

No. 20-649

In the
Supreme Court of the United States

LEVEL THE PLAYING FIELD,
PETER ACKERMAN,
GREEN PARTY OF THE UNITED STATES, and
LIBERTARIAN NATIONAL COMMITTEE, INC.,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

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

BRIEF OF *AMICUS CURIAE* FAIRVOTE
IN SUPPORT OF PETITIONERS

ANDREW S. PENROSE
FAIRVOTE
6930 Carroll Avenue,
Suite 240
Takoma Park, MD 20912
(301) 270-4616
drew@penrosefamily.us

WILLIAM P. TEDARDS, JR.
Counsel of Record
1101 30th Street, NW,
Suite 500
Washington, DC 20007
(202) 744-1214
BT@tedards.net

Counsel for *Amicus Curiae* FairVote

December 14, 2020

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
Exclusion of Non-Major Party Candidates From the CPD Debates	3
ARGUMENT	6
I. THE CPD OPERATES AS A PARTISAN ORGANIZATION UNDER THE EXPRESS DIRECTION OF THE MAJOR PARTY PRESIDENTIAL CAMPAIGNS, IN CONTRAVENTION OF 11 C.F.R. § 110.13(a)(1).....	6
The MOU Eliminates Any Doubt That the CPD Operates as a Partisan Organization	9
II. THE 15% POLLING REQUIREMENT, AS APPLIED BY THE CPD TO FREEZE THE POLITICAL <i>STATUS QUO</i> , IS NOT AN “OBJECTIVE” STANDARD WITHIN THE MEANING OF 11 C.F.R. § 110.13(c)	10
A. The 15% Polling Requirement Freezes the Political <i>Status Quo</i> ...	11

B.	Polling Data Is Increasingly Unreliable	13
C.	The 15% Polling Requirement is Not in Accord With Debate Inclusion Standards in the U.S. or Abroad	20
	CONCLUSION	25

TABLE OF AUTHORITIES

	Page
CASES	
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983)	12
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	12
<i>Jenness v. Fortson</i> , 403 U.S. 431 (1971)	11
<i>Storer v. Brown</i> , 415 U.S. 724 (1974)	10
STATUTES	
ARIZ. REV. STAT. ANN. § 16-956(A)(2) (2011)	22
Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (1991)	17
REGULATIONS	
11 C.F.R. § 110.13(a)(1)	3, 6, 9
11 C.F.R. § 110.13(c)	1, 5, 10
OTHER AUTHORITIES	
Articles	
Andrew Mercer, Claudia Deane and Kyley McGeeney, <i>Why 2016 election polls missed their mark</i> , PEW RESEARCH CENTER, Nov. 9, 2016,	

- <https://www.pewresearch.org/fact-tank/2016/11/09/why-2016-election-polls-missed-their-mark/> 18
- Andrew Prokop and Christina Animashaun, *Elizabeth Warren leads Joe Biden in ranked-choice poll*, VOX, Sep. 12, 2019, <https://www.vox.com/2019/9/12/20860985/poll-democratic-primary-ranked-choice-warren-biden> 13
- Carl Bialik, *Why the Polls Missed Bernie Sanders Michigan Upset*, FIVETHIRTYEIGHT, Mar. 9, 2016, <http://fivethirtyeight.com/features/why-the-polls-missed-bernie-sanders-michigan-upset/> 18
- Cliff Zukin, *What's the Matter With Polling?*, THE NEW YORK TIMES, June 20, 2015, <http://www.nytimes.com/2015/06/21/opinion/sunday/whats-the-matter-with-polling.html> 19
- Dan Balz, *The debate over debates: Why should polls pick winners and losers?*, THE WASHINGTON POST, Nov. 7, 2015, https://www.washingtonpost.com/politics/the-debate-over-debates-why-should-polls-pick-winners-and-losers/2015/11/07/1e107b86-84d7-11e5-9afb-0c971f713d0c_story.html 14
- Danielle Kurtzleben, *4 Possible Reasons The Polls Got It So Wrong This Year*, NPR, Nov. 14, 2016, <https://www.npr.org/2016/11/14/502014643/4-possible-reasons-the-polls-got-it-so-wrong-this-year> 18
- Gloria Dickie, *Why Polls Were Mostly Wrong*, SCIENTIFIC AMERICAN, Nov. 13, 2020, <https://www.scientificamerican.com/article/why-polls>

- [-were-mostly-wrong/](#) 19-20
- Jill Lepore, *Politics and the New Machine*, THE NEW YORKER, Nov. 16, 2015,
<http://www.newyorker.com/magazine/2015/11/16/politics-and-the-new-machine> 16-17, 22
- Lance Lambert, *The 2020 elections polling errors are eerily similar to four years ago*, FORTUNE, Dec 1, 2020,
<https://fortune.com/2020/12/01/polling-fivethirtyeight-nate-silver-2020-election-errors/> 20
- Larry Diamond, *Ending the Presidential-Debate Duopoly*, THE ATLANTIC, May 8, 2015,
<http://www.theatlantic.com/politics/archive/2015/05/ending-the-presidential-debate-duopoly/392480> . 25
- Leaders' debate: ICM/Guardian poll puts Miliband ahead - just*, THE GUARDIAN, April 2, 2015,
<http://www.theguardian.com/politics/blog/live/2015/apr/02/leaders-debate-cameron-and-miliband-go-head-to-head-with-other-parties-live> 23
- Michael Barone, *Why Political Polls Are So Often Wrong*, THE WALL STREET JOURNAL, Nov. 11, 2015,
<http://www.wsj.com/articles/why-political-polls-are-so-often-wrong-1447285797> 19
- Michael W. Link, *et al.*, *Reaching the U.S. Cell Phone Generation*,
 71 PUBLIC OPIN. Q. 814 (2007) 16

