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September 10, 2014

VIA FEDEX

Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

MUR # 6869

To Whom It May Concern:

We represent Level the Playing Field, a nonpartisan, nonprofit corporation that is not affiliated with any candidate or candidate committee, and Peter Ackerman. On their behalf, we hereby submit the enclosed Complaint against the Commission on Presidential Debates and its directors. With this letter, please find one original and three copies of each the Complaint and its two accompanying volumes of exhibits, as well as a DVD containing electronic copies of these documents.

Among other evidence, the Complaint relies on expert reports from Dr. Clifford Young, head of U.S. public affairs at the polling firm Ipsos, and Douglas Schoen, veteran pollster and campaign strategist. These reports, along with other supporting evidence, are submitted as exhibits to the Complaint. The data and authorities that Dr. Young and Mr. Schoen cite and rely upon in their reports are not submitted herewith, but are available for the Commission's review and can be provided upon request. Additionally, certain exhibits to the Complaint have been excerpted to present only the pertinent material. Complete copies of any exhibit can also be provided upon request.

Please contact us if the Commission has any questions or needs additional information.

We hope that the Commission will move expeditiously to address the matters in the Complaint, which have significant and far-reaching implications for the 2016 presidential election campaign, which will soon be underway.

Sincerely,

Alexandra A.E. Shapiro

Encls.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)
	)
Commission on Presidential Debates,	)
Frank Fahrenkopf, Jr., Michael D. McCurry,	)
Howard G. Buffett, John C. Danforth,	)
John Griffen, Antonia Hernandez,	)
John I. Jenkins, Newton N. Minow,	)
Richard D. Parsons, Dorothy Ridings,	)
Alan K. Simpson, and Janet Brown	)

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COMPLAINT

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PRELIMINARY STATEMENT

The American people feel the two-party system has failed them. Sixty-two percent of Americans do not think the federal government has the consent of the governed,[1] and 86% feel the political system is broken and does not serve the interests of the American people.[2] Eighty-one percent believe that it is important to have independent candidates run for office, and 65% say they wish they had the option to vote for an independent candidate in a U.S. presidential election.[3]

At the same time, more than two-thirds of Americans do not believe that the independent candidate they would prefer can ever emerge because our election system is rigged to favor Democratic and Republican incumbents,[4] and, unfortunately, they are right. The Democratic and Republican parties have created a host of anti-democratic election rules that deprive Americans of their ability to elect the leaders they prefer – independent candidates who are unaffiliated with the two major parties and the extreme viewpoints and special interest groups that dominate those parties. Through numerous anti-competitive measures ranging from gerrymandered districts that protect incumbents, to laws that make independent candidacies harder to mount, such as laws prohibiting losing primary candidates from running in a general election, to campaign finance rules that give major parties enormous fundraising advantages, the Democratic and Republican parties have prevented Americans from electing the leaders they want and deserve.

The Commission on Presidential Debates ("CPD") is a cornerstone feature of this Democratic-Republican duopoly. The CPD is a group of unelected, unaccountable, and largely

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[1] *68% Think Election Rules Rigged for Incumbents*, Rasmussen (July 13, 2014), http://www.rasmussenreports.com /public_content/politics/general_politics/july_2014/68_think_election_rules_rigged_for_incumbents, submitted herewith as Exhibit 1.

[2] Douglas E. Schoen, Independents and the Presidential Debate System at 9 (Aug. 29, 2014), submitted herewith as Exhibit 2.

[3] *Id.* at 21, 53.

[4] *68% Think Election Rules Rigged for Incumbents* (Exhibit 1), *supra* n.1.

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unknown Republican and Democratic insiders who decide who participates in the general election presidential debates. In violation of the law, the CPD has repeatedly and deliberately prevented an independent candidate from participating in the fall presidential debates, thereby denying voters a viable alternative to the Republican and Democratic parties that Americans increasingly feel have failed the nation.

The Federal Election Commission ("FEC") has rules meant to ensure fairness and integrity in the sponsorship of presidential debates. Those rules require the CPD to be a nonpartisan organization and to use an objective rule to determine who gets invited to the presidential debates. The CPD does not remotely satisfy either of these legal standards.

First, the CPD is not nonpartisan. It is a tool of the Democratic and Republican parties. That was the premise of its creation; the two major parties founded the CPD to "forge a permanent framework on which all future presidential debates *between the nominees of the two political parties will be based*."[5] Since its founding, the CPD has always acted to further the interests of the two major parties, at the expense of independent candidates and the large number of Americans who want a third alternative. This will, in fact, always be true because the CPD is dominated by Democratic and Republican partisans. Although the CPD as an entity claims it does not support or oppose candidates or parties, its leaders are unabashed partisans who support their respective parties and their parties' candidates for president, both vocally and financially. The CPD's ability to operate in a nonpartisan manner is compromised by its leaders' severe conflicts of interest. The CPD is also financed by corporations heavily invested in the two-party system – to the tune of millions spent supporting and lobbying Democrats and Republicans. The

[5] Press Release, *News from the Democratic and Republican National Committees*, Feb. 18, 1987 (emphasis added), *available at* http://www.opendebates.org/theissue/CPDrelease.pdf, submitted herewith as Exhibit 3.

CPD has no reason to create a presidential debate system that treats third-party and independent candidates fairly, and every reason not to.

Second, because of its bipartisan bias, the CPD does not employ the "pre-established, objective criteria" for selecting debate participants that the law requires. Objective criteria cannot reflect a content bias or be geared to the selection of pre-chosen participants. Yet the CPD's selection criteria are specifically *designed to exclude independent or third-party candidates from participating in the debates.*

The CPD requires that a candidate poll at 15% in an average of five national polls taken in mid-September. That criterion is virtually impossible for a third-party or independent candidate to satisfy. Candidates who do not participate in the major party primaries do not have any institutionalized mechanism, like the party primary process, for getting free media coverage. Debates enable them to gain name recognition and, thereby, gain support, but the CPD's rule denies them that opportunity because they have not yet gained support. It is the quintessential Catch-22. Unsurprisingly, since World War II, only candidates who have participated in major party primaries would have surpassed the CPD's mid-September 15% threshold; no unaffiliated candidate would have qualified.

The simple fact is that the cost of achieving 15% support is prohibitively expensive for an independent or third-party candidate. New expert analysis demonstrates that, on average, a candidate needs a minimum of 60% name recognition – and probably as much as 80% name recognition – in order to achieve 15% in polls. Democrats and Republicans can rely on an abundance of free media through the primary and convention process to boost their name recognition. By contrast, an independent candidate unable to participate in a high profile primary process or obtain a guaranteed spot in the debates will get little press coverage. The

only way to compensate for that deficit in attention is paid media, but the cost of achieving adequate name recognition to satisfy the CPD rule would be at least $113 million – and probably more like $150 million – in paid media alone, and over $250 million in total campaign expenses. No third-party or independent candidate has ever come close to raising that kind of money. And an independent candidate would have to raise that money in small increments from individual donors, without the benefit of widespread name recognition or guaranteed access to the debates that could convince individuals to contribute.

Even if it were possible for anyone other than a self-funded billionaire to amass these vast resources, it could well be for nothing. The 15% threshold is systematically skewed to keep a qualified and otherwise viable unaffiliated candidate out of the debates. Races with a serious third-party or independent contender are prone to a distinct volatility in terms of voter support that limits the predictive power of pre-election polls. On average, polling in three-way races is 8% off two months before the election. At that level of inaccuracy, polls will falsely exclude candidates with 15% support more than one third of the time. These inaccuracies aside, the candidate could still miss out on the debates if the vagaries of public polling leave his or her support a tick below the arbitrary 15% cutoff. For example, whether the candidate meets the 15% threshold depends on which polls are averaged; there could be 20 polls in which the candidate exceeds 15%, and only five in which he does not; there is nothing to stop the CPD from simply choosing to average the polls that would exclude the candidate. Moreover, the difference between meeting the 15% threshold could be whether the CPD relied on a poll completed a day before the candidate had a positive turn in the news cycle, or a day after. The CPD does not commit itself to measuring a candidate's polling average on a specific date, or to

any objective standard for choosing the five polls to average, allowing it to engage in precisely this type of manipulation.

The timing of the CPD's determination also violates the FEC's rule in another way: by postponing the application of its 15% determination until September, the CPD forces third-party and independent candidates to endure months of uncertainty about whether they will be in the debates, while their Democratic and Republican competitors will know by May (when their nominations have become certain) that they will be invited to the debates. That uncertainty puts the non-major-party candidates at an enormous disadvantage, and creates yet another Catch-22, because it makes it that much harder for such candidates to raise money and obtain the press coverage necessary to bolster their support in order to poll at 15% by September. This is yet another reason the CPD's rule is biased and not objective: It sets a hurdle that is impossible for independent candidates to satisfy, while guaranteeing major party candidates access to the debates. In short, as the new empirical evidence detailed in this complaint amply demonstrates, the CPD's rule requires a third-party or independent candidate to commit to raising and spending an unprecedented sum just for the chance to satisfy an error-prone and arbitrary test.

The FEC should not let this rigged system stand. Access to the debates is essential to being elected President. The CPD and its leadership have engaged in long-standing and egregious violations of FEC rules that are supposed to maintain the integrity of the election system, and have deprived the American people of their desire and right to hear from and choose a candidate unaffiliated with the two major parties. The FEC should find that the CPD and its leadership's partisan gerrymandering of the debates is illegal, and force the CPD to abandon its exclusionary polling criterion.

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BACKGROUND

A. The Parties

Complainant Level the Playing Field is a nonpartisan, nonprofit corporation not affiliated with any candidate or candidate committee. It seeks to break the two major parties' stranglehold on the democratic process by making the 2016 presidential election about issues rather than partisan ideology. To do so, Level the Playing Field intends to nominate a nonpartisan presidential and vice presidential ticket via a rules-based nominating process. The CPD's biased and exclusionary policies, however, harm Level the Playing Field in at least two concrete ways.

First, the CPD's rule deters qualified candidates from participating in Level the Playing Field's nomination process. Level the Playing Field is the successor to Americans Elect, which sought to nominate a nonpartisan presidential ticket in 2012. Americans Elect learned that qualified candidates for the presidency will not run under the current debate rules because of the virtual impossibility of securing access to the debates. The CPD's rule thus deprived Americans Elect of the robust competition for its nonpartisan nomination that it sought to achieve in 2012. If the CPD's rule remains in place, it will injure Level the Playing Field's 2016 nomination process in the same way.

Second, the CPD's rule will harm the competitive prospects of Level the Playing Field's eventual presidential and vice presidential nominees by denying them a fair opportunity to compete with their Democratic and Republican rivals. If the CPD's rule remains in place, it is virtually certain to exclude Level the Playing Field's candidates from the debates. That will deprive Level the Playing Field's candidates of a crucial platform for expressing their ideas, in turn reducing their chances of election. The FEC must invalidate the CPD's unlawful policy in

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order to remedy the injuries Level the Playing Field and its nominees would otherwise suffer. Level the Playing Field's address is P.O. Box 25554, Alexandria, Virginia 22313.

Complainant Dr. Peter Ackerman is a registered voter interested in the presidential electoral process. Dr. Ackerman is entitled to know exactly which political committees are supporting which candidates, and also is entitled to information concerning individuals and entities that have chosen to support the Democratic and Republican nominees. Possession of this information would assist Dr. Ackerman, and others to whom he would communicate the information, in evaluating the various candidates for President and Vice President. The CPD, in violation of the law, fails to disclose information on its donors and expenditures. Dr. Ackerman's inability to obtain information that the law requires be made available will result in a substantial, concrete and particularized injury to him and similarly situated voters. Dr. Ackerman's address is P.O. Box 25554, Alexandria, Virginia 22313.

Respondent the CPD is a not-for-profit corporation organized under the laws of the District of Columbia. The CPD was organized by the Republican and Democratic Parties. The address of the CPD is 1200 New Hampshire Avenue, NW #445, Washington, D.C. 20036.

Respondent Frank Fahrenkopf, Jr. is co-chair of the CPD, a position he has occupied since the CPD's founding in 1987. Fahrenkopf was chairman of the Republican National Committee from 1983 to 1989. From 1995 to 2013, he was the President of the American Gaming Association, the main lobbying organization for the gambling industry.

Respondent Michael D. McCurry is co-chair of the CPD. McCurry was the press secretary to President Bill Clinton and, before that, the press secretary for four different Democratic presidential candidates and the communications director for the Democratic National Committee. McCurry is also a principal at Public Strategies Washington, Inc., which lobbies on

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behalf of major corporate interests, including Bain Capital, Lockheed Martin, and the U.S. Chamber of Commerce.

Respondents Howard G. Buffett, John C. Danforth, John Griffen, Antonia Hernandez, John I. Jenkins, Newton N. Minow, Richard D. Parsons, Dorothy Ridings, and Alan K. Simpson are directors of the CPD and were directors of the CPD when it held debates during the 2012 presidential election.

Respondent Janet Brown is the executive director of the CPD, a position she has held since 1987.

B. Regulatory Framework

The primary purpose of the Federal Election Campaign Act ("FECA") is to "limit *quid pro quo* corruption and its appearance."[6] To achieve this purpose, FECA prohibits corporations from making many types of contributions or expenditures "in connection with" any federal election.[7] It also requires disclosure of most federal political contributions and expenditures.[8]

Absent a specific exemption, FECA's prohibitions on corporate campaign spending would preclude corporate funding of candidate debates. FECA's definitions of contribution and expenditure are broad,[9] and corporate funding of a public forum in which a candidate can appear to influence voters would typically be subject to FECA's strictures.[10] The FEC has in fact recognized that corporate funding of candidate debates creates "the real or apparent potential for

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[6] *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434, 1444 (2014).
[7] 2 U.S.C. § 441b(a).
[8] *See, e.g., id.* § 434.
[9] *See id.* § 431(8)(A), 9(A).
[10] *See* 11 C.F.R. § 100.52(d)(1) (noting that "[u]nless specifically exempted" under the FEC's regulations, "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services is a contribution"); 11 C.F.R. § 100.111(e)(1) (same for expenditures); *see also, e.g.*, Federal Election Commission, Advisory Opinion 1988-22 at 6 (July 5, 1988) ("A payment of costs to sponsor and finance public appearances by candidates for Federal office that are 'campaign-related' is considered made 'for the purpose of influencing Federal elections' and to constitute a 'contribution' to or 'expenditure' on behalf of such candidates, unless such payment is specifically exempted by the Act or regulations.").

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a quid pro quo" corrupt payment and jeopardizes the "integrity and fairness of the [debate] process."[11] If, for example, a corporation decided to spend hundreds of thousands of dollars on a debate that included its two, favored candidates and excluded the candidate the corporation opposed, the corporation would be making a valuable contribution to specific candidates in order to influence the election – a clear violation of FECA.

