No. _____

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**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the partisan political activities of a debate-staging organization's decisionmakers bear upon whether the organization "endorse[s], support[s], or oppose[s] political candidates or political parties" in violation of 11 C.F.R. §110.13(a).

2. Whether criteria for determining which presidential candidates are invited to participate in general election debates are "objective" under 11 C.F.R. §110.13(c) if only major party candidates can satisfy the criteria.

## PARTIES TO THE PROCEEDING

Level the Playing Field, Peter Ackerman, Green Party of the United States ("Green Party"), and the Libertarian National Committee, Inc. ("Libertarian Party") are the petitioners here and were the plaintiffs-appellants below.

The Federal Election Commission ("FEC") is the respondent here and was the defendant-appellee below.

## CORPORATE DISCLOSURE STATEMENT

Petitioner Level the Playing Field is a not-for-profit organization incorporated under the laws of Virginia. Petitioner Libertarian Party is a not-for-profit organization incorporated under the laws of the District of Columbia. No petitioner has a corporate parent or a publicly-held company that owns 10% or more of its stock.

## RELATED CASES

*Level the Playing Field v. FEC*, No. 15 Civ. 1397 (TSC), U.S. District Court for the District of Columbia. Judgment entered March 31, 2019.

*Level the Playing Field v. FEC*, No. 19-5117, United States Court of Appeals for the District of Columbia Circuit. Judgment entered June 12, 2020.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Regulations**



**Other Authorities**

## INTRODUCTION

This case relates to an issue of paramount importance: who can participate in the presidential debates held before the general election every four years. No one can be elected president without participating in these debates, and 76% of Americans believe someone who is not a Democrat or Republican deserves serious consideration for the Presidency and should participate in the debates. Indeed, a plurality of Americans identify as independents, and 86% feel the two-party political system does not serve the interests of the American people.[1] Yet for decades, a small group of unelected, unaccountable Democratic and Republican party insiders have violated federal law by using the Commission on Presidential Debates to prevent Americans from hearing from an independent candidate. The CPD stifles competition through a selection criterion designed to create an insurmountable hurdle for any candidate other than the Democratic and Republican nominees. The result is that the only options ever presented to voters are the major-party nominees.

The CPD and its exclusionary debate-qualifying criterion violate federal election law. Under the Federal Election Campaign Act ("FECA") and its regulations, a debate-staging organization that, like the CPD, accepts corporate donations, must be nonpartisan: It may not "endorse, support, or oppose" any candidate or political party and must use "objective" criteria to determine which candidates are

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[1] C.A.App.386, 606. "Independent candidate" refers to candidates who are either unaffiliated with any political party or affiliated with a third party.

invited to its debates. The CPD has violated these provisions ever since it was founded for the express purpose of "strengthening the role" of the two major parties. It is not *nonpartisan*; it is *bipartisan*, comprised entirely of Democratic and Republican insiders who endorse their own parties' candidates, host partisan fundraisers, donate massive sums to Republican and Democratic campaigns, and openly support the very Republicans and Democrats who appear in CPD-sponsored debates. Some have even admitted the CPD's goal was to "exclude third-party candidates" from the debates. And they have erected an insurmountable hurdle: a polling benchmark that no independent candidate has or could ever satisfy.

Yet the Federal Election Commission found no reason to believe the CPD violates FECA. This Court's intervention is needed because the D.C. Circuit—the only Circuit that can review FEC decisions—misconstrued both prongs of the governing regulation.

*First*, the D.C. Circuit held that only an express "organizational endorsement" of, or illegal direct contribution to, a party or its candidates violates federal law. It therefore upheld the FEC's categorical exclusion of (per the district court) a "mountain of submitted evidence" of CPD leaders' partisan activities—even though no organization would ever *formally announce* its own violation of the law. The D.C. Circuit's decision defies this Court's decisions insisting that such circumstantial evidence of bias cannot be categorically excluded—and gives corporate-funded debate sponsors carte blanche to violate the regulation but easily evade enforcement.

*Second*, the D.C. Circuit held that the CPD's debate-qualifying criterion is "objective" because it uses a percentage, restricting debates to candidates who have "a level of support of at least 15%...of the national electorate as determined by" five unspecified polls at an unspecified time. But using a number does not make a criterion objective. Plain meaning and the regulation's history dictate that a criterion that systematically excludes independent candidates is not objective, and as 2020 reaffirms, polling numbers can be wildly inaccurate. Experience in three-way gubernatorial races shows that independent candidates polling below 15% can win the general election *if* they are invited to debates. Yet legitimate contenders for the *Presidency* are excluded and even dissuaded from even running by the 15% rule.

These questions concern a matter of obvious and critical importance—who can meaningfully run for President of the United States. Without access to the debates, independent candidates are barred from consideration. The D.C. Circuit and FEC decisions violate the regulation they purport to interpret. And, by fortifying the two-party duopoly, they defy the wishes of the Founding Fathers, who deeply mistrusted an entrenched two-party system and correctly predicted that it would result in extremism that alienates citizens. Because federal courts in the D.C. Circuit have exclusive jurisdiction over FECA suits, there is no prospect of further percolation of this issue. Accordingly, this case is the ideal, and likely only, vehicle to address whether the CPD should be permitted to defy the popular will and the plain meaning of the regulation by willfully depriving the American people of choice in presidential elections.

## OPINIONS BELOW

The D.C. Circuit's opinion is reported at 961 F.3d 462 and reprinted at App.1a–15a. The district court's opinions are reported at 381 F. Supp. 3d 78 and 232 F. Supp. 3d 130 and reprinted at App.16a–70a and 155a–190a. The FEC's enforcement decision is unreported and reprinted at App.71a–122a. The FEC's rulemaking decision is reported at 82 Fed. Reg. 15468-74, and reprinted at App.123a–154a.

## JURISDICTION

The D.C. Circuit issued its opinion on June 12, 2020. On March 19, 2020, this Court issued an order extending the time to file petitions for certiorari by 150 days, making the deadline for this petition November 9, 2020. This Court has jurisdiction under 28 U.S.C. §1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at App.191a–195a.

## STATEMENT OF THE CASE

### A. Background

1. Petitioner Peter Ackerman is committed to reforming the democratic process in the United States and abroad. He has served as Chairman of the Board of Overseers of Tufts University's Fletcher School of Law and Diplomacy, and on the Board of Directors of the Council on Foreign Relations and multiple nonprofit organizations dedicated to promoting democracy and human rights. He founded Petitioner Level the Playing Field, a nonpartisan, non-profit

organization which promotes reforms to enhance competition and choice in federal elections.

