

**ORAL ARGUMENT NOT YET SCHEDULED**

No. 19-5117-cv

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA**

LEVEL THE PLAYING FIELD, et al.,

Plaintiffs-Appellants,

vs.

FEDERAL ELECTION COMMISSION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**AMICUS CURIAE BRIEF OF FAIRVOTE AND THE COALITION FOR  
FREE AND OPEN ELECTIONS IN SUPPORT OF PLAINTIFFS-  
APPELLANTS AND IN SUPPORT OF REVERSAL**

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AMICUS CURIAE BRIEF OF FAIRVOTE AND THE COALITION FOR FREE AND OPEN ELECTIONS IN SUPPORT OF PLAINTIFFS-  
APPELLANTS AND IN SUPPORT OF REVERSAL

## **CORPORATE DISCLOSURE STATEMENT**

Amicus Curiae is a non-profit organization. It has no parent corporation and does not issue stock.

**CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND  
RELATED CASES**

**A. Parties and Amici**

Pursuant to Circuit Rule 28(a)(1)(A), Amicus Curiae certify that the parties and amici curiae in the case are as follows: Plaintiffs-Appellants Level the Playing Field, Dr. Peter Ackerman, Green Party of the United States, Libertarian National Committee, Inc.; Defendant-Appellee is the Federal Elections Commission; and Amici FairVote, Coalition for Free and Open Elections, Independent Voter Project, Norman R. Augustine, Dennis C. Blair, Scott Blackmun, Mary McInnis Boise, W. Bowman Cutter, James J. Fishman, Carla A. Hills, Daniel L. Kurtz, Vali R. Nasr, Nancy E. Roman, James Stavridis, Joseph Robert Kerry, Joseph I. Lieberman, Hon. Clarine N. Riddle, Hon. David M. Walker, Hon. Christine Todd Whitman, and the Commission on Presidential Debates.

**B. Rulings Under Review**

The rulings under review, each entered by Hon. Tanya S. Chutkan, are (1) the Order, dated March 31, 2019 (Docket No. 111), denying Appellants' motion for summary judgment, denying Appellants' motion to supplement the record, granting the FEC's motion for summary judgment, and granting in part and denying in part the FEC's motion to strike; and (2) the Memorandum Opinion,

dated March 31, 2019 (Docket No. 110) addressing these motions, which appears at 381 F. Supp. 3d 78.

### **C. No Related Cases**

This case has not previously been before this Court or any other court except for the district court. Counsel for Amicus is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

## TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	2
CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES	3
TABLE OF CONTENTS	5
TABLE OF AUTHORITIES	6
GLOSSARY OF ABBREVIATIONS	10
STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE	11
INTRODUCTION AND SUMMARY OF ARGUMENT	14
ARGUMENT	15
I. POLLING DATA IS INCREASINGLY UNRELIABLE	15
II. THE CPD INCLUSION CRITERIA ARE ABNORMALLY HARSH	22
CONCLUSION	26
CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT	28
CERTIFICATE OF SERVICE	29

## TABLE OF AUTHORITIES

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*Balsam v. Guadagno*, No. 15-39 (U.S. 2015), Brief for FairVote and the Center for Competitive Democracy as Amici Curiae in Support of Neither Party 11

*Gill v. Whitford*, No. 16-1161 (U.S. 2017), Brief for FairVote and One Nation One Vote as Amici Curiae in Support of Appellees 11

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ARIZ. REV. STAT. ANN. § 16-956(A)(2) (2011) 24

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Fed. R. App. P. 32(a)(7)(B)(i) 28

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**GLOSSARY OF ABBREVIATIONS**

CPD	Commission on Presidential Debates
FEC	Federal Elections Commission
COFOE	Coalition for Free and Open Elections

## STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

FairVote is a 501(c)(3) non-profit organization incorporated in the District of Columbia, whose mission is to advocate for fairer representation in government through changes to the election process. FairVote's goal is to promote the voices and views of every voter, grounded in evidence that the use of a more fair election process will help create a government that is more representative and effective. FairVote encourages public officials, judges, and the public to explore fairer and more inclusive election methods, including through litigation when appropriate.

