Change the Rule

Open Up the Presidential Debates
Make Room for an Independent Voice
Tab 1) Executive Summary

Tab 2) Exhibit I is the Administrative Complaint that Level the Playing Field has filed with FEC, which details why the CPD’s current rules violate the law.

Tab 3) Exhibit II is the study of Dr. Clifford Young, head of U.S. Public Affairs at the polling firm IPSOS, which explains his quantitative analysis demonstrating the bias in the CPD’s polling-based rule. It shows that an independent candidate would need extremely high name recognition to satisfy the CPD’s rule, and that, even if he or she could achieve it, the inaccuracies of polling in a three-way race would often result in his or her exclusion from the debates.

Tab 4) Exhibit III is a study by Doug Schoen, veteran campaign consultant and pollster, which explains that the cost of achieving the name recognition necessary to satisfy the CPD’s rule is prohibitively expensive for an independent or third-party candidate.

Tab 5) Exhibit IV is the Petition for Rulemaking that Level the Playing Field has filed with the FEC. The Petition includes a proposed new rule based on a signature drive competition. A supplemental brief with additional evidence in support of the Petition was filed on 11/26/14 and is included in this exhibit.

Tab 6) Exhibit V is Michael Arno’s explanation of how a signature drive competition can be used to determine access to the presidential debates in an objective way that allows a viable, moderate third choice to emerge.

Tab 7) Exhibit VI is a second study by Doug Schoen showing that, under a system where debate access is determined by a signature drive competition, an independent candidate can run a competitive campaign at a significantly lower cost than is required by the CPD’s present rules.

Tab 8) Exhibit VII lists the directors of the CPD.

Tab 9) Exhibit VIII shows the results of poll conducted by Doug Schoen illustrating the public’s dissatisfaction with the current two-party system and its desire for independent leadership.
“The debates are part of the unconscionable fraud that our political campaigns have become. Here is a means to present the American people a rational exposition of the major issues that face the nation, and the alternate approaches to their solution. Yet the candidates participate only with the guarantee of a format that defies meaningful discourse. They should be charged with sabotaging the American electoral process.”

- Walter Cronkite

“When neither candidate wants a third party in there, they’re not going to allow it.”

- Former General Counsel, Federal Election Commission
While agreeing on little else, Democratic and Republican leaders together proclaim that “elections have consequences.” The unspoken implication is that the choices the two parties offer are all the American voter needs. Of far greater consequence, however, is how the two parties collude to create election rules that solidify their joint control of the ballot box.

Qualified Americans hoping to run unencumbered by the demands of party loyalty quickly discover that the two major parties have rigged our system to prevent anyone who is not affiliated with the two parties from getting elected. Democrats and Republicans draw gerrymandered districts to protect Democratic and Republican incumbents. They enact “sore loser laws” that prevent candidates who lose a party primary from running in a general election. They create campaign finance laws that make it legal for party committees to receive hundreds of thousands of dollars from individual donors, but prohibit independents from raising equal sums.

The two parties have also deliberately prevented independent candidates from participating in the presidential debates. Democrats and Republicans control the presidential debates, and create rules that ensure that that their own nominees can participate in the debates, but that no independent challenger can participate. They have exercised control through the Commission on Presidential Debates (“CPD”), an organization the two parties created in 1987 when the League of Women Voters refused to succumb to the parties’ attempt to hijack control of the Presidential debates. The CPD was created to ensure that the two parties could control the presidential debates, and it has promulgated rules deliberately designed to prevent an independent challenger from participating in the debates.

The American people are catching on. A recent Rasmussen Poll found that 68% of Americans believe elections are rigged in favor of Democrats and Republican incumbents. And they don’t like it. That same poll recorded only 19% believing that the government has the consent of the governed. Shockingly, 62% believed that the government lacks the public’s consent. Confidence in the two-party duopoly is nonexistent, as it is now viewed as the primary cause of political dysfunction. Americans want an alternative.

In a survey conducted by Doug Schoen (Exhibit VIII), respondents were asked whether they agreed with the following:

“Right now, because they are the only options, the two parties control who gets elected to office, not the voters. We need to break the hold that they have on elections, and elect candidates who make decisions based on what’s right, rather than what their party tells them.”

The result: 86% agreed.
The Schoen survey illustrates that this discontent extends to how we elect the President. Respondents were asked whether they agreed with the following statement:

“In the U.S. presidential election, I often feel that the Democratic candidate is too far to the left, and the Republican candidate is too far to the right. I wish I had the option to vote for an Independent who was somewhere in the middle.”

The result: 65% agreed.

Stop anyone in the street and ask if they think a Presidential candidate can win the election without participating in the October debates. They will say no. Then ask how they would feel knowing for as long as they and every member of their family will live, they will only see Democratic and Republican nominees in the debates. They will express surprise and find the idea upsetting.

Show them the accompanying chart and they will understand the significance of the premeditated exclusion of independent candidates and why it creates the political dysfunction they are witnessing. The chart shows how the two-party system deprives Americans of the opportunity to vote for the centrist presidential candidate that most of them prefer.

Finally, tell them there are 17 individuals unknown and unaccountable to the American people with the power to change the rules determining who can be in the Presidential debates, but who refuse to do so. Then the response will be much sharper: “Who are these people and why do they decide who should be viable candidates for President?”

The answer, of course, is the members of the CPD.

The CPD determines who participates in the presidential debates. Under Federal Election Commission (“FEC”) regulations, the CPD must use objective, unbiased criteria to select debate participants. As detailed in the administrative complaint that Level the Playing Field has filed with the FEC (Exhibit I), the CPD’s present criteria make participation in the debates contingent on satisfying a polling threshold that is subject to manipulation, notoriously inaccurate, and set unreasonably high so that no third-party or independent candidate could have a practical shot of gaining entry to the debates. In other words, the CPD’s criteria “are specifically designed to exclude independents or third party candidates from participating in the debates” in direct violation of the FEC’s regulations.

This violation of the law is a direct result of the CPD’s partisan makeup. Its leaders are committed Republicans and Democrats (see Exhibit VII); are accountable to no one; and have no ability to consider the interests of independent and third-party candidates. Indeed, the organization does not limit its leaders’ partisan activities one iota, leading to egregious conflicts of interest. For example, at the same time the CPD was supposedly objectively determining whom to invite and how to structure the debates, one of its co-chairs was a Democratic superdelegate supporting Barack Obama, while the other was an adviser to Mitt Romney.
The good news is that the CPD could end the Democratic and Republican manipulation of the debates with a simple rule change. The new rule would work as follows: On April 30 any candidate, party, or nominating process with ballot access in states that collectively have at least 270 Electoral College votes would notify the CPD of that access. If there is more than one, then whoever has gathered the most signatures as part of the ballot access process will participate in the debates with the Democratic and Republican nominees.

Under this new rule, for the first time in our history, an independent or third-party candidate can be designated to be in the debates at least six months before the election. Given the historic prize of entry into the debates, the competition will be vigorous and a legitimate third candidate will emerge. We estimate that the winner of the signature competition will need to collect some 4 million signatures, obtained from a broad cross section of Americans – a clear demonstration of popular appeal. The cost and scale of that endeavor would not be insurmountable, but it is substantial enough to ensure that only someone with significant fundraising and operational capacity and public support could win. (See Exhibit V). Before it adopted the 15% rule, the CPD endorsed fundraising ability, operational capacity, and numerical demonstrations of popular support (for example, attendance at campaign rallies), as criteria for debate selection. The signature drive competition provides an objective, fair, and measurable way to implement those criteria.

The competition – not unlike the early state primaries – could spur many great men and women who are highly qualified to be President to consider running. And since by May 1 it will be clear that a third candidate will occupy the debate stage with the Democratic and Republican nominees, the media will be compelled to cover that candidate. This will give the American people six months to get to know a qualified, non-major party presidential nominee who will be in the debates. Our democracy would be much better for it.

The attached exhibits address four subjects:

1. Why the CPD’s current rules of admission to the presidential debates violate the legal requirement that debate sponsors use nonpartisan, unbiased criteria to select debate participants. (See Exhibit I).
2. How a signature-based competition for debate access will level the playing field and attract many proven American leaders to run for President without raising the banner of Democrat and Republican. (See Exhibit IV and Exhibit V).
3. The names of the 17 directors of the CPD with the power to change the rules. (See Exhibit VII).
4. The threat to the integrity of our political system if the CPD continues to keep the debate rules unchanged. (See Exhibit VIII).

Exhibit I is the administrative complaint that Level the Playing Field has filed with FEC, which details why the CPD’s current rules violate the law.
Exhibit II is the study of Dr. Clifford Young, head of U.S. Public Affairs at the polling firm IPSOS, which explains his quantitative analysis demonstrating the bias in the CPD’s polling-based rule. It shows that an independent candidate would need extremely high name recognition to satisfy the CPD’s rule, and that, even if he or she could achieve it, the inaccuracies of polling in a three-way race would often result in his or her exclusion from the debates.

Exhibit III is a study by Doug Schoen, veteran campaign consultant and pollster, which explains that the cost of achieving the name recognition necessary to satisfy the CPD’s rule is prohibitively expensive for an independent or third-party candidate.

