**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| LEVEL THE PLAYING FIELD, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | Civ. No. 15-1397 (TSC)<br><br>FEC REPLY BRIEF |

**DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT**

Daniel A. Petalas (D.C. Bar No. 467908)
Acting General Counsel
dpetalas@fec.gov

Erin Chlopak (D.C. Bar. No. 496370)
Acting Assistant General Counsel
echlopak@fec.gov

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law
lstevenson@fec.gov

Robert W. Bonham III (D.C. Bar. No. 397859)
Senior Attorney
rbonham@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Jin Lee (D.C. Bar. No. 484455)
Attorney
jlee@fec.gov

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

July 13, 2016

**TABLE OF CONTENTS**

**Page**

## TABLE OF AUTHORITIES

**Cases**

**Statutes and Regulations**

## INTRODUCTION

In its opening brief, the Federal Election Commission ("FEC") explained that under the highly deferential standard of review that the Court must apply here, the agency's dismissal of plaintiffs' administrative complaints and denial of Level the Playing Field's ("LPF") petition for rulemaking were proper exercises of agency discretion and not contrary to law. The FEC demonstrated that it applied prior agency and court precedent in a consistent manner to reasonably conclude that there was no reason to believe that the Commission on Presidential Debates ("CPD") violated the law. (FEC's Mem. in Supp. of Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 16-34 (Docket No. 43) ("FEC Mem.").) The FEC further demonstrated that it had reasonably denied LPF's rulemaking petition, which sought to impose a *per se* ban on debate staging organizations' use of polling results in determining candidates' eligibility to participate in general election debates based on the alleged conduct of one entity, CPD. (*Id.* at 34-45.)

Plaintiffs' responses fail to establish that the FEC's actions were contrary to law or otherwise an abuse of the Commission's broad discretion. As reflected in plaintiffs' arguments both to the FEC and this Court, their case largely rests on their subjective preferences and purported policy reasons for expanding CPD's general election presidential and vice presidential debates in order to ensure inclusion of candidates who were not associated with the two major political parties. Such subjective policy preferences fail to demonstrate any basis for finding the Commission's decisions at issue here unlawful. Indeed, rather than attempt to satisfy their heavy burden and explain how FEC actions that did not enact plaintiffs' preferred policies were necessarily *contrary to law*, plaintiffs instead ask the Court to disregard decades of binding precedent by declining to defer to the Commission here. Plaintiffs acknowledge that prior

reviewing courts have affirmed the FEC's dismissals of similar allegations against CPD, while insisting that their latest characterizations and allegations require a different outcome here. They do not. The FEC properly exercised its broad discretion and reasonably found that there was insufficient information to establish that CPD violated the law and there were no compelling circumstances warranting a new rulemaking. Summary judgment should be awarded to the FEC.

## ARGUMENT

### I. THE FEC IS ENTITLED TO DEFERENTIAL REVIEW

It has long been settled that the FEC is entitled to deferential review of its administrative decisions. *See, e.g.*, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*") ("[T]he Commission is precisely the type of agency to which deference should presumptively be afforded."); *Hagelin v. FEC*, 411 F.3d 237, 242-43 (D.C. Cir. 2005); *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988); *Becker v. FEC*, 230 F.3d 381, 390 (1st Cir. 2000). In particular, where, as here, plaintiffs challenge the Commission's dismissal of an administrative complaint, the court *must* defer to the FEC unless the agency fails to meets the "minimal burden of showing a 'coherent and reasonable explanation [for] its exercise of discretion.'" *Carter/Mondale Presidential Comm., Inc. v. FEC*, 775 F.2d 1182, 1185 (D.C. Cir. 1985) (quoting *MCI Telecom Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982)); *see Common Cause v. FEC*, 108 F.3d 413, 415 (D.C. Cir. 1997) (per curiam) ("A court may not disturb a Commission decision to dismiss a complaint unless the dismissal was based on an 'impermissible interpretation of [FECA] . . . or was arbitrary or capricious, or an abuse of discretion.'"); *see generally* FEC Mem. at 12-15. The Commission's decision not to institute rulemaking proceedings is similarly subject to an "'extremely limited' and 'highly deferential'" standard of review (*see* FEC. Mem. at 15 (citing *Massachusetts v. E.P.A.*, 549 U.S. 497, 527-28

(2007))), and may be overturned "'only in the rarest and most compelling circumstances,'" *Defs.' of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008) (citation omitted).

Indeed, in cases like this one in which an agency has made determinations within its area of expertise, "deference is at its zenith." *Nat'l Wildlife Fed. v. Westphal*, 116 F. Supp. 2d 49, 57 (D.D.C. 2000); *see Buchanan v. FEC*, 112 F. Supp. 2d 58, 70 (D.D.C. 2000) ("Deference is particularly appropriate in this case because it involves the FEC's interpretation of its own regulations . . . . [T]he court 'is not to decide which among several competing interpretations best serves the regulatory purpose.'"), *aff'd in part*, Order, No. 00-5337 (D.C. Cir. Sept. 29, 2000), http://www.fec.gov/law/litigation/buchanan00_ac_order.pdf; FEC Mem. at 13. Plaintiffs have failed to identify any authority supporting their request that the Court depart from this well-settled, binding authority here.

Instead, plaintiffs argue that this Court should decline to defer to the Commission because the FEC is supposedly "bias[ed]." (Pls.' Reply Mem. of P. & A. in Further Supp. of their Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. at 4 (Docket No. 47) ("Pls.' Opp'n.").) But plaintiffs' only purported support for that accusation is their mischaracterization of the Commission's statutorily required composition as "bipartisan" and their reference to the Commission's prior, consistent decisions to reject similar allegations against CPD in past matters. (*Id*.) Both arguments are unavailing.