Since 1980, however, the FEC has created an exception to FECA's bans on corporate contributions and expenditures that permits corporations to fund debates, but only under certain specified conditions.[12] The rationale for this exception is that debates can serve a nonpartisan, voter education purpose, rather than be a contribution to favored candidates.[13] FECA authorizes corporations to spend funds on certain "nonpartisan registration and get-out-the-vote campaigns" and other "nonpartisan activity designed to encourage individuals to vote or to register to vote."[14] The FEC extrapolated from these provisions a "legislative policy" of authorizing corporate financing of "activity directed to the general public to encourage voter participation, if the activity is conducted primarily by a nonpartisan organization."[15] As the FEC explained when it first permitted debate sponsorship, "[u]nlike single candidate appearances, nonpartisan debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate."[16] Thus, the FEC concluded that "[t]he educational purpose" of a debate sponsored by a nonpartisan organization is "similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns" that FECA already authorized.[17] In light of this

[11] Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995).
[12] *See* Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76,734, 76,734 (Dec. 27, 1979).
[13] *See id.*
[14] 2 U.S.C. § 441b(b)(2)(B); *id.* § 431(9)(B)(ii).
[15] Br. of Fed. Election Comm'n, Becker v. Fed. Election Comm'n, No. 00-2124, 2000 WL 35567185 (1st Cir. Oct. 2, 2000).
[16] Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,734.
[17] *Id.*

purpose, the FEC determined that corporate funding of nonpartisan debates should not be prohibited.[18]

The FEC, however, has adopted rules to ensure that debates are nonpartisan and educational, and not a means for corporate donors to give favored candidates an improper advantage.

First, debate staging organizations must be nonpartisan. That means a debate sponsor (that is not a media outlet) must be a 501(c)(3) or 501(c)(4) nonprofit which "do[es] not endorse, support, or oppose political candidates or political parties."[19] And staging organizations "shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate."[20] The resulting debate must be nonpartisan too, and cannot favor one candidate over other.[21] In all, "[a] debate is nonpartisan if it is for the purpose of educating and informing the voters, provides fair and impartial treatment of candidates, and does not promote or advance one candidate over another."[22]

Second, debate staging organizations must use objective candidate selection criteria. Specifically, they must use "pre-established objective criteria to determine which candidates may participate in a debate" and may not rely solely on nomination by particular parties.[23] To be objective, a criterion "must be free of content bias, and not geared to the selection of certain pre-chosen participants."[24] Under this definition, objectivity means more than subject to verifiable

[18] *See id.* The First Circuit has upheld the FEC's decision to exempt debate sponsorship from the ban on corporate campaign contributions and expenditures as a permissible construction of FECA. *See Becker v. Fed. Election Comm'n*, 230 F.3d 381, 396 (1st Cir. 2000).
[19] 11 C.F.R. § 110.13(a).
[20] *Id.* § 110.13(c).
[21] *See id.* § 110.13(b)(2) (prohibiting debate sponsors from "structur[ing] the debates to promote or advance one candidate over another").
[22] Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,735.
[23] 11 C.F.R. § 110.13(c).
[24] First General Counsel's Report at 7, MUR 5395 (Dow Jones) (Jan. 13, 2005) (internal quotation marks omitted).

measurement. It incorporates a "reasonableness" requirement.[25] Thus, as one federal court has explained, a criterion that "only the Democratic and Republican nominees could reasonably achieve" does not satisfy the FEC's rules.[26] Nor does the debate sponsor's ipse dixit that it has objective criteria satisfy the rules. Rather, a sponsor "*must be able to show* that their objective criteria were used to pick the participants, *and that the criteria were not designed to result in the selection of certain pre-chosen participants*."[27]

If and only if a debate staging organization satisfies these criteria may it use corporate money to pay for candidate debates.[28] Likewise, if and only if a debate staging organization meets these criteria, it does not have to disclose its contributors as a normal political committee would.

C. The Commission On Presidential Debates As Debate Sponsor

The CPD has sponsored every general election presidential and vice presidential debate since 1988, including four in 2012.[29] The CPD pays for these multimillion dollar events with corporate money[30]; its roster of donors includes Anheuser-Busch Companies, Southwest Airlines, BBH New York, American Airlines, Continental Airlines, Discovery Channel, EDS, JetBlue Airways, AT&T, 3Com, Atlantic Richfield, Dun & Bradstreet, Ford Motor Company,

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[25] *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 74 (D.D.C. 2000).
[26] *Id.*
[27] Corporate and Labor Organization Activity, 60 Fed. Reg. at 64,262 (emphasis added).
[28] *See* 11 C.F.R. § 114.4(f).
[29] *See CPD: Our Mission*, Commission on Presidential Debates, http://www.debates.org/index.php?page=about-cpd (last visited Sept. 7, 2014), submitted herewith as Exhibit 4; *CPD: 2012 Debates*, Commission on Presidential Debates, http://www.debates.org/index.php?page=2012-debates (last visited Sept. 7, 2014), submitted herewith as Exhibit 5.
[30] The CPD spent nearly $3.8 million in 2012. *See* Commission on Presidential Debates, 2012 Form 990 Return of Organization Exempt from Income Tax, dated Nov. 12, 2013, at 10 (hereinafter "CPD 2012 Form 990"), submitted herewith as Exhibit 6.

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Hallmark, IBM, J.P. Morgan & Co., Philip Morris Companies Inc., and Prudential, among others.[31]

The CPD claims it satisfies the FEC's regulations, and thereby can use this corporate money to pay for the major televised candidate appearances that are the debates. The CPD claims that it is a "nonpartisan" organization with an "ongoing goal of educating voters."[32] The CPD further claims that it extends invitations to candidates "based on the application of 'pre-established, objective' criteria" that are consistent with the FEC's rules.[33] In 2012, as well as in the three previous presidential elections, the criteria for participation in a CPD debate were that the candidate: (1) be constitutionally eligible for office, (2) have his or her name appear on enough state ballots to have a mathematical chance of securing an Electoral College majority, and (3) "have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination."[34] The date for determining satisfaction of the 15% rule is not specified in advance; the CPD states it makes its determination after Labor Day but sufficiently in advance of the first debate so as to permit orderly planning. The determination typically first occurs in mid-September.[35] The polls that the CPD claims to rely upon are not announced, either in advance or upon application of the

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[31] *CPD: National Debate Sponsors*, Commission on Presidential Debates, http://www.debates.org/index.php?page=national-debate-sponsors (last visited Sept. 7, 2014), submitted herewith as Exhibit 7.
[32] *CPD: Our Mission* (Exhibit 4), *supra* n.29.
[33] *CPD: 2012 Candidate Selection Criteria*, Commission on Presidential Debates, http://www.debates.org/index.php?page=candidate-selection-process (last visited Sept. 4, 2014), submitted herewith as Exhibit 8.
[34] *Id.*
[35] In 2012, the CPD purportedly applied the polling criterion for the first presidential debate on September 21; in 2008, it purportedly applied the polling criterion on September 17. *See 2012 Application of Criteria*, Commission on Presidential Debates (Sept. 21, 2012), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=42&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80, submitted herewith as Exhibit 9; *Senator Obama and Senator McCain, Senator Biden and Governor Palin invited to CPD's debates*, Commission on Presidential Debates (Sept. 17, 2008), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=5&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80, submitted herewith as Exhibit 10.

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criteria. For instance, in 2012, the CPD announced that it applied its polling criterion "with the assistance of the Editor-In-Chief of the Gallup Polling Organization, Dr. Frank Newport," but it did not announce the five polls it purportedly consulted.[36] The CPD claimed before the FEC in 2000 that it used the ABC News/Washington Post; CBS News/New York Times; NBC News/Wall Street Journal; CNN/USA Today/Gallup; and Fox News/Opinion Dynamics polls to make its determination.[37]

The CPD has purported to rely on these criteria in the last four elections, but in each election it invited only the Democratic and Republican nominees to the debates it sponsored.[38]

The CPD's claims that it complies with the FEC's rules are false. As set forth in detail below, the CPD violates the two core components of the FEC's debate regulations. First, it is not nonpartisan. It is bipartisan, supporting the Republican and Democratic parties and opposing third parties and independents, in direct violation of the prohibition on "support[ing] or oppos[ing] . . . political parties" in the FEC's rules.[39] Second, its 15% polling threshold is not an objective criterion within the meaning of the FEC's rules. Rather, the 15% rule is a biased one that "only the Democratic and Republican nominees could reasonably achieve."[40] It is, simply

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[36] *See 2012 Application of Criteria* (Exhibit 9), *supra* n.35; *2012 Application of Criteria – Second Presidential Debate*, Commission on Presidential Debates (Oct. 12, 2012), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=46&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80, submitted herewith as Exhibit 11; *2012 Application of Criteria – Third Presidential Debate*, Commission on Presidential Debates (Oct. 19, 2012), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=47&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80, submitted herewith as Exhibit 12.

[37] Response of the Commission on Presidential Debates at 10, MUR 4987 (Commission on Presidential Debates) (May 2, 2000).

[38] *See, e.g., 2012 Application of Criteria* (Exhibit 9), *supra* n.35; *Senator Obama and Senator McCain, Senator Biden and Governor Palin invited to CPD's debates* (Exhibit 10), *supra* n.35; *Commission on Presidential Debates Announces Application Of Non-Partisan Candidate Selection Criteria*, Commission on Presidential Debates (Sept. 24, 2004), http://www.debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=23&cntnt01origid=27&cntnt01detailtemplate=newspage&cntnt01returnid=80, submitted herewith as Exhibit 13.

[39] 11 C.F.R. § 110.13(a).

[40] *Buchanan*, 112 F. Supp. 2d at 74.

put, "geared to the selection of certain pre-chosen participants"[41] – the Democratic and Republican nominees – and the exclusion of third-party and independent candidates (often referred to herein as "unaffiliated" candidates) from the debates.

THE CPD VIOLATES THE FEC'S DEBATE STAGING RULES

Elections in this country are conducted to favor Democrats and Republicans at the expense of unaffiliated challengers. That design is not accidental. Democrats and Republicans control institutions that create and enforce election rules. Partisan legislatures draw gerrymandered districts to protect Republican and Democratic incumbents.[42] "Sore loser laws" prevent candidates who lose a party primary from contesting a general election, thereby protecting party nominees from proven challengers.[43] Federal law allows a Democratic or Republican presidential nominee and his or her party to receive contributions up to $537,000 in each of the two years prior to a presidential election from an individual, but permits an independent candidate to receive no more than $5200 in contributions from an individual.[44] These rules enable a vicious cycle: Democrats and Republicans create a system that favors them,

[41] First General Counsel's Report at 7, MUR 5395 (Dow Jones) (Jan. 13, 2005) (internal quotation marks omitted).
[42] In this process, known as a bipartisan gerrymander, districts have "either an inefficiently large Democratic supermajority, or an inefficiently large Republican supermajority" so that "incumbents face no threat of loss in the general election." Justin Buchler, *The Inevitability of Gerrymandering: Winners and Losers Under Alternative Approaches to Redistricting*, 5 Duke J. Const. L. & Pub. Pol'y 17, 19 (2010), submitted herewith as Exhibit 14. The Supreme Court has held the bipartisan gerrymander constitutional. *See, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (affirming bipartisan gerrymander designed to create safe seats for Democratic and Republican legislators); *Davis v. Bandemer*, 478 U.S. 109, 154 (1986) (O'Connor, J., concurring) (explaining that the Constitution allows "self-interested legislators" to create districts designed to protect incumbents of both major parties).
[43] As of 2010, all but three states had sore loser laws. *See* Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L.J. 1013, 1043 (2011), submitted herewith as Exhibit 15. These can take the form of express prohibitions on losing primary candidates appearing on a general election ballot, or rules that make it impossible to register both as a candidate for a primary election and as an independent candidate for a general election. *See id.* at 1044-45.
[44] Under *McCutcheon v. Federal Election Comm'n*, 134 S. Ct. 1434 (2014), an individual can donate $2600 per general election and $2600 per primary election to a Democratic or Republican presidential candidate, $32,400 to a national committee of the party per year, and, for every state, a combined total of $10,000 to state and local party committees within that state per year. *See* 11 C.F.R. §§ 110.1(b)(1), (c)(1), (c)(5); *id.* § 110.3(b)(3); *Quick Answers to General Questions*, Federal Election Commission, http://www.fec.gov/ans/answers_general.shtml (last visited Sept. 4, 2014).

win more power in that system, and then use that power to create more rules to entrench their power.[45]

This same dynamic infects the presidential debates: Democrats and Republicans control the debates, and they create rules that foster their own dominance and squelch the chances of an independent or third-party challenger. The means of the partisan control is the CPD, an organization the two major parties created to ensure that the debates would occur on their terms. The rule that entrenches Democratic and Republican candidates and thwarts an unaffiliated challenger is the CPD's 15% polling requirement, which seeks to leverage existing disadvantages facing unaffiliated candidates into a roadblock that all but guarantees a third participant can never qualify for the debates. As set forth in detail below, through its partisan makeup and biased, nonobjective 15% rule, the CPD has violated the FEC's regulations on debate sponsorship.

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I. THE CPD IS NOT A NONPARTISAN ORGANIZATION; IT SUPPORTS THE DEMOCRATIC AND REPUBLICAN PARTIES AND OPPOSES THIRD PARTIES AND INDEPENDENTS

Nonpartisanship has been a core requirement for debate sponsors since the FEC first authorized corporate debate funding more than thirty years ago. At that time, the FEC contemplated that debate sponsors would have "a history of nonpartisanship" that would be a bulwark against partisan rigging of the debates.[46] The FEC codified this expectation by requiring debate sponsors to be 501(c)(3) or 501(c)(4) organizations – which by law face

[45] *See, e.g.*, Kang, *supra* n.43, at 1037 (explaining how parties design election laws to reduce political competition and create political entrenchment).
[46] Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 39,348, 39,348 (July 5, 1979).

significant restrictions on political activity[47] – that do not "endorse, support, or oppose political candidates or political parties."[48]

The CPD is the antithesis of the FEC's expectations for a debate sponsor. Its history is one of *partisanship*, not nonpartisanship. The Democratic and Republican parties created the CPD to serve their interests, and the CPD has faithfully done so since its founding, and will continue to do so in the future. The result is that the CPD as a debate sponsor endorses and supports the Democratic and Republican parties and their candidates for president and vice president, and opposes third parties and third-party and independent candidates for president and vice president. This is a flagrant violation of the FEC's rules.

A. The Democratic And Republican Parties Created The CPD As A Partisan Organization

The Democratic and Republican parties have controlled the presidential debates since the 1988 election. Prior to that, the League of Women Voters ("League") had sponsored the general election debates in 1976, 1980, and 1984.[49] The League was a strictly nonpartisan organization.[50] The League's mission in sponsoring the debates was to educate voters on where

[47] *See* 26 U.S.C. § 501(c)(3) (prohibiting 501(c)(3) organizations from "participat[ing] in, or interven[ing] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office"); *id.* § 501(c)(4) (limiting 501(c)(4) status to entities that "operate[] exclusively for the promotion of social welfare").

[48] 11 C.F.R. § 110.13(a). Limiting the tax status of sponsoring organizations to 501(c)(3) or (c)(4) entities was meant to ensure "the integrity and fairness of the debate process." Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,734. The FEC reasoned that the rules prohibiting 501(c)(3) organizations from participating in political campaigns would guarantee nonpartisanship. While 501(c)(4) organizations can participate to a limited extent in political campaigns, the FEC determined that "a 501(c)(4) organization which participates in political campaigns even to a limited degree may not stage debates under this subsection because that organization would not qualify as one which does not endorse, support or oppose political candidates or political parties." *Id.*

[49] The League of Women Voters and Candidate Debates: A Changing Relationship, League of Women Voters, http://www.lwv.org/content/league-women-voters-and-candidate-debates-changing-relationship (last visited Sept. 4, 2014), submitted herewith as Exhibit 16.