- Nate Cohn, *A 2016 Review: Why Key State Polls Were Wrong About Trump*, THE NEW YORK TIMES, May 31, 2017,
<https://www.nytimes.com/2017/05/31/upshot/a-2016-review-why-key-state-polls-were-wrong-about-trump.html> 17-18
- Nate Silver, *The Polls Weren't Great. But That's Pretty Normal*, FIVETHIRTYEIGHT, Nov. 11, 2020,
<https://fivethirtyeight.com/features/the-polls-werent-great-but-thats-pretty-normal/> 20
- Nick Anstead, *We need to look at other parliamentary democracies for ideas about how to run televised debates*, MEDIA POLICY PROJECT BLOG, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, Oct. 15, 2014,
<http://blogs.lse.ac.uk/medialse/2014/10/15/we-need-to-look-at-other-parliamentary-democracies-for-ideas-about-how-to-run-televised-debates/> 23
- Paul Merrill, *Maine governor hopefuls face off in first debate*, WMTW NEWS 8, Oct. 8, 2014,
<http://www.wmtw.com/news/maine-governor-hopefuls-face-off-in-first-debate/29007466> 21
- POLITICO, *Democratic primary polls: Who's ahead in the 2020 race?*,
<https://www.politico.com/2020-election/democratic-presidential-candidates/polls/> 13
- The problem with polls*, THE WEEK, April 10, 2016,
<http://theweek.com/articles/617109/problem-polls>
 19

Ryan Heath, “*Worst presidential debate in history*”:
*Foreigners recoil at Trump and Biden’s prime-time
 brawl*, POLITICO, Sept. 9, 2020,
[https://www.politico.com/news/2020/09/30/the-worst-
 presidential-debate-in-history-423765](https://www.politico.com/news/2020/09/30/the-worst-presidential-debate-in-history-423765) 24-25

Television debates, ACE,
[http://aceproject.org/epic-en/CDTable?view=country
 &question=ME059](http://aceproject.org/epic-en/CDTable?view=country&question=ME059) 22

*What Is Public Opinion Polling and Why Is It
 Important?*, GALLUP WORLD POLL (2007),
[http://media.gallup.com/muslimwestfacts/PDF/Pollin
 gAndHowToUseItR1drevENG.pdf](http://media.gallup.com/muslimwestfacts/PDF/Pollin

 gAndHowToUseItR1drevENG.pdf) 15

Reports

Nick Anstead, *Televised Debates in Parliamentary
 Democracies*, MEDIA POLICY PROJECT, THE
 LONDON SCHOOL OF ECONOMICS AND
 POLITICAL SCIENCE, 10–11 (January, 2015).. 23

Parties and Candidates, THE ACE
 ENCYCLOPAEDIA, ACE, 2d edition, 2012,
<http://aceproject.org/ace-en/topics/pc/pcc/pcc07>. . . 22

Polling Fundamentals - Total Survey Error, ROPER
 CENTER, CORNELL UNIVERSITY,
[https://ropercenter.cornell.edu/polling-and-public-opi
 nion/polling-fundamentals](https://ropercenter.cornell.edu/polling-and-public-opi

 nion/polling-fundamentals). 16, 17

White House 2016: General Election,
 POLLINGREPORT.COM,
<http://www.pollingreport.com/wh16gen.htm>. . . 15-16

Internet Sources

- 2004 U.S. House of Representatives race in Vermont (Democratic Candidate, 7.1%), *2004 U.S. House General Election*, VERMONT SECRETARY OF STATE, Election Archives,
<https://electionarchive.vermont.gov/elections/view/75532>. 14
- 2006 U.S. Senate race in Connecticut (Republican Candidate, 9.6%), *Official Election Results For United States Senate, 2006 U.S. Senate Campaigns*, FEDERAL ELECTION COMMISSION,
<https://www.fec.gov/resources/cms-content/documents/2006senate.pdf>. 14-15
- 2010 Governor election in Colorado (Republican candidate, 11.1%) - *Colorado gubernatorial election, 2010*, BALLOTPEDIA,
https://ballotpedia.org/Colorado_gubernatorial_election,_2010 15
- 2012 U.S. Senate race in Maine (Democratic Candidate, 13%), *U.S. Senate elections in Maine, 2012*, BALLOTPEDIA,
https://ballotpedia.org/United_States_Senate_elections_in_Maine,_2012. 15
- 2016 U.S. Senate race in Alaska (Democratic Candidate, 11.62%), *U.S. Senate election in Alaska, 2016*, BALLOTPEDIA,
https://ballotpedia.org/United_States_Senate_election_in_Alaska,_2016 15

2018 U.S. Senate race in Maine (Democratic Candidate, 10.5%), *U.S. Senate election in Maine, 2018*, BALLOTPEDIA, https://ballotpedia.org/United_States_Senate_election_in_Maine,_2018 15

Guidelines for Debates and Forums, LEAGUE OF WOMEN VOTERS WISCONSIN, Revised July 2014, <https://web.archive.org/web/20140824043756/http://www.lwvwi.org/Members/GuidelinesforDebates.aspx> 21

