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 REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The CPD is an unelected, unaccountable, and secretive private organization created by the Democratic and Republican Parties. For the past three decades, it has exercised unchecked power to decide who may participate in the general election presidential and vice-presidential debates. In every election cycle since 2000, it has abused that power by erecting an impossible barrier for independent candidates to overcome, to ensure that they never participate in the debates.[1] Now more than ever, the CPD's exclusionary effort to prevent a third voice in the debates is causing grave harm to our democracy. Over 140 million registered U.S. voters will be forced to select between the two most unpopular nominees for president ever served up by the two major parties' nominating processes – candidates preferred by less than 12% of the registered voters.[2] A sizeable majority of U.S. voters strongly prefers a third choice, but the CPD helps prevent that –putting the U.S. out of sync with the U.K., Canada, and many other more democratic countries that permit multiple candidates for the head-of-state position to appear in televised debates.[3]

The CPD provides a convenient vehicle for corporations to evade the Federal Election Campaign Act's anti-corruption provisions. Federal law prohibits corporations from making contributions to or expenditures for political campaigns, in order to prevent corporations from corruptly buying influence. But the CPD funds its debates with corporate money, and thereby funnels millions of dollars of corporate donations to the two major party candidates for joint televised appearances to promote their campaigns. In order to justify using all this corporate

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[1] The term "independent candidate" herein also includes third-party candidates.

[2] *See 2016 Republican Popular Vote*, RealClearPolitics, http://www.realclearpolitics.com/epolls/2016/president/republican_vote_count.html (last visited June 8, 2016) (13.3 million votes for Trump); *2016 Democratic Popular Vote*, RealClearPolitics, http://www.realclearpolitics.com/epolls/2016/president/democratic_vote_count.html (last visited June 8, 2016) (last visited May 31, 2016) (15.6 million votes for Clinton).

[3] *See* Larry Diamond, *Why an Independent Doesn't Run for President*, Bloomberg View (June 2, 2016), http://www.bloomberg.com/view/articles/2016-06-02/why-an-independent-doesn-t-run-for-president.

money to promote these candidates, the CPD claims it qualifies for a narrow exemption from the ban on corporate contributions and expenditures. But this exemption only applies to debate staging organizations that refrain from endorsing, supporting, or opposing political candidates and parties and use objective candidate selection criteria. The CPD does neither. Nevertheless, and even though CPD plays such a critical role in our political system, the FEC remains unwilling and uninterested in enforcing its own regulation, and repeatedly refuses even to investigate the CPD. In this case, the FEC has continued to stick its head in the sand, deliberately ignoring virtually all of Plaintiffs' allegations to shield the CPD from well-deserved legal scrutiny.

The FEC's Memorandum suffers from the same flaws as its administrative decisions. The FEC claims it does not apply an erroneous interpretation of its debate staging regulations because it has never *said* it was using that interpretation – as if what it says, rather than what it has actually been doing for the past 16 years, is what counts. The FEC asserts that it doesn't need to consider Plaintiffs' evidence because it was "the same" as previous administrative complaints; but the agency ignores that it never grappled with Plaintiffs' substantial new evidence showing that the CPD is partisan today, and that its polling criterion is biased against independent candidates. The FEC repeatedly and erroneously contends that this Court decided as a matter of law in *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000), that the CPD "qualif[ies]" as a legitimate debate staging organization and that its 15% rule is objective, no matter what evidence any future administrative complaint could present. In fact, the *Buchanan* Court expressly limited its findings to the evidence in that case, and left the door open for future complainants to present more contemporaneous evidence – which is precisely what Plaintiffs have done.

The FEC's defense of its arbitrary and capricious denial of LPF's petition for a rulemaking to revise the FEC's debate staging regulations, like its notice of disposition, is based on a misinterpretation of the petition and its own efficacy as a law enforcer. Because the FEC failed to actually consider the merits of the petition and the evidence it marshalled, its denial of the petition for rulemaking cannot stand.

I. THE STANDARD OF REVIEW DOES NOT REQUIRE THE COURT TO BE A POTTED PLANT, AS THE FEC SUGGESTS

As Plaintiffs explained, the FEC's dismissals of Plaintiffs administrative complaints must be overturned either if they were based on an "impermissible interpretation of the Act" or if they were "arbitrary and capricious, or an abuse of discretion." *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986); (Pls.' Mem. at 26). The FEC's refusal to initiate a rulemaking is similarly subject to the arbitrary and capricious standard. (Pls.' Mem. at 27). That standard is deferential, but does not permit "judicial inertia," *La Botz v. FEC*, 889 F. Supp. 2d 51, 63 (D.D.C. 2012) (quoting *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272 (1968)), as the FEC suggests. (FEC Mem. at 12-13). The Court is not "to accept meekly 'administrative pronouncements clearly at variance with established facts,'" *Antosh v. FEC*, 599 F. Supp. 850, 853 (D.D.C. 1984) (quoting *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 463 (D.C. Cir. 1967)), or uphold unreasonable decisions, *Menkes v. Dep't of Homeland Sec.*, 486 F.3d 1307, 1313 (D.C. Cir. 2007).