FairVote has previously filed *amicus curiae* briefs in a variety of cases, including cases regarding voter choice in general elections, the role of primary elections, and in cases brought under the Voting Rights Act. *See* Brief for FairVote as Amicus Curiae in support of Appellees, *Higginson v. Becerra*, No. 19-55275 (9th Cir. 2019); Brief for FairVote and One Nation One Vote as Amici Curiae in Support of Appellees, *Gill v. Whitford*, No. 16-1161 (U.S. 2017); Brief for FairVote and the Center for Competitive Democracy as Amici Curiae in Support of Neither Party, *Rubin v. Padilla*, No. 15-135 (U.S. 2015); Brief for FairVote and the Center for Competitive Democracy as Amici Curiae in Support of Neither Party, *Balsam v. Guadagno*, No. 15-39 (U.S. 2015). FairVote previously participated as *amicus curiae* in this case, at an earlier stage in litigation. Brief for FairVote as

AMICUS CURIAE BRIEF OF FAIRVOTE AND THE COALITION FOR FREE AND OPEN ELECTIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND IN SUPPORT OF REVERSAL

Amicus Curiae, *Level the Playing Field v. FEC*, No. 1:15-cv-01397 (TSC), available at <https://fairvote.app.box.com/file/61453602489>.

*Amicus* has published articles and comments advocating for and critically analyzing reforms to debate qualification rules. See, e.g., Robert Richie, Re: Petition for Rulemaking from Level the Playing Field to Revise and Amend 11 C.F.R. § 110.13(c) (Dec. 15, 2014), available at <http://www.shapiroarato.com/wp-content/uploads/2014/12/FairVote-Comment-12.15.14.pdf>. Because of its familiarity with the benefits and drawbacks of debate rules, independent and third party participation in debates, and debate rule reforms, FairVote is particularly well-suited to expound on this issue.

The Coalition for Free and Open Elections (COFOE) is a nonprofit advocacy organization dedicated to the idea that full and fair access to the electoral process is central to democracy. COFOE is a group of independents and representatives from alternative parties. Since the 1980s, the group has supported efforts to remove barriers that prevent non-major-party candidates and would-be voters from fully participating in the political process.

The third-party candidates and voters that make up COFOE's constituency have an interest in the questions presented, because participation in presidential

debates is an essential way that third-party and independent candidates participate in elections.

Amici received consent from Plaintiffs-Appellants to file on August 31, 2019 and from Defendant-Appellee on September 19, 2019. Amici certify that (1) no counsel for a party authored this brief in whole or in part, and that (2) no person other than the amici curiae, their members (if applicable), or their counsel contributed money that was intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

FairVote agrees with the arguments made by Plaintiffs-Appellants, and files separately to expand on the important factual background that goes to the heart of the legal questions they present.

The Federal Elections Commission (“FEC”) acted arbitrarily, capriciously and contrary to law by approving of the Commission on Presidential Debates’ (“CPD”) exclusive reliance on polling as a means of assessing public support.

Polling as a method of assessing public support is increasingly unreliable.

Traditional polling methods relied on calling landline telephones for a sample of likely voters, and then extrapolating from that to estimate public support. These methods have become dated in a number of ways, leading to polls becoming more likely to fail, sometimes spectacularly, in correctly predicting election outcomes. This makes their use as the sole substantive exclusionary criterion for inclusion in debates for the nation’s highest executive office unacceptable, especially when compounded with the high polling threshold required for inclusion.

Further, the exclusive use of five selected polls with a minimum 15% threshold for inclusion is abnormally harsh. Both in the states and in other nations, debate inclusion rules vary, but are generally far less exclusive than those used by the CPD. Debates may be conducted by non-profit organizations operating in the

public interest, by the media directly, or by a public agency, and they may follow one set of rules or vary their rules as the election season progresses. In any case, a rule effectively limiting the debates to only two candidates is more limiting than either the state or international norms.

