

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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LEVEL THE PLAYING FIELD et al.,

Plaintiffs,

v.

Civil Action No. 15-1397-TSC

FEDERAL ELECTION COMMISSION,

Defendants.

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Washington, D.C

Thursday, January 5, 2017

10:00 a.m.

TRANSCRIPT OF MOTION HEARING  
BEFORE THE HONORABLE TANYA S. CHUTKAN  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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**P R O C E E D I N G S**

1  
2 THE DEPUTY CLERK: This is Civil Action 15-1397,  
3 Level the Playing Field, et al. versus Federal Election  
4 Commission.

5 I'd ask that counsel please approached the lecturn,  
6 identify yourselves for the record, starting with the  
7 plaintiff's side of the room. Thank you.

8 MS. SHAPIRO: Thank you. Good morning, Judge.  
9 Alexandra Shapiro, and my colleague, Chetan Patil, of  
10 Shapiro, Arato, LLP, for the plaintiffs.

11 THE COURT: Good morning.

12 MR. BONHAM: Good morning, Your Honor. Robert  
13 Bonham for the Federal Election Commission. And with me this  
14 morning are my colleagues, Erin Chlopak, Jim Lee and Kevin  
15 Deeley.

16 THE COURT: Good morning.

17 All right. We're here for oral argument on cross  
18 motions for summary judgment that have been brought in this  
19 APA challenge to the FEC.

20 I believe we have agreed on 25 minutes per side,  
21 with rebuttal if necessary. I'm not, you know, in a case  
22 like this that has a lot of issues, I'm not going to be, if,  
23 obviously, if I start interrupting you all with questions,  
24 I'm not going hold to you strictly to that limit, but I ask  
25 that you keep that in mind. I'm not going to stop anybody in

1 mid-sentence or anything.

2           So, since plaintiffs filed first, they go first,  
3 and, Ms. Shapiro, will you be arguing?

4           MS. SHAPIRO: Yes, Your Honor.

5           THE COURT: All right.

6           MS. SHAPIRO: Thank you, Your Honor.

7           Very briefly, before turning to the legal arguments  
8 I'd like to highlight for the Court this morning, I just want  
9 to address the significance of this case in the broader  
10 context of our democracy. Our democracy, as the last  
11 election, I think, vividly showed is not serving the American  
12 people with the choice or providing them with the choices  
13 they would like for the presidency.

14           And by just about any measure, the two major  
15 parties failed the American people miserably in 2016. As an  
16 increasingly polarized primary electorate, which represents  
17 just a small fraction of eligible U.S. voters, has become  
18 more and more polarized and more and more likely to produce  
19 candidates that most Americans view unfavorably.

20           And in 2016, this resulted in the two parties  
21 nominating the two most unpopular presidential candidates in  
22 history. Indeed, the day he was elected, Mr. Trump was  
23 viewed unfavorably by nearly 60 percent of the American  
24 people.

25           So how did we get here? We got here because the

1 two major parties have rigged the system to maintain their  
2 own power and deprive American citizens of their choices.  
3 They've done that in a number of ways, including partisan  
4 gerrymandering, voter suppression laws, rules to prevent  
5 independence from appearing on a ballot if they won in a  
6 major party primary first.

7           And, of course, the reason we're here today, the  
8 rule of the Commission on Presidential Debates uses to  
9 exclude independent and third party candidates from competing  
10 against the Democrat and Republican nominees. And this is  
11 critical because everyone knows that in the United States you  
12 can't become president without participating in these  
13 debates.

14           Now, most Americans want additional choices, and if  
15 the CPD continues to operate as it has in the past, run by  
16 partisans who are erecting impossible barriers --

17           THE COURT: Well, I mean, let me stop you, because  
18 I really don't want this to turn into any kind of a political  
19 issue because that's not my role. And so, I mean, I don't  
20 know that most Americans want more choices, I don't know  
21 that, you know, the issue I'm being asked to decide here  
22 today has really anything to do with the past election.

23           But my question for you is, is it your argument  
24 that the fact that the Commission on Presidential Debates is,  
25 as you claim, bipartisan instead of nonpartisan? How would

1 that have given us different choices?

2 I mean, if as you say the system is rigged to  
3 prevent viable third party or fourth party candidates from  
4 participating, what is the Commission on Presidential Debates  
5 required to do to make sure that they are not dominated by  
6 the two major parties in terms of rule-making?

7 MS. SHAPIRO: Well, Your Honor, and I was just  
8 getting to that. Could I take a little time to put this in  
9 the context of the purpose of the Federal Election Campaign  
10 Act and the regulation?

11 So, the Federal Election Campaign Act, as the Court  
12 is well aware, was enacted to prevent quid pro quo corruption  
13 and its appearance in connection with federal election  
14 campaigns. And to effectuate that purpose, one of the things  
15 the statute does is it prohibits corporations from making  
16 contributions and expenditures in connection with federal  
17 election campaigns.

18 The statute does, however, contain a safe harbor  
19 for, quote, nonpartisan activity designed to encourage  
20 individuals to register to vote or to vote.

21 And decades ago the Federal Election Commission  
22 determined that the educational purpose of nonpartisan public  
23 candidate debates is similar to that purpose articulated  
24 expressly in the statute that I just described. And the FEC  
25 said that a nonpartisan candidate debate staged by a

1 qualified nonpartisan organization is designed to educate and  
2 inform voters and, therefore, should be exempt from the ban  
3 on the receipt and expenditure of corporate funds.

4           So the regulation it promulgated has, I think, two  
5 important provisions that we're focused on here and that we  
6 believe the Commission on Presidential Debates has violated.  
7 The first part is the part Your Honor alluded to earlier,  
8 which says that the organization, if it wants to take  
9 advantage of this exemption, should not endorse support or  
10 oppose political candidates or political parties.