League of Women Voters (LWV) Candidate Forum Guidelines, LEAGUE OF WOMEN VOTERS SAN DIEGO, https://web.archive.org/web/20170302211248/http://www.lwvsandiego.org/files/CANDIDATE_FORUM_GUIDELINES.pdf 21-22

Presidential Candidates, 2020, BALLOTPEDIA, https://ballotpedia.org/Presidential_candidates,_2020. 4

Presidential Candidates, 2016, BALLOTPEDIA, https://ballotpedia.org/Presidential_candidates,_2016. 4

Presidential election by state, 2016, BALLOTPEDIA, https://ballotpedia.org/Presidential_election_by_state,_2016 4

Renee Davidson, *4 Reasons You Should Watch a Candidate Debate*, LEAGUE OF WOMEN VOTERS, Oct. 7, 2014, <http://lww.org/blog/4-reasons-you-should-watch-candidate-debate> 21

The League of Women Voters and Candidate Debates: A Changing Relationship, LEAGUE OF WOMEN VOTERS, <http://lww.org/content/league-women-voters-and-candidate-debates-changing-relationship> 21

Third Party and independent candidates for the 2012 United States Presidential election, BALLOT ACCESS NEWS, Oct. 1, 2012, Vol. 28, No. 5, <http://ballot-access.org/2012/10/27/ballot-access-news-october-2012-print-edition/> and WIKIPEDIA, 2012, https://en.wikipedia.org/wiki/Third_party_and_independent_candidates_for_the_2012_United_States_presidential_election#Ballot_access_to_270_or_more_electoral_votes 3, 4

INTEREST OF *AMICUS CURIAE*¹

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

Lack of competition in presidential debates is an important concern for FairVote, as voters nationwide are deprived of full participation in the process because candidates of the two dominant political parties frequently do not represent an adequate range of choice and fail to address issues of public importance. *See, e.g.*, Robert Richie, President and CEO of FairVote, Re: Petition for Rulemaking from Level the Playing Field to Revise and Amend 11 C.F.R. § 110.13(c) (Dec. 15, 2014), *available at* <https://www.shapiroarato.com/wp-content/uploads/2014/12/FairVote-Comment-12.15.14.pdf>.

¹Pursuant to Supreme Court Rule 37.2(a) counsel of record for all parties received timely notice of the intent to file this brief and all parties have consented to its filing. Pursuant to Rule 37.6, *amicus* counsel certifies that no counsel for a party authored this brief in whole or in part and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Here, where the two major parties have gained complete control of the presidential debate process -- permanently excluding all other candidates -- the lack of competition prompts the filing of this *amicus* brief in favor of Petitioners.

SUMMARY OF ARGUMENT

Acting in accordance with the provisions of a contract between the Democratic and Republican presidential campaigns, the Commission on Presidential Debates (“CPD”) sponsored three presidential debates and one vice presidential debate in 2012.² The only participants were the respective candidates of the Democratic and Republican parties. All other candidates were excluded pursuant to a set of selection criteria for participation, which the CPD was required to apply under the contract between the two campaigns. To assure that no *other* public debate or competitive discussion between a major party candidate and any other candidate(s) could occur, the major party campaigns further agreed not to appear in or accept an invitation to any debate or adversarial forum other than the debates sponsored by the CPD. The CPD’s exclusive right to sponsor major party debates was contingent, however, on its compliance with the provisions of the contract, and the campaigns jointly reserved the right to change the sponsor if the CPD did not so agree.

²The Petitioners’ 2014 administrative complaints were filed against the CPD, its executive director, and 11 directors who adopted the CPD’s rules for the 2012 presidential election. Petition for Writ of Certiorari (“Petition”) at 12.

The CPD's participation in an exclusive arrangement to sponsor all presidential debates involving the two major party candidates, via compliance with a private contract designed to exclude all possibility of public debate between major party candidates and other candidates, was an *official* act of *partisanship* by the organization, taken in "support" of the Democratic and Republican parties in violation of 11 C.F.R. § 110.13(a)(1).

Exclusion of Non-Major Party Candidates From the CPD Debates

Under the selection criteria for participation in the CPD debates, which the CPD was mandated to use by the contract between the two major party campaigns, eligible candidates have to meet two requirements, titled "Evidence of Ballot Access" and "Indicators of Electoral Support." The "ballot access" requirement,³ itself, eliminates most independent and minor party candidates and satisfies all concerns with respect to manageability of the debate process. In the 2012, 2016, and 2020 elections, application of the "ballot access" criterion, alone, would have produced a field of only four debate participants, including the two major party candidates,⁴ but would have allowed two minor party

³The candidate must appear on enough state ballots to have a mathematical chance of securing at least 270 electoral votes and winning the election.

⁴For 2012, see *Third party and independent candidates for the 2012 United States presidential election*, <http://ballot-access.org/2012/10/27/ballot-access-news-october-2012-print-edition/>; WIKIPEDIA, 2012,

(continued...)

candidates an opportunity to gain the necessary capital and public recognition that comes only with participation in a debate.⁵

The threshold “electoral support” requirement,⁶ on the other hand, has been shown to be an absolute bar to participation in a CPD debate for any candidate other than a Democratic or Republican nominee, as explained at length in the Petition. And since participation in presidential debates is a prerequisite for electoral success, the 15% requirement, combined with the agreement not to participate in any other debate, operates as a definitive barrier to entry, assuring that the Democratic/Republican combination

⁴(...continued)

https://en.wikipedia.org/wiki/Third_party_and_independent_candidates_for_the_2012_United_States_presidential_election#Ballot_access_to_270_or_more_electoral_votes (last visited 12/13/2020).