[50] *See* Susan E. Spotts, *The Presidential Debates Act of 1992*, 29 Harv. J. on Legis. 561, 567 (1992), submitted herewith as Exhibit 17.

the candidates stood and how well they could defend their positions.[51] The League sought to provide a view of how the candidates acted and reacted outside of campaign-controlled environments.[52]

The League's dedication to nonpartisanship and voter education created conflict with the major party candidates, who sought only political advantage through the debates. During the 1980 election, there was a dispute between the League and President Jimmy Carter's campaign over including candidate John Anderson in the debates. Anderson, a Republican Congressman who failed in his bid to win the Republican nomination, was mounting an independent campaign for the presidency.[53] Carter opposed inviting Anderson to debate. Carter feared that Anderson would draw votes from him, and did not want to give Anderson the opportunity to gain supporters by debating.[54] The League, however, determined that Anderson should participate and scheduled the first debate to include Carter, Anderson, and Republican nominee Ronald Reagan.[55] Carter refused to participate in the first debate, but the League did not back down; it held the first debate between Reagan and Anderson alone.[56] In 1984, the Reagan and Mondale campaigns sought to dictate the terms of the debates to the League; they hoped that the League would acquiesce to their demands, thereby allowing them to deflect any criticism of the debate

[51] *See* Press Release, League of Women Voters, League Refuses to "Help Perpetrate a Fraud" (Oct. 3, 1988), *available at* http://www.lwv.org/press-releases/league-refuses-help-perpetrate-fraud, submitted herewith as Exhibit 18.
[52] *Id.*
[53] *See* Warren Weaver Jr., *Anderson Declares as Independent, Vowing to Draw Many New Voters*, N.Y. Times, Apr. 25, 1980, submitted herewith as Exhibit 19.
[54] Newton Minow & Craig L. LaMay, Inside the Presidential Debates: Their Improbable Past and Promising Future 59 (2008) ("[T]he Carter campaign staff believed Anderson drew from the president's base even though he came from the Republican Party perspective, and they were adamant about not including him."), submitted herewith as Exhibit 20.
[55] *See id.* at 56.
[56] Carter's refusal to join Anderson on stage resulted in cancellation of the second planned debate. In the final two weeks of the election, with the incumbent President not having appeared in a debate and with Anderson's support having dwindled in the polls, the League held a debate between Carter and Reagan alone. *See id.* at 57.

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structure.[57] The League resisted, seeking to vindicate the public interest through negotiations with the campaigns.[58] For example, rather than let the campaigns dictate the moderators, the League forced the campaigns to go through a list of 103 journalists in order to reach an agreement[59] that the League found acceptable and publicly admonished the campaigns for their "abuse of the process."[60] Although the negotiations became "hostile,"[61] the end result was two debates between President Reagan and Mondale.[62]

After these experiences, the respective chairmen of the Democratic and Republican National Committees, Frank Fahrenkopf, Jr. and Paul G. Kirk, Jr., decided that their parties, and not the nonpartisan League, should control the debates. In 1985, Fahrenkopf and Kirk entered a one-page Memorandum of Agreement on Presidential Candidate Joint Appearances.[63] The memo expressed their desire to replace League-sponsored debates with "nationally televised joint appearances conducted between the presidential and vice presidential nominees of the two major political parties."[64] That agreement envisaged the use of these "televised joint appearances" as a means to cement the two parties' electoral position:

> It is our bipartisan view that a primary responsibility of each major political party is to educate and inform the American electorate of its fundamental philosophy and policies as well as its candidates' positions on critical issues. One of the most effective means of fulfilling that responsibility is through nationally televised joint appearances conducted between the presidential and vice-presidential nominees of the two major political parties during general election campaigns. Therefore, to better fulfill our parties' responsibilities for educating and informing the American public and to strengthen the role of political parties in the electoral process, it is our conclusion that future joint appearances should be

[57] *See id.* at 60 ("The candidates would insist on conditions for their participation, then hide behind the League when critics came calling.").
[58] *See id.* at 61.
[59] *Id.*
[60] William A. Henry III, *In Search Of Questioners*, Time, Oct. 22, 1984, *available at* http://content.time.com/time/magazine/article/0,9171,951362,00 html, submitted herewith as Exhibit 21.
[61] *Id.* at 60.
[62] *See* Minow & LaMay (Exhibit 20), *supra* n.54, at 157-58.
[63] Frank Fahrenkopf & Paul Kirk, Memorandum of Agreement on Presidential Candidate Joint Appearances (Nov. 26, 1985), *available at* http://www.opendebates.org/theissue/memo.jpg, submitted herewith as Exhibit 22.
[64] *Id.*

> principally and jointly sponsored and conducted by the Republican and Democratic National Committees.[65]

The Democratic and Republican National committees formally approved Fahrenkopf and Kirk's proposal "for the parties to take over presidential debates" soon thereafter.[66]

The CPD is the direct outgrowth and implementation of Fahrenkopf and Kirk's agreement. Announcing the CPD's formation in 1987, Fahrenkopf and Kirk explained, "We have no doubt that with the help of the Commission we can forge a permanent framework on which all future presidential debates *between the nominees of the two political parties will be based*."[67] The Democratic and Republican parties called the CPD "a *bipartisan*, non-profit, tax-exempt organization formed to implement joint sponsorship of general election presidential and vice-presidential debates, starting in 1988, *by the national Republican and Democratic committees* between their respective nominees."[68]

At the time, Fahrenkopf and Kirk admitted that, consistent with its mission to strengthen the Democratic and Republican parties, the CPD would do the bidding of the two parties and discriminate against third-party and independent candidates. As the *New York Times* reported:

> In response to questions, Mr. Fahrenkopf indicated that the new Commission on Presidential Debates, a nonprofit group made up of representatives from each party, was not likely to look with favor on including third-party candidates in the debates. He said the issue was a matter for the commission to consider when it worked out the format, timing and other details of the debates with the candidates. Mr. Kirk was less equivocal, saying he personally believed the panel should exclude third-party candidates from the debates.[69]

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[65] *Id.*
[66] *G.O.P Seeks a City for '88*, N.Y. Times, Jan. 26, 1986, submitted herewith as Exhibit 23.
[67] Press Release, News from the Democratic and Republican National Committees, Feb. 18, 1987 (emphasis added), *available at* http://www.opendebates.org/theissue/CPDrelease.pdf, submitted herewith as Exhibit 24.
[68] *Id.* (emphasis added).
[69] Phil Gailey, *Democrats and Republicans Form Panel to Hold Presidential Debates*, N.Y. Times, Feb. 19,1987, submitted herewith as Exhibit 25. Newton Minow, a CPD director, has admitted that the CPD was conceived of as a "bipartisan," rather than nonpartisan, organization. Minow & LaMay (Exhibit 20), *supra* n.54, at 74.

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Thus, at its inception, the CPD was not nonpartisan. It was a bipartisan organization dedicated to supporting the candidacies of the Democratic and Republican presidential and vice presidential nominees.

B. The CPD Has Consistently Supported The Democratic And Republican Parties And Opposed Third Parties And Independents

The CPD has been true to its founding mission. From its inception to the present, the CPD has been a joint effort of the Democratic and Republican parties and has worked exclusively to further the interests of those two parties.

This pattern began in 1988 when the CPD accepted the major party candidates' debate demands – demands the League refused to accept. That year, the candidates entered into a memorandum of understanding dictating the dates, places, formats, camera placement, audience reaction shots, selection of moderators and panelists, etc., for the debates.[70] This agreement also called for the CPD to sponsor two debates (a presidential debate and a vice-presidential debate) and the League one.[71] The League refused. League President Nancy Neuman explained that the "demands of the two campaign organizations would perpetrate a fraud on the American voters . . . . It has become clear to us that the candidates' organizations aim to add debates to their list of campaign-trail charades devoid of substance, spontaneity, and honest answers to tough questions."[72] The League, in effect, refused to capitulate to debates that were nothing more than a forum for campaign-friendly sound bites. The CPD, on the other hand, was willing to comply with the candidates' demands.

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[70] *See* Memorandum of Understanding from Vice President Bush and Governor Dukakis' representatives (1988), *available at* http://web.archive.org/web/20070422205357/http://www museum.tv/debateweb/html/history/1988/88essay/memorandum htm, submitted herewith as Exhibit 26.

[71] *See id.*

[72] *See* Press Release, League of Women Voters, League Refuses to "Help Perpetrate a Fraud" (Exhibit 18), *supra* n.51.

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This began a pattern of the CPD enabling the campaigns to dictate the terms of the debates by accepting the campaigns' agreed-upon debate terms without question. In 1992, 1996, and 2000, the Democratic and Republican candidates entered memoranda of understanding, and the CPD followed their terms.[73] The CPD thereby enabled the candidates to agree on moderators, put checks on candidate-to-candidate questioning, pre-screen town hall questions, and limit the response times and number of follow up questions.[74] As two commentators observed, the "result is a series of glorified bipartisan news conferences, where the major-party candidates merely recite pre-packaged sound bites and avoid discussing many important issues."[75] When a complainant brought this practice to the FEC's attention in 2004, the CPD was not able to point to a single instance where it had contravened the major party candidates' demands.[76]

CPD board member Newton Minow suggests that the CPD "declared its independence in 2004" when it when it refused to sign the 2004 memorandum of understanding between the Bush and Kerry campaigns; Minow says that the moment was a statement that "[f]rom now on, [the CPD] was saying, that [it] is in charge."[77] That quote is telling for at least two reasons. First, it is a clear admission from someone who has been involved with the CPD from its inception that prior to 2004, the CPD had followed the dictates of the major parties. Second, the CPD's refusal to sign the memorandum of understanding – which it had never been asked to sign before[78] –

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[73] *See* Minow & LaMay (Exhibit 20), *supra* n.54, at 73.
[74] Paul Weyrich & Randall Robinson, *End the Debates Before They Start*, N.Y. Times, Nov. 12, 2003, *available at* http://www nytimes.com/2003/11/12/opinion/end-the-debates-before-they-start.html, submitted herewith as Exhibit 27.
[75] *Id.*
[76] *See* Response from Commission on Presidential Debates at 8-9, MUR 5414 (Commission on Presidential Debates) (Mar. 30, 2004).
[77] Minow & LaMay (Exhibit 20), *supra* n.54, at 80.
[78] *See* Jim Rutenberg, *Panel Won't Sign Agreement but Will Enforce Stipulations*, N.Y. Times, Sept. 28, 2004, *available at* http://www nytimes.com/2004/09/28/politics/campaign/28debate html, submitted herewith as Exhibit 28.

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was window dressing. Four days after the Bush and Kerry campaigns entered into the memorandum of understanding, the CPD informed the campaigns it would "make every good faith effort to accommodate [its] terms."[79]

The CPD has even ceded to the two major parties its most crucial decision, namely whom to invite to debate. The CPD's bipolar decisions to invite Ross Perot to the debates in 1992 and to exclude him from the debates in 1996 had one thing in common: both were concessions to the demands of the Republican and Democratic campaigns.

In 1992, the CPD purported to use a multifactor test to determine whom to invite to the debates. The test supposedly took into account (1) evidence of national organization, which included constitutional eligibility for office, placement on the ballot in states sufficient to make an Electoral College majority, organization in a majority of congressional districts in those states, eligibility for matching funds from the FEC or other demonstration of the ability to fund a national campaign, and endorsements from federal and state officeholders; (2) signs of national newsworthiness and competitiveness, which included professional opinions of Washington bureau chiefs of major media outlets, opinions of professional campaign managers and pollsters not affiliated with a candidate, opinions of expert political scientists, comparative media exposure to the major party candidates, and published views of prominent political commentators; and (3) indicators of national public enthusiasm or concern, including findings of significant public opinion polls and attendance at meetings and rallies in comparison with the two major party candidates.[80] The CPD tasked an Advisory Committee with applying these

[79] Letter from Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr. to James A. Baker, III, Esq. and Vernon E. Jordan, Esq. (Sept. 24, 2004), submitted herewith as Exhibit 29.
[80] First General Counsel's Report at 8-10, MURs 4451 and 4473 (Commission on Presidential Debates) (Feb. 6, 1998).

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criteria, and it concluded that Ross Perot should be invited to the first debate and his inclusion in the second and third debates should be subject to further review.[81]

The major party candidates did not like that possibility. President George H.W. Bush wanted Perot to participate in the debates, thinking that was to his political advantage.[82] The Clinton campaign agreed. A Bush campaign official explained what transpired as follows:

> We [the Bush campaign] wanted Ross Perot to be included. . . . [On October 1] Mr. Perot stood at less than ten percent in every national poll, and few, if any commentators gave him a chance of winning. Under the CPD's criteria for determining whether a non-major party candidate would be included in the debates, it was far from clear that Mr. Perot would qualify. . . . Therefore, the Bush campaign insisted and the Clinton campaign agreed, that Mr. Perot and Admiral Stockdale be invited to participate in the debates.[83]

In accordance with their agreement, the campaigns jointly instructed the CPD to include Perot in all three debates. The CPD, disregarding its own Advisory Committee, complied.[84]

The CPD again capitulated to the Democratic and Republican campaigns when it excluded Perot from the debates in 1996. Perot had won nearly 19% of the popular vote in 1992. In 1996, 60% of the American people wanted Perot to participate in the presidential debates.[85] Yet the CPD, supposedly in service of its nonpartisan mission to educate voters, excluded Perot from the debates. It justified that decision by citing the same criteria it had used to invite him to the debates in 1992.[86] The Advisory Committee purportedly determined Perot should not be

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[81] Letter from Paul G. Kirk, Jr., & Frank Fahrenkopf, Jr., to Bush and Clinton campaigns (Oct. 6, 1992), attached as exhibit to Decl. of Janet H. Brown, dated May 1, 2000, MUR 4987 (Commission on Presidential Debates) (hereinafter "2000 Brown Decl."), submitted herewith as Exhibit 30.

[82] *See* Richard L. Berke, *The 1992 Campaign: The Debates; Bush and Clinton Agree on Debate Details*, N.Y. Times, Oct. 2, 1992, *available at* http://www.nytimes.com/1992/10/02/us/the-1992-campaign-the-debates-bush-and-clinton-camps-agree-on-debate-details html, submitted herewith as Exhibit 31.

[83] H. Comm. on H. Admin., *Presidential Debates: Hearing Before the Subcomm. on Elections of the H. Comm. on H. Admin.* at 48, 50-51, 103d Cong., 1st Session (June 17, 1993) (testimony of Bobby Burchfield), submitted herewith as Exhibit 32.

[84] *See id.* at 51-52; Letter from Paul G. Kirk, Jr., & Frank Fahrenkopf, Jr., to Bush and Clinton campaigns (Oct. 7, 1992), attached as exhibit to 2000 Brown Decl. (Exhibit 30).

[85] *See* Brooks Jackson, *Will Perot Be Invited To The Debate Party?*, CNN (Sept. 16, 1996), http://cgi.cnn.com/ALLPOLITICS/1996/news/9609/16/jackson/, submitted herewith as Exhibit 33.

