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 FOR THE RESPONDENT IN OPPOSITION**


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## QUESTION PRESENTED

Whether the Federal Election Commission acted "contrary to law," 52 U.S.C. 30109(a)(8)(C), when it found that the Commission on Presidential Debates had not endorsed, supported, or opposed political candidates or parties, within the meaning of 11 C.F.R. 110.13(a), and had adopted objective debate criteria, within the meaning of 11 C.F.R. 110.13(c).

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 961 F.3d 462. The opinion of the district court (Pet. App. 16a-70a) is reported at 381 F. Supp. 3d 78. An additional opinion of the district court (Pet. App. 155a-190a) is reported at 232 F. Supp. 3d 130.

## JURISDICTION

The judgment of the court of appeals was entered on June 12, 2020. The petition for a writ of certiorari was filed on November 9, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners filed two administrative complaints with the Federal Election Commission (FEC or Commission) alleging that the Commission on Presidential Debates (CPD) and a group of its officers and directors

had violated federal laws restricting corporate contributions to federal election campaigns. Pet. App. 3a, 71a. The FEC dismissed the complaints. *Id.* at 71a-122a, 123a-154a. The district court dismissed petitioners' suit challenging the FEC's decision. *Id.* at 16a-70a. The court of appeals affirmed. *Id.* at 1a-15a.

1. The Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 *et seq.*, regulates the financing of political campaigns. As relevant here, FECA prohibits corporations from making "contribution[s]" to federal candidates. 52 U.S.C. 30118(a). FECA provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." 52 U.S.C. 30116(a)(7)(B)(i). The statute further provides that "[t]he term 'expenditure' does not include * * * nonpartisan activity designed to encourage individuals to vote." 52 U.S.C. 30101(9)(B)(ii).

For 40 years, the FEC has read those provisions to allow certain non-profit and media organizations to use corporate funds to stage candidate debates. See *Funding and Sponsorship of Fed. Candidate Debates*, 44 Fed. Reg. 76,477, 76,734 (Dec. 27, 1979). The Commission has explained that, because debates are "designed to educate and inform voters rather than to influence the nomination or election of a particular candidate," funds donated to or spent by a qualifying organization are not "contributions" or "expenditures" within the meaning of FECA. *Ibid.*; see 11 C.F.R. 110.13, 100.92, 100.154, and 114.4(f). A debate sponsor can qualify for that safe harbor only if it does not "endorse, support, or oppose" political parties or candidates. 11 C.F.R.

110.13(a)(1). In addition, the sponsor must use "pre-established objective criteria" when choosing debate candidates, and cannot "use nomination by a particular political party as the sole objective criterion" for general-election debates. 11 C.F.R. 110.13(c).

The CPD is a non-profit, private corporation that was established in 1987 to sponsor presidential debates. Pet. App. 76a, 79a. The CPD has hosted debates for every presidential election since then. *Id.* at 79a. Since 2000, the CPD has considered a candidate eligible to participate in its debates if the candidate satisfies three criteria: (1) constitutional eligibility to be President; (2) qualification for enough state ballots to have a mathematical chance of winning the Electoral College; and (3) support of at least 15% of the national electorate, "as determined by five selected national public opinion polling organizations, using the average of those organizations' most recently publicly-reported results at the time of determination." *Id.* at 80a-81a (citation omitted); see *id.* at 3a. The CPD has stated that the polling threshold "best balance[s] the goal of being sufficiently inclusive to invite those candidates considered to be among the leading candidates" against other goals, such as ensuring that the debate is not "'hindered by the sheer number of speakers.'" *Id.* at 87a (citation omitted).

2. Petitioners filed administrative complaints alleging that the CPD and twelve of its officers and directors had violated FECA and the FEC's debate regulations in hosting the 2012 presidential debates. Pet. App. 76a; see 52 U.S.C. 30109(a)(1) (allowing any person who believes that a violation of the statute has occurred to file a complaint with the FEC). More specifically, they alleged that the CPD had violated 11 C.F.R. 110.13 by (1)

endorsing and supporting the Democratic and Republican parties and opposing third parties and independents and (2) using a 15% polling threshold to choose debate candidates. Pet. App. 2a-3a. Petitioners alleged that, as a result, the funds received and expended by the CPD constituted corporate contributions that were prohibited by 52 U.S.C. 30118(a). Pet. App. 76a.