As explained, this Court should not defer to the FEC here, because of the FEC's bipartisan nature and its consistent dereliction of its duty to investigate the CPD's unlawful protection of the two major parties. (Pls.' Mem. at 28). The FEC claims that this argument was rejected in *Hagelin v. FEC*, 411 F.3d 237 (D.C. Cir. 2005) (*see* FEC Mem. at 13-14), but *Hagelin* addressed only the more limited argument that the FEC's "bipartisan character" alone

counseled against deference. 411 F.3d at 242. Here, by contrast, it is the FEC's bipartisan nature together with its history of acquiescence to the CPD that requires the Court to be less deferential and more skeptical of the FEC's decisions. The D.C. Circuit requires "[m]ore exacting scrutiny" "where the agency has demonstrated undue bias towards particular private interests." *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1049 & n.23 (D.C. Cir. 1979).

The FEC suggests that even if *Hagelin* does not control, there is "no reason to deny deference" because there is no basis to believe that "party affiliation taints" the FEC's decisions. (FEC Mem. at 14). But the concern that party affiliation could taint the FEC's decisions is the fundamental rationale for the FEC's own "bipartisanship requirement[]." The D.C. Circuit has held that the "bipartisanship requirement[]" that no more than three Commissioners can be affiliated with single party is intended as a safeguard to "reduce the risk that the Commission will abuse its powers." *Combat Veterans for Cong. Political Action Comm. v. FEC*, 795 F.3d 151, 153 (D.C. Cir. 2015); (*see also* Pls.' Mem. at 23). The FEC's long-running refusal to scrutinize the CPD in and of itself is evidence of the FEC's bias, and thus a sufficient reason why it should not be accorded deference here.

II. THE FEC'S DISMISSALS OF THE ADMINISTRATIVE COMPLAINTS WERE CONTRARY TO LAW

A. The Dismissals Were Based On An Erroneous Interpretation Of Section 110.13(a)

The FEC devotes numerous pages to rehashing the "long line of judicial and administrative authority" that it claims to have "reasonably relied on" in dismissing Plaintiffs' administrative complaints. (*See* FEC Mem. at 16-26). But Plaintiffs have acknowledged these cases as well as the FEC's reliance on them. (*See* Pls.' Mem. at 11-13). Plaintiffs' point is that in these matters, the FEC has effectively adopted an erroneous interpretation of 11 C.F.R.

§ 110.13(a) that a debate staging organization "endorse[s], support[s], or oppose[s]" political candidates or parties only if a political party or candidate "control[s]" the organization. (*See* Pls.' Mem. at 29-33). This test, which the FEC refers to as the "control over" test (FEC Mem. at 28), cannot be squared with the plain language of § 110.13(a). Accordingly, the FEC's dismissals of Plaintiffs' administrative complaints were contrary to law. (Pls.' Mem. at 30-33).

The FEC disputes that it has adopted the "control over" test as its governing interpretation of § 110.13(a), on the ground that there is "no instance in which the [FEC] *actually said* it was adopting" that test. (FEC Mem. at 28-29). This argument fails.

First, regardless of whether or not the FEC has formally announced that it is adopting a "control over" test as its interpretation of § 110.13(a), in practice that is the test it has applied. The FEC admits that it dismissed three consolidated administrative complaints (including the one at issue in *Buchanan*) on the ground that the CPD "*complied with the requirements of section 110.13*" because there was no evidence that "the CPD [wa]s controlled by the DNC or RNC," that the "DNC or RNC [wa]s involved in the operation of the CPD," or that the "DNC and the RNC had input into the development of the CPD's candidate selection criteria." (FEC Mem. at 21 (emphasis added); *see also* Pls.' Mem. at 29). This language was supposedly a "response to specific allegations regarding control in those enforcement cases" (FEC Mem. at 28), an argument that was central to this Court's conclusion that the FEC's dismissal of those MURs was not arbitrary and capricious. The Court expressly stated that the "control over" language was only a response to specific allegations at issue, *see Buchanan*, 112 F. Supp. 2d at 71 n.8, and held that the administrative record did not sufficiently show that the major parties controlled the CPD or had influence over its selection criteria, *i.e.*, applying the "control over" test, *id.* at 72.

Although that argument was purportedly tied to the specific allegations in *Buchanan* (*see* Pls.' Mem. at 12), since that time, the FEC has continued to apply the identical "control over" test to find that the CPD does not endorse, support, or oppose political parties or candidates. (*See id.* at 13 (quoting the FEC's 2002 dismissal of MUR 5207 using materially identical language); *id.* (quoting the FEC's 2004 dismissal of MUR 5414 which concluded there was no "evidence that the major parties played a controlling role" in the CPD); *id.* at 29-30). The FEC offers no response to this point. Nor can the FEC dispute that in dismissing Plaintiffs' administrative complaints, it did so explicitly in reliance on *Buchanan* and its own dismissals of prior MURs, all of which were themselves based on the "control over" test. (AR3178-79 (concluding that "the CPD was an eligible debate staging organization" because of those matters); AR5007-08 (same)).

In any event, even if the FEC's reliance on the "control over" test somehow did not constitute an interpretation of § 110.13(a), then the FEC simply failed to apply the proper standard in this case. The only references to the "endorse, support, or oppose" standard in the FEC's dismissals of Plaintiffs' complaints are a mere boilerplate citation to § 110.13(a) and a description of the CPD's response to the administrative complaints. (*See* AR3176-77; AR5004-05). The FEC engaged in no substantive analysis applying the language of the regulation to the facts alleged in the administrative complaints.

