No. 20-649

# In the Supreme Court of the United States

LEVEL THE PLAYING FIELD, ET AL., PETITIONERS,

*v.*

FEDERAL ELECTION COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF OF NONPROFIT LEADERS, SCHOLARS, AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Other Authorities (Continued)** Page(s)

## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are eight prominent leaders, scholars, and practitioners with considerable experience in the nonprofit sector. All of the *amici* are dedicated to ensuring public trust in the nonprofit organizations with which they are affiliated, or to the study or practice of nonprofit law, and therefore have a direct stake in the implications of this case for public trust in the nonprofit community at large[2]:

- Norman R. Augustine is a recently retired member of the Bipartisan Policy Center's Board of Directors. He served as chairman and principal officer of the American Red Cross for nine years, and as chairman of the National Academy of Engineering and the Defense Science Board. Mr. Augustine has served as Under Secretary of the Army and later Acting Secretary of the Army, and as Lecturer with the Rank of Professor on the faculty of Princeton University. He is a former president of the American Institute of Aeronautics and Astronautics and the Boy Scouts of America.
- Admiral Dennis C. Blair is the Knott Distinguished Visiting Professor at the University of North Carolina, Chapel Hill. He is the former United States Director of National Intelligence and a retired United States Navy admiral. He also serves as a member of the Energy Security Leadership Council and is on the boards

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No one other than the *amici curiae*, their members, and their counsel made any monetary contribution to its preparation and submission. The parties were given timely notice and consented to this filing.

[2] *Amici* include for the Court's reference their current and former professional and personal affiliations, but submit this brief in their personal capacities only.

of Freedom House, the National Bureau of Asian Research, the National Committee on U.S.-China Relations, and No Labels.

- Mary McInnis Boies serves as counsel to Boies Schiller Flexner LLP. She is a member of the Board of Directors of the Council on Foreign Relations and chairs its Committee on Nominations and Governance. She is a former Second Circuit representative to the American Bar Association's Standing Committee of Federal Judiciary.
- W. Bowman Cutter was Chairman of the Board of CARE, a global development organization, for over seven years, and was a member of the Board for 20 years; and is a founder and immediate past Chairman of MicroVest, a leading global microfinance fund with assets under management now in excess of $400 million. He is the immediate past Chairman of the Board of Resources for the Future, one of the most important energy and environmental research institutes in the world; and Chairman of the Tunisian American Enterprise Fund (TAEF), which was founded by the United States government to help the Tunisian economy through private sector investment. In addition, Mr. Cutter is Co-Chair of the Fiscal Health Subcommittee and past Co-Chairman of the Committee for Economic Development, the leading business "think-tank" in the United States. Mr. Cutter is a member of the New York Council on Foreign Relations.
- Dr. James J. Fishman is a professor of law *Emeritus* at the Elisabeth Haub School of Law at Pace University and has authored numerous books and articles on nonprofit tax law and regulation. He is a co-author of *New York Nonprofit Law and Practice: With Tax Analysis* and a leading law school casebook, *Nonprofit Organizations: Cases and Materials*, now in its fifth

edition. He previously served as the executive director of the Council of New York Law Associates (now The Lawyers Alliance for New York) and Volunteer Lawyers for the Arts.

- Carla A. Hills is the chairman and CEO of Hills & Company, International Consultants, which advises companies on global trade and investment issues. Ms. Hill serves as Co-Chair *Emeritus* of the Council on Foreign Relations and of the Inter-American Dialogue; chair of the Advisory Board of the Center for Strategic & International Studies, chair of the National Committee on U.S.-China Relations, member of the executive committees of the Trilateral Commission, member of the Senior Advisory Council of the Gerald R. Ford Presidential Foundation, and a member of Yale's President's Council on International Activities. She also serves as honorary board member of the Peterson Institute for International Economics.
- Dr. Vali R. Nasr is the Dean of the Johns Hopkins University Paul H. Nitze School of Advanced International Studies and a Nonresident Senior Fellow at the Brookings Institution. He is a life member of the Council on Foreign Relations. Dr. Nasr was previously a Senior Advisor to the U.S. Special Representative for Afghanistan and Pakistan and a member of the U.S. Department of State's Foreign Affairs Policy Board.
- Nancy E. Roman is the President and CEO of Partnership for a Healthier America ("PHA"). Prior to joining PHA, she was the President and CEO of the Capital Area Food Bank, an $80 million NGO addressing hunger and its companion problems of obesity and diet-related disease. She has served on the leadership team of the United Nation's World Food Programme and as Vice President of the Council on Foreign

