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

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

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION

Defendant.

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

**PLAINTIFFS LEVEL THE PLAYING FIELD, PETER ACKERMAN, GREEN PARTY OF THE UNITED STATES, AND LIBERTARIAN NATIONAL COMMITTEE, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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There is a "mountain" of evidence supporting Plaintiffs' claim that the CPD has rigged its debate-selection criteria in favor of Democrats and Republicans and against independent candidates.[1] *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 142 (D.D.C. 2017) ("*LPF*"). The CPD is led by staunch partisans who reflexively endorse Republican and Democratic candidates, lavish them with high-dollar cash contributions, served them as aides or high-priced consultants, mingle with partisan elites at exclusive fundraisers, oversee hundreds of thousands of dollars of contributions to Democratic and Republican politicians as paid-for-hire lobbyists, and accept dark money contributions from anonymous corporations seeking to buy influence with the major parties using the CPD itself as a vehicle. These diehard Democrats and Republicans have confirmed time and again that the CPD's goal is to ensure that only their own parties' nominees, and not any independent challengers, are invited to the presidential debates. For five consecutive elections, they have achieved this goal using an exclusionary polling threshold that, as the current President admitted when he previously pursued a third-party candidacy, was designed by "the two-party political establishment" to "keep the American people from having a third choice."[2] Plaintiffs' experts confirmed this conclusion with empirical proof that virtually no independent candidate could satisfy the CPD's biased polling criterion.

The FEC refuses to fix this problem because the FEC is part of the problem. An "inherently bipartisan" agency, *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) ("*DSCC*"), the FEC is part of the same "two-party political establishment" as the CPD. That is why, for over two decades, the agency has consistently rubber-stamped the CPD's

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1 "Independent candidate" refers to candidates who are unaffiliated with any political party as well as candidates who are affiliated with political parties other than the Democratic and Republican parties, such as the Green Party of the United States and the United States Libertarian Party.

2 http://www.nydailynews.com/archives/news/debate-bar-raised-3rd-party-choice-article-1.874058.

lawless exclusion of independents from the presidential debates.

And that is precisely what it did once again here. When Plaintiffs filed their administrative complaints challenging the CPD's debate-selection criteria and petitioned for a rulemaking, the FEC "stuck its head in the sand," "ignored the evidence" that the process is rigged, and summarily dismissed Plaintiffs' applications. *LPF*, 232 F. Supp. 3d at 148. This Court held that "the FEC acted arbitrarily and capriciously," and remanded the matter to the FEC. *Id*. at 145, 148. The Court did not "mandate that the FEC reach a different conclusion on remand," but stressed that "the weight of Plaintiffs' evidence is substantial," and required the FEC to "demonstrate that it actually considered the full scope of this evidence." *Id*. at 145.

On remand, the FEC did the opposite of what this Court instructed, and again "stuck its head in the sand" and refused to "actually consider" the evidence. The post-remand decisions do not and cannot explain the overwhelming evidence of the CPD's partisanship, including the multitude of partisan endorsements, campaign contributions, and concessions that the CPD will not "look with favor on including third-party candidates in the debates." Most of this evidence remains unaddressed, and what the FEC does say simply reveals that it will say just about anything to cover for the CPD. For example, in attempting to explain why one CPD director admitted that the CPD is "bipartisan," the FEC claims that she must have meant "nonpartisan." But the term "bipartisan" by definition "involv[es] cooperation [and] agreement . . . *between two major political parties*"[3]—it means *the opposite* of "nonpartisan." The FEC's explanation is analogous to claiming that "biweekly" means "never," or that "bigamous" means "unwed." This Orwellian construction of the term "bipartisan" is arbitrary, capricious, and contrary to law.

The FEC's treatment of Plaintiffs' expert evidence is equally arbitrary and capricious,

[3] https://www.merriam-webster.com/dictionary/bipartisan (emphasis supplied).

and reflects an equally dubious effort to justify a pre-ordained result. For example, expert political strategist Douglas Schoen has explained that independent candidates are unable to attract adequate news coverage, requiring them to spend amounts they could never afford on paid media. In response, the FEC presents a purported analysis of a Westlaw news database in which it claims that Libertarian Party candidate Gary Johnson received substantial press in 2016. But the FEC either misrepresented or did not review the results of its news searches, or consider that "Gary Johnson" is a common name. Its "analysis" cites articles about dozens of people named Gary Johnson who are not the presidential candidate, including athletes, chefs, museum presidents, criminals, doctors, lawyers, and musicians. The FEC also vastly understates the news coverage of the major party candidates to make it seem comparable to that of the independent candidates. For example, the FEC claims that Gary Johnson received almost half as much coverage as Donald Trump, which is both facially preposterous and demonstrably false.

The FEC did not "actually consider" Plaintiffs' evidence. It concocted flimsy excuses for the CPD, just as it has always done. The only "evidence" the FEC cites to purport to justify the outcome largely post-dates the FEC's original 2015 decisions dismissing the complaints and rulemaking petition. This shows that the FEC never had any reasoned basis for its original decisions, and that it manufactured a rationale after this Court rejected its latest attempt to sweep the CPD's partisanship under the rug. The FEC also makes no effort to actually defend the 15% polling criterion. As this Court observed, given "the evidence that since 1988 only one non-major party candidate . . . has participated in the debates, and only then at the request of the two major parties, and the evidence that the CPD's chairmen and directors are actively invested in the partisan political process," it is "perplex[ing]" that the FEC is so quick to deem the CPD's criteria "objective." "This begs the question: if under these facts the FEC does not consider the

fifteen percent polling criterion to be subjective, what would be?" *LPF*, 232 F. Supp. 2d at 144-45. The Court will search the FEC's post-remand decisions in vain for an answer to its question.

These decisions come on the heels of a presidential election in which the American people were clamoring louder than ever for an alternative to the major party candidates. The major parties nominated the two "most unfavorable [presidential] candidates ever"[4] and ultimately delivered the least popular president since the advent of favorability polling.[5] 76% of Americans wanted an independent candidate to participate in the 2016 presidential debates because they believe that someone who is not a Democrat or Republican deserves serious consideration for the presidency.[6] But the CPD—an unelected body accountable to no one—defied the popular will and invited only the major party candidates for the sixth straight time.

The FEC has squandered countless opportunities to address the harm that the CPD is inflicting upon our democratic institutions. The agency has instead demonstrated its own complicity in the CPD's efforts to entrench the two-party establishment. The FEC has consistently ignored the irrefutable evidence demonstrating both how and why the CPD contravenes FECA by excluding independent candidates from the debates. And, by disregarding the Court's explicit instructions, it has now made it absolutely clear that it will never "give [this evidence] the consideration it requires." *LPF*, 232 F. Supp. 2d at 148. Accordingly, this Court should grant summary judgment; hold that the FEC's post-remand decisions do not conform to the Court's prior declaration that the FEC "carefully," "thoughtfully" and "actually" consider the evidence on remand; and permit Plaintiffs to bring an action directly against the CPD.

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4 https://www.usatoday.com/story/news/politics/onpolitics/2016/08/31/poll-clinton-trump-most-unfavorable-candidates-ever/89644296/.

5 https://projects.fivethirtyeight.com/trump-approval-ratings/?ex_cid=rrpromo.

6 www.suffolk.edu/academics/10741.php.

## BACKGROUND

### I. The CPD And Its FECA Violations[7]

The purpose of the Federal Election Campaign Act ("FECA") is to protect the integrity of the political processs by "limit[ing] *quid pro quo* corruption and its appearance." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1444 (2014). FECA thus prohibits "corporation[s]" from "mak[ing] a contribution or expenditure in connection with" presidential campaigns. 52 U.S.C. § 30118(a). An exception to this rule exists for "debate staging" organizations. 11 C.F.R. §§ 100.92, 100.154, 111.4(f). However, "[t]o prevent debate staging organizations . . . from operating as conduits for corporate contributions made to benefit only one or two candidates" from the major parties, "the regulations require these organizations to (1) be nonpartisan, (2) not endorse, support, or oppose candidates or campaigns, and (3) use pre-established, objective criteria" for determining who will participate in the debates. *LPF*, 232 F. Supp. 3d at 135; *see also* 11 C.F.R. § 110.13. "If a debate staging organization fails to comply" with these requirements, "then the value of the debate is actually a contribution or expenditure made to the participating political campaigns in violation of [FECA]." *LPF*, 232 F. Supp. 3d at 135.

The CPD has staged every general election presidential and vice presidential debate since 1988, and accepts undisclosed corporate donations to pay its costs. *Id*. at 134. These donations violate FECA unless the CPD qualifies as a "debate staging organization." But the CPD does not qualify, because it is a partisan organization that supports major party presidential nominees and uses biased debate-qualifying criteria to ensure that only those nominees participate.

[7] Plaintiffs detailed their allegations against the CPD in the prior summary judgment motion. (*See, e.g.*, Dkt. 37 at 6-21). Because of the Court's familiarity with these allegations, Plaintiffs only summarize them here.

The CPD is led by staunch partisans who have no qualms about their favoritism toward the Democratic and Republican parties. Indeed, the CPD is partisan by its very design. It was "formed [in 1985] . . . by the national Republican and Democratic committees" so that "all future presidential debates" would be "between the nominees of th[os]e two political parties." (AR2249-50). Since then, the CPD's directors have repeatedly confirmed that the Democrats and Republicans determine who participates in the debates; that the CPD is "interested in the American people finding out more about the two major candidates [and] not about independent candidates" who, in the CPD's view, would only "mess things up"; that the CPD will "not likely . . . look with favor on including third-party candidates in the debates"; and that its "system" therefore prioritizes inclusion of "the two leading candidates" from the Democratic and Republican parties. (AR2252, 3095, 3099). The directors have also revealed their partisan bias by, *inter alia*, donating hundreds of thousands of dollars to Democrats and Republicans; repeatedly endorsing major party candidates; serving as high-ranking party officials and top aides to elected officials; raising money for these officials; and funneling hundreds of thousands of dollars to them as high-powered lobbyists. (*See, e.g.*, AR2370-89, 2403-08, 3099).