First, plaintiffs' "bipartisan" characterization is simply incorrect. While some courts have imprecisely described the FEC as "bipartisan" in the past, *e.g.*, *DSCC*, 454 U.S. at 37, FECA merely provides that "[n]o more than 3 members of the Commission . . . may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). The Act clearly does not require Commissioners to represent only the two major parties, as plainly reflected by the current

composition of the FEC.[1] The no-more-than-three requirement ensures that no single political party can dictate FEC decisions where four votes are required and the Commission continues to be entitled to deference on that basis. Plaintiffs' "bias" argument attempts to turn congressional will on its head by misrepresenting the agency's FECA-compliant composition as supposed "evidence" of Commission partisanship.

Plaintiffs' attempt to show bias through the Commission's consistency in its prior rejections of similar allegations against CPD is equally backwards. Plaintiffs' *characterization* of such past decisions as a "history of acquiescence to the CPD" (Pls.' Opp'n at 4) ignores that courts have uniformly *upheld* the FEC's actions in those matters, as the Commission previously explained (FEC Br. at 26). *See Hagelin v. FEC*, 411 F.3d 237 (D.C. Cir. 2005); *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000); Order, *Natural Law Party*, No. 00-02138 (D.D.C. Sept. 21, 2000), http://www.fec.gov/law/litigation/NatLaw_dc_order_judg.pdf, *aff'd per curiam*, Order, No. 00-5338 (D.C. Cir. Sept. 29, 2000), http://www.fec.gov/law/litigation/NatLaw_dc_order.pdf. Plaintiffs' claim that the Commission's consistency demonstrates bias is also contrary to courts' recognition that consistency in agency decisions "is certainly an indicium of reasonableness." *Buchanan*, 112 F. Supp. 2d at 76 (citing *DSCC*, 454 U.S. at 37). Indeed, in *Natural Resources Defense Council, Inc. v. SEC*, inaptly relied upon by plaintiffs (Pls.' Opp'n at 4), the court determined that it would apply more exacting scrutiny where an agency "has had a history of 'ad hoc and *inconsistent* judgments' on a particular question. 606 F.2d 1031, 1049 n.23 (D.C. Cir. 1979) (emphasis added).

[1] As the Commission previously explained, (FEC Mem. at 14 n.8), Vice Chairman Walther, who has been a member of the Commission for more than ten years, is not registered with any political party.

In addition, the CDP's adoption of a 15 percent polling threshold is also a poor candidate for demonstrating organizational bias because, as the petition itself acknowledged, the non-partisan League of Women Voters relied upon that same threshold for presidential debates before the CPD's formation in 1987. (AR0022; *see also* Comment of CPD, Ex. 1 (AR0437); Br. of *Amicus Curiae* Comm'n on Presidential Debates in Supp. of Def.'s Mot. for Summ. J. at 5-6 (Docket No. 45) ("Br. of CPD").)

Finally, plaintiffs' arguments (Pls.' Opp'n at 3) that the deferential standard of review that applies here "does not permit 'judicial inertia'" or "require the court to be a potted plant," or "to accept meekly 'administrative pronouncements clearly at variance with established facts,'" or to "uphold unreasonable decisions" are simply strawmen. The Commission of course has never suggested any such interpretation of the applicable standard.

Plaintiffs' subjective disagreement with the Commission and the courts and their unfounded accusations of bias fail to demonstrate any legal basis for departing from the deferential review the Court is required to apply here.

## II. THE FEC DISMISSALS OF THE ADMINISTRATIVE COMPLAINTS IN MATTERS UNDER REVIEW 6869 AND 6942 WERE NOT CONTRARY TO LAW

### A. The Challenged Dismissal Decisions Were a Lawful Exercise of the FEC's Broad Discretion and Are Consistent with Prior FEC and Judicial Decisions

The FEC's opening brief explained (FEC Br. 16-26) that the dismissals here were consistent with prior FEC and court decisions and plaintiffs have failed to demonstrate that it was contrary to law for the FEC not to revisit those precedents. Similar to plaintiffs here, the administrative complainants in multiple prior administrative matters, including complainants related to the Green Party plaintiff here, alleged that CPD violated FECA's ban on corporate contributions, 52 U.S.C. § 30118(a), in connection with its sponsorship of past presidential

debates, because CPD allegedly endorsed, supported, or opposed political candidates or political parties and thus was not a qualified debate sponsor under 11 C.F.R. § 110.13(a)(1), or because CPD allegedly failed to use pre-established objective criteria to determine which candidate may participate as required under 11 C.F.R. § 110.13(c). (*See* FEC Br. 17-18.) As explained above and in the FEC's opening brief (*id.* at 18-26), Commissioners unanimously rejected such allegations and subsequent attempts to challenge the Commission's dismissals of those prior administrative complaints were uniformly unsuccessful. The FEC sensibly relied on this precedent in dismissing MURs 6869 and 6942, and those reasonable determinations, in an area of the FEC's expertise, are entitled to the highest deference. *DSCC*, 454 U.S. at 37; *Nat'l Wildlife Fed.*, 116 F. Supp. 2d at 57.

In their opposition, plaintiffs detail their subjective *disagreement* with the FEC's dismissal decisions, but they fail to demonstrate that those decisions were contrary to law. In particular, plaintiffs' argument (Pls.' Opp'n at 4-5) that the Commission adopted "an erroneous interpretation" of its own regulation, 11 C.F.R. § 110.13(a), lacks legal support and is directly contrary to the court's decision in *Buchanan*. Indeed, in *Buchanan*, the district court concluded that the Commission's "rejection of [similar] allegations . . . was based on a *reasonable* interpretation of 11 C.F.R. 110.13." 112 F. Supp. 2d at 70 (emphasis added).