Relations. Ms. Roman currently serves on the board of Global Communities, a $125 million NGO working on global development issues in 25 countries, and on the board of the Millennial Action Project, an NGO that seeks to engage and work with millennials serving in government nationwide.

For decades, *amici* have studied, developed, implemented, and promoted specific standards of governance and accountability within the nonprofit community, including with respect to identification and management of apparent and actual conflicts of interests, to strengthen public confidence in nonprofit organizations. *Amici* believe that an understanding of these standards in the context of the prevailing policies and practices of the Commission on Presidential Debates (CPD) will assist the Court's resolution of this important petition.

Many of the *amici* have had working relationships with and greatly respect the Commissioners of the FEC and the Directors of the CPD, and this brief is not intended to criticize their personal integrity. Rather, *amici* question the rules and regulations under which the FEC and CPD operate, which require or allow the FEC Commissioners and CPD Board of Directors to have partisan affiliations.

## SUMMARY OF ARGUMENT

This litigation is about safeguarding the integrity of the nation's presidential and vice-presidential debates system. Petitioners have demonstrated throughout this litigation that the CPD is not, as it claims to be, nonpartisan. CPD's leaders and many of its board members have been extensively involved in highly partisan activities for both the Republican and Democratic parties, including by participating in events for presidential and vice-presidential candidates from both parties. The Executive Director of the CPD claims that an "informal" conflict-of-interest

policy—allegedly supplemented by a terse "Political Activities Policy" never produced by the CPD and that at most "intend[s] to *deter*" rather than *prohibit* partisan activities—prevents the CPD board members from serving in an "official" capacity in a political campaign. Pet. App. 104a. But this supposed "policy" is wholly inadequate to prevent actual conflicts of interest, much less the appearance thereof.

As the district court observed, in its initial decision, the Federal Election Commission (FEC) has "ignored" a "mountain of submitted evidence" that is probative of the CPD board members' partisan conduct. *Level the Playing Field* v. *Fed. Election Comm'n*, 232 F. Supp. 3d 130, 142-43 (D.D.C. 2017). The CPD refuses to follow established best practices for conflict-of-interest policies in the nonprofit sector, and the CPD's purported policies do not sufficiently address actual or potential conflicts arising from partisanship at the CPD. Indeed, by eschewing *formal* conflict-of-interest policies that are explicit, written, accessible, and, importantly, appropriately monitored for compliance, the CPD has contravened an essential tenet of responsible governance for a nonprofit organization, thereby condoning and even encouraging the partisan activities of its board members without safeguarding its nonpartisan tax-exempt purposes.

The integrity of the nation's presidential and vice-presidential debates should not rest on informal and unenforceable conflict-of-interest policies—particularly when those limited policies by their own terms ostensibly permit CPD board members to consult "unofficially" with political campaigns, contribute to fundraising efforts, and even endorse candidates. The FEC's post-remand decisions insulating this conduct are of profound importance to the fairness and openness of our presidential elections. This Court should grant certiorari and reverse the decision below.

## ARGUMENT

At no point in this litigation has CPD offered evidence of a formal, written conflict-of-interest policy governing its board members' partisan political activities that is enforceable and monitored for compliance. One of CPD's two purported policies, according to CPD's own description, is "informal" and unwritten. See Pet. App. 104a. And while the CPD claims to have another policy that is written, that policy has never been produced and thus cannot meaningfully be evaluated. Moreover, the CPD admits that its policy does not even prohibit partisan conduct, and rather is at most "intended to deter" certain types of conduct. Pet. App. 104a. Because nothing is actually prohibited by this alleged policy, and no aspect of the policy is or could be enforced, the alleged written policy is really no policy at all. Consequently, even when the informal and purported written components are considered together, the CPD's conflict-of-interest policy is entirely informal, unenforceable, and unmonitored, which renders it a nullity. The policy rests on formalistic and unrealistic distinctions between "official" and "personal" participation in political campaigns, Pet. App. 102a-105a, and it tries to create a distinction that does not and cannot exist, at an organization whose purpose is to host the presidential debates in a nonpartisan way, regarding partisan activities undertaken in an individual capacity as opposed to an organizational capacity.