Unsurprisingly, the CPD's partisan leadership has adopted debate-qualifying criteria ensuring that only Republican and Democratic candidates will be invited to the presidential debates. Since 2000, the CPD has included only candidates who have "a level of support of at least 15% . . . of the national electorate as determined by five national public opinion polling organizations selected by the CPD, using the average of those organizations' most recent publicly-reported results at the time of the determination." (*E.g.*, AR7114-15). Plaintiffs' experts have presented empirical proof that this polling criterion is virtually impossible for independent candidates to satisfy. Dr. Clifford Young showed that a candidate seeking to

achieve 15% voter support must first obtain name recognition of at least 60%, and likely 80% or more. (AR2493 ¶ 10, AR2504-05 ¶¶ 29-30, 32). In practice, independent candidates cannot reach that level of name recognition unless they are self-funded billionaires. Major party candidates have a default level of support from committed partisans and benefit significantly from media coverage of the major party primaries. (AR2500-01 ¶ 21). Independent candidates have no analogous mechanisms for generating name recognition, and must instead pay for advertising and other media exposure. Plaintiffs' expert Douglas Schoen demonstrated that to reach and sustain the requisite level of name recognition, an independent campaign must spend at least $266 million. (AR2571-72). No independent candidate has, or could, raise such funds, because few donors will fund candidates whose participation in the debates is uncertain.

Polling is also unreliable in a way that systematically works to independent candidates' detriment. These candidates often bring out new voters who are politically inactive or even unregistered until mobilized by a compelling independent candidate, and thus undercounted in polls. (AR2581). An unfavorable polling error could very easily exclude an independent candidate who is near the 15% threshold, a problem that Republicans and Democrats never face. (AR2515 ¶56, AR2517 ¶ 66). The CPD also retains complete discretion about whom to poll, when to poll, what polls to use, and when to choose debate participants, all of which allows it to pick and choose polls that put independent candidates below the 15% threshold. (AR7114-15).

The CPD is an unabashedly partisan organization that supports the major party presidential nominees by using debate-qualifying criteria that are designed to, and do, exclude other candidates from the presidential debates. The CPD is not a valid "debate staging organization," and both the corporate donations it accepts and the benefits it provides the major party nominees therefore violate FECA. *LPF*, 232 F. Supp. 3d at 135.

## II. The FEC's History Of Protecting The CPD

The FEC refuses to police these violations because it shares the CPD's partisan bias. The agency is comprised of six commissioners, no more than three of whom "may be affiliated with the same political party." 52 U.S.C. § 30106(a)(1). Because of this structure, the Supreme Court has called the FEC "inherently bipartisan," *DSCC*, 454 U.S. at 37, which is why its Democratic and Republican commissioners can be expected to, and do, favor the interests of the major parties they represent. Indeed, the FEC has spoken openly about its "desire to strengthen party organizations," a goal divorced from its statutorily delegated authority and inimical to including independent candidates in the debates.[8] These problems have been exacerbated over the past decade by "dysfunction" at the FEC.[9] As a former FEC Chair acknowledged, the FEC has simply stopped enforcing FECA, meaning that "[m]ajor violations are swept under the rug" and "violators of the law are given a free pass."[10] The FEC has always been opposed to enforcing the CPD's compliance with FECA, and now refuses to enforce *any* FECA violation.

That is why the FEC has rejected every administrative challenge to the CPD and its biased polling rule since 1996. At that time, administrative complaintants argued that the CPD's selection criteria for the 1996 election, which differed from its current criteria, were not objective and that the CPD was not nonpartisan. (Dkt. 37-2 Ex. 3 at 10-13, 25-26). The FEC's General Counsel agreed, concluding that there was reason to believe that the CPD was violating FECA. (*Id.* at 35-36). Yet the FEC rejected its Counsel's advice and refused to act.

In 2000, after the CPD adopted the 15% rule, the FEC dismissed several administrative complaints alleging that both the CPD and its new polling criterion were biased in favor of the

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8 http://www.fec.gov/agenda/2015/documents/transcripts/Open_Meeting_Captions_07_16_2015.txt.

9 https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf.

10 *Id.* at 1.

major party candidates. *See Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000). The agency reasoned that the CPD did not "endorse, support or oppose" candidates or parties under § 110.13 because the complaintants offered no "evidence that the CPD is *controlled by* the DNC or the RNC." (Dkt. 37-2 Ex. 4 at 15 (emphasis supplied)). The FEC admitted at the time that this was not an interpretation of § 110.13(a), but "simply a response to the allegations plaintiffs had made" that "the Republican and Democratic Parties . . . control . . . the presidential . . . debates." (Dkt. 37-2 Ex. 6 at 5-6). In affirming the FEC, the district court in *Buchanan* agreed that the FEC was merely "refuting the specific contention made in plaintiffs' administrative complaints," and was not adopting a "standard." *Buchanan*, 112 F. Supp. 2d at 71 n.8.[11]

Yet the FEC ignored this, and dismissed all subsequent administrative complaints on the ground that the CPD is not "controlled" by the parties, regardless of whether the complaintant even claimed that it was. (*See, e.g.*, Dkt. 37-2 Exs. 7-9). This made no sense. The CPD obviously doesn't need to be controlled by the parties to "endorse," "support" or "oppose" them; the CPD can and does support parties regardless of who controls the CPD. That is one reason why, as this Court would later confirm, the "control" standard is "contrary to the plain text of the regulation." *LPF*, 232 F. Supp. 3d at 140. Yet for 15 years, the FEC summarily dismissed every challenge to the CPD in reliance upon this erroneous and pretextual standard of review.

## III. This Court's Decision Concluding That The FEC Arbitrarily And Capriciously Dismissed Plaintiffs' Administrative Complaints And Rulemaking Petition

The FEC simply employed its now-familiar playbook yet again in this case. In 2014, Plaintiffs filed administrative complaints alleging that the CPD and twelve of its directors contravened FECA and the FEC's debate staging regulations, and Plaintiff LPF filed a petition

[11] The complaintants in *Buchanan* also presented no "contemporaneous evidence of influence by the major parties" or evidence showing how the polling criterion would "systematically work to minor-party candidates disadvantage." *Id.* at 72, 75.

for rulemaking requesting that the FEC revise 11 C.F.R. § 110.13(c) to specifically bar debate staging organizations from using a polling threshold as a necessary criterion for participation in general election presidential and vice-presidential debates. *LPF*, 232 F. Supp. 3d at 136-37. In 2015, the FEC summarily dismissed the administrative complaints and the petition. These decisions, like the its prior ones, contained little substance, and instead invoked *Buchanan* and the FEC's own history of dismissing complaints against the CPD. (AR3178-81; AR5006-10; AR 1904). The FEC ignored nearly all the evidence and ten respondents.

On August 27, 2015, Plaintiffs petitioned this Court for review of the FEC's decisions. On February 1, 2017, this Court granted summary judgment to Plaintiffs. *LPF*, 232 F. Supp. 3d at 133. The Court remanded the matter and ordered the FEC to explain the reasoning behind its dismissal of the administrative complaints and the rulemaking petition. *Id*. at 140, 142, 145, 148. The Court held that the FEC's dismissal of the administrative complaints was "arbitrary and capricious" and "contrary to law" in four specific respects.

First, "the FEC did not articulate what standard it used to determine whether the CPD had endorsed, supported or opposed political parties." *Id*. at 138. "[T]he FEC's reliance on its past dismissals and the *Buchanan* case strongly implie[d] that it ha[d] effectively adopted or relied on the control test it articulated in those past dismissals," even though that test "is contrary to the plain text of the regulation." *Id*. at 139-40. Thus, the FEC "acted arbitrarily and capriciously and contrary to law when it determined that the CPD did not endorse, support or oppose political parties," and the Court ordered it to explain how it applied that standard. *Id*. at 140.

Second, "the FEC failed to adequately consider" or take "a hard look at [Plaintiffs'] evidence," even though that evidence was "quite substantial." *Id*. at 140, 142, 144.

Consequently, the Court commanded the FEC to "demonstrate how it . . . carefully reviewed the evidence" and "thoughtfully reach[ed] its conclusions" on remand. *Id*. at 142.

Third, the Court held that the FEC violated FECA by "failing to notify ten CPD directors about the complaints" or "even consider" the evidence or allegations "specific to th[e] ten directors." *Id*. at 142-43. The Court ordered the agency to "notify these ten remaining directors, address these allegations and consider the evidence presented against these respondents." *Id*.

Fourth, "the agency unreasonably found that the CPD's fifteen percent polling criterion was 'objective'" because, as above, it failed to "actually consider[] the submitted evidence" or conduct "any reasoned decision-making." *Id*. at 143-44. The FEC was ordered to "demonstrate that it actually considered the full scope of this evidence" and "explain how and why it rejected this evidence in deciding that the CPD's polling requirement is . . . objective." *Id*.

The Court reached similar conclusions with respect to the rulemaking decision. It found that "the FEC acted arbitrarily and capriciously by refusing to engage in rulemaking without a thorough consideration of the presented evidence," and ordered the FEC to "give the Petition the consideration it requires" on remand. *Id*. at 148.

## IV. The FEC Reached An Identical Result On Remand

On March 29, 2017, the FEC issued new decisions reaching the exact same result as before: a "Factual and Legal Analysis" purporting to justify dismissing the administrative complaints ( "Factual and Legal Analysis II"), and a denial of the rulemaking petition. (AR7202-34; AR1931-37). It is readily apparent from these decisions that the FEC did *not* "carefully" and "thoughtfully" consider the evidence or give it "the consideration it requires." The FEC still disregards much evidence, and its treatment of the remainder is filled with such blatant errors that it shows the FEC was either deliberately deceitful or careless in its "analysis."

