21; *cf. Lane v. Franks*, 134 S. Ct. 2369, 2378, 2380 (2014) (holding that, unless the "government's needs as an employer" adequately justified restricting speech, statements made by a public employee "as a citizen," as opposed to as part of "official duties," were protected by the First Amendment).

Nor are plaintiffs persuasive in contesting the FEC's reliance on CPD's policies as additional support for their decision. (*See* Pls.' Mem. at 24-26.) Plaintiffs themselves submitted CPD's conflict-of-interest policy, which the Commission found "appear[s] to limit financial conflicts of interest that could arise as a result of outside employment." (AR 7222.) Not only are plaintiffs' assertions that the policy was "violated" reliant on information that is outside the

record (Pls.' Mem. at 25), but that evidence does not support their claim. Even if Fahrenkopf co-chaired a fundraiser for a person who was not then campaigning as a candidate for any office, much less for the presidential or vice-presidential offices, that would not constitute "serving in any official capacity with a campaign." (AR 7221.)

Additionally, in objecting to the Commission's reliance on sworn affidavits provided by the CPD officers and directors, plaintiffs also incorrectly invoke the sham affidavit rule. (Pls.' Mem. at 33 ("The director affidavits are a sham.").) The "sham affidavit rule . . . precludes a party from creating an issue of material fact by contradicting prior sworn testimony unless the shifting party can offer persuasive reasons for believing the supposed correction is more accurate than the prior testimony." *Galvin v. Eli Lilly & Co.*, 488 F.3d 1026, 1030 (D.C. Cir. 2007) (citation and internal quotation marks omitted). Here, plaintiffs' cherry-picked quotes from CPD's directors were not made under oath, and the quoted statements do not necessarily contradict respondents' declarations. For example, Alan Simpson submitted a declaration that directly addressed the quoted statement plaintiffs accuse him of ignoring. (*Compare* AR 3142, *with* Pls.' Mem. at 32.) He explained that he did not recall conducting an interview with the complainant in MUR 5414 and noted that, by employing ellipses, the quote itself demonstrates that it did not reflect his full statement. (AR 3142-43 ¶ 3.) He also averred that the statements the complainant attributed to him "do not fairly or fully reflect my views," and that he "believe[d] that the CPD's debates should include the leading candidates for president and vice-president, regardless of party affiliation," but exclude "candidates who have only marginal national electoral support." (*Id.* ¶ 4.)

That some of the declarations in the record were nearly identical does not itself render them ineligible for consideration. *E.g.*, *Lee v. Metrocare Servs.*, 980 F. Supp. 2d 754, 760 n.1

(N.D. Tex. 2013) (denying motion to strike declarations because the fact that they "contain virtually identical assertions goes to their weight and credibility, not their admissibility"). Plaintiffs' speculation that the CPD officers and directors committed joint perjury after "one person simultaneously distributed a form affidavit to all nine directors, most of whom immediately signed it, and none of whom made a single substantive change" (Pls.' Mem. at 32) is unconvincing. The more likely explanation is that the declarations were signed because they are accurate, which is why each of them was submitted "under penalty of perjury that the foregoing is true and correct." (*E.g.*, AR 7145.)

c. The Commission's Evaluation of Plaintiffs' Evidence Regarding CPD's 15 Percent Polling Threshold Was Not Arbitrary

The Commission's review of plaintiffs' expert evidence was equally thorough and far from arbitrary. In taking issue with several of the Commission's evidentiary determinations, plaintiffs once again misapprehend the nature of the Court's review. It is not the Court's role to evaluate the evidence *de novo* but to "defer to the FEC unless the agency fails to meet the 'minimal burden of showing a 'coherent and reasonable explanation [for] its exercise of discretion.'" *LPF I*, 232 F. Supp. 3d at 140 (quoting *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985)). Because the Commission's detailed evaluation of plaintiffs' expert reports readily passes this standard, plaintiffs cannot meet their burden to show that the Commission's dismissal was arbitrary or capricious.

