No. 20-649

In the
Supreme Court of the United States

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

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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February 26, 2021

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INTRODUCTION

As the distinguished amici supporting the petition attest, the questions presented are exceptionally important. That is because these questions bear on what choices American voters have for President of the United States. No law restricting that office to Democrats and Republicans would survive constitutional scrutiny. Yet the CPD has effectively imposed such a restriction using its monopoly over the presidential debates. It has been allowed to do so because the FEC has sanctioned the CPD's violations of federal election law, and because the D.C. Circuit has misconstrued the relevant legal provisions.

The FEC does not contest any of this. In fact, its opposition fails to rebut the vast majority of petitioners' legal arguments. And what it does say is either demonstrably wrong or beside the point.

First, the D.C. Circuit's decision conflicts with this Court's decisions and reduces the nonpartisanship requirement of 11 C.F.R. §110.13(a) to a nullity: It holds evidence of CPD directors' partisan activities irrelevant to whether the *organization* "endorses," "supports," or "opposes" political candidates or parties in violation of §110.13(a). The FEC does not dispute the substance of these arguments. Instead, it claims the court of appeals and the agency *did* consider the extensive evidence of CPD leaders' political activities. But it is clear from the face of the D.C. Circuit's opinion (and the FEC's own decision) that both bodies insisted on direct evidence of partisan statements, contributions or activity by the *organization* itself. This was a legal ruling, not a factual conclusion.

Second, in holding that the CPD's 15% rule is "objective" because it uses a percentage, the D.C. Circuit defied the regulation's plain meaning and history. The FEC does not dispute that the CPD's criteria systematically bar independent candidates from the debates. Nor does it deny that under this Court's longstanding precedent, such a discriminatory policy is the antithesis of "objective." Instead, it raises an assortment of red herrings and misstatements: *e.g.*, a citation to a dictionary which confirms that "objective" means "without bias" and "nonpartisan"; and claims about the regulation's history that are belied by the FEC's own pronouncements in the Federal Register. None of these arguments can overcome the traditional tools of construction, which show that a criterion cannot be objective if it systematically excludes independent candidates.

The importance of the questions raised are self-evident, and as a practical matter this is the only vehicle in which they can be addressed. The FEC notes the lack of a circuit conflict and asserts that these issues could be litigated in other venues. But the lawsuits it cites raise issues completely distinct from the questions presented. The FEC also disregards the statute conferring exclusive jurisdiction for the questions presented on the District Court for the District of Columbia, 52 U.S.C. §30109(a)(8)(A). That statute gives the D.C. Circuit the last word on the subject unless this Court reviews its decision. This Court should grant certiorari; otherwise, the CPD will have free rein to continue violating FECA and thwarting American voters' desire for robust political competition in presidential elections.

I. WHETHER THE PARTISANSHIP OF A DEBATE-STAGING ORGANIZATION'S LEADERS CAN BE ATTRIBUTED TO THE ORGANIZATION ITSELF

No debate-staging organization funded by corporate contributions would ever make an explicit statement endorsing, supporting or opposing any candidate or party. Nor would any such organization directly make an illegal organizational campaign contribution. That would be tantamount to conceding the very partisanship that the regulation forbids. 11 C.F.R. §110.13(a). But as amici Nonprofit Leaders, Scholars and Practitioners explain, any "distinction" between the partisan actions of a nonprofit organization and its leadership "does not and cannot exist," particularly at an organization like the CPD that has no purpose other than staging candidate debates. Br. of Nonprofit Leaders, Scholars and Practitioners as Amicus Curiae, pp.6, 13. And there is similarly no distinction between a board member's "official" and "personal" partisan actions—each creates actual and apparent conflicts of interest, which is why a "basic standard of governance" for nonprofits is to have formal conflict-of-interest policies prohibiting both. *Id.*, pp.6, 13-14.

