UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEVEL THE PLAYING FIELD, *et al.*, Plaintiffs, v. FEDERAL ELECTION COMMISSION, Defendant.	Civ. No. 15-1397 (TSC) REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

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December 8, 2017

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In its opening brief, the Federal Election Commission ("Commission" or "FEC") demonstrated that the Court should sustain the Commission's post-remand actions on plaintiffs' administrative complaints concerning the Commission on Presidential Debates ("CPD") and the individual respondents, as well as Level the Playing Field's ("LPF") rulemaking petition. With respect to plaintiffs' administrative complaints, the agency conducted a searching and careful review of plaintiffs' evidence on remand and, in a thorough and thoughtful 33-page Factual & Legal Analysis, set forth the legal standards guiding its review, as well as why there was no reason to believe that respondents violated the FEC's principal regulation regarding debate sponsorship, 11 C.F.R. § 110.13. As for LPF's rulemaking request, the Commission issued a Supplemental Notice of Decision ("Supplemental NOD") thoroughly considering LPF's new evidence and detailing its reasonable decision not to initiate the requested rulemaking.

With neither law nor facts supporting their requests that the Court reject these well-reasoned decisions, plaintiffs attempt to distract the Court with false accusations and incorrect claims that the FEC has "concede[d]" arguments or "abandoned" portions of its analysis. (Pls.' Reply Mem. of P. & A. in Supp. of Their Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. at 1, 6, 13, 15, 16 (Docket No. 98) ("Pls.' Reply").) The Court should not credit these baseless diversions. Instead, it should reject plaintiffs' meritless plea for reduced deference and continue to evaluate the Commission's actions in accordance with the full deference required by law. *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 137-38 (D.D.C. 2017) ("*LPF I*"). Applying the proper standards of review, the Commission's dismissals of plaintiffs' administrative complaints and Supplemental NOD were fully explained and rational. The Court

did not require or expect the Commission to "discuss every single page of evidence," *id.* at 142, and plaintiffs' notion that the agency abandons its reasoning or makes concessions by not repeating its thorough considerations of plaintiffs' evidence word-for-word in its legal briefs is incorrect. The deferential standard of review that applies here requires plaintiffs to meet a heavy burden of showing that the FEC acted contrary to law or arbitrarily. Plaintiffs are not close to making such a showing. The FEC's careful analyses were grounded in the record and reasonable. The Court thus should award summary judgment to the FEC.

I. DISMISSING PLAINTIFFS' COMPLAINTS WAS NOT CONTRARY TO LAW

A. Well-Established, Controlling Law Requires That the FEC's Dismissal Decision Be Accorded Full Deference In this Section 30109(a)(8) Case

As this Court already recognized, it "must 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)); *see also* FEC's Mem. in Supp. of Its Mot. for Summ. J. and in Opp'n to Pls.' Mot. for Summ. J. at 19-23 (Docket No. 90) ("FEC Mem."). Neither this Court's prior ruling, nor the recitation in the FEC's opening brief of the well-established standard of review applying under 52 U.S.C. § 30109(a)(8), is "radical," as plaintiffs suggest. (Pls.' Reply at 2.) To the contrary, plaintiffs' wholly unprecedented argument that the Commission should receive "*no* deference" (*id.* at 3) is radical because it asks this Court to disregard longstanding, controlling authority that the Federal Election Campaign Act's contrary-to-law standard is "extremely deferential" and "*requires affirmance* if a rational basis for the agency's decision is shown." *Orloski v. FEC*, 795 F.2d 156, 167 (D.C. Cir. 1986) (emphasis added and internal quotation marks omitted); *see also Hagelin v. FEC*, 411 F.3d 237, 242 (D.C.

Cir. 2005) ("Highly deferential, [the arbitrary and capricious] standard presumes the validity of agency action and permits reversal only if the agency's decision is not supported by substantial evidence, or the agency has made a clear error in judgment." (internal quotation marks omitted)).

In arguing otherwise, plaintiffs conflate the standard of review with the merits. Whether the FEC sufficiently considered the evidence (*see* Pls.' Reply at 2-3) goes to the merits of this Court's review of the agency's action — it does not alter the standard by which the Court conducts that review. The cases plaintiffs cite echo the deferential nature of such review. *E.g.*, *Nat. Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1053 (D.C. Cir. 1979) ("[O]ur review . . . will perforce be a narrow one, limited to ensuring that the [SEC] has adequately explained the facts and policy concerns it relied on and to satisfying ourselves that those facts have some basis in the record."); *Antosh v. FEC*, 599 F. Supp. 850, 853 (D.D.C. 1984) ("The Court must affirm the agency's decision if it is supported by a rational basis, even though [the court] might otherwise disagree." (internal quotation marks omitted)). Plaintiffs similarly conflate the standard of review and the merits by arguing for "*no* deference" because the FEC has, in their view, misinterpreted 11 C.F.R. § 110.13. (Pls.' Reply at 3-4.) However, a court in this District previously upheld the Commission's interpretation as applied to that particular case. *Buchanan v. FEC*, 112 F. Supp. 2d 58, 69-71 & n.8 (D.D.C. 2000). And whether the FEC has interpreted section 110.13 in a manner that is contrary to law in evaluating plaintiffs' administrative complaints is precisely the question before this Court.