The FEC continues to ignore the vast majority of the evidence demonstrating the CPD's deep partisan ties and favoritism toward the major parties. The FEC instead cites a handful of mostly new boilerplate affidavits from the CPD's directors, none of which meaningfully address Plaintiffs' allegations, some of which directly contradict these affiants' prior admissions, and at least one of which unwittingly confirms the CPD's partisanship. (AR7216-17, AR7219). The FEC also claims that the directors' partisan conduct was "personal" and cannot be attributed to the CPD, even when they admitted how the CPD itself operates in a partisan manner. (AR7220-21). And the FEC mindlessly accepts the CPD's curiously timed revelation of supposed longstanding "policies" intended to curb some of the directors' partisan endeavors—even though the FEC has no idea what the "policies" say because the CPD withheld them, the CPD concedes that they ignore most of the CPD directors' partisan activities, and the directors continue to engage without repercussion in the few activities that are supposedly prohibited (AR7221-22).

The FEC's treatment of Plaintiffs' expert evidence is equally superficial. It largely ignores what the experts said and the substantial data supporting it. The FEC instead cites events from the 2016 presidential race which, in reality, directly support the conclusions of Plaintiffs' experts. For example, the FEC purports to rely upon Libertarian Gary Johnson's candidacy to justify the 15% polling criterion, even though Johnson never polled anywhere close to 15% (AR7225; AR1933); cites the 2016 race as evidence that fundraising lacks significance to a modern presidential campaign, even though that race cost the candidates over $3 billion (AR7227); and egregiously misrepresents news coverage of the 2016 campaign, which overwhelmingly favored Democrats and Republicans (AR7226, AR1933 n.6).

Indeed, the FEC either carelessly or deliberately ignores what actually happened in 2016. As in the five preceding elections, only the Republican and Democratic nominees were invited to

the 2016 debates. These nominees or their campaigns have confirmed that the CPD is a "bipartisan" organization, and therefore violates FECA's requirement that a debate staging organization be nonpartisan.[12] Trump previously observed that the CPD belongs to the "two-party political establishment," and that the purpose of the 15% rule is "to keep [independents] out" of the debates and to prevent "the American people from having a third choice."[13]

These observations were amply supported by the CPD directors' own extensive involvement in the 2016 election and other recent partisan acts. For example, since January 2016, CPD co-chair Frank Fahrenkopf has made seven campaign contributions totaling $4,000 to both the Republican Party and four different Republican candidates.[14] He also taught a seminar at Harvard promoting "bi-partisanship"; an entire session was devoted to the "Commission on Presidential Debates," which Fahrenkopf described as a program that "[w]ork[s] [a]cross [p]arty [l]ines" and exemplifies the "possibilities [for] rejuvenating . . . bipartisanship" in Washington.[15]

Fahrenkopf's former co-chair and current director Michael McCurry contributed over $33,000 to Democratic candidates during the 2016 election cycle, including Hillary Clinton and at least six Democratic congressional candidates. McCurry opined after the election that "the smart people voted for Hillary Clinton."[16] CPD director and former Democratic congresswoman Jane Harman similarly published a June 2016 article in the *Washington Post* identifying Clinton

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12 *See, e.g.*, http://money.cnn.com/2016/07/31/media/donald-trump-jason-miller-reliable-sources/index.html; http://nymag.com/daily/intelligencer/2016/10/trump-on-commission-for-presidential-debates-im-done.html.

13 http://www.nydailynews.com/archives/news/debate-bar-raised-3rd-party-choice-article-1.874058; http://www.cnn.com/TRANSCRIPTS/0001/07/se.03.html.

14 The campaign contribution data described herein is sourced from FEC disclosures located on its website. *See* https://www.fec.gov/data/ (under "Find contributions from specific individuals").

15 https://www.iop.harvard.edu/get-involved/study-groups/can-congressional-bi-partisanship-be-rejuvenated-frank-fahrenkopf.

16 https://www.youtube.com/watch?v=L-TQQdlgVxw, at 1:08:11-1:08:14.

as the candidate best "equipped to lead us into the future."[17] Also during the 2016 cycle, director Richard Parsons contributed $7,400 to major party candidates, including Hillary Clinton.

Former Republican Senator Olympia Snowe contributed over $8,000 to Republican candidates for the 2016 elections, and opined that Donald Trump "is hurting our [Republican] brand."[18] She also continued her work as Director at the "Bipartsian Policy Center," a think tank that "actively promotes bipartisanship" and engages in "aggressive advocacy" to "unite Republicans and Democrats" and to enact "bipartisan policy solutions . . . into law."[19]

And CPD director and former Republican Senator John Danforth contributed $28,300 to at least five different Republican congressional candidates in 2016 and 2017. Danforth also continued his tradition of endorsing "whichever Republican is on the ballot" in 2016,[20] including the Republican candidate for governor of Missouri.[21] And in April 2017, Danforth announced his support for Republican Josh Hawley's prospective 2018 Senate bid.[22]

The 15% rule is also obviously biased, as many candidates have recognized. For example, never in his 37 years as an elected official had Bernie Sanders identified himself as a Democrat or participated in a Democratic primary. But he and his advisors concluded early on that if he did not compete in the Democratic primary in 2016, he "wouldn't be invited to participate in presidential debates" and "no one would hear him."[23] The day he announced his

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17 https://www.washingtonpost.com/opinions/clinton-displays-her-foreign-policy-bona-fides/2016/06/03/5eba91f6-29c5-11e6-ae4a-3cdd5fe74204_story.html?utm_term=.ef3785da378d.

18 http://bangordailynews.com/2016/04/01/opinion/contributors/olympia-snowe-says-donald-trump-is-damaging-the-republican-party-brand/.

19 https://bipartisanpolicy.org/about/who-we-are/.

20 http://www.pitch.com/news/blog/20832766/john-danforth-continues-his-electionyear-tradition-of-endorsing-candidates-he-purports-to-despise.

21 https://rturner229.blogspot.com/2016/08/danforth-endorses-greitens.html.

22 http://www.weeklystandard.com/missouris-political-phenom/article/2008740.

23 Jonathan Allen & Amie Parnes, *Shattered* 41 (2017).

candidacy for the nomination, Sanders was asked by a reporter whether he "was . . . now a Democrat." "No," Sanders responded. "I'm an independent."[24] Thus, in a country with more independents than Democrats or Republicans, where voters desperately want an independent choice for president, the CPD—an unelected and accountable body—effectively precluded a popular independent candidate from running as an independent.

Donald Trump presents an even starker illustration of the CPD's bias. He first briefly ran for president as a Reform Party candidate in 2000. That campaign was virtually identical to his 2016 campaign, in terms of both the issues raised and the candidate's idiosyncratic personality.[25] But Trump received relatively little attention and polled in the single digits as a third party candidate. That is why he ran as a Republican in 2016—in his words, it gave him "the best chance of winning."[26] With major party status, Trump's second campaign received more than ten times the daily press coverage than his prior one, catapulting him to the Republican nomination and ultimately the presidency.[27] In other words, the same candidate, running a virtually identical campaign, came nowhere close to 15% as an independent, but easily surpassed that polling threshold and became President as a Republican.

These candidates and others were rightly concerned about the disadvantages they would face if they ran as independent candidates. The average major party presidential candidate—including also-rans like Jim Webb, Martin O'Malley, Lincoln Chafee, Jim Gilmore, and George Pataki—received 10 times more press coverage than the independent candidates.[28] The major

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[24] *Id*. at 48.

[25] John B. Judis, *The Populist Explosion* 65-70 (2016).

[26] http://www.latimes.com/nation/politics/trailguide/la-na-republican-debate-updates-trailguide-03032016-htmlstory.html.

[27] This figure is calculated using the FEC's Westlaw news analysis, described in more detail below (at 37-42).

[28] *See infra* at 42 n.54.

party candidates also enjoyed a massive fundraising advantage. Of the $3 billion raised during the 2016 cycle, over 99% went to Democrats and Republicans. (Dkt. 76 ¶ 42; Dkt. 82 ¶ 42).

And while the CPD paid lip service to the need for nonpartisan debate-qualifying criteria, in moments of candor, its directors revealed their true colors. When asked about the exclusion of independents from the 2016 debates, then co-chair McCurry responded that it was "wasn't our problem, it was their problem."[29] Fahrenkopf made an even more revealing concession after the election was over, when he opined during an interview that "[t]he hardest job we have on the commission is determining who the moderators are going to be."[30] One would think that, when planning debates that could determine the next leader of the free world, the CPD might be more concerned about who *the candidates* are going to be, and that the identity of the moderators would be secondary. But for the CPD, candidate-selection is a forgone conclusion—it knows that only the Republican and Democratic nominees will be invited.

## V. Plaintiffs' Petition For Review Of The Post-Remand Decisions

On May 26, 2017, Plaintiffs filed a Supplemental Complaint petitioning for review of the FEC's post-remand decisions dismissing the administrative complaints and rulemaking petition. (Dkt. 70). Plaintiffs allege that these decisions were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. (*Id*. ¶¶ 76-82). On July 25, 2017, the FEC filed a partial motion to dismiss (Dkt. 71), but abandoned it after Plaintiffs amended the Supplemental Complaint (Dkt. 76). The FEC filed its answer on August 25, 2017. (Dkt. 82).

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29 https://www.youtube.com/watch?v=L-TQQdlgVxw, at 1:11:47-1:11:50.

30 *Id*. at 7:09-7:16.

## ARGUMENT

### I. STANDARD OF REVIEW

The dismissal of an administrative complaint must be overturned if it is "contrary to law." 52 U.S.C. § 30109(a)(8)(C). A dismissal may be contrary to law if: (1) "the FEC dismissed the complaint as a result of an impermissible interpretation of the Act," or (2) "the FEC's dismissal of the complaint, under a permissible interpretation of the statute, was arbitrary or capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). A decision is arbitrary and capricious where the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency must "take into consideration all available information concerning the alleged wrongdoing," and accordingly, "a consideration of all available materials is vital to a rational review of [agency] decisions." *Antosh v. FEC*, 599 F. Supp. 850, 855 (D.D.C. 1984) (quotation marks omitted). This Court should correct improper administrative fact-finding if it "becomes aware, especially from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems" or "genuinely engaged in reasoned decision-making." *Greater Boston Television v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970).