Second, the FEC does not even try to substantively rebut Plaintiffs' argument that the "control over" test is inconsistent with the plain language of the regulation and the manner in which the FEC has interpreted similar language in other contexts. (*See* Pls.' Mem. at 31-33). The FEC conclusorily asserts that its "control over" formulation is "a helpful aid in determining whether a group's activities are nonpartisan" (FEC Mem. at 28-29), but this misses the point. A

debate staging organization that was "controlled" by a political party or candidate certainly would violate § 110.13(a)'s prohibition on endorsing, supporting, or opposing political parties or candidates. But that does not mean that control is required to violate § 110.13(a)'s prohibition; one can "endorse, support or oppose" candidates or parties without having control over them. The "control over" test that the FEC used to dismiss Plaintiffs' complaints has no basis in the language of § 110.13(a), and the FEC's dismissals were therefore contrary to law.

B. The FEC Failed To Give A Hard Look To Plaintiffs' Allegations Regarding The CPD's Partisanship

Because the FEC summarily relied on *Buchanan* and its prior MURs, it failed to give the allegations of Plaintiffs' administrative complaints a hard look. (*See* Pls.' Mem. at 33-37). None of the FEC's attempts to explain away its conclusory treatment of Plaintiffs' evidence withstands scrutiny.

1. Prior Decisions Do Not Excuse The FEC Of Complying With Its Obligation To Consider Plaintiffs' New Evidence

The FEC's primary argument is that it simply did not need to consider Plaintiffs' allegations because *Buchanan* and its prior MURs already decided that the CPD "qualif[ies] as a debate sponsor" under § 110.13(a). (FEC Mem. at 26). The FEC claims it did not have to "reconsider its conclusions" because Plaintiffs' administrative complaints included some of the same evidence of the CPD's partisanship that was addressed in those matters. (*See* FEC Mem. at 26, 29-30).[4]

[4] Throughout its Memorandum, the FEC exaggerates the extent to which the courts have addressed challenges to the CPD's non-partisanship. It misleadingly asserts that complainants in several administrative matters "filed suits seeking judicial review of the FEC's decisions," but that "all those cases were dismissed or decided in the FEC's favor," (*id.* at 18-19 & n.15), and that "reviewing *courts*" have rejected challenges to the CPD's 15% rule. (*Id.* at 31 (emphasis added)). However, *Buchanan* is the only opinion that actually addresses the merits of a challenge similar to Plaintiffs'.

But the fact that Plaintiffs discussed the history of the CPD does not absolve the FEC of the responsibility to consider all of the extensive additional evidence Plaintiffs presented. The *Buchanan* Court explicitly found that this historical evidence was "not insubstantial" and could "easily" suggest to the ordinary person that there was "some 'reason to believe' that the CPD always has supported, and still does support, the two major parties to the detriment of all others." 112 F. Supp. 2d at 72. *Buchanan* never purported to decide that the CPD "qualif[ies]" as a legitimate debate staging organization under § 110.13(a) in perpetuity. On the contrary, the Court recognized that while the evidence in *Buchanan* was insufficient (under the "control over" test) to show that the FEC acted arbitrarily and capriciously in finding that the CPD was not partisan, "contemporaneous" evidence of the CPD's partisan conduct would require a different result. *Id.* at 73. Here, Plaintiffs identified such evidence, demonstrating that during the lead-up to the 2012 debates, the CPD's leadership endorsed and supported the two major parties and their candidates. (*See* Pls.' Mem. at 34-35). The FEC was obliged to take a "hard look" at this new evidence, which is all the more telling in light of the historical context – the earlier evidence of partisanship that the *Buchanan* court found "not insubstantial."

Nor does the D.C. Circuit's decision in *Hagelin* stand for the proposition that the CPD complies with § 110.13(a) in perpetuity. (*See* FEC Mem. at 25-26). Though *Hagelin* involved an administrative complaint filed against the CPD, the case is inapposite because the claim there was that the CPD had engaged in impermissible partisan activity by excluding all third-party candidates from attending the CPD's debates as audience members. 411 F.3d at 240. The D.C. Circuit upheld the FEC's conclusion that the exclusion of third-party candidates was not done for partisan reasons, and unlike here, the plaintiffs offered no further evidence requiring the FEC to

"revisit" *Buchanan*. *Id.* at 244. *Hagelin* provides no basis for the FEC to cursorily disregard Plaintiffs' evidence.

Relatedly, the FEC contends that it could disregard the evidence of the CPD directors' partisan activities because there is no proof that "this partisan activity *began* since 2000 (when *Buchanan* was decided) or 2005 (when MUR 5530 was dismissed)." (FEC Mem. at 29). It is not entirely clear what the FEC means, but it appears to be suggesting that since some of the partisans currently on the CPD have served since before 2000, their more recent partisan activities are irrelevant because the *Buchanan* Court and the FEC in MUR 5530 implicitly found the evidence of these individuals' partisanship insufficient. This is nonsensical. The *Buchanan* Court found an absence of "contemporaneous evidence" of partisan conduct, and concluded that the evidence of the CPD's partisan creation and partisan conduct in connection with pre-2000 debates was stale; the Court did not remotely suggest that evidence of *more recent* partisan activities by the same individuals would be insufficient in a future case. 112 F. Supp. 2d at 71-72. It is indisputable that Plaintiffs pointed to contemporaneous evidence of partisan activity during the lead-up to the 2012 general election debates, and beyond. The FEC's reliance on the administrative complaint in MUR 5530 is even more inapposite, as that complaint only challenged the CPD's polling criterion, not its partisan status. *See* First General Counsel's Report (MUR 5530) at 1-2 (Commission on Presidential Debates) (May 4, 2005) (Ex. 9 to Decl. of Alexandra A.E. Shapiro, dated April 6, 2016).