The other petitioners are the Libertarian Party, which has nominated presidential candidates in every election since 1972, and the Green Party, which has nominated candidates in every presidential election since 2000.

Petitioners are supported by prominent amici from the government, academic and non-profit communities, including, *inter alia*, Admiral James Stavridis, former governor Christine Todd Whitman, former Senator Bob Kerry, and Admiral Dennis Blair. *See* C.A.Dkt.1808275, 1808194, 1808105.

2. The questions presented relate to the interpretation of an FEC regulation promulgated pursuant to FECA. The statute prohibits corporations from making a "contribution or expenditure in connection with" federal elections. 52 U.S.C. §30118(a). The purpose of this prohibition is to "limit *quid pro quo* corruption and its appearance." *McCutcheon v. FEC*, 572 U.S. 185, 197 (2014). However, a safe harbor exempts corporate expenditures for "nonpartisan activity designed to encourage individuals to vote or to register to vote," which do not raise corruption concerns. 52 U.S.C. §30101(9)(B)(ii).

Corporate funding therefore may only be used to stage nonpartisan candidate debates. To lawfully receive and spend corporate funds, a debate-staging organization (1) cannot "endorse, support, or oppose political candidates or political parties," and (2) "must use pre-established objective criteria to determine which candidates may participate in a debate." 11

C.F.R. §§110.13(a), (c), 114.4(f). The FEC has confirmed that "pre-established objective criteria" cannot be "designed to result in the selection of certain pre-chosen participants." 60 Fed. Reg. 64,260-01 (Dec. 14, 1995); C.A.App.105, 133, 181, 249.

3. The CPD has used corporate funding to stage every general election presidential and vice-presidential debate since 1988. C.A.App.1095. These debates were previously sponsored by the League of Women Voters, but in 1985, the Democratic and Republican parties entered an "Agreement on Presidential Candidate Joint Appearances" providing that all future debates would be "jointly sponsored and conducted by the Republican[s] and Democrat[s]." C.A.App.850. The CPD was formed in 1987 to implement this agreement and "forge a permanent framework on which all future presidential debates *between the nominees of the two political parties* will be based." C.A.App.855 (emphasis added). The CPD's express purpose was "to inform the American electorate on the[] philosophies and policies" of "the Democratic and Republican parties" and to "strengthen the role of [these] parties" in presidential elections. C.A.App.850, 854-55. Republican Party chairman Frank Fahrenkopf indicated at the time that the CPD "was not likely to look with favor on including third-party candidates in the debates." C.A.App.857. His Democratic counterpart, Paul Kirk, agreed that "the [CPD] should exclude third-party candidates." *Id.*

Consistent with its self-described partisan purposes, the CPD has always been co-chaired by a prominent Republican and Democrat. Fahrenkopf has

been the co-chair since the CPD's inception, despite remaining deeply enmeshed in the Republican party. He has donated over $130,000 to Republican candidates, including two (George W. Bush and John McCain) who appeared in CPD-sponsored debates. *E.g.*, C.A.App.919-26. In 2011 he penned an op-ed addressed to Republicans extolling "our great party." C.A.App.929.

Kirk was the CPD's Democratic chair until 2009, when Michael McCurry, a longtime Democratic power broker and former press secretary to President Bill Clinton, replaced him. C.A.App.911, 914, 1097-98. McCurry donated over $110,000 to Democrats during his tenure at the CPD, including Barack Obama and Hillary Clinton close in time to their appearance in CPD debates.[2] *E.g.*, C.A.App.916.

The chairs have always stocked the CPD's board with equally powerful Democrats and Republicans, who have actively supported those parties and their presidential candidates while serving as CPD directors. C.A.App.911, 1094. For example, Richard Parsons donated more than $100,000 to Republican candidates and committees between 2008 and 2012 and gave the maximum contribution to Jeb Bush and Hillary Clinton in 2015. *E.g.*, C.A.App.916. Then-director Howard Buffett contributed to Barack Obama's 2008 presidential campaign in the same month that Obama appeared in a CPD debate. C.A.App.946. Democratic aide Newton Minow made at least 30 contributions to Democrats between 2008

[2] McCurry was replaced by Democrat Dorothy Ridings after the 2016 election. C.A.App.1286.

and 2016. C.A.Dkt.1807168, p.12. Former Democratic Congresswoman Jane Harman made 55 contributions during that same period and published a 2016 op-ed identifying Hillary Clinton as the presidential candidate best "equipped to lead us into the future." C.A.App.395-96. Former Republican Senator Olympia Snowe contributed over $8,000 to Republican candidates during the 2016 election cycle. C.A.App.396. Antonia Hernandez, former counsel to Ted Kennedy's Judiciary Committee, made the maximum contribution to Hillary Clinton prior to Clinton's appearance in CPD debates. C.A.Dkt.1807168, p.12. And former Republican Senator John Danforth, who endorses "whichever Republican is on the ballot," contributed $28,300 to Republican candidates in 2016-17. C.A.App.396.

The CPD has no oversight mechanism to curb this overt partisanship. Its conflict of interest rules do not address partisan political activities. C.A.App.1075-78. Nor does the CPD have an institutionalized process for nominating or selecting its board members, enabling the chairs to pack the board with fellow partisan politicos. The CPD now says it has an "informal policy…that Board Members are to refrain from serving in any official capacity with a political campaign." C.A.App.1297. This "policy," which conveniently surfaced for the first time in this litigation, is unenforceable by definition—no one need comply with an "informal" policy—and the CPD's leadership casually violates it. C.A.App.407. The CPD also claims it enacted a "formal 'Political Activities Policy'" *after* this litigation was filed, App.104a, but has refused to disclose the purported policy. Instead the CPD supplied a vague, one-

sentence description, which itself confirms that the "policy" prohibits nothing. App.104a-105a. As Amici Nonprofit Leaders, Scholars and Practitioners supporting petitioners have explained, these purported policies are "wholly inadequate to prevent actual conflicts of interest, much less the appearance thereof." C.A.Dkt.1808275, p.5.

