

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

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

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION,

Defendant.

Civil Action No.: 1:15-CV-1397 (TSC)

**BRIEF OF AMICI CURIAE NONPROFIT LEADERS, SCHOLARS AND
PRACTITIONERS IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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STATEMENT OF INTEREST

The ten (10) individual *amici* jointly submitting this brief in support of Plaintiffs' Motion for Summary Judgment represent a broad array of prominent leaders, scholars, and practitioners with considerable experience in the nonprofit sector.¹ All *amici* are dedicated to ensuring public trust in the nonprofit organizations with which they are affiliated, or to the study or practice of nonprofit law, and they therefore have a direct stake in the implications of this litigation for public trust in the nonprofit community at large. Their backgrounds are set forth briefly below:²

- Norman R. Augustine is a member of the Bipartisan Policy Center's Board of Directors. He served as chairman and principal officer of the American Red Cross for nine years, and as chairman of the National Academy of Engineering, the Aerospace Industries Association, and the Defense Science Board. Mr. Augustine is a former president of the American Institute of Aeronautics and Astronautics and the Boy Scouts of America.
- Admiral Dennis C. Blair is the former United States Director of National Intelligence and a retired United States Navy admiral. He currently serves as the Chairman of the Board and Distinguished Senior Fellow of Sasakawa Peace Foundation USA. He also serves as a member of the Energy Security Leadership Council and is on the boards of Freedom House, the National Bureau of Asian Research, the National Committee on U.S.-China Relations, and the Atlantic Council.
- Scott Blackmun is the Chief Executive Officer of the United States Olympic Committee ("USOC") and an ex-officio member of the USOC's board of directors. He is also a member of the International Council of Arbitration for Sport. Mr. Blackmun was previously a partner with both Hogan & Hartson LLP and Holme Roberts & Owen LLP, where his practice included advising nonprofit clients on corporate governance matters.
- Mary McInnis Boies serves as counsel to Boies Schiller Flexner LLP. She is a member of the Board of Directors of the Council on Foreign Relations and chairs its Committee on Nominations and Governance. She is a former Second Circuit representative to the American Bar Association's Standing Committee of Federal Judiciary.

¹ *Amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* and contributed money toward the preparation or filing of this brief.

² *Amici* include for the Court's reference their current and former professional and personal affiliations, but each *amicus* submits this brief in his or her personal capacity only.

- W. Bowman Cutter is a Senior Fellow and Director of the Next American Economy Project at the Roosevelt Institute. He is the immediate past chairman of CARE, a global development organization, and has served as a board member for 18 years. Mr. Cutter is also the chairman of MicroVest; the chairman of the Tunisian American Enterprise Fund; a board member of SeaChange; a member of the Governing Council of the IFMR Trust in India; a member of the executive committee and immediate past co-chairman of the Committee for Economic Development; a board member and immediate past chair of Resources for the Future; and a board member of the Russell Sage Foundation.
- Dr. James J. Fishman is a professor at the Elisabeth Haub School of Law at Pace University and has authored numerous books and articles on nonprofit tax law and regulation. He is a co-author of *New York Nonprofit Law and Practice: With Tax Analysis* and a leading law school casebook, *Nonprofit Organizations: Cases and Materials*, now in its fifth edition. He previously served as the executive director of the Council of New York Law Associates (now The Lawyers Alliance for New York) and Volunteer Lawyers for the Arts.
- Carla A. Hills is the chairman and CEO of Hills & Company, International Consultants, which advises companies on global trade and investment issues. Ms. Hill serves as co-chair of the Inter-American Dialogue and the Advisory Board of the Center for Strategic & International Studies, the chair of the National Committee on U.S.-China Relations, and a member of the executive committees of both the Trilateral Commission and the Gerald R. Ford Presidential Foundation. She also serves on the board of the Peterson Institute for International Economics.
- Daniel L. Kurtz is a partner with Pryor Cashman and chairs the firm's Nonprofit + Tax-Exempt Organizations Group. Mr. Kurtz advises his clients on corporate and governance issues, sponsorship and charitable fundraising opportunities, endowment administration and investment, indemnification, charitable solicitation laws, and exempt organization tax issues. He also represents nonprofit clients in litigation, focusing on issues of governance and fiduciary responsibility. Mr. Kurtz serves on the boards of numerous nonprofits of varying sizes and services, including the Jewish Home and Hospital for the Aged; Fountain House; Simon's Rock College of Bard; The Packer Collegiate Institute; and Manhattan Youth Recreation and Resources. He is the co-author of both "New York Nonprofit Law and Practice: With Tax Analysis" and "Managing Conflicts of Interest." Mr. Kurtz is the former assistant attorney general-in-charge of the New York State Attorney General's Charities Bureau, and he is the Founding Executive Director of New York Lawyers for the Public Interest.
- Dr. Vali R. Nasr is the Dean of the Johns Hopkins University Paul H. Nitze School of Advanced International Studies and a Nonresident Senior Fellow at the Brookings Institution. He is a life member of the Council on Foreign Relations. Dr. Nasr was previously a Senior Advisor to the U.S. Special Representative for Afghanistan and