The Commission dismissed the complaints, finding that there was no reason to believe that the CPD had violated FECA or FEC regulations. Pet. App. 3a-4a. Following a challenge in court and a remand for further consideration of the record, the FEC again dismissed the complaints. *Id.* at 4a, 37a-38a.

The Commission first determined that there was no reason to believe that the CPD had endorsed, supported, or opposed political candidates in violation of 11 C.F.R. 110.13(a). Pet. App. 90a-105a. The FEC rejected petitioners' reliance on decades-old statements by individual CPD directors and officers, explaining that those statements had little continuing relevance given the "significant indications" that the CPD had changed over time, had "made concerted efforts to be independent in recent years," and was open to participation by independent candidates. *Id.* at 97a-99a. The Commission also rejected petitioners' reliance on a 2015 statement by a CPD co-chair that the CPD "primarily go[es] with the two leading candidates, it's been the two political party candidates . . . except for 1992 when Ross Perot participated." *Id.* at 100a (citation omitted). The FEC found that the statement, in context, "appears to be more an assertion of historical fact than an admission that [the] CPD favors candidates from the two major political parties over others." *Id.* at 100a-101a. Finally, the Commission rejected petitioners' reliance on

the fact that CPD directors and officers, acting in their personal capacities, had supported or contributed to political candidates. The FEC explained that those personal activities did not show that the CPD, a separate legal entity, had violated 11 C.F.R. 110.13(a). Pet. App. 102a-105a.

The FEC also rejected petitioners' contention that the CPD's 15% polling threshold for debate participation was not an "objective" criterion, as required by 11 C.F.R. 110.13(c). Pet. App. 105a-121a. The Commission explained that its regulations do not require "a single set of objective criteria all staging organization[s] must follow," but rather give organizations "leeway to decide what specific criteria to use." *Id.* at 106a (citation omitted). The FEC rejected petitioners' argument that the threshold was so high that only Democrats and Republicans could achieve it, observing that George Wallace in 1968, John Anderson in 1980, and Ross Perot in 1992 had all reached the 15% threshold. *Id.* at 107a. The agency also rejected petitioners' "policy arguments" about the virtues of including third-party candidates in the debates, explaining that "these points, no matter how compelling, do not bear on the [FEC's] consideration of whether or not the 15 percent threshold is an objective criterion." *Id.* at 120a.

3. Petitioners filed suit against the FEC, alleging that the agency's dismissal of their administrative complaints was "contrary to law." 52 U.S.C. 30109(a)(8)(C). The district court dismissed petitioners' action. Pet. App. 37a-66a. The court found that the Commission's analysis of the "endorse, support, or oppose" evidence was reasonable, explaining that petitioners' "simple disagreement" with the FEC's evaluation of the facts could not justify setting aside the agency's decision. *Id.* at

58a. The court similarly found that the FEC's decision regarding the 15% polling threshold was reasonable. *Id.* at 63a.

4. The court of appeals affirmed. Pet. App. 1a-15a. Like the district court, the court of appeals found the Commission's analysis of the "endorse, support, or oppose" regulation to be reasonable. *Id.* at 9a-10a. The court of appeals explained that the FEC had "thoughtfully evaluated the record," and that petitioners had "failed to show that the [FEC's] decisionmaking was arbitrary or unreasonable." *Id.* at 10a. The court also held that the Commission had "acted reasonably" in reviewing the polling threshold. *Id.* at 14a. The court observed that "[t]here is no legal requirement that the [FEC] make it easier for independent candidates to run for President." *Ibid.*

**ARGUMENT**

Petitioners contend (Pet. 17-38) that the FEC acted contrary to law in dismissing their claims that the CPD had endorsed, supported, and opposed political candidates, in violation of 11 C.F.R. 110.13(a), and had failed to apply objective debate-eligibility criteria, in violation of 11 C.F.R. 110.13(c). The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly sustained the FEC's rejection of petitioners' claims that the CPD had violated 11 C.F.R. 110.13(a) by endorsing, supporting, or opposing candidates or parties. See Pet. App. 5a-10a. A reviewing court may overturn the Commission's decision to dismiss an administrative complaint only if that decision was "contrary to law." 52 U.S.C. 30109(a)(8)(C).