11           And then in addition, in order to ensure that the  
12 debates are truly nonpartisan in promoting these educational  
13 purposes that I just described, the organizations have to  
14 use, quote, preestablished objective criteria to determine  
15 who may participate.

16           And the FEC itself, as well as the District Court  
17 in the *Buchanan* case have further elaborated on what  
18 objective criteria means. And the FEC has said that in order  
19 for criteria to be objective, they must be free of content  
20 bias and not geared to the selection of certain prechosen  
21 participants. And the FEC has also said, quote,  
22 reasonableness is implied.

23           In picking up on those two statements, the District  
24 Court in *Buchanan* held that in order for selection criteria  
25 to be objective within the meaning of the regulation, they

1 must be reasonable. And in addition, the Court held that the  
2 objectivity requirement precludes debate sponsors from  
3 selecting a level of support if they use a polling criteria  
4 that is so high that only the Democratic and Republican  
5 nominees could reasonably achieve it.

6 Now, what I was going to do next, but I'd just like  
7 to go back, not to the discussion of the problem as it fits  
8 in the context of today's events, but I did want to give the  
9 Court a little bit of background about the of plaintiffs.

10 As the Court is aware, the original administrative  
11 complainant, a petition were filed by Peter Ackerman and  
12 Level the Playing Field, and we were later -- who were later  
13 joined by the Libertarian Green Parties. And I know that the  
14 Court is no doubt aware of who the two minor parties are, but  
15 I thought it might be helpful just to spend literally a  
16 minute, giving the Court a little more information about the  
17 other plaintiffs who originally brought the suit.

18 So, Dr. Ackerman is a businessman who has a Ph.D in  
19 international relations and has been involved for decades in  
20 democracy reform efforts around the world and here in the  
21 United States. And he's cochair of the U.S. Institute of  
22 Peace's International Advisory Council, a member of the  
23 Executive Committee of the Atlantic Council, and he founded  
24 the International Center on Non-Violent Conflict, which was  
25 nominated for a Nobel Peace Prize by Lech Walesa a few years

1 ago. And for nearly ten years, Dr. Ackerman has been  
2 involved in various efforts leading up to the Level the  
3 Playing Field organization founding that have the goal of  
4 encouraging prominent qualified Americans who are not  
5 interested in running in one of the two major parties to run  
6 for president outside that partisan context. I just wanted  
7 the Court to be aware of that.

8 Now, getting back to the regulation. How does it  
9 apply to this case? We believe that the record  
10 overwhelmingly demonstrates that the CPD has violated the  
11 regulation, and that we have put forward extensive new  
12 contemporaneous evidence demonstrating as much.

13 I just want to touch on a few highlights because I  
14 know the Court is familiar with the record and we've written  
15 a lot of pages in the briefs about this, but I want to touch  
16 on some key points in the record that show that what the FEC  
17 did here was arbitrary and capricious because it failed to  
18 even consider or address in any way any of the new evidence.

19 THE COURT: Let me ask you, your argument as to the  
20 administrative complaint, is it your argument that the FEC is  
21 required to spell out its legal analysis? I mean, I read the  
22 legal analysis. And is your argument that the FEC is  
23 required to spell out that legal analysis? And if it doesn't  
24 do so, its decision must be considered arbitrary and  
25 capricious? Or is that just a factor I consider?



1 MS. SHAPIRO: I think the Court has to, sorry, the  
2 agency has to provide a reasoned analysis and it has to be  
3 clear from the content of its written decision that it  
4 considered the evidence, and so it has to explain that.

5 THE COURT: Does the FEC have to -- is it actually  
6 required to mention or acknowledge each piece of evidence in  
7 its analysis to demonstrate that it gave it a hard look? In  
8 other words, I mean, there's a lot of evidence, both in the  
9 earlier complaints and in the later complaints. And is the  
10 FEC in danger of being accused of not considering the  
11 evidence if it doesn't in its analysis touch on each piece or  
12 mention each piece or will it be found not to have given a  
13 hard look if it doesn't do that?

14 MS. SHAPIRO: No, Your Honor. And our argument  
15 certainly doesn't depend on a claim of that sort. Indeed,  
16 the point here, and I do want to touch on some of the key  
17 evidence. The point here is not that the FEC has to produce  
18 a 200-page opinion analyzing every word in the material that  
19 plaintiffs submitted in connection with the administrative  
20 complaint. That's not it at all.

21 THE COURT: Let me ask you -- sorry, I mean, I hate  
22 to interrupt you, but let me give you an example, then. If,  
23 for example, the analysis had simply mentioned the two expert  
24 reports, which it didn't. But if it had simply mentioned the  
25 two expert reports and said, well, we don't think these are

1 significant or we disagree with these for X and Y reasons,  
2 would that have been enough?

3 MS. SHAPIRO: Well, I guess obviously the devil is  
4 always in the details. But I think that if the FEC had  
5 mentioned the reports and provided some reasons that were  
6 reasons that weren't conclusionary, that might be a very  
7 different case. But that's not the case that we have here.

8 THE COURT: Right. Okay.

9 MS. SHAPIRO: So quickly. With regard to the  
10 partisanship, as the Court is aware, and we're obviously not  
11 relying on the history alone, but obviously its relevant  
12 context needs to be considered in connection with the  
13 contemporaneous evidence. The CPD was founded for the  
14 express purpose of promoting the two major party candidates.  
15 And the founders made express public statements about keeping  
16 third parties out. And it was founded to wrest control from  
17 an obviously nonpartisan organization, the League of Women  
18 Voters. Its founders were the then chairman respectively of  
19 the Republican and National and Democrat National Committees.