4. The CPD's leadership has made no bones about its desire to exclude independent candidates from CPD-sponsored debates, and that is precisely what they have done. For example, former CPD director and Republican Senator Alan Simpson said the CPD's "purpose…is to try to preserve the two-party system," and that independent candidates should "not be included in the debates" because they "mess things up." C.A.App.26, 1165. Former CPD director and Democratic Representative John Lewis asserted that "the two major parties [have] absolute control of the presidential debate process." C.A.App.1165. Consequently, the only independent candidate to appear in a CPD-sponsored debate—Ross Perot in 1992—did so at the explicit request of the major party nominees, both of whom perceived an advantage to his participation. C.A.App.282, 700, 889-90. In 1996, the major parties changed their mind about Perot's debate participation, and the CPD accordingly excluded him. C.A.App.700.

In 2000, the CPD adopted new debate-qualifying criteria designed to exclude candidates other than the Democratic and Republican nominees. These criteria, which remain in effect, restrict the debates to candidates who have "a level of support of at least 15%...of the national electorate" as determined by five

unspecified "national…polling organizations" at an unspecified time in the September before the election. C.A.App.1118, 1308.[3]

This "15% rule" is designed to, and does, systematically exclude independent candidates, none of whom have been invited to the debates since it was instituted. Even Perot, who participated before the 15% rule, would not have qualified under the rule, because he was polling at less than 10% at the relevant time. C.A.App.367, 701.

There are numerous reasons why the 15% rule systematically excludes candidates other than the major-party nominees. Petitioners' expert evidence shows—and common sense dictates—that only a well-funded independent challenger could wrest such a substantial vote share from the major-party nominees. C.A.App.1034-35. Those nominees spend a combined $2-3 billion each election cycle, enjoy a default level of support from partisan voters, and benefit from the widespread media coverage of the major parties' presidential primaries. C.A.App.966. Independent candidates, by contrast, must rely on paid media to reach voters. Only a self-funded billionaire could realistically hope to compete as an independent, because participation in the debates is a prerequisite for victory, and few donors will fund candidates whose participation in the debates is uncertain.

That is just the first hurdle an independent candidate must overcome. The CPD also retains

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[3] Participants must also be constitutionally eligible to serve as President and must appear on the ballot in enough states to garner 270 electoral votes. Petitioners do not challenge those criteria.

complete discretion about what polls to use, when the polls are conducted, and when to choose debate participants, enabling it to select polls that put independent candidates below the 15% threshold. C.A.App.1117-18, 1308-09. Indeed, the CPD sometimes uses polls that do not even include independent candidates. C.A.App.1127. Furthermore, polling in three-way races is subject to increased error rates. C.A.App.985. This means independents effectively need to poll at 25% to ensure that their support is measured at 15% by whichever polls the CPD chooses. C.A.Dkt.1808105, p.17. And independent candidates attract new voters who "are politically inactive or even unregistered until mobilized by a compelling candidate," and thus undercounted in polls. C.A.App.1044.

Meanwhile, three-way gubernatorial elections prove that independent candidates polling below 15% in September can easily come back to win the election—if they are allowed to debate. C.A.App.720. Indeed, Perot polled at under 10% before the 1992 debates, but earned nearly 20% of the popular vote. C.A.App.621, 873. It is therefore unsurprising that the American people strongly favor including more than two candidates in the general election debates. Barring independents prevents voters from choosing among potentially viable candidates for the nation's highest office. *See, e.g.*, C.A.App.761, 786. Yet the CPD's polling hurdle is so prohibitive that its mere existence dissuades prominent amici and other qualified prospective independent candidates from running in the first place, as these amici have explained. C.A.Dkt.1808194, pp.9-11.

5. The FEC is "inherently bipartisan," *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981), and has expressly stated that it shares the CPD's "desire to strengthen party organizations," C.A.App.547. Not surprisingly, therefore, the FEC has summarily rejected every single one of many administrative challenges to the CPD's partisan structure and biased selection criteria. C.A.App.240-79. Indeed, in response to one such challenge, the FEC's own General Counsel concluded based on the extensive evidence of the CPD's partisanship that there was "reason to believe" that the CPD violated FECA and §110.13. The General Counsel recommended that the agency initiate an investigation into the CPD, but the FEC still refused to act. C.A.App.155-56, 162-63, 181.

### B. Proceedings Before The FEC And District Court

1. Any person may file an administrative complaint alleging a FECA violation. 52 U.S.C. §30109(a)(1). If the FEC finds "reason to believe" that the party named in the complaint "has committed, or is about to commit, a violation," it must "make an investigation." *Id.* §30109(a)(2). "Any party aggrieved by" an FEC order dismissing an administrative complaint may challenge the FEC's decision (or failure to act within 120 days) in the U.S. District Court for the District of Columbia. *Id.* §30109(a)(8).

In 2014, petitioners filed administrative complaints against the CPD, its executive director, and the 11 directors who adopted the CPD's rules for the 2012 presidential election. C.A.App.40-42, 81, 664-739, 1223, 1229. The complaints alleged, *inter*

*alia*, that the CPD violated FECA's expenditure and contribution rules. The complaints were supported by 800 pages of evidence detailing the CPD leadership's partisan activities and expert analyses quantifying the obstacles imposed by the 15% rule.

The FEC ignored the complaints until after petitioners filed a lawsuit challenging the agency's failure to act within 120 days. *See Level the Playing Field v. FEC*, No. 15-CV-961 (D.D.C.), Dkt.1. After the action was filed, the FEC quickly dismissed the complaint and a related petition for rulemaking.[4] Its decision dismissing the complaint summarily concluded that there was no reason to believe the CPD or its leadership had violated FECA, ignoring petitioners' evidence and rotely citing the agency's dismissals of prior complaints against the CPD. C.A.App.1218-21, 1243-47. The dismissal of the rulemaking—over the dissent of two commissioners—was similarly conclusory: The FEC said enforcement was sufficient to deal with the problems petitioners identified—even though the agency for decades *refused* to enforce its regulation against the CPD. C.A.App.662-63.

2. On August 27, 2015, petitioners filed an action seeking review of the FEC's decisions. On February 1,

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[4] The petition sought a rulemaking to amend the FEC's regulation and prohibit debate-stagers from using a polling threshold as the exclusive means of accessing the presidential general election debates. C.A.App.599-631. *All* of the petition's approximately 1,260 commenters (except for the CPD itself) supported opening a rulemaking. C.A.App.661. The questions presented in this petition concern only the interpretation of the FEC's existing regulation and do not implicate the denial of the rulemaking.