Under this Court's precedents, a reviewing court applying that standard owes "deference" to the FEC's application of the statute, and the court should uphold the agency's decision as long as it is "'sufficiently reasonable' to be accepted." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 39 (1981) (citation omitted). To satisfy that requirement, the Commission need only have "examined 'the relevant data' and articulated 'a satisfactory explanation' for [its] decision, 'including a rational connection between the facts found and the choice made.'" *Department of Commerce* v. *New York*, 139 S. Ct. 2551, 2569 (2019) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Here, the FEC "carefully considered" petitioners' arguments, "thoughtfully evaluated the record," and then "offered detailed explanations in support of its view that plaintiffs failed to show impermissible bias." Pet. App. 5a, 10a. For example, in evaluating petitioners' invocation of decades-old statements made by individual CPD officers and directors, "it was reasonable for the [FEC] to believe that statements made about the CPD in 1987 do not adequately describe the CPD as it exists today." *Id.* at 6a; see *id.* at 8a ("The [FEC] considered [petitioners'] submissions and articulated reasonable explanations for assigning the decades-old statements little probative value."). Petitioners also relied on "contemporaneous evidence of the CPD's alleged bias," but the Commission "again provid[ed] reasonable explanations supported by the record," for example by "[c]onsidering [a CPD officer's] words in the appropriate context." *Id.* at 8a-9a. The court determined that petitioners' arguments "amount to a disa-

greement with the Commission's view," but that petitioners "ha[d] failed to show that the [FEC's] decisionmaking was arbitrary or unreasonable." *Id.* at 10a.

Petitioners contend that the Commission and court of appeals "categorically reject[ed] circumstantial evidence" and required petitioners to obtain "unattainable 'smoking gun' proof" of bias in order to prevail. Pet. 19-20; see Pet. 21 ("FEC's new categorical refusal to consider this type of circumstantial evidence"); Pet. 22 ("categorically excludes * * * evidence demonstrating the partisan bias"); Pet. 25 ("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"). Neither the FEC nor the court of appeals imposed any such categorical rule. The FEC explained: "[T]he Commission must evaluate whether [petitioners'] evidence on the formation and evolution of CPD and on the alleged partisanship of CPD officers and directors either demonstrates directly *or supports a reasonable inference* that the CPD has endorsed or supported the Democratic and Republican Parties * * * or opposed third parties." Pet. App. 92a (emphasis added). After evaluating the evidence that petitioners had advanced, the agency concluded that the evidence "does not support *a reasonable inference* that CPD endorses supports or opposes political candidates or parties." *Id.* at 105a (emphasis added). The court of appeals accordingly explained that, "far from ignoring [petitioners'] evidence, the [FEC] thoughtfully evaluated the record" and "offered detailed explanations in support of its view." *Id.* at 10a.

Petitioners also argue (Pet. 22-26) that the evidence supports their assertion that the CPD has supported major-party candidates and opposed other candidates.

But the FEC reasonably explained why it found petitioners' evidence inadequate, see pp. 4-5, *supra*, and petitioners' factbound objections to the agency's analysis do not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. The court of appeals also correctly sustained the FEC's rejection of petitioners' claims that the CPD's 15% polling threshold for presidential debates was not an objective criterion under 11 C.F.R. 110.13(c). The word "objective" means "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions." *Black's Law Dictionary* 1291 (11th ed. 2019); see *Oxford English Dictionary* 643 (2d ed. 1989) ("[d]ealing with, or laying stress upon, that which is external to the mind; treating of outward things or events, rather than inward thoughts or feelings"). This Court likewise has construed the term "objective" to mean "supported by evidence external to the [decisionmaker's] own (*subjective*) impressions." *Allentown Mack Sales & Serv., Inc.* v. *N.L.R.B.*, 522 U.S. 359, 368 n.2 (1998). A 15% polling threshold is objective because it relies on externally verifiable information (namely, the level of public support for particular candidates as measured by polls), rather than on the debate organizers' subjective impressions of the candidates.

The conclusion that the CPD may use a 15% polling threshold accords with this Court's precedents. The

Court has held that even a government institution hosting a debate has the right to exclude a candidate who has "generated no appreciable public interest." *Arkansas Educ. Television Comm'n* v. *Forbes*, 523 U.S. 666, 682-683 (1998). The CPD, a private organization, may likewise use a 15% polling threshold to exclude candidates who have not generated substantial public support, and to implement a "preference for smaller debates where the candidates with the most support are given more time to share their views with voters." Pet. App. 9a.

The FEC's conclusion also comports with the agency's longstanding application of the regulatory term "objective." In 1998, in its "first major enforcement action under this regulation," the Commission explained that the "CPD's use of polling data * * * did not result in an unlawful corporate contribution." Pet. App. 129a. The FEC observed at the time that it would make "little sense" if "a debate sponsor could not look at the latest poll results even though the rest of the nation could look at this as an indicator of a candidate's popularity." *Ibid.* (citation omitted).