20 And throughout -- from that time, through the 2016  
21 election, the CPD has continued to be led by extremely  
22 partisan chairmen. And it has also had other similarly  
23 partisan board members. And these people have made numerous  
24 statements over the years confirming their bias, including  
25 several recent statements.

1           But most importantly for purposes of this case we  
2 demonstrated that, including very recently many of the board  
3 members have contributed heavily to the two major parties and  
4 their candidates. They have raised funds for them. The two  
5 chairmen are lobbyists who have been funneling money to  
6 Democratic and Republican politicians for years. And in  
7 particular that a number of the members have actually  
8 contributed money in the maximum possible to candidates  
9 running for the 2016 -- for the presidency in connection with  
10 the 2016 election. So.

11           I won't belabor the details about Fahrenkopf and  
12 McCurry. I'm sure the Court is familiar with each of their  
13 deep ties to the parties, and their careers as lobbyists and  
14 their past contributions, which are, you know, in the tens of  
15 thousands, if not more, range. But we pointed out that  
16 several -- a number of other board members, none of whom were  
17 even acknowledged by the FEC as respondents, had contributed.

18           So, for example, John Danforth, former Republican  
19 senator hosted a fundraiser for Jeb Bush's super PAC, and  
20 donated the maximum allowed to John Kasich's campaign.  
21 Richard Parsons, the former chairman of Citigroup and Time  
22 Warner has donated over \$100,000 to Democratic and Republican  
23 campaigns, including maximum contributions to Jeb Bush and  
24 Hillary Clinton in connection with this past cycle. Antonio  
25 Hernandez donated the maximum to Hillary Clinton this time.

1 Leon Panetta endorsed Hillary Clinton publically. Olympia  
2 Snow donated to Jeb Bush's campaign as well.

3           And this partisanship, I think very importantly for  
4 purposes of the statute and the regulation we're dealing  
5 with, has produced precisely this sort of corporate funding  
6 that the act was designed to prevent. And when the League of  
7 Women Voters sponsored the debates, they received no  
8 corporate funding. And yet from its inception, the CPD has  
9 taken in millions of dollars from major corporations:  
10 Anheuser Busch, Southwest Airlines, American Airlines, AT&T,  
11 Ford Motor Company, to name just a few.

12           And it's obvious that these corporations are not  
13 donating their money for the good of educating the voters.  
14 If they were, they would have been participating and  
15 contributing to the league's debates as well.

16           THE COURT: Well, let me ask you, is there a  
17 difference in your argument for contributions from corporate  
18 sources to the commission to sponsor the debates by TV time,  
19 whatever, as opposed to contributions from commission  
20 members?

21           MS. SHAPIRO: Well, if -- so the commission  
22 operates -- claims that its entitled to take corporate  
23 donations because it claims it's complying with the  
24 regulation.

25           THE COURT: Right.

1 MS. SHAPIRO: If the commission didn't take --  
2 didn't take corporate contributions and wasn't seeking an  
3 exemption under the safe harbor for those, then certainly  
4 we're not saying that sort of anybody who doesn't use  
5 corporate or other disallowed money couldn't host a debate,  
6 for example.

7 THE COURT: Right.

8 MS. SHAPIRO: And that's why the First Amendment is  
9 not at issue in this case. I think even the CPD in its  
10 amicus brief concedes that it doesn't purport to the  
11 challenge the constitutionality of the regulation. They just  
12 claim that they comply with it. So there's no constitutional  
13 issue here. We're not saying that no one can host a debate  
14 if they have some partisan agenda. The point is that if you  
15 want to take advantage of the exemption or the loophole in  
16 the Campaign Act could take corporate money to do so, you  
17 have to comply with the regulation.

18 And one way to think about it, I did want to  
19 mention, you know, the commission argues in its amicus brief,  
20 and the FEC makes this argument now for the first time in its  
21 brief, that somehow there's a reasonable distinction you can  
22 make between the individual members and the organization.  
23 And in the particular context here, that really doesn't make  
24 any sense given that this is an organization that has as its  
25 sole purpose hosting these debates. These are people who

1 give their time voluntarily. It's not a job or something  
2 like that.

3           And one way to think about it is this: You know,  
4 if one were to go about look at this regulation and say, hey,  
5 you know, I'd like to create an organization that complies  
6 with it that's a nonprofit, nonpartisan organization, how  
7 would you do that? I think if it were truly intended to be  
8 nonpartisan, the chairpersons and board would be comprised of  
9 people like academics, prominent election lawyers, debate  
10 historians, journalists, and it wouldn't be instead partisan  
11 politicians and political professionals and lobbyists.

12           And you would also have a conflict of interest  
13 policy. You would require the members to discontinue  
14 partisan activity during their service on the board. You'd  
15 probably have term limits as most organizations do.

16           And I think if you think about it that way, it  
17 helps to illustrate why it's just not reasonable or compliant  
18 with common sense to try to make an artificial distinction in  
19 this unusual context between the activities of the people and  
20 the activities of the organization.

21           Now, I'd like to quickly turn to some of the  
22 evidence that we have put forward regarding the objectivity  
23 and why the 15 percent is not objectionable, unless the Court  
24 has other questions.

25           THE COURT: I have one question. Regarding your

1 argument about the fact that all of the respondents weren't  
2 included in the analysis, would it -- were the allegations in  
3 evidence against the ten directors similar enough to the two  
4 chairmen such that this was harmless error? I mean, isn't  
5 that --

6 MS. SHAPIRO: No, Your Honor.

7 THE COURT: -- that the result wouldn't have been  
8 any different because the allegations were basically the same  
9 as to all ten?

