QUESTION PRESENTED

Whether the Federal Election Commission's Debate Regulations, which permit business corporations to sponsor nationally-televised debates that serve as campaign advertisements used by selected candidates to solicit millions of votes, exceed the Commission's authority because the Federal Election Campaign Act prohibits corporate contributions or expenditures in connection with any federal election.

PARTIES BEFORE THE COURT

The petitioners are Ralph Nader, Nader 2000 Primary Committee, Inc., Association of State Green Parties and Green Party USA.

The respondent is the Federal Election Commission.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties before this Court, eight individual voters were plaintiffs below: Heidi Becker, Medea Benjamin, Phil Donahue, Mark Dunlea, Anne Goeke, Elizabeth Horton Scheff, James O'Keefe and Susan Sarandon. The court of appeals rejected their claims of standing, however, and the individual voter plaintiffs are not petitioners before this Court.

RULE 29.6 LISTING

Petitioner Nader 2000 Primary Committee, Inc. states that it is a non-profit corporation that has no parent corporation or stock owned by a publicly held company.

Petitioner Green Party USA states that it is a non-profit corporation that has no parent corporation or stock owned by a publicly held company.

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No. 01-

In The

Supreme Court of the United States

October Term, 2000

RALPH NADER, ***ET AL.***,

Petitioners,

v.

FEDERAL ELECTION COMMISSION,

Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ralph Nader ("Nader"), Nader 2000 Primary Committee, Inc., Association of State Green Parties and Green Party USA respectfully petition for a writ of certiorari to

review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as ***Becker*** v**.** ***FEC***, 230 F.3d 381 (1st Cir. 2000), and reprinted in Appendix A at 1a. The opinion of the district court is reported as ***Becker*** v**.** ***FEC***, 112 F. Supp. 2d 172 (D. Mass. 2000), and reprinted in Appendix B at 58a.

JURISDICTION

The court of appeals entered its judgment on November 1, 2000 (App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

2 U.S.C. § 431(9)

2 U.S.C. § 441b(a)

2 U.S.C. § 441b(b)(2)

11 C.F.R. § 110.13

11 C.F.R. § 114.4(f)

These provisions are reprinted in Appendix C at 93a.

STATEMENT OF THE CASE

Petitioners, a presidential candidate and his organizational supporters, sought judicial review of certain Federal Election Commission ("FEC")

regulations, claiming that they exceeded the agency's authority under the Federal Election Campaign Act ("FECA") and were distorting the 2000 campaign.[1] The district court rejected the FEC's jurisdictional challenges, but deferred to the agency's interpretation of the statute. The court of appeals affirmed.

A. The FEC's Debate Regulations.

For almost a century, Congress has sought to limit the influence of business corporations in federal elections. ***See United States*** **v.** ***Auto. Workers***, 352 U.S. 567, 575 (1957). In the FECA, Congress unambiguously barred contributions or expenditures by corporations and labor unions "in connection with" any federal election. 2 U.S.C. § 441b(a).

This suit asserts that the FEC exceeded its statutory authority under the FECA when it adopted regulations governing the staging and funding of candidate debates (the "Debate Regulations"). 11 C.F.R. §§ 110.13 and 114.4(f). These regulations allow business corporations to contribute unlimited amounts of money to fund nationally televised candidate debates that promote the presidential and vice-presidential campaigns of selected participants, so long as the

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[1] When they filed their complaint, the petitioners were joined by both committed and uncommitted voters. The courts below rejected the standing of the individual voters, and they are not petitioners in this Court.

debates are staged by a nonpartisan nonprofit organization.