Exhibit IV is the petition for rulemaking that Level the Playing Field has filed with the FEC. The petition includes the proposed new rule based on a signature drive competition.

Exhibit V is Michael Arno’s explanation of how that signature drive competition can be used to determine access to the presidential debates in an objective way that allows a viable, moderate third choice to emerge.

Exhibit VI is a second study by Doug Schoen showing that, under a system where debate access is determined by a signature drive competition, an independent candidate can run a competitive campaign at a significantly less cost than required by the CPD’s present rules.

Exhibit VII lists the current members of the CPD.

Exhibit VIII shows the results of poll conducted by Doug Schoen illustrating the public’s dissatisfaction with the current two-party system and its desire for independent leadership.
The vast majority of Americans, fully two-thirds of U.S. voters, are “B” or “C” voters: namely, either left- or right leaning moderates (“B”) or centrists (“C”). Yet today a “B” or “C” voter only has one choice, which is to support a candidate whose winning coalition includes “A” voters — those on the extreme right or extreme left.

This results in a President who wins with an “A-B-C” coalition, and who necessarily will govern very differently than a President who wins with a “B-C-B” coalition. With an “A-B-C” coalition, the President’s policies will tend towards the views of the “A” and “B” voters in his or her coalition—many of whom have more extreme views and thus will be adverse to voters who voted for a different presidential candidate.

By contrast, a “B-C-B” coalition will represent the two-thirds of US voters who can more easily find common ground with voters who voted for a different candidate; this will lead to a President who can govern more effectively, and in a manner more reflective of the views of most Americans. *Unless we change the rule for who is allowed in the debates, there will be no hope of a presidential ticket that could win with a “B-C-B” coalition.*
Change the Rule

Exhibit I -- Administrative Complaint filed with the FEC by Level the Playing Field, detailing why the CPD's rules violate the law.
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

COMPLAINT

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Exhibit 19 Warren Weaver Jr., Anderson Declares as Independent, Vowing to Draw Many New Voters, N.Y. Times, Apr. 25, 1980

Exhibit 20 Excerpts of Newton Minow & Craig L. LaMay, Inside the Presidential Debates: Their Improbable Past and Promising Future (2008)

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Frank Fahrenkopf & Paul Kirk, *Memorandum of Agreement on Presidential Candidate Joint Appearances* (Nov. 26, 1985)

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*G.O.P Seeks a City for ’88*, N.Y. Times, Jan. 26, 1986

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Steven A. Holmes, *Ross Perot; Noncandidate Tells His Supporters to Look for Real Candidates to Support*, N.Y. Times, July 19, 1992

Exhibit 37 *The 1992 Campaign: Polls; Despite Perot’s Re-entry, Clinton Retains Big Lead,* N.Y. Times, Oct. 7, 1992


Exhibit 41 Excerpts of David Broder, *Campaign For President: The Managers Look at ’96* (1997)


Exhibit 51  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


Exhibit 57  Commission on Presidential Debates, Excerpts from Form 990 Return of Organization Exempt From Income Tax for 1997-2007 Tax Years

Exhibit 58  Commission on Presidential Debates, Excerpts from Form 990 Return of Organization Exempt From Income Tax for 2008-2012 Tax Years

Exhibit 59  Commission on Presidential Debates, Transcript of the Oct. 3, 2012 presidential debate at the University of Denver


Exhibit 90  Tom Morgenthau, *Citizen Perot*, Newsweek, Nov. 9, 1992

Exhibit 91  Sandy Grady, *Without Ross Perot, There Would Be No Deficit Deal*, Orlando Sentinel, Aug. 5, 1993

Exhibit 92  Commission on Presidential Debates, Schedule A to Form 990 Return of Organization Exempt From Income Tax for 2008 Tax Year, dated Nov. 10, 2009

Exhibit 93  Brody Mullins & Alicia Mundy, *Corporate Political Giving Swings Toward the GOP*, Wall St. Journal, Sept. 21, 2010


| Exhibit 101 | Commission on Presidential Debates, Conflict of Interest Policy, obtained from the CPD on Sept. 9, 2014 |
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, and 86% feel the political system is broken and does not serve the interests of the American people. 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.

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, 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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3 Id. at 21, 53.
4 68% Think Election Rules Rigged for Incumbents (Exhibit 1), supra n.1.
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.” 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),
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
dependent 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.
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
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
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.” To achieve this purpose, FECA prohibits corporations from making many types of contributions or expenditures “in connection with” any federal election. It also requires disclosure of most federal political contributions and expenditures.

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, and corporate funding of a public forum in which a candidate can appear to influence voters would typically be subject to FECA’s strictures. The FEC has in fact recognized that corporate funding of candidate debates creates “the real or apparent potential for

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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.”).
a quid pro quo” corrupt payment and jeopardizes the “integrity and fairness of the [debate] process.”  

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.  The rationale for this exception is that debates can serve a nonpartisan, voter education purpose, rather than be a contribution to favored candidates.  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.”

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.”  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.”  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. 

11 Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995).
13 See id.
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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{20} The resulting debate must be nonpartisan too, and cannot favor one candidate over other.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{23} To be objective, a criterion “must be free of content bias, and not geared to the selection of certain pre-chosen participants.”\textsuperscript{24} Under this definition, objectivity means more than subject to verifiable

\textsuperscript{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).
\textsuperscript{19}11 C.F.R. § 110.13(a).
\textsuperscript{20}Id. § 110.13(c).
\textsuperscript{21}See id. § 110.13(b)(2) (prohibiting debate sponsors from “structur[ing] the debates to promote or advance one candidate over another”).
\textsuperscript{22}Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,735.
\textsuperscript{23}11 C.F.R. § 110.13(c).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{26} Nor does the debate sponsor’s ipse dixit that it has objective criteria satisfy the rules. Rather, a sponsor “\textit{must be able to show} that their objective criteria were used to pick the participants, \textit{and that the criteria were not designed to result in the selection of certain pre-chosen participants}.”\textsuperscript{27}

If and only if a debate staging organization satisfies these criteria may it use corporate money to pay for candidate debates.\textsuperscript{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.

\textbf{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.\textsuperscript{29} The CPD pays for these multimillion dollar events with corporate money\textsuperscript{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,
Hallmark, IBM, J.P. Morgan & Co., Philip Morris Companies Inc., and Prudential, among others.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{35} The polls that the CPD claims to rely upon are not announced, either in advance or upon application of the

\begin{itemize}
\item \textsuperscript{32} CPD: Our Mission (Exhibit 4), supra n.29.
\item \textsuperscript{34} Id.
\item \textsuperscript{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.
\end{itemize}
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. 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.

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.

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. 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.” It is, simply

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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” – 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. “Sore loser laws” prevent candidates who lose a party primary from contesting a general election, thereby protecting party nominees from proven challengers. 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.

These rules enable a vicious cycle: Democrats and Republicans create a system that favors them,

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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.\textsuperscript{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.

\textbf{I. THE CPD \textit{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.\textsuperscript{46} The FEC codified this expectation by requiring debate sponsors to be 501(c)(3) or 501(c)(4) organizations – which by law face

\textsuperscript{45} See, \textit{e.g.}, Kang, \textit{supra} n.43, at 1037 (explaining how parties design election laws to reduce political competition and create political entrenchment).

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

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\(^{47}\) 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.


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

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. 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. The League, however, determined that Anderson should participate and scheduled the first debate to include Carter, Anderson, and Republican nominee Ronald Reagan. 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. 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.

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52 Id.
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.
The League resisted, seeking to vindicate the public interest through negotiations with the campaigns. 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 that the League found acceptable and publicly admonished the campaigns for their “abuse of the process.” Although the negotiations became “hostile,” the end result was two debates between President Reagan and Mondale.

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. 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.” 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.
61 Id. at 60.
62 See Minow & LaMay (Exhibit 20), supra n.54, at 157-58.
64 Id.
principally and jointly sponsored and conducted by the Republican and Democratic National Committees.\textsuperscript{65}

The Democratic and Republican National committees formally approved Fahrenkopf and Kirk’s proposal “for the parties to take over presidential debates” soon thereafter.\textsuperscript{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 \textit{between the nominees of the two political parties will be based}.\textsuperscript{67} The Democratic and Republican parties called the CPD “a \textit{bipartisan}, non-profit, tax-exempt organization formed to implement joint sponsorship of general election presidential and vice-presidential debates, starting in 1988, \textit{by the national Republican and Democratic committees} between their respective nominees.”\textsuperscript{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 \textit{New York Times} reported:

\textquote{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.}\textsuperscript{69}

\textsuperscript{65 Id.\
\textsuperscript{66} \textit{G.O.P Seeks a City for ’88}, N.Y. Times, Jan. 26, 1986, submitted herewith as Exhibit 23.\
\textsuperscript{68} Id. (emphasis added).\
\textsuperscript{69} Phil Gailey, \textit{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), \textit{supra} n.54, at 74.
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. This agreement also called for the CPD to sponsor two debates (a presidential debate and a vice-presidential debate) and the League one. 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.” 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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71 See id.
72 See Press Release, League of Women Voters, League Refuses to “Help Perpetrate a Fraud” (Exhibit 18), supra n.51.
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 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 before78 –

73 See Minow & LaMay (Exhibit 20), supra n.54, at 73.
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.
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.”