## **ARGUMENT**

FairVote submits this brief to highlight important factual background which tends to suggest that the rules adopted by the CPD cannot be justified by an interest in orderly debates among serious candidates, but rather suggest an interest in preventing competition from those outside the two major parties in the general election. First, polling is too unreliable to be used as an exclusive means of testing for public support. Second, the debate inclusion rules used by the CPD are abnormal, and are out of step with recommended practices for both debates for governor in states and debates for public office in other democratic nations.

### **I. POLLING DATA IS INCREASINGLY UNRELIABLE**

The way the CPD uses polls to determine debate eligibility fails to account for the limitations of polling data. Although polling data can be useful as one line of evidence for public support, it is insufficiently reliable to be used as the sole determinant for debate inclusion.

Polling in elections relies on asking representative samples of people their answers to various questions and then making inferences from those answers about the opinions and behaviors of the voting public in general. *See generally, What Is Public Opinion Polling and Why Is It Important?*, GALLUP WORLD POLL (2007), available at

[http://media.gallup.com/muslimwestfacts/PDF/PollingAndHowToUseItR1drevEN](http://media.gallup.com/muslimwestfacts/PDF/PollingAndHowToUseItR1drevENG.pdf)

[G.pdf](http://media.gallup.com/muslimwestfacts/PDF/PollingAndHowToUseItR1drevENG.pdf). For example, a poll may ask a “likely voter” for whom they would vote

were the election held today. *See, e.g., White House 2016: General Election*,

POLLINGREPORT.COM, <http://www.pollingreport.com/wh16gen.htm> (last visited

April 11, 2016) (summarizing various polls that included who participants would

vote for for president “if the election were held today”). Then, the polling agency

would weigh respondents according to characteristics such as age, education, race

and income so that their sample reflects, as closely as possible, the population in

general. *Polling Fundamentals - Total Survey Error*, ROPER CENTER, CORNELL

UNIVERSITY, [http://ropercenter.cornell.edu/support/polling-fundamentals-total-](http://ropercenter.cornell.edu/support/polling-fundamentals-total-survey-error/)

[survey-error/](http://ropercenter.cornell.edu/support/polling-fundamentals-total-survey-error/) (last visited, April 11, 2016). Using these weights, responses are then

aggregated to produce estimates of who likely voters actually would vote for, were

the election held today, as a means of estimating how actual voters will actually

vote when the election is held. *Id.* These estimates are just that: estimates. They



always have a degree of uncertainty and a margin of error. Additionally, weaknesses in polling design and execution tend to increase the error associated with polling figures.

One common problem today is that the ability to draw a representative sample can be impeded by a technological or informational barrier. For example, polls historically relied on calling people on their home phones. *See generally*, Michael W. Link, et. al., *Reaching the U.S. Cell Phone Generation*, 71 PUBLIC OPIN. Q. 814 (2007). However, increasingly people rely on mobile phones, with 40 percent of adults no longer owning a landline at all. Jill Lepore, *Politics and the New Machine*, THE NEW YORKER, Nov. 16, 2015, available at <http://www.newyorker.com/magazine/2015/11/16/politics-and-the-new-machine>.

Polling agencies have attempted to compensate for this, but either prospective pollees simply do not answer their phones or the lists are compiled from skewed or otherwise unreliable sources, given the absence of the equivalent of a phone book for mobile phones and a federal ban on autodialing to cell phones. *Id.*; Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (1991).

Even with a perfectly representative sample, polling estimates of support have error margins, often as high as 5 to 10 percentage points. *Polling Fundamentals - Total Survey Error, supra*. When compounded with these sources

of unrepresentativeness in sampling, candidates polling below 15 percent may actually have as much as 25 percent support, certainly high enough to consider them viable candidates with a viewpoint the voting public deserves to hear in debates.