Thus, as a practical matter evidence of an organization's bias will inevitably take the form of circumstantial evidence about the conduct of the individuals who run the organization. Unless such evidence can be considered, neither the CPD nor any other partisan debate-staging organization can ever be held accountable for violating the regulation. Moreover, this Court has repeatedly held that

plaintiffs may "prove [their] case by direct *or circumstantial evidence*," and should not be categorically barred from introducing circumstantial evidence. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (emphasis added); *see also* Pet.21-22.

The FEC does not deny (or even address) any of this. Instead, it insists that neither the D.C. Circuit nor the agency actually "imposed any…categorical rule" refusing to consider evidence of the CPD leaders' partisan activities. BIO.8. But the D.C. Circuit clearly considered such evidence legally irrelevant. The court said a full-fledged "organizational endorsement" was required to establish partisan bias in violation of the regulation. App.7a. Indeed, the court chastised petitioners for not identifying "a single instance of a donation to a Democrat or Republican that was made by the CPD or one of its leaders acting in his or her official capacity." App.9a-10a. Although the D.C. Circuit did characterize some evidence as old (BIO.7), it dismissed that evidence because it was the "personal view" of CPD leadership, rather than an organizational endorsement. App.7a.

The FEC also points to a boilerplate recitation of the legal standard in its own decision about whether the evidence "demonstrates directly or supports a reasonable inference that the CPD has endorsed or supported" the major parties. BIO.8 (quoting App.92a). While this language arguably pays "lip service" to the consideration of circumstantial evidence, that is all it does; it does *not* alter the substance of the FEC's decision, which categorically excluded the evidence. *See*, *e.g.*, *Sexton v. Beaudreaux*,

138 S. Ct. 2555, 2560-61 (2018) (reversing judgment where lower court "only tack[ed] on a perfunctory statement at the end of its analysis" but otherwise "essentially…disregarded" correct "standard"); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934) (Cardozo, J.) (reversing decision that "profess[ed] adherence to" the correct legal standard but "honored it…with lip service only"). Indeed, the FEC expressly disregarded the "mountain" of circumstantial evidence establishing the CPD's partisanship *precisely because* it concluded that this evidence did not qualify as a direct admission. *See* App.103a-104a (requiring an "official" act of partisanship that a CPD director performed directly "on behalf of the CPD" or "as [an] agent[] of CPD").

For the same reason, the FEC's attempts to dismiss petitioners' arguments as "factbound" and assert that it "reasonably explained why it found petitioners' evidence inadequate" to establish the CPD's partisanship are unavailing. BIO.9. The categorical exclusion of circumstantial evidence is a legal error, not a factual one. As explained (Pet.21), the "law makes no distinction between the weight or value to be given to either direct or circumstantial evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). This Court therefore prohibits "restrict[ing] a litigant to the presentation of direct evidence absent some affirmative directive in a statute." *Id.* Yet the FEC did just that. Its legal error, endorsed by the D.C. Circuit, makes it impossible to enforce §110.13(a) against *any* debate-staging organization, no matter how obvious it is that the organization supports or endorses parties and their

candidates in violation of that provision. Only this Court can rectify that error.

II. WHETHER DEBATE-QUALIFYING CRITERIA THAT DISCRIMINATE AGAINST INDEPENDENT CANDIDATES CAN BE "OBJECTIVE"

The FEC does not dispute that in practice, the CPD's 15% criterion bars independent candidates from the debate stage. By any definition, such a discriminatory policy is not "objective." Indeed, the government makes no effort to refute petitioners' principal arguments:

- That dictionaries define "objective" as "disinterested" and "without bias" and as synonymous with "equitable," "evenhanded," "fair," and "nonpartisan" (Pet. 27);
- That the FEC interprets "objective" to mean that a criterion "must…not [be] designed to result in the selection of certain pre-chosen participants" (Pet.28);
- That this Court has repeatedly held that a facially objective law can be discriminatory in operation (Pet.28-29);
- That no truly independent candidate has ever satisfied the 15% criterion (Pet.30);
- That an independent would need to raise hundreds of millions of dollars to stand a chance of polling at 15%, yet

cannot raise the requisite sums of money absent a meaningful chance of appearing in the debate (Pet.31-32);