For 2016-2020, see *Presidential Candidates, 2020*, BALLOTPEDIA, https://ballotpedia.org/Presidential_candidates,_2020; *Presidential Candidates, 2016*, BALLOTPEDIA, https://ballotpedia.org/Presidential_candidates,_2016 and *Presidential election by state, 2016*, BALLOTPEDIA, https://ballotpedia.org/Presidential_election_by_state,_2016.

⁵If this more inclusive approach were applied in selecting candidates for the first debate, the criteria could then be tightened for subsequent debates, allowing a standard that evolves from inclusive to less inclusive as seen, for example, in presidential primary debates and in other countries (pp. 22-25, *infra*).

⁶The candidate must be supported by at least 15% of the national electorate, as determined by an average of five selected national polls.

will never face effective competition in presidential elections. This systemic exclusion of new entrants to protect the two dominant parties via the 15% polling requirement does not qualify as “objective” under 11 C.F.R. § 110.13(c).

Because the 15% polling requirement as so applied has *frozen the political status quo* for 20 years, the Court may consult its analogous “ballot access” standards to determine whether, absent a strong countervailing rationale for the requirement, it should be invalidated.

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

Further, the exclusive use of five selected polls with a minimum 15% threshold for inclusion is out of step with debate inclusion standards generally. In the states, in federal primaries, and in other nations, debate inclusion rules vary, but are generally far more inclusive than those used by the CPD. Debates may be conducted by non-profit organizations operating in the public interest, by the media directly, or by a public agency, and they may follow one set of rules or vary their rules as the election season progresses.

Whatever the setting, a rule effectively limiting debates to only two candidates is virtually unheard of elsewhere. A limit to two choices contributed directly to this year's first presidential debate being termed by many the worst presidential debate in history and underscores the value of having a more inclusive standard in opening presidential debates.

ARGUMENT

I.

THE CPD OPERATES AS A PARTISAN ORGANIZATION UNDER THE EXPRESS DIRECTION OF THE MAJOR PARTY PRESIDENTIAL CAMPAIGNS, IN CONTRAVENTION OF 11 C.F.R. § 110.13(a)(1)

The Petition notes that “[f]ormer CPD director and Democratic Representative John Lewis asserted that ‘the two major parties [have] absolute control of the presidential debate process’” (Petition at 9), which is exemplified by the “Memorandum of Understanding” (MOU) between Obama for America and Romney for President (the “major party campaigns”) that governed the CPD-sponsored presidential debates in 2012. The MOU is *available at* <https://info.publicintelligence.net/ObamaRomneyDebateMOU.pdf>. Under Paragraph 2 of the MOU, titled “Sponsorship,” the two major party campaigns agree that:

[T]he Commission shall sponsor the debates, *subject to its expression of a willingness to employ the provisions of this agreement in conducting these debates*. In the event the Commission

does not so agree, the two campaigns jointly reserve the right to determine whether an alternate sponsor is preferable. (MOU ¶ 2, “Sponsorship,” at p. 2 (emphasis added).)

This is immediately followed by a direction as to how to control entry into the debates:

[T]he Commission’s Nonpartisan Candidate Selection Criteria for 2012 General Election Debate participation *shall apply* in determining the candidates to be invited to participate in these debates. (*Id.* (emphasis added).)

The “Candidate Selection Criteria” are *available at* <https://www.debatesinternational.org/sites/default/files/CPD-Candidate-Selection-Criteria-10.20.11.pdf>. The criteria include both the “Evidence of Ballot Access” and “Indicators of Electoral Support” requirements, discussed above at pp. 3-5.

Under this MOU, the CPD has no discretion to modify the selection criteria to include any candidate other than the Democratic and Republican nominees, regardless of the conditions which might exist in a particular election cycle. For instance, if an independent or minor party candidate were gaining public attention and had met the “ballot access” requirements, the CPD would not be allowed to relax the 15% polling requirement to allow the public to see that candidate on the debate stage. This would have disqualified Ross Perot, for example, in 1992. Petition at 10 (“Even Perot, who participated before the 15%

rule, would not have qualified under the rule, because he was polling at less than 10% at the relevant time. C.A.App. 367, 701.”).

Finally, paragraph 1(d) of the MOU states that the major party campaigns will not:

(1) issue any challenges for additional debates, (2) appear at any other debate or adversarial forums except as agreed to by the parties, or (3) accept any television or radio air time offers that involve a debate format or otherwise involve the simultaneous appearance of more than one candidate.

MOU ¶ 1(d), under the heading “Number, Dates, Time, Locations, Topics,” at p. 1.⁷

In effect, the MOU grants the CPD a monopoly in staging major party presidential debates -- eliminating all other competition -- so long as the CPD employs the provisions of the MOU, including the 15% polling requirement that systemically excludes all independent and minor party candidates. By employing a combination of the 15% polling requirement to block entry into the CPD debates and the agreement not to participate in any other debates, the two major parties, with the assistance of the CPD, have erected a definitive barrier to entry into presidential politics. The arrangement assures that

⁷The remainder of the 21-page MOU regulates virtually every aspect of the debate process, itself, in minute detail, leaving the CPD with little or no discretion as to how to conduct the debates.

the major party candidates will never have to face other debate opponents, thereby insulating them from effective competition. By supporting the two major parties in this anticompetitive scheme, the CPD is in violation of 11 C.F.R. § 110.13(a)(1).