[86] Decl. of Janet H. Brown at ¶ 26, dated Mar. 29, 2004, MUR 5414 (Commission on Presidential Debates) (hereinafter "2004 Brown Decl."), submitted herewith as Exhibit 34.

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invited because (1) his 1996 poll numbers were lower than his 1992 numbers; (2) the academics and journalists consulted did not think Perot had a realistic chance of winning the election; and (3) Perot could not spend his personal fortune because he had accepted federal matching funds.[87] These three reasons were all pretext.

First, Perot's poll numbers leading up to the Advisory Committee's decision in 1996 were not materially different from his poll numbers in the run up to the Committee's decision in 1992. In 1992, from the time Perot reentered the race[88] to the day the CPD made its decision to include him in the first debate, national polls showed him with only 7 to 10% support.[89] In the week preceding the CPD's decision in 1996, Perot's support was in the same range.[90]

Second, the Advisory Committee's purported reliance on the opinions of journalists was suspect because it did not follow its own published criterion concerning whom to solicit. The CPD criteria required consultation with the Washington bureau chiefs of major news outlets.[91] The CPD would not divulge who it consulted, but the Washington bureau chiefs of the New

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[87] *See* Letter from Richard E. Neustadt to Paul G. Kirk, Jr., & Frank Fahrenkopf, Jr. (Sept. 17, 1992), attached as exhibit to 2000 Brown Decl. (Exhibit 30).

[88] Perot withdrew from the presidential race on July 17, 1992, *see* Steven A. Holmes, *Ross Perot; Noncandidate Tells His Supporters to Look for Real Candidates to Support*, N.Y. Times, July 19, 1992, submitted herewith as Exhibit 35, and reentered the race on October 1, 1992, *see* Robin Toner, *Perot Re-enters The Campaign, Saying Bush and Clinton Fails To Address Government 'Mess,'* N.Y. Times, Oct. 2, 1992, submitted herewith as Exhibit 36.

[89] Perot reentered the 1992 presidential race on October 1, and the CPD's Advisory Committee convened to consider his reentry on October 5. *See* 2000 Brown Decl. (Exhibit 30) at ¶ 22. Polls conducted over October 2 to 4 by the CBS News/New York Times, the ABC News/Washington Post, and CNN/USA Today/Gallup poll – three of the five polls the CPD has previously purported to rely on in applying the 15% rule – had Perot at 7, 9, and 10%, respectively. *The 1992 Campaign: Polls; Despite Perot's Re-entry, Clinton Retains Big Lead*, N.Y. Times, Oct. 7, 1992, *available at* http://www nytimes.com/1992/10/07/us/the-1992-campaign-polls-despite-perot-s-re-entry-clinton-retains-big-lead html, submitted herewith as Exhibit 37. A Harris poll over the same time period had Perot at 9%. *Id.*

[90] The CPD officially made its decision to exclude Perot on or about September 17, 1996. *See* 2000 Brown Decl. (Exhibit 30) at ¶¶ 26-27. On September 13, Pew released a poll with Perot at 8%. *Solid Clinton Lead, Small Gain for Congressional Democrats*, Pew (Sept. 13, 1996), http://www.people-press.org/1996/09/13/solid-clinton-lead-small-gain-for-congressional-democrats/, submitted herewith as Exhibit 38. Gallup's tracking poll had Perot at 7% at the same time. *U.S. Presidential Election Center*, Gallup, http://www.gallup.com/poll/154559/us-presidential-election-center.aspx (last visited Sept. 6, 2014), submitted herewith as Exhibit 39.

[91] *See supra* text accompanying n.80.

York Times, the Wall Street Journal, the Los Angeles Times, The Chicago Tribune, Time, Newsweek, NBC, CNN, and ABC all confirmed that they were *not* consulted.[92]

Third, the CPD's published criterion considered receipt of federal matching funds as evidence *favoring* inclusion,[93] so it was ignoring its own stated criteria in purporting to exclude Perot on that basis.

In excluding Perot, the CPD, like it did in 1992, was furthering the major parties' interests. In 1996, Robert Dole was desperate to have Ross Perot excluded from the debates. The Clinton campaign used this as a bargaining chip. As a senior Clinton campaign official explained,

> [The Dole campaign] didn't have leverage going into the negotiations. They were behind, they needed to make sure Perot wasn't in it. As long as we would agree to Perot not being in it we could get everything else we wanted going in. We got our time frame, we got our length, we got our moderator.[94]

Thus, as in 1992, the major party candidates had a self-interested agreement about whether to permit Perot to debate. Just as in 1992, the CPD did their bidding.

C. The CPD Is Designed To Further Democratic And Republican Interests

The Perot hypocrisy reflects the inherent partisanship that is a product of the CPD's institutional makeup and design. The CPD's leaders are Republican and Democratic partisans with partisan interests, they are accountable to no one, and they have not created any mechanism for considering the interests of third-party and independent candidates – much less the interest of enormous numbers of Americans in hearing from a candidate who is not affiliated with the two

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[92] *See* Neil A. Lewis, *Should Journalists Be Perot Judges?*, N.Y. Times, Sept. 19, 1996, submitted herewith as Exhibit 40.
[93] *See supra* text accompanying n.80.
[94] David Broder, Campaign For President: The Managers Look at '96 at 170 (1997), submitted herewith as Exhibit 41.

major parties. Given this reality, it is inevitable that the CPD will continue to further Democratic and Republican interests.

The CPD's leadership is partisan. It has always had two chairmen, one a high ranking Republican and the other a high ranking Democrat. Fahrenkopf, the former RNC chair from 1983 to 1989, has always occupied the Republican leadership slot.[95] As set forth above, Fahrenkopf made clear at the CPD's founding that it was a vehicle to further Democratic and Republican interests. Kirk, a former DNC chair, first occupied the Democratic leadership slot.[96] Mike McCurry, a longtime Democratic insider – the holder of "a variety of leadership roles in national campaigns for the Democratic ticket from 1984 to 2004" according to his professional biography[97] – replaced Kirk and remains at the helm.[98] Before he took that spot, however, McCurry was a key player in the Clinton campaign when it and Bob Dole's campaign arranged for the CPD to exclude Ross Perot from the 1996 debates. Others in the Clinton campaign freely admitted, after the fact, that the campaign was more than happy to use the threat of Perot's participation as leverage in its negotiations with the Dole campaign.[99] At the time, however, McCurry claimed that the Clinton campaign accepted Perot's exclusion "reluctantly and with some regret."[100]

That Fahrenkopf and McCurry do not presently hold partisan appointments does not mean they are no longer servants of Republican and Democratic interests. Their campaign contributions and professional activities demonstrate that they are still dyed-in-the-wool

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[95] *See Commission Leadership*, Commission on Presidential Debates, http://www.debates.org/index.php?page=commission-leadership (last visited Sept. 7, 2014), submitted herewith as Exhibit 42.
[96] *See id.*
[97] Michael D. McCurry, Public Strategies Washington Inc., http://www.psw-inc.com/team/member/michael-d.-mccurry (last visited Sept. 5, 2014), submitted herewith as Exhibit 43.
[98] *See Commission Leadership* (Exhibit 42), *supra* n.95.
[99] *See supra* text accompanying n.94.
[100] Press Briefing by Mike McCurry, White House, Sept. 23, 1996, *available at* http://www.presidency.acsb.edu /ws/?pid=48827, submitted herewith as Exhibit 44.

partisans. Fahrenkopf has given tens of thousands of dollars to the Republican Party and its candidates over the years, including more than $23,000 in between 2008 and 2012[101]; in this election cycle alone, he has already given more than $35,000 to GOP candidates and committees.[102] In 2011, Fahrenkopf authored an op-ed calling for the Republican Party to find a "dynamic and hardworking new chairman" who could win the trust of "*our major-donor base*" and "rebuild the tattered reputation and organization of *our great party*."[103] Fahrenkopf has even donated to the presidential campaign of at least one *candidate appearing in the CPD's debates*, George W. Bush.[104] McCurry is just as much a partisan as Fahrenkopf. From 2008 through 2012, McCurry gave nearly $85,000 to Democrats.[105]

Fahrenkopf and McCurry are also well-known lobbyists. During the last presidential election, Fahrenkopf was the head of the American Gaming Association, which spent more $3.5 million on lobbying activities in 2011 and 2012[106] and gave over $150,000 to Democratic and Republican candidates in that span.[107] McCurry is a principal at Public Strategies Washington, Inc.,[108] a lobbying firm for a who's who of major corporations.[109] Its clients include CPD sponsors Anheuser-Busch and Southwest Airlines, which give hundreds of thousands of dollars

[101] *See* Harrison Wills, *Debate Commission's Own Hot Topic*, Open Secrets.org (Oct. 2, 2012), https://www.opensecrets.org/news/2012/10/debate-commission/, submitted herewith as Exhibit 45.
[102] List of Frank Fahrenkopf Individual Contributions, retrieved on September 4, 2014 from FEC's website using the Transaction Query By Individual Contributor, http://www.fec.gov/finance/disclosure/norindsea.shtml, submitted herewith as Exhibit 46.
[103] Frank Fahrenkopf and Jim Nicholson, *Don't Repeat Error of Picking Steele*, Politico (Jan. 12, 2011, 4:37 a.m.), http://www.politico.com/news/stories/0111/47440.html (emphasis added), submitted herewith as Exhibit 47.
[104] List of Frank Fahrenkopf Individual Contributions (Exhibit 46), *supra* n.102.
[105] *See* Wills (Exhibit 45), *supra* n.101.
[106] *Id.*
[107] *See* 2012 Two-Year Summary, Details for Committee ID: C00309146 (American Gaming Association Political Action Committee), retrieved on September 7, 2014 from FEC's website using the Candidate and Committee Viewer, http://www fec.gov/finance/disclosure/candcmte_info.shtml, submitted herewith as Exhibit 48.
[108] *See* Michael D. McCurry (Exhibit 43), *supra* n.97.
[109] *See* What We Do, Public Strategies Washington Inc., http://www.psw-inc.com/what (last visited Sept. 7, 2014), submitted herewith as Exhibit 49.

to Democratic and Republican candidates.[110] Thus, for the CPD leadership to act against Democratic and Republican interests would not only contravene their longstanding political allegiances, but would also be contrary to interests of major corporate clients heavily invested in currying favor with the two major parties.

There is a dense network of ties between the rest of the CPD leadership and the major parties. The CPD's executive director, Janet Brown, is herself a creature of partisan politics, having served as an aide to top Republicans before taking over her present office in 1987.[111] Two former Republican senators, John Danforth and Alan Simpson, are on the CPD board.[112] Democratic board representatives include Newton Minow, a close aide to Adlai Stevenson and a Kennedy appointee to the Federal Communications Commission[113]; and Antonia Hernandez, who served as counsel to the Senate Committee on the Judiciary when it was led by Ted Kennedy.[114] These and other board members have routinely contributed to Republican and Democratic causes. The biggest bankroller of major party campaigns on the CPD from 2008 to 2012 was Richard Parsons; he and his wife gave more than $100,000 to Republican candidates

[110] Anheuser-Busch's political action committee made nearly $1.3 million in federal campaign contributions to Democratic and Republican candidates in the 2012 cycle. *See* 2012 Two-Year Summary, Details for Committee ID: C00034488 (Anheuser-Busch Companies Inc. Political Action Committee), retrieved on September 4, 2014 from FEC's website using the Candidate and Committee Viewer, http://www fec.gov/finance/disclosure/candcmte_ info.shtml, submitted herewith as Exhibit 50. Southwest Airlines' political action committee made more than $150,000 in campaign contributions to Democratic and Republican candidates in the 2012 cycle. *See* 2012 Two-Year Summary, Details for Committee ID: C00341602 (Southwest Airlines Co. Freedom Fund), retrieved on September 4, 2014 from FEC's website using the Candidate and Committee Viewer, http://www fec.gov/finance/ disclosure/candcmte_info.shtml, submitted herewith as Exhibit 51.

[111] *See* 2000 Brown Decl. (Exhibit 30) at ¶ 2.

[112] *See Commission Leadership* (Exhibit 42), *supra* n.95.

[113] *See* Minow & LaMay (Exhibit 20), *supra* n.54, at 7. Minow has been a strong proponent of Democratic and Republican control over the debates: "Because debates are political events, responsibility for them should rest with the political system—with the Democratic and Republican Parties . . . . Although entrusting such debates to the major parties is likely to exclude independent and minor-party candidates, this approach is consistent with the two-party system. Moreover, if the Democratic and Republican nominees agreed, other candidates could be included." Newton Minow & Lee Mitchell, *Formalize Debates*, N.Y. Times, May 30, 1984, submitted herewith as Exhibit 52.

[114] *See* Andrea Saenz, *Former MALDEF Chief Antonia Hernandez Speaks At HLS*, The Harvard Law Record (Nov. 16, 2007), http://hlrecord.org/?p=12381, submitted herewith as Exhibit 53.

and party committees in that span.[115] Howard Buffett, a CPD board member since at least 2000,[116] contributed to Barack Obama's 2008 presidential campaign the *very same month* that the supposedly "nonpartisan" CPD sponsored the debates between Obama and John McCain.[117] Board member Dorothy Ridings has contributed to Democratic campaigns too.[118]

To be sure, some CPD board members have less overt ties to the political parties than others.[119] But there is no evidence that these few less overtly partisan members provide any check on the CPD's record of partisanship. Nothing suggests that the CPD has any institutional mechanisms to check Democratic and Republican influence or to protect the interests of third parties and independents. In contrast, there is ample reason to believe that Democratic and Republican influence will go unchecked.

First, by all appearances, the board is not a powerful or committed organization. According to one director, the board may meet as infrequently as once a year, and generally by conference call, and its members "frequently [] will leave because of real or perceived conflicts of time or interest."[120] Indeed, board membership appears little more than an honorific. For years, the CPD admitted that its board members devoted *zero* hours per week to the organization,

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[115] *See* Wills (Exhibit 45), *supra* n.101.
[116] *See* 2000 Brown Decl. (Exhibit 30) at ¶ 7.
[117] *See* List of Howard Buffett Individual Contributions, retrieved on September 4, 2014 from FEC's website using the Transaction Query By Individual Contributor, http://www fec.gov/finance/disclosure/norindsea.shtml, submitted herewith as Exhibit 54.
[118] *See* List of Dorothy Ridings Individual Contributions, retrieved on September 4, 2014 from FEC's website using the Transaction Query By Individual Contributor, http://www fec.gov/finance/disclosure/norindsea.shtml, submitted herewith as Exhibit 55.
[119] The CPD added six new board members in April 2014, among them a former Republican governor, a former Republican Senator, a former Democratic congresswoman, and a former Democratic congressman and cabinet official. *See CPD Elects Six New Directors*, Commission on Presidential Debates (Apr. 16, 2014), http://www. debates.org/index.php?mact=News,cntnt01,detail,0&cntnt01articleid=52&cntnt01origid=15&cntnt01 detailtemplate=newspage&cntnt01returnid=80, submitted herewith as Exhibit 56. Because these individuals were not on the CPD board in 2012 and the CPD has not yet announced its 2016 criteria, they are not named as respondents in this complaint.
[120] Minow & LaMay (Exhibit 20), *supra* n.54, at 64.