10 MS. SHAPIRO: No, they weren't the same. And in  
11 particular, Fahrenkopf, I think they were different in  
12 several ways. I think the point about the other directors is  
13 to show that this wasn't a problem just as to the chairmen.  
14 It's replete throughout the commission. And the analyses do  
15 not address the evidence we put forward that doesn't exist in  
16 any of the past complaints regarding actual contributions to  
17 presidential candidates in the current cycle before, during  
18 and after the commission is in the process of determining  
19 what criteria it's going to use to select the participants.

20 And so, that's really the point we're making there  
21 is that this is an example that shows that the commission was  
22 not taking the evidence seriously, was not really considering  
23 it, but was instead simply reflexively invoking prior  
24 decisions as if essentially the CPD has been previously given  
25 a free pass for life.

1           Now, with respect to the 15 percent polling rule,  
2 as noted earlier, the District Court in *Buchanan* specifically  
3 held that the debate sponsors can't select a level of support  
4 that's so high that only the Democratic and Republican  
5 nominees could reasonably achieve it. And I believe the new  
6 evidence that we have demonstrates that that is, in fact, the  
7 case as a practical matter.

8           And whereas the previous complainants in *Buchanan*  
9 did not, according to the Court, present any evidence that,  
10 for example, the problems with polling they pointed to, which  
11 was really just polls have margins of error, that that would  
12 systemically work to minor party candidates' disadvantage.  
13 And we have with extensive detailed and virtually undisputed  
14 empirical evidence through the reports that the Court  
15 mentioned earlier. So I wanted to just take a little bit of  
16 time to highlight some key aspects of those reports.

17           And also just note that the reports contain  
18 rigorous analysis by leading experts in the fields of polling  
19 statistics and politics, Clifford Young and Douglas Schoen.  
20 And if the Court hasn't already done so, I strongly urge the  
21 Court to actually read the reports in their entirety.  
22 Young's report is at tab 22 AR 2487, and Schoen's is at tab  
23 4, AR 163 of the joint appendix.

24           Now, Young is the head of the U.S. Public Affairs  
25 practice in Ipsos, which is a leading international firm



1 specializing in polling and politics. He has a Ph.D and  
2 extensive experience in sociology, statistics and public  
3 opinion and teaches courses at John Hopkins and Columbia, and  
4 has polled many elections around the world.

5 Douglas Schoen is a leading political analyst,  
6 pollster and author. He's got extensive experience  
7 conducting polls and advising leading politicians in the U.S.  
8 and around the world, including former President Clinton,  
9 Mayor Bloomberg, and various prime ministers of the UK, Italy  
10 and Israel. So their credentials are extremely impressive.

11 Now, their findings were -- I'd like to just talk  
12 about their findings very briefly. Dr. Young explored the  
13 relationship between name recognition and the CPD's 15  
14 percent rule. In other words, how well known does a  
15 candidate have to be to even have a possibility of polling at  
16 15 percent. And he examined extensive presidential public  
17 polling data from multiple sources, including over 800  
18 instances of poll results measuring both name recognition and  
19 vote share of the same candidate from each presidential  
20 election between 1992 and 2012.

21 He used three different statistical models with  
22 different variables in each, and determined that on average  
23 an independent candidate must achieve a minimum of 60 percent  
24 name recognition and more likely closer to 80 to have a  
25 polling of 15 percent. And whereas people who compete in the

1 Democrat and Republican primaries can start out with low name  
2 recognition and build their name recognition easily through  
3 the primary process because of all the media attention that's  
4 paid to candidates who run in the two parties. Independents  
5 and third parties don't have that same opportunity.

6 And Schoen was asked to determine how much would it  
7 cost a candidate who did run in the party primaries to try to  
8 poll with 15 percent the September before the general  
9 election. He drew on extensive data from the 2012  
10 presidential election in the finance reports filed by the  
11 candidates, as well as his extensive experience.

12 And he produced a very detailed budget that goes  
13 through exactly what types of media buys a hypothetical  
14 candidate might need to purchase, and included other aspects  
15 of the campaign one would have to budget for. And he  
16 determined that assuming you need to get to at least 60  
17 percent name recognition, and he agreed that the Ipsos figure  
18 was a reasonable one, that an independent would likely need  
19 to raise and spend at least around \$265 million.

20 And it's obvious, I think, that there's no way that  
21 anyone who's not a self-funded billionaire would have the  
22 ability to raise anything close to these funds, especially  
23 because of the catch-22 that the CPD's rule has created in  
24 that, you know, if you go around and try to raise money, the  
25 first question potential donors are going to ask is, you

1 know, ask themselves is does this person have a serious  
2 chance of being considered, of getting elected. And if they  
3 can't get into the debates, then, of course, they don't. And  
4 here, so it's a catch-22 that prevents them from raising  
5 these funds if it were even possible.

6           The other thing that Young and Schoen address in  
7 terms of the accuracy of polling was how accurate are polls  
8 particularly in three-way races. And their findings on this  
9 topic further demonstrates the bias inherent in the operation  
10 of the CPD's rule.

11           So Young examined data from over a thousand polls  
12 relating to three-way races and others. And what he  
13 determined that it was much more likely than an independent  
14 candidate support would be underrepresented in polls in  
15 connection with three-way races. And that, for instance, a  
16 hypothetical independent candidate with a 17 percent vote  
17 share has a nearly 40 percent chance of actually polling  
18 below 15 percent.

19           And there's some examples in his report and  
20 Schoen's as well from actual three-way gubernatorial races  
21 that bear this out where, you know, a candidate like Jesse  
22 Ventura, who actually won the election. Or Eliot Cutler in  
23 Maine who didn't win, but ended up with a very significant  
24 plurality, where they were polling very low, but they were in  
25 debates, and then their actual vote share went up

1       tremendously.

2                   And Schoen further demonstrated as well that  
3 three-way races introduce volatility and that polls tend to  
4 underrepresent support for independents in part because  
5 independents tend to bring out new voters who might not  
6 otherwise be captured and are less likely to vote without the  
7 independent in the race.