The FEC's illegal regulations have permitted major corporations that have deep financial interests in federal legislative and regulatory affairs to sponsor presidential and vice-presidential debates showcasing the candidates of the two major political parties. These debates have played a central role in recent campaigns and have been used by the participating candidates to solicit votes from millions of voters. They serve as prime time advertisements for the candidates selected to participate in the debates.[2]

By allowing business corporations to sponsor these debates, the FEC's Debate Regulations have opened the spigot of impermissible corporate influence that Congress closed in the FECA. The FECA prohibits corporations from making any contribution or expenditure in connection with any federal election. 2 U.S.C. § 441b(a). Section 441b(b)(2) defines "contribution or expenditure" as used in § 441b(a) in broad terms to include "any direct or indirect payment ... or gift of money, or any

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[2] Transcripts of the debates held during the 2000 presidential election campaign can be found at www.debates.org/pages/debhis2000.html. Transcripts of debates from earlier presidential campaigns can also be found at this website. These transcripts show that the formats of all of these debates have provided for unrebutted solicitations of votes by each of the debate participants.

services, or anything of value ... to any candidate." Section 441b(b)(2) then articulates three narrow exceptions to this general rule which permit corporate funds to be used only for: (a) ***internal*** corporate communications on any subject; (b) nonpartisan registration and get-out-the-vote campaigns by a corporation ***aimed at its stockholders, and executive or administrative personnel and their families***; and (c) the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes. 2 U.S.C. § 441b(b)(2).

The FEC, however, created a "safe harbor" for corporate funding of candidate debates not found anywhere on the map drawn by Congress. The Debate Regulations allow a nonpartisan nonprofit corporation to stage candidate debates "us[ing] its own funds" or "accept[ing] funds donated by corporations or labor organizations." 11 C.F.R. §§ 110.13(a) and 114.4(f)(1). Completing the circle, the Debate Regulations permit business corporations to donate funds to nonprofit organizations qualified to stage debates under 11 C.F.R. § 110.13(a)(1). 11 C.F.R. § 114.4(f)(3). The FEC's regulations thus allow corporations to make illegal contributions to support political campaign activity at the core of the federal electoral process: presidential debates that promote the candidates of the two major parties and provide them with a nationwide forum for the solicitation of votes.

B. The Proceedings Below.

Ralph Nader, the leading third-party candidate for the Presidency in 2000, his campaign organization, and the national and state political party organizations supporting Mr. Nader's campaign brought this suit seeking to vindicate an essential precept of federal election law: that business corporations may not use their vast financial resources to tilt the electoral playing field. The complaint was styled as a petition for judicial review of agency action under the Administrative Procedure Act and invoked the district court's jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. § 706. The complaint alleged that the FEC's Debate Regulations should be set aside because the FEC has no power under the FECA to exempt corporate sponsorship of candidate debates from the statute's ban on corporate contributions and expenditures.

The complaint was filed on June 19, 2000 and swiftly followed by a motion for preliminary injunction. The FEC moved to dismiss on jurisdictional grounds. On September 1, 2000, the district court denied both the FEC's motion to dismiss and petitioners' motion for injunctive relief (App. 58a). On September 14, 2000, the district court entered final judgment. After expedited review, the court of appeals affirmed on November 1, 2000 (App. 1a).

A majority of the panel concluded that the district court had jurisdiction to review the FEC's regulations and that the petitioners had standing to seek judicial review because it was alleged that

corporate funding of the presidential debates harmed Nader's campaign (App.15a).[3] On the merits, the court of appeals acknowledged that, as Nader argued, "[i]nsofar as such debates have the primary effect of showcasing the candidacies of those selected to participate," it might be reasonable to view corporate funding of the debates "as contributing in effect to the candidacies of the participants" and, therefore, as prohibited by the FECA (App. 37a). The court of appeals nevertheless concluded that it should defer to the FEC's interpretation of the statute under ***Chevron USA, Inc.*** v. ***Natural Resources Defense Council, Inc.***, 467 U.S. 837 (1984) ("***Chevron***"), because, it found, the FECA does not express a clear Congressional intent to prohibit the corporate funding of debates and the FEC's Debate Regulations reflect a reasonable construction of the statute (App. 37a).

REASONS FOR GRANTING THE WRIT

As the First Circuit recognized, it is reasonable to view corporate funding of the debates as contributions to the selected candidates who are showcased by the debates (App. 37a). It is precisely for this reason that the court of appeals should have set aside the FEC's Debate Regulations as contrary to the FECA. Instead, the court of appeals misapplied ***Chevron***, found a gap in the FECA that does not exist, and gave the FEC discretion to create exemptions

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[3] Chief Judge Torruella would have affirmed for want of standing and mootness (App. 37a-38a).

from FECA prohibitions that Congress never intended. This case provides a timely opportunity to refine the principles governing deference to an agency's statutory interpretation and to address an important question of federal election law that has never been considered by this Court.