Plaintiffs attempt to minimize the significance of *Buchanan* by focusing on its "control over" analysis, which considered whether the major political parties controlled or influenced CPD, a claim raised by the administrative complainants (later plaintiffs) in that case (Pls.' Opp'n at 5-7). But the decision is not so limited. The court more broadly found that the Commission had reasonably exercised its wide discretion in finding no reason to believe that CPD is a partisan organization ineligible for the safe harbor for groups that do not "'endorse, support, or

oppose political candidates or political parties.'" *Buchanan*, 112 F. Supp. 2d at 70 (quoting 11 C.F.R. § 110.13(a)(1)); *see id.* at 71-73. It determined that the Commission had reasonably concluded that CPD's debate selection criteria were "pre-established and objective." *Id.* at 73-76 (internal quotation marks omitted). In so concluding, the court specifically observed that the Commission's regulations do "not spell out precisely what the phrase 'objective criteria' means" and that the regulation accordingly does not mandate any particular criteria but instead provides debate staging organizations like CPD "'leeway to decide what specific criteria to use.'" *Id.* at 73 (quoting *Perot v. FEC*, 97 F.3d 553, 559-60 (D.C. Cir. 1996)). Those conclusions support the Commission's dismissal decisions here as well.

At the same time, plaintiffs' insistence (Pls.' Opp'n at 5) that the Commission "has adopted the 'control over' test as its governing interpretation of § 110.13(a)" fails to account for the Commission's further reliance on the lack of evidence "'that any officer or member of the DNC or the RNC is involved in the operation of the CPD'" or "'had input into the development of the CPD's candidate selection criteria.'" (FEC Mem. at 21.) Indeed, rather than respond to this aspect of the Commission's analysis, plaintiffs oversimplify and mischaracterize it as a test under which "whether an 'officer or member' of a party is 'involved in the operation of the CPD' is *dispositive* of the CPD's partisanship." (Pls.' Opp'n at 11 (emphasis added).) But plaintiffs' omissions and mischaracterizations are not *evidence* in support of their renewed allegations against CPD.

Plaintiffs alternatively challenge the brevity of the FEC's explanations for its dismissal decisions (Pls.' Opp'n at 7), but *Buchanan* undermines that argument as well. Indeed, the court in *Buchanan* upheld the Commission's dismissal decisions notwithstanding the court's observation that the Commission's "terse explanation could have been more clear and thorough."

112 F. Supp. 2d at 72. Serial administrative complaints by the same or similarly interested parties, like the complaints here against CPD, are not uncommon. *See also, e.g., Nat'l Rifle Ass'n. v. FEC*, 854 F.2d 1330 (D.C. Cir. 1988); *Jordan v. FEC*, No. 91-2428-NHJ (D.D.C. May 27, 1994), http://www.fec.gov/law/litigation/jordan_dc_order.pdf (dismissing similar complaint by NRA member), *aff'd on other grounds*, 68 F. 3d 518 (D.C. Cir. 1995). In light of that phenomenon, an agency's adherence to its own precedent is hardly arbitrary. *Hall v. McLaughlin*, 864 F. 2d 868, 872 (D.C. Cir. 1989) ("Reasoned decisionmaking requires treating like cases alike"); *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F. 2d 677, 683 (D.C. Cir. 1984) (noting that "abrupt and unexplained departure from agency precedent" amounts to arbitrary and capricious action). On the contrary, "[w]here the reviewing court can ascertain that the agency has not . . . diverged from past decisions, the need for comprehensive and explicit statement of [the agency's] current rationale is less pressing." *Hall*, 864 F. 2d at 872. The agency's explanation in such cases "need not be elaborate" and courts will uphold agency findings "'of less than ideal clarity, if the agency's path may reasonably be discerned.'" *Hall*, 864 F. 2d at 872-873 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C.Cir.1970)).

Plaintiffs offer no legal basis for rejecting the FEC's determinations within its area of expertise, when deference to the agency is "at its zenith." *Nat'l Wildlife Fed.*, 116 F. Supp. 2d at 57. Under the highly deferential standard of review that applies here, plaintiffs' have failed to carry their burden and the Commission's dismissal decisions must be affirmed.

### B. The Commission's Disagreement with Plaintiffs' Characterization of Their Evidence Does Not Render the Dismissal Decisions Contrary to Law

Contrary to plaintiffs' arguments (Pls.' Opp'n at 7), the FEC's determination that plaintiffs' factual allegations did not support reason-to-believe findings in MURs 6869 and 6942

does not mean that the FEC failed to adequately consider such allegations. Plaintiffs' propose a contrary interpretation of the evidence they submitted to the Commission, but that does not prove that the Commission's assessment of plaintiffs' administrative complaints was inadequate and contrary to law.

As the Commission previously explained, its Factual and Legal Analyses in these matters describe the Commission's consideration of plaintiffs' allegations and evidence (*see* FEC Mem. at 8-9), and support the FEC's dismissal decisions challenged in this case. Plaintiffs continue to insist (Pls.' Opp'n at 10-11) that the *personal* partisan activities of individuals affiliated with CPD are dispositive evidence that CPD *itself* has engaged in partisan activities. In plaintiffs' view, "the people who run the CPD" are "diehard partisans" and the notion that "somehow the organization itself could remain nonpartisan, borders on laughable." (*Id.*) The Commission was not required to adopt plaintiffs' hyperbolic characterizations and legally unsupported conclusions. Indeed, plaintiffs have provided no authority for the sweeping interpretation they advocate, and it is not legally required. In fact, declining to attribute personal, individual actions to an entity with which an individual is affiliated is common in various areas of the law, including FECA's soft money restrictions where the Act distinguishes political party committees from actions taken by their officers in their individual capacities. Party committees are prohibited from soliciting soft money, *see* 52 U.S.C. § 30125(a), (d), but "officers of national parties are free to solicit soft money in their individual capacities." *McConnell v. FEC*, 540 U.S. 93, 157 (2003), *overruled on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010).[2]

[2] Plaintiffs' assertion that the "Internal Revenue Code is not a substitute for FECA" (Pls.' Opp'n at 11) mischaracterizes CPD's appropriate *analogy* to the Internal Revenue Services' guidance for churches and religious organizations. (*See* Br. of CPD at 3 n.1 (May 11, 2016) (Docket No. 45)). Neither CPD nor the Commission has suggested that the tax code is controlling here.