## I. The CPD's Informal Conflict-of-Interest Policy Willfully Ignores Partisan Conduct by Falling Woefully Short of Basic Standards of Governance Applicable to Nonprofit Organizations

The CPD's failure to establish a formal, written conflict-of-interest policy to safeguard its impartiality contravenes the basic standards and practices of good governance that are fundamental in the nonprofit community. This failure directly inhibits the CPD's ability to ensure that its board members perform their duties in a nonpartisan manner and, pursuant to their fiduciary duties as board members, in the best interest of the CPD in furthering its mission.

That a nonprofit organization must have written and enforceable conflict-of-interest policies is hardly controversial. In BoardSource's most recent tri-annual survey of nonprofit governance practices, 94% of the 1,378 responding organizations had adopted a written conflict-of-interest policy. See *Leading with Intent: 2017 National Index of Nonprofit Board Practices* 6, 52 (2017), https://bit.ly/35S5wxW. The prior compilation by BoardSource found that 96% of nonprofit organizations surveyed had adopted a written conflict-of-interest policy. BoardSource, *Nonprofit Governance Index 2012*, at 15 (2012), https://bit.ly/35UwIw7.

Conflict-of-interest guidelines were not always the norm and so prevalent in the nonprofit sector. In 2007, the Urban Institute reported that only half of the respondents in its national survey of nonprofit organizations had a written conflict-of-interest policy. See The Urban Institute, *Nonprofit Governance in the United States: Findings on Performance and Accountability from the First National Representative Study* 9 (2007), https://urbn.is/3lVQZa4. However, the nonprofit community has been heavily influenced by the rigorous conflict-of-interest guidelines that govern publicly traded corporations

and large accounting firms. The enactment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, brought about renewed scrutiny of the governance of nonprofit organizations. See BoardSource, *The Sarbanes-Oxley Act and Implications for Nonprofit Organizations* 2, 10 (Jan. 2006), https://bit.ly/3fmAUYm. Specifically, Sarbanes-Oxley introduced a provision pertaining to the adoption and disclosure of a formal "code of ethics" for certain officers of a reportable company "to promote * * * the ethical handling of actual or apparent conflicts of interest between personal and professional relationships." 15 U.S.C. 7264. As a result, although not formally extended to nonprofit organizations, the corporate governance standards under Sarbanes-Oxley have permanently altered expectations of governance practices for nonprofit organizations. Accordingly, adoption of written conflict-of-interest policies has increased significantly in the nonprofit community during the past decade.

In 2005, the Panel on the Nonprofit Sector—consisting of several leaders of the nonprofit community convened by the nonprofit coalition Independent Sector—issued a comprehensive report at the encouragement of the leaders of the Senate Finance Committee. See Panel on the Nonprofit Sector, *Strengthening Transparency Governance Accountability of Charitable Organizations: A Final Report to Congress and the Nonprofit Sector* (2005), https://bit.ly/3fpf5Yc. In the report, the nonprofit community emphasized that "charitable organizations should adopt and enforce a conflict-of-interest policy consistent with its state laws and organizational needs." *Id.* at 8. The report, which reflected the input of "thousands of people representing diverse organizations from every part of the country," *ibid.*, instructs nonprofits to:

> [a]dopt and enforce a conflict of interest policy consistent with the laws of its state and tailored to its specific organizational needs and characteristics. This policy should define conflict of interest, identify the classes of individuals within the organization covered by the policy, facilitate disclosure of information that may help identify conflicts of interest, and specify procedures to be followed in managing conflicts of interest.

*Id.* at 81.