2. Evidence Of Directors' Partisan Activities Is Sufficient To Show The CPD's Own Partisanship

The FEC and the CPD as amicus curiae both argue that evidence that the CPD's directors have endorsed, supported, or opposed candidates or parties does not show that the CPD itself has done so. (FEC Mem. at 27, 29-30; *see also* CPD Br. (Dkt. No. 45) at 3 n.1 (arguing that acts

done in "personal" rather than "official" capacity should not be attributed to the organization)). This argument fails for two reasons.

First, it is being asserted for the first time in litigation; the FEC's Analyses never drew any distinction between the CPD and its leadership. (AR3178-81; AR5006-09). "[C]ourts may not accept . . . *post hoc* rationalizations for agency action. It is well-established that an agency's actions must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (citation omitted). This Court cannot uphold the FEC's dismissal of an administrative complaint on grounds "first presented in the legal memoranda which defendant filed in this litigation." *Common Cause v. FEC*, 676 F. Supp. 286, 291 (D.D.C. 1986).

Second, any distinction between the conduct of the CPD and the conduct of its directors is form over substance in this context. The FEC does not (and cannot) dispute that organizations like the CPD "must act through [their] employees and agents." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 33 (1981). Here, the CPD consists of little more than its leadership – at least as late as 2008, its staff consisted entirely of its executive director, her two assistants, and a receptionist, and there is no indication that this has changed. (AR2232; AR2160 (CPD spent less than $275,000 in total salaries and wages for non-officer employees in 2012)). Its sole mission is to host the ostensibly non-partisan general election debates, which provide a massive platform for the major-party candidates who participate in them. The notion that the people who run the CPD and decide who can participate in the debates can be diehard partisans who actively promote the Democratic and Republican Parties and their candidates, while somehow the organization itself could remain nonpartisan, borders on laughable.

Indeed, the FEC does not even really believe that the CPD as an organization is untainted by the partisanship of its directors. It never made such an argument in any of the prior cases, including *Buchanan*. In fact, in its dismissal of the administrative complaint in MUR 5414, the FEC observed that certain statements made by CPD Director Alan K. Simpson about excluding independent candidates from the CPD's debates "raise[d] questions" about the CPD's opposition to independent candidates. *See* First General Counsel's Report, MUR 5414 at 15 (Commission on Presidential Debates) (Dec. 7, 2004) (Ex. 8 to Declaration of Alexandra A.E. Shapiro, dated April 6, 2016). It ultimately found these statements insufficient not because Simpson's personal statements were irrelevant, but rather because he was only one director and did not represent the views of any other director. *Id.* Similarly, under the FEC's erroneous "control over" test, which it touts as a "helpful aid" in identifying partisan activity by a debate staging organization, whether an "officer or member" of a party is "involved in the operation of the CPD" is dispositive of the CPD's partisanship. (*See* FEC Mem. at 21, 28-29). In other words, the FEC itself recognizes that the behavior of the leaders of a debate staging organization is highly probative of whether that organization is partisan in violation of § 110.13(a).

In addition, § 110.13(a) does not recognize the distinction between conduct in a personal and official capacity arising under 26 U.S.C. § 501(c)(3) on which the CPD relies. (*See* CPD Br. at 3 n.1). The Internal Revenue Code is not a substitute for FECA; the FEC itself has stated that "the use of the Internal Revenue Code classification to interpret and implement FECA is inappropriate." Political Committee Status, 72 Fed. Reg. 5595, 5599 (Feb. 7, 2007); *see also Shays v. FEC*, 337 F. Supp. 2d 28, 127-28 (D.D.C. 2004) (rejecting FEC regulation which provided that communications by § 501(c)(3) organizations were not electioneering communications; FEC's reliance on tax status was "troubling" because "the IRS in the past has

not viewed Section 501(c)(3)'s ban on political activities to encompass activities that are so considered under FECA"), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005).

3. Like Its Analyses, The FEC's Memorandum Ignores Most Of Plaintiffs' Evidence

Because the FEC mischaracterized Plaintiffs' allegations in the Analyses as "the same allegations regarding the same candidate selection criteria" as prior complainants (AR3181; AR5009; *see also* Pls.' Mem. at 34-35), it ignored the vast majority of the new evidence detailed in the administrative complaints. The FEC's Memorandum does the same, erroneously asserting that the only new information in the complaints was Fahrenkopf's statement about the CPD's candidate selection system, and reiterating its assertion that Fahrenkopf was "merely reciting the obvious fact that most CPD debates have involved two major party candidates." (FEC Mem. at 26, 30). But as explained, the FEC's rubber-stamp of Fahrenkopf's self-serving, post hoc explanation well illustrates that the FEC refuses to substantively consider Plaintiffs' allegations, in violation of its legal duties, by unquestioningly accepting the CPD's whitewashing of its own directors' material admissions. (*See* Pls.' Mem. at 35-36 & n.16).

The FEC tries to discount its history of sanctioning the CPD's non-compliance by conclusorily claiming that it has "shown" any suggestion that the FEC has a history of accepting the CPD's whitewashing to be "baseless." (FEC Mem. at 30). It has done nothing of the sort. As it always has done, the FEC here has simply adopted the CPD's after-the-fact declarations that statements do not mean what they say, without any further scrutiny. (Pls.' Mem. at 35-36 & n.16). That is not the required "hard look" at the issues presented in the administrative complaints.

4. The CPD's Failure To Address Allegations About Most Of The Named Respondents Was Arbitrary And Capricious

The FEC failed to address allegations concerning ten of the CPD's directors who were named as respondents in Plaintiffs' complaints. It mischaracterizes this as a mere error in failing to "notify[]" these directors (FEC Mem. at 30), but the error is much more significant: the FEC wholly ignored the specific allegations about those respondents. (*See* Pls.' Mem. at 36).