Inaccurate polls can clash with actual voting results in spectacular ways, eroding public confidence in their use. This is particularly true today, given the outcome of the 2016 presidential election compared to the predictions being made by analysts relying principally on polls. There exists no shortage of media pieces bemoaning how inaccurate such polls were. *E.g.*, Nate Cohn, *A 2016 Review: Why Key State Polls Were Wrong About Trump*, New York Times, May 31, 2017, <https://www.nytimes.com/2017/05/31/upshot/a-2016-review-why-key-state-polls-were-wrong-about-trump.html>; Danielle Kurtzleben, *4 Possible Reasons The Polls Got It So Wrong This Year*, NPR, <https://www.npr.org/2016/11/14/502014643/4-possible-reasons-the-polls-got-it-so-wrong-this-year>; Andrew Mercer, Claudia Deane and Kyley McGeeney, *Why 2016 election polls missed their mark*, Pew Research Center, <https://www.pewresearch.org/fact-tank/2016/11/09/why-2016-election-polls-missed-their-mark/>.

Signs of this unreliability had shown up in the 2016 primary campaign, and demonstrated the weaknesses of polling as a means of identifying accurate levels

of support. In March of 2016, for example, Bernie Sanders outperformed his polling by over 20 percentage points in the Michigan Democratic primary. Carl Bialik, *Why the Polls Missed Bernie Sanders' Michigan Upset*, FIVETHIRTYEIGHT, Mar. 9, 2016, <http://fivethirtyeight.com/features/why-the-polls-missed-bernie-sanders-michigan-upset/>. That upset demonstrated many of the ways polling data can fail to reflect reality. The Michigan polls did not sufficiently correct for their lack of young voters, who disproportionately favored Sanders, even while it overcompensated in attempting to correct for responses from African Americans, a population previously supporting Clinton at higher rates than it did in Michigan. *Id.* That particular example was an outlier, but it serves as an example of how bad errors can be, even when multiple polls by multiple polling agencies are used.

Reliance on polling in the 2012 presidential general election was also misplaced. Polling showed a near-tie between Mitt Romney and Barack Obama, with some—including Gallup—predicting that Mitt Romney would win. *The problem with polls*, THE WEEK, April 10, 2016, <http://theweek.com/articles/617109/problem-polls>. In fact, the president was re-elected by a nearly four percentage point margin, amounting to some 5 million votes. *Id.*

These flaws are likely to erode public confidence in the exclusive use of polling as a metric of public support, especially as reports continue to issue from popular periodicals highlighting them. *E.g.* Cliff Zukin, *What's the Matter With Polling?*, N.Y. TIMES, June 20, 2015, <http://www.nytimes.com/2015/06/21/opinion/sunday/whats-the-matter-with-polling.html>; Michael Barone, *Why Political Polls Are So Often Wrong*, The Wall Street Journal, Nov. 11, 2015, <http://www.wsj.com/articles/why-political-polls-are-so-often-wrong-1447285797>.

As Plaintiffs demonstrate in their brief, the way the CPD uses polling data to determine inclusion in the presidential general election debates virtually guarantees that only two candidates will qualify. No candidate who did not run in the Democratic or Republican primary has ever met the 15 percent threshold in the general election—not even Ross Perot, who participated in the 1992 general election debates before that threshold was instituted. That fact, combined with the unreliability of polls described here, creates a serious risk of unjustifiably excluding one or more serious and potentially viable presidential candidates from the debates.

For example, if a 15 percent threshold were applied to the first Democratic primary debates in June, 2019, only Joe Biden and Bernie Sanders—the two

candidates with the greatest name recognition—would have qualified. *See Politico, Democratic primary polls: Who's ahead in the 2020 race?*,

<https://www.politico.com/2020-election/democratic-presidential-candidates/polls/>

(setting the date to the week ending June 23, 2019). Such a result would have not only excluded several high profile candidates, including every woman candidate and every person of color, it also would have excluded the candidate the most recent polls identify as the likely frontrunner, Elizabeth Warren. *See Andrew Prokop and Christina Animashaun, Elizabeth Warren leads Joe Biden in ranked-choice poll*, Vox, Sep. 12, 2019, <https://www.vox.com/2019/9/12/20860985/poll-democratic-primary-ranked-choice-warren-biden>.