2017, the district court vacated the decisions as "arbitrary and capricious" and "contrary to law." App.183a-184a, 189a-190a. The court held that the FEC had relied on a legal standard "contrary to the plain text of the regulation" and that the FEC "did not provide any indication that it actually considered" the "mountain of submitted evidence" supporting petitioners' claims, even though the "weight of [this] evidence is…substantial." App.171a, 175a, 180a, 183a. Finding that the FEC had "stuck its head in the sand and ignored the evidence," the court remanded the matter to the agency to reconsider its decisions. App.189a-190a.

3. On March 29, 2017, the FEC issued new decisions reaching the same result. App.71a-154a. This time, in addressing the evidence of the CPD's deep partisan ties and favoritism toward the major parties, the FEC said that the CPD's leaders did not act in their "official capacity" when they endorsed or supported political parties or their candidates. App.103a; *see also* App.103a-104a ("there is no indication that they act on behalf of CPD" or "as agents of CPD"); App.99a (CPD director statements "are not indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties"). Rather, according to the FEC, those individuals "may wear 'multiple hats,'" and their partisan activities—even when supporting candidates who appear in CPD debates—are merely "personal." App.102a-103a.[5]

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[5] The FEC also claimed that evidence related to the CPD's founding and earlier operation "d[id] not necessarily reflect the

The FEC also concluded that the CPD's biased candidate selection rule is "objective." App.105a-121a. The FEC agreed that to be "objective," criteria cannot be "designed to result in the selection of certain pre-chosen participants," but concluded that the CPD met this standard based on a series of demonstrably incorrect assertions. App.107a. For example, independent candidates must spend enormous amounts on paid media, because unlike major-party candidates they attract little news coverage. To counter this evidence, the FEC claimed that a Westlaw news database showed Libertarian Party candidate Gary Johnson received substantial press in 2016. App.137a. But the FEC counted numerous articles about other people named Gary Johnson, including athletes, chefs, museum presidents, doctors, lawyers, and musicians all named Gary Johnson. As another example, the FEC brushed aside one of petitioners' expert reports purportedly because the expert limited his analysis to polls conducted "at the early stages of the party primary process" App.134a, even though the report explicitly incorporated "late primary" and "general" election polling data. C.A.App.986.

Petitioners challenged the FEC's post-remand decisions in a Supplemental Complaint filed on May

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organization's perspective" in 2012—without pointing to any evidence that the CPD leaders' partisan objectives have ever changed. App.97a-99a. The FEC also claimed it was "not clear" that this evidence reflected "an endorsement of, or support for, the Democratic and Republican Parties" (App.95a-96a), even though that is exactly what the evidence—such as Fahrenkopf's statement that the CPD "was not likely to look with favor on including third-party candidates in the debates"—demonstrates.

26, 2017. C.A.App.308. On March 31, 2019, the district court awarded summary judgment to the FEC. App.17a. The court's opinion restated the FEC's justifications, with virtually no serious attempt to evaluate whether they met the legal standard under FECA or the APA. App.45a-70a.

### C. D.C. Circuit Decision

The D.C. Circuit affirmed. It did not dispute that, as the district court had initially concluded, a "mountain of evidence" established the partisanship of the CPD's leadership. Instead, the court held that it was "reasonable" for the FEC to conclude that this evidence was "not indicative of CPD's *organizational* endorsement of or support for the Democratic and Republican Parties and their candidates." App.7a. The court found that "individuals may support political candidates when acting in their personal capacities, even if they would be prohibited from doing so in their professional capacities." App.10a. The court purported to ground this conclusion in the law of agency, holding that "for an agent's statement to be attributable to the principal, the 'speaking must be done in the capacity of agent and connected with the business of the principal.'" App.10a (quoting Restatement (First) of Agency §288 cmt. b). Thus, the court concluded, it was dispositive that Fahrenkopf, McCurry and other CPD leaders were not acting in their "official capacity" when engaging in partisan political activity. App.9a-10a.

The court also held the CPD's 15% polling criterion "objective." The court agreed that there are "many reasons why it might be difficult for an independent candidate to achieve the support of 15%

of the electorate." App.14a. Yet it found these reasons irrelevant and concluded that the polling criterion "does not become 'subjective' merely because it is difficult to reach" for independents. *Id.*

## REASONS FOR GRANTING CERTIORARI

I. Corporate-funded debate-staging organizations cannot "endorse," "support" or "oppose" political parties or their candidates. 11 C.F.R. §110.13(a). Partisan activities by the organization's leaders clearly bear on whether the organization itself has complied with this regulation. Indeed, this Court has repeatedly held that such circumstantial evidence can be as probative as direct evidence; that no plaintiff should be categorically prohibited from presenting it; and that circumstantial evidence is particularly important where, as here, the plaintiff is attempting to root out dishonesty or unlawful bias that defendants will inevitably deny. Yet the D.C. Circuit held that abundant evidence of partisan activities by the CPD's leaders was legally irrelevant to whether the organization violated the regulation. It held that the only acceptable form of proof of the organization's bias is direct evidence: *official* acts of partisanship by or formally on behalf of the organization.

That holding conflicts with this Court's decisions and reduces the regulation's nonpartisanship requirement to a nullity: It allows people to operate a corporate-funded debate staging organization for partisan purposes so long as they don't *officially* declare on the organization's letterhead or website that that is what they are doing, or write a check from the organization's bank account to a campaign. In other words, the D.C. Circuit's decision enables people

to violate the rule but easily evade enforcement. This Court should grant review to prevent that result and ensure that the nonpartisanship provision is enforceable.

II. To conclude that the CPD's 15% criterion is "objective," the D.C. Circuit and FEC turned the English language on its head and ignored all interpretive guides, including this Court's precedent and the FEC's stated rationale for the regulation. The court reasoned that the criterion is "objective" because it is facially neutral and ended its inquiry there. But this Court has made clear in other contexts that facial neutrality is not the touchstone of objectivity, and the FEC itself acknowledged as much when promulgating the regulation. The D.C. Circuit also completely ignored the subjectivity inherent in the CPD's unilateral power to select which polls to rely on, as well as the unreliable and subjective nature of polling itself. When applied, the CPD's 15% criterion functionally bars independents from the debates but guarantees entry to the major-party candidates. This Court should grant review to correct this flawed analysis and hold that a facially neutral criterion that has severe discriminatory effects cannot be "objective."