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even in presidential election years.[121] Board members do not even bother to attend the debates. Five of the eleven board members were absent from the first presidential debate in 2012, and Fahrenkopf noted that that attendance level was an *accomplishment.*[122]

Second, the CPD board nominates its own members, without any oversight.[123] That leaves the partisan leadership of the CPD free to stack the board with people who will not challenge their partisan approach to manipulating the debates. That appears to be the practice. For example, the CPD's original bylaws gave the two chairmen of the organization – *i.e.* veteran chairmen of the two major parties – the unilateral power to determine which directors could nominate candidates for board admission, and unchecked discretion in filling vacancies occurring before a director's official term expired.[124] The current Democratic co-chair, McCurry, likely owes his CPD position to Kirk, who was his "former boss" when McCurry was communications director of the Democratic National Committee.[125]

Third, the CPD apparently has no rules preventing board members from cultivating and maintaining active partisan ties. The CPD's conflict of interest policy is *entirely silent* when it comes to partisan activity.[126] In other words, an organization that by law must be nonpartisan

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[121] *See* Commission on Presidential Debates, Excerpts from Form 990 Return of Organization Exempt From Income Tax for 1997-2007 Tax Years, submitted herewith as Exhibit 57. Beginning in 2008, the CPD's tax returns have claimed that each of its board members spends an average of one hour per week on CPD business. *See* Commission on Presidential Debates, Excerpts from Form 990 Return of Organization Exempt From Income Tax for 2008-2012 Tax Years, submitted herewith as Exhibit 58. Thus, the amount of time claimed does not vary from election year to nonelection year, nor does it vary among directors. These uniform assertions – made after years of uniform assertions that the same directors spent zero hours per week on CPD affairs – strain credulity.

[122] *See* Commission on Presidential Debates, Transcript of the Oct. 3, 2012 presidential debate at the University of Denver at 2, *available at* http://dyn.politico.com/printstory.cfm?uuid=9D86F64C-E1F6-5113-51036B3743BD9466 ("I don't think we've ever had six of us together at one debate" (quoting CPD chair Frank Fahrenkopf)), submitted herewith as Exhibit 59.

[123] Minow & LaMay (Exhibit 20), *supra* n.54, at 65.

[124] Bylaws of the Commission on Presidential Debates at §§ 2, 3, attached as Exhibit B to the Commission on Presidential Debates, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code, dated Mar. 5, 1987, submitted herewith as Exhibit 100.

[125] *See* Commission on Presidential Debates, Transcript of the Oct. 3, 2012 presidential debate (Exhibit 59), *supra* n.122, at 2.

[126] *See* Commission on Presidential Debates, Conflict of Interest Policy, obtained from the CPD on Sept. 9, 2014, submitted herewith as Exhibit 101.

does not even see fit to ensure that its directors and officers – which appear to be virtually all of the people who make up the CPD[127] – adhere to any standard of what is acceptable political conduct. That is not surprising, given that the CPD's leaders have remained heavily active Democratic and Republican partisans. Indeed, CPD members not only contribute heavily to Democratic and Republican campaigns as set forth above, but they also receive political favors from the Democrats and Republicans they support. Paul O'Neill joined the CPD's board in 1999[128]; less than two years later President George W. Bush appointed him Secretary of the Treasury. Paul Kirk, when he was still co-chairman of the CPD, served as a Democratic superdelegate who publicly declared support for Barack Obama in May 2008. Kirk touted that Obama would "bring young and new and independent voters to the Democratic banner in November."[129] Kirk was repaid for his endorsement. He left his CPD position to accept an appointment from Deval Patrick, a Democratic governor and close Obama ally, to take Ted Kennedy's seat as a Democratic member of the Senate.[130] According to news reports, Kirk was the favored choice of the Obama administration, and Obama himself called Kirk's selection an "excellent" choice.[131] Thus, CPD board members not only retain close ties with the parties, but they do so with the hope of winning future partisan appointments.

In light of all the historic close ties between the Republican and Democratic parties and the CPD leadership, the leadership's willingness to maintain such ties, and the incentives to

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[127] The CPD spent less than $275,000 on salaries and wages for non-officer employees, *see* CPD 2012 Form 990 (Exhibit 6) at 10, so it cannot have a very large staff.

[128] *See* Commission on Presidential Debates, Excerpts from Form 990 Return of Organization Exempt From Income Tax for 1997-2007 Tax Years at 1999 Form 990, Statement 5 (Exhibit 57), *supra* n.121.

[129] Jonathan D. Salant, *Former Democratic Party Leader Paul Kirk Backs Obama*, Bloomberg.com (May 2, 2008 2:22 p.m.), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aBtdfyDJEwZM&refer=home, submitted herewith as Exhibit 60.

[130] *See* Commission on Presidential Debates, Transcript of the Oct. 3, 2012 presidential debate (Exhibit 59), *supra* n.122, at 2; Abby Goodnough & Carl Hulse, *Former Kennedy Aide Is Appointed to Fill His Senate Seat*, N.Y. Times, Sept. 24, 2009, *available at* http://www.nytimes.com/2009/09/25/us/politics/25massachusetts html?_r=0, submitted herewith as Exhibit 61.

[131] *See* Goodnough & Hulse (Exhibit 61), *supra* n.130.

maintain such ties, partisanship infects the CPD. And there are no institutional mechanisms to fight that infection.

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The Democratic and Republican parties created the CPD to serve their interests, and it has faithfully done so since its founding. For this reason alone, the CPD has not satisfied the FEC's debate sponsorship regulations and has violated the Act.

II. THE CPD USES SUBJECTIVE CANDIDATE SELECTION CRITERIA THAT ARE DESIGNED TO EXCLUDE THIRD-PARTY AND INDEPENDENT CANDIDATES

The CPD purports to use objective candidate selection criteria. Beginning in 2000, the key element of these criteria is the CPD's rule that in order to participate in the general election debates, a candidate must have 15% support in an average of five national polls taken in early to mid-September. The CPD's 15% rule has excluded third-party and independent candidates for all five election cycles it has been in effect.

The CPD's 15% rule is illegal. The rule is not objective. Rather, it is designed to result in the selection of only the Democratic and Republican candidates and is biased against third-party and independent candidates. The rule serves no valid purpose. It is not, as the CPD claims, necessary to ensure leading candidates attend the debates or to prevent too many candidates from participating. The rule also undermines the voter educational purpose that the debates are supposed to serve. It limits voters' exposure to new candidates and ideas in service of partisan ends, not voter education. For each and all of these reasons, the FEC should find that the CPD's 15% rule violates the debate sponsorship regulations.

A. The 15% Rule Is Not Objective

The FEC requires debate sponsors to "use pre-established objective criteria to determine which candidates may participate in a debate."[132] To satisfy this regulation, it is not enough that a debate sponsor publish criteria that meet some basic dictionary definition of objective. The FEC's debate sponsorship rules "do not allow a staging organization to bar minor party candidates or independent candidates from participating simply because they have not been nominated by a major party."[133] Many rules can seem objective on the surface but nonetheless operate in practice as a means for improperly excluding unaffiliated candidates. To guard against this possibility, the FEC has explained that the objectivity requirement means that the criteria "must be free of 'content bias,' *and not geared to the selection of certain pre-chosen participants.*"[134] Moreover, "reasonableness" is an implicit component of the objectivity requirement, and the FEC has further explained that "specific evidence that a candidate assessment criterion was 'fixed' or arranged in some manner so as to guarantee a preordained result" warrants an investigation of whether a debate sponsor has violated the FEC's debate regulations.[135] To demonstrate that its 15% criteria satisfies the FEC's rule, the CPD "*must be able to show* . . . that the criteria were not designed to result in the selection of certain pre-chosen participants."[136]

The CPD's 15% rule may appear reasonable on its face, but appearances do not satisfy the FEC's requirement that the CPD show the rule is, in fact, objective. The CPD cannot make

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[132] 11 C.F.R. § 110.13(c).
[133] Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. at 64,262; *see also* 11 C.F.R. § 110.13(c); Statement of Reasons at 10, MURs 4451 and 4473 (Commission on Presidential Debates) (Apr. 6, 1998) (regulations were intended "to prevent a debate sponsor from *excluding* a candidate from debate solely because the candidate was not a major party nominee").
[134] First General Counsel's Report at 7, MUR 5395 (Dow Jones) (Jan. 13, 2005).
[135] Statement of Reasons at 9, MURs 4451 and 4473 (Commission on Presidential Debates) (Apr. 6, 1998).
[136] Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. at 64,262 (emphasis added).

that showing. As set forth in detail below, the only reasonable conclusion from the evidence is that the CPD's 15% rule is not an objective criterion at all, but rather a purposeful barrier to third-party and independent candidate participation in the presidential and vice-presidential debates.

1. The 15% Rule Is Designed To Select Republican And Democratic Candidates And Exclude Third-Party And Independent Candidates

The 15% rule is not objective because it is designed to guarantee a preordained result in which only the Democratic and Republican nominees for president qualify for the debates, and independent candidates are excluded. In particular, "the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it."[137] No third-party or independent candidate has satisfied the CPD's polling criterion in the four election cycles in which it has been in place; nor would Ross Perot have satisfied it had it been in effect in 1992 or 1996. That is not an accident. An unaffiliated candidate – no matter how qualified to be president – cannot reasonably be expected to satisfy the CPD's rule.

The first step in gaining vote share is gaining name recognition. Before a voter can express an intention to vote for a candidate, the voter needs to know enough about the candidate to want to vote for him or her.[138] To achieve 15% support nationally, the candidate needs to become sufficiently well known by at least 15% of the electorate. That is a theoretical minimum, of course. Practically speaking, the candidate needs to become known by well more than 15% of the electorate because not every voter that knows the candidate will want to vote for him or her – the candidate will not appeal to everyone. A candidate seeking to satisfy the CPD's rule thus

[137] *Buchanan*, 112 F. Supp. 2d at 74.
[138] Expert Report of Dr. Clifford Young, dated Sept. 5, 2014, (hereinafter "Young Report") at ¶ 11, submitted herewith as Exhibit 62.

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needs to become sufficiently well known nationally such that 15% of the electorate will support him or her. How well known does an independent candidate need to become to satisfy the 15% rule? Data show that, on average, a candidate would have to achieve, at a minimum, 60% national name recognition to have a chance at achieving 15% voter support.[139] It is likely, moreover, that the necessary name recognition is much higher, approaching 80% or above.[140]

Even 60% name recognition is a high bar, but it is one that Democratic and Republican nominees will necessarily clear after their primary process and that is outside the practical reach of third-party and independent candidates in the current campaign environment.

Achieving broad name recognition and 15% vote share is much easier for candidates who compete in the major party primaries than it is for those who do not.

First, Democratic and Republican candidates receive a default level of vote share by virtue of their partisan affiliation alone.[141] Accordingly, such candidates could approach 15% support without mounting a campaign at all.

Second, the primary process provides a ready-made mechanism for Democratic and Republican hopefuls to generate name recognition, and, in turn, voter support, all at a cost that is manageable for Democratic and Republican candidates without a national profile. The early primary states are small. Candidates without a national profile can raise the money necessary to become competitive in those states. That, in turn, leads to media coverage, inclusion in the primary debates, and other *free* avenues to enhanced name recognition. Data from the 2012 Republican primary bear this out. Rick Santorum began the primary process with only 47%

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[139] *Id.* at ¶¶ 10, 32; *see id.* at ¶¶ 24-28.
[140] *Id.* at ¶¶ 10, 29-30, 32. It is important to note that name recognition is even more important for unaffiliated candidates than it is for Democrats and Republicans. That is because Democrat and Republican candidates can earn vote share from voters who have knowledge of, and preference for, one of the major parties. A voter may express a preference for the Democrat without knowledge of the specific candidate simply because he or she knows that the candidate is a Democrat. *Id.* at ¶ 21.
[141] *See id.*

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name recognition among Republican voters in May 2011.[142] By February 13, 2012, his name recognition had increased to 85% among all Americans.[143] Santorum, however, spent no more than $13.1 million on his campaign up to that point.[144] Similarly, Herman Cain saw his name recognition increase from 21% among Republican voters in March 2011 to 78% among Republican voters by the end of October 2011[145] at a cost to his campaign of less than $16 million.[146]

Thirteen to sixteen million dollars is a meaningful amount of money, but by no means an unattainable sum for a candidate running for national office. Indeed, it is equal to or less than what a serious Senate candidate in a populous state would need to raise.[147] It may cost more to win the primary, of course. But the cost of getting sufficiently known to have a chance of polling at 15% is manageable for primary participants.

By contrast, candidates unaffiliated with the Democratic and Republican parties have no analogous way to build name recognition, and as a practical matter it is virtually impossible for such candidates to satisfy the 15% threshold. These candidates do not have the benefit of a party brand identity to inflate their vote share. And unlike Democratic and Republican hopefuls who

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[142] Frank Newport, *With Huckabee Out, No Clear GOP Front-Runner*, Gallup (May 17, 2011), http://www.gallup.com/poll/147584/huckabee-no-clear-gop-front-runner.aspx, submitted herewith as Exhibit 63.

[143] *See CNN/ORC Poll*, CNN (Feb. 14, 2012), http://i2.cdn.turner.com/cnn/2012/images/02/14/rel2c.pdf (reporting that only 15% of all Americans had never heard of Rick Santorum), submitted herewith as Exhibit 64.

[144] Presidential Pre-Nomination Campaign Disbursements February 29, 2012, Federal Election Commission, http://www fec.gov/press/bkgnd/pres_cf/pres_cf_odd_doc/presdisbursm32012.pdf (last visited Sept. 5, 2014), submitted herewith as Exhibit 65.

[145] Stephanie Condon, *Herman Cain becomes a familiar name, poll shows*, CBS News (Oct. 28, 2011 8:32 p m.), http://www.cbsnews.com/news/herman-cain-becomes-a-familiar-name-poll-shows/, submitted herewith as Exhibit 66.

[146] Presidential Pre-Nomination Campaign Disbursements December 31, 2011, Federal Election Commission, http://www fec.gov/press/bkgnd/pres_cf/pres_cf_odd_doc/presdisbursye2011.pdf (last visited Sept. 5, 2014), submitted herewith as Exhibit 67.

[147] For example, the Republican and Democratic Senate candidates in Ohio each raised more than $16 million in 2012. *See* 2012 House and Senate Campaign Finance for Ohio, retrieved on September 4, 2014 from FEC's website using the 2012 House and Senate Campaign Finance Map, http://www.fec.gov/disclosurehs/hsnational.do, submitted herewith as Exhibit 68. The winners of the 2012 Senate races raised $10.5 million on average. David Knowles, *U.S. Senate seat now costs $10.5 million to win, on average, while U.S. House seat costs, $1.7 million, new analysis of FEC data shows*, N.Y. Daily News (Mar. 11, 2013, 5:32 p m.), http://www.nydailynews.com/news/politics/cost-u-s-senate-seat-10-5-million-article-1.1285491, submitted herewith as Exhibit 69.

benefit from press coverage of the primary process, unaffiliated candidates lack an institutionalized process for obtaining free media that can generate name recognition. Indeed, the media pay little attention to these candidates at all[148]; as leading political analyst Chuck Todd put it, these candidates "typically don't get the media attention – *and thus name ID* – that Democrats and Republicans get."[149] As a result, an unaffiliated candidate would have to rely on paid media to become known and to communicate his or her message. The cost to a third-party or independent candidate of achieving the name recognition necessary to have a chance and accessing the debates is exorbitant.