Independent Sector has since issued two additional reports, in 2007 and 2015, explicating its principles for good governance for nonprofit organizations. Independent Sector, *Principles for Good Governance and Ethical Practice* 5-6 (2015), https://bit.ly/3nKUEIg. Both reports counsel nonprofits to adopt and implement "policies and procedures to ensure that *all* conflicts of interest (real and potential), or the appearance thereof, within the organization and the governing board are appropriately managed through disclosure, recusal, or other means." *Id.* at 12. The reports specifically contemplate a "*written* conflict-of-interest policy," with periodic monitoring for compliance, to avoid or manage any financial or non-financial "conflict[] of interest that could affect the decisions of board members, staff leaders, and other employees." *Ibid.* (emphasis added).

In many jurisdictions, such best practices for written conflict-of-interest policies are reflected in legislation and administrative guidance applicable to nonprofit organizations. For example, New York requires nonprofit organizations to adopt a conflict-of-interest policy that defines the circumstances constituting a conflict of interest, provides procedures for disclosing such a conflict, and describes the actions that should be taken after a conflict has been identified. See Nonprofit Revitalization Act of 2013,

N.Y. Not-for-Profit Corp. Law § 715-a(a)-(b). New York law recognizes that "to ensure that [the nonprofit organization's] directors, officers, and key employees act in [such organization's] best interest," a conflict-of-interest policy may be required to cover "types of conflicts that may exist e*ven though there is no financial interest at stake*." N.Y. Att'y Gen., Conflicts of Interest Policies Under the Nonprofit Revitalization Act of 2013, Guidance Document 2015-4, at 2-3 (Apr. 2015) (emphasis added).

The federal government, and in particular the Internal Revenue Service, also recognizes the importance for nonprofit organizations of implementing written conflict-of-interest policies to manage all actual and potential conflicts, including non-financial conflicts. In addition to routinely gathering information about the written policies of nonprofit organizations through the applicable annual information return[3] and audit procedures,[4] the IRS emphasizes that board members of a nonprofit organization should:

> adopt and regularly evaluate a written conflict of interest policy that requires directors and staff to act solely in the interests of the charity *without regard for personal interests*; include[] written

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[3] In 2007, the IRS redesigned the annual information return for tax-exempt organizations (IRS Form 990) to enumerate several types of written policies and procedures that such organizations are expected to adopt, including a written conflict-of-interest policy and regular monitoring of such policy. See IRS Form 990, Part VI, Section B, Questions 12a-c (2018).

[4] For each audit of a tax-exempt organization, the IRS has directed its agents to gather information about the governance practices of such organization so that the IRS can determine whether the organization has a written conflict-of-interest policy and, if so, whether such policy addresses recusals and requires annual written disclosures of any conflicts. See IRS Form 14114, Part 5, Questions 18a-c (2009).

> procedures for determining whether *a relationship*, financial interest, or business affiliation results in a conflict of interest; and prescribe[] a course of action in the event a conflict of interest is identified.

IRS, *Governance and Related Topics - 501(c)(3) Organizations* § 4(B) (Feb. 4, 2008), https://bit.ly/3m7Wqm8 (emphasis added).

The CPD's only existing formal policy is explicitly limited to "financial conflicts of interest that could arise as a result of outside employment" and does not prevent the appearance of conflicts by the CPD board members. Pet. App. 105a. Prohibiting financial conflicts removes only one possible source of actual conflicts of interest; it does nothing to address non-financial conflicts or the appearance of conflicts. Moreover, although the informal conflict-of-interest policy purports to "reflect[] the CPD's view that a debate staging organization better serves the public when it * * * adopts and adheres to balanced policies designed to prevent even the potential for an erroneous appearance of partisanship" based on political activities undertaken by CPD-affiliated persons (including Board members) in a personal capacity, Pet. App. 104a, the policy is silent as to any specific mechanism for disclosure and management of situations that give rise to a realized or potential conflict.