i. Young's Report

It was reasonable for the Commission to conclude that Young's single-variable regression model, focusing exclusively on the issue of name recognition, significantly limited the probative value of his report. (AR 7224-25.) Young himself admitted that "[m]ultiple factors, many of them beyond a candidate's control, influence a candidate's vote share." (AR 2492

(Young Rep. ¶ 9)). In finding that Young failed to take account for several significant variables that impact vote share, including, *inter alia*, "'fundraising, candidate positioning, election results, . . . idiosyncratic events,'" and "'laying the ground work for a run quite early on,' [such as] efforts to 'hire staff, cultivate early support, [and] brush[ing] up [on] media skills'" (AR 7225 & n.104 (quoting Young Rep.¶ 20(d); Nate Silver, *A Polling Based Forecast of the Republican Primary Field*, FiveThirtyEight Politics (May 11, 2011))), the FEC acted in conformance with the D.C. Circuit's own observation that "[i]t is commonly understood that the more variables that are included in a regression analysis, the more likely it is that the model describes accurately the phenomenon it is being used to explain." *Appalachian Power Co. v. E.P.A.*, 135 F.3d 791, 804 (D.C. Cir. 1998) (per curiam); *accord Love v. Johanns*, 439 F.3d 723, 731-32 (D.C. Cir. 2006) (finding unpersuasive expert analysis that did not account for important variables). Because Young failed to take account of so many of these important drivers of vote share, it was reasonable for the Commission to find that his analysis did not persuasively demonstrate the extent of the claimed direct relationship between increasing name recognition and increasing vote share. (AR 7225.) As the Commission observed, "no matter how recognizable a candidate is, the candidate may, nonetheless, be unpopular." (*Id.*)

The Commission also reasonably found that "neither the Young Report nor the Complaints and their voluminous exhibits ever establish that independent candidates do not or cannot meet 60-80 percent name recognition." (AR 7225.) In fact, the Commission pointed to a YouGov poll from August 25-26, 2016, which "found that 63 percent of registered voters had heard of Libertarian Gary Johnson and 59 percent had heard of Green Party candidate Jill Stein." (*Id.*) Plaintiffs take issue with the YouGov poll the Commission cites (Pls.' Mem. at 26-27 & n.36) by seeking to draw a distinction between registered voters and the population at large. But

registered voters plainly are a relevant group when it comes to election polling, which is why Young himself used such data in his own analysis. (AR 2494 (Young Rep. ¶ 12(a) (noting that the "public opinion data cited in this analysis samples several different portions of the American population," including "registered voters"); *id.* ¶ 12(b) ("On name recognition questions, this analysis includes samples of all Americans, registered voters and likely voters."); *id.* ¶ 12(c) (stating that "[g]eneral election ballot questions most commonly use samples of registered or likely voters").)

Nor did the Commission err in finding Young's opinion regarding polling error unpersuasive. (*Contra* Pls.' Mem. at 28.) The Commission's decision to give CPD's expert's opinion greater weight was reasonable and should not be disturbed. *Wisc. Valley Improvement v. F.E.R.C.*, 236 F.3d 738, 746-47 (D.C. Cir. 2001) (explaining that the presence of disputing experts is a "classic example of a factual dispute" implicating agency expertise and requires deference to the "informed discretion of the responsible federal agencies" (internal quotation marks omitted)); *Bean Dredging, LLC v. United States*, 773 F. Supp. 2d 63, 81 (D.D.C. 2011) ("[A]bsent clear error, an agency's credibility decision normally enjoys almost overwhelming deference." (citation and internal quotation marks omitted)). And plaintiffs' attempt to draw out a conflict (Pls.' Mem. at 28) 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. Similarly unpersuasive are plaintiffs' claims with respect to polling error in light of the Commission's consideration of both experts' analyses. (AR 7229-32.) As the FEC observed, "all candidates must abide by the same polls, and thus equally endure whatever errors may be present." (AR 7232.) Having carefully considered Young's report and weighed it

against that of CPD's expert and its own expertise, the FEC reasonably determined that aspects of Young's report were unpersuasive.