**The MOU Eliminates Any Doubt
That the CPD Operates as a Partisan
Organization**

After reviewing what the district court characterized as a “mountain of submitted evidence” (Petition at 14) documenting the partisanship of the CPD’s directors, the Petition argues that:

Where, as here, an organization that has no purpose other than to stage political debates is run by people who have dedicated their lives and careers to partisan politics, it stands to reason that—without an independent board or mechanism of corporate governance to override its leaders’ partisanship—the organization will behave in a partisan fashion. And the CPD’s lengthy track record of excluding independents from the debates confirms that the CPD has done precisely what one would expect from such an organization.

Petition at 25-26. The MOU confirms that the Petitioners’ inference is correct, showing that, in excluding independent and minor party candidates from the major party debates, the CPD is acting at the *express direction* of the major party campaigns. By

agreeing to employ the 15% polling requirement as an integral part of the major parties' plan to eliminate competition in presidential politics, the CPD is *officially* acting as a *partisan organization*.

The reasonable suggestion in the Petition that the CPD might need "an independent board or mechanism of corporate governance to override its leaders' partisanship" (*Id.*) is of course impossible with such an MOU in place, where the two major party campaigns jointly reserve the right to change the sponsor if the CPD does not agree to follow the instructions in the MOU.

II.

THE 15% POLLING REQUIREMENT, AS APPLIED BY THE CPD TO FREEZE THE POLITICAL *STATUS QUO*, IS NOT AN "OBJECTIVE" STANDARD WITHIN THE MEANING OF 11 C.F.R. § 110.13(c)

In the context of assessing the constitutionality of state-imposed ballot access requirements which independent and minor party candidates must satisfy in order to access election ballots -- such as collecting a minimum number of supporting signatures (another "indicator of electoral support") -- this Court takes past experience into account. *See, e.g., Storer v. Brown*, 415 U.S. 724, 742 (1974):

Third, once the number of signatures required in the 24-day period is ascertained, along with the total pool from which they may be drawn, there will arise the inevitable question for

judgment: in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity, and quite a different matter if they have not.

See also, Jenness v. Fortson, 403 U.S. 431, 438 (1971), upholding Georgia's ballot access requirements because they did not freeze the political *status quo*:

Finally, and in sum, Georgia's election laws, unlike Ohio's, do not operate to freeze the political *status quo*. In this setting, we cannot say that Georgia's 5% petition requirement violates the Constitution.

A. The 15% Polling Requirement Arbitrarily Freezes the Political *Status Quo*

This is not a ballot access case, but this case concerns the same fundamental issue: the fairness and objectivity of restrictions on access to the democratic political process. The two major political parties have constructed a system which has effectively frozen the political *status quo* in presidential politics for 20 years. In assessing the objectivity of the linchpin of that system -- the 15% polling requirement -- the Court can take that 20-year history into account and, in the

absence of a strong countervailing rationale for the requirement,⁸ apply the same fundamental principles that the Court applies in ballot access cases. As in ballot access cases, the emphasis in assessing *this* type of restriction on access to the democratic process should focus on reasonably promoting *inclusion*, comparing the severity of the restriction with any compelling interest that the restriction might serve.

As the Petition demonstrates, the way the CPD uses polling data to determine inclusion in the presidential general election debates virtually guarantees that only two candidates will qualify. No candidate who did not run in the Democratic or Republican primary has ever met this 15% threshold requirement -- not even Ross Perot, who participated in the 1992 general election debates before that threshold was instituted. That fact, combined with the unreliability of polls described below, assures unjustifiable exclusion of one or more serious and potentially viable presidential candidates from the debates.

This systematic exclusion of all independent and minority candidates from all CPD-sponsored debates appears to have no justification stemming from any need to have orderly and manageable debates. As explained above (at pp. 3-5), if the CPD had dropped the 15% polling requirement and simply applied its ballot access requirement in the debates of 2012, 2016, and 2020, the major party candidates would have been

⁸Described as a “compelling” interest which is “narrowly drawn” in ballot access cases applying strict scrutiny *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

joined on the stage by only two additional candidates.

B. Polling Data Is Increasingly Unreliable

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

For example, if a 15% threshold were applied to the first Democratic primary debates in June, 2019, only Joe Biden and Bernie Sanders -- the two candidates with the greatest name recognition -- would have qualified. See POLITICO, *Democratic primary polls: Who's ahead in the 2020 race?*,⁹ (setting the date to the week ending June 23, 2019). Such a result would have not only excluded several high profile candidates, including every woman candidate and every person of color, it also would have excluded the candidate that later polls identified as a potential frontrunner, Elizabeth Warren. See Andrew Prokop and Christina Animashaun, *Elizabeth Warren leads Joe Biden in ranked-choice poll*, VOX, Sep. 12, 2019.¹⁰

When candidates for the Republican nomination for president in 2016 began participating in debates, only Donald Trump and Ben Carson polled higher than 15%

⁹<https://www.politico.com/2020-election/democratic-presidential-candidates/polls/>

¹⁰<https://www.vox.com/2019/9/12/20860985/poll-democratic-primary-ranked-choice-warren-biden>

on average, with Marco Rubio in third polling at about 10% on average. Dan Balz, *The debate over debates: Why should polls pick winners and losers?*, THE WASHINGTON POST, Nov. 7, 2015.¹¹ This demonstrates how a field of serious candidates can split polling totals, causing nearly every candidate to apparently poll poorly. Under those circumstances, candidates invited to debate and candidates excluded may both be well within the margin of error of the poll from each other, effectively making the exclusions arbitrary. In the Republican primary debates in 2016, it meant that governors of New York, Louisiana, and Virginia never had a chance to present their case to Republican primary voters. In a general election to which the 15% threshold applies, it means the loss of important perspectives on the future of the country.