Moreover, contrary to plaintiffs' "'*post hoc* rationalization[]'" accusations (Pls.' Opp'n at 10), the Commission's Factual and Legal Analyses in MURs 6869 and 6942, which are before the Court here, cited and relied upon authority that addressed this point. (*See* AR3177-AR3179 (discussing history of matters with allegations the CPD is partisan); AR5005-AR5010 (same)), In MUR 4987 (Buchanan), the administrative complainants similarly alleged that CPD was created and controlled by the former chairmen of the Republican and Democratic parties, and continued to be controlled by a board of directors consisting of persons "affiliated" or "closely identified" with the two parties."[3] The complaint in MUR 5004 contained similar allegations.[4] When the court reviewed the Commission's dismissals of those matters in *Buchanan*, it expressly acknowledged that the membership of CPD's board "consisted largely of current and former elected officials from both parties as well as party activists," but nevertheless upheld the FEC's dismissal decisions. *Buchanan*, 112 F. Supp 2d at 71-73. As explained *infra* pp. 18-19, the Commission properly articulated its rationale for the challenged dismissal decisions by reference to other decisions, including in the *Buchanan* matters, and amplification of those authorities here does not constitute *post hoc* justification.

Requiring CPD and other debate sponsors to prohibit their officers and directors from making contributions to major party candidates also would have potentially serious constitutional implications, going well beyond even the restrictions in the Hatch Act on most federal employees, the rules Congress imposed to ensure a merit-based workforce. *See Wagner v. FEC*,

---

[3] Administrative Complaint, MUR 4987 (Mar. 20, 2000) at 3, 15, 20, http://eqs.fec.gov/eqsdocsMUR/000026F4.pdf.

[4] Administrative Complaint, MUR 5004 (April 24, 2000) at 4, http://eqs.fec.gov/eqsdocsMUR/00002787.pdf ("As has been true since its inception, '[t]he members of the CPD include a former chairman of the Democratic National Committee, a former chairman of the Republican National Committee, and *other representatives* of the Democratic and Republican parties.'" (quoting *Perot*, 97 F.3d at 555-556 (emphasis added)).

793 F.3d 1, 8-9 (D.C. Cir. 2015) (en banc) (explaining that the Supreme Court has upheld the Hatch Act's restrictions on "'political campaigning'" by federal employees in part because "'congressional subordination of those activities was permissible to safeguard the core interests of individual belief and association,'" *i.e.*, "'the Hatch Act aimed to *protect* employees' rights, notably their right to free expression, rather than to restrict those rights'" (quoting *Elrod v. Burns*, 427 U.S. 347, 371 (1976))), *cert. denied sub nom. Miller v. FEC*, __ U.S.__, 136 S. Ct. 895 (2016), and *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 471 (1995)). The Commission plainly was not required to attribute to CPD the political activities and affiliations of its officers, and it certainly was not arbitrary or capricious for the FEC to decline to do so.

As the Commission also previously explained (FEC Mem. at 30), it reasonably accepted the statements in CPD Chairman Frank Fahrenkopf's declaration explaining his description of the composition of CPD's past presidential debates in a prior interview. (AR3119-AR3121.) Plaintiffs' dismissive characterizations of the declaration as "self-serving" and "whitewashing," and of the FEC's acceptance of the declaration as a "rubber-stamp . . . in violation of its legal duties," are not legal arguments that support a finding that the Commission's determinations were contrary to law. (Pls' Opp'n at 12.) The FEC is not required to agree with plaintiffs' subjective assessments of evidence in the record. On the contrary, and as the Court of Appeals has observed, "[t]he 'reason to believe' standard . . . itself suggests that the FEC is entitled, and indeed, required, to make subjective evaluations of claims." *Orloski v. FEC*, 795 F. 2d 156, 168 ( D.C. Cir. 1986); *see* FEC Mem. at 23. The FEC is thus "expected to weigh the evidence before it and make credibility determinations" in reaching its ultimate decision, and such decisions "must be upheld" as long as the Commission presents a "coherent and reasonable explanation." *Buchanan*, 112 F. Supp. 2d at 72 (citing *Orloski*, 795 F.2d at 168; *Carter/Mondale Presidential*

*Comm., Inc*, 775 F. 2d at 1185); *see also* FEC Mem. at 23. Plaintiffs have not sustained their heavy burden of demonstrating that the Commission's explanation was incoherent or unreasonable.

Finally, and as also previously explained (FEC Mem. at 30-31), to the extent the FEC erred by not formally naming ten additional CPD directors listed in plaintiffs' administrative complaints as respondents in MURs 6869 and 6942, any such error was harmless. *See Nader v. FEC*, 823 F. Supp. 2d 53, 67-68 (D.D.C. 2011). Plaintiffs portray the omission of these individuals as respondents as evidence that the Commission was "just protecting the CPD" and failing "to conscientiously do its job and consider the allegations on their merits." (Pls.' Opp'n at 13.) Those unfounded accusations fail to demonstrate any *actual* harm resulting from the oversight. Of course, plaintiffs' allegations regarding these individuals were before the Commission in connection with the CPD, and the agency nevertheless made no reason-to-believe findings against CPD and its co-chairs, and closed the entire files in the two matters. (AR3172-AR3173; AR5000-AR5001.)

In sum, plaintiffs' hyperbole, baseless and dismissive characterizations, and subjective disagreement with the FEC's dismissal decisions fail to demonstrate that those decisions were contrary to law.