8                   But importantly, there's no substantive evidence in  
9 the record to refute any of the analysis. And the FEC did  
10 not even purport to reject it or challenge its reliability.

11                   THE COURT: Well, in the voter disposition, the FEC  
12 appears to have at least acknowledged and addressed the  
13 arguments raised in the petition. And why isn't that enough  
14 to -- for me to grant a deference as I'm required to?

15                   MS. SHAPIRO: Well, Your Honor, I don't really  
16 think the FEC addressed it at all, all the evidence I was  
17 just talking about. There's a footnote --

18                   THE COURT: Well, you're right. They don't really  
19 address, you know, they address certain pieces of evidence,  
20 but not the large majority of it. But is it enough that they  
21 address the arguments?

22                   MS. SHAPIRO: No, because I think they really  
23 didn't, I mean, with all due respect, Your Honor. I think  
24 that what they did was, in the analysis dealing with the  
25 initial complaint filed by Dr. Ackerman in Level the Playing

1 Field, most of the opinion is just rehashing the old cases.  
2 And then the FEC has a paragraph or so addressing one piece  
3 of evidence which related to Mr. Fahrenkopf's comments in the  
4 "Sky News," which we felt was important and illustrative of  
5 the bias, but certainly was not, you know, the centerpiece of  
6 our case by any means. And that evidence was provided in a  
7 supplemental letter because it happened while the FEC was  
8 sitting on the complaint.

9           And the only even mention of all the evidence I  
10 just described as well as the backup, which I don't have time  
11 to get into here, but which is in the record and discussed in  
12 the briefs, was one footnote in which it said essentially  
13 that even if it's true that the 15 percent rule tends to work  
14 to the disadvantage of independents, that does not mean,  
15 quote, that the FEC failed to use preestablished objective  
16 criteria. But that footnote is directly inconsistent with  
17 the holding of the District Court in *Buchanan*, which held  
18 that if a polling rule had a threshold so high that no one  
19 other than a Democrat or Republican could reasonably achieve  
20 it, it wouldn't be objective.

21           So, I've used --

22           THE COURT: You can take a few more minutes. I've  
23 asked you a number of questions.

24           MS. SHAPIRO: Yes, Your Honor. But I think I --  
25 the next thing I was going to turn to was, you know, the

1 FEC's decisions and why they're arbitrary and capricious.  
2 And I think I've just explained in large part why that's so  
3 with regard to the administrative complaint. And I just want  
4 to highlight again that, and I hope I'm not repeating myself,  
5 but that the *Buchanan*, I think one of the keys to this case  
6 is that the FEC is misreading the *Buchanan* case.

7           The FEC's position is essentially that the holding  
8 in *Buchanan* was that the CPD is complying with the regulation  
9 in perpetuity, and that was not the holding in the case at  
10 all. The Court acknowledged that the evidence those plans  
11 had marshaled was, quote, not insubstantial, that it, quote,  
12 makes the arguments, quote, makes sense, and that an ordinary  
13 citizen might well believe there was reason to believe at  
14 that time based on that evidence that the CPD was partisan.  
15 But the Court found that there was an absence of  
16 contemporaneous evidence as to the partisanship. And again,  
17 the holding was expressly limited to, quote, the factual  
18 record before the Court.

19           And as I mentioned, with regard to the objectivity,  
20 the Court said that if we could show -- if someone could show  
21 that the polling threshold was systematically working to the  
22 disadvantage of minor parties and independents, and that  
23 would be a different story. Those plaintiffs, just to remind  
24 the Court, made very different arguments. They made two  
25 arguments essentially. One was that the threshold should be

1 five percent rather than 15 because five percent is the  
2 public funding threshold. And they also argued that polls  
3 have margins of error.

4 The evidence that we submitted through Dr. Young  
5 and Mr. Schoen is not just -- it's not about margins of  
6 error. It goes way beyond that.

7 THE COURT: Inherent unreliability, I think.

8 MS. SHAPIRO: Exactly, exactly.

9 THE COURT: There is increasing support for that.

10 MS. SHAPIRO: I think the, you know, I didn't -- in  
11 the administrative record we have evidence from the 2014  
12 election showing that, and obviously the more recent  
13 elections in this country and in Britain last year are  
14 further evidence of that that's not in the record, but I  
15 think it's just common sense.

16 I guess the last thing I want to say about how the  
17 FEC has behaved arbitrary and capriciously is I think that  
18 the timeline in this case is further evidence of that.

19 Just simply of the FEC's unwillingness to take  
20 another look, to take a hard look when plaintiff's confer  
21 with any evidence about the CPD violating this rule, and  
22 instead to reflexively essentially do nothing. And in this  
23 case they didn't act at all. They sat on both the complaint  
24 and the petition for rule-making for months and months and  
25 months notwithstanding the fact that the statute provides a

1 complainant with the ability to bring suit if the commission  
2 hasn't acted on the complaint in 120 days.

3           So in this case we filed the first complaint in  
4 September of 2014, the 120th day passed in early January of  
5 2015. Five more months elapsed. Finally we brought suit in  
6 June of 2015. And then suddenly within a few weeks the  
7 commission issued what we submit are the very cursory  
8 decisions that are before the Court. And I think that says a  
9 lot about the commission's arbitrary and capricious behavior  
10 here.

11           So, unless the Court has further questions at this  
12 point, I'd like to reserve the rest of my time for rebuttal,  
13 if there's any left.

14           THE COURT: Thank you.

15           MS. SHAPIRO: Thank you, Your Honor.

16           THE COURT: Good morning.

17           MR. BONHAM: Good morning. May it please the  
18 Court. This case is another attempt to challenge the Federal  
19 Election Commission's expert policy determinations regarding  
20 the scope of the Act's prohibition on corporate contributions  
21 and expenditures in federal elections.