When candidates for the Republican nomination for president in 2016 began participating in debates, only Donald Trump and Ben Carson polled higher than 15 percent on average, with Marco Rubio in third polling at about 10 percent on average. Dan Balz, *The debate over debates: Why should polls pick winners and losers?*, THE WASHINGTON POST, Nov. 7, 2015,

[https://www.washingtonpost.com/politics/the-debate-over-debates-why-should-polls-pick-winners-and-losers/2015/11/07/1e107b86-84d7-11e5-9afb-](https://www.washingtonpost.com/politics/the-debate-over-debates-why-should-polls-pick-winners-and-losers/2015/11/07/1e107b86-84d7-11e5-9afb-0c971f713d0c_story.html)

[0c971f713d0c\\_story.html](https://www.washingtonpost.com/politics/the-debate-over-debates-why-should-polls-pick-winners-and-losers/2015/11/07/1e107b86-84d7-11e5-9afb-0c971f713d0c_story.html). This demonstrates how a large field of serious

candidates can split polling totals, causing nearly every candidate to apparently

poll poorly. Under those circumstances, candidates invited to debate and candidates excluded may both be well within the margin of error of the poll from each other, effectively making the exclusions arbitrary. In the Republican primary debates, it meant that governors of New York, Louisiana, and Virginia never had a chance to present their case to Republican primary voters; in a general election to which the 15 percent threshold applies, it means the loss of important perspectives on the future of the country.

## II. THE CPD INCLUSION CRITERIA ARE ABNORMALLY HARSH

The degree to which the CPD inclusion rules harshly exclude candidates who might otherwise contribute meaningfully to the debate can be seen in how out of step those rules are with recognized best practices in debates for the office of governor in states and in debates for public office in other nations.

In states, debates are often held by nonpartisan public interest organizations like the League of Women Voters, who also conducted presidential debates prior to the two major parties creating the CPD in 1987. *See*, Renee Davidson, *4 Reasons You Should Watch a Candidate Debate*, LEAGUE OF WOMEN VOTERS, Oct. 7, 2014, <http://lwv.org/blog/4-reasons-you-should-watch-candidate-debate>; *The League of Women Voters and Candidate Debates: A Changing Relationship*, League of Women Voters, <http://lwv.org/content/league-women-voters-and-candidate->

[debates-changing-relationship](#) (last visited April 11, 2016). The media also sponsors debates directly, sometimes in coordination with a particular venue. *See, e.g.,* Paul Merrill, *Maine governor hopefuls face off in first debate*, WMTW NEWS 8, Oct. 8, 2014, <http://www.wmtw.com/news/maine-governor-hopefuls-face-off-in-first-debate/29007466> (describing a gubernatorial debate between three candidates held by a media corporation and noting the plan to hold a second).

When the League of Women Voters sponsors a debate, it typically invites every candidate on the ballot, and sometimes includes write-in candidates as well. *See, e.g., Guidelines for Debates and Forums*, LEAGUE OF WOMEN VOTERS WISCONSIN, July, 2014, <http://www.lwwwi.org/Members/GuidelinesforDebates.aspx>; *League of Women Voters (LWV) Candidate Forum Guidelines*, League of Women Voters San Diego, [http://www.lwvsandiego.org/files/CANDIDATE\\_FORUM\\_GUIDELINES.pdf](http://www.lwvsandiego.org/files/CANDIDATE_FORUM_GUIDELINES.pdf) (last visited April 11, 2016) (emphasizing to “[i]nvite all candidates”). When media sponsors debates, they adopt their own inclusion rules, presumably to maximize the newsworthiness of the event. *See, e.g.,* Lepore, *supra* (“It would make better television” to include Carly Fiorina in an early debate among Republican candidates, despite her relatively low polling numbers at the time). When a state agency sponsors debates, it ordinarily uses rules more inclusive than

those adopted by the CPD. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-956(A)(2) (2011) (instructing the Arizona Clean Elections Commission to sponsor debates and invite all candidates).