Pakistan and a member of the U.S. Department of State's Foreign Affairs Policy Board.

- Nancy E. Roman is the President and CEO of Partnership for a Healthier America ("PHA"). Prior to joining PHA, she was the President and CEO of the Capital Area Food Bank, an \$80 million NGO addressing hunger and its companion problems of obesity and diet-related disease. She has served on the leadership team of the United Nation's World Food Programme and as Vice President of the Council on Foreign Relations. Ms. Roman currently serves on the board of Global Communities, a \$125 million NGO working on global development issues in 25 countries, and on the board of the Millennial Action Project, an NGO that seeks to engage and work with millennials serving in government nationwide.

For decades, the individual *amici* have studied, developed, implemented and promoted specific standards of governance and accountability within the nonprofit community, including with respect to identification and management of apparent and actual conflicts of interests, to strengthen public confidence in nonprofit organizations. *Amici* believe that an understanding of these standards in the context of the prevailing policies and practices of the Commission on Presidential Debates ("CPD") will assist the Court's resolution of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs have demonstrated throughout the course of this litigation that the CPD is not, as it claims to be, nonpartisan. *See generally* Dkt. No. 83-1, Plaintiffs Level the Playing Field, Peter Ackerman, Green Party of the United States, and Libertarian National Committee Inc.'s Mem. of Pts. and Auth. in Support of their Motion for Summary Judgment ("Plaintiffs' Mot."). Indeed, the CPD leaders and many of its board members have been extensively involved in highly partisan activities for both the Republican and Democratic parties, including participating in events for presidential and vice-presidential candidates from both such parties. The Executive Director of the CPD claims that an "informal" conflict-of-interest policy, allegedly supplemented by a terse "Political Activities Policy" that has not even been produced by the CPD and, at most, merely "intend[s] to *deter*," rather than *prohibit*, partisan activities, prevents the CPD board

members from serving in an “official” capacity in a political campaign.³ This “policy,” even if supplemented with some portion in writing (which remains in doubt), remains wholly inadequate to prevent actual conflicts of interest, much less the appearance thereof. The *amici* would still consider the CPD to be, improperly, operating under an informal, unwritten conflict-of-interest policy.

Worryingly, the Federal Election Commission (“FEC”) has “ignored” a “mountain of submitted evidence” that is probative of the CPD board members’ partisan conduct.⁴ Such conduct likely stems from the absence of proper governance at the CPD. The FEC’s willingness to find that an “informal policy” suffices “to prevent . . . the potential for an erroneous appearance of partisanship”⁵ is insupportable when considered in the context of established best practices for conflict-of-interest policies in the nonprofit sector.⁶ By eschewing *formal* conflict-of-interest policies that are explicit, in writing, accessible, and, importantly, appropriately monitored for compliance, the CPD has contravened an essential tenet of responsible governance for a nonprofit organization, thereby condoning and even encouraging the partisan activities of its board members without safeguarding its nonpartisan tax-exempt purposes. Even ignoring the notion that the integrity of the nation’s presidential and vice-presidential debates rests on informal and unenforceable conflict-of-interest policies, such policies by their own terms would

³ AR7221-22 (emphasis added).