Plaintiffs also argue that no deference is warranted because of their claim that they have rebutted the presumption of agency regularity. (Pls.' Reply at 3-4.) They have not. As the FEC explained (FEC Mem. at 21-22), the D.C. Circuit already rejected the argument that, "because

the FEC is dominated by the two major parties, courts cannot trust it to deal fairly with third-party complaints." *Hagelin*, 411 F.3d at 242. Rather, the court found that there was "no basis for thinking that third-party complaints warrant more demanding review." *Id.* Indeed, courts "must presume an agency acts in good faith," *Comcast Corp. v. F.C.C.*, 526 F.3d 763, 769 n.2 (D.C. Cir. 2008), absent "well-nigh irrefragable proof of bad faith or bias on the part of governmental officials." *Adair v. England*, 183 F. Supp. 2d 31, 60 (D.D.C. 2002) (internal quotation marks omitted). There is no such evidence here. Plaintiffs' false claims of "three decades of shameless dereliction" by the FEC, based on an op-ed endorsing plaintiffs' policy agenda (Pls.' Reply at 24-25 & n.12), and a former FEC Commissioner's views about split votes of the Commissioners (*id.* at 8 n.3), when the agency's decision here was unanimous, do not support plaintiffs' assertions. Critically, the D.C. Circuit elaborated on its rejection of plaintiffs' bias argument, explaining that "the arbitrary and capricious and substantial evidence standards seem to us fully adequate to capture partisan or discriminatory FEC behavior" because "'unjustifiably disparate treatment'" of "third parties" would violate those standards. *Hagelin*, 411 F.3d at 243 (quoting *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986)). This Court previously refused to countenance plaintiffs' argument that the FEC's composition changes the level of review and should do so again here post-remand.

The Commission's opening brief also established that D.C. Circuit precedent requires the same standard of review for pre- and post-remand agency decisions. (FEC Mem. at 22-23 (discussing *City of Los Angeles v. U.S. Dep't of Transp.*, 165 F.3d 972, 977 (D.C. Cir. 1999)).) That the FEC reached the same outcome on remand (*see* Pls.' Reply at 4-5) is hardly an irregular agency action warranting the elimination of agency deference. Indeed, the Supreme Court has

expressly recognized that the FEC is free to so do. *FEC v. Akins*, 524 U.S. 11, 25 (1998). Accordingly, this Court should apply the well-established, highly deferential standard of review.

B. The Commission Reasonably Dismissed Plaintiffs' Complaints

Under section 30109(a)(8)'s deferential standard of review, the FEC reasonably applied the plain meaning of section 110.13; carefully considered plaintiffs' evidence for the allegations that CPD endorsed, supported, or opposed any candidate or party; and reasonably found that plaintiffs' evidence that CPD's polling threshold is not objective was unpersuasive. (FEC Mem. at 24-41.) Plaintiffs' response fails to show otherwise and does not meet their heavy burden of showing that the FEC's actions were contrary to law or arbitrary or capricious.

1. The FEC Applied the Plain Meaning of 11 C.F.R. § 110.13

In remanding to the FEC, the Court instructed the agency to "articulate its analysis in determining whether the CPD endorsed, supported, or opposed political parties or candidates." *LPF I*, 232 F. Supp. 3d at 140. The Commission accordingly clarified that it was applying the plain meaning of section 110.13. (FEC Mem. at 24-25; AR 7213 & n.54.) Plaintiffs do not contest that the regulation's meaning is plain. Rather, plaintiffs argue that the Commission's explanation nonetheless fell short because it did not *further* explain the meaning of the regulation. (Pls.' Reply at 5.) But "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise." *United States v. Dickson*, 816 F.2d 751, 752 (D.C. Cir. 1987) (per curiam) (internal quotation marks omitted). There thus is no legal basis to require the Commission to do more. (FEC Mem. at 25.)

Plaintiffs next incorrectly argue that — despite the FEC's express statements to the contrary — the Commission applied a "control test." (*Compare* Pls.' Reply at 5-6, *with* AR

7213 & n.54.) Plaintiffs first point to the Commission's quotation of *Buchanan* when discussing the evidence from the time of CPD's formation. (Pls.' Mem. of P. & A. in Supp. of Pls.' Mot. for Summ. J. at 20 (citing AR 7215) (Docket No. 83-1) ("Pls.' Mem."); Pls.' Reply at 5.) But the context demonstrates that the FEC relied on *Buchanan*, as well as a 2004 decision in another administrative FEC matter, to support its finding that evidence over 20 years old is not probative of whether CPD currently "endorses, supports, or opposes" a candidate or party. (AR 7215; AR 7217-18.) This is not controversial. Indeed, courts and agencies regularly disregard old evidence as too remote in time to be probative. (FEC Mem. at 31.)[1]

The only other asserted basis for plaintiffs' control-test allegation is that the Commission considered who certain directors were "'act[ing] on behalf of'" when analyzing plaintiffs' allegations regarding those directors' outside employment. (Pls.' Mem. at 20 (quoting AR 7221); Pls.' Reply at 5.) Once again, the statement's context belies plaintiffs' claim. As the Commission explained, to hold the CPD liable for its directors' actions, the agency needed to determine in what capacity the directors were acting. (AR 7218; AR 7220.) Under Commission precedent and the law of agency generally, the FEC thus appropriately considered whether there was evidence that the directors were "act[ing] on behalf of CPD in the course of such employment, or alternatively, on behalf of their employer while volunteering for CPD" for this

[1] *See also, e.g.*, *N.L.R.B. v. Donnelly Garment Co.*, 330 U.S. 219, 232 (1947) (finding reasonable agency's exclusion of evidence it determined to be too remote to be probative); *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"); *BE & K Const. Co. v. N.L.R.B.*, 133 F.3d 1372, 1376 n.10 (11th Cir. 1997) (holding that the agency erred by relying upon evidence from more than twelve years ago because, without some contemporaneous evidence linking it to the present dispute, it is "too remote in time to be relevant"); *Elion v. Jackson*, 544 F. Supp. 2d 1, 8 (D.D.C. 2008) (excluding evidence that was "too remote in time to have significant probative value with respect to the matters at issue in this case").

limited purpose. AR 7221; *see also, e.g.*, FEC Advisory Op. 2005-02 (Corzine) at 10 (Apr. 22, 2005) ("[T]he Commission [has] made clear that a principal may only be held liable under [the Bipartisan Campaign Reform Act] for the actions of an agent when the agent is *acting on behalf of* the principal." (emphasis added)); Restatement (Second) of Agency § 288, comment c (1958). Because there was no evidence of any such crossover, the Commission never got to a point where it even *could* have considered whether the Democratic or Republican parties were exerting control over the CPD, which is consistent with the Commission's explanation that such a control test would be "inapplicable here." (AR 7213 & n.54.)