A typical third-party or independent candidate would not have 60% name recognition prior to campaigning for office. Senators, governors, and major CEOs have national name recognition well below that level before they run for president.[150] Experienced pollster and campaign strategist Doug Schoen estimates that the cost of just the advertising necessary to achieve 60% name recognition for an unaffiliated candidate would be in the ballpark of $113 million, at an absolute minimum.[151] The chief component of that cost is paid media. To achieve 60% name recognition, a near-unknown candidate would have to plan to embark on an 18-week,

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[148] Expert Report of Douglas Schoen, dated Sept. 5, 2014, (hereinafter "Schoen Report") at 4-5, submitted herewith as Exhibit 70.

[149] Chuck Todd, Mary Murray & Carrie Dan, *Independents' Day? Game Rigged Against Third-Party Candidates*, NBC News (July 3, 2014 9:12 a.m.), http://www nbcnews.com/politics/first-read/independents-day-game-rigged-against-third-party-candidates-n147331, submitted herewith as Exhibit 71.

[150] For example, Jon Huntsman, a former Republican governor and sitting Ambassador to China, had only 21% name recognition *among Republicans* before he declared his candidacy for the Republican nomination for president. *See* Frank Newport, *Pawlenty Begins Race With 41% GOP Name Recognition*, Gallup (Mar. 23, 2011) http://www.gallup.com/poll/146768/pawlenty-begins-race-gop-name-recognition.aspx, submitted herewith as Exhibit 72. In a recent Gallup poll, many possible contenders for the 2016 Democratic and Republican nominations – persons who have already benefitted from media speculation about their potential runs – are familiar to less than half of the country: Senator Marco Rubio had 46% familiarity, Massachusetts Senator Elizabeth Warren and Louisiana Governor Bobby Jindal were at 38%, and Maryland Governor Martin O'Malley was at 16%. *See* Jeffrey Jones, *Clinton Is Best Known, Best Liked Potential 2016 Candidate*, Gallup (July 17, 2014), http://www.gallup.com/poll/173402/clinton-best-known-best-liked-potential-2016-candidate.aspx, submitted herewith as Exhibit 73. Even seemingly "household" names like Chris Christie (65%), Jeb Bush (65%), and Paul Ryan (56%) were unfamiliar to more than one-third of the country. *See id.*

[151] Schoen Report (Exhibit 70) at 11.

broad-based advertising blitz that included ad buys on national broadcast television, cable television, and digital media.[152] The media purchase necessary to take a near-unknown candidate to this level of name recognition is $106 million.[153] The candidate would have to spend an additional $6 million to produce the content to fill that media purchase.[154] And to achieve 80% – the more likely amount necessary – the candidate would have to spend $150 million on paid media.[155]

No third-party or independent candidate has ever raised $113 million, much less $150 million.[156] To put these figures in perspective, $113 million is seven to nine times more than what candidates like Cain and Santorum spent, in total, before seeing their name recognition rise to significant levels. Indeed, $113 million is more than what Mitt Romney's campaign spent to *win* the Republican nomination in 2012.[157]

The foregoing, however, is only the cost directly associated with paid media. A campaign faces myriad other costs, to pay for staff, consultants, polling, legal advice, travel, events, direct mail, etc.[158] A candidate seeking to be competitive with the major party candidates would likely budget to spend more than $133 million on these other campaign costs (roughly 75% of Mitt Romney's campaign nonmedia related expenses in 2012).[159] A third-party or independent candidate, moreover, has to spend money to coordinate the massive signature

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[152] *Id.* at 6-10.
[153] *Id.* at 10.
[154] *Id.* at 11.
[155] *Id.*
[156] Billionaires may be able to afford this sum. Billionaire status, however, should not be a prerequisite for a candidate to gain access to the debates.
[157] Mitt Romney secured a majority of Republican delegates on May 29, 2012. Gregory Wallace, *Romney hits 'magic number' for GOP nomination*, CNN (May 30, 2012 5:34 a m.), http://www.cnn.com/2012/05/29/politics/romney-delegates/, submitted herewith as Exhibit 74. Through May 31, 2012, his campaign had spent $106.5 million. *See* Presidential Pre-Nomination Campaign Disbursements Through May 31, 2012, Federal Election Commission, http://www.fec.gov/press/bkgnd/pres_cf/pres_cf_odd_doc/presdisbursm62012.pdf (last visited Sept. 5, 2014), submitted herewith as Exhibit 75.
[158] *See* Schoen Report (Exhibit 70) at 12-16.
[159] *Id.* at 17; *see id.* at 14-16.

gathering effort that is necessary to achieve ballot access, which could cost upwards of $13 million or more.[160] Adding up these costs for paid media, campaigning generally, and ballot access, and a third-party or independent candidate is looking at a budget of more than $253 million to mount a competitive bid and achieve poll results of 15% or more in September.[161] Factor in the approximate 5% growth in costs that occurs from one presidential cycle to the next, and that number rises to $266 million in 2016.[162]

It is simply not feasible for a third-party or independent candidate to raise this kind of money. Individuals can only donate $2600 to a candidate per election (primary and general).[163] In 2012, the plurality of individual donations to the major party candidates was considerably less, under $200.[164] If one assumes that the average individual donation is $200, a third-party or independent candidate would need to obtain 560,000 donations in order to raise the funds necessary to pay just for the advertising necessary to achieve 60% name recognition. If one assumes that only one out of two individuals will be willing to contribute – an aggressive assumption – then a candidate will need to solicit over one million people to raise the necessary funds. And that is only the fundraising needed for paid media – it does not begin to cover the other costs of mounting a campaign. Moreover, the candidate would have to achieve massive fundraising success *before* obtaining significant name recognition, which makes fundraising that much harder – why would someone give money to a candidate they had never heard of?

Additionally, most political donors are repeat donors, and they are typically invested in the success of one of the major parties. A third-party or independent candidate needs to either

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[160] *Id.* at 17 n.18.
[161] *Id.* at 18.
[162] *Id.* at 17-18.
[163] *See* Contribution Limits 2013-14, Federal Election Commission, http://www fec.gov/pages/brochures/ contriblimits.shtml (last visited Aug. 9, 2014).
[164] *See* Schoen Report (Exhibit 70) at 24.

convert a donor with a partisan preference, or appeal to people who do not typically make political contributions. He or she has to do so without any guarantee of access to the presidential debates, participation in which is a prerequisite to winning the election. And he or she has to do that more than half a million times. There is no evidence that that is a practical possibility.

In sum, without unparalleled sums of campaign cash that no unaffiliated candidate has ever raised, it is not possible for a third-party or independent candidate to achieve the name recognition necessary to poll at 15%. Thus, it is clear that the CPD's rule, when assessed against the realities of the presidential campaign system, creates a hurdle that third-party and independent candidates cannot reasonably expect to clear.

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2. The CPD's 15% Rule Is Biased Because It Systematically Disfavors Third-Party And Independent Candidates

The CPD claims that the 15% rule identifies "principal rivals for the Presidency."[165] That claim has no merit. All the CPD's polling rule does is systematically and arbitrarily disadvantage third-party and unaffiliated candidates. This bias against third-party and independent candidates is a second reason why the 15% rule is not objective.

First, the CPD's polling measure is a flawed way to measure the viability of a third-party or independent candidate. It fails to account for the differential in name recognition between the major party candidates, who have benefitted from the attention resulting from the primaries, and a third-party or independent candidate who has not had a comparable opportunity to make his or her case to the public. As a result, a simple poll does not capture a candidate's potential.[166] An

[165] First General Counsel's Report at 12, MURs 4987, 5004, and 5021 (Commission on Presidential Debates) (July 13, 2000).

[166] *See* Nate Silver, *A Polling Based Forecast of the Republican Primary Field*, FiveThirtyEight Politics (May 11, 2011 10:05 a.m.), http://fivethirtyeight.com/features/a-polling-based-forecast-of-the-republican-primary-field/ (explaining that one must account for differentials in name recognition in order to evaluate a "candidate's upside"), submitted herewith as Exhibit 76.

unaffiliated candidate might meet or exceed the 15% threshold if he or she had sufficient name recognition. The CPD's polling criteria ignores that possibility.

Second, the CPD's rule leaves third-party and independent candidates at the mercy of arbitrary decisions of pollsters and the CPD on who to poll, when to poll, what polls to consider, and when to make the debate selection determination. There is no requirement that pollsters test third-party and independent candidates. Thus, regardless of the level of support a debate sponsor determines is necessary, a minor or third-party candidate could be excluded from the debates simply because the pollsters the CPD relies on choose not to test his or her support.

In addition, the CPD does not use objective, pre-determined criteria to select which five polls to average. Its rule states that the average will be of polls of "five selected national public opinion polling organizations,"[167] but does not identify the five organizations or limit itself in advance to any particular organizations. As a result, the selection of which polls to include is subject to manipulation to achieve particular results. For example, the average of any 5 of 30, or 20, or 10 polls could show the independent candidate with 15% support, but the average of 5 other polls would not. The CPD could simply choose the 5 that exclude the third candidate, and ignore the others.

Moreover, there is no requirement that pollsters take a poll at any particular point in time. That is problematic when a debate sponsor uses a strict polling cutoff as a prerequisite for debate inclusion. The difference between meeting the 15% threshold could be whether the CPD relied on a poll completed a day before the candidate had a positive turn in the news cycle, or a day after. The CPD's rule, in fact, permits precisely this kind of manipulation. The CPD does not commit itself to measuring a candidate's polling average on a specific date. Rather, the CPD applies the polling criterion after Labor Day "but sufficiently in advance of the first-scheduled

[167] *CPD: 2012 Candidate Selection Criteria* (Exhibit 8), *supra* n.33.

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debate to allow for orderly planning."[168] That flexibility gives the CPD the opportunity to manipulate the results: it can hasten its "determination" if a candidate hovering around 15% happens to be below it on one given day, or postpone its "determination" in the hopes that a candidate's support will decrease.

Third, polls in three-way races are subject to increased inaccuracy. A poll's accuracy relies on the pollster selecting the right sample, which, in turn, requires the pollster to make assumptions about the anticipated turnout on Election Day.[169] If a pollster's prediction about who will vote is incorrect, the accuracy of his or her pre-election polls will suffer.[170] Third-party and independent candidates complicate the selection of an appropriate sample. As polling and campaign expert Doug Schoen explains, this is "because of the new voters that serious third party and independent candidates tend to bring out in an election, just as Ross Perot did in 1992. These voters, some of whom are politically inactive or even unregistered until mobilized by a compelling candidate, are easily overlooked when creating samples for pre-election polls."[171] Thus, even if a pollster chooses to test the support of a third-party or independent candidate, there is significant chance that the test will be skewed because the pollster chose an incorrect sample.

Evidence from three-way races bears this out. As Schoen explains,

> [R]aces with a serious third party or independent contender are prone to a distinct volatility in terms of voter support that limits the predictive power of pre-election data. The extent of this volatility is, of course, dependent on the nature of the electorate and its perception of that third party candidate. A recent article by Harry Enten of *FiveThirtyEight* outlined a short historical analysis over the last 12 years for gubernatorial races where a third candidate was polling at or above 5%. Analyzing polling data from the months prior to the election and comparing them to the final results, he found a median absolute error difference of 10.1% in the mid-election polls for those

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[168] *Id.*
[169] Young Report (Exhibit 62) at ¶¶ 43, 43a-43c.
[170] *See id.* at ¶¶ 43d-43e.
[171] Schoen Report (Exhibit 70) at 28.

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> polling in second place. That number grows to 15.3% for those polling third. Further, it was wholly unclear whether the polling over- or underestimated the potential of the third party candidate, with some polls missing a runaway by the major-party contender and others unable to foresee a third-party victory. . . .
>
> A hypothetical third candidate can be polling at 5% against his two opponents, excluding him from the debate due to the 15% participation standard. However, because of the pronounced volatility in a three-way race – 15.3% on average – that candidate could still finish with 20% of the vote.[172]

This increased error and volatility means that polling-based debate inclusion criteria will often exclude candidates with the potential to take a large share of votes on Election Day, or even win.

History proves this to be true. In the 1998 Minnesota governor's race, independent candidate Jesse Ventura was polling near 10% two months before Election Day.[173] If a rule requiring 15% in popular support to warrant inclusion in the debates had been in effect, he would have been excluded from the debates. Ventura, of course, went on to win the governor's race with 37% of the vote.[174] Independent gubernatorial candidate Elliot Cutler in Maine in 2010 would not have met a 15% cutoff either; Cutler was polling at 11%[175] two months out of the election. Although he did not win, he had a far more significant showing than these poll numbers had suggested come Election Day: Cutler took 36% of the final vote.[176] This demonstrated volatility in three-way races shows that the CPD's polling-based criteria will result in excluding third-party and independent candidates that may have significant popular appeal.

Statistical analysis proves this to be true as well. The increased inaccuracy of polling in three-way races will lead to a significant number of false results: because of the inaccuracy of polling, the CPD's rule will often exclude a candidate who actually draws 15% support. New

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[172] *Id.* at 26-27.
[173] *See* Tim Cramm, *The Designated Nonpublic Forum: Remedying the Forbes Mistake*, 67 Alb. L. Rev. 89, 89 (2003), submitted herewith as Exhibit 77.
[174] *Id.*
[175] Matt Wichkenheiser, *The Results*, Portland Press Herald, Sept. 19, 2010, *available at* http://www.pressherald.com/2010/09/19/the-results_2010-09-19/, submitted herewith as Exhibit 78.
[176] General Election Tabulations, Maine.gov, http://www maine.gov/sos/cec/elec/2010/gen2010gov html (last visited Sept. 6, 2014), submitted herewith as Exhibit 79.

research shows that in three-way gubernatorial races,[177] the average absolute difference between a poll taken two months before the election and the final result is 8.04%.[178] At that error rate, a hypothetical candidate with 17% support would nonetheless fail to satisfy the CPD's 15% rule 40.2% of the time.[179] In contrast, at the same 8.04% error rate, a hypothetical candidate with 42% support would only fail to satisfy the CPD's rule .04% of the time.[180] In other words, 4 out of 10 times, the CPD's rule will exclude the 17% candidate from the debates, but only 4 out of 1000 times will it exclude the 42% candidate from the debates. The high risk of a false negative resulting from the application of the CPD's rule thus hurts only the third place candidate, which, in almost all cases, will be the third-party or independent candidate. As a result, because of the inaccuracy of three-way polling, the CPD's rule is systematically skewed to reduce an unaffiliated candidate's chance of satisfying it.

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3. The Timing Of The CPD's Determination Is Biased And Designed To Exclude Third-Party And Independent Candidates

The mid-September timing of the CPD's 15% determination also violates the FEC's objectivity requirement. Because they know the CPD has never and would never exclude a Republican or Democratic nominee from the debates, the Republican and Democratic candidates can be sure that they can participate in the debates from the moment they secure their parties' nominations. Even if the CPD actually applied the 15% rule to Democratic and Republican candidates, those candidates could rely on the support of devout partisans to clear that hurdle.[181] Thus, they face no uncertainty when it comes to debate participation.