Petitioners argue that the 15% polling threshold is not objective because it is not "fair" and "equitable" to minor parties. Pet. 27 (citation omitted). That view conflicts with the most natural reading of the word "objective." See p. 9, *supra*. Petitioners' argument also conflicts with the FEC's longstanding view of its own regulation. The agency has explained that it cannot "question each and every . . . candidate assessment criterion," that "the choice of which objective criteria to use is largely left to the discretion of the staging organization," and that the Commission "gives great latitude" to debate organizers. Pet. App. 128a-129a (brackets and

citations omitted). In addition, petitioners' proposed interpretation—under which the FEC could review private debate-organizers' criteria to determine whether they are "fair"—would raise significant First Amendment questions.

Petitioners also suggest (Pet. 30) that no independent or minor-party candidate "has ever satisfied, or could ever have satisfied," the 15% threshold. Even if that suggestion was accurate, it would be beside the point because "a threshold does not become 'subjective' merely because it is difficult to reach." Pet. App. 14a. In any event, petitioners are incorrect: George Wallace (1968), John Anderson (1980), and Ross Perot (1992) are "independent candidates who achieved at least 15% support in pre-election polling." *Id.* at 12a-13a; see *id.* at 61a-63a, 65a-66a (district court findings); *id.* at 107a-120a (FEC analysis).

Finally, petitioners argue (Pet. 32) that the CPD could "manipulate" its 15% polling threshold to exclude independent candidates. The FEC has recognized that a debate organizer's eligibility criterion might not qualify as objective if it has been "'fixed'" or "arranged in some manner so as to guarantee a preordained result." Pet. App. 129a (citation omitted). In denying petitioners' administrative complaint, the Commission simply concluded that petitioners had failed to produce evidence of any such manipulation here. As the district court observed, petitioners have offered only "conjecture" about "hypothetical misconduct," not evidence of actual misconduct. *Id.* at 64a-65a.

3. The decision below does not conflict with any decision of another court of appeals. Petitioners assert (Pet. 38) that, "[b]ecause 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." That is incorrect. Other parties have challenged the FEC's debate regulations under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See, *e.g.*, *Becker* v. *FEC*, 230 F.3d 381, 384 (1st Cir. 2000), cert. denied, 532 U.S. 1007 (2001). In fact, petitioners brought (but later abandoned) just such a challenge after the FEC denied a petition for rulemaking. See Pet. 13 n.4; see also Pet. App. 15a ("[Petitioners] suggest that the [FEC]'s rejection of their [rulemaking] petition was arbitrary and capricious 'for the same reasons' they challenge the [FEC]'s decisions about the CPD's neutrality and the 15% polling criterion."). Other plaintiffs could file similar suits throughout the country. See 28 U.S.C. 1391(e)(1). The issues that petitioners raise also could arise outside the District of Columbia, in challenges to debate criteria in state and local races. See, *e.g.*, *Alabama Libertarian Party* v. *Alabama Pub. Television*, 227 F. Supp. 2d 1213 (M.D. Ala. 2002); *Piccolo* v. *New York City Campaign Fin. Bd.*, No. 05-cv-7040, 2007 WL 2844939 (S.D.N.Y. Sept. 28, 2007). Petitioners thus are mistaken in asserting (Pet. 38) that, "[a]bsent this Court's review, the opinion below will likely remain the last word on the subject."

Petitioners also argue (Pet. 35) that this Court should grant review because the CPD "uses its vast power to stifle political competition and cement the Democratic and Republican parties' duopoly control over the Presidency." They contend (*ibid.*) that the "duopoly" has had "pernicious effects," has "driven each of the major parties to partisan extremes," and has "left constituents out in the cold." But whatever the merits of a more pluralistic party system, "American politics

has been, for the most part, organized around two parties since the time of Andrew Jackson." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 367 (1997). Neither the Commission nor the courts are authorized to use FEC regulations to restructure that system. To the contrary, for the FEC to deploy its regulations to "level the playing field" (as one petitioner's name puts it) would itself raise serious constitutional questions. See *McCutcheon* v. *FEC*, 572 U.S. 185, 207 (2014) ("No matter how desirable it may seem, it is not an acceptable governmental objective to 'level the playing field,' or to 'level electoral opportunities,' or to 'equalize the financial resources of candidates.'") (brackets and citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2021