Internationally, debates are also usually the domain of the media, and they typically invite more than two candidates for presidential elections. *See Parties and Candidates*, THE ACE ENCYCLOPAEDIA, ACE, <http://aceproject.org/ace-en/topics/pc/pcc/pcc07> (last visited April 11, 2016); *see also Television debates*, ACE, <http://aceproject.org/epic-en/CDTable?view=country&question=ME059> (last visited April 11, 2016) (table listing countries along with comments on how televised debates are conducted, if at all, in that country). When countries do adopt public regulations regarding debate inclusion, they use standards more inclusive than those of the CPD. For example, Canada permits participation by any candidate from a political party with representation in the House of Commons (five parties) with a consistent polling threshold of only 5 percent. Nick Anstead, *We need to look at other parliamentary democracies for ideas about how to run televised debates*, MEDIA POLICY PROJECT BLOG, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, <http://blogs.lse.ac.uk/mediapolicyproject/2014/10/15/we-need-to-look-at-other->



[parliamentary-democracies-for-ideas-about-how-to-run-televiased-debates/](#) (last visited April 11, 2016).

Germany follows a similar rule, allowing participation (in the first round of debates) by representatives of parties with a presence in the Bundestag, which amounts to a 5 percent threshold as well. *Id.* Germany's practice also highlights another way of balancing the goals of inclusion with an orderly and informative process common in other nations: they narrow the inclusion rules over a series of debates. Nick Anstead, *Televiased Debates in Parliamentary Democracies*, MEDIA POLICY PROJECT, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, 10–11 (January, 2015). In the first round, representatives of any party in the Bundestag may participate, but the second round is limited to only three candidates. *Id.* In the U.S., debates also go from more inclusionary (in the primaries) to exclusionary (in the general election), but the primary debates are no exception for inclusion general election debates, when nominees from different political parties and independent candidates face each other before a national audience.

In fashioning its rules prior to the 2015 election season, the United Kingdom considered the examples of countries like Canada and Germany to adopt a best practice. *Id.* at 13. It ultimately included seven candidates in its national debate in

April, 2015. *See, Leaders' debate: ICM/Guardian poll puts Miliband ahead - just,* theguardian, April 2, 2015,

<http://www.theguardian.com/politics/blog/live/2015/apr/02/leaders-debate->

[cameron-and-miliband-go-head-to-head-with-other-parties-live](http://www.theguardian.com/politics/blog/live/2015/apr/02/leaders-debate-cameron-and-miliband-go-head-to-head-with-other-parties-live). More inclusive

debate rules helped to change the conversation in the United Kingdom, allowing the Liberal Democrats to rise in prominence. A similar phenomenon had occurred in Canada; the New Democratic Party, traditionally a third party, rose to second-place in 2011; and in 2015, the Liberal Party went from third place to first place.

This is not to suggest that the U.S. should be bound by international norms. Instead, it is evidence that CPD has adopted a rule that is not justified by ordinary debate inclusion rules, such as orderly debates among serious candidates with viewpoints reflective of public opinion. Rather, it better reflects a rule designed to prevent competition. *See, Larry Diamond, Ending the Presidential-Debate Duopoly*, THE ATLANTIC, May 8, 2015,

<http://www.theatlantic.com/politics/archive/2015/05/ending-the-presidential-debate-duopoly/392480/>.

## CONCLUSION

As Plaintiffs-Appellants rightfully point out, this issue goes directly to the question of the future of American democracy. Evidence suggests that the CPD

harshly excludes candidates to the extent that not only are many important viewpoints unheard in presidential debates, but viable candidates may fail to qualify or choose not to run in the first place because they would fail to qualify. The unreliability of polls is such evidence, suggesting that the CPD is less interested in testing for public support than they are with creating an artificial barrier. Similarly, the degree to which the rule is abnormally harsh suggests that it is unjustifiable by the interest in an orderly debate.

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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