Similarly, a reviewing court must overturn a refusal to initiate rulemaking "if it is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." *EMR Network v. FCC*, 391 F.3d 269, 272-73 (D.C. Cir. 2004). An error of law requires reversal, *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014), as does an agency's failure to

take a "hard look" at the relevant issues, *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981). The Court "must examine the petition . . . , comments pro and con . . . and the agency's explanation of its decision to reject the petition." *Am. Horse Prot. Ass'n Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (quotation marks omitted).

Though judicial review of agency decisionmaking is typically deferential, this Court should not defer to the FEC here. The legal standard requires "close attention to the nature of the particular problem faced by the agency." *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1050 (D.C. Cir. 1979). "The stringency of [the] review, in a given case, depends upon analysis of a number of factors," and "[m]ore exacting scrutiny will be particularly useful when for some reason the presumption of agency regularity is rebutted." *Id.* at 1049 n.23, 1050.

Here that presumption has been rebutted, and the FEC is owed no deference, for three reasons. First, as explained, the FEC is "inherently bipartisan" and has the same partisan loyalties as the CPD. The FEC is fundamentally incapable of policing what is essentially its own political bias. That is why, in case after case, it has refused to enforce its debate regulation and sanctioned the CPD's partisan debate rules. That also explains why, in its original decisions here, the FEC "stuck its head in the sand" instead of addressing the "quite substantial" evidence Plaintiffs presented. *LPF*, 232 F. Supp. 3d at 144, 149. The Court should not defer to the FEC because it has "demonstrated undue bias" that renders the agency incapable of making an impartial assessment of Plaintiffs' allegations. *Natural Res. Def. Council*, 606 F.2d at 1049 n.23.

Second, this Court should apply a "greater degree of scrutiny to an [agency] order that arrives at substantially the same conclusion as an order previously remanded" to the agency. *Greyhound Corp. v. ICC*, 668 F.2d 1354, 1358 (D.C. Cir. 1981); *accord Nat. Res. Def. Council*, 606 F.2d at 1050 ("More exacting scrutiny will be particularly useful when . . . the agency . . .

has arrived at an identical result after remand . . . ."). That is because "an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues." *Greyhound*, 668 F.2d at 1358 (quotation marks omitted); *accord California v. U.S. Dep't of Labor*, No. 2:13-CV-02069-KJM-DB, 2016 WL 4441221, at *14 (E.D. Cal. Aug. 22, 2016) ("Federal courts have long recognized that an agency may become so committed to a decision that it resists genuine reconsideration on remand.").[31]

Third, the FEC's decisions rest primarily on evidence that did not exist at the time of its original dismissals in 2015. This post-remand "rel[iance] upon a considerable amount of new data and information" smacks of "*post-hoc* rationalization," which further underscores the need for sticter review. *AFL-CIO v. McLaughlin*, 702 F. Supp. 307, 310-11 (D.D.C. 1988).

The FEC therefore should be afforded no deference.[32] But even under ordinary deferential review, the FEC's post-remand decisions would be arbitrary and capricious.

## II. THE FEC'S DISMISSALS OF THE ADMINISTRATIVE COMPLAINTS WERE ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION

This Court ordered the FEC to (1) explain the standard it used to determine whether the CPD endorsed, supported, or opposed political parties, (2) demonstrate its reasoned consideration of Plaintiffs' evidence, (3) notify the ten CPD directors and address the evidence presented against them, and (4) explain why the CPD's polling requirement is objective. The FEC's post-remand Factual and Legal Analysis II meets none of these requirements.

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[31] *City of Los Angeles v. U.S. Dep't of Transp.*, 165 F.3d 972, 977-78 (D.C. Cir. 1999), does not hold otherwise. Though it declined to apply greater scrutiny following a remand, that case did not involve an agency with a decades-long history of reaching the exact same result, like the FEC here.

[32] *Hagelin v. FEC*, 411 F.3d 237, 242-43 (D.C. Cir. 2005), rejected an argument that the FEC is biased because of its bipartisan structure. But *Hagelin* did not involve the host of additional factors that are present here, including the FEC's long history of dismissing similar challenges, its inexplicable refusal to consider the evidence in its original decisions, its post-remand decisions reaching the exact same result using post-hoc rationalizations, and the recent onset of "dysfunction" at the agency. And the argument in *Hagelin* was presented only in "a footnote," so it was not even "properly raised." *Id.* at 242.

### A. The FEC Failed To Articulate The Standard It Used

A debate staging organization must be a nonprofit organization that does not "endorse, support, or oppose political candidates or political parties." 11 C.F.R. § 110.13(a)(1). The FEC again fails to "articulate what standard it used to determine whether the CPD" complied with this requirement. *LPF*, 232 F. Supp. 3d at 138. As this Court made clear, bare recitation of the regulation's "endorse, support, or oppose" language is not enough. *See, e.g.*, *id.* (when previously asked to articulate a standard, "FEC's counsel responded simply, though unhelpfully, that '[t]he FEC applied the endorsed support opposed standard that's in the regulation'"). The FEC was instead required to *explain* this standard. But the Factual and Legal Analysis II states only that "the meaning of this standard is plain on its face," without explaining what that supposed "plain meaning" is. (AR7213). This tautology offers no insight into what the FEC means when it claims that the CPD does not "endorse, support, or oppose" candidates, and disregards this Court's demand for an explanation. *See LPF*, 232 F. Supp. 3d at 138-40.

Moreover, the FEC continues to rely upon the erroneous "control" test that this Court rejected, even while pretending not to. As the Court observed in its decision, the FEC "strongly implie[d]" that it had "effectively adopted" this improper standard by relying upon "its past dismissals of administrative complaints involving the CPD . . . as well as . . . *Buchanan v. FEC*." *Id*. at 138-39. Yet the post-remand decision invokes these same prior dismissals. (AR7215). And it quotes *Buchanan*, asserting that there is no "contemporaneous evidence of *influence* by the major parties" on the CPD, and argues that the CPD directors do not "act on behalf of" the "Democratic or Republican parties" in connection with their work "for CPD." (AR7215, AR7221) (emphasis supplied). The FEC remains focused on whether the major parties *control* the CPD, contrary to what the "plain text of the regulation" requires. *LPF*, 232 F. Supp. 3d at

140. Its continued reliance on this erroneous standard is contrary to law. This in and of itself entitles Plaintiffs to summary judgment. *See, e.g., id.*; *Dialysis Clinic, Inc. v. Leavitt*, 518 F. Supp. 2d 197, 202-04 (D.D.C. 2007) (agency decision "arbitrary and capricious" based on "[mis]interpretation of the applicable regulations").

### B. The FEC Failed To Demonstrate How It Considered The Evidence

Nor did the FEC comply with the Court's directive to "demonstrate how" it "carefully" and "thoughtfully" reviewed the "mountain of submitted evidence" supporting the administrative complaints. *LPF*, 232 F. Supp. 3d at 142. This includes evidence of (1) the CPD directors' "partisanship and political donations"; (2) Young and Schoen's "expert analyses"; and (3) the CPD's discretion to cherry-pick polls disfavoring independent candidates. *Id*. The FEC's post-remand decisions, like the original ones, instead "ignore[]" much of this evidence. *Id*. at 148. And what the FEC does say illustrates its continued failure to "carefully review[] the evidence submitted by Plaintiffs." *Id*. at 142. Put simply, the FEC has yet again refused to "take[] a 'hard look' at the salient problems," and thus "has not genuinely engaged in [the] reasoned decision-making" that the law requires. *Greater Boston Television*, 444 F.2d at 851.

#### 1. The FEC Arbitrarily And Capriciously Refused To Acknowledge The CPD's Partisanship

The FEC specifically addresses only a small handful of the numerous inculpatory statements and partisan acts of the CPD's officers and directors. At its inception, Fahrenkopf and Kirk agreed that the CPD was "formed . . . by the National Republican and Democratic Committees," that "future [debates] should be principally and jointly sponsored and conducted by the Republican and Democratic" parties, and that "all future presidential debates" would be between those two parties' nominees. (AR2244, AR2249-50). The FEC claims that "it is not clear that, in context, these . . . past statements constitute an endorsement of, or support for, the

Democratic and Republican parties." (AR7216). But these statements are incontestably partisan, and the FEC neither does nor can explain explain how the "context" would somehow deprive them of their obvious meaning. "[An] agency must base its decision on more than wishful or whimsical thinking." *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 533 (D.D.C. 2016). What is more, the FEC cites a March 2017 affidavit by Frank Fahrenkopf which *confirms* that Fahrenkopf's "goal" was to "secur[e] the commitment of both major party nominees to debate"—a quintessential "bipartisan" objective. (AR7216; AR7058 ¶ 10).

The FEC's "analysis" of two more recent statements by CPD directors is even more sophistical. First, the FEC relies on an affidavit from former director Barbara Vucanovich claiming that, when she characterized the the CPD as "bi-partisan," she really meant to say it was "non-partisan." (AR 7216; AR7094-95 ¶¶ 2, 4-5). But the term "bipartisan" by definition "involv[es] cooperation [or] agreement . . . between two major political parties" or "members of two parties."[33] "Nonpartisan," by contrast, means "free from party affiliation."[34] These words have opposite meanings, and by simply equating the two, the FEC yet again disregards the plain meaning of words in a manner that is arbitrary and capricious.

Likewise, the FEC rotely accepts Fahrenkopf's bogus explanation for why he said the CPD has a "system" that "primarily go[es] with the two leading candidates" from "the two political part[ies]." (AR7219-20). This statement was made in response to a question about "the prospects" of having more than two participants in a presidential debate. (AR3099). Even though the question on its face was prospective, the FEC claims it credits Fahrenkopf's self-serving claim that he was making "an assertion of historical fact." (AR3119-20; AR7219). That

[33] https://www.merriam-webster.com/dictionary/bipartisan.