2. The Commission Reasonably Dismissed Plaintiffs' Allegations that CPD Endorsed, Supported, or Opposed Any Party or Candidate

The Commission's detailed, careful analysis readily demonstrates that the Commission considered the evidence plaintiffs submitted in support of their allegation that the CPD endorsed, supported, or opposed a political party or candidate. (FEC Mem. at 26-27, 31-36.) Because the agency considered all of the evidence and demonstrated a rational connection between that evidence and its conclusions, its decision should be upheld. *Accord Tex. Neighborhood Servs. v. U.S. Dep't of Health & Human Servs.*, 172 F. Supp. 3d 236, 243 (D.D.C. 2016) (rejecting Administrative Procedure Act challenge), *aff'd*, 875 F.3d 1 (D.C. Cir. 2017).

The Commission found that nearly all of plaintiffs' evidence was (a) too old to be probative, (b) pertained to personal action, as opposed to official action on behalf of CPD, or (c) both. The Commission's analysis and conclusions were well-grounded in the record and long-established legal principles. First, the Commission reasonably concluded that evidence more than 10 years — and often more than 20 years — old was not probative of whether CPD recently endorsed, supported, or opposed a political party or candidate. Plaintiffs cite *no* law

demonstrating that this was contrary to law. Nor could they. As discussed above, *supra* p. 6 & n1, courts and agencies regularly disregard old evidence as being too remote in time to be probative. (*See also* FEC Mem. at 31.) This is particularly true here, where the Commission found that CPD changed over time. (AR 7217; AR 7221-22.)

Second, the Commission reasonably and rationally drew a distinction between actions taken by CPD directors in their personal, as opposed to official, capacity when holding that only official actions could give rise to CPD's liability under section 110.13. (AR 7218; AR 7220-22.) Plaintiffs have not, and cannot, show that this interpretation of the Commission's own regulation "is plainly erroneous or inconsistent with the regulation." *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617-18 (2013) (internal quotation marks omitted). Indeed, plaintiffs do not point to *any* law contrary to the FEC's interpretation.

As explained in the FEC's opening brief, the regulation addresses debate staging organizations, not their agents' or employees' personal conduct. (FEC Mem. at 34.) Further, the Commission's interpretation is entirely consistent not only with Commission precedent, but also American law generally. *See supra* p. 7; FEC Mem. at 33-34.[2]

Moreover, personal political beliefs do not necessarily render people incapable of doing their jobs in a fair and impartial manner. The recusal cases the FEC cited in its opening brief merely recognize this established principle, as does the Hatch Act. (FEC Mem. at 34.) Again, plaintiffs fail to cite any law contravening this well-recognized principle (or supporting their

[2] The personal versus official capacity distinction is widely applied in numerous areas of American law. *E.g.*, *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014); *Bellis v. United States*, 417 U.S. 85, 90 (1974); *Clegg v. Falcon Plastics, Inc.*, 174 F. App'x 18, 28 (3d Cir. 2006); *Hawkins v. District of Columbia*, 923 F. Supp. 2d 128, 138 (D.D.C. 2013).

theory of heightened recusal obligations for CPD personnel (Pls.' Reply at 8-9)), much less law to which the Commission acted contrary. Nor have plaintiffs cited any law finding inappropriate sensitivity when regulating in an area implicating First Amendment rights and erring on the side of caution. *Cf. Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (approving of FEC's exercise of "its unique prerogative to safeguard the First Amendment when implementing its congressional directives"). Accordingly, under the Court's "'exceedingly deferential'" review of the FEC'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 FEC's interpretation that section 110.13 focuses on a review of official action by CPD should be upheld.

Merely reciting evidence to which the Commission correctly applied these well-established legal principles does not satisfy plaintiffs' heavy burden to demonstrate that the agency acted arbitrarily. For example, the 1985 Memorandum of Understanding and a 1987 joint press release by the Democratic and Republican national committees that plaintiffs quote (Pls.' Reply at 6 (quoting AR 2244 and AR 2249-50)) are too old and not attributable to CPD as an organization. (AR 7214-18.) The quote by Frank Fahrenkopf from a newspaper article dated February 19, 1987 that plaintiffs highlight (Pls.' Reply at 7 (quoting AR 2252)) not only is too old to be probative, but also it does not appear that Fahrenkopf was speaking on behalf of CPD, as he deferred to CPD on its candidate selection process and was only identified in the article as the then-chairman of the Republican National Committee. (AR 7214-15; AR 7218.) Similarly, plaintiffs quote a 2001 statement David Norcross purportedly made, which was not only over ten years old, but also could not have been made in an official CPD capacity, as he had not served as a CPD director since 1993. (AR 7218; AR 3136.)