III. This petition raises issues of the utmost importance to American democracy. Participation in the general election debates is a prerequisite to winning the Presidency, yet the CPD has barred independents for decades, ensuring that only the major-party candidates are invited to debate. The ensuing major-party duopoly has bred hyper-partisanship that has destroyed public confidence in

government and brought about the dire consequences George Washington warned about in his Farewell Address. The Founders never wanted the United States to be governed by two warring political parties, and most Americans are desperate for alternative options. This petition may be the only chance to resolve whether an unelected, unaccountable entity comprised of career partisan political operatives can undermine the American experiment by setting up a barricade blocking independent candidates from the debate stage.

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

**A.** No corporate-sponsored debate-staging organization would formally announce its partisanship to the world or make a direct, blatantly illegal campaign contribution to a candidate. That would be tantamount to conceding a violation of FECA and the regulation prohibiting debate-staging organizations that "endorse," "support" or "oppose" political parties or their candidates from using corporate funds. 11 C.F.R. §110.13(a). Yet the D.C. Circuit's opinion requires exactly this sort of unattainable "smoking gun" proof; nothing short of an illegal direct campaign contribution by the organization, or an announcement on its letterhead formally endorsing a political party or candidate, will do. App.5a-7a. Indeed, the court went so far as to fault 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—even though FECA flatly prohibits direct corporate contributions, and there is no way for an individual to donate money to a candidate in a corporate capacity. By insisting upon proof of an admission or donation no organization would ever make, and categorically rejecting circumstantial evidence based on the conduct of the organization's leaders, the D.C. Circuit made it impossible to prove that a debate-staging organization is partisan, no matter how partisan the organization truly is.

Until this litigation, the FEC *agreed* that organizational bias could be established using circumstantial evidence. The FEC has adjudicated numerous administrative proceedings over the past two decades in which the CPD was accused of endorsing, supporting or opposing political parties or their candidates in violation of 11 C.F.R. §110.13(a). *See, e.g.*, C.A.App.240-79. At no point did the agency suggest that a formal endorsement would be required to substantiate these allegations. *Id*. To the contrary, the FEC *conceded* that at least some of the same circumstantial evidence petitioners presented here *did* "raise[] questions" about whether the "CPD is infected with bias against third party and independent candidates sufficient to disqualify it as a debate staging organization." C.A.App.266-68. It was only after the district court vacated and remanded the FEC's initial arbitrary and capricious dismissal of petitioners' complaints that the FEC suddenly reversed course and refused to consider this evidence because it concerned conduct by individual CPD leaders. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2417–18 (2019) ("a court may not defer to a new

interpretation…that creates 'unfair surprise' to regulated parties").

The D.C. Circuit's affirmance of the FEC's new categorical refusal to consider this type of circumstantial evidence squarely conflicts with this Court's precedent. As the Court has explained, "in *any* lawsuit, the plaintiff may prove [its] case by direct *or* circumstantial evidence." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (emphasis added); *see also Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("inference from circumstantial evidence" is one of the "usual ways" to establish "mental state"). That is because "[t]he 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). Consequently, there is no "circumstance" in which this Court has "restricted a litigant to the presentation of direct evidence absent some affirmative directive in a statute." *Id.*

Circumstantial evidence is essential where, as here, the plaintiff is trying to root out bias or dishonesty, because a defendant will rarely provide a direct admission. As this Court has recognized, "circumstantial evidence" can "be quite persuasive" to expose hidden motivations such as "discriminatory purpose." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000); *see also United States v. Clarke*, 573 U.S. 248, 254–55 (2014) ("circumstantial evidence" can "suffice" to "rais[e] an inference of bad faith"). For example, in the gerrymandering context, this Court has recognized that "circumstantial evidence" may be a "compelling" way to establish

"unconstitutional racial" motive, and that "it may be difficult for challengers to find other evidence." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017); *accord Hunt v. Cromartie*, 526 U.S. 541, 547-49 (1999) (parties can establish an "impermissible racial motive" using "only circumstantial evidence"). The same is true here—an organization like the CPD will never willingly reveal its illicit bias, which is why in cases like this, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 508 n.17 (1957).

Moreover, a non-profit corporation like the CPD is "an artificial being, invisible, intangible, and existing only in contemplation of law." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989); *Shaffer v. Heitner*, 433 U.S. 186, 226 n.4 (1977) (corporation is "legal fiction"). The CPD can exhibit bias, if at all, only "through [the] employees" who work there. *Democratic Senatorial Campaign Comm.*, 454 U.S. at 33. And it "'believes,' if it can be said to believe anything, only what the people who found, own and/or manage the corporation believe." *Korte v. Sebelius*, 735 F.3d 654, 701 (7th Cir. 2013) (Rovner, J., dissenting). Yet the opinion below categorically excludes not just the evidence demonstrating the partisan bias of those who run the CPD, but additional evidence that their bias has corrupted the CPD and led it to adopt exclusionary debate-qualifying criteria.

**B.** Applying the correct standard, which permits consideration of this evidence, it is clear that the CPD

endorses, supports and opposes political parties and their candidates in violation of 11 C.F.R. §110.13(a). The CPD is led by staunch partisans who endorse Republican and Democratic candidates, lavish them with high-dollar contributions, served them as aides or high-priced consultants, mingle with partisan elites at exclusive fundraisers, and oversee hundreds of thousands of dollars of contributions to Democratic and Republican politicians as paid-for-hire lobbyists. These individuals endorse and contribute to their own parties' nominees even when these candidates appear in the very debates that the CPD itself sponsors. They have confirmed time and again that the CPD's goal is to ensure that only these nominees, and not any independent challengers, are invited to the presidential debates.

Fahrenkopf typifies the partisan CPD director. He founded the CPD *in his capacity* as chair of the Republican party and declared his intent to "forge a permanent framework" to hold "all future presidential debates between the nominees of the two political parties." C.A.App.855. He continued at the helm of the RNC while *simultaneously* serving as co-chair of the CPD for several years. After leaving the RNC, he has continued to serve as a prominent ambassador of the Republican party. While serving as co-chair and the public face of the CPD, he has (1) contributed substantial sums to the same Republicans who appeared in CPD-sponsored debates, showing that he favors including those particular candidates in the debates; (2) assumed Republican campaign roles; (3) told a Harvard audience that the "Commission on Presidential Debates" helps "rejuvenat[e]…bipartisanship"; and (4) conceded that

he is "not likely to look with favor on including third-party candidates in the debates." C.A.App.919-26, 395, 407, 857.