The FEC argues that even if it was required to address these allegations, its failure to do so was "harmless" because "the allegations against all named respondents . . . were the same." (FEC Mem. at 31). This is not true. There were specific allegations about many of the named respondents, relating to their particular partisan activities, which the FEC never addressed. In any event, even if the allegations had been the same as those against Fahrenkopf, McCurry, and the CPD, the FEC ignored even those allegations because it erroneously said they were the "same allegations" as raised in previous administrative complaints. (*See* AR3181; AR5009; Pls.' Mem. at 34-35). It was surely not harmless for the FEC to ignore allegations by falsely labeling them "the same" as allegations it never considered in the first place. (FEC Mem. at 31). *See Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) ("The burden to demonstrate prejudicial error . . . is 'not . . . a particularly onerous requirement.'" (quoting *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009)). It is entirely possible that, if the FEC were to conscientiously do its job and consider the allegations on their merits, rather than just protecting the CPD, it could come to a different conclusion. *See, e.g.*, *PDK Labs. Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (finding error not harmless where it was possible on remand that agency could reach a different decision).

* * *

In sum, the FEC failed to adequately consider Plaintiffs' evidence showing that the CPD endorses and supports the two major parties and opposes independent candidates. It summarily dismissed the administrative complaints, without analysis of whether the regulatory standard was met, because it erroneously relied on a "control over" test that it has silently followed ever since *Buchanan*. It failed to give Plaintiffs' allegations and the evidence in support of them a hard look. In so doing, the FEC has abdicated its responsibility to prevent the appearance of *quid pro quo* corruption, and has permitted corporations to take advantage of a narrow loophole to make what otherwise would be patently illegal contributions to the two major parties and their candidates. As one prominent campaign finance scholar has observed, the CPD takes advantage of debate staging regulations to grant "corporations an easy way to influence both the Republican and Democratic parties," and "without the public even recognizing that influence." Lawrence Lessig, *How Big Business Kills Third-Party Candidates*, Daily Beast (May 6, 2016), http://www.thedailybeast.com/articles/2016/05/16/how-big-business-kills-third-party-candidates.html. This Court should direct the FEC to do its job and enforce the law.

C. The FEC Failed To Consider Plaintiffs' Allegations Regarding The CPD's Systematically Biased Polling Criterion

The FEC did not substantively address Plaintiffs' evidence demonstrating that the CPD's 15% rule and the manner in which it is applied systematically disadvantage independent candidates. (Pls.' Mem. at 37-39). The sole discussion of this evidence in the Analyses was a conclusory footnote. (AR3181 n.4; AR5010 n.5). The FEC's *ipse dixit* response to Plaintiffs' arguments in its Memorandum further confirms that it never actually considered this evidence.

The FEC notes that *Buchanan* and other MURs have already rejected prior arguments that the CPD's 15% rule was not an objective criterion. It goes so far as to assert that the

Buchanan Court "explicitly rejected" the argument that the CPD's polling criterion could *ever* systematically disadvantage independent candidates, apparently because the Court observed that three third-party candidates (George Wallace, John Anderson, and Ross Perot) in the past had achieved a 15% level of support. (FEC Mem. at 32 (citing 112 F. Supp. 2d at 74)). This misreads *Buchanan*. The Court there never held that the CPD's 15% rule was objective as a matter of law and could never be shown to systematically disadvantage independent candidates. On the contrary, it explicitly concluded that the evidence presented in that case did not "suggest that these problems [with polling] would systematically work to minor-party candidates' disadvantage." 112 F. Supp. 2d at 75. In other words, on the basis of the administrative record in that case, there was no reason to believe that polling systematically disfavored independent candidates. By contrast, the administrative record here showed exactly that. (*See* Pls.' Mem. at 16-19, 37-39). The very fact that the FEC says *Buchanan*'s holding decided this issue in perpetuity confirms that the FEC never actually considered the evidence presented in Plaintiffs' administrative complaints.

Moreover, the *Buchanan* Court's observation that three third-party candidates have reached 15% in decades-old elections does not absolve the FEC from failing to consider Plaintiffs' evidence. That observation was made 16 years ago, about elections that are now 48, 36, and 24 years old. Here Plaintiffs presented substantial evidence, which was ignored by the FEC, showing that modern campaigns are different. (*See id.* at 16-19). In addition, as Plaintiffs' administrative complaints explained, the observation about past third-party candidates was wrong as a factual matter for several reasons. First, Anderson and Wallace had participated in major-party primaries, and accordingly received the free media coverage that independent candidates do not receive. (*See* AR2059; *see also* Pls.' Mem. at 16-17). Second, Perot, the only

true unaffiliated candidate, would not have satisfied the CPD's present 15% criterion; in mid-September, Perot was polling at or below 10%. (AR2337-38).

The FEC also suggests that it was free to "set aside" the practical impossibility of an independent candidate satisfying the CPD's 15% rule in a modern election because the evidence did not show "that the CPD failed to use pre-established, objective criteria." (FEC Mem. at 33 (quoting AR3181 n.4; AR5010 n.5)). This is mere question-begging. As *Buchanan* clearly instructed, "the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it." 112 F. Supp. 2d at 74. If it is practically impossible for any independent candidate to satisfy the CPD's polling criterion, that criterion is not a "pre-established, objective" criterion; the FEC cannot "set aside" that evidence.