I. THE FIRST CIRCUIT'S DEFERENCE TO THE FEC'S STATUTORY INTERPRETATION CONFLICTS WITH DECISIONS BY THE D.C. CIRCUIT APPLYING *CHEVRON*.

In ***Chevron***, 467 U.S. 837 (1984) ("***Chevron***"), this Court held that courts should defer to an agency's reasonable interpretation of an ambiguous statute. 467 U.S. at 843. ***Chevron*** deference is not triggered, however, when Congress has spoken to the "precise question at issue," for then the clearly expressed intent of Congress is controlling. ***Id.*** at 842. In upholding the FEC's Debate Regulations, the court of appeals misapprehended its role and gave the FEC rulemaking authority never granted by Congress.

Congress plainly spoke to the precise question of whether corporations may sponsor federal candidate debates when it barred ***all*** corporate contributions and expenditures in connection with federal elections, with limited exceptions that do not include the staging of candidate debates. The FECA provides that it is generally unlawful for "any corporation … to make a contribution or expenditure in connection with any [federal] election." 2 U.S.C. § 441b(a). When it imposed this broad ban, Congress provided only three narrow exceptions to its rule

for the ***internal*** use of corporate funds. ***See*** 2 U.S.C. § 441b(b)(2). There is nothing in the language of § 441b(b)(2) to suggest that these exceptions are merely illustrative and that the FEC (or the courts) may expand them to permit the use of corporate funds to sponsor televised debates designed to reach millions of voters.

Neither the court of appeals nor the FEC ever pointed to any language in the FECA (or in its legislative history) that grants the FEC power to exempt the sponsorship of candidate debates from the general ban on the use of corporate funds in connection with a federal election. Instead, the court of appeals found that Congressional ***silence*** on the question of debates was sufficient to create a regulatory gap that the FEC could fill with its regulations. In the context of a broad prohibitory statute, this approach cannot be squared with ***Chevron***.

Congress could not, and did not need to, itemize all of the possible uses of corporate funds that it intended to prohibit. Instead, consistent with long-standing federal policy, Congress prohibited ***all*** contributions and expenditures of corporate funds, with three narrowly drawn exceptions that have nothing to do with staging public debates. 2 U.S.C. § 441b(b)(2). To say that, as a result, the FECA has a "gap" on this issue, and therefore that the FEC is entitled to deference when it legislates what it proclaims to be a "similar" exception for corporate-sponsored

candidate debates, takes ***Chevron*** well beyond its breaking point.[4]

The First Circuit's approach to the review of an agency's statutory interpretation is in conflict with a number of recent decisions by the D.C. Circuit that illustrate the proper application of ***Chevron***. The D.C. Circuit has held repeatedly that an agency may not read Congressional silence as a grant of authority. ***See, e.g.***, ***American Bus Ass'n*** v. ***Slater***, 231 F.3d 1 (D.C. Cir. 2000); ***Backcountry Against Dumps*** v. ***EPA***, 100 F.3d 147 (D.C. Cir. 1996); ***Ethyl Corp***. v. ***EPA***, 51 F.3d 1053 (D.C. Cir. 1995).

In ***American Bus***, the D.C. Circuit reviewed a rule promulgated by the Secretary of Transportation under the Americans with

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[4] In its rulemaking on the Debate Regulations and in the courts below, the FEC never suggested that corporate sponsorship of candidate debates is permissible under FECA because the payments are not indirect or direct contributions to the participating candidates or because the staging of debates is not in connection with an election. In fact, the FEC has acknowledged that absent the "safe harbor" created by its regulations, corporate donations to debate staging organized would be prohibited by the FECA. Rather, it has been the FEC's own position that the Debate Regulations were authorized by the FECA because the statute is ambiguous about the use of corporate funds for public "get-out-the-vote activities" contemplated by 2 U.S.C § 431(9)(B)(ii) and, according to the FEC, candidate debates are similar to such activities.