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. The CPD tasked an Advisory Committee with applying these

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80 First General Counsel’s Report at 8-10, MURs 4451 and 4473 (Commission on Presidential Debates) (Feb. 6, 1998).
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.\textsuperscript{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.\textsuperscript{82} The Clinton campaign agreed. A Bush campaign official explained what transpired as follows:

\begin{quote}
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.\textsuperscript{83}
\end{quote}

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{86} The Advisory Committee purportedly determined Perot should not be

\begin{footnotes}
\item[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.
\item[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).
\end{footnotes}
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. 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 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. In the week preceding the CPD’s decision in 1996, Perot’s support was in the same range.

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. The CPD would not divulge who it consulted, but the Washington bureau chiefs of the New York Times, submitted as Exhibit 37. A Harris poll over the same time period had Perot at 9%.

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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).
90 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

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. 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. 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 – replaced Kirk and remains at the helm. 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. At the time, however, McCurry claimed that the Clinton campaign accepted Perot’s exclusion “reluctantly and with some regret.”

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

96 See id.
98 See Commission Leadership (Exhibit 42), supra n.95.
99 See supra text accompanying n.94.
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\(^\text{101}\); in this election cycle alone, he has already given more than $35,000 to GOP candidates and committees.\(^\text{102}\) 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.”\(^\text{103}\) Fahrenkopf has even donated to the presidential campaign of at least one candidate appearing in the CPD’s debates, George W. Bush.\(^\text{104}\) McCurry is just as much a partisan as Fahrenkopf. From 2008 through 2012, McCurry gave nearly $85,000 to Democrats.\(^\text{105}\)

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\(^\text{106}\) and gave over $150,000 to Democratic and Republican candidates in that span.\(^\text{107}\) McCurry is a principal at Public Strategies Washington, Inc., \(^\text{108}\) a lobbying firm for a who’s who of major corporations.\(^\text{109}\) Its clients include CPD sponsors Anheuser-Busch and Southwest Airlines, which give hundreds of thousands of dollars


\(^{104}\) List of Frank Fahrenkopf Individual Contributions (Exhibit 46), supra n.102.

\(^{105}\) See Wills (Exhibit 45), supra n.101.

\(^{106}\) Id.


\(^{108}\) See Michael D. McCurry (Exhibit 43), supra n.97.

to Democratic and Republican candidates.\textsuperscript{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.\textsuperscript{111} Two former Republican senators, John Danforth and Alan Simpson, are on the CPD board.\textsuperscript{112} Democratic board representatives include Newton Minow, a close aide to Adlai Stevenson and a Kennedy appointee to the Federal Communications Commission\textsuperscript{113}; and Antonia Hernandez, who served as counsel to the Senate Committee on the Judiciary when it was led by Ted Kennedy.\textsuperscript{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

\footnotesize{\textsuperscript{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. \textit{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. \textit{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.

\textsuperscript{111} \textit{See} 2000 Brown Decl. (Exhibit 30) at ¶ 2.

\textsuperscript{112} \textit{See Commission Leadership} (Exhibit 42), \textit{supra} n.95.

\textsuperscript{113} \textit{See} Minow & LaMay (Exhibit 20), \textit{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, \textit{Formalize Debates}, N.Y. Times, May 30, 1984, submitted herewith as Exhibit 52.

\textsuperscript{114} \textit{See} Andrea Saenz, \textit{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.\footnote{See Wills (Exhibit 45), \textit{supra} n.101.} Howard Buffett, a CPD board member since at least 2000,\footnote{See 2000 Brown Decl. (Exhibit 30) at ¶ 7.} contributed to Barack Obama’s 2008 presidential campaign the \textit{very same month} that the supposedly “nonpartisan” CPD sponsored the debates between Obama and John McCain.\footnote{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.} Board member Dorothy Ridings has contributed to Democratic campaigns too.\footnote{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.}

To be sure, some CPD board members have less overt ties to the political parties than others.\footnote{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. \textit{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&cntnt01detailtemplate=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.} 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.”\footnote{Minow & LaMay (Exhibit 20), \textit{supra} n.54, at 64.} Indeed, board membership appears little more than an honorific. For years, the CPD admitted that its board members devoted \textit{zero} hours per week to the organization,
even in presidential election years.\textsuperscript{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 \textit{accomplishment}.\textsuperscript{122}

Second, the CPD board nominates its own members, without any oversight.\textsuperscript{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 – \textit{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.\textsuperscript{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.\textsuperscript{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 \textit{entirely silent} when it comes to partisan activity.\textsuperscript{126} In other words, an organization that by law must be nonpartisan

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{123} Minow & LaMay (Exhibit 20), supra n.54, at 65.

\textsuperscript{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.


\textsuperscript{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\textsuperscript{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\textsuperscript{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.”\textsuperscript{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.\textsuperscript{130} According to news reports, Kirk was
the favored choice of the Obama administration, and Obama himself called Kirk’s selection an
“excellent” choice.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{129} Jonathan D. Salant, \textit{Former Democratic Party Leader Paul Kirk Backs Obama}, Bloomberg.com (May 2, 2008
herewith as Exhibit 60.

\textsuperscript{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, \textit{Former Kennedy Aide Is Appointed to Fill His Senate Seat}, N.Y.
submitted herewith as Exhibit 61.

\textsuperscript{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.

* * *

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

\(^{132}\) 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.
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. It is likely, moreover, that the necessary name recognition is much higher, approaching 80% or above.

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. 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%

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.
name recognition among Republican voters in May 2011.\textsuperscript{142} By February 13, 2012, his name recognition had increased to 85% among all Americans.\textsuperscript{143} Santorum, however, spent no more than $13.1 million on his campaign up to that point.\textsuperscript{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\textsuperscript{145} at a cost to his campaign of less than $16 million.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{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.
\item \textsuperscript{143} See CNN/ORC Poll, CNN (Feb. 14, 2012), http://i2.cdn.turner.com/cnn/2012/images/02/14/re12c.pdf (reporting that only 15% of all Americans had never heard of Rick Santorum), submitted herewith as Exhibit 64.
\item \textsuperscript{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/national.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.
\end{itemize}
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; 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.” 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. 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. 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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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 benefited 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. The media purchase necessary to take a near-unknown candidate to this level of name recognition is $106 million. The candidate would have to spend an additional $6 million to produce the content to fill that media purchase. And to achieve 80% – the more likely amount necessary – the candidate would have to spend $150 million on paid media.

No third-party or independent candidate has ever raised $113 million, much less $150 million. 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.

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. 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). A third-party or independent candidate, moreover, has to spend money to coordinate the massive signature

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.
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

\[^{160}Id. at 17 \text{n.18.}\]
\[^{161}Id. at 18.\]
\[^{162}Id. at 17-18.\]
\[^{164}\text{See Schoen Report (Exhibit 70) at 24.}\]
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.

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.” 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. 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.
debate to allow for orderly planning.” 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. If a pollster’s prediction about who will vote is incorrect, the accuracy of his or her pre-election polls will suffer. 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.”

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

168 Id.
169 Young Report (Exhibit 62) at ¶¶ 43, 43a-43c.
170 See id. at ¶¶ 43d-43e.
171 Schoen Report (Exhibit 70) at 28.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{174} Independent gubernatorial candidate Elliot Cutler in Maine in 2010 would not have met a 15% cutoff either; Cutler was polling at 11%\textsuperscript{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.\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item Id. at 26-27.
\item See Tim Cramm, The Designated Nonpublic Forum: Remediying the Forbes Mistake, 67 Alb. L. Rev. 89, 89 (2003), submitted herewith as Exhibit 77.
\item Id.
\end{enumerate}
\end{footnotesize}
research shows that in three-way gubernatorial races,\textsuperscript{177} the average absolute difference between a poll taken two months before the election and the final result is 8.04\%.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

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.\textsuperscript{181} Thus, they face no uncertainty when it comes to debate participation.

\textsuperscript{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.
\textsuperscript{178} \textit{Id.} at ¶ 56.
\textsuperscript{179} \textit{Id.} at ¶ 66.
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{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.

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. 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.” 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

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182 See supra text accompanying n.80.
pursuing data as the sole basis for debate participation” was “preceded by careful study,”\textsuperscript{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.\textsuperscript{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,\textsuperscript{186} and Anderson competed in the Republican primary for president in 1980.\textsuperscript{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.\textsuperscript{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%.\textsuperscript{189}

\textsuperscript{184} 2000 Brown Decl. (Exhibit 30) at ¶ 34.
\textsuperscript{185} Id. at ¶ 35.
\textsuperscript{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.
\textsuperscript{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 LaFollette), and 1948 (Henry Wallace and Strom Thurmond).\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\begin{enumerate}
\item[\textsuperscript{190}] See Minow & LaMay (Exhibit 20), supra n.54, at 56.
\item[\textsuperscript{191}] \textit{Id.}
\item[\textsuperscript{192}] Buchanan, 112 F. Supp. 2d at 74.
\item[\textsuperscript{193}] \textit{Id.}
\end{enumerate}
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.