[177] Because there is more three-way polling data for gubernatorial races, the author of the expert report drew on that larger sample to form a more robust conclusion. Young Report (Exhibit 62) at ¶ 34.
[178] *Id.* at ¶ 56.
[179] *Id.* at ¶ 66.
[180] *Id.*
[181] *See id.* at ¶ 21.

In contrast, a third-party or independent candidate must campaign for months under uncertainty as to whether he or she will have access to the debates. This uncertainty creates concrete harms that themselves make it even more impossible to poll at 15% in September. Without guaranteed access to the debates, the media is much less likely to cover the candidate, which inhibits the candidate's ability to raise money and build support. Moreover, given that participation in the debates is a prerequisite to victory, many prospective donors will not contribute to a candidate who has not yet qualified for the debates. Thus, the uncertainty resulting from the timing of the CPD's polling determination creates another Catch-22: The CPD requires unaffiliated candidates to raise an unprecedented sum of money in order to reach 15% in the polls in September, yet by postponing the determination of debate access to September, the CPD creates additional hurdles to raising that money. For this reason too, the CPD's rule is biased and designed to exclude third-party and independent candidates.

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4. The CPD Has Never Shown That 15% Vote Share Is Reasonably Achievable For A Third-Party Or Independent Candidate

There is no indication that the CPD – or the FEC, for that matter – has ever analyzed what it would take for an unaffiliated candidate to achieve 15% vote share. Before adopting its present rule, the CPD eligibility criteria consisted of a number of indefinite, manipulable factors.[182] The CPD defended that approach in a 1997 amicus brief to the Supreme Court, explaining that it did "not favor[] the simplistic use of polling data as the sole basis for debate participation."[183] Just a few short years later, the CPD adopted the present 15% rule for the 2000 presidential election cycle. The CPD told the FEC that this about-face on "the simplistic use of

[182] *See supra* text accompanying n.80.
[183] Br. of Commission on Presidential Debates at 6 n.4, Arkansas Educational Television Comm'n v. Forbes, 1997 WL 311466 (U.S. May 30, 1997).

polling data as the sole basis for debate participation" was "preceded by careful study,"[184] but it did not detail what that study included.

The CPD's primary defense of the 15% threshold has relied on historical examples. The CPD has told the FEC that the 15% rule is objective because John Anderson in 1980, George Wallace in 1968, and Ross Perot in 1992 purportedly achieved polling numbers in excess of 15% at various points in their campaigns.[185] The CPD, however, has never justified how campaigns conducted 46, 34, and 22 years ago, respectively, provide a barometer for what a candidate can "reasonably achieve" in a modern campaign environment. The drastic changes in media, campaign finance, and campaigns themselves demonstrate that these examples are anachronistic.

In any event, the CPD's historical "precedents" are flawed. Neither George Wallace nor John Anderson was unaffiliated with the Democratic or Republican parties. Wallace competed in the Democratic primary for president in 1964,[186] and Anderson competed in the Republican primary for president in 1980.[187] Both thus received the enhanced name recognition that results from primary participation that truly unaffiliated candidates do not receive. Their candidacies do not undercut the case that the CPD's rule is not one that unaffiliated candidates can reasonably satisfy.[188] As for Ross Perot in 1992, he would not have satisfied the CPD's present rule; in mid-September, when the CPD makes its polling determination, Perot was polling at or below 10%.[189]

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[184] 2000 Brown Decl. (Exhibit 30) at ¶ 34.
[185] *Id.* at ¶ 35.
[186] *See* Richard Pearson, *Former Ala. Gov. George C. Wallace Dies*, Wash. Post, Sept. 14, 1998, *available at* http://www.washingtonpost.com/wp-srv/politics/daily/sept98/wallace.htm, submitted herewith as Exhibit 80.
[187] *See* Walter Shapiro, *John Anderson: The Nice Guy Candidate*, The Atlantic, Feb. 1, 1980, *available at* http://www.theatlantic.com/magazine/archive/1980/02/john-anderson-the-nice-guy-syndrome/306028/, submitted herewith as Exhibit 81.
[188] Moreover, it is not clear that Wallace would have satisfied the CPD's rule. The CPD relies on an average of five national polls taken in early to mid-September. Comparable polling data does not appear to exist for Wallace.
[189] *See supra* n.89.

Examples of third-party or independent candidates predating George Wallace's 1968 candidacy have been relied on to defend the 15% rule too: When the League of Women Voters came up with a 15% threshold in 1980 to determine whether to invite John Anderson to participate in the debates, the defense of that rule relied on third-party candidacies from 1912 (Theodore Roosevelt), 1924 (Robert LaFolette), and 1948 (Henry Wallace and Strom Thurmond).[190] CPD board member Newton Minow has written that critics' charge that the League's rule was arbitrary was not "quite true" because of these examples.[191] But these examples are completely anachronistic; such campaigns predate not only the Internet age, but the television age too. They cannot provide guidance on 21st century campaigns.

* * *

The FEC's regulations do not provide that "any pre-established required level of support [will] necessarily satisfy the [debate] regulation's definition of objectivity."[192] Rather, "the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it."[193] The CPD's 15% rule fails this test. It requires a non-Republican or Democratic candidate to demonstrate a significant level of support at a point in time when the media and public have focused intently on only the Republican or Democratic candidates. The only way to compensate for that deficit in attention is paid media, but the CPD's rule requires an amount of paid media that no third-party or independent candidate could realistically afford. And even if an unaffiliated candidate could do the impossible, the systematic bias in polling in three-way races means that he or she runs a high risk of being excluded from the debates anyway. The upshot is that the CPD's 15% rule

[190] *See* Minow & LaMay (Exhibit 20), *supra* n.54, at 56.
[191] *Id.*
[192] *Buchanan*, 112 F. Supp. 2d at 74.
[193] *Id.*

guarantees a preordained result: Democratic and Republican candidates will be included in the debates, and third-party and independent candidates will be shut out. That is a clear-cut violation of the FEC's debate sponsoring rules.

B. The CPD Rule Serves No Valid Purpose

As set forth above, the CPD's 15% rule is biased and designed to result in the selection of pre-chosen participants. The CPD has defended the rule, however, as (1) ensuring that only viable candidates appear in the debates, (2) ensuring that leading candidates attend the debates, and (3) limiting debate participants to a manageable number. In fact, the 15% rule does not validly further any of these purposes. These purposes are just pretexts, which only reinforces the conclusion that the 15% rule is not objective.

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First, the 15% rule does not ensure that only viable candidates participate in the debates. As set forth above, polling is an improper measure of an unaffiliated candidate's electoral potential and is notoriously inaccurate.[194] But even if the polls could be relied upon to measure viability and could do so accurately, a polling threshold like the CPD's will necessarily be over and under inclusive. The 15% rule is over inclusive because it risks including candidates who may happen to be very well known but who have no realistic chance of winning the election because they have only regional or fringe appeal. Indeed, any polling threshold of 15% or less will be over inclusive. George Wallace is the case in point. Although he finished with 13.5% of the national vote, he ran on a segregationist platform that was popular in the South but had no potential for national appeal.[195] The 15% rule – or any polling-based rule – is under inclusive because its sets an arbitrary cliff. The CPD would invite a candidate to debate if he had 15.0%

[194] *See supra* Part II.A.2.

[195] More than half of Wallace's popular vote total came from states that had seceded in the Civil War. *See* 1968 Presidential General Election – National, Atlas of U.S. Presidential Elections, http://uselectionatlas.org/RESULTS/data.php?year=1968&datatype=national&def=1&f=0&off=0&elect=0 (last visited Sept. 6, 2014), submitted herewith as Exhibit 82.

support, but exclude the same candidate if he had 14.9% support. The notion that participation in national debates should turn on such a difference is arbitrary and irrational.

Second, the 15% polling threshold does not mitigate the "risk that leading candidates with the highest levels of public support would refuse to participate,"[196] as the CPD has falsely claimed. The CPD's concern about "leading" candidates skipping the debates ignores the institutionalization of the debates. The public has come to expect the leading candidates to debate. President Reagan "set a precedent"[197] when he debated Walter Mondale, even though he had a commanding lead in the polls and had little to gain from engaging his opponent. It would be very costly for major candidates to retreat from that precedent. As one study concluded, the public expectation for regular debates makes it "quite unlikely that a major candidate would find it worthwhile to endure the opprobrium that accompanied a refusal to meet other challengers."[198] Indeed, CPD co-chair Fahrenkopf admitted that, *by 1996*, the debates had "reached the point where it is impossible, in practical terms, for anyone to say no. . . . Debates have become institutionalized. Even for the candidates to delay or play games these days costs them."[199] The CPD's claim that it needs an exclusionary rule to ensure that "leading" candidates attend its debates is baseless and disingenuous speculation.

Third, the 15% rule is not necessary to limit the number of participants to ensure an orderly debate, as the CPD insists. The two other CPD criteria – constitutional eligibility and ballot access in states comprising a majority of Electoral College votes – significantly limit the pool of potential participants on their own. Since 1988, the greatest number of third-party or

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[196] 2004 Brown Decl. (Exhibit 34) at ¶ 31.
[197] Anthony Corrado, Let America Decide: The Report of the Twentieth Century Fund Task Force on Presidential Debates 65 (1996), submitted herewith as Exhibit 83.
[198] *Id.* at vii.
[199] R.W. Apple Jr., *For Debate Commission, A Predicament on Perot*, N.Y. Times, Sept. 1, 1996, *available at* http://www nytimes.com/1996/09/01/us/for-debate-commission-a-predicament-on-perot html?module=Search& mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A7%22%7D, submitted herewith as Exhibit 84.

independent candidates to meet these criteria in any given election was five (in 2000), and was often three or fewer.[200]

Furthermore, the exclusionary polling criterion is not the only means of limiting the number of participants. For example, bills in Congress have proposed extending invitations to candidates that qualify for federal matching funds or that have raised a specified sum in campaign contributions.[201] Complainant Level the Playing Field has also proposed a rule that would permit the third-party or independent candidate that gathered the most signatures as of April 30 of the election during the ballot access process to participate in the debates with the Democratic and Republican nominees.[202]

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C. The CPD's Reliance On Polling Conflicts With FECA's Purposes

The FEC has authorized corporate debate sponsorship on the theory that "nonpartisan debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate."[203] The CPD's 15% polling requirement is inconsistent with this purpose.

The CPD's reliance on polling to determine who the voters should hear in the debates puts the cart before the horse. Debates enable candidates to gain support, especially third-party and independent candidates; the CPD's rule denies candidates that opportunity because they have not yet gained support, which is a Catch-22. A candidate's lack of significant support in a given poll may reflect only that enough of the public has not yet become familiar with that candidate; if he or she were better known, he or she would have more support.[204] The lack of public exposure

[200] *The 15 Percent Barrier*, Open Debates, http://www.opendebates.org/theissue/15percent html (last visited Sept. 7, 2014), submitted herewith as Exhibit 85.
[201] *See* Spotts (Exhibit 17), *supra* n.50 at 568.
[202] *See* Petition for Rulemaking to the FEC filed by Level the Playing Field simultaneous to the filing of this Complaint, at Part III.
[203] Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,734.
[204] *See supra* n.166.

to third-party and independent candidates that is inherent in our current election system creates a high risk that a poll will fail to capture a candidate's potential for popular appeal. Relying on polling to determine debate admission does not account for this. As a result, excluding a candidate from a debate because of an insufficiently high poll number can be the equivalent of determining that the public should not be educated about this candidate because the public has not *yet* been educated about the candidate. That is not consistent with the educational purpose corporate-funded debates are supposed to serve.

Furthermore, the CPD's polling rule does not measure the public's views about who it wants to hear in a debate. Ross Perot in 1996 and Ralph Nader and Patrick Buchanan in 2000 did not satisfy the CPD's 15% rule. Yet a majority of Americans wanted to hear from those candidates in the presidential debates.[205] The CPD's rule denied voters that chance.

The CPD's emphasis on viability as measured by polls also ignores the role third-party and independent candidates play in issue education, agenda setting, and expanding turnout.[206] Third-party and independent candidates can further those democratic ends, even if they do not have a high prospect of electoral success.

An election is about more than who wins and who loses. "[A]n election campaign is a means of disseminating ideas as well as attaining political office."[207] Elections set the public agenda by prioritizing among the many pressing issues of the day. They enable the public to

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[205] More than 60% of Americans wanted Ross Perot to participate in the 1996 debates. *Debate Commission Excludes Perot*, CNN, (Sept. 17, 1996), http://cgi.cnn.com/ALLPOLITICS/1996/news/9609/17/debate.announce/, submitted herewith as Exhibit 86. In 2000, 56% of Americans wanted Pat Buchanan and Ralph Nader to participate in the general election debates. Thomas E. Patterson, Election 2000: How Viewers 'See' a Presidential Debate 5 (2000), *available at* http://shorensteincenter.org/wp-content/uploads/2012/03/vv_debate_paper.pdf, submitted herewith as Exhibit 87.

[206] The Commission has linked the debates with voter participation, noting that the purpose of the debates is "similar to the purpose underlying nonpartisan [corporate-funded] voter registration and get-out-the-vote campaigns" that FECA explicitly authorizes. Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,736.

[207] *Illinois State Bd. of Elections v. Socialist Workers' Party*, 440 U.S. 173, 186 (1979).

weigh in on proposed solutions to society's problems and new innovations to move society forward. Third-party and independent candidates, even those who do not win, can play a vital role in that process.[208] They can address issues that divide the two major parties, or that the two major parties would prefer to ignore, and can also suggest new initiatives. The Republican Party began as a third party that strongly supported abolition at a time when the two major parties, the Democrats and Whigs, were divided on the issue.[209] Numerous Socialist Party candidates suffered electoral defeat in the early 1900s, but their advocacy of women's suffrage and a progressive income tax helped bring about the Sixteenth and Nineteenth Amendments.[210] More recently, in 1992, "there was little or no sign that George Bush and Bill Clinton were prepared to discuss [the] primal issues" of deficit reduction and generational equity, but Ross Perot's candidacy made deficit reduction a central issue in the campaign and the Clinton administration.[211] Supporting third-party and independent candidacies is also a means of expressing discontent with the major parties. The participation of third-party and independent candidates in debates can thereby encourage participation in the electoral process by those whose disenchantment would otherwise cause them to sit on the sidelines.[212] The CPD's 15% rule drastically curtails the voices and viewpoints heard in the debates, effectively preventing the democracy-enhancing functions that the debates could otherwise have.

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[208] *See Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) ("Historically political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream."); *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) ("History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.").

[209] *See* Steven Rosenstone *et al.*, Third Parties in America 56 (1996), submitted herewith as Exhibit 88.

[210] *See* J. David Gillespie, Politics at the Periphery 27 (1993), submitted herewith as Exhibit 89.

[211] Tom Morgenthau, *Citizen Perot*, Newsweek, Nov. 9, 1992, submitted herewith as Exhibit 90; *see* Sandy Grady, *Without Ross Perot, There Would Be No Deficit Deal*, Orlando Sentinel, Aug. 5, 1993, *available at* http://articles.orlandosentinel.com/1993-08-05/news/9308050846_1_ross-perot-clinton-media-trend, submitted herewith as Exhibit 91.

[212] *See* Rosenstone *et al.* (Exhibit 88), *supra* n.209, at 224; Gillespie (Exhibit 89), *supra* n.210, at 19.