This proves not just that Fahrenkopf favors Republicans, but that his bias infects the CPD itself. Indeed, over the years, the CPD's leaders have *admitted* that their own partisan preferences are intertwined with the CPD's in precisely this way. One director opined that they use the CPD to "try to preserve the two-party system," and to prevent independent candidates from being "included in the debates." C.A.App.26. According to another, the CPD debates have been "entrust[ed]…to the major parties" in a way that "is likely to exclude independent…candidates." C.A.App.1165. And multiple directors have admitted that the CPD is "not really nonpartisan," as the FECA regulations require, and instead is "bipartisan." C.A.App.1165.

It is no accident that the CPD has refused to enact a single internal control that might curb its partisanship, because any organization that was serious about being nonpartisan would take pains to ensure that such policies were in place. The CPD alone decides who appears in the presidential debates. The leaders of an organization with such immense influence will be tempted to exclude candidates with disfavored viewpoints. But the law prohibits a corporate-funded debate-staging organization from doing so. The only way to ensure that it will is to enact and rigorously enforce policies prohibiting conflicts that might compromise the organization's nonpartisan mandate. Indeed, in the nonprofit community, it is considered essential that every

organization have a written, enforceable policy to prevent such conflicts. Nonprofit leaders appearing as amici below criticized the CPD's refusal to enact any policy because this "contravenes the basic standards and practices of good governance that are fundamental in the nonprofit community." C.A.Dkt.1808188, pp.7-16.

Yet the D.C. Circuit agreed with the FEC that, as a matter of law, none of this evidence could even conceivably inform the FEC's assessment of whether the CPD "endorses," "supports" or "opposes" political parties or their candidates. It relied principally on the law of agency, but the law of agency does not support its conclusion. The court observed that, "for an agent's statement to be attributable to the principal, the 'speaking must be done in the capacity of agent and connected with the business of the principal.'" App.10a (quoting Restatement (First) of Agency §288 cmt.b). But petitioners do not claim that the directors, as agents, made independently actionable partisan statements for which the CPD is liable as principal, nor should they need to make any such showing. The point is that the CPD directors' statements—as well as their extensive ties to the major parties and substantial contributions to partisan causes—are circumstantial *evidence* that the CPD itself supports those same causes. After all, the CPD is nothing more than a collection of the individuals who operate it. Where, as here, an organization that has no purpose other than to stage political debates is run by people who have dedicated their lives and careers to partisan politics, it stands to reason that—without an independent board or mechanism of corporate governance to override its leaders' partisanship—the

organization will behave in a partisan fashion. And the CPD's lengthy track record of excluding independents from the debates confirms that the CPD has done precisely what one would expect from such an organization. In short, it looks like a duck, swims like a duck, and quacks like a duck—but per the D.C. Circuit, none of that proves it's a duck.

If evidence of conduct by an organization's leaders cannot be considered to assess whether the organization has complied with the regulation, there will be no way to enforce the regulation: it will be completely toothless. Given the stakes for American democracy, and the inability of any other Circuit to weigh in, this Court's intervention is essential to ensuring the debate-staging regulation is enforceable as written.

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

### A. A Criterion Is Not "Objective" When It Is Discriminatory In Practice

The D.C. Circuit held that a polling criterion can be "objective" within the meaning of §110.13(c) even though it systematically excludes independent candidates from participating in presidential debates. The court expressly found that the consequences of the criterion are irrelevant even if they dramatically disadvantage independents. It held that even if petitioners are "correct" that it is nearly impossible for an independent candidate to qualify, the CPD's criterion is nevertheless "objective." App.13a. The

court failed to even consider other reasons the criterion is not "objective": the CPD selects polls solely based on its subjective whims, and the polls themselves are unreliable and based on subjective choices made by pollsters. In essence, the D.C. Circuit's view is that it doesn't matter that the CPD's criteria always result in debates limited to the Democratic and Republican nominees because the criteria are not *explicitly* biased. But that reasoning is inconsistent with the meaning of the word "objective."

Like "any law," a regulation is interpreted using "the 'traditional tools' of construction" including "the text, structure, history, and purpose of a regulation." *Kisor*, 139 S. Ct. at 2415. As to the text, "objective" means "based on externally verifiable phenomena" as well as "disinterested" and "[w]ithout bias." OBJECTIVE, Black's Law Dictionary (11th ed. 2019). It is synonymous with "equitable," "evenhanded," "fair," and "nonpartisan." *See* Merriam-webster.com/thesaurus/objective. Thus, it is not "objective" to apply an inherently discriminatory criterion even if it is facially neutral, because such a criterion is not "without bias" or "evenhanded." Nor is it "objective" to choose polls based on manipulable subjective criteria rather than "externally verifiable" facts.[6]

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[6] The CPD chooses polls based on "recommendations" from pollster Frank Newport, "principally" based on his *subjective* "judgment" about "the quality of the methodology employed, the reputation of the polling organizations and the frequency of the polling conducted." C.A.App.1121-22.

The D.C. Circuit not only failed to analyze the meaning of the text, but also ignored that the FEC's own stated rationale for its regulation supports our textual reading. Corporations are barred from contributing or spending money in connection with federal elections unless, as relevant here, the money is used for "*nonpartisan activity* designed to encourage individuals to vote or to register to vote." 52 U.S.C. §30101(9)(B)(ii) (emphasis added). The FEC has interpreted this provision to permit corporate donations to "nonpartisan organizations" to defray the costs of staging "*nonpartisan* debates." 44 Fed. Reg. 76,734 (Dec. 27, 1979) (emphasis added); *see also Perot v. FEC*, 97 F.3d 553, 556 (D.C. Cir. 1996) (explaining that 11 CFR § 110.13 is the "current version" codifying FEC's original understanding). To ensure that corporate-sponsored debates are nonpartisan, the FEC enacted the "objectiv[ity]" rule to protect "the integrity and fairness of the [candidate-selection] process." 60 Fed. Reg. 64,260-01 (Dec. 14, 1995). The agency explained that the chosen criteria "must…not [be] designed to result in the selection of certain pre-chosen participants." *Id.*

This interpretation of "objective" is also consistent with this Court's precedents in analogous areas of the law. In other contexts, this Court has recognized that a law "may be grossly discriminatory in its operation" even where "[o]n its face [it] extends to all…an apparently equal opportunity." *Williams v. Illinois*, 399 U.S. 235, 242 (1970). Where access is "contingent" upon circumstances only one group can satisfy, a facially-objective policy impermissibly "visit[s] different consequences on two categories of persons." *Id.; see also Griffin v. Illinois*, 351 U.S. 12, 17 n.11

(1956) ("[A] law nondiscriminatory on its face may be grossly discriminatory in its operation."). The Court's First Amendment jurisprudence is instructive. It is well-established that, just as the FEC regulation requires debate sponsors to select participants without partisan bias, the government cannot "'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson v. Valente*, 456 U.S. 228, 246 (1982) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947)). "'The First Amendment mandates government neutrality between religion and religion…The State may not adopt programs or practices…which 'aid or oppose' any religion." *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). In other words, the government must be objective when it comes to religion.