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. 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. 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%

\[\text{See supra Part II.A.2.}\]

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

\(^{196}\) 2004 Brown Decl. (Exhibit 34) at ¶ 31.
\(^{198}\) Id. at vii.
independent candidates to meet these criteria in any given election was five (in 2000), and was often three or fewer.\textsuperscript{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.\textsuperscript{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.\textsuperscript{202}

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.”\textsuperscript{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.\textsuperscript{204} The lack of public exposure

\textsuperscript{201} See Spotts (Exhibit 17), supra n.50 at 568.
\textsuperscript{202} See Petition for Rulemaking to the FEC filed by Level the Playing Field simultaneous to the filing of this Complaint, at Part III.
\textsuperscript{203} Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,734.
\textsuperscript{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.\(^\text{205}\) 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.\(^\text{206}\) 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.”\(^\text{207}\) Elections set the public agenda by prioritizing among the many pressing issues of the day. They enable the public to


\(^{206}\) 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. \textit{Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates}, 44 Fed. Reg. at 76,736.

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. 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. 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. 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. 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. 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.

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.
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.”  

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.” 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. 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. 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.”

Key to that purpose are statutory rules preventing corporate campaign contributions and requiring identification of the sources of campaign funds. 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. 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. 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. 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.
federal government has the consent of the governed, and 86% feel the political system is broken and does not serve the interests of the American people. 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. 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. 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. In contrast, the CPD, in its first year of operation and without any track record, took in hundreds of thousands of corporate dollars. 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.”

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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.
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.⁴⁶² 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.”⁴⁶³ Similarly, the YWCA declared that because it is “a nonpartisan organization,” it was withdrawing its support for the CPD.⁴⁶⁴ 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 2012.⁴⁶⁵ 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.”⁴⁶⁶ The vast majority of that money funded the debates,⁴⁶⁷ 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

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⁴⁶³ Id.
⁴⁶⁵ CPD 2012 Form 990 (Exhibit 6) at 1.
⁴⁶⁶ Id. at 2, 10.
⁴⁶⁷ See id. at 10.
and Republican candidates – the debates “draw what is easily the largest audience of any public activity associated with the election” – 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.

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 and defines contributions broadly to include the provision of any good or service free of charge. The CPD’s provision of free televised campaign fora to the Democratic and Republican candidates were illegal corporate campaign contributions.

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

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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).
any election for Federal office.” FECA prohibits corporations like the CPD from making such expenditures. 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. A political committee includes any group that has as its “major purpose” the election of a candidate and that “makes expenditures aggregating in excess of $1,000 during a calendar year.” 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. The CPD’s acceptance of corporate “donations” was an illegal receipt of corporate campaign contributions.

*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. 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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244 2 U.S.C. § 441b(a).
245 Id.
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.
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.  

**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.

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Respectfully submitted,

[Signature]
Level the Playing Field
By: Kahlil Byrd, President

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

[Signature]
Notary Public

SHYAM D. BUXANI
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01B6044080
Qualified in New York County
Commission Expires April 24, 2018
Respectfully submitted,

[Signature]
Peter Ackerman

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

[Signature]
Notary Public
Washington D.C.

My commission expires February 28, 2019
Change the Rule

Exhibit II - The study of Dr. Clifford Young, head of U.S. Public Affairs at the polling firm IPSOS, which explains his quantitative analysis demonstrating the bias in the CPD’s polling-based rule.

This study shows that an independent candidate would need extremely high name recognition to satisfy the CPD’s rule, and that, even if he or she could achieve it, the inaccuracies of polling in a three-way race would often result in his or her exclusion from the debates.
EXPERT REPORT OF DR. CLIFFORD YOUNG
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BACKGROUND

1. I am President of Ipsos’ Public Affairs practice in the United States, and also lead Ipsos’ global election polling and political risk practice. I have over a decade of experience in public opinion polling and forecasting. I work with a wide variety of corporate, government, media, and political clients, and am the spokesperson for Ipsos Public Affairs in the United States. I also currently oversee Ipsos’ U.S. public opinion polling for Thomson Reuters.

2. I earned my BA from the University of Illinois at Urbana-Champaign (Magna Cum Laude, Phi Beta Kappa) and completed my graduate work at the University of Chicago (MA and PhD in Sociology with a concentration in statistics and public opinion). I also trained as a survey statistician at the University of Michigan and in political psychology at Stanford. I am an adjunct professor at Johns Hopkins School of Advanced International Studies and an instructor at Columbia University School of International and Public Affairs, where I teach courses on public opinion, reputation management, election polling, and political risk. I have written and presented extensively in the fields of public opinion, election polling, election forecasting, and survey methodology.

3. In my time at Ipsos Public Affairs U.S., I have worked on a variety of projects for federal government, private sector, and global clients including: the U.S. Department of State, Thomson Reuters, Booz Allen Hamilton, Inbev, the National Intelligence Council, the Eurasia Group, and the British Council, among others. Before coming to Ipsos Public Affairs North America, I was Managing Director of Ipsos Public Affairs Brazil where I started the practice for Ipsos and established it as the leading public opinion research firm in Brazil. In this capacity, my primary responsibilities included project and staff management, sample design, questionnaire
design (qualitative and quantitative), data analysis, report writing, sales, client servicing, product and service development, and ensuring the profitability of the company.

4. My expertise includes political and public opinion polling, and I have polled on over 80 elections around the world. The elections I have researched include the 2012 U.S. presidential election, 25 state-level races for the U.S. midterms in 2010; the Nigerian presidential and gubernatorial elections in 2011; the federal and parliamentary elections in Canada in 2011; the Russian presidential elections in 2012; the Egyptian and Kuwaiti parliamentary elections in 2011/2012; the Venezuelan presidential elections in 2012 and 2013; the 2014 Brazilian presidential elections; and the 2014 U.S. mid-term elections. Trained in survey sampling and survey methods design, I have also led more than 100 full public opinion sample designs and post-survey analytics in the following countries: Mexico, Argentina, Bolivia, Peru, Ecuador, Colombia, Venezuela, Chile, South Africa, Russia, India, Indonesia, China, Egypt, Saudi Arabia, Turkey, Palestine, China, Lebanon, United Arab Emirates, Iraq, Afghanistan, Canada, United Kingdom, France, Spain, Italy, Nigeria, Mozambique, Angola, Guinea Bissau, and New Caledonia. I am a frequent writer, analyst, and commentator on elections, communication, and public opinion.
5. The Commission on Presidential Debates ("CPD") sponsors presidential debates held before the general election. The CPD has established three criteria to govern who is included in the debates: 1) the candidate must fulfill the constitutional requirements to be president, 2) the candidate must have ballot access in sufficient states to win a majority of the electoral college, and 3) the candidate must average a vote share of at least 15% in five public polls in September of the presidential election year.

6. I have been tasked with investigating the 15% vote share threshold established by the CPD. This expert report examines two different subjects: First, it addresses the relationship between this 15% vote share threshold and candidate name recognition through an analysis of public polling data from multiple sources over the last twenty-two years. The discussion of that subject begins at paragraph 7. Second, it addresses polling error in three-way races with independent candidates. The discussion of that subject begins at paragraph 33.
CORRELATION BETWEEN NAME RECOGNITION AND VOTE SHARE IN THE ELECTORAL CONTEXT

SUMMARY

7. In opinion research there is an adage, “you have to be known to be liked.” The aggregated data shows that this adage holds true in all domains: the public sector, the private sector, and politics. In particular, it holds true for presidential candidates where, generally speaking, vote share is predicated on favorability which is in turn predicated on knowing who a candidate is. Or to put it another way, a candidate is first known, then liked, then supported.

8. In order for a candidate to achieve the CPD’s 15% vote share threshold, that candidate must be known by a significant number of people. In layman’s terms, the question that this part of the report addresses is what percentage of American voters needs to know who a candidate is before 15% of them are willing to vote for that candidate. In polling, the percentage of people who know a candidate is referred to as name recognition. Another way to phrase the question, then, is what level of name recognition does a candidate need to achieve in order to reach 15% vote share.

9. There is, of course, no uniform answer to this question that holds true across all candidates and all elections. Multiple factors, many of them beyond a candidate’s control, influence a candidate’s vote share. But that does not mean the answer to this question is entirely unknowable. For a candidate unaffiliated with the two major parties, some level of name recognition is necessary for a candidate to achieve 15% vote share. One would expect that the requisite level of name recognition is higher than 15%, since it is unlikely that 100% of people with knowledge of a candidate would be inclined to vote for that candidate. The question is whether it is possible to estimate, on average, the minimum amount of name recognition such an
unaffiliated candidate would need to achieve in order to expect to be able to claim a 15% vote share.

10. My examination of public opinion trends yields such an estimate. The data show that there is a positive correlation between name recognition and vote share. While multiple factors influence vote share, this correlation enables me to model the relationship between name recognition and vote share. Presidential polling data from the past 22 years demonstrate that on average, an independent candidate must achieve a minimum of 60% name recognition, and likely 80%, in order to obtain 15% vote share.