It is unrealistic to expect that the CPD can, as its Executive Director has claimed, "operate[] completely independently of any party or political campaign," C.A. App. 1297, while governed by an unwritten and unmonitored conflict-of-interest policy with no formal procedure for disclosing actual or potential non-financial conflicts. Beyond the CPD's self-serving claim that the unwritten policy prohibits the CPD board members from "serving in any official capacity with a political campaign," *ibid.*, there

is no indication as to whether the CPD has procedures to follow for enforcing the informal policy, whether the informal policy includes any reporting or monitoring requirements, or if there are consequences for violating the informal policy. Indeed, there is no suggestion that CPD enforces the informal policy at all. The failure of the CPD's informal policy to conform to basic principles of nonprofit governance all but guarantees the prevalence of partisan conduct within the organization.

## II. The CPD's Informal Conflict-Of-Interest Policy Is Incapable Of Preventing The Appearance Of Partisanship

It is similarly uncontroversial, both within and outside the nonprofit community, that organizations charged with the public trust must prevent not only actual conflicts of interest, but also the *appearance* of such conflicts. In addition to instructing organizations to adopt written policies, Independent Sector counsels that "[a] charitable organization should adopt and implement policies and procedures to ensure that all conflicts of interest (real and potential), *or the appearance thereof*, within the organization and the governing board are appropriately managed through disclosure, recusal, or other means." Independent Sector, *Principles for Good Governance*, *supra*, at 12 (emphasis added). The CPD itself recognizes that avoiding the appearance of conflicts must be part of its mandate. C.A. App. 1298 (recognizing "the potential for *an erroneous appearance of partisanship* based on political activities undertaken by CPD-affiliated persons (including Board members) in a personal capacity" (emphasis added)). But the CPD's conflict-of-interest policy, such as it is, falls short of eliminating the appearance of conflicts.

As described by the CPD Executive Director, the CPD's informal policy prohibits board members only from serving in an "official" capacity on a political campaign or

with a political party, without any clarification as to the meaning of "official." C.A. App. 1297. The CPD's policy already lacks any enforcement mechanism, given that it is both unwritten and informal; and the CPD extinguishes what remains of the policy's viability by expressly recognizing a loophole permitting board members, who make decisions about the selection of presidential and vice-presidential debate participants, to be actively involved in partisan political activities on behalf of those very same debate participants or their parties.

The CPD compounds the problem by also recognizing a distinction between partisan political activities undertaken by the board members in their "personal capacit[ies]," as opposed to their "official capacit[ies]." C.A. App. 1297-98. For purposes of complying with a meaningful conflict-of-interest policy that should be drafted to help ensure that the CPD is engaging in its activities in a nonpartisan manner, as required pursuant to its tax-exempt status and by its specific mission of hosting the presidential and vice-presidential debates, this distinction between board members' individual and official partisan activities is entirely unrealistic.

Even if a clear line could be drawn between individual and official partisan activities, the CPD ignores that even individual partisan conduct by CPD board members can taint the organization itself, specifically in light of the mission of the CPD. At a minimum, such conduct would create the *appearance* of a conflict of interest; the public reasonably would interpret any overtly partisan statement by a board member as an expression of the views of the organization itself. Carried to its logical conclusion, the CPD would permit openly partisan conduct, so long as it is done in board members' ill-defined "personal capacit[ies]."

The alleged written "policy" is no more effective than the unwritten "informal policy" at avoiding the appearance of conflict. As noted above, the CPD failed to disclose this policy, making it impossible to confirm that it would actually avoid the appearance of conflict. The CPD's own description evinces that it would not because it only "intends to deter" partisan activities, instead of prohibiting them. Thus, the CPD's leadership may continue to, and apparently does, actively support and oppose partisan causes, notwithstanding any supposed "deterrence" from the alleged written policy.

* * *

An unwritten, informal conflict-of-interest policy is tantamount to having no policy at all. The CPD fails to meet the basic standard of governance adopted by the nonprofit community at large. Its board members have engaged in the endorsement of (and opposition to) political campaigns and other partisan conduct, while at the same time bearing responsibility for ensuring that the CPD conducts its activities in a nonpartisan way in accordance with its tax-exempt purposes. For an organization like the CPD that is charged with safeguarding the integrity of the nation's presidential and vice-presidential debates, the FEC should and must demand more. And given the importance of fair, robust political competition to our democratic system, this Court's review is urgently needed.

## CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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