### C. The FEC's Determination Regarding CPD's Polling Criterion Was Lawful

The FEC previously demonstrated (FEC Mem. at 31-33), that it was not contrary to law to find CPD's use of a 15% minimum polling criterion permissible under the Commission's safe harbor regulation, 11 C.F.R. § 110.13. Like the FEC's determinations discussed above, the FEC's finding regarding CPD's use of a 15% minimum polling criterion is entitled to substantial deference, particularly where, as here, the same interpretation has already been upheld by courts

in prior challenges. *See, e.g. Buchanan*, 112 F. Supp. 2d at 73-76; *Natural Law Party v. FEC*, Order, No. 00-cv-2138 (ESH) (D.D.C. Sept. 21, 2000), http://www.fec.gov/litigation/NatLaw_dc_order_judg.pdf, *aff'd per curiam*, Order, No. 00-5338 (D.C. Cir. Sept. 29, 2000), http://www.fec.gov/law/litigation/NatLaw_dc_order.pdf).[5] Though that unpublished Court of Appeals order is not technically binding precedent, as plaintiffs point out (Pls.' Opp'n. at 18 n.7), it has "some precedential value" as discussed in the very case cited by plaintiffs, *Martin v. District of Columbia*, 78 F. Supp. 3d 279, 308 n.36 (D.D.C. 2015).

Plaintiffs emphasize the court's statement in *Buchanan* that "'the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it.'" (Pls.' Opp'n at 16 (quoting *Buchanan*, 112 F. Supp. 2d at 74).) But they conspicuously omit the court's subsequent, crucial sentence: "In view of the substantial deference I must accord to the FEC's interpretation of its own regulations, I cannot conclude that it was plainly erroneous or inconsistent with the regulation for the FEC to find the15% support level set by the CPD is 'objective' for the purposes of 11 C.F.R. § 110.13(c)." *Buchanan*, 112 F. Supp. at 74. The district court acknowledged that as a policy matter, "a lower threshold of support might be preferable to many," but nevertheless held that "such a reading is neither compelled by the regulation's text nor by the drafters' intent at the time the regulation was promulgated," and that accordingly, "deference to the FEC's interpretation is warranted." *Id.* Plaintiffs' latest policy arguments in this case do not undermine

[5] As plaintiffs note, *Natural Law Party* was a companion case to *Buchanan*, but it is not true that the D.C. Circuit's summary affirmance had no independent analysis. (Pls.' Opp'n at 18 n.7; *contra* FEC Mem. at 37.) The order stated that "to the extent that appellants argue that even if the safe harbor provisions apply, the fifteen percent electoral support requirement is illegal because it favors some candidates over others, the district court's order filed September 21, 2000 be affirmed substantially for the reasons stated therein." Order, *Natural Law Party v. FEC*, No. 00-5338 (D.C. Cir. Sept. 29, 2000), http://www.fec.gov/law/litigation/NatLaw_dc_order.pdf.

the relevance of *Buchanan*'s holding nor do they render the Commission's reliance on it unlawful.

Unable to overcome *Buchanan*'s holding, plaintiffs argue (Pls.' Opp'n at 14-16) that the FEC's disagreement with their conclusion that CPD's polling criterion was "systematically biased" demonstrates that the Commission "failed to consider" plaintiffs' allegations. Plaintiffs are wrong. As explained in the FEC's opening brief (FEC Br. at 33), the Commission reviewed plaintiffs' evidence and provided its reasons for concluding that such evidence did not undermine the agency's reliance on its decisions in prior matters that CPD's 15% polling criterion was permissible under section 110.13(c). Plaintiffs criticize (Pls.' Opp'n at 14) the *location* of this explanation — in a footnote — but once again substitute characterizations and labels ("conclusory" and "*ipse dixit*") for authority supporting their assertions.

Importantly, plaintiffs' arguments regarding polling in this case not only are unavailing, they are internally inconsistent. For example, plaintiffs previously criticized polling because the margins of error could result in flawed decisions (Pls.' Mem. of P. & A. in Supp. of Mot. for Summ. J. at 3-4, 18-19), but as the Commission explained (FEC Mem. at 36), the *Buchanan* court recognized that all polls have a margin of error, so "some degree of imprecision is inevitable in almost any measurement," and "[s]uch imprecision alone does not make a predictor subjective such that it favors one group of candidates over another." 112 F. Supp. 2d at 75. The court in *Buchanan* also noted that polling errors work in both directions so polls could just as easily overestimate a candidate's support (resulting in inclusion) as underestimate support (resulting in exclusion). *Id.* As discussed *infra* p. 19, plaintiff LPF's own expert recognized this very point. (*See* FEC Br. at 37; AR0190.)

Plaintiffs have no response to these logical conclusions (or to their own expert's recognition of them, *see infra* p. 19). Instead, they have now recast their position as objecting to polling only when it is the "*exclusive* criterion for accessing the general election presidential debates" (Pls.' Opp'n at 16 (emphasis in original).) But that new argument fails to advance plaintiffs' claims here. CPD uses *three* different criteria for determining who may participate in a general election presidential debate: (1) constitutional eligibility to serve as president; (2) qualifying for enough state ballots to have at least a mathematical chance of securing an electoral majority; and (3) minimum public support. (AR3117-AR3118; AR5006.) Plaintiffs' attempt to fix the flaws of their margin-of-error argument thus ultimately undermine that argument entirely. *See also infra* pp. 18-19.