22           THE COURT: I hate to jump right in, but I'm going  
23 to because I have a lot more questions for you, frankly, than  
24 I did for Ms. Shapiro. If you start out this case reading  
25 your decision, your legal analysis, which is, I don't know,



1 eight pages, seven pages, you would think that plaintiff's  
2 challenge had been brought only as against Michael McCurry  
3 and Frank Fahrenkopf. And you would think that the evidence  
4 was basically a rehash or -- well, either very little or a  
5 rehash of the arguments and the evidence brought in *Buchanan*,  
6 if you started out with your analysis.

7           Can you explain to me why it is that you chose to  
8 ignore the other very substantial record? And I know that  
9 this is probably not, I'm jumping ahead, but I think, you  
10 know, it is the elephant in the room here, why you chose to  
11 ignore a substantial and highly developed record of evidence  
12 in this case and not even address your arguments to the  
13 remaining subjects of the complaint. You deal with only two.  
14 You pick out one particular statement that isn't even the  
15 strongest statement, frankly, or the most, you know, has the  
16 most evidentiary value. Can you explain why you chose to  
17 issue a decision that was so limited?

18           MR. BONHAM: As the Court acknowledges, there is an  
19 established history of the FEC review of these matters and  
20 these issues. The administrative complaints dating back  
21 years. There's also established court precedent.

22           The FEC in these cases review the administrative  
23 record, review the evidence submitted and concluded that the  
24 same allegations, the same alleged violations were being  
25 alleged here, and the evidence that was provided was the same

1 or similar as in prior matters.

2 In the earliest cases there were allegations about  
3 the founding of the CPD and the close ties between CPD's  
4 chairs and the party committees. Similar allegations I  
5 believe about some of the directors. Here there is more  
6 about the directors. And the plaintiffs have added the  
7 contributions that were made by the officers and directors.

8 After reviewing the complaints and the responses of  
9 these two matters the commission concluded that the  
10 allegations and evidence were similar or like kind.

11 Plaintiffs have emphasized that -- plaintiffs have  
12 argued rather that the personal individual activities of  
13 officers and directors in their individual capacities should  
14 be attributed to CPD. However, that's not required under our  
15 statute. The regulations here focus on whether or not the  
16 nonprofit organizations endorse, support or oppose candidates  
17 or parties. And that the activities of the individuals in  
18 their personal capacity simply are not attributable to the  
19 organization that way.

20 As noted in the briefs, it is not -- contribution  
21 is not uncommon in the law. I believe it's the case under  
22 the Internal Revenue code and also in our own statute that  
23 rules on soft money have different rules for solicitation of  
24 contributions by committees and by individuals.

25 THE COURT: You said -- you said you concluded that

1 the plaintiffs made the same -- the allegations against the  
2 other directors were basically substantially the same as the  
3 ones made against the codirectors, and so you -- that's why  
4 you didn't address them. But did you put that in your  
5 analysis? Because I didn't see it. Maybe I'm missing it.

6 MR. BONHAM: The preliminary issue in this case  
7 raised by plaintiffs is that the commission had not notified  
8 the additional directors. And our response, as the Court  
9 noted earlier, is that it's harmless error. The purpose of  
10 the notification requirements is to provide individuals named  
11 in the complaint with an opportunity to respond. There's no  
12 requirement that they do, in fact, respond. However, they  
13 have the opportunity in order to provide information about  
14 themselves and respond to the allegations if they think that  
15 helps them.

16 THE COURT: Let me ask you, let me shift for a  
17 minute. It's not clear from, again, and I turn back to your  
18 factual and legal analysis. It's not clear from those  
19 analyses or from your briefs, frankly, what standard the FEC  
20 used to decide that the CPD didn't support or oppose  
21 political parties or candidates. Can you explain what  
22 standard you actually used?

23 MR. BONHAM: The standard the commission applied in  
24 this case, like it applied in the *Buchanan* matter is the  
25 regulatory endorsed support and opposed standard.

1 THE COURT: I'm sorry?

2 MR. BONHAM: The FEC applied the endorsed support  
3 and opposed standard that's in the regulation 110.13A. In  
4 prior matters, there was also an issue raised in the  
5 administrative complaints about whether or not the party  
6 committees controlled CPD. And the prior administrative  
7 matters and in *Buchanan* that was discussed.

8 As the District Court noted in *Buchanan*, however,  
9 that was not the standard the FEC applied in that case, and  
10 it isn't the standard here.

11 THE COURT: Please continue. I have some more  
12 questions, but I'm going to wait until you get to a point in  
13 your argument where I think it would be relevant to jump in.

14 MR. BONHAM: In this case, the FEC is entitled to  
15 great deference on its policy judgments about how to  
16 interpret the Act.

17 THE COURT: But that's not in dispute. I have to  
18 give the agency's decision deference, but if the agency  
19 doesn't articulate any analysis in dismissing the complaints,  
20 why should I grant the agency deference? I'm finding it very  
21 difficult to determine whether there's any -- what it seems  
22 to me that the FEC has done in its analysis is simply say  
23 more of the same, *Buchanan*, more of the same, *Buchanan*. I  
24 mean, *Buchanan* was a particular case that dealt with  
25 particular facts. And I don't think, frankly, it provides

1 you with everything you think it does. And I strain in my  
2 reading of the analysis to find your articulation of what  
3 fact criteria you used, what analysis you used in coming to  
4 your conclusions. The conclusions are in there. But I'm  
5 having a hard time finding the analysis. And without such  
6 analysis, how can I give the decision the deference I'm  
7 supposed to? How can I determine if it's reasonable?

8 MR. BONHAM: I believe you're questioning the  
9 brevity of the commission's effectual legal analysis. And  
10 it's not surprising that they are relatively straightforward  
11 and short in this case. The commission was following its  
12 established precedent.