[34] https://www.merriam-webster.com/dictionary/nonpartisan.

conclusion is irreconcilable with the question to which Fahrenkopf was responding, the answer he gave, and his thirty years of shameless outward partisanship while running the CPD. It was arbitrary and capricious for the FEC to simply "accept[] on its face," without any meaningful analysis, Fahrenkopf's implausible post-hoc rationale. *LPF*, 232 F. Supp. 2d at 142.

The FEC makes another argument about Fahrenkopf's admission of partisan bias that proves that it shares his bias. It asserts, "Fahrenkopf makes his statement in the context of a broader point about the [negative] impact of multiple candidates . . . on the educational value of the debates," and that "go[ing] with the two leading candidates" advances "the purpose of providing meaningful debates for the public." (AR7219-20). Thus, even though the vast majority of *voters* think it would be more "educational" to open the debates to a third candidate, the FEC apparently has its own paternalistic view of what is in their best interests—one that just happens to involve excluding all candidates who are not Democrats or Republicans.

The Factual and Legal Analysis II fails to specifically address the reams of additional evidence demonstrating the CPD's partisan bias, including, but not limited to:

- Fahrenkopf's statement that the CPD was "not likely to look with favor on including third-party candidates in the debates" (AR2252);
- Alan Simpson's comment that "Democrats and Republicans on the commission [] are interested in the American people finding out more about the two major candidates—not about independent candidates who mess things up" (AR3136);
- John Lewis' comment that "the two major parties [have] absolute control of the presidential debate process" (AR3095);
- Congressional testimony that the Democratic and Republican parties determine who participates in the debates, *Buchanan*, 112 F. Supp. 2d at 71;
- Fahrenkopf's reference to the Republican Party as "our great party" (AR2382-83);
- The substantial cash contributions to Democratic and Republican campaigns (*see, e.g.*, AR2370, 2373-80, 2403-05, 2407-08); and

- The lobbying efforts of CPD directors on behalf of industries that funneled hundreds of thousands of dollars to Democratic and Republican candidates (*see, e.g.*, AR2370, 2385).

As it did previously, the FEC simply "ignore[s]" this "mountain of submitted evidence." *LPF*, 232 F. Supp. 3d at 142, 144. The FEC instead resorts to a spurious argument it unsuccessfully raised in the prior summary judgment motion—that the CPD members supposedly acted in a "personal" rather than "official" capacity, such that their partisanship should not be attributed to the CPD. (AR7220-22; Dkt. 42-1 at 27-30). As previously explained, the CPD, like any organization, "must act through its employees and agents," *DSCC*, 454 U.S. at 33—*i.e.*, the same staunch partisans who have conceded that the CPD is a bipartisan organization that prefers to keep independents out of debates. For example, it is absurd to suggest that, when Fahrenkopf admitted that the CPD's "system" is designed to include only "the two political party candidates," he was speaking only in a "personal" capacity. Fahrenkopf founded the organization and has run it for three decades. Frank Fahrenkopf *is* the CPD, and he obviously does not operate the CPD any differently from the way he described. And the CPD consists of little more than Fahrenkopf and his inside-the-Beltway counterparts on the board—other staff has consisted entirely of executive director and Republican operative Janet Brown, several assistants, and a receptionist. (AR2232; AR2270 ¶ 2).

The FEC does not really believe that the CPD as an organization is untainted by the partisanship of its directors. It made no such argument in the prior CPD-related cases and, in one of them, even admitted that Alan Simpson's statements about excluding independent candidates *did* "raise[] questions" concerning the CPD's bias. (Dkt. 37-2 Ex. 8 at 15).

And the FEC all but concedes the significance of the CPD directors' partisan endeavors by relying upon two supposed CPD "policies" designed to curb them, both of which surfaced for the very first time on remand. (AR7221). If these activities they were truly blameless, there

would be no need for any policy restricting them. And the "policies" themselves are plainly mere window dressing—if they even really exist. The CPD now claims that "[i]t has long been the informal policy of the CPD that Board members are to refrain from serving in any official capacity with a political campaign or party." (AR7221-22 (citing AR7103 ¶ 6)). But an "informal policy" is, by definition, one that is not enforced. Indeed, the CPD directors have repeatedly violated this alleged "informal policy"; Fahrenkopf himself did so as recently as May 2017, when it was announced that he would serve as "co-chair" of a "fundrais[ing]" event for Nevada Republican Attorney General Adam Laxalt.[35] Moreover, the "informal policy" only purports to prohibit supporting "political campaigns or part[ies]" in "an official capacity." That would still allow CPD members to endorse candidates, contribute to their campaigns, attend campaign functions, raise money for them, campaign on their behalf, "unofficially" consult campaigns, and support the major parties in ways not connected to a particular campaign. This, of course, is precisely what the FEC has allowed CPD directors to do for the past three decades.

The CPD also now claims that in October 2015, it enacted a "formal political activities policy" "intended to deter CPD-affiliated persons from participating, even in a personal capacity, in the political process at the presidential level." (AR7221 (citing AR7103-04 ¶ 7)). But the CPD has never supplied this alleged policy to the FEC; all the FEC received was the one-sentence description quoted above, which the FEC was apparently content to rely upon. (*Id*.). Even that cursory description reveals that the "policy" does not actually prohibit partisan activities, and is at most "intended to deter" them. How it would achieve that goal is left to the reader's imagination. But whatever the policy says, the directors simply ignored it, and instead "participated" in the 2016 election by supporting major party candidates. (*See supra* at 13-14).

[35] Zach C. Cohen, *Laxalt D.C. Fundraiser Being Held at Ricketts Home*, The Hotline (May 3, 2017), 2017 WLNR 13678202.

And the "policy" is only for "presidential" races, permitting the other partisan endeavors to continue unabated. It was wholly "implausible," and thus "arbitrary and capricious," for the FEC to rely on the curiously-timed announcement of a previously undisclosed "policy" that the CPD continues to withhold from the FEC, which at most covers only one aspect of the CPD's many partisan activities, and that the CPD's directors openly flout. *State Farm*, 463 U.S. at 43.

**2. The Treatment Of The Expert Evidence Is Arbitrary And Capricious**

**a. Clifford Young**

Clifford Young demonstrated that a candidate must, on average, obtain name recognition of at least 60-80% among the "American public" in order to *potentially* achieve 15% in the polls. (AR2502-05 ¶¶ 24-32). The FEC responds with two non sequiturs: (1) "polling results are not merely a function of name recognition," because there are other things that could make a candidate "unpopular"; and (2) Gary Johnson supposedly exceeded Young's 60% threshold in a poll conducted by "YouGov." (AR7225). These arguments are irrelevant, and the attempt to rebut Young with these "*non sequitur[s]*" was "arbitrary and capricious." *Tenn. Gas Pipeline Co. v. FERC*, 824 F.2d 78, 84 (D.C. Cir. 1987).

Young found that at least 60% name recognition is *necessary* to reach 15% support. Young never suggested that it was *sufficient*, such that anyone who achieves 60% name recognition will automatically poll at 15%. Of course other factors will influence a candidate's popularity, as Young is the first to admit. His point is simply that you cannot become popular until people first know who you are (AR2492 ¶ 7); that because so many voters default to a major party candidate, an independent must be widely known to reach 15% in the polls (*see, e.g.*, AR 2500 ¶ 21); and, according to the data, on average 60-80% of "the American public" must have heard of the candidate. (AR2505 ¶ 32). The Factual and Legal Analysis II does not even attempt to undermine this data or question the conclusions Young draws from it.

Gary Johnson never achieved the requisite name recognition. In the "YouGov" poll the FEC cites, Gary Johnson was actually *below* the the 60% threshold (at 53%).[36] And the FEC ignores two other polls showing Johnson's name recognition to be even lower (36% and 37%, respectively).[37] So even if the "YouGov" poll supported the FEC's position (it doesn't), the FEC "disregard[ed] unfavorable evidence" and engaged in "cherry-picking [that] embodies arbitrary and capricious conduct." *Salazar*, 177 F. Supp. 3d at 540; *accord Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 237 (D.C. Cir. 2008) (citations omitted) ("there is no APA precedent allowing an agency to cherry-pick a study on which it has chosen to rely"). Nor would it even matter if Johnson's name recognition exceeded 60%. Though Johnson never reached 15% in the polls, Young never said a candidate necessarily would. The 60% threshold is but the first of *many* obstacles independent candidates face in attempting to satisfy the CPD's polling criterion, as the FEC itself admits. (AR7225).

Young also identified a separate and independent reason why the 15% criterion disfavors independents: because polling conducted in three-way races is more error-prone than in two-way races, an independent candidate could be easily be excluded from the debates due to polling error. (AR2516-18 ¶¶ 59-68). In response, the FEC (1) purports to re-define polling "error" in a way that contradicts the CPD's own definition; (2) argues that polling error is "just as likely to result in overinclusion of candidates shy of the 15 percent threshold," without explaining why

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[36] https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/wc35k48hrs/tabs_HP_Third_Party_Candidates_20160831.pdf. The FEC relies upon Johnson's higher name recognition among "registered voters." But Young was explicit that a candidate needs at least 60% name recognition among *the population at large*. (AR2502 ¶ 24). It is is irrelevant that Johnson's name recognition was higher among registered voters (*i.e.*, a more politically astute subset of the population at large).

[37] http://www.gallup.com/poll/194162/third-party-candidates-johnson-stein-largely-unknown.aspx; https://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/c5v3fxj0ct/econTabReport.pdf.

that would matter; and (3) quibbles with Young's use of data from gubernatorial elections, ignoring that Young already corrected for this. (AR7231-32).

The FEC asserts, "Young's metric for polling error appears to be based on the difference between the poll and the actual results on Election Day. However, CPD does not purport to use the polls as predictors of what will occur on Election Day, but as a reliable measure of candidates' support at a given moment in September." (AR7231). But the CPD purports to do exactly that. It claims "[t]he purpose of the criteria is to identify those candidates whose support among the electorate places them among the candidates *who have a realistic chance of being elected President of the United States*." (AR7114) (emphasis supplied). It was "arbitrary and capricious" for the FEC to contradict the CPD's explanation and rely instead upon its own conflicting "*post hoc* rationalization." *N.Y. State Bar Ass'n v. FTC*, Civ. 02-810 (RBW), 2004 WL 964173, at *3 (D.D.C. Apr. 30, 2004).

