

Federal Court Upholds FEC Debate Regulation

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On the eve of a 2020 presidential election featuring over 20 significant Democratic contenders, the U.S. District Court for the District of Columbia has upheld the use of poll standings to qualify for debate participation.

FEC regulations permit nonprofit corporations and press corporations to sponsor candidate debates so long as the sponsor “does not structure the debate[] to promote or advance one candidate over another” and “uses pre-established objective criteria to determine which candidates may participate in a debate.” Historically, the FEC has afforded debate sponsors wide discretion to set “objective criteria,” including the use of candidates’ poll standings.

The Commission on Presidential Debates (CPD) over several elections has sponsored presidential debates and, since 2000, has screened candidates according to three criteria: (1) evidence of the candidate’s constitutional eligibility to serve; (2) evidence of ballot access on enough state ballots to constitute a mathematical chance of winning the general election; and (3) support of at least 15% across five national polls.

An organization called Level the Playing Field filed an enforcement complaint against the CPD alleging that the CPD’s 15% threshold systematically discriminated against third-party candidates and effectively supported only the major party candidates. Level the Playing Field also petitioned the FEC to open a rulemaking to change the debate regulation to prohibit the use of poll standings as a criterion for debate participation in federal elections. The FEC dismissed Level the Playing Field’s enforcement complaint against the CPD on the basis that poll standing is an objective criterion with a long history of use. The FEC also declined to open a rulemaking to change the debate regulation. The FEC issued a Supplemental Notice

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of Disposition explaining its rationale for the decision (82 Fed. Reg. 15468-15474, Mar. 29, 2017). Commissioner Goodman issued a Concurring Statement elaborating on his view that press-sponsored debates should not be regulated in any event because the press is exempt from regulation under the "Press Exemption" of the Federal Election Campaign Act (https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/Concurring_Statement_of_Commissioner_Lee_Goodman_to_Notice_of_Disposition_re_Candidate_Debate_Rulemaking.pdf) and debates staged by press outlets is bona fide news coverage.

Level the Playing Field then sued the FEC in federal court claiming that the FEC's actions were arbitrary, capricious, and contrary to law. On March 31, 2019, the federal district court ruled that the FEC had acted lawfully and the CPD's 15% polling threshold was reasonable and objective. The federal court also declined to force the FEC to open a new rulemaking. The decision was written by Judge Tanya S. Chutkan in *Level the Playing Field v. Federal Election Commission* (Civil Action No. 15-cv-1397).

Level the Playing Field has filed a notice of appeal to the U.S. Court of Appeals for the District of Columbia Circuit. Nonprofit and press debate sponsors might consider filing *amicus curiae* briefs in support of the FEC's position.

Unless overturned by the Court of Appeals, the district court's decision will provide debate sponsors in the upcoming 2020 election cycle confidence that they may use poll standings at the 15% level, or lower, to select candidates.