In this analogous context, mere "[f]acial neutrality is not determinative." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Indeed, "action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality," because the First Amendment "protects against…hostility which is masked, as well as overt." *Id.* Thus, "[e]ven if the plain language of…[a] policy [is] facially neutral" the government cannot "hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307 n.21 (2000).

At the expense of independent candidates, the FEC and D.C. Circuit have allowed the CPD to "hide behind…[its] formally neutral criteria" for years,

contrary to the clear meaning of "objective." This Court should grant review to ensure that the objectivity requirement is enforced as written.

### B. This Case Is An Excellent Vehicle Because The 15% Criterion Is Not Objective

1. History demonstrates that the 15% criterion is not objective within the regulation's meaning, because no candidate who has not participated in a major party primary has ever satisfied, or could ever have satisfied it: No independent candidate has hurdled the CPD's 15% bar since it was adopted in 2000, and as explained (*supra* p.10), Perot would not have satisfied it. The only other examples of purportedly "independent" candidates the FEC cited were former Republican President Teddy Roosevelt in 1912, former three-term Republican governor and three-term Republican Senator Robert LaFollette in 1924, former Democratic Governor Strom Thurmond (who later served 48 years as a major-party Senator) in 1948, former Democratic Governor George Wallace in 1968, and 20-year Republican Congressman John Anderson in 1980. App.107a, 144a; *see also* App12a-13a. If anything, these outdated examples prove petitioners' point: All candidates started as prominent major-party politicians and obtained even more national attention by competing for the major-parties' presidential nominations before running as independents. C.A.App.332-33, C.A.App.367. They are the equivalent of, say, Pete Buttigieg running as an "independent" *after* losing the 2020 Democratic primary. And the cost of running for President has skyrocketed since those historical candidates ran—a

serious campaign now requires many hundreds of millions of dollars to compete, a sum no one can raise absent a legitimate chance of qualifying to debate. In short, the fact that no independent has satisfied this criterion demonstrates that it is not objective.

Moreover, it is obvious why it is impossible for any independent candidate (other than perhaps a self-funded billionaire) to ever hurdle the CPD's 15% rule, and why it systematically excludes independents. To make a serious run for President, a candidate needs (1) enormous sums of money and (2) to be known to prospective voters, because if voters don't know who a candidate is, they won't tell a pollster they support the candidate. Major-party candidates always receive extensive media coverage, and voters therefore hear about them through such "free" media, starting during the primaries. By contrast, the media pay little attention to independent candidates, so to become known to the public, they must raise and spend huge amounts of money on advertising. This creates a catch-22 for independent candidates: they can't be known and supported in polls without large sums of money, but their ability to garner such financial support will be hamstrung because they can't demonstrate to potential donors that they will appear in the debates.

These points are a matter of common sense, but petitioners also presented expert evidence demonstrating them through quantitative analysis. For instance, Clifford Young, a polling specialist, showed that, on average, a candidate must obtain name recognition of at least 60-80% among the American public to poll at 15%. App.11a. And

Douglas Schoen—a veteran pollster and campaign strategist—showed that because independent candidates have difficulty attracting earned media, they must raise at least $266 million to achieve the requisite name recognition. *Id.* (That was based on 2014 data; the figure would surely be much higher in 2020). Although not central to its holding, the D.C. Circuit deferred to the FEC's jerry-rigged critique of these data, App.12a-13a; but the FEC ignored or misstated the expert reports and relied upon demonstrably false assumptions. *See* C.A.Dkt.1807265, pp.46-51; C.A.Dkt.1817426, pp.21-28. Regardless, the historical evidence shows that no genuinely independent candidate has *ever* hurdled the CPD's polling criterion, which demonstrates that it cannot be objective; the expert evidence merely confirms some of the reasons *why* that is so.

2. As explained in Point II.A, an "objective" criterion must be "externally verifiable," like the solution to a math equation or a provable fact. Anyone can verify that 1+1=2, or that a company sold 1,000 widgets. But the mere fact that the criterion includes a number—15%—does not make it "objective." For one, the CPD retains complete discretion about what polls to use and when to choose debate participants, enabling it to manipulate the selection of polls to exclude independent candidates. C.A.App.1308-09. Thus, even if an independent candidate *could* reach 15% support in certain polls, the CPD could *still* exclude them by simply selecting a pollster whose methodology resulted in a different outcome. Indeed, the CPD has relied upon polls that only asked about the major party candidates and made no effort to assess the support for their independent competitors.

*See, e.g.,* NBC/Wall Street Journal Poll, https://s.wsj.net/public/resources/documents/WSJNBCPoll-Mid-October-2020.pdf at p.10 (mid-October poll asking only about Biden and Trump). That is patently subjective.

Moreover, horse-race polling itself is unreliable, biased, and certainly not "objective." C.A.Dkt.1808105, pp.15-22. One need only look to the spectacular polling failures leading up to the 2020 and 2016 presidential elections to see the difference between a poll and a verifiable, objective fact. In both elections, pollsters "systemic[ally]" erred in predicting which voters would turn out and failed to account for "Shy Trump Voter[s]," who lied to pollsters about which candidate they supported. Alex Woodie, *Systemic Data Errors Still Plague Presidential Polling*, Datanami (Oct. 7, 2020).[7] Indeed, polls are mere estimates that face significant obstacles to accuracy, such as the decreased use of landlines, the lack of centralized databases for cell-phone numbers, and the likelihood of individuals not answering calls from unknown numbers. C.A.Dkt.1808105, pp.16-18. Polls frequently have significant margins of error as high as 5 to 10 percentage points. *Id.*

Even Ann Ravel—the FEC's Chair at the time the agency dismissed the complaints—has acknowledged that "the world may have a polling problem, and it is harder to find an election in which polls did all that well." D.Ct.Dkt.37, pp.22-23. It is absurd for an FEC Commissioner to acknowledge, on the one hand, that

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[7] *Available at* https://www.datanami.com/2020/10/07/systemic-data-errors-still-plague-presidential-polling.

polls are unreliable indicators of voter support, yet see nothing wrong with the CPD's use of polls as supposedly "objective" measures "to identify those candidates…who have a realistic chance of being elected President of the United States." C.A.App.1308.