The illogic of relying on a minimum 15% polling performance to determine whether a candidate should be allowed to debate a major party candidate at the presidential level takes on even sharper focus considering that, at times, major party candidates, themselves, finish with vote totals below 15% in statewide races. Following are six examples from state elections for Governor, U.S. Senate, and U.S. House of Representatives: in Vermont in 2004, the Democratic candidate for the U.S. House received 7.1% of the vote;¹² in Connecticut in 2006, the Republican candidate for the U.S. Senate received 9.6% of the

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

¹²<https://electionarchive.vermont.gov/elections/view/75532>

vote;¹³ in Colorado in 2010, the Republican candidate for Governor received 11.1% of the vote;¹⁴ in Maine in 2012, the Democratic candidate for the U.S. Senate received 13% of the vote;¹⁵ in Alaska in 2016, the Democratic candidate for the U.S. Senate received 11.62% of the vote;¹⁶ and in Maine in 2018, the Democratic candidate for the U.S. Senate received 10.5% of the vote.¹⁷

Polling in elections relies on asking representative samples of people their answers to various questions and then making inferences from those answers about the opinions and behaviors of the voting public in general. *See generally, What Is Public Opinion Polling and Why Is It Important?*, GALLUP WORLD POLL (2007).¹⁸ For example, a poll may ask a “likely voter” for whom they would vote were the election held today. *See, e.g., White House 2016: General Election*,

¹³<https://www.fec.gov/resources/cms-content/documents/2006senate.pdf>

¹⁴https://ballotpedia.org/Colorado_gubernatorial_election,_2010

¹⁵https://ballotpedia.org/United_States_Senate_elections_in_Maine,_2012

¹⁶https://ballotpedia.org/United_States_Senate_election_in_Alaska,_2016

¹⁷https://ballotpedia.org/United_States_Senate_election_in_Maine,_2018

¹⁸<http://media.gallup.com/muslimwestfacts/PDF/PollingAndHowToUseItR1drevENG.pdf>

POLLINGREPORT.COM¹⁹ (summarizing various polls that included who participants would vote for president “if the election were held today”). Then, the polling agency would weigh respondents according to characteristics such as age, education, race, and income so that their sample reflects, as closely as possible, the population in general. *Polling Fundamentals - Total Survey Error*, ROPER CENTER, CORNELL UNIVERSITY.²⁰ Using these weights, responses are then aggregated to produce estimates of who likely voters would vote for, were the election held today, as a means of estimating how actual voters will actually vote when the election is held. *Id.* These estimates are just that: estimates. They always have a degree of uncertainty and a margin of error. Additionally, weaknesses in polling design and execution tend to increase the error associated with polling figures.

One common problem today is that the ability to draw a representative sample of voters can be impeded by a technological or informational barrier. For example, polls historically relied on calling people on their home phones. *See generally*, Michael W. Link, *et al.*, *Reaching the U.S. Cell Phone Generation*, 71 PUBLIC OPIN. Q. 814 (2007). However, increasingly people rely on mobile phones, with 40% of adults no longer owning a landline at all. Jill Lepore, *Politics and the*

¹⁹<http://www.pollingreport.com/wh16gen.htm>

²⁰<https://ropercenter.cornell.edu/polling-and-public-opinion/polling-fundamentals>, “Total Survey Error” tab.

New Machine, THE NEW YORKER, Nov. 16, 2015.²¹ Polling agencies have attempted to compensate for this, but either prospective pollees simply do not answer their phones or the lists are compiled from skewed or otherwise unreliable sources, given the absence of the equivalent of a phone book for mobile phones and a federal ban on autodialing to cell phones. *Id.*; Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (1991).

Even with a perfectly representative sample, polling estimates of support have error margins, often as high as five to ten percentage points. *Polling Fundamentals - Total Survey Error, supra*. When compounded with these sources of unrepresentativeness in sampling, candidates polling below 15% may actually have as much as 25% support, certainly high enough to consider them viable candidates with a viewpoint the voting public deserves to hear in debates.

Inaccurate polls can clash with actual voting results in spectacular ways, eroding public confidence in their use. This is particularly true today, given the outcomes of the 2016 and 2020 presidential elections compared to the predictions being made by analysts relying principally on polls. There exists no shortage of media pieces bemoaning how inaccurate such polls were in 2016. *E.g.*, Nate Cohn, *A 2016 Review: Why Key State Polls Were Wrong About Trump*, NEW YORK TIMES,

²¹<http://www.newyorker.com/magazine/2015/11/16/politics-and-the-new-machine>

May 31, 2017;²² Danielle Kurtzleben, *4 Possible Reasons The Polls Got It So Wrong This Year*, NPR, Nov. 14, 2016;²³ Andrew Mercer, Claudia Deane and Kiley McGeeney, *Why 2016 election polls missed their mark*, PEW RESEARCH CENTER, Nov. 9, 2016.²⁴