Disabilities Act ("ADA") imposing financial penalties on bus companies that did not meet prescribed standards for serving disabled passengers. 231 F.3d at 3. Relying on ***Chevron***, the district court had accepted the Secretary's argument that ambiguity existed because "[t]he plain language [of the ADA] indicates that Congress did not explicitly forbid the Secretary from including a compensation mechanism in the [busing] accessibility regulations." ***Id.*** at 4. The D.C. Circuit, however, overturned the district court's improper application of ***Chevron*** and ruled that the Secretary had exceeded the scope of his powers by establishing remedies that were not authorized in the ADA. ***Id***. at 2, 6.

In his concurring opinion in ***American Bus***, Judge Sentelle summed up the problem with the Secretary's approach: "Congress's failure to grant an agency a given power is not an ambiguity as to whether the power has, in fact, been granted. On the contrary, and as this Court persistently has recognized, a statutory silence on the granting of a power is a ***denial*** of that power to the agency." 231 F.3d at 8 (emphasis in original).

In ***Backcountry Against Dumps***, the D.C. Circuit addressed the EPA's argument that because a provision of the Resource Conservation and Recovery Act giving EPA authority to approve solid waste permitting plans submitted by states did not explicitly address its application to Indian tribes, the EPA was entitled to ***Chevron*** deference on the issue. 100 F.3d at 148, 150. The EPA contended that the courts should defer to the agency's interpretation that the statute also applies to plans submitted by Indian tribes

because RCRA says nothing about this precise issue.

In rejecting the EPA's argument, the D.C. Circuit held that the analysis should begin and end with the first step of ***Chevron***. ***Backcountry***, 100 F.3d at 150. The D.C. Circuit rejected the EPA's claim that ***Chevron*** deference was triggered by legislative silence:

> To suggest, as the [agency] effectively does, that ***Chevron*** step two is implicated any time a statute does not expressly negate the existence of a claimed administrative power... is both flatly unfaithful to the principles of administrative law... and refuted by precedent.... [W]ere courts to ***presume*** a delegation of power absent an express ***withholding*** of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with ***Chevron*** and quite likely with the Constitution as well.

Backcountry, 100 F.3d at 151, ***quoting Ethyl Corp.*** v. ***EPA***, 51 F.3d at 1060 (emphasis in original).[5]

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[5] The constitutional issue to which the D.C. Circuit alludes arises under the non-delegation doctrine. By interpreting the FECA to give the FEC discretion to legislate its own exemptions from the general prohibition on corporate expenditures in connection with federal elections, the court of appeals raised a constitutional question that

The First Circuit, however, followed the path the D.C. Circuit has repudiated. The court of appeals should have found that Congressional silence on the issue gave the FEC no authority to adopt regulations permitting corporate sponsorship of candidate debates. This Court should grant certiorari to resolve the split between the First Circuit and the D.C. Circuit, to clarify that ***Chevron*** deference is not triggered by legislative silence, and to declare the FEC's Debate Regulations to be in excess of its authority.

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should be avoided. ***See American Trucking Ass'ns, Inc.*** **v. *EPA***, 175 F.3d 1027, 1033, ***reh'g denied in part,*** 195 F.3d 4 (D.C. Cir. 1999), ***cert. granted, Browner*** v**. *American Trucking Ass'ns, Inc.***, 120 S.Ct. 2003 (2000) (no "intelligible principle" for line-drawing; reliance on speculative reasoning). Presumably because Congress did not intend to delegate legislative authority to the FEC, the FECA provides no guidance to the FEC about the principles that should govern the creation of new regulatory "safe harbors" for corporate expenditures. Because the FEC has not claimed, and could not reasonably assert, that its Debate Regulations are authorized by the plain terms of the FECA, the court of appeals' decision impermissibly confers legislative powers upon the agency.

II. THE FIRST CIRCUIT'S JUDGMENT THAT THE FEC'S REGULATIONS REASONABLY IMPLEMENT THE FECA CONFLICTS WITH LONG-STANDING SUPREME COURT PRECEDENT LIMITING CORPORATE PARTICIPATION IN ELECTIONS.

Having concluded that Congressional silence rendered the FECA ambiguous with respect to corporate sponsorship of candidate debates, the court of appeals moved to the second stage of ***Chevron*** and determined that the FEC's Debate Regulations were neither "unreasonable, nor . . . inconsistent with the statute" (App. 36a). This finding anoints the FEC with authority to dismantle an essential precept of federal campaign finance regulation: the prohibition of corporate sponsored activities designed to advance candidate campaigns.