ii. Schoen's Report

The Commission's treatment of Schoen's analysis also was not arbitrary and the opposite of "superficial." (*Contra* Pls.' Mem. at 29.) As a preliminary matter, it is undisputed that Schoen's opinion was premised on Young's conclusions and thus incorporated all of the deficiencies the Commission identified in analyzing Young's report. In addition, the FEC's analysis of Schoen's opinion can be sustained on the single basis that Schoen's opinion that an independent candidate must spend at least $266 million to reach at least 60% name recognition (AR 2555 (Schoen Rep. at 2)) was shown to be considerably off the mark given Gary Johnson's actual experience. As the Commission observed, Johnson reached 63% name recognition by late-August 2016 but had "raised only $7.9 million and spent only $5.4 million." (AR 7228.) This is "a mere *2-3 percent* of the $266 million that Schoen estimates an independent candidate would need to achieve 60-80 percent name recognition." (*Id.*)

Plaintiffs' argument that "[i]ndependent candidates must pay for media exposure" (Pls.' Mem. at 30) is similarly contrary to the experience of the 2016 election. Neither Johnson nor Green Party candidate Jill Stein were ever "'certainly in the debates,'" yet they both received free media attention. (AR 7226 (citing as an example Supp. Brown Decl. ¶ 16) (identifying over 60 appearances by Johnson and Stein in media outlets including ABC, CBS, CNN, PBS, C-SPAN, *USA Today*, *Time*, *People*, the *New York Times*, and others).) Nor are plaintiffs correct in supposing that super PACs are unavailable to independent candidates because "Super PAC donors contribute to candidates they think can win." (Pls.' Mem. at 30.) As the Commission explained, super PACs spent several million expressly advocating for Johnson in the 2016

election. (AR 7227 n.114.) "Such independent support likely increases a candidate's name recognition at no cost to the candidate, thereby reducing the total sum that the candidate must spend to achieve 60-80 percent name recognition." (AR 7228.) And plaintiffs' complaints about the efficacy of digital media (Pls.' Mem. at 30-31) is discordant with the actual experience of social media in the 2016 elections. As the FEC explained, Donald Trump achieved efficiencies by "focusing his spending on digital platforms like Facebook and Twitter." (AR 7227.)

Furthermore, the Commission did not apply a "'presum[ption]' that independent candidates begin their campaign with meaningful name recognition." (Pls.' Mem. at 31.) Rather, the Commission noted that Schoen's analysis did not account for the fact that "independent candidates frequently do not start from zero in terms of either name recognition or fundraising." (AR 7228.) As the Commission observed, "Gary Johnson and George Wallace . . . were both governors before running for president and thus *presumably* enjoyed at least regional recognition." (AR 7228.) Again, not starting from zero name recognition may have explained why Johnson achieved a high level of name recognition at a fraction of the cost predicted by Schoen's model. The Commission's analysis of Schoen's report was reasonable.

iii. The 15 Percent Threshold

"Having carefully weighed and considered the analyses of the parties' respective experts," as well as "the Commission's judicially upheld determinations that independent candidates of the past *have* reached 15 percent in the polls," the Commission concluded that there was not a sufficient basis to conclude that CPD's 15 percent polling threshold was not an objective debate criteria. (AR 7229, 7232.) CPD selected that threshold to "ensure[] that [the] debate itself is not 'hindered by the sheer number of speakers,'" and to "best balance[] the goal of being sufficiently inclusive to invite those candidates considered to be among the leading

candidates," without "creating an unacceptable risk that leading candidates with the highest levels of public support would refuse to participate." (AR 7210 (citation and internal quotation marks omitted).)

The Commission's conclusion that CPD's 15 percent threshold is objective is reasonable. Indeed, a 15 percent threshold is unquestionably objective on its face. Nor is it biased in effect, because "independent candidates have demonstrated that they are able to achieve 15+% support in the polls at or near the time of the debates." (AR 7223 (identifying George Wallace, John Anderson, and Ross Perot as examples).) Though plaintiffs now assert that several of these independent candidates should not count because they were not "truly independent" (Pls.' Mem. at 34), plaintiffs' inchoate purity test does not change the fact that these were independent candidates who enjoyed significant electoral success. For its part, CPD has demonstrated that it will invite an independent candidate to participate in its debates when that candidate satisfies the applicable candidate criteria, as in the case of Perot's invitation to the 1992 debates.