Signs of this unreliability had shown up in the 2016 primary campaign, and demonstrated the weaknesses of polling as a means of identifying accurate levels of support. In March of 2016, for example, Bernie Sanders outperformed his polling by over 20 percentage points in the Michigan Democratic primary. Carl Bialik, *Why the Polls Missed Bernie Sanders' Michigan Upset*, FIVETHIRTYEIGHT, Mar. 9, 2016.²⁵ That upset demonstrated many of the ways polling data can fail to reflect reality. The Michigan polls did not sufficiently correct for their lack of young voters, who disproportionately favored Sanders, even while it overcompensated in attempting to correct for responses from African Americans, a population previously supporting Clinton at higher rates than it did in Michigan. *Id.* That particular example was an outlier, but it serves as an example of how bad errors can be, even when multiple polls by multiple polling

²²<https://www.nytimes.com/2017/05/31/upshot/a-2016-review-w-hy-key-state-polls-were-wrong-about-trump.html>

²³<https://www.npr.org/2016/11/14/502014643/4-possible-reasons-the-polls-got-it-so-wrong-this-year>

²⁴<https://www.pewresearch.org/fact-tank/2016/11/09/why-2016-election-polls-missed-their-mark/>

²⁵<http://fivethirtyeight.com/features/why-the-polls-missed-bernie-sanders-michigan-upset/>

agencies are used.

Reliance on polling in the 2012 presidential general election was also misplaced. Polling showed a near-tie between Mitt Romney and Barack Obama, with some -- including Gallup -- predicting that Mitt Romney would win. *The problem with polls*, THE WEEK, April 10, 2016.²⁶ In fact, the president was reelected by a nearly four percentage point margin, amounting to some five million votes. *Id.*

Public confidence in the exclusive use of polling as a metric of public support began to erode in the 2016 election cycle, especially as reports began to issue from popular periodicals highlighting them. *E.g.* Cliff Zukin, *What's the Matter With Polling?*, THE NEW YORK TIMES, June 20, 2015;²⁷ Michael Barone, *Why Political Polls Are So Often Wrong*, THE WALL STREET JOURNAL, Nov. 11, 2015.²⁸

Public confidence in polls has continued to erode in the 2020 election cycle, featuring similar discrepancies between polling predictions and electoral results, with critical reviews and analyses by publications such as: Gloria Dickie, *Why Polls Were Mostly Wrong*,

²⁶<http://theweek.com/articles/617109/problem-polls>

²⁷<http://www.nytimes.com/2015/06/21/opinion/sunday/whats-the-matter-with-polling.html>

²⁸<http://www.wsj.com/articles/why-political-polls-are-so-often-wrong-1447285797>

SCIENTIFIC AMERICAN, Nov. 13, 2020;²⁹ Lance Lambert, *The 2020 elections polling errors are eerily similar to four years ago*, FORTUNE, Dec. 1, 2020;³⁰ and Nate Silver, *The Polls Weren't Great. But That's Pretty Normal*, FIVETHIRTYEIGHT, Nov. 11, 2020.³¹

The FORTUNE and FIVETHIRTYEIGHT articles both suggest that polling errors in excess of four percent are normal, while SCIENTIFIC AMERICAN identified errors ranging from 2.6 - 6.4%. These levels of variability/unreliability are particularly troublesome here, where the CPD, operating in accordance with directions from the major party political campaigns, “retains complete discretion about what polls to use ... enabling it to select polls that put independent candidates below the 15% threshold. C.A.App. 1117-18, 1308-09.” Petition at 10-11.

C. The 15% Polling Requirement is Not in Accord With Debate Inclusion Standards in the U.S. or Abroad

The degree to which the CPD inclusion rules exclude candidates who might otherwise contribute meaningfully to the debate can be seen in how out of step those rules are with recognized best practices in debates for the offices of governor and U.S. senator in

²⁹<https://www.scientificamerican.com/article/why-polls-were-mostly-wrong/>

³⁰<https://fortune.com/2020/12/01/polling-fivethirtyeight-nate-silver-2020-election-errors/>

³¹<https://fivethirtyeight.com/features/the-polls-werent-great-but-thats-pretty-normal/>

states, in U.S. presidential primaries, and in debates for public office in other nations.

In states, debates are often held by nonpartisan public interest organizations like the League of Women Voters, who also conducted presidential debates prior to the two major parties creating the CPD in 1987. *See*, Renee Davidson, *4 Reasons You Should Watch a Candidate Debate*, LEAGUE OF WOMEN VOTERS, Oct. 7, 2014;³² *The League of Women Voters and Candidate Debates: A Changing Relationship*, LEAGUE OF WOMEN VOTERS.³³ The media also sponsors debates directly, sometimes in coordination with a particular venue. *See, e.g.*, Paul Merrill, *Maine governor hopefuls face off in first debate*, WMTW NEWS 8, Oct. 8, 2014³⁴ (describing a gubernatorial debate between three candidates held by a media corporation and noting the plan to hold a second).

When the League of Women Voters sponsors a debate, it typically invites every candidate on the ballot, and sometimes includes write-in candidates as well. *See, e.g.*, *Guidelines for Debates and Forums*, LEAGUE OF WOMEN VOTERS WISCONSIN, Revised July 2014;³⁵ *League of Women Voters (LWV) Candidate Forum*

³²<http://lwv.org/blog/4-reasons-you-should-watch-candidate-debate>

³³<https://www.lwv.org/league-women-voters-and-candidate-debates-changing-relationship>

³⁴<http://www.wmtw.com/news/maine-governor-hopefuls-face-off-in-first-debate/29007466>

³⁵<https://web.archive.org/web/20140824043756/http://www.lwvwi.org/Members/GuidelinesforDebates.aspx>

Guidelines, LEAGUE OF WOMEN VOTERS SAN DIEGO³⁶ (emphasizing to “[i]nvite all candidates”). When media sponsors debates, they adopt their own inclusion rules, presumably to maximize the newsworthiness of the event. *See, e.g.*, Lepore, *supra* (“[i]t would make better television” to include Carly Fiorina in an early debate among Republican candidates, despite her relatively low polling numbers at the time). When a state agency sponsors debates, it ordinarily uses rules more inclusive than those adopted by the CPD. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-956(A)(2) (2011) (instructing the Arizona Clean Elections Commission to sponsor debates and invite all candidates).