## III. PLAINTIFFS HAVE FAILED TO MAKE THE REQUIRED SHOWING TO COMPEL AGENCY RULEMAKING

As explained above and in the FEC's opening brief, the standard of review for a decision not to institute rulemaking proceedings, like judicial review under section 30109(a)(8), is "'extremely limited' and 'highly deferential.'" *See supra* pp. 2-3; *FEC*. Mem. at 15 (citing *Massachusetts v. E.P.A.*, 549 U.S. at 527-28).) The Court of Appeals has thus explained that it will overturn an agency's refusal "'only in the rarest and most compelling of circumstances,'" *Defs. of Wildlife*, 532 F.3d at 921 (citation omitted), such as "plain error of law" or a "fundamental change in the factual premises previously considered by the agency." *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 883 F.2d 93, 94, 97 (D.C. Cir. 1989) (describing "the extraordinary deference due an agency when it declines to undertake a rulemaking"). As the Commission previously explained, no such error of law or fundamental change in the facts has occurred here (*see* FEC Mem. at 34-44), and plaintiffs have failed to

carry their heavy burden to demonstrate the "compelling circumstances" necessary to overcome the "extraordinary deference" to which the FEC is entitled here.

**A. Plaintiffs Have Failed to Identify Compelling Circumstances or Legal Error**

Plaintiffs fail to identify any legal authority supporting their view that the FEC's interpretation of the debate rules is clearly erroneous; instead, they declare that evidence they have submitted proves "that polling thresholds systematically exclude independent candidates from debates, permitting debate sponsors to funnel corporate contributions to the major-party candidates." (Pls.' Opp'n at 17.) Yet, as the FEC previously explained, the Commission's Notice of Disposition ("Notice") squarely addressed the data presented, finding that the petition primarily focused on the conduct of a single debate sponsor, CPD, and failed to establish that polls were inherently unobjective. (FEC Mem. at 35, 39.) The Commission also rejected plaintiffs' repackaged arguments that had been rejected by the court in *Buchanan*, *i.e.*, arguments about the inaccuracy of polling and the tendency of polls to exclude certain candidates. (*See* FEC Mem. at 36-37 (citing *Buchanan*, 112 F. Supp. 2d at 74-75).)[6] Under these circumstances, the FEC reasonably determined that a wholesale rulemaking to impose a per se ban on the use of polling thresholds for selecting debate participants was not required.

Plaintiffs also purport to fault the FEC for failing to "demonstrate[] that allowing sponsors to use polling thresholds serves a valuable purpose" (Pls.' Opp'n at 19), but plaintiffs bear the burden here and their focus on whether polling thresholds serve a "valuable purpose" highlights their misconception of the purpose of the regulation at issue. As explained above and

[6] Plaintiffs have now made clear in their briefs that only Level the Playing Field challenges the Commission's regulation, and not the other plaintiffs. (Pls.' Opp'n at 17 n.6.) Plaintiff Green Party's decision not to join the petition for rulemaking and related claim for relief may spare plaintiffs from claim preclusion, but not the persuasive authority of the First Circuit having already rejected a challenge to the Commission's debate regulation as contrary to FECA. (*See* FEC Br. at 35 (citing *Becker*, 230 F.3d at 390-97).)

in the FEC's opening brief (FEC Br. at 35-36), section 100.13(c) is a safe harbor delineating the limits of FECA's prohibition on corporate contributions; it is not intended to micromanage the manner in which debate staging organizations determine how to select debate participants. In the Notice, the FEC thus explained 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.'" (AR1904 (citing Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,261 (Dec. 14, 1995)).) Accordingly, "the Commission has required that debate 'staging organizations use pre-established objective criteria to avoid the real or apparent potential for a *quid pro quo*, and to ensure the integrity and fairness of the process.'" (*Id.*).

At the same time, the Commission explicitly "'left to the discretion of the staging organization'" the "'choice of which objective criteria to use'" and emphasized that "[w]ithin the realm of reasonable criteria," debate staging organizations have "'great latitude in establishing the criteria for participant selection.'" (*Id.* (quoting Corporate and Labor Organization Activity, 60 Fed. Reg. at 64,262).) The FEC explained that staging organizations may use selection criteria to control the number of participants but must not use criteria "'designed to result in the selection of certain pre-chosen participants.'" (*Id.* (quoting Corporate and Labor Organization Activity, 60 Fed. Reg. at 64262).) Thus, while the FEC acknowledged that the petition provided some data "intended to demonstrate that polling figures are sometimes inaccurate," the Commission determined that "the fact that polls can be *inaccurate* does not mean that a staging organization acts *unobjectively* by using them." (AR1905 n.6.) The FEC reasonably concluded

that the petition did not set forth sufficient information indicating that the use of polls resulted in prohibited contributions being made to candidates.

In any event, and as the FEC previously explained (FEC Mem. at 38), plaintiffs have undermined their own arguments regarding the use of polling thresholds as a measure of candidate viability. Although plaintiffs continue to insist (Pls.' Opp'n at 19) that polling is not sufficiently reliable to exclude candidates from debate participation, they have conceded that polling is not so unreliable that they would advocate eliminating polling altogether as a debate criterion option. (*See* FEC Mem. at 38 (responding to LPF Summ. J. Mem. at 41).) Indeed, the Notice indicated that LPF relied largely on policy arguments — such as the lack of funds that independent/third party candidates need to achieve sufficient name recognition to satisfy polling thresholds — in favor of a rulemaking. (AR1904.) However, as reflected in the petition itself, polling is not the cause of an independent candidate's lack of name recognition or electoral support but a measure of such conditions. (AR0015-AR0023 (describing independent candidates' lack of campaign funds and media exposure to achieve name recognition among voters).) And the Constitution does not permit the government to adjust campaign finance rules in order to equalize resources, or "Level the Playing Field," as plaintiffs seek. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .").