**ACADEMIC AND THEORETIC BASIS**

11. This analysis is based on extensive foundational research from the cognitive psychology and attitudinal formation literature. These scientific studies outline the thought process that leads to opinions and behaviors. The fundamental model is that an individual has to know something exists before he/she can hold an opinion about it. Once that recognition is established, an individual can evaluate the subject and form positive or negative associations with it. The individual then is able to form his/her own position toward the subject. With his/her attitude formed, the individual then is equipped to act. (Azjen 1991; Campbell & Keller 2003; Zaller 1992). This attitudinal formation process applies to decisions on voting for presidential candidates: voters first learn of the existence of a candidate, then develop some sort of favorable opinion towards the candidate, and that opinion leads them to vote for that candidate. (Abramowitz 1975; Prior 2007).
DATA SOURCES AND METHODS

12. The public opinion data used in this report is sourced from major public opinion research organizations including Gallup, Reuters/Ipsos, Opinion Research Corporation, Pew Research Center, Bloomberg, Associated Press-GfK, ABC News, NBC News, CBS News and others. These opinion research organizations include most of the major media public opinion pollsters and include many of the organizations relied upon by the CPD. The data was collected from multiple “polling aggregators” including Polling Report, Pollster.com, the Roper Center, and Real Clear Politics which provide central clearinghouses for polling research. The data set is made up of over 800 separate observations – that is 800 instances of poll results measuring both the name recognition and vote share of the same individual candidate – from the 1992, 1996, 2000, 2004, 2008, and 2012 presidential elections.

   a. The public opinion data cited in this analysis samples several different portions of the American population. These include all Americans (all American adults), registered voters (Americans who are registered to vote), likely voters (Americans who, based on a variety of criteria, are considered likely to vote in the upcoming election), Democratic voters (Americans who identify as Democrats), and Republican voters (Americans who identify as Republicans).

   b. On name recognition questions, this analysis includes samples of all Americans, registered voters and likely voters.

   c. On primary election ballot questions, the sample is almost always either Democratic or Republican voters (depending on the partisan identification of the candidate).
d. General election ballot questions most commonly use samples of registered or likely voters. However, in earlier time periods, samples of all Americans are also present.

13. The public opinion poll data in this report is analyzed using regression analysis. Regression analysis is a statistical analysis technique that allows the user to determine correlation between variables, i.e. to determine if change observed in one variable is related to change seen in another variable. This report uses regression analysis to examine the relationship between our variables: name recognition and vote share. Regression analysis contains four analytic concepts cited in this report, “variables”, an “r square”, a “regression equation”, and “linear vs. non-linear (logarithmic) line fits”.

a. Most simply a variable is an object of interest, ideally expressed in some sort of mathematic form. In this report poll results for name recognition and vote share are variables. In research, variables are often referred to as “dependent” or “independent”. Independent variables (also referred to as explanatory variables) represent the inputs or causes in an experiment or model. The dependent variable (also referred to as a response variable) represents the output or effect. In this report, name recognition is the independent variable while vote share is the dependent variable.

b. The r square is a measure of how well data “fits” together, that is how much of the variation in one variable is explained by observations of another variable. R square ($R^2$) is measured on a 0 to 1 scale where 1 indicates a perfect fit with 100% of the variance in the dependent variable explained by the independent variable,
and 0 would indicate that there is no correlation between the variables. Thus, the higher the $R^2$, the more reliably predictive the model is.

c. The **regression equation** is a mathematical expression of the relationship between two variables. It is expressed as “$y = bx + e$” where $y$ is the dependent variable, $x$ is the independent variable, $b$ is the parameter (how the relationship between independent and dependent is modified) and $e$ is the error term (the average of what is not predicted).

d. Standard regression analysis posits a fixed relationship between the variables being investigated; that is for the entire range of possible responses the change in the independent variable is associated with the same magnitude of change in the dependent variable. This fixed relationship is referred to as a **linear** regression. However, non-linear relationships exist and in many cases provide better explanatory power. A **non-linear** relationship indicates that the magnitude of the relationship between the independent and dependent variables are not fixed across all values and can change in some mathematically derived equation. In a non-linear relationship you have concepts such as “diminishing returns”.

14. This analysis is based on understanding the general trends in public opinion data. It is designed to explain the hypothetical “average” presidential candidate. As such it is built from looking at data on many different candidates over many different election cycles and not at any one individual’s experience. As with any statistical analysis, it is possible to pick individual cases that may be outliers in the context of this model (like Ross Perot in 1992). However, these cases do not invalidate the macro-level analysis in this report, as this analysis includes that experience and all others in developing the model.
TERMINOLOGY

15. “Public opinion” is a term used to simplify the discussion of the aggregated views and opinions of a particular population. In modern use, public opinion most frequently refers to public opinion polls or samples of the public that are meant to represent the opinion of the entire population. The rest of this report will use the terms public opinion and polls interchangeably to mean these public opinion polls.

16. “Name recognition” refers to the percentage of the population that is aware of a particular individual, organization or event as measured in public opinion polls. Name recognition is most often ascertained through the use of direct questions such as “have you ever heard of any of the following people…”. Name recognition is also often extrapolated as part of other questions (such as familiarity or favorability) that have multiple response options where one option includes “I have never heard of this.” In this case, the other answer categories are jointly thought of as representing the percentage of people who are aware of the person in question. Both versions of name recognition questions, the direct and the extrapolated, return similar results.

a. The term “familiarity” is often used interchangeably with name recognition. However, in public opinion research, familiarity refers to a specific condition. It is the percentage of the population that both recognizes a subject (i.e. name recognition) and possesses some level of deeper knowledge or understanding about that subject. While familiarity is a useful and important indicator, it is not central to this report.

17. “Favorability” is the measure of the percentage of the population that voices positive opinions about a subject. Favorability is most often measured through the use of a direct
question with a Likert scale (scale with two symmetrical poles) response set. Favorability questions generally resemble the construction, “based on all of your knowledge or experiences, are you generally favorable or unfavorable towards X or do you have no opinion? Is that strongly favorable/unfavorable or somewhat favorable/unfavorable?”

18. “Vote share”, also, frequently called horse race or ballot questions, refers to the percentage of votes a candidate would get in a hypothetical election matchup presented by the poll. Vote share questions are commonly asked like the following, “if the election for president were held today, whom would you vote for candidate X or candidate Y?” Late in the election cycle vote share questions only include the individuals still running for the particular office, often with candidates who have dropped out and perennial or third-party contenders excluded. Earlier in the election cycle, vote share questions are often asked as a series of match-ups using a broad list of actual and potential candidates.

a. Vote share questions are often divided into “general election” and “primary election” ballot questions. Primary election ballot questions are restricted to candidates competing within a particular party’s primary election contest, i.e. only the Democrats or Republicans competing for their respective parties’ nomination.

b. General election ballot questions are the two-way (occasionally three-way) vote share questions matching the hypothetical or actual final party nominees for the office. Most often this is represented by a single Democratic candidate vs. a single Republican candidate.

19. In public opinion research on political issues, name recognition, familiarity, favorability, and vote share are frequently measured for major candidates for public office – especially for presidential candidates. However, the set of candidates included for measurement
is determined by the individual pollsters so the candidate set can and does frequently change
over the course of an election cycle. This analysis aggregates the findings from multiple polls
and multiple different pollsters to try to capture the broadest set of candidates possible and
minimize the effects of variation in any one poll.

**ASSUMPTIONS**

20. The opinion formation process for presidential candidates is a very compressed
affair. The election campaign season condenses this process into at most two years and often a
much shorter time period as candidates are introduced to the public, become familiar figures and
ultimately win or lose. The dynamic of the election season introduces a number of complications
into the opinion formation process:

a. A successful campaign is predicated on increasing a candidate’s name recognition
   and vote share. As a consequence, candidates generally have stronger name
   recognition scores later in the election cycle than earlier.

b. Additionally, the main purpose of an election is to narrow a larger field of
candidates to a single election winner. This means, on average, that observations
from later in the electoral cycle will include fewer candidates as the other
candidates have lost elections, run out of money, or ended candidacies for other
reasons.

c. Taking “a” and “b” together, the presidential election cycle can be typified into
two periods, an early period where there are numerous candidates with (widely)
divergent levels of name recognition and vote share, and a late period where there
are few candidates that are mostly well known by the public. In this analysis we
are categorizing early as before the first caucus in Iowa and late as after the
primary elections begin. The dividing line does not neatly coincide with a drop in the number of candidates, as there may still be numerous candidates at the time of the first primary election. But candidates are generally better known by the start of the primaries, and in subsequent weeks and months the number of candidates competing in the primaries typically decreases.

d. The goal of this report is not to proclaim that name recognition is the only factor affecting candidate vote share. Many other factors including fundraising, candidate positioning, election results, and idiosyncratic events also exert influence over the course of the election. However, these other factors can be minimized, to an extent, by looking at the early time period when candidates are just establishing their name recognition. If they “have to be known to be liked,” they also have to be known for these other factors to take an effect as well.

21. In American electoral politics there is a strong ‘party halo effect’ where no matter who the candidates representing the Republican and Democratic parties might be, they garner a minimum vote share in the general election ballot from being associated with a party. This ultimately complicates any analysis because a virtual unknown who runs on the Republican or Democratic ticket can poll a hefty general election vote share, independent of name recognition and timing. This effect can be seen in polls from the early primary period when pollsters test hypothetical general election matchups. These hypothetical matchups can include Democratic and Republican candidates who are not yet well known. For instance, Herman Cain in June 2011 was only known to 48% of Republicans and had a primary election vote share of 7% but had a general election vote share of 34%. Another example is Mike Huckabee in September 2007, who was only known to 50% of Republicans and had a primary vote share of 4%, but his general
election vote share was 36%. Voters will be induced to express a preference for one candidate, even not knowing who he or she is, because he or she is affiliated with one of the two major parties. When included in the data analyzed, this effect tends to lower the name recognition necessary to achieve 15% vote share. Candidates unaffiliated with the major parties (often referred to as “independent” candidates in this report), however, do not benefit from this effect. (Bartels 1988; Prior 2006; Kam & Zechmeister 2013).