Internationally, debates are also usually the domain of the media, and they typically invite more than two candidates for presidential elections. *See Parties and Candidates*, THE ACE ENCYCLOPAEDIA, ACE, 2d edition, 2012,³⁷ *see also Television debates*, ACE³⁸ (table listing countries along with comments on how televised debates are conducted, if at all, in that country). When countries do adopt public regulations regarding debate inclusion, they use standards more inclusive than those of the CPD. For example, Canada permits participation by any candidate from a political party with representation in the House of Commons (five parties) with a consistent polling threshold of only

³⁶https://web.archive.org/web/20170302211248/http://www.lwvsandiego.org/files/CANDIDATE_FORUM_GUIDELINES.pdf

³⁷<http://aceproject.org/ace-en/topics/pc/pcc/pcc07>

³⁸<http://aceproject.org/epic-en/CDTable?view=country&question=ME059>

5%. Nick Anstead, *We need to look at other parliamentary democracies for ideas about how to run televised debates*, MEDIA POLICY PROJECT BLOG, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, Oct. 15, 2014.³⁹

Germany follows a similar rule, allowing participation (in the first round of debates) by representatives of parties with a presence in the Bundestag, which amounts to a 5% threshold as well. *Id.* Germany's practice also highlights another way of balancing the goals of inclusion with an orderly and informative process common in other nations: they narrow the inclusion rules over a series of debates. Nick Anstead, *Televised Debates in Parliamentary Democracies*, MEDIA POLICY PROJECT, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, 10–11 (January, 2015). In the first round, representatives of any party in the Bundestag may participate, but the second round is limited to only three candidates. *Id.*

In fashioning its rules prior to the 2015 election season, the United Kingdom considered the examples of countries like Canada and Germany to adopt a best practice. *Id.* at 13. It ultimately included seven candidates in its national debate in April, 2015. *See, Leaders' debate: ICM/Guardian poll puts Miliband ahead - just*, THE GUARDIAN, April 2, 2015.⁴⁰ More

³⁹<http://blogs.lse.ac.uk/medialse/2014/10/15/we-need-to-look-at-other-parliamentary-democracies-for-ideas-about-how-to-run-televised-debates/>

⁴⁰<http://www.theguardian.com/politics/blog/live/2015/apr/02/leaders-debate-cameron-and-miliband-go-head-to-head-with-other-p>
(continued...)

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

U.S. presidential primary debates take a similar approach, moving from inclusive to less inclusive, as demonstrated in the Democratic Party presidential debates in 2019 and 2020 that regularly raised the bar for inclusion. Rushing directly to an exclusive, binary general election debate, however, did not do the voters any favors in 2020. After the first debate was plagued by interruptions and insults, many analysts termed it the worst in our history. See, e.g. Ryan Heath, “*Worst presidential debate in history*”: *Foreigners recoil at Trump and Biden’s prime-time brawl*, POLITICO, Sept. 9, 2020:

Foreign leaders and observers are expressing dismay at the spectacle of Tuesday night’s melee between Donald Trump and Joe Biden, with sound bites of the bitter recriminations reverberating around the globe.

The unrestrained format — which quickly descended into a series of extended brawls — is unfamiliar to viewers in most other countries, where

⁴⁰(...continued)
[arties-live](#)

serious political debates steeped in policy and firmly controlled by the moderator are the norm.

While global audiences tend to be skeptical of Trump, the global reaction to Tuesday's debate goes deeper than commentary on one political figure or moment: Allies and foes, alike, are interpreting it as yet another sign of the decline in American democracy.⁴¹

This is not to suggest that U.S. presidential debates must imitate the states or other countries. Instead, it is evidence that the CPD has adopted a rule that is not justified by ordinary debate inclusion rules, such as orderly debates among serious candidates with viewpoints reflective of public opinion. Rather, it better reflects a rule designed to prevent competition. See, Larry Diamond, *Ending the Presidential-Debate Duopoly*, THE ATLANTIC, May 8, 2015.⁴²

CONCLUSION

For these reasons, and the reasons stated in the Petition, the Petitioner's Writ of Certiorari should be granted.

DATED: December 14, 2020

⁴¹<https://www.politico.com/news/2020/09/30/the-worst-presidential-debate-in-history-423765>

⁴²<http://www.theatlantic.com/politics/archive/2015/05/ending-the-presidential-debate-duopoly/392480/>

Respectfully submitted,

WILLIAM P. TEDARDS, JR.
Counsel of Record
1101 30th Street, NW, Suite 500
Washington, DC 20007
(202) 744-1214
BT@tedards.net

ANDREW S. PENROSE
FAIRVOTE
6930 Carroll Avenue, Suite 240
Takoma Park, MD 20912
(301) 270-4616
drew@penrosefamily.us

Counsel for *Amicus Curiae* FairVote