The FEC concedes that a deserving independent candidate might be excluded from the debate due to unfavorable polling error, but says an "undeserving" candidate might be included due to favorable polling error. (*See* AR7232). But this misses the point, which is that Democratic and Republican candidates are *never* excluded by the 15% rule. Because polling error will only exclude independent candidates, the polling criteria is biased against those candidates. The FEC's "non sequitur" requires reversal. *Tenn. Gas Pipeline*, 824 F.2d at 84.

Finally, Young analyzed data from gubernatorial races because of "the relative paucity of three-way races at the presidential level." (AR2514 ¶ 52). He recognized that "gubernatorial races are more error prone" than presidential races, and explicitly "adjusted" for this difference. (AR2515-16 ¶¶ 57-58). The FEC purports to critique his use of gubernatorial data, but neither acknowledges that Young addressed this issue nor refutes the manner in which he corrected for

it. (AR7232). In other words, the FEC continues to "ignore[] important . . . evidence" demonstrating why the CPD's polling criterion is biased, which epitomizes its "arbitrary and capricious" treatment of the Young report. *Natural Res. Def. Council*, 822 F.2d at 111.

**b. Douglas Schoen**

Schoen demonstrated that because independent candidates have difficulty attracting earned media, they must raise approximately $266 million to achieve at least 60% name recognition. (AR2571-72). In response, the FEC contends: (1) by making two media appearances per month during their campaigns, Gary Johnson and Jill Stein received sufficient earned media; (2) Super PAC money (99% of which goes to major party candidates) and social media advertising (which major party candidates buy in quantities independents could never afford) would somehow help independent candidates to overcome the preexisting multi-billion dollar fundraising advantage enjoyed by major party candidates; and (3) independent candidates theorically might begin the race with some preexisting name recognition, though billionaire Michael Bloomberg is the only recent example the FEC provides. (AR7226-29). These superficial arguments show that the FEC gave *no* "careful[]" or "thoughtful[]" consideration to the major obstacles faced by independent presidential candidates. *LPF*, 232 F. Supp. 3d at 142.

The FEC says Gary Johnson and Jill Stein received "extensive" media coverage because, between them, they made just over two media appearances per month during their respective campaigns. (AR7226 n.107; AR7107-09). That is not a serious argument, particularly since many of these appearances ran only on C-SPAN, a television station the vast majority of Americans actively avoid. The CPD even concedes that there has been an "explosion" of media sources "beyond traditional mainstream media" from which voters can choose, which is a "very significant development" that makes the small handful of media appearances by independent

candidates even less meaningful.[38] Indeed, Americans rely upon a vast array of sources to inform themselves, including local television news, cable news, national nightly network news, late night television, news websites or apps, campaign websites, issue-based websites, radio, and print.[39] 80% of Americans regularly consult at least three of these sources for their political news, and 45% consult five or more.[40] It is laughable to suggest that an independent candidate could be elected President by making semi-regular appearances on C-SPAN.

Independent candidates must pay for media exposure, and Super PACs and social media only make that problem worse. The FEC's own campaign contribution data shows that, in 2016, Super PACs and other outside funding sources raised over *$700 million* for Democratic and Republican candidates, and only *$1.4 million* for their third-party and independent counterparts (Johnson, Stein, and McMullin).[41] Most of that $700 million went to the two major party nominees, which shows that Super PAC donors contribute to candidates they think can win, and explains why they would not contribute to a candidate who will be excluded from the debates.[42] Super PACs benefit Democrats and Republicans, not independents, thereby exacerbating the preexisting $2.3 billion fundraising disadvantage that independent candidates already faced.

Nor can the FEC seriously suggest that independent candidates can overcome this massive fundraising gap on social media. The FEC's own purported examples of how social media can relieve a candidate's fundraising burden—the 2016 Trump campaign and the Obama presidential campaigns—show the opposite. (AR7227). Trump and outside groups supporting

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38 http://www.politico.com/blogs/on-media/2016/04/commission-on-presidential-debates-seeks-new-formats-222390.

39 http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss.

40 *Id.*

41 *See, e.g.*, https://www.opensecrets.org/pres16; https://www.opensecrets.org/pres16/also-rans.

42 *Id.*

him spent close to *$1 billion* in 2016; Obama spent even more.[43] If this is how a campaign is run "economical[ly]" using social media, as the FEC claims (AR7227), Schoen's $266 million fundraising estimate for an independent campaign is modest by comparison.

Indeed, the FEC appears to assume that social media is cheaper than more traditional advertising. But the FEC readily concedes that Trump's social media advertising cost nearly $90 million,[44] and Obama's reportedly cost $52 million,[45] amounts that no independent candidate has ever come close to raising. And because of the sheer number of media sources voters consult, no candidate can realistically focus on one media source to the exclusion of the others. When asked to prioritize which media outlets they rely upon the most, Americans rank social media toward the bottom. Only 14% identify social media as their preferred news source, and most Americans receive *no* information about presidential elections from social media.[46] That is why Trump and Obama spent only a fraction of their respective warchests on social media advertising, and why it is nonsense to suggest that an independent could expect to become President any other way.

Finally, the FEC cites no evidence to support its "presum[ption]" that independent candidates begin their campaign with meaningful name recognition.[47] (Dkt. 76 ¶ 44; Dkt. 82 ¶ 44). There is none, because candidates without strong ties to the major parties are, by and large, starting from scratch. Independently wealthy candidates are the only ones realistically

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43 https://www.washingtonpost.com/graphics/politics/2016-election/campaign-finance/; https://www.nytimes.com/elections/2012/campaign-finance.html.

44 https://www.wired.com/2016/11/facebook-won-trump-election-not-just-fake-news/ (cited at AR7227).

45 https://www.theatlantic.com/politics/archive/2012/11/most-expensive-election-history-numbers/321728/.

46 http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss.

47 In the rulemaking decision, discussed below, the FEC cites an early 2011 poll in which Johnson had "over 10%" name recognition among *Republican* voters. (AR1934 (citing AR0200)). This poll (1) says nothing about Johnson's overall name recognition, including whether Democratic or independent voters knew who the former Republican governor was, and (2) ranked Johnson dead last among the 2012 presidential candidates included in the poll. Presumably that is why, unlike the rulemaking decision, the Factual and Legal Analysis II does not even purport to rely upon this poll.

able to launch a serious independent campaign. The FEC points to Michael Bloomberg (AR7229), and on this we agree: if you are the 10th richest person in the world, you can run for President of the United States as an independent candidate. The problem is that virtually no one else can, because the CPD has rigged the process and the FEC refuses to call them on it.

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

This Court had to order the FEC to notify many of the CPD directors about the administrative complaints, "address" the "allegations made against" them, and "consider the evidence presented against these respondents." *LPF*, 232 F. Supp. 3d at 143. These directors' responses demonstrate that neither they nor the FEC gave any thought to the substantial evidence implicating them in the CPD's partisan scheme.

Nine directors signed a short, identically worded affidavit with the exact same Microsoft Word identifier in the footer ("232792 v.1"), and seven signed it the exact same day. (AR7144-61). This means that one person simultaneously distributed a form affidavit to all nine directors, most of whom immediately signed it, and none of whom made a single substantive change. And the affidavit itself is meaningless. It neither responds to Plaintiffs' allegations specifically nor addresses the evidence specific to these directors. Instead, the directors summarily deny those allegations in four conclusory paragraphs reprinted verbatim in all nine affidavits. (*Id.*).

Nor do the directors confirm that they even *reviewed* the complaint or the evidence supporting it.[48] For example, former director Alan Simpson once commented that "Democrats and Republicans on the commission" want "the American people [to] find[] out more about the two major candidates—not about independent candidates who mess things up." (AR3095). Yet

[48] *See* AR7144 ¶ 3 ("Contrary to what *I understand* the complaintants have claimed . . .") (emphasis supplied); *accord* AR7146 ¶ 3, AR7148 ¶ 3, AR7150 ¶ 3, AR7152 ¶ 3, AR7154 ¶ 3, AR 7156 ¶ 3, AR7158 ¶ 3, AR7160 ¶ 3.

in the affidavit he signed, Simpson declares under penalty of perjury that the CPD does not try to "keep any party or candidate from participating in the CPD's debates" or "bring about a predetermined result," and that "[i]t has long been [Simpson's] view that the CPD's debates should include any independent . . . candidate if that candidate is properly considered a leading candidate." (AR7160-61 ¶¶ 3-4). Either Simpson (i) was not shown the evidence of his prior statement, (ii) did not read the conflicting affidavit before he signed it, or (iii) both.

The other directors similarly disregard the evidence against them. McCurry ignores his long history as a Democratic operative, the tens of thousands of dollars he has contributed to Democrats, his endorsements and his efforts to funnel money to major party elected officials as a lobbyist. (AR7144-45). Newton Minow ignores his prior concession that "other candidates could be included" in the debates only if "the Democratic and Republican nominees agreed" (AR3095) and his more recent admission that he is "not satisfied" and does not "like the idea of using polls" to determine eligibility for the debates.[49] (AR7156-58). Other directors ignore their longstanding support for, financial contributions to, and/or repeated direct involvement with, Republicans and Democrats. (*See, e.g.*, AR7146-49, AR7152-53, AR7158-59).

The director affidavits are a sham. The FEC plainly failed to give them the requisite "hard look," and its rote, unquestioning acceptance of their validity was therefore "arbitrary and capricious." *Greater Boston Television*, 444 F.2d at 851.

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

As explained, the FEC ignored or misconstrued the evidence that the CPD's polling criterion is not "objective" and instead favors the major party nominees. 11 C.F.R. § 110.13(c).

[49] http://progressillinois.com/posts/content/2016/09/20/newton-minow-addresses-criticism-over-presidential-debate-criteria-handling.