In addition, the FEC claims that Plaintiffs' arguments about polling "are belied by their own reliance on polling," and the "apparent concession" that polling could be part of an objective candidate selection system. (FEC Mem. at 33). This is a strawman. Plaintiffs have never contended that polling cannot be considered at all; rather, they have argued that when used as an *exclusive* criterion for accessing the general election presidential debates, polling is not objective because it systematically disadvantages independent candidates. There is no inconsistency in this argument.

Finally, the FEC's failure to substantively consider Plaintiffs' new evidence of the 15% rule's bias against independent candidates was compounded by its perfunctory acceptance of the Newport Declaration, which tried to explain away Gallup's extremely significant withdrawal from horse-race polling in the 2016 presidential primaries. (*See* Pls.' Mem. at 22, 39-40). The FEC's Memorandum merely reiterates its subservience to the CPD's self-serving post hoc

explanations (*see* FEC Mem. at 33), further demonstrating that the FEC has simply never grappled with Plaintiffs' allegations against the CPD.[5]

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

This Court should also reverse the FEC's denial of the rulemaking petition.[6]

The petition presented evidence that polling thresholds systematically exclude independent candidates from debates, permitting debate sponsors to funnel corporate contributions to the major-party candidates in violation of FECA. As a result, the petition urged the FEC to open a rulemaking in order to prohibit the use of polling thresholds as a means of excluding candidates. In its notice of disposition, the FEC conceded that "polling thresholds could be used to promote or advance" certain candidates. (AR1905).

Now, for the first time, the FEC suggests that polling thresholds do not disfavor independent candidates because the margin of error in polling "could just as easily result in the inclusion of a candidate by overestimating the candidate's support as exclusion of the candidate by underestimating his or her support." (FEC Mem. at 36). As this argument does not appear in the notice of disposition, the FEC cannot invoke it now. As explained *supra*, "courts may not

[5] Plaintiffs requested an order declaring that, *inter alia*, the FEC's dismissals of Plaintiffs' administrative complaint were "contrary to law" and directing the FEC to find reason to believe that the CPD and its directors have violated FECA. (*See* Dkt. No. 37-3). The FEC protests that this requested relief is "improper," and that the most the Court can do is declare the dismissals "contrary to law" and direct the FEC to conform with that declaration. (*See* FEC Mem. at 33-34). That is of course what Plaintiffs have requested. Moreover, because the allegations of the administrative complaint plainly provided reason to believe that the CPD was violating FECA and the debate staging regulations (*see* Pls.' Mem. at 19-21, 29-40), this Court may order the FEC to conform to that declaration and commence an investigation. *Cf. Common Cause v. FEC*, 729 F. Supp. 148, 152-53 (D.D.C. 1990) (concluding that FEC decision was contrary to law, and ordering FEC to proceed on basis that probable cause for violation of FECA existed); *cf. also FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1474 (D.C. Cir. 1992) (discussing order in *Common Cause* requiring FEC to proceed to negotiations for conciliation agreement).

[6] The FEC argues that *res judicata* bars the Green Party from challenging the denial of the rulemaking petition because the Green Party's predecessor challenged the debate regulations in *Becker v. FEC*, 230 F.3d 381 (1st Cir. 2000). But LPF, not the Green Party, filed the petition for rulemaking and challenges its denial. (Second Am. Compl. ¶¶ 102-07, 142-44). In any event, *Becker* did not involve the denial of any rulemaking petition; it resolved a suit alleging that the debate regulations were *ultra vires* under FECA. *See* 230 F.3d at 383-84. Accordingly, *res judicata* would not bar the Green Party from challenging the FEC's denial of the rulemaking petition here. *See Coll. Sports Council v. Dep't of Educ.*, 465 F.3d 20, 22-23 (D.C. Cir. 2006).

accept appellate counsel's *post hoc* rationalizations for agency action. It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50 (citation omitted). Moreover, the inaccuracy of polling is more likely to result in the exclusion of independent candidates who would otherwise satisfy polling thresholds. This is because, as explained in the petition, independent candidates mobilize new voters whom pollsters tend to overlook when creating samples for their polls. (AR0024-25; AR0192). Additionally, the FEC does not dispute that independent candidates face other disadvantages in attempting to satisfy polling thresholds, including the need to raise impossible sums of money to pay for media exposure and the possibility that debate sponsors may engineer a specific outcome by selecting specific polls. (AR0015-24). Thus, even if polls are not "inherently unobjective" (FEC Mem. at 35, 44; *see also id.* at 36, 39), the use of polling thresholds to further partisan interests is a real threat.[7]

The FEC contends that the current regulation preserves flexibility for debate sponsors while allowing the FEC to police corrupt uses of polling thresholds through enforcement actions on a "case-by-case" basis. (FEC Mem. at 35-36, 40-41). This argument misconstrues the petition, and misrepresents the FEC's reliability as a law enforcement agency.

As for flexibility, the only constraint the proposed rulemaking would impose on sponsors is the inability to use polling thresholds to exclude candidates. The FEC argues that sponsors must be able to exclude candidates who are not viable, and that polls are an indicator of viability. That sponsors should be allowed to rely on polls is apparently "obvious" and "so basic that it . . .