⁴ *Level the Playing Field v. Fed. Election Comm’n*, 232 F. Supp. 3d 130, 142-43 (D.D.C. 2017).

⁵ AR7222.

⁶ Many of the undersigned *amici* have had working relationships with and greatly respect the Commissioners of the FEC and the Directors of the CPD, and this brief is not intended to criticize their personal integrity. Rather, *amici* question the rules and regulations under which the FEC and CPD operate, which require and/or allow the FEC Commissioners and CPD Board of Directors to have partisan affiliations.

permit CPD board members to consult “unofficially” with political campaigns, contribute to fundraising efforts, and even endorse candidates.

The inadequacy of the CPD’s conflict-of-interest policy invites the CPD board members to endorse, support, or oppose political candidates and indulge in other overtly partisan conduct, and renders the FEC’s post-remand decisions holding otherwise arbitrary and capricious. *See, e.g.,* Plaintiffs’ Mot. at 21-26.

ARGUMENT

The CPD offers no evidence of having a *formal, written conflict-of-interest policy* that is enforceable and monitored for compliance to govern its board members’ partisan political activities.⁷ One of the two alleged policies, according to the very description provided by the CPD, is “informal” and unwritten. Though the CPD claims to have another policy that is written, that policy was never produced and thus cannot be meaningfully evaluated.⁸ Moreover, the CPD admits that this policy does not even prohibit partisan conduct, and at most is “intended to deter” certain types of conduct. Because nothing is prohibited by this alleged policy, and no aspect of the policy is or could be enforced, the alleged written policy is, in reality, no policy at all. Consequently, even when these two components are considered together, the CPD’s conflict-of-interest policy is entirely informal, unenforceable, and unmonitored, which renders it meaningless. The policy rests on formalistic and unrealistic distinctions between “official” and “personal” participation in political campaigns,⁹ and it tries to create a distinction that does not and cannot exist, at an organization whose purpose is to host the presidential debates in a

⁷ *See* AR7041 n.2.

⁸ AR7103-04.

⁹ AR7220-22.

nonpartisan way, regarding partisan activities undertaken in an individual capacity as opposed to an organizational capacity.

I. CPD’s Informal Conflict-Of-Interest Policy Willfully Ignores Partisan Conduct By Falling Woefully Short Of Basic Standards Of Governance Applicable to Nonprofit Organizations.

The CPD’s failure to establish a formal, written conflict-of-interest policy to safeguard its impartiality contravenes the basic standards and practices of good governance that are fundamental in the nonprofit community. Such failure directly inhibits the CPD’s ability to ensure that its board members perform their duties in a nonpartisan manner and, pursuant to their fiduciary duties as board members, in the best interest of the CPD in furthering its mission.

That a nonprofit organization must have written and enforceable conflict-of-interest policies is hardly controversial.¹⁰ In a comprehensive report issued by the Panel on the