- That polls are not based on "externally verifiable" facts because the CPD retains complete discretion over which polls to use and selects the polls based on the subjective evaluation of a single pollster (Pet. 27, 32);
- That polling is a demonstrably unreliable indicator of which candidates have a realistic chance at the Presidency, and its failings disproportionately disadvantage independent candidates (Pet.33-34); and
- That the CPD uses polls that do not even *include* independent candidates for president, giving them no chance of qualifying (Pet.32-33).

Taken together, these arguments conclusively establish that the 15% criterion is not objective. Yet rather than address these dispositive arguments, the FEC instead offers a handful of inapposite, inaccurate, and disingenuous assertions.

First, the FEC cherry-picks one definition of "objective." BIO.9. But as noted, objective is also defined—by one of the very sources on which the FEC relies—as "disinterested" and "[w]ithout bias," and as synonymous with "equitable," "evenhanded," "fair," and "nonpartisan." Pet.27. The FEC does not even try

to argue that the 15% rule is "objective" under these definitions, because it plainly is not.

Second, the FEC's contention that petitioners have "failed to produce evidence" of poll "manipulation" by the CPD (BIO.11) misses the point. The CPD has complete discretion over what polls it will select and when it will select them, allowing it to pick and choose polls that will enable it to exclude independent candidates. Pet.32-33. In other words, "manipulation" is *permitted* under the CPD's criterion, which is precisely why the criterion *itself* is not objective—it is, by its own terms, subject to manipulation. Moreover, the CPD has used polls that did not even *test the popularity* of the independent candidates. Pet.32-33. How can a metric be "objective" if the debate sponsor can and does choose polls that do not even attempt to measure the independent candidates' levels of support?

Third, based on a single inapposite case, the FEC concludes that a 15% polling threshold "accords with this Court's precedents." BIO.9-10. But that case, *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998), has nothing to do with either a 15% polling threshold or an FEC regulation. It merely stands for the proposition that the *First Amendment* does not require a debate sponsor to "allow unlimited access to a candidate debate." *Id.* at 676. The Court thus held that a debate sponsor could constitutionally exclude a nonserious candidate with "no appreciable public interest," who admitted his campaign was "bedlam" and listed his headquarters as "his house." *Id.* at 682-683. This petition does not implicate the First Amendment, and petitioners do not assert that every

nonserious candidate for president must be included in the debates. Petitioners merely contend that the 15% polling threshold is impermissibly designed to exclude all candidates other than those from the two major parties.

Fourth, the FEC's claim of consistency "with the agency's longstanding application" of the term "objective" is irrelevant and misleading. BIO.10. It is true that the FEC has repeatedly refused to find that the CPD's 15% criteria lacks objectivity. But the agency's past failure to accord "objective" its plain meaning does not make that erroneous prior construction correct. The FEC does not even argue that the term is "genuinely ambiguous" after exhausting "all the 'traditional tools' of construction," so its interpretation is owed no deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019). Indeed, the "history" and "purpose" of the regulation, *id.*, show that in its own original "explanation and justification" of this regulation the FEC itself interpreted "objective" the same way petitioners do. At that time, the FEC explained that "objective" criteria "must…not [be] designed to result in the selection of certain pre-chosen participants." 60 Fed. Reg. 64,260-61 (Dec. 14, 1995). Thus, under the FEC's actual "longstanding application," a criterion that works to systematically exclude independent candidates is not objective.