[7] The FEC points out that *Buchanan* upheld the use of polling thresholds. (FEC Mem. at 36). But unlike here, the plaintiffs in *Buchanan* "did not present any evidence to suggest that these problems [with polling] would systematically work to minor-party candidates' disadvantage." 112 F. Supp. 2d at 75. The FEC also cites the D.C. Circuit's summary affirmance in *Natural Law Party v. FEC*, No. 00-5338 (D.C. Cir. Sept. 29, 2000), but as the FEC concedes, this was a companion case to *Buchanan* and included no independent analysis (FEC Mem. at 24, 37), and it is not binding on this Court. *See* D.C. Cir. Local Rule 32.1(b)(1)(A); *Martin v. District of Columbia*, 78 F. Supp. 3d 279, 308 n.36 (D.D.C. 2015).

hardly requires citation or elaboration." (FEC Mem. at 38-39).[8] But when a rulemaking petition presents evidence that calls into question the assumptions an agency deems obvious, the agency must take a "hard look" and give that evidence meaningful consideration. *See, e.g.*, *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981); *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1240 (D.D.C. 1986). Here, the petition explained that polls are poor measures of viability for independent candidates because they (1) undercount the voters these candidates mobilize; (2) may not test support for these candidates at all; (3) fail to account for the differential in name recognition that obscures independent candidates' electoral potential; and (4) are notoriously inaccurate in three-way races. (AR0023-26). The petition also provided alternatives for measuring viability that would limit the number of debate participants. (Pls.' Mem. at 42).[9] By contrast, the FEC has not demonstrated that allowing sponsors to use polling thresholds serves a valuable purpose.

Nor has the FEC shown that enforcement actions will prevent the use of polling thresholds for corrupt purposes. Enforcement actions work only if the agency chooses to bring them. Several FEC Commissioners have admitted, however that the FEC has become dysfunctional and is unable to enforce its own regulations – an admission corroborated by the FEC's plummeting caseload and fine assessments. (Pls.' Mem. at 43). This Court itself has

[8] The FEC also makes much of the fact that LPF cites polls in support of its position. (FEC Mem. at 37). Using polls as a rough estimate of popular sentiment is, however, a far cry from treating polls as the decisive criterion for exclusion from the presidential debates.

[9] In continuing to argue that "no rulemaking was necessary" because the alternatives proposed in the petition and comments are "already permissible" (FEC Mem. at 43), the FEC misses the point entirely and fails to address Plaintiffs' response (Pls.' Mem. at 42-43). The petition seeks to prevent debate sponsors from using polling thresholds because polls are especially susceptible to being used to exclude independent candidates. It is undisputed that this use of polling thresholds would violate FECA by allowing corporations to funnel contributions directly to favored major-party candidates. (A1904). The alternatives to polling thresholds simply show that debates can be limited to a manageable number of candidates without running the risk of corrupt discrimination. Quoting the CPD's comment on the petition, the FEC now suggests that the petition's proposed alternative "would favor early ballot qualification by candidates with the most resources." (FEC Mem. at 43). But although the FEC acknowledged this comment in its notice of disposition when discussing all of the comments it had received (AR1904), the FEC did not adopt the CPD's comment as a basis for its decision (AR1904-05). It cannot do so now. *See State Farm*, 463 U.S. at 50.

recognized that the FEC's "lack of action" on administrative complaints "has become predictable," and the FEC's gridlock has "prevented [it] from interceding in numerous campaign finance disputes in recent years." *Citizens for Responsibility & Ethics in Washington v. FEC*, --- F. Supp. 3d ----, No. 1:14-cv-01419 (CRC), 2015 WL 10354778, at *1 (D.D.C. Aug. 13, 2015). Although the FEC argues that it has a "long history of examining specific allegations of bias in polling thresholds" and "has successfully resolved past enforcement matters involving debate criteria," it does not identify a single instance in which it pursued an enforcement action against a debate sponsor. (FEC Mem. at 41-42). To the contrary, the sources cited by the FEC demonstrate that it has consistently dismissed administrative complaints against debate sponsors. (*Id.*). Thus, there is no evidence that enforcement actions are an adequate substitute for the rulemaking that Plaintiffs propose.

Citing *Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007) ("*Shays II*"), the FEC argues that agencies have discretion to use adjudication rather than rulemaking to achieve statutory goals. (FEC Mem. at 40-41). While this is true as a general matter, the FEC must nevertheless "provide a reasoned explanation for its decision to regulate . . . through adjudication instead of rulemaking." *Shays II*, 511 F. Supp. 2d at 23; *see also Shays v. FEC*, 424 F. Supp. 2d 100, 103 (D.D.C. 2006) (remanding to the FEC "either to articulate its reasoning for its decision to proceed by case-by-case adjudication or to promulgate a rule if necessary"). It is not enough to say, as the FEC does here, that "there is no statutory command requiring the FEC to implement a particular rule with respect to polling." (FEC Mem. at 41). This fact does not "bear o[n] the question of which statutorily-permitted method [of regulation] the agency *should* use." *Shays II*, 511 F. Supp. 2d at 28 (emphasis added).

Moreover, while the FEC ordinarily might have discretion to choose adjudication over rulemaking, its complete failure to bring enforcement actions shows that it has abused that discretion. The court in *Shays II* eventually upheld the FEC's use of adjudication to regulate so-called "527 groups" because "the FEC ha[d] successfully brought enforcement actions against 527 groups," thereby "demonstrat[ing] that the case-by-case approach c[ould] be at least somewhat effective." *Id.* at 31. These enforcement actions "resulted in Conciliation Agreements" and "civil penalt[ies]," including "fines between $45,000 and $750,000." *Id.* at 29-30. Here, by contrast, the FEC has provided no reason to believe that its case-by-case approach will sufficiently mitigate the risk of corruption described in the petition.