Even worse, polling errors are magnified in three-way races as opposed to two-way races. C.A.App.985. And, because the major-party candidates will always easily garner 15% support, C.A.App.966, only independent candidates are impacted by polling errors. Indeed, an independent could be excluded even though she *did* reach 15% support but, due to a 5% error rate, only registered 10% in the polls. This is particularly likely given that independent candidates often bring out new voters who "are politically inactive or even unregistered until mobilized by a compelling candidate," and therefore undercounted in polls (much like supporters of President Trump). C.A.App.1044. Polls are based on subjective decisions by pollsters which lead to frequent human error, and any such error can only result in harm to independents and not major-party candidates. Thus, by any definition of the word, the CPD's polling criterion is plainly not "objective." Accordingly, this case presents an excellent vehicle for reviewing whether criteria that discriminate against independent candidates can be "objective" within the meaning of the debate-staging regulation.

## III. THE QUESTIONS PRESENTED ARE EXTREMELY IMPORTANT

It is hard to imagine a topic with greater stakes for the United States than ensuring a robust competition

for the Presidency. And no one can win the Presidency or be taken seriously as a presidential candidate without participating in the general election debates, which are typically viewed by enormous audiences. For example, in 2016, the first presidential debate drew a staggering 84 million viewers.[8] As the only presidential-debate sponsor, the CPD is a gatekeeper to the White House. Unfortunately, however, it uses its vast power to stifle political competition and cement the Democratic and Republican parties' duopoly control over the Presidency.

The pernicious effects of that duopoly and its stranglehold over political power in the United States have increased exponentially in recent years, as the lack of competition has driven each of the major parties to partisan extremes. The resulting polarization has ground government to a halt and left constituents out in the cold. This governmental dysfunction is precisely what the Founders warned would happen in a two-party system: "George Washington…warn[ed] against hyper-partisanship" in his farewell address, as he feared it would lead to the "alternate domination of one faction over another, sharpened by the spirit of revenge" which is "itself a frightful despotism." Lee Drutman, *America Is Now the Divided Republic the Framers Feared*, The Atlantic (Jan. 2, 2020).[9] Washington worried that parties

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[8] *See* www.pewresearch.org/fact-tank/2020/08/28/5-facts-about-presidential-and-vice-presidential-debates/; *see also* cnn.com/2020/09/30/media/first-presidential-debate-tv-ratings/index.html (over 73 million watched first Biden-Trump debate).

[9] *Available at* www.theatlantic.com/ideas/archive/2020/01/two-party-system-broke-constitution/604213.

"become potent engines, by which cunning, ambitious and unprincipled men will be enabled to subvert the power of the people, and to usurp for themselves the reigns of government." George Washington, Farewell Address (Sept. 19, 1796).[10] John Adams also believed that "a [d]ivision of the republic[] into two great [p]arties…is to be dreaded as the great political [e]vil." Letter from John Adams to Jonathan Jackson (Oct. 2, 1780).[11]

A recent prominent Harvard Business School study confirms the Founders' assessment, explaining that "[i]n a duopoly" parties only "compete to create and reinforce partisan divisions, not deliver practical solutions." Katherine M. Gehl & Michael E. Porter, *Why Competition In The Politics Industry Is Failing America* (Sept. 2017), at 4.[12] In other words, the losers in a duopoly are average American citizens.

The current Congress exemplifies this problem. It is comprised nearly entirely of Democrats and Republicans, who rarely work together on any legislation; the result is typically either gridlock or, when one party has full control, controversial legislation that lacks broad support but is enacted based on pure party-line voting. Unsurprisingly, an astounding 80% of the public disapproves of "the way Congress is handling its job." *See* news.gallup.com/

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[10] *Available at* www.founders.archives.gov/documents/Washington/99-01-02-00963.

[11] *Available at* www.founders.archives.gov/documents/Adams/06-10-02-0113.

[12] *Available at* https://gehlporter.com/wp-content/uploads/2018/11/why-competition-in-the-politics-industry-is-failing-america.pdf.

poll/1600/congress-public.aspx. Thus, a plurality of Americans (42%) consider themselves political independents, *see* news.gallup.com/poll/15370/party-affiliation.aspx, and a majority believe the two major parties "do such a poor job" of "representing the American people…that a third major party is needed." news.gallup.com/poll/244094/majority-say-third-party-needed.aspx.

Expanded debate access is not only what Americans want, it is also beneficial to the political process: Since the first CPD-sponsored debate in 1988, the debate that voters deemed most "helpful" "in deciding which candidate to vote for" was in 1992, the only time an independent (Ross Perot) joined the major party candidates on stage. *See* www.pewresearch.org/fact-tank/2020/08/28/5-facts-about-presidential-and-vice-presidential-debates/.

But in a duopoly, "rivals…understand that…they will both benefit from…limit[ing] the power of other actors, and increas[ing] barriers to entry." Gehl & Porter at p.4. This has borne out. These days, most major-party politicians seem to have only one goal: stymy any possible challenge to their own power and squash any dissent within their caucus. Whether it's Democrats blacklisting consultants who work with primary challengers to "protect all Members of the Democratic Caucus," *see* cnn.com/2019/03/31/politics/dccc-primary-challenger-rule/index.html, or Republican delegates denying renomination to a Congressman because he dared to break from party dogma by officiating a same-sex wedding, *see* cnn.com/2020/06/14/politics/virginia-5th-district-gop-convention-riggleman/index.html, the major parties

have closed ranks. This consolidation of partisan power leaves no room for independent ideas, nonpartisan coalition building, or consensus solutions to America's problems. Unfortunately, the CPD, comprised of these very same partisans, works to preserve this duopoly, as it caters to the major parties and denies the American people what they want: a third way forward.

This petition is the ideal—and perhaps only—chance for this Court to review the important legal questions presented here about the interpretation of the FEC's FECA-implementing debate rule. Because FECA permits judicial review only in the District Court for the District of Columbia, 52 U.S.C. §30109(a)(8)(A), there is no mechanism for further percolation of this issue. Absent this Court's review, the opinion below will likely remain the last word on the subject, allowing the "great political evil" that the Founders warned of to continue unabated.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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