II. THE FEC'S DENIAL OF LPF'S RULEMAKING PETITION WAS NOT ARBITRARY OR CAPRICIOUS

Plaintiffs' claims regarding the Commission's decision not to initiate a new rulemaking largely overlap with their claims regarding the dismissed enforcement matters and should be rejected for the same reasons. Because plaintiffs cannot show that the FEC's decision was arbitrary or capricious, the Court should grant summary judgment to the Commission on plaintiffs' rulemaking claims.

A. Standard of Review for Denial of Rulemaking Petition

As this Court recognized, "[t]he court's review of an agency's decision not to engage in rulemaking is very limited, and that decision 'is at the high end of the range of levels of deference we give to agency action under our 'arbitrary and capricious' review.'" *LPF I*,

232 F. Supp. 3d at 145-46 (quoting *Defs. of Wildlife*, 532 F.3d at 919 (internal citations omitted)). "The proper inquiry is 'whether the agency employed reasoned decision-making in rejecting the petition.'" *Id.* at 146. "In making this assessment, the court 'must examine the petition for rulemaking, comments pro and con . . . and the agency's explanation of its decision to reject the petition.'" *Id.* (quoting *Am. Horse Prot. Ass'n., Inc. v. Lyng*, 812 F. 2d 1, 5 (D.C. Cir. 1987) (internal quotation and citation omitted)). Where, as here, "the proposed rule pertains to a matter of policy within the agency's expertise and discretion," the scope of review is limited to ensuring that the agency has explained the facts and policy concerns it relied upon and those facts have some basis in the record. *Defs of Wildlife*, 532 F.3d at 919 (citation and internal quotation marks omitted). For the reasons previously explained, plaintiffs' arguments for reduced deference are unavailing. *See supra* pp. 21-23.

B. The FEC's Denial of LPF's Rulemaking Petition Conforms with the Court's Remand Decision and Is Not Otherwise Arbitrary or Capricious

Like the Factual & Legal Analysis of plaintiffs' administrative complaints, the Supplemental NOD conforms with the Court's remand decision. As instructed, in more than six, single-spaced triple column pages in the Federal Register, the Commission thoroughly identified the substantial limitations of LPF's evidence and thus "why it [rejected petitioner LPF's] request for a specific debate rule for presidential and vice-presidential debates." *LPF I*, 232 F. Supp. 3d at 147. The Commission's analysis of the evidence was reasonable. As in the case of plaintiffs' administrative complaints, the Commission's assessment of the Young and Schoen expert reports reasonably demonstrated the agency's determination that these materials did not provide a sufficient basis to initiate a rulemaking. *See supra* pp. 16-18, 36-40.

Plaintiffs do not seriously contend otherwise. Rather, they raise a series of insubstantial objections to the Commission's assessments of the expert reports, none of which is compelling.

Responding to the Commission's critique that Young's report inappropriately extrapolates from data taken from the early stages of the election (AR 1933), plaintiffs argue that "Young said that the 60-80% result is based on polling data from every stage of the election, including 'late primary' and 'general' election polling." (Pls.' Mem. at 36.) This is unpersuasive because even late primary polling fails to "address or account for differences in the size of the candidate fields at those points in time" (AR 1933) and, more importantly, because the page in the Administrative Record plaintiffs cite does not actually show any use of general election polling. (AR 2520 (only using early and late primary stages of election cycle).) Plaintiffs' other counterpoint is the incorrect assertion that "causative effect *must* be implied" between name recognition and vote share. (Pls.' Mem. at 36-37.) As the FEC explained, however, name recognition does not necessarily lead to a positive opinion about that person. (AR 1933.) When Gary Johnson received significant attention regarding his lack of knowledge about Aleppo, that attention may have increased the number of Americans who learned his name while simultaneously decreasing their likelihood of telling pollsters that they would vote for him. (*Accord* AR 1935 n.12 (mentioning Jeb Bush as an example of a candidate whose name recognition did "not translate to high vote share").)