22. This ‘party halo effect’ only occurs in polling of general election matchups. In primary election polling, all the candidates have the same partisan identification and therefore people are not primed to express a preference for a candidate merely by virtue of his or her party affiliation. Accordingly, this party halo effect can be controlled by focusing on primary election matchups.

23. Constructing a model of the relationship between name recognition and vote share calls for some decisions about how to organize the data. Particularly, we must make decisions about looking at data from the early vs. late time periods, using primary vs. general election vote share numbers, and if the relationship is linear or non-linear.

a. An all elections model involves looking at all observations across both the early and late time periods and using both the primary and general election vote share questions in a single model. This model allows us to say if the relationship between name recognition and vote share exists even in the face of complicating variables like party effects and fundraising advantages. However this model will not present the clearest view of the relationship between name recognition and vote share because of the other variables.
b. An **all primary** model uses all the primary election vote share questions across both the early and late time periods. This model reduces the effect of party halos in the data and includes the entire time series of observations of primary vote share. However, it contains multiple late election observations where the candidates’ name recognition is at or above 90% and exhibits limited variation. As such, these late cases mute some of the relationship between name recognition and vote share.

c. The **early primary** analytical model examines primary election data from the early time period. This approach allows for the clearest view of the relationship between name recognition and vote share. Specifically, it reduces the impact of party halos and provides multiple observations of candidates with significantly varying levels of name recognition and vote share.

**FINDINGS**

24. The first step of the analysis of attitude formation is examining the relationship between name recognition and vote share. The direct correlation between name recognition and vote share varies based upon the assumptions built into the model. However all models point to a need for significant levels of name recognition – in excess of 60% of the American public – before a vote share of 15% can be reached. Various models are presented below:

25. **All Elections Model** (early and late observations of both primary and general election ballot questions, non-linear): Observations from both presidential election types across all time periods introduce a number of other variables that limit the predictive power of name recognition on its own. In this model the $R^2$ relationship is 0.41, a moderate to low level of
correlation. Under this model, a candidate would need to have 70% name recognition in order to reach the 15% vote share.

26. While this gives us a “real world” sense of the relationship between name recognition and vote share, because of the inclusion of late and general election observations, it includes a potentially wide variety of un-accounted for variables depicted by the low $R^2$. These variables include potential areas like partisan effects, the effect of fundraising, the impact of news events and primary election results. This conforms to an intuitive understanding of politics; later in the election the polls focus on two candidates who are universally known among likely voters, and thus changes in vote share are likely to be unrelated to changes in name recognition. A model that more clearly represents the conditions faced by an independent candidate in reaching 15% vote share would remove the effects of partisan halos and is present in the all primary model.

27. All Primary Model (early and late observations in primary elections, non-linear): Observations from all time periods of the primary election (before and after the elections begin) show a similar trend to the all election model. However, by removing the general election observations this model minimizes the effects of partisan identification on vote share and has a commensurate increase in predictive power. The all primary model has a $R^2$ of 0.56, a moderately strong correlation. Under this model, a candidate would need to have 80% name recognition in order to reach the 15% vote share.

28. This model presents a clearer depiction of the conditions that an independent candidate would experience by minimizing the impact of party halo effect in the dataset. However, this model is still encumbered by the effects of the primary elections winnowing down the field of candidates and leaving the best known, highest vote share individuals. The best
simulation of the conditions for an independent presidential candidate would remove the effects of the primary elections by looking at the early time period – before vote share begins to collapse into the single ultimate winner.

29. **Early Primary Model** (primary election data from early time period, non-linear): This model presents a clear picture of the relationship between name recognition and vote share in conditions where partisan effects are minimal, elections have not begun to winnow the field and there is large variation among the range of possible name identification levels. This model suggests that the relationship between name recognition and vote share is non-linear; that name recognition has increasing value as a candidate nears the top of the scale. That is, a candidate has to reach a certain critical mass of recognition before their electoral support really begins to take off.

30. This model predicts about 60% of the variation in vote share (R² of 0.6) and suggests that a candidate needs name recognition above 80% to reach a 15% vote share threshold.

31. Further models are listed in Appendix 1.
CONCLUSIONS

32. All things being equal, independent presidential candidates need to be recognized before they have the opportunity to earn votes. The models presented here suggest that in ideal circumstances – ones that might not exist in a typical election – a typical candidate needs to be recognized by at least 80% of the public before he or she can reach a vote share of 15%. Alternate scenarios modify this name recognition intercept but in all cases the typical candidate needs to be recognized by more than 60% of the public before he or she can reach a vote share of 15%.
POLL ERROR IN THREE-WAY RACES WITH INDEPENDENT CANDIDATES

SUMMARY

33. In this section of the report, I ask two central questions. First, is election polling conducted in three-way races more error prone than in two-way races? Second, given a particular level of error, what is the probability of a false negative when a candidate is just above the 15% threshold at the date of the poll?

34. To answer these questions, I will first examine the extant theoretical literature on poll (or survey) error. I then will describe the data and methods employed for the analysis. I finally will examine over 300 observations from 16 competitive three-way gubernatorial races over the past fifteen years. I benchmark my analysis against 40 two-way gubernatorial races and 6 presidential races. I do not focus exclusively on presidential races in this report given the relative lack of polling observations for competitive three-way races.

35. In my analysis, we find that three-way races are more error prone than two-way races and that such error rates are especially onerous for candidates at the cusp of the CPD’s 15% threshold. Depending on the specific conditions, the probability of such a candidate being falsely excluded from the debate by the CPD 15% threshold ranges from 37% to 41%.

ACADEMIC AND THEORETIC BASIS

36. Opinion research polls are subject to two broad classes of error: 1) sampling error – or margin of error – and 2) non-sampling error. Non-sampling error includes three sub-types: 1) coverage bias, 2) nonresponse bias, and 3) measurement error. (Groves 1989 and Weisberg 2005). Coverage bias occurs when the poll sample is systematically different from the population

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1 Throughout this exhibit, I use poll and survey interchangeably.
of interest. An example would be excluding poor nonwhites from the survey sample or using incorrect assumptions about the makeup of the electorate on Election Day. Nonresponse bias occurs when those people who respond to a poll are systematically different from those who do not. Measurement error includes different families of error ranging from interview bias, to question and questionnaire bias, to issue saliency for the respondent.

37. These two classes of error – sampling and non-sampling – are typically thought of as orthogonal (or unrelated) and together are referred to as total survey error and depicted by the triangle below. The central focus of pollsters and survey researchers is to minimize such error both at the survey design stage as well as the post-survey stage through weighting and other statistical calibration methods.

38. Sampling error, typically referred to as the margin of error (MOE), is a function of the square root of the sample size. Specifically, a MOE with a 95% confidence interval can be depicted mathematically as the following where “n” is the size of the sample:

\[ MoE = \pm \frac{0.98}{\sqrt{n}} \]
39. Perhaps the easiest way to visualize a MOE is showing it in graphical form. Here a sample size of 400 has a margin of error of +/- 4.9%; while one of 10,000 has a MOE of +/- 0.95% (see graph below).

40. The MOE on a poll of 400 can be interpreted in the following way: 95 times out of 100 the population parameter (let’s say actual vote share for Obama) is within +/- 4.9% percent of the sample estimate. So, if we have a poll with Obama at 45% vote share, the true population value ranges somewhere between 40.1% and 49.9%. However, one out of twenty times the poll estimate might be completely outside the MOE’s range. (Lynn Vavreck, New York Times).

41. To reduce such error, pollsters increase their sample size to the extent possible. This is easier said than done, given the high cost per interview. As such, in the U.S., the simple ‘rule of thumb’ is that a nationally representative poll should have around 1,000 interviews with a MOE of +/- 3.1%, which is a reasonable cost versus error compromise. For state and local level polling, the industry standard varies from 400 to 800 interviews with a MOE ranging between +/-4.9% to +/- 3.5% given greater cost-sensitivities

42. To gain analytical robustness, many election analysts and forecasters aggregate multiple polls from multiple firms to reduce poll estimate uncertainty (Young 2014; Jackman 2005). In effect, poll aggregation is an approach to minimize the MOE. Nate Silver, among other election forecasters, employed this technique during the U.S. 2012 presidential election to good effect. Given the volume of publically available polls, the standard 3.1% MOE for a typical
1,000 interview poll can be significantly reduced by aggregating it with other polls. Take the last day of the U.S. presidential election as an example. By aggregating all polls on that day, the total sample size comes to over 13,000 interviews with a corresponding MOE of +/-0.9%.