¹⁰ The nonprofit community has been heavily influenced by the rigorous conflict-of-interest guidelines that govern publicly traded corporations and large accounting firms. The enactment of the Sarbanes-Oxley Act in 2002, Pub. L. No. 107-204, 107th Cong., 2d Sess. (2002) (“SOX”), brought about renewed scrutiny of the governance of nonprofit organizations. *See* BoardSource, *The Sarbanes-Oxley Act and Implications for Nonprofit Organizations* 2, 10 (Jan. 2006), available at <https://www.centerfornonprofitexcellence.org/sites/default/files/SarbanesOxley.BoardSource.pdf> (last accessed Sept. 14, 2017). Specifically, SOX introduced a provision pertaining to the adoption and disclosure of a formal “code of ethics” for certain officers of a reportable company “to promote . . . the ethical handling of actual or apparent conflicts of interest between personal and professional relationships.” 15 U.S.C. § 7264. Although not formally extended to nonprofit organizations, the corporate governance standards under SOX have permanently altered expectations of governance practices for nonprofit organizations. Accordingly, adoption of written conflict-of-interest policies has increased significantly in the nonprofit community during the past decade. In 2007, the Urban Institute reported that only half of the respondents in its national survey of nonprofit organizations had a written conflict-of-interest policy. *See* The Urban Institute, *Nonprofit Governance in the United States: Findings on Performance and Accountability from the First National Representative Study* 9 (2007), available at <https://www.urban.org/sites/default/files/publication/46516/411479-Nonprofit-Governance-in-the-United-States.pdf> (last accessed Sept. 14, 2017). By contrast, only five years thereafter, the Nonprofit Governance Index 2012, compiled by BoardSource, found that 96% of nonprofit organizations surveyed had adopted a written conflict-of-interest policy. BoardSource, *Nonprofit Governance Index 2012*, at 15 (Sept. 2012), available at

Nonprofit Sector—which consisted of several leaders of the nonprofit community convened by the nonprofit coalition Independent Sector, at the encouragement of the leaders of the Finance Committee of the United States Senate—the nonprofit community emphasized that “charitable organizations should adopt and enforce a conflict-of-interest policy consistent with its state laws and organizational needs.”¹¹ The report, which reflected the input of “thousands of people representing diverse organizations from every part of the country,” *id.*, instructs nonprofits to:

[a]dopt and enforce a conflict of interest policy consistent with the laws of its state and tailored to its specific organizational needs and characteristics. This policy should define conflict of interest, identify the classes of individuals within the organization covered by the policy, facilitate disclosure of information that may help identify conflicts of interest, and specify procedures to be followed in managing conflicts of interest.¹²

Independent Sector has since issued two additional reports, in 2007 and 2015, explicating its principles for good governance for nonprofit organizations.¹³ Both reports counsel nonprofits to adopt and implement “policies and procedures to ensure that *all* conflicts of interest (real and potential), or the appearance thereof, within the organization and the governing board are appropriately managed through disclosure, recusal, or other means.”¹⁴ The reports specifically

https://www.leadingagemn.org/assets/docs/NonProfit_Governance_Index_Report_2012.pdf (last accessed Sept. 14, 2017). In a more recent survey, out of 1,378 responding organizations, 94% had adopted a written conflict-of-interest policy. See *Leading with Intent, 2017 National Index of Nonprofit Board Practices* 6, 52 (2017), available at <https://leadingwithintent.org/wp-content/uploads/2017/09/LWI2017.pdf> (last accessed Sept. 12, 2017).

¹¹ Panel on the Nonprofit Sector, *Strengthening Transparency Governance Accountability of Charitable Organizations: A Final Report to Congress and the Nonprofit Sector*, 8 (2005), available at <http://www.kiplinger.com/members/taxlinks/071505/Nonprofit-Sector-report.pdf> (last accessed Sept. 13, 2017).

¹² *Id.* at 81.

¹³ Independent Sector, *Principles for Good Governance and Ethical Practice* 5-6 (2015), available at <https://www.independentsector.org/wp-content/uploads/2016/11/Principles2015-Web-1.pdf> (last accessed Sept. 13, 2017).

¹⁴ *Id.* at 12 (emphasis added).

contemplate a “*written* conflict-of-interest policy,” with periodic monitoring for compliance, to avoid or manage any financial or non-financial “conflict[] of interest that could affect the decisions of board members, staff leaders, and other employees.”¹⁵

In many jurisdictions, such best practices for written conflict-of-interest policies is reflected in legislation and administrative guidance applicable to nonprofit organizations. For example, New York requires nonprofit organizations to adopt a conflict-of-interest policy that defines the circumstances constituting a conflict of interest, provides procedures for disclosing such a conflict, and describes the actions that should be taken after a conflict has been identified.¹⁶ New York law recognizes that “to ensure that [the nonprofit organization’s] directors, officers, and key employees act in [such organization’s] best interest,” a conflict-of-interest policy may be required to cover “types of conflicts that may exist *even though there is no financial interest at stake*.”¹⁷