And the FEC does not dispute that if an independent candidate did reach 15% support there is nothing to stop the CPD from manipulating the selection of polls to exclude him or her. (AR7230). The FEC also simply ignores the most important question of all: given "that since 1988 only one non-major party candidate . . . has participated in the debates, and only then at the request of the two major parties, and the evidence that" the CPD's leadership is "actively invested in the partisan political process," "if under these facts the FEC does not consider the fifteen percent polling criterion to be subjective, what would be?" *LPF*, 232 F. Supp. 2d at 144-45. The FEC does not even try to answer this critical question, because it has no answer.

Instead, the FEC identifies a handful of historical independent candidates who supposedly would have qualified under the 15% rule—Teddy Roosevelt in 1912, Robert LaFolette in 1924, Strom Thurmond in 1948, George Wallace in 1968, John Anderson in 1980, and Ross Perot in 1992. (AR7223; *accord* AR1935). But Ross Perot is the only one of these candidates who was truly independent, and it is now undisputed that he would *not* have satisfied the CPD's current rule because he was polling at or below 10% prior to the 1992 debates. (Dkt. 76 ¶ 52; Dkt. 82 ¶ 52). The others all rose to prominence within a major party. Both Wallace and Anderson competed in major party primaries, and thus received the enhanced name recognition that truly unaffiliated candidates do not receive. (AR2059; Dkt. 82 ¶ 52). Roosevelt was a two-term Republican president who then ran a third time on a third-party ticket. (Dkt. 76 ¶ 53; Dkt. 82 ¶ 53). LaFolette was a longtime Republican Senator who ran for president three times as a Republican before doing so as an independent. (*Id.*). Thurmond was a lifelong Democrat who attended the 1948 Democratic Convention as a Democratic governor, and later ran on a segregationist third-party ticket.[50]

[50] Zachary Karabell, *The Last Campaign: How Harry Truman Won the 1948 Election* 171-76 (2001).

Moreover, the FEC offers no evidence that Roosevelt, LaFolette, or Thurmond polled above 15% at the relevant time. Even if they had, they did so 105, 97 and 69 years ago, respectively, when it did not cost $1 billion to run for president. Their experience provides no meaningful guidance about how independent candidates could overcome present day obstacles.

* * * * * *

The FEC has again failed to "demonstrate how" it "carefully reviewed the evidence" or "thoughtfully reach[ed] its conclusion[]" that the administrative complaints should be dismissed. *LPF*, 232 F. Supp. 3d at 142. Instead, the FEC continues to disregard much of the critical evidence; addresses the remainder by defining words to mean the opposite of what the dictionary says; relies upon purported CPD "policies" that either no one observes or do not actually exist; credits affidavits that are directly undermined by the affiant's own prior statements; misrepresents the results of one poll and ignores others that directly support Plaintiffs' allegations; suggests that an independent candidate could win the presidency by making two media appearances per month; contradicts the CPD's own stated rationale for the 15% rule; encourages independent candidates to purchase online advertising that they obviously cannot afford and that, in any event, Americans largely ignore; and maintains that independent candidates could somehow overcome a multi-billion dollar fundraising deficit using a funding source that, according to the FEC's own data, only supports major party candidates. These arguments cannot withstand judicial review, as they "fail[] to consider . . . important aspect[s] of the problem," "run[] counter to the evidence before the agency," and are "so implausible" as to be frivolous. *State Farm*, 463 U.S. at 43.

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

Plaintiffs are also entitled to summary judgment as to the FEC's post-remand dismissal of the rulemaking petition. Before remand, the FEC rationalized this outcome by arguing that the CPD's bias could be rooted out "through the enforcement process." *LPF*, 232 F. Supp. 3d at 148. It simply "brushed . . . aside" the bias inherent in the 15% rule as the mere "use of polling data by a single debate staging organization for candidate debates for a single office." *Id*. at 147. Now the FEC abandons these arguments, and presents an entirely new justification for its refusal to open a rulemaking. Its reasoning largely mirrors the arguments in the Factual and Legal Analysis II, and is arbitrary and capricious for the same reasons. (AR1932-37). The handful of additional arguments as to the rulemaking are equally frivolous for the reasons stated below.

### A. The Treatment Of The Young Report Is Arbitrary And Capricious

The rulemaking decision presents two additional critiques of the Young report. First, it claims that "the Young Report reaches its 60-80% name recognition result" by examining "data about name recognition of major party candidates at the early stages of the party primary process." (AR1933). The FEC contends that this purported focus on early polling "may amplify polling errors," and that the focus should instead be on data from later in the process. But Young said that the 60-80% result is based on polling data from *every* stage of the election, including "late primary" and "general" election polling. (*See, e.g.*, AR2520). Young ran three computations using only "late primary" data, which required name recognition of 76.9%, 78.4% and 77.1%, respectively. (*Id*.). Focusing on later stages of the election, as the FEC apparently prefers, would thus require name recognition at the *higher* end of the 60-80% range.

Second, while apparently acknowledging the strong correlation between name recognition and vote share, the FEC purports to question whether a "causative effect" can be implied.

(AR1933). Yet a causative effect *must* be implied. As explained above, voters cannot like a candidate unless they first know who that candidate is. (AR2492 ¶ 7). Consequently, there *must* be a causal relationship between name recognition—whether voters have even heard of the candidate—and vote share—whether voters have decided to vote for that person. The FEC's contrary argument is simply "irrational on its face," and thus "arbitrary and capricious." *Public Citizen v. Carlin*, 2 F. Supp. 2d 18, 19 (D.D.C. 1998).

**B. The Treatment Of The Schoen Report Is Arbitrary And Capricious**

The rulemaking decision's attempt to impugn Schoen is equally unpersuasive. First, it disputes his conclusion that independent candidates have difficulty attracting earned media, purportedly in reliance upon an analysis of newspaper coverage of the 2016 election. (AR1933 n.6). In fact, this analysis confirms both the paltry coverage received by independent candidates and enormous advantages enjoyed by their major party counterparts. In reaching a contrary conclusion, the FEC egregiously misrepresents the results of its purported "analysis." Where, as here, the "agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon," its decision "should be overturned." *Resolute Forest Prods., Inc. v. U.S. Dep't of Agric.*, 187 F. Supp. 3d 100, 123 (D.D.C. 2016).

The FEC claims to have searched Westlaw's "major newspaper" database, which includes at least 46 newspapers from around the country, to determine how many stories mentioned the candidates during specified periods. It purportedly searched the database for "Gary Johnson," "Jill Stein," and "Evan McMullin" for the 277 days between February 5, 2016 and November 7, 2016. It asserts that these searches yielded 3,001 hits for Johnson, 1,744 hits for Stein, and 353 hits for McMullin. (AR1933 n.6). The FEC also searched for stories that mentioned certain Republican and Democratic candidates, but for much earlier 277-day periods: August 1, 2015 to May 4, 2016 for the Republicans, and September 4, 2015 to June 7, 2016 for the Democrats.

The FEC claims that the results for Donald Trump and Hillary Clinton were 7,451 and 7,404, and that the results for other primary candidates (Jim Webb, Martin O'Malley, Lincoln Chafee, Rick Perry, George Pataki, Bobby Jindal, and Mike Huckabee) were lower. (*Id*.).

The FEC fails to explain how the coverage it claimed the independent candidates received could be remotely sufficient to support a viable presidential candidacy, and attract a level of support in polls of at least 15%. Though the total number of articles mentioning them may appear sizeable, the independent candidates in reality received very little press because the FEC searched at least 46 newspapers over a 9-month period. Stein and McMullin were mentioned on average about once every two weeks by each paper, and Johnson was mentioned only once or twice a week. (Declaration of Eric S. Olney, dated Sept. 15, 2017 ("Olney Decl.") ¶ 10). This *confirms* that independent candidates have considerable difficulty attracting earned media. (AR2557-58). Also, many of these articles only mentioned the candidate in passing, discussed the candidates' exclusion from the debates, and/or or recited a poll that showed the candidate trailing Clinton and Trump by wide margins. (Olney Decl. ¶ 9 & Ex. 4). Simply being mentioned in an article is not necessarily indicative of increased or sustained name recognition, and the FEC makes no effort to differentiate between articles that meaningfully advance a candidacy and those that do not. (AR1933 n.6; Dkt. 82 ¶ 60).

The FEC also misrepresents the search results for Gary Johnson. Because Gary Johnson is a common name, a number of the articles were not even about the presidential candidate, and were instead about a different person named Gary Johnson. Examples include: dozens of obituaries in which either the deceased or a relative of the deceased was named "Gary Johnson"; articles about up and coming Hawaiian chef Gary Johnson and his new restaurant, "Hana Ranch Provisions"; articles about Gary "Big Hands" Johnson, the legendary defensive standout of the

NFL's San Diego Chargers; property listings from around the country in which homeowners named Gary Johnson bought or sold their homes; an article about Missouri real estate agent Gary Johnson's collection of hand-painted earthenware; articles recounting Texas Longhorn power forward Gary Johnson's dramatic last-second bankshot to win the NCAA Maui Invitational; an article covering a "competitive ax-throwing" event attended by Norristown, Pennsylvania resident Gary Johnson; results for golf, bowling, bass fishing, and other tournaments in which various amateur athletes named Gary Johnson participated; and a story about musician Gary Johnson's four-piece band. (Olney Decl. ¶ 8 & Ex. 3). These are just examples of the dozens of Gary Johnsons referenced in the articles who are not Libertarian presidential candidate Gary Johnson. As the FEC's answer concedes (Dkt. 82 ¶ 62), it was only by including all of these articles that the FEC arrived at the 3,001 newspaper references to "Gary Johnson." The notion that these articles somehow advanced the candidacy of candidate Gary Johnson is arbitrary and capricious, and underscores that the rationale for its decision is entirely pretextual.