Finally, the FEC reiterates its argument that the petition was properly denied because it sought to change the rules for *only* the presidential and vice-presidential debates. (FEC Mem. at 43-44; AR0009). But as in its notice of disposition, the FEC does not explain why "adopting different standards for different races" would be undesirable. (FEC Mem. at 44). Apparently, it is unable to do so. The petition presented evidence that polling thresholds were especially problematic in the context of the presidential and vice-presidential debates. (AR0015-22). Unless there was a good reason to prefer a one-size-fits-all rule, the rational response would have been to open a rulemaking tailored to the problem at hand. The FEC has not articulated any such reason, and accordingly this was not a proper basis for rejecting the petition. *See Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987) ("conclusory" arguments "are insufficient to assure a reviewing court that the agency's refusal to act was the product of reasoned decisionmaking").

Thus, the FEC's denial of the rulemaking petition lacks any reasoned basis and should be reversed as arbitrary and capricious.

IV. THE CPD'S AMICUS BRIEF PRESENTS NO VALID ARGUMENTS FOR DENYING PLAINTIFFS' SUMMARY JUDGMENT MOTION

Nothing in the CPD's self-serving amicus curiae brief is any more persuasive than the FEC's arguments. The CPD presents a highly misleading account of its own history and role in staging the general election presidential and vice-presidential debates, as well as the reasons underlying its 15% rule. For example, the CPD claims that because "[s]cores of candidates" run for president, it needs to use its polling criterion to winnow the field down to the "leading candidates." (CPD Br. at 4). This is a red herring. No one disputes the appropriateness of the CPD's separate criterion requiring a candidate to be on the ballot in enough states to obtain 270 electoral votes, and historically very few candidates have obtained such ballot access. From 2000 to 2012, the period in which the CPD has deployed its current 15% rule, there have never been more than five independent candidates who have had the requisite ballot access (and there were five only once in that period). (AR0030). A concern about unwieldy debates is not a genuine basis to exclude the few non-major-party candidates who have enough voter support to have obtained sufficient ballot access that they could win the election.

The CPD also professes to have engaged in a "thorough and wide-ranging review of alternative approaches" to its debate selection criteria. (CPD Br. at 5). But in fact, its "review" appears to have been nothing more than window dressing. The CPD publicly announced to great fanfare in April 2015 that it would "seek input" on selection criteria and other debate issues through a "transparent online process"; although six weeks later it unveiled an online suggestion box, which was later taken down, the CPD never provided any public access or transparency into its "review." Instead, on October 29, 2015, it simply announced that it would use the same exact criteria it has used for five elections in a row – despite all the recent data showing how inaccurate

polling is, and despite all the data LPF submitted showing that the CPD's polling criterion is virtually impossible for any independent candidate to satisfy. (*See* Pls.' Mem. at 10 & n.6).[10]

Finally, the CPD's contention that a ruling in Plaintiffs' favor would violate the CPD's First Amendment rights is spurious. The CPD admits that the FEC's debate staging regulations are perfectly tailored to target *quid pro quo* corruption, and contends that any further restrictions on the discretion of debate staging organizations would violate those organizations' First Amendment rights. (CPD Br. at 9-10). The CPD does not challenge the long-standing restrictions on corporate contributions and expenditures in connection with federal elections. *See, e.g.*, 52 U.S.C. § 30118(a); *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). Its concession that the FEC's regulations are valid, constitutional restrictions on debate staging organizations (CPD Br. at 9) shows that there is no First Amendment issue implicated by Plaintiffs' suit at all. Plaintiffs' point is that the CPD is violating the debate staging regulations that the CPD agrees are constitutional, and as a result, is illegally making contributions and expenditures to the two major parties. The CPD's reliance on authority for the propositions that the First Amendment applies to debate staging organizations (*id.* at 7-8) and that FEC regulations must be geared to preventing *quid pro quo* corruption (*id.* at 8-10) is simply misplaced and irrelevant.

[10] *See April 1, 2015 Update*, Commission on Presidential Debates (Apr. 1, 2015), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=55&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80; *Commission on Presidential Debates Announces 2016 Nonpartisan Candidate Selection Criteria; Forms Working Group on Format*, Commission on Presidential Debates (Oct. 29, 2015), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=58&cntnt01origid=93&cntnt01detailtemplate=newspage&cntnt01returnid=80.

CONCLUSION

No one can be elected President without participating in the televised general election debates. For decades, the CPD, which is run by partisans with deep ties to the Democratic and Republican Parties, has had sole control over these debates. It has used that control, and its claimed exemption from FECA's ban on corporate contributions and expenditures, to exclude independent candidates from the debates, and to prevent independent presidential candidates from competing on a level playing field with the two major parties' nominees. The FEC has repeatedly and steadfastly refused to enforce the CPD's obvious violation of FEC regulations, and through its inaction has enabled the CPD's corrupt, anti-democratic, and anti-competitive stranglehold over the presidential debates. More than ever, the American people are dissatisfied with the nominees the two major parties are offering, and overwhelmingly would prefer a third option. Yet even though the nominees of the Libertarian Party and the Green Party are likely to appear on most if not all 50 states' ballots, the CPD will exclude them from participating in the debates.

Unless the Court acts now, the CPD will continue to exclude independent candidates from the debates, and no one other than a Democrat or Republican will ever become President of the United States – no matter how dissatisfied the American people are with these two parties and their nominees. Up to this point, the CPD has rigged the system, and undermined our democracy. This Court should require the FEC to do its job, and hold the CPD accountable, so that the American people can have a real choice in future presidential elections, rather than being limited to the candidates served up by the two major parties, their corporate donors, and the tiny minority of voters who participate in their primaries.

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Respectfully submitted,

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