13 THE COURT: Well, that's the problem. The  
14 commission just seems to be saying we get to do what we get  
15 to do because we've always gotten to do it, and *Buchanan* says  
16 we can't, which it doesn't. And that's my problem, it's not  
17 the straightforwardness of the analysis that I'm having  
18 trouble with. It is simply the conclusory nature which  
19 simply says we always do this, this is what we get to do, and  
20 this is what we're going to continue doing. Obviously, I'm  
21 simplifying things.

22 But what I'm not finding in the analysis and what I  
23 think I have to find is an explanation of why it is you  
24 conclude, you make the conclusions that you do. And again,  
25 if you read the -- if you start out your -- and if I started

1 out the process, which I didn't, but if I started out the  
2 process by simply reading the analysis, I would think, oh,  
3 this is just a rehashing of the allegations brought in  
4 *Buchanan* against two -- the two cochairman. And there's no  
5 even mention of a substantial amount of new evidence that was  
6 brought since that case and that was brought since the  
7 earlier complaints. And that's what I'm asking. Aren't you  
8 required to acknowledge the evidence, to -- so you can refute  
9 it, you can say why it's not important, you can say why the  
10 claims against the other directors are the same, but you  
11 can't ignore it, can you?

12 MR. BONHAM: I would disagree with the Court's  
13 interpretation of what the commission thought and did. They  
14 reviewed the evidence --

15 THE COURT: I'm trying to find out what the  
16 commission thought and did based on the analysis. And I'm  
17 having a hard time figuring that out other than, you know,  
18 their conclusion that you've done this in the past and you  
19 can keep doing it in the future.

20 MR. BONHAM: The commission reviewed the evidence  
21 and states in the factual legal analysis that certain  
22 evidence is the same as in the prior cases.

23 THE COURT: The reports of Schoen, and I think it's  
24 Young, expert reports, there's no mention of that?

25 MR. BONHAM: If I can finish on my first point.

1 THE COURT: Okay. Sorry.

2 MR. BONHAM: The courts -- I'm sorry, the FEC,  
3 rather, reviewed the evidence, certain evidence they thought  
4 was of the same or like kind. There was other evidence which  
5 it thought required separate response, there were allegations  
6 about an interview by Chairman Fahrenkopf on "Sky News." And  
7 the commission specifically addressed that.

8 There was also a question about the practices of  
9 Gallup and its horse race, so to speak, polling presidential  
10 campaigns, and the commission specifically addressed that.

11 Your Honor was asking, I believe, about the expert  
12 reports in this case. And plaintiffs have already conceded  
13 that the commission did not have to address every piece of  
14 evidence submitted in this case.

15 THE COURT: Granted. Let me accept for the purpose  
16 of argument your premise that the FEC doesn't have to accept  
17 every piece of evidence. But does that then mean that they  
18 can simply ignore large amounts of the evidence? I mean, if  
19 a court in ruling ignored, you know, expert reports and  
20 testimony, obviously it's a different standard, but certainly  
21 if the FEC is going to say, going to conclude that basically  
22 this complaint is similar to the complaints that have been  
23 brought before and should be -- and therefore were not acting  
24 on it or should be dismissed, isn't it a little disingenuous  
25 to reach that conclusion by ignoring all the new evidence and

1 all the new reports that they've put forward?

2 MR. BONHAM: Once again, I don't believe that's  
3 what the FEC did, but the important thing here is --

4 THE COURT: But I don't have -- I have to look at  
5 the legal analysis in a deferential manner, but I have to  
6 determine that the FEC considered the evidence. And if you  
7 don't mention the evidence, how can I determine that you  
8 considered the evidence?

9 MR. BONHAM: Like in *Buchanan*, the FEC's  
10 explanation might not be as extensive as the Court might  
11 like. However, the FEC's path here I believe is clear.  
12 Bottom of this case is really about policy disagreements  
13 between the plaintiffs and the FEC and the FEC's regulation.  
14 And the plaintiffs have submitted expert reports and evidence  
15 that they believe supports their policy positions. However,  
16 what the FEC was doing when it initially dealt with this  
17 regulation is it was setting forth what a basic standard and  
18 criteria and the leaving debate sponsors discretion within  
19 certain limits to stage their debates and select candidates  
20 to participate.

21 The FEC was not trying to select the best rule for  
22 doing those things as a matter of policy. It was leaving  
23 sponsors that discretion. Plaintiffs may disagree with the  
24 FEC's policy choices here or the FEC's approach. However,  
25 the FEC is the expert agency in this area. And is entitled



1 to substantial discretion.

2 THE COURT: If you state that the FEC's failure to  
3 include ten of the 13 total respondents was harmless error.  
4 But if you didn't consider the evidence against those ten  
5 directors or the allegations against them, how can I find it  
6 to be harmless?

7 MR. BONHAM: I believe the decision in *Nadar*, which  
8 we cite in our briefs, supports that proposition. There's no  
9 indications and the plaintiff have not shown any harm from  
10 the fact that they're not notified.

11 THE COURT: Let me ask, I'm going to let you get  
12 back to your argument, and when you get to the rule-making  
13 I'll interrupt you again.

14 MR. BONHAM: The policy issue I just want to add  
15 that another example of the policy disagreements here is  
16 plaintiff's preference for a different composition of the  
17 board of the directors of the CPD. But that is entirely  
18 beyond the scope of the FEC's regulation.

19 THE COURT: Well, I mean, that may be at the root  
20 of their filing of their complaints. But the plaintiffs have  
21 brought forth allegations backed up by a lot of evidence  
22 which the FEC may dispute or not, but that there are -- that  
23 contributions made by CPD directors are violating  
24 regulations, that the selection of the CPD and the  
25 determination of eligibility criteria are an effort by the

1 two major parties to keep out third party candidates.