And plaintiffs certainly cannot satisfy their burden to demonstrate the Commission acted contrary to law by relying on statements that are stale, not made in an official capacity, *and* which the Commission found may not have had, in context, the negative meaning plaintiffs claim. For example, plaintiffs make much of Barbara Vucanovich being "quoted as praising CPD's executive director for being 'extremely careful to be bi-partisan'" in 2001. (AR 7216; *see also* Pls.' Reply at 1, 6.) But this statement is old and could not have been made in an official capacity as she left CPD's board in 1997, and thus can be appropriately disregarded on these bases alone. The FEC, however, also noted that Vucanovich later clarified in a sworn declaration that she "used the word 'bi-partisan,' as many do, to mean not favoring any one party over another." (AR 7216 (internal quotation marks omitted).) Plaintiffs' claim that the FEC wrongly credited this clarification because these words have "opposite meanings" (Pls.' Mem. at 22; *see also* Pls.' Reply at 1, 6), but the dictionary definitions plaintiffs cited for "nonpartisan" and "bipartisan" (Pls.' Mem. at 22 nn.33-34) demonstrate that the terms can be read harmoniously.[3] When the debate staging regulations were initially enacted in 1979, they required that the "debates include at least two candidates" and be "nonpartisan in that they do not promote or advance one candidate over another." *Funding & Sponsorship of Fed. Candidate Debates*, 44 Fed. Reg. 76,734, 76,736 (Dec. 27, 1979). The Supreme Court similarly used "bipartisan" in this way: "[T]he Commission is inherently bipartisan *in that no more than three*

[3] The webpage plaintiffs cite for their definition of "nonpartisan" (Pls.' Mem. at 22 n.34) also defines that term as "not supporting one political party or group over another." If something is "bipartisan" and thus, according to the webpage plaintiffs cite, "marked by or involving cooperation, agreement, and compromise between two major political parties" (*id.* at 22 n.33), it is likely not supporting one political party, the Democratic party, over another, the Republican party, or vice versa — consistent with the definition of "nonpartisan."

of its six voting members may be of the same political party." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (emphasis added) (citing 52 U.S.C. § 30106(a)(1)).[4]

Indeed, the *only* CPD director statement submitted by plaintiffs that is both recent and made in an official CPD capacity is a 2015 interview between Fahrenkopf and Sky News, which the Commission reasonably discounted for three primary reasons. (AR 7219-20.) First, the Commission found that, by stating 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.) This is a reasonable interpretation, as Fahrenkopf did not say CPD will *only* go with candidates from the two major parties, and indeed provided an example where an independent candidate who was deemed to be a "leading" candidate by CPD was included.[5] Second, the Commission found that "the statement appears to be more an assertion of historical fact," which Fahrenkopf confirmed. (*Id.*) This also is reasonable. When someone is speaking about what an organization "primarily does," it is reasonable to believe that he or she is colloquially referring to what the organization primarily has done, as repeated past experiences are a necessary predicate to generalizations about what an organization does most of the time. That is especially reasonable, where, as here, the phrase was immediately followed by a historical accounting: "[I]t's *been* the two political party candidates . . . except for *1992* when Ross Perot participated

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[4] The Court should reject plaintiffs' attempt to reclassify an FEC Commissioner's self-defined political affiliation. (Pls.' Reply at 3 n.1.) Chairman Walther is an independent. *See* https://www.fec.gov/about/leadership-and-structure/steven-t-walther/.

[5] Contrary to plaintiffs' assertion (Pls.' Reply at 10), CPD averred that Perot was invited to the 1992 debates because he satisfied the then-applicable candidate criteria (AR 7133-34 ¶¶ 22-24; AR 7062 ¶ 6; AR 2318-9 ¶¶ 21-23).

in the debates." (*Id.* (emphases added).) Answering a question about the present or future with a statement about what has happened in the past is hardly unusual. Third, the Commission recognized that the statement's context supported CPD's broader point that the organization limits the number of speakers at least in part to ensure that the debate is meaningful. (*Id.*) This likewise was reasonable. *See Ark. Educ. Television Comm. 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)).

Plaintiffs' focus on the Commission's mention of a CPD policy remains immaterial. (FEC Mem. at 34-35; Pls.' Reply at 10-11.) There was nothing improper about the Commission relying upon CPD's explanation of that policy sworn under penalty of perjury. (AR 7103-04.) Moreover, plaintiffs exaggerate the importance of these policies upon the Commission's analysis. As the Commission pointed out before, plaintiffs have overstated matters in claiming that the policy has been violated. (FEC Mem. at 35.) And most importantly, while CPD may seek to discourage its directors' personal participation in presidential elections, the Commission's focus was undisputedly on the directors' official actions. *Supra* p.6-7, 8 & n.2..

Plaintiffs also err in claiming that the FEC failed to consider the evidence against the CPD directors because it gave weight to their sworn declarations. (Pls.' Reply at 18-19.) As the FEC demonstrated in its opening brief, though, the agency could as a matter of law consider these affidavits (FEC Mem. at 35-36), which plaintiffs appear to concede by withdrawing their faulty assertion that they were "sham affidavits" (*compare* Pls.' Mem. at 33, *with* Pls.' Reply at 18). The agency's detailed analysis plainly demonstrates that it did not blindly accept the

declarations because it spent nearly ten pages discussing the plaintiffs' evidence's age, history, context, and legal significance. (AR 7214-22.) Moreover, with perhaps the exception of the 2015 Fahrenkopf interview, plaintiffs' evidence was too old and/or only pertained to CPD directors' non-official capacity and thus likely would not establish CPD liability regardless.