Finally, the FEC's assertion that the criterion is not subjective "merely because it is difficult to reach" (BIO.11), proceeds from a false premise. The FEC claims George Wallace, John Anderson, and Ross Perot satisfied the 15% criterion and that this shows independents can meet the threshold. But two of the

cited examples (Wallace and Anderson) were prominent major-party elected officials who became well-known by competing for a major-party presidential nomination prior to launching their independent candidacies. Pet.30. Neither of them was truly "independent." And Ross Perot would *not* have satisfied the 15% criterion: He was polling at less than 10% at the relevant time, a fact the FEC conceded below. *See* Pet. 10, 30; C.A.App.367.

In any event, petitioners do not argue that the 15% criterion is invalid because it is "difficult to reach." The criterion is not objective because it is *easy* to reach for the major party candidates but *nearly impossible* for any independent candidate to satisfy, functionally ensuring that only Democrats and Republicans are invited to the debates. *See* Pet.30-34.

III. THE QUESTIONS PRESENTED ARE EXTREMELY IMPORTANT AND CANNOT SPLIT THE CIRCUITS

The FEC's argument that the issues raised here can be litigated in other circuits is dead wrong and reflects a fundamental misunderstanding of the nature of this petition. It does not involve a "facial challenge" to the FEC's "debate regulation" itself, as was the case in *Becker v. FEC*, 230 F.3d 381, 383 (1st Cir. 2000). Petitioners are not challenging the FEC's regulation; on the contrary, they seek to *enforce* that regulation.[1] Nor is this action a constitutional

[1] The FEC incorrectly asserts that petitioners' unsuccessful petition for rulemaking was a "challenge[] [to] the FEC's debate regulations." BIO.12. But the rulemaking petition did not

challenge "to debate criteria in state and local races," as was the case in *Alabama Libertarian Party v. Alabama Pub. Television*, 227 F. Supp. 2d 1213 (M.D. Ala. 2002) (First Amendment challenge to Alabama TV station's gubernatorial debate criteria) and *Piccolo v. New York City Campaign Fin. Bd.*, No. 05-cv-7040, 2007 WL 2844939 (S.D.N.Y. Sept. 28, 2007) (constitutional challenge to New York City's mayoral debate criteria). BIO.12. Rather, this is a case about the application of the FEC's existing regulations and its failure to enforce them. The only way to bring such an action is to file an administrative complaint with the FEC itself and, if the complaint is dismissed, to appeal the dismissal to the District Court for the District of Columbia. *See* 52 U.S.C. §30109(a)(8)(A). Thus, absent this Court's review, the opinion below will indeed be the "last word" on the two questions presented as to the meaning of the FEC's regulations.

The FEC completely ignores the founders' concerns about the dangers of a two-party system. *See* Pet.35-36. Instead, it hyperbolically accuses petitioners of seeking to "restructure" America's political "system," which has been dominated by two parties. BIO.12. That is nonsense. The only remedy petitioners seek from their lawsuit is an order that would require the FEC to do its job and enforce its own regulations as written. This request is hardly radical. Indeed, it is joined by numerous distinguished amici, including Admiral James Stavridis, former Senators Joseph Lieberman and Robert Kerrey, Admiral

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challenge the validity of the FEC's regulations. It merely requested that the FEC open a rulemaking to consider *modifying* its existing regulations. App.164a.

Dennis Blair, and former Governor Christine Todd Whitman, among others. Yet the FEC has nothing to say in response to any of the three amicus briefs urging this Court to grant certiorari.

The legal issues presented here implicate a matter of immense importance: who can make a serious run for the Presidency. These questions go to the heart of American democracy and cannot be raised in any forum other than the D.C. Circuit. If this Court does not intervene, an unaccountable private debate-staging organization will continue violating federal election law. And it will do so to prevent American voters from considering any presidential candidates other than those nominated by the Democratic and Republican parties. The result, as President Washington warned in his farewell address, will be the "alternate domination of one faction over another, sharpened by the spirit of revenge, natural to party dissension, which…leads at length to a more formal and permanent despotism." George Washington, Farewell Address (Sept. 19, 1796).

CONCLUSION

For the foregoing reasons and those set forth in the petition, this Court should grant the petition.

Respectfully submitted,

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