At the same time, the FEC egregiously understates newspaper coverage of the Republican and Democratic candidates in order to create the false impression that it was comparable to coverage of the independent candidates. The results the FEC reported cannot possibly be right; any observer of the 2016 race would know that, for example, Gary Johnson did not receive almost half as much newspaper coverage as Donald Trump, as the FEC spuriously claims. Plaintiffs therefore conducted their own searches of the Westlaw database, and confirmed that the FEC had indeed misrepresented the results. During the periods the FEC allegedly searched, Trump had at least 49,500 stories (not 7,541), and Clinton had at least 39,608 (not 7,404).[51]

[51] The FEC reported lower results because, as Westlaw confirmed to us, its search engine automatically cuts off the results for especially large searches. This is readily apparent from even a cursory review of result pages for the searches performed by the FEC, which only display articles for a month or two of the nine-

(Olney Decl. ¶ 7). If one instead searches the later time period searched for the independent candidates (February 2016 to November 2016), these numbers increase to at least 84,709 for Trump and at least 68,997 for Clinton. (*Id*.). Using the corrected numbers, the chart below shows the actual number of mentions per week of the candidates in each newspaper:

| **Candidate** | **Average Mentions Per Week** |
|---|---|
| Stein | 0.6 |
| Johnson | 1.6 |
| McMullin | 0.6 |
| Trump | 34.1 |
| Clinton | 27.8 |

(*Id.* ¶ 9). This confirms what anyone who followed the election already knows: coverage of the major party nominees dwarfed that of the independent candidates. Once again, the FEC "relied on incorrect or inaccurate data" and made no "effort to ensure that appropriate data" was used, requiring that its decision be "overturned." *Resolute Forest Prods., Inc.*, 187 F. Supp. 3d at 123.

The FEC also rigged the date ranges it searched to make it seem like coverage of the other major party candidates was comparable to coverage of the independent candidates. For Republicans it searched between August 2015 and May 2016, and for Democrats it searched between September 2015 and June 2016. But there is no dispute that the primary candidates used in its comparison (O'Malley, Webb, Chafee, Pataki, Jindal, Perry, and Huckabee) ended their campaigns long before May or June 2016. (Dkt. 76 ¶ 64; Dkt. 82 ¶ 64). For example, Perry ended his campaign on September 11, 2015, meaning he was only running for president for the

month period searched. (Olney Decl. Exs. 1-2). Thus, the FEC either ignored these search results, or it intentionally misrepresented them despite its awareness of the problem. Westlaw informed us that more accurate results are yielded by running daily searches for each day during the nine month time period; that way, each search yields fewer results that do not reach the search engine's cutoff point. (Olney Decl. ¶ 6).

first month of the nine-month period for which his name was searched.[52] The FEC plainly set up the searches this way to minimize the search results for these candidates, when in reality they were simply not running for president for most of the 9-month period that the FEC searched.

Conversely, the FEC went out of its way to inflate the results for the independent candidates. It did not search for press coverage of those candidates during the same time period it examined for the major party candidates. Instead, it compared apples to oranges, examining a later time period for the independent candidates (February 5, 2016 to November 7, 2016) throughout which (i) both Johnson and Stein had active candidacies and (ii) coverage of *all* candidates increased as the general election neared. To correct this error, Plaintiffs conducted a comparison for the time periods when the independent candidacies overlapped with the major party candidacies. This apples to apples comparison demonstrates that, in fact, as expected, the press overwhelming favored the major party candidates[53]:

| Major Party Candidate | Search Hits | Third-Party Candidate | Search Hits |
|---|---|---|---|
| Huckabee | 3,557 | Stein | 17 |
| Jindal | 2,668 | Stein | 11 |
| Perry | 1,719 | Stein | 5 |
| Pataki | 948 | Stein | 15 |
| Webb | 581 | Stein | 9 |
| Chafee | 564 | Stein | 10 |
| O'Malley | 3,128 | Stein | 17 |
| Huckabee | 447 | Johnson | 17 |
| O'Malley | 525 | Johnson | 17 |

[52] *See, e.g.*, David Wiegel, *His Do-over Foundering, Perry Exits 2016 Scrum*, Washington Post (Sept. 12, 2015), 2015 WLNR 27168783.

[53] This chart otherwise mimics the FEC's methodology in order to show what the FEC's results would have looked like if it performed an apples to apples comparison. As explained above, this methodology is flawed in a variety of additional ways that largely disfavor the independent candidates.

(Olney Decl. ¶ 11).[54] Thus, the Westlaw news database directly confirms Schoen's conclusion that independent candidates have difficulty attracting sufficient earned media.

The remaining arguments in the FEC's rulemaking decision are frivolous. It claims Schoen's conclusion is "based primarily on research published in 1999" (AR1394), but ignores both the various recent publications on which Schoen relies (AR2557-58 (citing articles from 2010, 2012, and 2014)) and the FEC's own Westlaw data confirming that he is right.

Schoen also cited major party candidates who benefited from the national exposure provided by early party primaries—Barack Obama in 2008 and Rick Santorum in 2012. (AR2558-59). There is no dispute that Obama's support skyrocketed after the Iowa caucuses.[55] He did have some preexisting name recognition, as the FEC notes, but largely because his keynote address at the 2004 Democratic Convention elevated his status in the party and led to speculation that he would run for president. (AR1394). It was the party nominating process—an opportunity unavailable to an independent candidate—that boosted Obama's profile.

Santorum likewise received a significant boost from news coverage of the 2012 Iowa caucus, despite spending only $21,980 on media there. (AR2558-59). The FEC appears to dispute this figure, but in claiming that Santorum spent more, it relies upon *aggregated* campaign expenditures, which include *non-media* costs like "rent, payroll, lodging, direct mail . . .

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[54] The misleading nature of the FEC's "analysis" is detailed further in the Olney Declaration. For example, the FEC cherry-picked some of the least successful candidates from the major party primaries to compare to the third-party candidates—Webb, O'Malley, Jindal, Pataki, Chafee, Huckabee, and Perry. For every Jim Webb and Lincoln Chafee, there is a Bernie Sanders or Marco Rubio who is catapulted to national prominence during the primaries. Had the FEC compared press coverage of Sanders or Rubio to the third-party candidates, the results would have been even more one-sided. (Olney Decl. ¶ 11).

[55] *See* http://www.realclearpolitics.com/epolls/2008/president/us/democratic_presidential_nomination-191.html.

communication consulting and coalition building." (AR1934). Nothing in the rulemaking decision shows that Santorum's media expenditures in Iowa exceeded $21,980.

Finally, the FEC falsely claims it lacked access to the data underlying Schoen's media expenditure estimates, which were supplied to Schoen by media-buying firm Canal Partners. (AR1934; AR2559). When Plaintiffs submitted the Schoen Report, they told the FEC that "the data and authorities that . . . Mr. Schoen cite[s] and rel[ies] upon in [his] report[] . . . [is] available for the Commission's review and can be provided upon request." (AR 2001). The FEC ignored this offer. Its decision not to examine the data and then to pretend it was not available is yet more arbitrary and capricious action. Moreover, Schoen's report describes the proposal in considerable detail, providing a lengthy, item-by-item explanation supporting his conclusion that an independent candidate would need to spend between $110 and 150 million on paid media. (AR2559-64).[56] And, including these figures, Schoen estimates that the overall cost of a viable independent campaign would be approximately $266 million; because the FEC now concedes that an "economically" run presidential campaign will cost close to *$1 billion* (AR7227), it effectively concedes the reasonableness of Schoen's estimate.[57]

* * * * * *

The additional arguments in the post-remand rulemaking decision only underscore that the FEC is determined to rebuff any effort to ensure that independents have a fair opportunity to compete for debate access. The FEC complains about Young's use of early primary data, when the later data leads to the exact same conclusion. It critiques Schoen's conclusion that

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[56] Though the FEC never asked for it, we attach the underlying data supplied by Canal Partners in case the Court wishes to examine it. (Affidavit of Douglas Schoen, dated Sept. 13, 2017 Ex. 1).

[57] The FEC also appears to question Canal Partners' integrity (AR1934), but its credentials are impeccable. Canal and/or its principals have decades of experience buying media for presidential and other high-profile races (including the presidential campaigns of Bill Clinton and Al Gore). (*See, e.g.*, Olney Decl. Ex. 5).

independent candidates have difficulty attracting earned media, but ignores both its own Westlaw data and various recent publications demonstrating just that. It blatantly mischaracterizes examples of major party candidates who plainly benefited from the free press that only major party candidates receive. And it bemoans the supposed absence of underlying data that was readily available and confirmed by the FEC's own post-remand decision. Its decision is plainly the product of an inherent bias in favor of the CPD's exclusionary policies, and does not provide the "thorough consideration of the presented evidence" that this Court required. *LPF*, 232 F. Supp. 3d at 148. The Court should therefore award summary judgment to Plaintiffs, order the FEC to open a rulemaking, and require that it be completed sufficiently in advance of the 2020 presidential election. (Dkt. 76 ¶ 82).

## CONCLUSION

Independent candidates and third parties have a rich tradition in our nation's history. Many of the nation's most important policies and institutional innovations were third-party ideas, including women's suffrage, transparency in government, popular election of senators, child labor legislation and Social Security. Ross Perot's independent candidacy in 1992 forced the Democratic and Republican candidates to stop ignoring the budget deficit, and led to policies in the next administration addressing that issue, which was important to voters.[58] The President of the United States has conceded that the CPD now jeopardizes that tradition in defiance of the American people's expanding preference for a viable alternative to Democrats and Republicans. By excluding independents from the debates, the CPD has distorted the electoral process, forced some to run as Democrats or Republicans against their wishes and dissuaded others from running at all. Its singular goal is to entrench a two-party establishment that the American people deeply

[58] http://articles.latimes.com/1993-06-25/news/mn-7049_1_deficit-reduction-plan.
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mistrust and increasingly disfavor. And, for more than two decades, the FEC has demonstrated its complicity in the CPD's efforts to thwart the popular will. The Court should therefore grant summary judgment for Plaintiffs; hold that the FEC's post-remand decisions do not conform to the Court's prior declaration that the FEC "carefully," "thoughtfully" and "actually" consider the evidence on remand; permit Plaintiffs to assert a direct action against the CPD; and order the FEC to open a rulemaking that is completed well in advance of the 2020 election.

Dated: September 15, 2017
New York, New York

Respectfully submitted,

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