2 I mean, their allegations may be based on policy  
3 differences or a displeasure with the selection of the  
4 cochairman. But their allegations are substantive. They're  
5 not policy based. They provide examples and evidence of  
6 their positions. What I've seen in the analysis is basically  
7 a conclusion that says, they don't like the way we do things,  
8 but we can do things the way we do things. And I don't mean  
9 to be flip here, but I am surprised at the decision of the  
10 FEC to basically ignore a lot of substantive evidence and  
11 substantive allegations against more than two people that  
12 plaintiffs have brought here. And I'm surprised by that  
13 decision.

14 And I'm very mindful of my role to give deference  
15 to agency decisions. I don't want to get involved in the  
16 workings of government agencies in Washington, D.C. That's  
17 not my role and that's not what I want to be doing, but on  
18 the other hand, I have to be satisfied that in reaching a  
19 decision the FEC considered all the evidence here. And I'm  
20 finding it very difficult based on what I've been provided in  
21 terms of the analysis.

22 And that's why I asked you about the harmless error  
23 issue.

24 One stated reason for not amending, regarding  
25 enforcement versus regulation, and one of the stated reasons

1 for not amending the regulation is that the FEC can use its  
2 enforcement process if an organization like the CPD is  
3 supporting or opposing a political party. So let me ask you,  
4 if I find that the FEC acted arbitrary and capriciously in  
5 dismissing the administrative complaint, should I still defer  
6 to the agency's judgment on choosing to use enforcement here  
7 instead of regulation?

8 MR. BONHAM: I disagree with your premise, Your  
9 Honor. However, I believe the Court, yes, should still defer  
10 in that instance.

11 THE COURT: All right.

12 MR. BONHAM: The standard for review of rule-making  
13 decisions is as high or if not higher than the standard in  
14 the enforcement context. And the Court should only require  
15 rule-making in the case of a clear error of law or compelling  
16 circumstances. And we certainly do not have that here.

17 THE COURT: All right. Please continue with the  
18 argument, I'm sorry. I've exhausted my questions for you,  
19 but if I interrupted your argument, please continue.

20 MR. BONHAM: I believe that's all I have at this  
21 time, Your Honor.

22 THE COURT: Thank you.

23 MR. BONHAM: Thank you.

24 THE COURT: Ms. Shapiro, did you have any rebuttal?

25 MS. SHAPIRO: Very, very briefly, Your Honor. I

1 think the Court's comments touched on many of the points I  
2 was going to take up. I just want to emphasize again that as  
3 the Court, I think, said, our arguments are not policy  
4 arguments. The policy issues may be, and certainly are part  
5 of the reason we have been -- filed the complaint, sought the  
6 petition and have filed this lawsuit. But our arguments in  
7 the lawsuit are fundamentally based on the premise, based on  
8 all the evidence that we presented, that the Commission on  
9 Presidential Debates has been violating the law. And I think  
10 our evidence shows that in spades, and our briefs are clear  
11 that these are legal arguments.

12           The only other thing I just wanted to mention with  
13 regard to the issue relating to the directors that the FEC  
14 ignored is that I believe Mr. Bonham said that the FEC  
15 thought our argument was about notice, but if you look at  
16 page 36 of our initial summary judgment brief, it's clear  
17 that the point that we're making there is that, and I'll just  
18 read a sentence to the Court very quickly. Is that the FEC  
19 gave no indication it ever considered the allegations against  
20 these other directors. It apparently made up its mind that  
21 *Buchanan* --

22           THE COURT: Hold on a second.

23           MS. SHAPIRO: I'm sorry, Your Honor. It's page 36  
24 of docket number 37.

25           THE COURT: Yeah, but is it page -- yeah, is it the

1 bottom of page 36 or the top of page --

2 MS. SHAPIRO: Yes, the last paragraph.

3 THE COURT: That's why I'm not finding the --

4 MS. SHAPIRO: Sorry. And we say the FEC apparently  
5 made up its mind that *Buchanan* governed without considering  
6 what plaintiff's administrative complaints actually alleged  
7 about these ten directors. And that that was arbitrary and  
8 capricious.

9 And the point, as I think I mentioned earlier in my  
10 opening argument is that the fact that the FEC ignored these  
11 allegations is emblematic of its approach to the  
12 administrative complaints in this case, which was simply to  
13 ignore the vast bulk of the evidence, including most  
14 significantly perhaps those two expert reports that we've  
15 discussed, which were, I mean, I believe that there were  
16 many, many things that we put forward that were new pieces of  
17 evidence.

18 But those expert reports, as we discussed earlier,  
19 were extremely substantive. And in effect were a big part of  
20 the heart of our case. And for the FEC to not even mention  
21 them at all and, indeed, for it to focus on these two things,  
22 the "Sky News" statement, and then the letter submitted last  
23 summer about Gallup, those were -- those were, we think they  
24 were telling, but they were relatively minor compared to the  
25 significance of all the other things that we put forward in

1 connection with the original administrative complaint.

2 So unless the Court has any further questions, I'll  
3 rest.

4 THE COURT: Thank you.

5 MS. SHAPIRO: Than you, Your Honor.

6 THE COURT: Counsel for both sides, and I will take  
7 your arguments and briefs under advisement and issue an  
8 opinion as soon as I can. Thank you.

9 (Court recessed at 11:01 a.m.)

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14 CERTIFICATE OF REPORTER

15 I, Lisa Walker Griffith, certify that the  
16 foregoing is a correct transcript from the record of  
17 proceedings in the above-entitled matter.

18

  
\_\_\_\_\_  
Lisa Walker Griffith, RPR

\_\_\_\_\_  
Date

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