Whether the plaintiffs would have given the declarations less weight is irrelevant. As the D.C. Circuit has held, "it is not a valid objection that conflicts in the evidence might conceivably have been resolved differently, or other inferences drawn from the same record." *D.C. Transit Sys. Inc. v. Wash. Metro. Area Transit Comm'n*, 466 F.2d 394, 414 (D.C. Cir. 1972) (internal quotation marks omitted). Rather, the FEC's decision "requires affirmance if a rational basis . . . is shown." *Orloski*, 795 F.2d at 167 (internal quotation marks omitted). Here, there can be no question that the FEC acted rationally by weighing all the evidence before it and crediting declarations sworn under penalty of perjury over old, cherry-picked quotes that were from mostly second-hand sources and almost exclusively made in personal, rather than official, capacities. *See* 18 U.S.C. § 1621(2) (declarants guilty of perjury shall be fined and/or imprisoned for up to five years). In sum, the FEC carefully and thoughtfully considered plaintiffs' evidence and reasonably concluded that the evidence did not demonstrate that CPD itself endorsed, supported, or opposed any political party or candidate, as plaintiffs alleged. Plaintiffs have not satisfied their burden to demonstrate otherwise.

3. The Commission Reasonably Dismissed Plaintiffs' Allegations that CPD's Polling Threshold Is Not an Objective Criterion

On remand, the Commission considered plaintiffs' expert evidence and explained why it was ultimately unpersuasive in a well-reasoned, detailed opinion. Weighing this evidence against the evidence in the record demonstrating that independent candidates could reach and

had reached 15% favorability in the polls, the Commission reasonably concluded that there was insufficient information to find that CPD's 15% polling threshold was not an objective criterion, as that term has been construed by the Commission. (AR 7222-32; FEC Mem. at 36-41.)

a. Clifford Young's Report

As the Commission explained in its opening brief, Young's failure to account for numerous important variables is itself an appropriate and rational reason to accord little-to-no weight to his analysis. (FEC Mem. at 37; AR 7224-25 (explaining that Young's report draws conclusions "based on [the] one factor" of name recognition).) Tellingly, plaintiffs fail to cite even a single case where a single-variable regression analysis like Young's was so probative that it was contrary to law or arbitrary to disregard it. Nor could they.

Plaintiffs do not dispute that it is well-established that "the omission of variables from a regression analysis may render the analysis less probative than it otherwise might be." *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (per curiam); *see also* FEC Mem. at 37 (citing D.C. Circuit cases). Where an expert disregards numerous significant variables such as those identified by the FEC (AR 7224-25 & n.104) — as Young himself acknowledges he did (AR 2492-93 ¶ 9) — the regression analysis can be "so incomplete as to be inadmissible as irrelevant." *Bazemore*, 478 U.S. at 400 n.10. Young's failure to include *any* variable other than name recognition thus is itself a sufficient reason to uphold the FEC's determination that his analysis was not probative. *Coward v. ADT Sec. Sys., Inc.*, 140 F.3d 271, 275 (D.C. Cir. 1998) (finding regression analysis to be "flawed as a matter of law" where it failed to account for an important variable).[6]

[6] *See also Munoz v. Orr*, 200 F.3d 291 (5th Cir. 2000) (statistical analysis excluded for, *inter alia*, failure to conduct a multiple variable regression analysis); *Sheehan v. Purolator, Inc.*, 839 F.2d 99, 103 (2d Cir. 1988) (holding that it was not clearly erroneous for the district court to

And even if Young's single-variable analysis could be given weight, plaintiffs fatally overstate its significance in maintaining that "there *must* be [a] causal relationship" between name recognition and vote share. (Pls.' Reply at 22.) Young himself never opined about causation, offering instead only an opinion about the "correlation" between the two — and not even a very strong correlation at that. (AR 2493 ¶ 10; AR 2502-03 ¶¶ 25, 27; AR 2504 ¶ 30.) Plaintiffs nevertheless maintain their "obviously flawed" argument "equati[ng] . . . correlation with causation." *Giles v. Transit Emps. Fed. Credit Union*, 794 F.3d 1, 10 (D.C. Cir. 2015); *see also* FEC Mem. at 43. Consistent with this elementary principle, the FEC reasonably found that Young's analysis "correlat[ing] polling results to name recognition alone" was unpersuasive because "polling results are not merely a function of name recognition." (AR 7224-25.) Not only was this analysis plainly "rational," *Orloski*, 795 F.2d at 167, plaintiffs' contrary argument is irrationally based on a well-recognized basic error identified by many courts of appeals.[7]

Plaintiffs further err by critiquing the Commission's reliance on a YouGov poll from August 25-26, 2016 (Pls.' Reply at 12-13), which "found that 63 percent of registered voters had

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find regression analysis to be flawed for failure to take into account various other factors); *Penk v. Or. State Bd. of Higher Educ.*, 816 F.2d 458, 465 (9th Cir. 1987) (holding that the district court did not clearly err by discounting the weight of a regression analysis that omitted important variables); *In re Wireless Tel. Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 427 (S.D.N.Y. 2005) ("Where an expert conducts a regression analysis and fails to incorporate major independent variables, such analysis may be excluded as irrelevant.")

[7] *In re Navy Chaplaincy*, 738 F.3d 425, 429 (D.C. Cir. 2013) ("Correlation is not causation." (internal quotation marks omitted)); *United States v. Valencia*, 600 F.3d 389, 425 (5th Cir. 2010) ("Evidence of mere correlation, even a strong correlation, is often spurious and misleading when masqueraded as causal evidence, because it does not adequately account for other contributory variables."); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 885 (10th Cir. 2005) ("A correlation does not equal causation."); *Wessmann v. Gittens*, 160 F.3d 790, 804 (1st Cir. 1998) ("Even strong statistical correlation between variables does not automatically establish causation.").

heard of Libertarian Gary Johnson and 59 percent had heard of Green Party candidate Jill Stein." (AR 7225; *see also* FEC Mem. at 37-38.) Even if the Court could consider the two polls plaintiffs cite (Pls.' Reply at 12; Pls.' Mem. at 27) — which it cannot (FEC Mem. at 23-24) — those polls are from June 25-26 and July 13-17, 2016. There is no evidence that these polls accurately reflected Johnson's name recognition over six and eight weeks later, respectively, much less that they rendered it arbitrary for the FEC to rely on an August 25-26 poll. (*Cf.* AR 2511 ¶ 43(g) (recognizing that, "at the early stages of the electoral cycle, people are not paying attention to the candidates and issues").)