Plaintiffs' additional arguments regarding Schoen's report are similarly without merit. Plaintiffs devote nearly five pages and a counsel declaration to criticizing a single statement in the Supplemental NOD and its accompanying footnote. (Pls.' Mem. at 37-42.) Plaintiffs focus on the Commission's response to Schoen's assertion that "'the media will not cover an independent candidate until they are certainly in the debates.'" (AR 1933.) That response included the agency's observation that "the report provides no basis for this assertion other than an unexplained reference to the number of publications 'follow[ing]' one particular candidate"

and the agency's awareness "of at least three non-major-party candidates who did not participate in the general election debates but received significant media attention in 2016." (*Id.*) In the accompanying footnote, the Commission described searches of Westlaw's Newspaper database for the names of Gary Johnson, Jill Stein, and Evan McMullin. (AR 1933 n.6.) Plaintiffs do not dispute that Schoen's authority for his assertion regarding earned media was unpersuasive. Nor do they dispute the FEC's assertion that Johnson, Stein, and Evan received significant media attention in 2016. (Pls.' Mem. at 38 (acknowledging that the total number of articles mentioning the candidates "appear[ed] sizeable").) Rather, they rail against the unsurprising fact that Republican and Democratic party candidates like Donald Trump and Hillary Clinton received considerably more media attention and devote extensive evidence to the FEC's failure to ensure that every single one of more than 3,000 news articles referencing "Gary Johnson" was about the candidate. (Pls.' Mem. at 39-40.) Plaintiffs' lavish attention on footnote six — without disputing the essential point that the media *does* cover independent candidates — does nothing but betray the thinness of their claim that the entire Supplemental NOD is arbitrary.

Plaintiffs also fail to rehabilitate Schoen's use of "obsolete data" (AR 1934) by relying on scant references to a few more recent online articles (Pls.' Mem. at 42) and incorrectly argue that party nominating processes are available only to Democrats and Republicans (*id.*). Plaintiffs' contortions over what Rick Santorum spent in Iowa (*id.*) misstate what Schoen plainly said ("Rick Santorum . . . spent only $21,980 in the state" (AR 0169)) and fails to undermine the FEC's observation that the data filed with the agency shows that "Santorum spent over $112,000 in Iowa between October 1 and December 31, 2011" (AR 1934). Lastly, plaintiffs challenge without any basis the FEC's note that it did not have Schoen's underlying media data. (Pls.' Mem. at 43.) As plaintiffs themselves explain (*see id.*), they chose not to include this data with

LPF's rulemaking petition, thus deliberately excluding from the administrative record data they now apparently wish to rely upon.

C. Plaintiffs' Requested Relief Is Improper

In addition to their meritless arguments that the FEC erred in denying LPF's rulemaking petition on remand, plaintiffs improperly request that the Court order the FEC to open a rulemaking within 30 days and adopt a new regulation regarding presidential debates "in sufficient time to ensure that the revised rules will be in place for the 2020 presidential election." (Am. Supp. Compl. For Declaratory and Injunctive Relief ¶ 82 (Docket No. 76).) Plaintiffs are nowhere near the very high threshold required to compel rulemaking. As previously concluded in this District, "[e]ven if the Court believes as a matter of policy that rulemaking is viable for the [statutory] test, the Court may not substitute this judgment for the agency's decision." S*hays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007) (holding that FEC's explanation following remand was sufficient and, applying the applicable standard of review, upholding the agency's decision to proceed on a case-by-case basis despite prior contrary arbitrary and capricious decision). Moreover, the speed and procedures an agency chooses to conform its regulations to court decisions are normally left to the discretion of the agency. *See, e.g., Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 67 (2004) ("The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with . . . congressional directives is not contemplated by the APA."). Accordingly, even if the Court could credit plaintiffs' arguments, the appropriate remedy would be remand, not compelling the agency to complete plaintiffs' proposed rulemaking without regard to other agency priorities.

CONCLUSION

For the foregoing reasons, the Court should grant the Commission's motion for summary judgment and deny plaintiffs' motion for summary judgment.

Respectfully submitted,

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