43. Election polling can suffer from all types of non-sampling error. In my experience, election polls are especially vulnerable to coverage bias and specific kinds of measurement error associated with low levels of election salience among voters as well as strategic voting. The empirical evidence and election literature support my opinion. (See Traugott and Wlezien 2008; Blumenthau 2012; Linzer 2013; Jackman 2005). Let me explain each in greater detail:

a. First, the central challenge of any survey researcher is to ensure that the poll sample represents the population of interest, or, in technical terms, to minimize coverage bias. This task is especially challenging for the pollster who a priori does not know exactly who, or what population, will show up on election day. To minimize such uncertainty, pollsters often employ “likely voter models” to predict the profile of voters who will actually vote (for an overview see Young and Bricker 2013).

b. For the typical U.S. general election, only about 65% of registered voters show up on election day. Those who show up on election day are usually quite different from those who do not.

c. Likely voter models can take on many forms. But most of them predict future behavior based on past behavior. Whether the past behavior metric is taken directly from the survey as a stated behavioral response or from external data sources, such as the Census Bureau Current Population Survey, or voter files,
pollsters use them to predict a given respondent’s likelihood to vote based upon said information.

d. Such methods work well in stable political environments but break down when underlying realities change either from an attitudinal or demographic standpoint. Case in point is in the 2012 U.S. presidential elections. The Romney campaign believed that he would win until the final moments. Why? They believed that the 2008 election actually was an aberration and that the electorate would revert back to the status quo ante: more white, affluent, and older. The problem with their assumption was that the U.S. electorate had shifted demographically, becoming less white, younger, and poorer.

e. The same can be said in Italy in the 2013 parliamentary elections. The polls as a class got the election wrong because they underestimated voter discontent and, consequently, support for the comedian candidate Grillo (the Cricket). He was, in practice, a ‘protest’ vote for disillusioned people fed up with the system who also were not habitual voters but who on this occasion came out to vote en masse. The polls assumed that the electorate would be the same as in years past. Ultimately likely voter models can and do often break down. This, in turn, can increase coverage bias—where the poll’s sample systematically differs from the relevant population—and thereby reduce poll accuracy.

f. Second, election polls especially suffer from two specific types of measurement error: (1) election salience among voters at the time of the poll and (2) strategic voting decisions at the time of the vote which are at odds with poll responses.
g. On point one, the research literature and experience show that the farther a poll is out from election day, the more error prone it will be. (Wlezien and Erikson (2007; Holbrooke 1996; Popkin 1994). Many explanations exist, but the most common one relates to *diminished election salience* among voters at the time of the poll. Put differently, at the early stages of the electoral cycle, people are not paying attention to the candidates and issues.

h. In this context, a disinterested voter population is also prone to the vagaries of events, e.g. party conventions, which have a momentary impact but diminish in effect, over time, as voters forget.

i. Pollsters can measure election saliency in a number of different ways. First, often pollsters employ a simple question, such as ‘are you paying attention to the election”. They also use candidate familiarity as a proxy for greater (or lesser) voter attention and election saliency. Whatever the measure though, voters typically only start paying particular attention close to election day. In my experience, this window varies from one day to several months before election day depending on the specific circumstances.

j. In sum, polls are more variable when they are conducted at length from election day. The average voter is worried about more relevant “bread and butter” and ‘quality of life” issues than politics and elections. And, as such, it is not until quite close to the election that voters begin to pay attention and hence their responses are more considered and polls more accurate.

k. Multi-candidate races have an added element of complication because voters often engage in what political scientists call *strategic voting*. (See Abramson et al.
1992; Burden 2005; Cox 1998; Riker 1976; Schaffner et. al. 2001). Strategic voting can take on two forms. First, voters might initially state a preference for a third-party or unaffiliated candidate but, on election day, go with a candidate that has a higher probability of victory. In this case, the poll would overstate the outsider or third-party and unaffiliated candidate vote share. Alternatively, voters might actually opt for a candidate at the time of voting for no other reason than to ‘send a message’ as a protest vote. The two forms of measurement error cited above can and do increase poll error as it relates to the final vote tally.

DATA SOURCES AND METHODS

44. Returning to the two research questions, is election opinion polling conducted in three-way races more error prone than in two-way races? And with a particular level of error, what is the probability of a false negative where a candidate just above the 15% threshold would be excluded from the debates?

45. To answer my two questions, I use data sourced from public opinion research organizations. This includes data from 95 firms, over 1,000 polls and approximately 2,500 observations.

   a. This includes polling firms such as CNN, USA Today, Ipsos, SurveyUSA, Field Poll, Gallup, Braun Research, Field Research Corp., Public Policy Polling, Quinnipiac, and state-level university and newspaper polls including, Brown University, Southeastern Louisiana University, Minnesota Public Radio, Los Angeles Times, Portland Tribune, Suffolk University, and others. These opinion research organization include most of the major media public opinion pollsters and include many of the same organizations relied upon by the CPD.
b. The data set includes observations from gubernatorial elections both with and without prominent third party candidates or unaffiliated candidates in over 40 states between 1998 and 2013.

c. The data comes from multiple “polling aggregators” including Polling Report, Pollster.com, U.S. Election Atlas, and Real Clear Politics, which provide central clearinghouses for polling research.

46. To analyze error in election polling, I employ an often used and widely-accepted measure of poll accuracy or error, known as the Average Absolute Difference (AAD). (Mitofsky, 1998).

47. The AAD is a simple difference measure which takes (1) the absolute difference between the actual results on election day for a given candidate minus the polled vote share for that same candidate and then (2) takes the average of each absolute candidate difference.

48. An example would be a simple two-way race. To demonstrate the logic, I include two scenarios: scenario 1 with an AAD of zero (0) and scenario 2 with an AAD of 2.

<table>
<thead>
<tr>
<th>Actual Election</th>
<th>Poll Result</th>
<th>AAD</th>
<th>Poll Result</th>
<th>AAD</th>
</tr>
</thead>
<tbody>
<tr>
<td>Candidate A</td>
<td>45%</td>
<td>0</td>
<td>47%</td>
<td>-2</td>
</tr>
<tr>
<td>Candidate B</td>
<td>55%</td>
<td>0</td>
<td>53%</td>
<td>+2</td>
</tr>
<tr>
<td>Total</td>
<td>100%</td>
<td>0</td>
<td>100%</td>
<td>2</td>
</tr>
</tbody>
</table>

49. The AAD can also be depicted mathematically as:

\[
ADD = \left( \sum |AR_i - PR_i| \right) / c
\]

where AR is the actual election result for candidate i; PR is the poll result for candidate i; and c is the number of candidates in a given race.

50. The AAD can be looked at as a measure that combines sampling and non-sampling error. Here pollsters will typically evaluate whether the AAD for their given poll falls
within the MOE of the poll. An AAD equal to the MOE of a poll can be thought of as having no, or minimal, non-sampling error. Alternatively, pollsters typically treat a poll with an AAD larger than the MOE as one having some form of non-sampling error.

51. Additionally, forecasters who are aggregating polls will assess whether their estimate falls within AAD of the aggregated sample size. Again, the market will assess an AAD smaller or equal to the MOE positively, and an AAD larger than the MOE negatively. At its core, the polling profession understands that MOE is a function of sample size \(n\) and hence cost constraints, while non-sampling error can and should be minimized via best practices and optimal pre- and post-survey design.

**FINDINGS: AVERAGE ABSOLUTE DIFFERENCE**

52. To assess the error in two-way versus three-way races, I employ the AAD in gubernatorial races given the relative paucity of three-way races at the presidential level.

53. I find that, in two-way gubernatorial races, the AAD increases the more distant from election day the poll is conducted (see table 1 below). Specifically, the analysis shows that the AAD one week out is 3.58% – approximately equivalent to the MOE for a “gold standard” survey sample of 1000 (3.1%). In contrast, the AAD is 9% a year out from the election. Two months before election day – the approximate period when the CPD is reviewing polling – the AAD for two-way races is 5.5%.

54. Again, comparing AAD and MOE gives a “rule of thumb” indication of the presence and effect of non-sampling error. At one week before the election, the AAD is minimal and estimates show little potential non-sampling error (3.58% versus 3.1%). However, at two months out, the AAD is larger than the MOE, suggesting problems with non-sampling error.
Table 1: Average Absolute Error in Two-Way Races

<table>
<thead>
<tr>
<th>Time before election</th>
<th>Two-way gubernatorial races</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Average absolute difference</td>
<td>Average margin of error</td>
<td></td>
</tr>
<tr>
<td>One week</td>
<td>3.58%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>One month</td>
<td>4.02%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Two months</td>
<td>5.54%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Three months</td>
<td>6.89%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Six months</td>
<td>7.48%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Nine months</td>
<td>8.26%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Twelve months</td>
<td>9.06%</td>
<td>3.1%</td>
<td></td>
</tr>
</tbody>
</table>

55. We find the same pattern when examining three-way races. That said, the AAD is, on average, larger than that of two-way races. Indeed, the typical three-way gubernatorial race has an average AAD of 5% a week before the election and over 8% two months prior to election day.

56. Again, when compared to the MOE, even at one week, the AAD suggests significant non-sampling error (5.06% versus 3.1%). And at three months out, the AAD is much larger than a MOE of a “gold standard” 1000 interview survey (8.04% versus 3.1%).