Nor did the Commission act contrary to law in finding Young's opinion regarding polling error less persuasive than that of CPD's expert, Gallup Organization's Editor-in-Chief Frank Newport.[8] Plaintiffs do not dispute the settled law deferring to an agency's resolution of competing expert evidence. (FEC Mem. at 38.) Instead, they continue to criticize the FEC's conclusion that Young's polling error opinion incorrectly focused on the difference between polling results and election results. (AR 7231.) Plaintiffs claim that the FEC allegedly contradicted CPD's statement that "[t]he purpose of the [polling] criteria is to identify those candidates . . . who have a realistic chance of being elected President," by stating that "CPD does not purport to use the polls as predictors of what will occur on Election Day." (Pls.' Reply at 13-14 (quoting AR 7114 & AR 7231).) But these statements are not contradictory. Indeed, on the very same page cited by plaintiffs, CPD states its polling criterion "requires that the candidate have a *level of support* of at least 15% . . . using the average of [the selected polling] organizations' most recent publicly-reported results *at the time of the determination*." (AR 7114

[8] Contrary to plaintiffs' suggestion (Pls.' Reply at 14 n.6), Newport's 2014 declaration was provided to plaintiffs. (AR 3043-50.)

(emphases added).) The FEC reasonably credited Newport's explanation that, although imperfect, "'there is no doubt that properly conducted polls remain the best measure of public support for a candidate . . . at the time the polls are conducted.'" (AR 7231 (quoting AR 3047-48 ¶ 21).) Just because a particular candidate has, at a particular point in time, a realistic chance of being elected President in the future does not mean that at that point in the future he or she will have an identical chance or in fact be elected President — and CPD nowhere says that it does. But, as the FEC pointed out (FEC Mem. at 38), it is hardly unreasonable for CPD to select candidates having a 15+% level of support at the time of its debates on the basis that these candidates likely are the most relevant to what happens on election day.

Because the FEC found Young's analysis to be fundamentally misconceived, it did not need to separately address his attempt to adjust that analysis. (*Contra* Pls.' Reply at 15.) As this Court recognized, the FEC need not "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. Further, the Commission relied on Newport's opinion, who reviewed all of plaintiffs' "submissions and data relating to the accuracy of public opinion polls" and credibly concluded that "[n]one of the information presented by [plaintiffs] casts doubt on the reliability of the public opinion polls CPD" has used. (AR 3047 ¶ 18.) He opined that "nothing about support for a significant third party-candidate [sic] [] makes it more difficult to measure." (AR 7232 (quoting AR 3047 ¶ 21).) Under D.C. Circuit law, the Court should defer to the FEC's weighing of these experts' opinions. *Wisc. Valley Improvement v. F.E.R.C.*, 236 F.3d 738, 746-47 (D.C. Cir. 2001).

Plaintiffs lastly argue that Young demonstrated that polling error "disfavors independent candidates." (Pls.' Reply at 15.) But even if it were true that such error disfavors "independent

gubernatorial candidates," the FEC explained that "it is not clear that independent presidential candidates are similarly impacted." (AR 7232.) In any event, the regulation itself recognizes that being a major party nominee can be one of the "objective" criteria, just not "the sole objective criterion." 11 C.F.R. § 110.13(c). Plaintiffs fail to show that that the Commission's evaluation of Young's polling error opinion was arbitrary.

b. Douglas Schoen's Report

The Commission also reasonably found Schoen's analysis unpersuasive for numerous reasons. (FEC Mem. at 39-40.) The Court may sustain this finding simply because (a) Schoen's report incorporates Young's errors and/or (b) Schoen's conclusion that independent candidates must spend at least $266 million to reach at least 60% name recognition was considerably off the mark, given Gary Johnson's actual experience achieving substantial name recognition at a fraction of Schoen's estimated cost. (*Id.* (citing AR 7228 (Johnson achieved 63% name recognition at "a mere *2-3 percent* of the $266 million that Schoen estimates an independent candidate would need to achieve 60-80% name recognition")).) In addition to these independently sufficient reasons, the FEC further identified additional flaws, including Schoen's incorrect assumptions that independent candidates do not receive earned (*i.e.*, free) media, that super PACs only contribute to major-party candidates, that digital platforms could not increase name recognition at a fraction of the cost of traditional media, and that an independent candidate would begin with zero name recognition. (FEC Mem. at 39-40; AR 7226-29.)

Plaintiffs' dispute about the *size* of Schoen's error (Pls.' Reply at 16-17) fails to rehabilitate his opinion. Whether or not 60+ free media appearances constitutes substantial coverage, the fact that the free coverage happened *at all* demonstrates Schoen's premise to be

inaccurate. Similarly, that there are super PACs spending millions advocating on behalf of independent candidates *at all* undercuts the persuasiveness of Schoen's premise that independent candidates must alone bear the costs of increasing name recognition. (FEC Mem. at 39-40.)