The federal government, and in particular the U.S. Internal Revenue Service (“IRS”), also recognizes the importance for nonprofit organizations of implementing written conflict-of-interest policies to manage all actual and potential conflicts, including non-financial conflicts. In addition to routinely gathering information about the written policies of nonprofit organizations through the applicable annual information return¹⁸ and audit procedures,¹⁹ the IRS emphasizes that board members of a nonprofit organization should:

¹⁵ *Id.* (emphasis added).

¹⁶ *See* Nonprofit Revitalization Act of 2013, N.Y. Not-for-Profit Corp. Law § 715-A(A)-(B).

¹⁷ Conflicts of Interest Policies Under the Nonprofit Revitalization Act of 2013, Guidance Document 2015-4, at 2-3 (April 2015) (emphasis added).

¹⁸ In 2007, the IRS redesigned the annual information return for tax-exempt organizations (IRS Form 990) to enumerate several types of written policies and procedures that such organizations are expected to adopt, including a written conflict-of-interest policy and regular monitoring of such policy. *See* IRS Form 990 (2016), Part VI, Section B, Questions 12a-c.

adopt and regularly evaluate a written conflict of interest policy that requires directors and staff to act solely in the interests of the charity *without regard for personal interests*; include[] written procedures for determining whether *a relationship*, financial interest, or business affiliation results in a conflict of interest; and prescribe[] a course of action in the event a conflict of interest is identified.²⁰

The CPD’s only existing formal policy is explicitly limited to “financial conflicts of interest that could arise as a result of outside employment” and does not prevent the appearance of conflicts-of-interest by the CPD board members.²¹ Prohibiting financial conflicts may remove *only* one possible source of *actual* conflicts of interest; it does *nothing* to address non-financial conflicts or the appearance of conflicts. Moreover, although the informal conflict-of-interest policy purports to “reflect[] the CPD’s view that a debate staging organization better serves the public when it . . . adopts and adheres to balanced policies designed to prevent even the potential for an erroneous appearance of partisanship based on political activities undertaken by CPD-affiliated persons (including Board members) in a personal capacity,”²² the policy is silent as to any specific mechanism for disclosure and management of situations that give rise to a realized or potential conflict.

¹⁹ For each audit of a tax-exempt organization, the IRS has directed its agents to gather information about the governance practices of such organization so that the IRS can determine whether the organization has a written conflict-of-interest policy and, if so, whether such policy addresses recusals and requires annual written disclosures of any conflicts. *See* IRS Form 14114 (2009), Part 5, Questions 18a-c.

²⁰ IRS, *Governance and Related Topics - 501(c)(3) Organizations* (Feb. 4, 2008), at § 4(B) (emphasis added), available at https://www.irs.gov/pub/irs-tege/governance_practices.pdf (last accessed Sept. 14, 2017).

²¹ AR7222; *see* Conflict of Interest Policy, Comm’n on Presidential Debates, ¶¶ 4-5.

²² AR7221-22.

It is unrealistic to expect that the CPD can “operate[] completely independently of any party or political campaign,”²³ while governed by an unwritten and unmonitored conflict-of-interest policy with no formal procedure for disclosing actual or potential non-financial conflicts. Beyond the CPD’s self-serving claim that the unwritten policy prohibits the CPD board members from “serving in any official capacity with a political campaign,”²⁴ there is no indication as to whether the CPD has procedures to follow for enforcing the informal policy, whether the informal policy includes any reporting or monitoring requirements, or if there are consequences for violating the informal policy. Indeed, there is no suggestion that CPD enforces the informal policy at all. The failure of the CPD’s informal policy to conform to basic principles of nonprofit governance all but guarantees the prevalence of partisan conduct within the organization.