Plaintiffs' attempt to dismiss the Commission's response to its margin-of-error argument as an improper post hoc rationalization also misses the mark. An agency may articulate its basis for action by reference to other relevant sources and adjudicated cases. *See, e.g., Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) ("An agency 'may

articulate the basis of its order by reference to other decisions. For 'adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein.'") (internal citation omitted); *Crawford v. FCC*, 417 F.3d 1289, 1298 (D.C. Cir. 2005) ("'If the necessary articulation of basis for agency action can be discerned by reference to clearly relevant sources other than a formal statement of reasons, we will make the reference.'") (citation omitted). Here, the Notice clearly referenced *Buchanan*, which explored this argument in detail, 112 F. Supp. 2d at 74-75, and the FEC's other enforcement matters relying on *Buchanan*, in finding that polling thresholds "can be objective and otherwise lawful selection criteria for candidate debates." (*See* AR1904 (citing *Buchanan*, 112 F. Supp. 2d at 75).) In particular, the Notice cites to the First General Counsel's Report in MUR 5530, http://eqs.fec.gov/eqsdocsMUR/000043F0.pdf, which expressly relied upon Buchanan's rationale to uphold polling thresholds. (*See* AR1904.) Further, plaintiffs tellingly do not dispute that LPF's own expert made a similar observation concerning the margin of error. (*See* FEC Br. at 37 (explaining that LPF's own expert acknowledged that with respect to the margin of error in a three-way race, "'it was wholly unclear whether the polling over- or underestimated the potential of a third party candidate'") (citing AR0190).)

### B. The Commission's Choice to Evaluate the Objectivity of Debate Selection Criteria Through the Enforcement Process was Reasonable

Plaintiffs acknowledge the Commission's "ordinar[y]" discretion to determine whether particular debate criteria violate section 110.13 through adjudication rather than rulemaking (Pls.' Opp'n at 21), and their attempts to undermine the adequacy of the Commission's case-by-case approach here are improper, misleading, and otherwise unavailing.

*First*, plaintiffs continue their improper reliance on extra-record statements in news articles and other materials outside the Administrative Record. (Pls.' Opp'n at 19 (citing Pls.'

Summ. J. Br. at 43).) Not only is such material improper, as the Commission previously explained (*see* FEC Br. 12 n.6; FEC Obj. to LPF Statement of Material Facts at 3-6) (Docket No. 43-1), plaintiffs' selectively excerpted quotations of statements by individual Commissioners and their reference to general statistics concerning the volume of the Commission's caseload and fines do not provide "compelling circumstances" necessary to overcome the "extraordinary deference" to which the FEC is entitled here.[7]

*Second*, plaintiffs' reliance on the FEC's supposed "complete failure to bring enforcement actions" (Pls.' Opp'n at 21) is misleading and conveniently ignores that the dismissal decisions plaintiffs reference were lawful and, indeed, *upheld* by courts in subsequent actions for judicial review. *See supra* Section II (citing *Hagelin*, *Buchanan*, and *Natural Law Party*).) Plaintiffs cannot demonstrate that a rulemaking was required on the basis of the Commission's decisions in those matters.

[7] The Commission previously detailed the other fundamental problems with plaintiffs' separate filing of a "Statement of Material Facts." (FEC Obj. to LPF Statement of Material Facts at 1-6.) In their response to the Commission's Objections, plaintiffs do not dispute the recognition by another court in this District that freestanding statements of material facts such as the one they submitted are "'improper'" in cases, like this one, involving judicial review of an administrative record. (*Compare* FEC Obj. to LPF Statement of Material Facts at 1-3 (quoting *Koretoff v. Vilsack*, 841 F. Supp. 2d 1, 5 n.3 (D.D.C. 2012), *aff'd*¸ 707 F.3d 394 (D.C. Cir. 2013)), *with* Pls.' Response to Def.'s Obj. to Pls.' Statement of Material Facts at 1 (Docket No. 47-1).) And they have no response to the Comment to that local rule, which distinguishes "cases where review is based on an administrative record" from other types of cases and clarifies that because "'the Court [in an administrative-review action] is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record . . . , *the normal summary judgment procedures requiring the filing of a statement of undisputed facts is not applicable*.'" (FEC Obj. to LPF Statement of Material Facts at 2 (quoting Cmt. to LCvR 7(h) (emphasis added).) In addition, and as the Commission previously explained (*id.* at 3 & n.4), plaintiffs' own summary-judgment brief underscores the extraneousness of their separate factual statement as it primarily cites directly to the administrative record (and other sources) rather than to the separate statement of facts. Though there may be instances where no objection was made to comparable violations of Local Rule 7(h), plaintiffs' improper separate factual statement should be disregarded here.

Plaintiffs' attempted reliance on background discussion in *Citizens for Responsibility & Ethics in Washington* ("*CREW*") v. *FEC*, No. 1:14-cv-01419 (CRC), 2015 WL 10354778, at *1 (D.D.C. Aug. 13, 2015), is likewise misplaced. In *CREW*, plaintiffs, *inter alia*, attempted to challenge two FEC dismissal decisions as an impermissible "de facto" regulation. *Id.* at *5. The court dismissed those claims, concluding that "the crux of CREW's complaint is that the FEC dismissed its earlier administrative complaints under a faulty and misguided rationale," and "CREW's exclusive remedy for its disagreement with the FEC's rationale is to challenge those particular decisions under the judicial review provision of FECA." *Id.* In reaching that conclusion, the court emphasized agencies' "broad discretion to choose between rulemaking and adjudication to carry out their statutory mandate." *Id.* at *4. *CREW* thus *undermines* plaintiffs' arguments here.

Third and finally, the FEC properly exercised its discretion not to promulgate a separate rule for presidential debates versus other federal election debates. Plaintiffs complain that the FEC did not explain "why 'adopting different standards for different races' would be undesirable." (Pls.' Opp'n at 21.) Setting aside the lack of any legal basis of plaintiffs' "undesirability" standard, the Commission *did* explain that the current rule is designed to apply to *all* federal elections, like many other FEC rules,[8] and that the agency did not believe that data presented by the petition was sufficient to warrant a change in the Commission's existing approach. (*See* FEC Mem. at 43-44 (citing AR1905).) Here, where the Commission was not even required to promulgate a specific debate-sponsor regulation in order to implement the

[8] *See, e.g.*, 11 C.F.R. § 100.3 (uniform definition of candidate); 11 C.F.R. 104.1 (all political committees must file reports with FEC); 11 C.F.R. § 114.2 (prohibitions on contributions made by corporations applies to all candidates); 11 C.F.R. § 300.61 (prohibition on soliciting, receiving, directing, transferring, spending or disbursing non-federal funds applies to all federal elections).

prohibition on corporate expenditures in the first place, the agency certainly was not required to refine the regulation further with the granular detail about the permissibility of polling that LPF sought in its rulemaking petition.