Moreover, given now-President Trump's success from employing digital media at less than half the cost of the traditional media Hillary Clinton used, the Commission's finding that Schoen likely over-estimated media costs is reasonable. (AR 7227.) Rather than contesting that traditional media is significantly more expensive than digital media, plaintiffs instead argue that major-party campaigns and their supporters spent a lot of money on paid digital advertising. (Pls.' Reply at 16-17.) But the question is not how much would an independent candidate need to spend in order to become President. It is whether it was arbitrary for the FEC to be unpersuaded by Schoen's opinion that a candidate *must* spend approximately $106 million on paid media, of which 95% is traditional media, in order to reach 60+% name recognition. The Trump/Clinton example relied upon by the FEC reasonably calls into question Schoen's opinion on this point by illustrating how cheaper digital media can contribute to a candidate's success.

The Commission was also correct in noting 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.) The Commission observed that "Gary Johnson and George Wallace . . . were both governors before running for president and presumably enjoyed at least regional recognition." (*Id*.) This is a matter of common sense. *Van Hollen*, 811 F.3d at 497-98 (finding hard evidence unnecessary to sustain reasonability of agency decision based on common sense). Additionally, plaintiffs themselves noted "an early 2011 poll in which Johnson had 'over 10%' name recognition among Republican voters.'" (Pls.' Mem. at 31 n.47.) That

poll shows that Johnson entered the election cycle with more-than-zero name recognition, which supports the Commission's critique of Schoen's assumption that independent candidates always begin their campaigns with no name recognition.

The FEC's analysis of Schoen's report — including his reliance on Young's flawed report and the fact that a real candidate demonstrated Schoen's conclusion to be radically off — demonstrates that the Commission had a rational basis for finding Schoen's report not credible.

c. The 15 Percent Threshold

The Commission's conclusion that CPD's 15 percent threshold is objective under section 110.13 is reasonable. (FEC Mem. at 40-41.) Plaintiffs cannot dispute that it is objective on its face, and "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)).[9] While plaintiffs argue that several of those independent candidates should not count because they were not "truly independent" (Pls.' Reply at 20), the distinction they seek to draw has no basis in the regulations. To paraphrase the Supreme Court, "it [would be] a dangerous business for [the Commission] to use the election

[9] The Commission did not admit otherwise in its answer. (*Compare* Pls.' Reply at 20 n.9, *with* Docket No. 82 ¶ 52.) According to CPD, the polls it used to assess whether Perot's 1992 candidacy satisfied its then-applicable criteria ranged from 9% to 20%. (AR 7133-34 ¶¶ 22-24; AR 2319 ¶ 23.) Thus, while some polls may have shown his favorability at 10% or below, the Commission's answer does not refer to all polls or admit that Perot did not satisfy CPD's current 15% polling threshold. (Docket No. 82 ¶ 52.) In any event, the Court's review is limited to the administrative record. *Cf. Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981) ("It is well settled that judicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made . . . , not some new record completed initially in the reviewing court.").

Further, according to plaintiffs, third-party candidates Theodore Roosevelt, Robert LaFolette, Henry Wallace, and Strom Thurmond also likely achieved 15+% favorability. (AR 2060.)

laws to influence the voters' choices." *Davis v. FEC*, 554 U.S. 724, 742 (2008). And while not unsympathetic to the challenges that independent candidates face (*see* AR 7233), the Commission is not permitted to interpret its debate staging regulations for the purpose of "'level[ing] electoral opportunities for candidates of different personal wealth,'" which the Supreme Court has found is not "a legitimate government objective." *Davis*, 554 U.S. at 741. History proves, however, that if and when the American people find an independent candidate compelling, that candidate can reach the 15% polling threshold for inclusion in the presidential debates. Accordingly, and because the Commission's detailed explanation easily satisfies its minimal burden of showing a rational basis for its decision, *Orloski*, 795 F.2d at 167, plaintiffs cannot satisfy their heavy burden to demonstrate the Commission abused its discretion.

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

Plaintiffs have similarly failed to show that the FEC's decision not to initiate a rulemaking was arbitrary and capricious. Their immaterial criticisms remain meritless.

A. The Court's Review of the FEC's Rulemaking Decision is Highly Deferential

Plaintiffs do not dispute that review of an agency's decision not to engage in rulemaking "'is very limited,'" and that such a decision "'is at the high end of the range of levels of deference.'" (FEC Mem. at 41-42 (quoting *LPF I*, 232 F. Supp. 3d at 145-46 (internal citations omitted)).) Nor do they dispute that where, as here, "the proposed rule pertains to a matter of policy within the agency expertise and discretion," review is limited to ensuring the agency has explained the facts and policy concerns it relied upon and those facts have some basis in the record. *Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 919 (D.C. Cir. 2008) (citation and internal quotation marks omitted); *see also* FEC Mem at 42.

Rather, plaintiffs' request for reduced deference is directly contrary to controlling precedent. *See supra* p. 2-5. And their suggestion that the Court should look to a favorable op-ed to reduce the standard of review is squarely contradicted by a court in this District's observation that the court in the *Shays* litigation "rightly" deferred to the FEC's decision to evaluate political committee status through adjudication rather than rulemaking, "reasoning that this implementation choice was 'exactly the type of question generally left to the expertise of an agency.'" *Citizens for Responsibility & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 88 (D.D.C. 2016) (quoting *Shays v. FEC*, 511 F. Supp. 2d 19, 31 (D.D.C. 2007)).[10]

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

The Commission's opening brief showed that plaintiffs' claims regarding the Commission's decision not to initiate a rulemaking continue to overlap with their claims regarding the administrative complaints and should be rejected for the same reasons. (FEC Mem. at 42.)[11] Plaintiffs' insubstantial objections concerning the polling stage used by Young and obsessive focus on a footnote in the Commission's Supplemental NOD, the substance of which is not disputed, and other incorrect miscellany, are unavailing. (*Id.* at 42-45.) Plaintiffs renew these criticisms in their latest brief (Pls.' Reply at 21-24), but they remain without merit.