The court of appeals offered four reasons why the Debate Regulations reflect a reasonable interpretation of the FECA. None of these reasons bears up under scrutiny. First, the court of appeals endorsed the FEC's claim that the "'educational purposes' of a debate staged by such nonpartisan organizations 'is similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns'" (App. 35a). Second, the court of appeals accepted the FEC's argument that "debates are designed to educate and inform voters rather than to influence the nomination or election" of particular candidates (***id***.). Third, the court of appeals determined that the Debate Regulations are "in accord with Congressional expectations as expressed in the legislative history" (***id***). Lastly, the court of

appeals found that "sponsoring a nonpartisan debate [is] not 'active electioneering'" (App. 36a).

All of these claimed justifications for the FEC's Debates Regulations fail for the same reason: they misconceive of the role the debates play in campaigns for federal office. The presidential and vice-presidential debates provide a nationally televised forum for selected candidates ***to solicit votes*** from the entire electorate. ***See*** n.2, ***supra***. They are viewed by the participants, and accepted by the voting public, as battles for voter support, and they represent the single most important opportunity for the solicitation of votes during the long presidential campaign.

This is why the Debate Regulations cannot reasonably be viewed as consistent with the purpose of FECA. The prohibition of corporate contributions in connection with campaigns for federal office is a major pillar of FECA's statutory protection of the integrity of the electoral system. ***See Auto. Workers,*** 352 U.S. at 570. When reviewing both the FECA and analogous state laws, the Supreme Court has consistently recognized "the compelling governmental interest in preventing corruption" that supports "the restriction of the influence of political war chests funneled through the corporate form." ***Austin*** v. ***Michigan Chamber of Commerce***, 494 U.S. 652, 659 (1990), ***quoting FEC*** v. ***National Conservative Political Action Committee***, 470 U.S. 480, 500-501 (1985); ***see also FEC*** v. ***National Right to Work Committee,*** 459 U.S. 197, 209-10 (1982) (FECA "reflects a legislative judgment that the special characteristics of the corporate structure require

particularly careful regulation"). By permitting limitless corporate funding of candidate debates, the FEC's Debate Regulations clearly violate this bedrock principle.

This Court has repeatedly observed that "state-created advantages" – such as "limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets" – "not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use 'resources amassed in the economic marketplace' to obtain 'an unfair advantage in the political marketplace.'" ***Austin***, 494 U.S. at 658-59, ***quoting FEC*** v. ***Massachusetts Citizens for Life, Inc.***, 479 U.S. 238, 257 (1986) ("***MCFL***"); ***see also National Right to Work Committee***, 459 U.S. at 207-210; ***Auto. Workers***, 352 U.S. at 570-584. The Court has explained why the political advantage of corporations is unfair:

> The resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

MCFL, 479 U.S. at 258.

In carving out an extremely narrow exception to the prohibitions on corporate funding carried forward by the FECA in ***MCFL***, the Court enumerated three "essential" characteristics that a nonprofit corporation must possess in order to be exempted from § 441b's ban on corporate expenditures. ***MCFL***, 479 U.S. at 263-64 (formed to promote political ideas; without shareholders or members with claims to corporate assets; and independent from business interests); ***see also Austin***, 494 U.S. at 661-62. The nonprofit "staging" organizations authorized by the Debate Regulations lack the most important of these essential characteristics, namely "independence from the influence of business corporations." ***Austin***, 494 U.S. at 664. The Court allowed partisan spending in ***MCFL,*** only because the nonprofit organization did not accept corporate contributions and therefore could not "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." ***MCFL***, 479 U.S. at 264.

In striking contrast, the FEC's Debate Regulations allow business corporations to circumvent the prohibitions of § 441b by "funneling money through" debate staging organizations that "serve as a conduit for corporate political spending." ***Austin***, 494 U.S. at 664. Both the language and purpose of the FECA thus contradict the court of appeals' decision. The Court should grant certiorari to correct the First Circuit's error on this critical question of federal election law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 30, 2001

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