D. The FEC's Prior Precedents Do Not Support Ratifying The CPD's Polling Criterion

The FEC cannot and should not dismiss this Complaint on the basis of prior decisions finding no reason to believe that the CPD has violated FECA, or district court decisions deferring to those findings.

First, the present Complaint contains new evidence and new arguments that the FEC has not previously addressed. To be sure, district courts have deferred to the FEC's 2000 finding that the 15% rule is consistent with the debate regulations. That deference, however, was predicated on a conclusion that it was not "plainly erroneous" for the FEC to make that finding on the agency record before it at the time.[213] For instance, the *Buchanan* court noted that prior complainants "did not present any evidence to suggest that [] problems [associated with the polling criterion] would systematically work to minor-party candidates' disadvantage."[214] That conclusion has no application to the different and detailed evidence presented herein, which demonstrates (a) that the 15% polling criterion is not reasonably achievable for a third-party or independent candidate and (b) that a polling criterion in a three-way race *will* systematically disfavor third-party and independent candidates.

Second, the FEC's main precedent approving use of the 15% threshold did not follow the FEC's own standard for assessing candidate selection criteria. In MURs 4987, 5004 and 5021, the FEC found the polling criterion "appear[ed] to be even more objective than the 1996 candidate selection criteria" that the FEC had previously approved, and sanctioned the use of the polling criteria on that basis.[215] But whether one set of criteria appears more or less objective than another set – assuming such relative degrees of objectivity even exist – is not the proper

[213] *Buchanan*, 112 F. Supp. 2d at 74.
[214] *Id.* at 75.
[215] First General Counsel's Report at 18, MURs 4987, 5004, and 5021 (Commission on Presidential Debates) (July 13, 2000).

inquiry. Rather, as the FEC itself has explained, the debate staging organization "must be able to show that their objective criteria . . . were not designed to result in the selection of certain pre-chosen participants."[216] Or as the primary case to address the issue put it, the regulatory history of the FEC's debate regulations indicate that "the objectivity requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it."[217] The determination that the CPD's polling criterion "appears" more objective than prior CPD criteria does not address whether the criterion was designed to result in the selection of certain pre-chosen participants or whether the polling threshold is unreasonably high. As set forth above, the CPD cannot meet its burden to show that its 15% rule is not designed to result in the exclusion of third-party and independent candidates.

III. PERMITTING THE CPD TO STAGE BIPARTISAN DEBATES THAT AUTOMATICALLY EXCLUDE THIRD-PARTY AND INDEPENDENT CANDIDATES FURTHERS CORRUPTION OF THE ELECTORAL PROCESS AND THE APPEARANCE OF CORRUPTION

The CPD takes in millions of dollars of contributions each presidential cycle.[218] Its roster of corporate backers has included The Anheuser-Busch Companies, Southwest Airlines, BBH New York, Electronic Data Systems, American Airlines, AT&T, Ford, Philip Morris Companies, Inc., IBM, J.P. Morgan & Co, and other major corporations.[219] This is not a complete list; the CPD does not disclose details on the sources of its funding, so it is impossible to know where all of its money comes from. Where that money goes, however, is clear: it pays for debates that are designed to exclude third-party and independent presidential candidates, thereby ensuring that a Democrat or Republican will win the presidency.

[216] Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. at 64,262.
[217] *Buchanan*, 112 F. Supp. 2d at 74.
[218] *See* CPD 2012 Form 990 (Exhibit 6) at 1; Commission on Presidential Debates, Schedule A to Form 990 Return of Organization Exempt From Income Tax for 2008 Tax Year at 2, dated Nov. 10, 2009 (reporting nearly $6.9 million in contributions for 2007 and 2008), submitted herewith as Exhibit 92.
[219] *CPD: National Debate Sponsors* (Exhibit 7), *supra* n.31.

For its part, FECA is designed to "limit *quid pro quo* corruption and its appearance."[220] Key to that purpose are statutory rules preventing corporate campaign contributions and requiring identification of the sources of campaign funds.[221] The CPD, however, takes unknown sums from corporations and other undisclosed sources and uses them to prop up a rigged debate system. That is inimical to the anticorruption purpose of FECA.

The political action committees of the corporate sponsors of the CPD donate more than a million dollars to the two major parties every year in order to sustain a two-party system that supports their interests.[222] In light of this investment, these corporations would necessarily disfavor the prospect of a third-party candidate winning the presidency; it would render the existing investment in the two-party system much less valuable. Moreover, corporations often contribute to both Republicans and Democrats in order to buy broad influence.[223] It is cheaper to pay for influence over two candidates than it is three, which is yet another reason corporations do not want a viable third alternative to emerge. The CPD's biased 15% rule allows corporations to further this corrupt interest in limiting competition.

Corporate sponsorship of rigged partisan debates also contributes to the public's perception that the two parties are beholden to corporate interests.[224] The public is dissatisfied with the Republican and Democratic parties. Sixty-two percent of Americans do not think the

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[220] *McCutcheon*, 134 S. Ct. at 1444.
[221] *See, e.g.*, 2 U.S.C. §§ 434, 441b(a).
[222] *See supra* n.110.
[223] *See, e.g.*, Brody Mullins & Alicia Mundy, *Corporate Political Giving Swings Toward the GOP*, Wall St. Journal, Sept. 21, 2010 (describing numerous corporations that split political donations between Republican and Democratic candidates), http://online.wsj.com/articles/SB10001424052748703989304575503933125159928, submitted herewith as Exhibit 93.
[224] *See, e.g.*, *Five Years after Market Crash, U.S. Economy Seen as 'No More Secure,'* Pew Research Center for the People & the Press (Sept. 12, 2013), http://www.people-press.org/2013/09/12/five-years-after-market-crash-u-s-economy-seen-as-no-more-secure/#winners-losers (reporting on "clear" public perception that government's economic regulation favors large corporations and the wealthy at the expense of other segments of society), submitted herewith as Exhibit 94.

federal government has the consent of the governed,[225] and 86% feel the political system is broken and does not serve the interests of the American people.[226] At the same time, the public prefers more inclusive presidential debates; fifty percent of Americans believe that the debates would be improved if a third candidate from outside the two major parties were included.[227] As explained above, the numbers are even higher when a specific third candidate is at issue: Fifty-six percent of respondents in a 2000 poll said that Ralph Nader and Pat Buchanan should have been included in the presidential debates, and sixty-two percent of Americans wanted Perot to participate in the 1996 debates.[228] In light of the foregoing, there is a clear risk that the public will view corporate sponsorship of exclusionary debates as a corrupt bargain between the major parties and their corporate patrons to deny the American people true electoral choice.

The varied fundraising experiences of the League of Women Voters and the CPD illustrates that this risk is all too real. When the League, a venerable organization with a well-known history of sponsoring candidate debates, sought corporate funding for its presidential debates, it received scant support.[229] In contrast, the CPD, in its first year of operation and without any track record, took in hundreds of thousands of corporate dollars.[230] As Nancy Neuman, former president of the League explained, "There was nothing in it for corporations when they made a contribution to the League. Not a quid pro quo. That's not the case with the commission."[231]

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[225] *See 68% Think Election Rules Rigged for Incumbents* (Exhibit 1), *supra* n.1.
[226] Schoen, Independents and the Presidential Debate System (Exhibit 2), *supra* n.2, at 9.
[227] *Id.* at 15.
[228] *See supra* n. 205.
[229] George Farah, No Debate: How the Republican and Democratic Parties Secretly Control the Presidential Debates 15 (2004) (quoting interview with former president of the League of Women Voters Nancy Neuman), submitted herewith as Exhibit 95.
[230] *See id.*
[231] *Id.* at 15-16.

Indeed, three prior CPD sponsors – BBH New York, the YWCA, and Philips Electronics – withdrew sponsorship in 2012 because they did not want to be seen as supporting overtly partisan activities.[232] Noting that the CPD could "appear to support bi-partisan politics," a Philips spokesman said the company "want[ed] to ensure that [it] doesn't provide even the slightest appearance of supporting partisan politics. As such, no company funds have been or will be used to support the Commission on Presidential Debates."[233] Similarly, the YWCA declared that because it is "a nonpartisan organization," it was withdrawing its support for the CPD.[234] Multiple corporate sponsors remained in 2012, however. Their presence ensured that the debates would be seen as a corrupt event designed to exclude third-party and independent candidates at the behest of corporations.

IV. THE CPD HAS VIOLATED FECA'S EXPENDITURE, CONTRIBUTION, AND DISCLOSURE RULES

The CPD received nearly $8 million in contributions in 2011 and 2012.[235] Upon information and belief, most of the CPD's money comes from corporations; because the CPD does not make public all its contributors, however, the full list of its backers is secret. In 2012, the CPD spent more than $3.7 million to "organize, produce, finance and publicize the general election debates" and on "other voter education activities."[236] The vast majority of that money funded the debates,[237] but, as with its donor list, the CPD does not disclose its specific expenditures. The CPD's expenditures paid for extensive television exposure for the Democratic

[232] Dylan Byers, *Philips polls presidential debate sponsorship*, Politico (Sept. 30, 2012 6:13 p m.), http://www.politico.com/blogs/media/2012/09/philips-pulls-presidential-debate-sponsorship-137053.html, submitted herewith as Exhibit 96.
[233] *Id.*
[234] J.D. Tuccille, *Presidential Debates Lose Sponsors Over Exclusion of Third-Party Candidates*, Hit & Run blog, Reason (Oct. 1, 2012 9:22 a.m.), http://reason.com/blog/2012/10/01/presidential-debates-lose-sponsors-over, submitted herewith as Exhibit 97.
[235] CPD 2012 Form 990 (Exhibit 6) at 1.
[236] *Id.* at 2, 10.
[237] *See id.* at 10.

and Republican candidates – the debates "draw what is easily the largest audience of any public activity associated with the election"[238] – and stimulated extensive media coverage of those candidates. In short, the CPD funded an "irreplaceable" opportunity for the Democratic and Republican candidates to communicate their messages and win votes.[239]

In funneling corporate money to pay for the Democratic and Republican presidential candidates' most-watched campaign appearances, the CPD ignored the strict rules FECA places on political contributions and expenditures. The CPD ignored those rules because it claimed compliance with the FEC's debate sponsorship regulations. Because the CPD in fact violated those regulations, its expenditures on debates, receipt of corporate contributions to fund those expenditures, and failure to report those expenditures and contributors all violated FECA.

First, the CPD violated FECA by making illegal corporate campaign contributions. FECA prohibits corporations, including the CPD, from making contributions to political candidates[240] and defines contributions broadly to include the provision of any good or service free of charge.[241] The CPD's provision of free televised campaign fora to the Democratic and Republican candidates were illegal corporate campaign contributions.[242]

Second, the CPD violated FECA by making illegal corporate campaign expenditures. Under FECA, an "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing

[238] Congressional Research Service, *Presidential Elections in the United States: A Primer* 37 (2000), submitted herewith as Exhibit 98.
[239] Theresa Amato, Grand Illusion 224-25 (2009) (noting that the debates are essential to candidate viability and that the publicity benefits from participation are irreplaceable), submitted herewith as Exhibit 99.
[240] 2 U.S.C. § 441b(a).
[241] *See* 11 C.F.R. § 100.52(d)(1) (defining in-kind contribution as "the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods or services").
[242] *See* First General Counsel's Report at 21, MURs 4451 and 4473 (Commission on Presidential Debates) (Feb. 6, 1998) (concluding that if the CPD violated the debate sponsorship rules, the CPD made illegal campaign contributions).

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any election for Federal office."[243] FECA prohibits corporations like the CPD from making such expenditures.[244] The CPD's spending on a forum for Democratic and Republican presidential candidates to influence voters was an illegal corporate campaign expenditure.

Third, the CPD violated FECA by accepting campaign contributions from its corporate sponsors. FECA prohibits corporations from making contributions to political committees.[245] A political committee includes any group that has as its "major purpose" the election of a candidate[246] and that "makes expenditures aggregating in excess of $1,000 during a calendar year."[247] The CPD is a political committee: as set forth above, its purpose is to promote the election of the Democratic or Republican nominee for president by hosting debates that showcase those candidates and exclude all others, and it devotes virtually all, if not all, of its multimillion dollar spending in service of that purpose.[248] The CPD's acceptance of corporate "donations" was an illegal receipt of corporate campaign contributions.[249]

Fourth, the CPD violated FECA by failing to disclose its contributors and expenditures. FECA requires a political committee to file a Statement of Organization with the FEC and to file reports detailing contributions received and expenditures made.[250] Although the CPD is a political committee, it ignored these requirements. The CPD's decision to keep its contributors and expenditures secret violated FECA.

The CPD's funding of major Democratic and Republican campaign events with secret corporate contributions not only violated FECA, but denied Dr. Ackerman information to which

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[243] 2 U.S.C. § 431(9)(A)(i).
[244] 2 U.S.C. § 441b(a).
[245] *Id.*
[246] *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 252 n.6 (1986).
[247] 2 U.S.C. § 431(4).
[248] *See* First General Counsel's Report at 27-29, MURs 4451 and 4473 (Commission on Presidential Debates) (Feb. 6, 1998) (concluding that if the CPD's purpose was to elect the Democratic and Republican presidential candidates, the CPD would be a political committee).
[249] *See* 2 U.S.C. § 441a(f).
[250] *Id.* §§ 433, 434.

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he is lawfully entitled. Dr. Ackerman has a statutory right to know the individuals and corporations making contributions to support the Democratic and Republican candidates for president, and the amount of their support. Such information is important to Dr. Ackerman's evaluation of the candidates for office, and he would communicate it to others who would find it important as well. The CPD's failure to observe the registration and disclosure requirements for political committees denied Dr. Ackerman this all-important right.[251]

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PRAYER FOR RELIEF

WHEREFORE, Complainants respectfully request that the FEC:

1) Find that the CPD has violated 11 C.F.R. § 110.13 by staging candidate debates in a partisan manner and without pre-established, objective criteria;

2) Find that the CPD has violated 2 U.S.C. § 441b(a) by making prohibited contributions and expenditures;

3) Find that the CPD has violated 2 U.S.C. § 441a(f) by accepting prohibited contributions;

4) Find that the CPD has violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee and by failing to make required reports and disclosures;

5) Direct the CPD to take corrective action by ceasing to sponsor future debates using the present candidate selection criteria;

6) Require the CPD to register as a political committee, and require the CPD to make required reports and disclosures; and

7) Take any and all further action within the FEC's power to correct and prevent the continued illegal activities of the CPD.

[251] *See Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998) (a voter suffers a concrete and particularized injury in fact when an organization that qualifies as a political committee fails to disclose its donors and campaign-related contributions and expenditures).

Respectfully submitted,

Level the Playing Field
By: Kahlil Byrd, President

Signed and sworn to before me this 9th day of September, 2014.

Notary Public

SHYAM D. BUXANI
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01BU6144080
Qualified in New York County
Commission Expires April 24, 2018

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Respectfully submitted,

Peter Ackerman.

Signed and sworn to before me this 9 day of September, 2014.

EVELYN ALAS

Notary Public Washington D.C.

My commission expires February 28, 2019

EVELYN J. ALAS NOTARY PUBLIC EXP. 2-28-2019 DISTRICT OF COLUMBIA