## IV. PLAINTIFFS CONTINUE TO SEEK RELIEF CONTRARY TO FECA AND THE APPLICABLE, DEFERENTIAL STANDARD OF REVIEW

As the Commission explained in its opening brief, plaintiffs' requests for relief are improper with respect to both their claims under section 30109(a)(8) challenging the Commission's dismissal decisions (*see* FEC Br. at 33-34), and their claims challenging the Commission's denial of LPF's rulemaking petition (*see id.* at 44-45). Plaintiffs' Opposition barely attempts to refute the Commission's explanation or to otherwise demonstrate that its requests are proper.

### A. Plaintiffs' Requests for Relief Under Section 30109(a)(8) Are Improper

Under section 30109(a)(8)(c), the court may declare the Commission's dismissal of an administrative complaint "contrary to law," in which case it may "direct the [FEC] to conform with such declaration within 30 days." Courts, including the Supreme Court and D.C. Circuit, have clarified that an order to "conform with" a declaration that an administrative dismissal was contrary to law does not necessarily mandate a different outcome on remand, and explicitly recognized that, following such a remand, the Commission could again dismiss an administrative complaint based on a different rationale. *See* FEC Mem. at 34; *FEC v. Akins*, 524 U.S. 11, 25 (1998) (per curiam) (explaining that even where a reviewing court finds that an FEC administrative dismissal was contrary to law, the Commission "(like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason" (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943))); *Akins v. FEC*, 146 F.3d 1049, 1050 (D.C.

Cir. 1998) ("A holding that the FEC's decision was invalid would leave the FEC free to reach the same decision on another ground.").[9]

Plaintiffs fail to identify any authority that contradicts these controlling decisions, and their subjective conclusion that their administrative complaints "plainly provided reason to believe that the CPD was violating FECA and the debate staging regulations" (Pls.' Opp'n at 17 n.5), carries no weight. Moreover, neither of the decisions plaintiffs cite supports their request that this Court "direct" the Commission to make particular findings regarding plaintiffs' allegations. (Sec. Am. Compl. Requested Relief ¶¶ (c)-(f).) In *Common Cause v. FEC*, the district's court's order merely stated "this matter is remanded, pursuant to 2 U.S.C. § 437g(a)(8)(C), to the Federal Election Commission, which is directed to conform with this declaration and proceed accordingly within 30 days of the date of this Order." 729 F. Supp. 148, 153 (D.D.C. 1990). Nothing in the decision mandated any particular action on remand by the FEC. Nor does the court's discussion of *Common Cause* in *FEC v. National Republican Senatorial Committee*, 966 F.2d 1471, 1474 (D.C. Cir. 1992), establish the authority of courts to mandate a particular outcome on remand. Accordingly, even if the Court finds the FEC's

[9] *See also Hagelin v. FEC*, 332 F. Supp. 2d 71, 81-82 (D.D.C. 2004) ("As the FEC correctly maintains, the court may not order the FEC to proceed directly to a probable cause determination. It must instead remand the case and allow the FEC to follow statutorily mandated procedures"), *rev'd on other grounds*, 411 F.3d 237 (D.C. Cir. 2005); *La Botz v. FEC*, 889 F. Supp. 2d 51, 63 n.6 (D.D.C. 2012) (clarifying that a judicial determination that an FEC dismissal of an administrative complaint was contrary to law does not mean "that the FEC is required to reach a different conclusion on remand" and suggesting the "possib[ility]" that "the [dismissal] . . . could have been justified entirely by the FEC's prosecutorial discretion, which is 'considerable'" (citation omitted)); *La Botz v. FEC*, 61 F. Supp. 3d 21 (D.D.C. 2014) (dismissing judicial-review action on mootness grounds following FEC's dismissal of plaintiff's administrative complaint upon remand; explaining further that even if the court had jurisdiction, FEC's dismissal represented a reasonable exercise of prosecutorial discretion that was not contrary to law under FECA).

dismissals here were unlawful, the Court may only remand the matter to the Commission and order the agency to "conform with" its decision.

### B. Plaintiffs' Request for a Supervised Rulemaking Is Improper

Plaintiffs offer no response to justify their extraordinary request for a mandatory rulemaking to be completed within a specified time. (*See* Sec. Am. Compl. ¶ 144.) As the Commission previously explained (FEC Br. at 44-45), such court-ordered supervision of the Commission's regulatory process is improper and plaintiffs have not even attempted to justify such a request based on the particular circumstances here. Thus, even if plaintiffs were to prevail, there is no basis for any particular relief beyond a simple remand.

## CONCLUSION

The FEC's motion for summary judgment should be granted and plaintiffs' motion for summary judgment should be denied.

Respectfully submitted,

Daniel A. Petalas (D.C. Bar No. 467908)
Acting General Counsel
dpetalas@fec.gov

Lisa J. Stevenson (D.C. Bar No. 457628)
Deputy General Counsel – Law
lstevenson@fec.gov

Kevin Deeley
Acting Associate General Counsel
kdeeley@fec.gov

Erin Chlopak (D.C. Bar. No. 496370)
Acting Assistant General Counsel
echlopak@fec.gov

*/s/ Robert W. Bonham III*
Robert W. Bonham III (D.C. Bar. No. 397859)
Senior Attorney
rbonham@fec.gov

Jin Lee (D.C. Bar. No. 484455)
Attorney
jlee@fec.gov

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

July 13, 2016