II. CPD’s Informal Conflict-Of-Interest Policy Is Incapable Of Preventing The Appearance Of Partisanship.

It is similarly uncontroversial both within and outside the nonprofit community, that organizations charged with the public trust, such as the CPD, must prevent not only actual conflicts of interest, but also the *appearance* of such conflicts. In addition to instructing organizations to adopt written policies, Independent Sector counsels that “[a] charitable organization should adopt and implement policies and procedures to ensure that all conflicts of interest (real and potential), *or the appearance thereof*, within the organization and the governing board are appropriately managed through disclosure, recusal, or other means.”²⁵ The CPD itself

²³ AR7103.

²⁴ *Id.*

²⁵ Independent Sector, *Principles for Good Governance*, *supra*, at 12 (emphasis added).

recognizes that avoiding the appearance of conflicts must be part of its mandate.²⁶ But the CPD's conflict-of-interest policy, such as it is, falls short of eliminating the appearance of conflicts.

As described by the CPD Executive Director, the CPD's informal policy prohibits board members only from serving in an "official" capacity on a political campaign or with a political party, without any clarification as to the meaning of "official."²⁷ The CPD's policy already lacks any enforcement mechanism, given that it is both unwritten and informal; and the CPD extinguishes what remains of the policy's viability by expressly recognizing a loophole permitting board members, who make decisions about the selection of presidential and vice-presidential debate participants, to be actively involved in partisan political activities on behalf of those very same debate participants or their parties.

The CPD compounds the problem by also recognizing a distinction between partisan political activities undertaken by the board members in their "personal capacit[ies]," as opposed to their "official capacit[ies]."²⁸ For purposes of complying with a meaningful conflict-of-interest policy that should be drafted to help ensure that the CPD is engaging in its activities in a nonpartisan manner, as required pursuant to its tax-exempt status and by its specific mission of hosting the presidential and vice-presidential debates, this distinction between board members' individual and official partisan activities is entirely unrealistic.

Even if a clear line could be drawn between individual and official partisan activities, the CPD ignores that even individual partisan conduct by CPD board members can taint the

²⁶ See AR7104 (recognizing "the potential for *an erroneous appearance of partisanship* based on political activities undertaken by CPD-affiliated persons (including Board members) in a personal capacity" (emphasis added)).

²⁷ AR7103.

²⁸ AR7103-04.

organization itself, specifically in light of the mission of the CPD. At a minimum, such conduct would create the *appearance* of a conflict of interest; the public reasonably would interpret any overtly partisan statement by a board member as an expression of the views of the organization itself. Carried to its logical conclusion, the CPD would permit openly partisan conduct, so long as it is done in board members' ill-defined "personal capacit[ies]."

The alleged written "policy" is no more effective than the unwritten "informal policy" at avoiding the appearance of conflict. As noted above, the CPD failed to disclose this policy, making it impossible to confirm that it would actually avoid the appearance of conflict. And the CPD's own description confirms it would not, because it only "intends to deter" partisan activities, instead of prohibiting them. Thus, the CPD's leadership may continue to, and apparently does, actively support and oppose partisan causes, notwithstanding any supposed "deterrence" from the alleged written policy.

CONCLUSION

Having a conflict-of-interest policy that is merely informal and unwritten is tantamount to having no policy at all. It is readily apparent that the CPD's current provision of informal and incomplete conflict-of-interest policies fails to meet the basic standard of governance adopted by the nonprofit community at large. CPD board members have engaged in the endorsement of (and opposition to) political campaigns and other partisan conduct, while at the same time bearing responsibility for ensuring that the CPD conducts its activities in a nonpartisan way in accordance with its tax-exempt purposes. For an organization like the CPD that is charged with safeguarding the integrity of the nation's presidential and vice-presidential debates, more should and must be demanded by the FEC. Accordingly, the *amici* respectfully request that this Court grant summary judgment for the Plaintiffs.

Dated: September 22, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 22, 2017, the foregoing brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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