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[10] Plaintiffs do not respond to the Commission's similar demonstration that there is a high threshold for obtaining an order compelling an agency to initiate a rulemaking, as opposed to an order remanding to the agency for reconsideration. (FEC Mem. at 45.) Tellingly, however, plaintiffs now ask the Court to "require the FEC to open a rulemaking" (Pls.' Reply at 25), having previously urged more sweeping relief. (*Compare* Pls.' Mem. at 44 (requesting that the Court "order the FEC to open a rulemaking, and require that it be completed sufficiently in advance of the 2020 presidential election").)

[11] Commissioner Goodman also included a concurring statement regarding the analysis in the Supplemental NOD. (AR 1886-1902.)

Plaintiffs' objection to the Supplemental NOD's criticism of Young's reliance upon early primary polling (AR 1933), based on their assertion that Young "explicitly relies upon polling data from *all* stages of the election" (Pls.' Reply at 21-22), fails to change Young's finding that an early primary polling model is superior and thus the basis for his conclusions (*see* Pls.' Reply at 11 (reproducing chart from Young's report from his "Early Primary Model" (AR 2504))). As the Commission explained, Young's models "extrapolate from data about name recognition of major party candidates at the early stages of the party primary process . . . because, the report explains, 'party halo effects' may be lower during early primary polling.'" (AR 1933 (quoting AR 2500 ¶ 22).) Plaintiffs still fail to show that it was arbitrary for the Commission to observe that Young does not "address or account for differences in the size of the candidate fields" during the distinct primary and general election campaign periods, and reduce reliance on Young's report accordingly. (AR 1933; *see also* FEC Mem. at 43.))[12]

Furthermore, as discussed above, *supra* p. 15 & n.7, plaintiffs' argument conflating correlation and causation between name recognition and vote share fails to account for the possibility that increasing name recognition will not always result in increasing vote share. As the FEC explained (FEC Mem. at 43), Johnson's "political misstep[]" (AR 1933) regarding Aleppo may have made his name more recognizable but also have convinced some voters that he was undeserving of their vote. To use plaintiffs' marathon analogy (Pls.' Reply at 22), while

[12] Young's appendix setting forth "*Alternative* Models of Name Recognition" (AR 2520 (emphasis added)) is suggested in his report to be distinct from the model Young used "present[ing] a clear picture of the relationship between name recognition and vote share" (AR 2504). And even in that alternative, Young describes the models as early primary ("before the primary elections begin"), late primary ("after the elections begin but before the general election"), and total ("all observations"). (AR 2520.)

training may be one factor that helps a runner compete, training in a way that leads to injury might scuttle the whole enterprise before the first step is taken.

As for Schoen, plaintiffs continue their criticism of footnote six of the FEC's Supplemental NOD responding to Schoen's assertion that "'the media will not cover an independent candidate until they are certainly in the debates.'" (AR1933 & n.6.) The Commission already explained that Schoen's point was incorrect because the agency was aware "of at least three non-major-party candidates who did not participate in the general election debates but received significant media attention in 2016" and described searches of Westlaw's Major Newspaper database for articles containing the names Gary Johnson, Jill Stein, and Evan McMullin. (FEC Mem. at 43-44 (discussing AR1933 n.6).)

Plaintiffs still do not dispute that Schoen's authority for his assertion that independent candidates get *no* earned media was unpersuasive. Rather, they gloss over Schoen's error, disputing instead whether the media attention Johnson, Stein, and McMullin received was significant. (Pls.' Reply at 23.) Plaintiffs' accusations of intentional misrepresentation, gerryrigging, falsification, and the like (*id.* at 22-23) are unfounded and do not substitute for the acknowledged error in the expert report that the FEC identified. (AR 1933.) What matters is that Schoen was wrong in claiming that the media "will not" cover independent candidates not in the debates, and it was not arbitrary for the Commission to say so. Especially in light of the extensive portions of the Commission's review of Schoen's report that plaintiffs do not challenge (AR 1933-35 (identifying numerous errors making Schoen's report unreliable)), their focus on whether Schoen's mistake was small, medium, or large is insufficient to show that the FEC's conclusions lacked a basis in the record. *Defs. of Wildlife*, 532 F.3d at 919.

Plaintiffs' remaining claims about Schoen are simply incorrect. The FEC has not "concede[d]" overlooking recent articles Schoen relied upon. (*Contra* Pls.' Reply at 24; FEC Mem. at 44.) The Commission's observation that, according to prominent polls analyst Nate Silver, President Obama was well known to voters in advance of the 2008 primaries (AR 1934) belies plaintiffs' claim that the FEC ignored the exposure Obama received during those primaries (Pls.' Reply at 24). And no amount of recharacterization of Schoen's claim that Rick Santorum spent "only $21,980 in" Iowa (AR 0169) will transform that amount into the $112,000 he actually reported spending in the state. (FEC Mem. at 44.)

Lastly, it was not arbitrary for the Commission not to request the data that plaintiffs chose not to provide. (Pls.' Reply at 24.) Despite the Commission's observation (FEC Mem. at 44-45) that plaintiffs could have provided this underlying data with LPF's voluminous rulemaking petition, plaintiffs still have provided no explanation for their decision not to provide this extra-record material, either initially or following remand, so the agency could have reviewed and responded to it in its Supplemental NOD.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Commission's opening brief, the Court should award summary judgment to the Commission.

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December 8, 2017