Table 2: Average Absolute Difference in Three-way Races

<table>
<thead>
<tr>
<th>Time before election</th>
<th>Three-way gubernatorial races</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Average absolute difference</td>
<td>Average margin of error</td>
<td></td>
</tr>
<tr>
<td>One week</td>
<td>5.06%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>One month</td>
<td>6.65%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Two months</td>
<td>8.04%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Three months</td>
<td>9.10%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Six months</td>
<td>9.23%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Nine months</td>
<td>11.35%</td>
<td>3.1%</td>
<td></td>
</tr>
<tr>
<td>Twelve months</td>
<td>13.89%</td>
<td>3.1%</td>
<td></td>
</tr>
</tbody>
</table>

57. Here it is worth noting that gubernatorial races are more error prone than presidential races (see table 3 below). On average, the AAD for two-way gubernatorial races is 2 percentage points higher than that of presidential races. This could be a function of smaller sample sizes or greater non-sampling error. The table below compares the gubernatorial AAD with presidential-level AAD at one week, three months and one year.
Table 3: AAD for Presidential and Gubernatorial Races

<table>
<thead>
<tr>
<th>Time before election</th>
<th>Presidential races</th>
<th>Two-way gubernatorial</th>
<th>Three-way gubernatorial</th>
<th>“Adjusted” three-way</th>
</tr>
</thead>
<tbody>
<tr>
<td>One week</td>
<td>1.7%</td>
<td>3.58%</td>
<td>5.06%</td>
<td>3.06%</td>
</tr>
<tr>
<td>Three months</td>
<td>4.8%</td>
<td>6.89%</td>
<td>9.10%</td>
<td>7.10%</td>
</tr>
<tr>
<td>Twelve months</td>
<td>7.9%</td>
<td>9.06%</td>
<td>13.89%</td>
<td>11.89%</td>
</tr>
</tbody>
</table>

58. In our sensitivity analysis below I include a two-month AAD for a three-way gubernatorial race (8.04%) as well as an “adjusted” two-month three-way gubernatorial race AAD (6.04%) to simulate conditions that might be encountered in three-way presidential polling.

FINDINGS: POWER ANALYSIS

59. Is an AAD of 6% or 8% large or small? Here I argue that it truly depends on what you are measuring. If the CPD 15% rule is being applied to a typical two-party candidate who has a vote share in the 40’s, then probably such an AAD does not matter. However, for a candidate at the cusp of the 15% threshold, then such error rates can produce undesirable rates of ‘false negatives’ (incorrectly excluding candidates that should have qualified). This is especially worrisome given that the inherent advantages of the two-party system means that any independent candidate is more likely to be at or near the 15% mark than either major party candidate.

60. The central question is: is the ‘ruler’ being applied precise enough to correctly identify those independent candidates?

61. To answer this question, I employ ‘statistical power analysis’. Statistical power analysis is a widely-used technique employed in hypothesis testing. It can be thought of conceptually as:

62. Power = P (Reject Null Hypothesis | the Null Hypothesis is False) where P means probability; and | means ‘given’
63. Specifically, statistical power analysis can be thought of as the ability to detect an effect, if the effect actually exists, of falsely accepting the null hypothesis when it is false. Put differently, statistical power analysis assesses the probability that a type II error (false negative) will occur. The greater the power, the less likely it is to accept a false negative.

64. I base my statistical power analysis on the actual AAD rates for 1,400 polls which includes observations of presidential, two-way and three-way gubernatorial races.

65. I develop a statistical power analysis simulator that allows us to assess the probability of a ‘false negative’ under different conditions. Specifically, I examine a hypothetical major-party candidate with an actual vote share of 42% versus a hypothetical independent candidate at 17%. For the purpose of this model, the actual vote share does not necessarily mean the vote share as polled – the point of the model is to assess the likelihood of the poll accurately measuring the actual vote share. I also look at different AAD rates which include: a three-way race three months out (9%) and two months out (8%) as well as adjusted AAD rates for two and three months out (6% and 7%).

66. In this hypothetical, the chances of the major party candidate at 42% vote share experiencing a false negative result in polling is only 0.04% (or .001% adjusted) two months out, whereas the independent candidate at 17% will falsely poll below the CPD threshold 40.2% of the time (or 37% adjusted) two months out.

<table>
<thead>
<tr>
<th>Table 4: False Negative Rates for Independent Candidates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vote share</td>
</tr>
<tr>
<td>(AAD rate)</td>
</tr>
<tr>
<td>Major party candidate 42%</td>
</tr>
<tr>
<td>Independent candidate 17%</td>
</tr>
<tr>
<td>False Negative Rate</td>
</tr>
<tr>
<td>False Negative Rate</td>
</tr>
</tbody>
</table>
67. Or consider a few example of actual candidates. Tom Horner was polling at 18% in September of the 2010 Minnesota gubernatorial election. At that point in time he had a 31% chance of a false negative result barring him from participating in debates applying a 15% threshold for admission.

68. In the 1998 Minnesota Gubernatorial Election, independent candidate Jesse Ventura was only polling at a 15% vote share one month prior to the election – indicating that he had an approximately 50% chance that the five polls the CPD would use would result in him being barred from the debates. However, Ventura ended up winning the election with 37% of the vote.

CONCLUSIONS

69. Opinion polling includes many sources of error that can impact the accuracy of poll, including sampling and non-sampling error. Non-sampling error is of special concern in election polling because it can lead to inaccurate polls when comparing them to the actual vote. While varied, election polling can especially suffer from two types of non-sampling error: coverage bias and measurement error (election salience and strategic voting).

70. The average absolute difference (AAD) is a widely-used measure of error in election polls and can be used as a proxy for assessing error (non-sampling error) above and beyond the MOE (sampling error).
71. In my analysis, I find that three-way races are more error prone than two-way races. Such error rates are especially onerous for candidates at the cusp of the CPD’s 15% threshold. Indeed, depending on the specific conditions, the probability of being falsely excluded from the debate by the CPD’s 15% rule for a hypothetical independent candidate at 17% ranges from 37% to 41%.

Dated: Washington, D.C.  
September 5, 2014 

Dr. Clifford Young

31
APPENDIX 1

ALTERNATIVE MODELS OF NAME RECOGNITION

a. **Model:** the type of regression model fit. Linear is a straight line, log-linear is a non-linear line based on an exponential relationship and log-log is a non-linear relationship based on exponential values on both variables.
b. **Dependent Variable:** The response variable. Either primary vote share or both primary and general election vote share.
c. **Independent Variable:** The explanatory variable. Name recognition in all conditions.
d. **Stage in Election Cycle:** The time period included. Total is all observations, early primary is before the primary elections begin, late primary is after the elections begin but before the general election.
e. **df:** Degrees of freedom. The amount of variability included in the model.
f. **R²:** The predictive power of the model. The scale is from 0 to 1 with 1 indicating a completely predictive relationship.
g. **Constant:** The value of the independent variable when the dependent variable equals “0”.
h. **B1 (Name Recog.):** The mathematic relationship between the independent and dependent variables.
i. **Name Rec to hit 15%:** The value of the independent variable when the dependent variable equals 15%.

<table>
<thead>
<tr>
<th>Model</th>
<th>Dependent Variable</th>
<th>Independent Variable</th>
<th>Stage in Election Cycle</th>
<th>df</th>
<th>R²</th>
<th>Constant</th>
<th>B1 (Name Recog.)</th>
<th>Name Rec to hit 15%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Linear</td>
<td>Primary Vote Share</td>
<td>Name Recognition</td>
<td>Total</td>
<td>286</td>
<td>0.438</td>
<td>-37.44</td>
<td>0.733</td>
<td>*</td>
</tr>
<tr>
<td>Linear</td>
<td>Primary Vote Share</td>
<td>Name Recognition</td>
<td>Early Primary</td>
<td>215</td>
<td>0.457</td>
<td>-30.274</td>
<td>0.627</td>
<td>*</td>
</tr>
<tr>
<td>Linear</td>
<td>Primary Vote Share</td>
<td>Name Recognition</td>
<td>Late Primary</td>
<td>70</td>
<td>0.253</td>
<td>-84.186</td>
<td>1.289</td>
<td>*</td>
</tr>
<tr>
<td>Log-linear</td>
<td>Primary Vote Share</td>
<td>Name Recognition</td>
<td>Total</td>
<td>286</td>
<td>0.557</td>
<td>-0.887</td>
<td>0.045</td>
<td>*</td>
</tr>
<tr>
<td>Log-linear</td>
<td>Primary Vote Share</td>
<td>Name Recognition</td>
<td>Early Primary</td>
<td>215</td>
<td>0.601</td>
<td>-0.812</td>
<td>0.043</td>
<td>*</td>
</tr>
<tr>
<td>Log-log</td>
<td>Primary Vote Share</td>
<td>Name Recognition</td>
<td>Late Primary</td>
<td>70</td>
<td>0.134</td>
<td>-0.584</td>
<td>0.042</td>
<td>*</td>
</tr>
<tr>
<td>Log-log</td>
<td>Primary Vote Share</td>
<td>Name Recognition</td>
<td>Total</td>
<td>286</td>
<td>0.533</td>
<td>-10.556</td>
<td>3.045</td>
<td>*</td>
</tr>
<tr>
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<td>-8.425</td>
<td>2.625</td>
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</table>

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APPENDIX 2

BIBLIOGRAPHY


Change the Rule

Exhibit III - The study by Doug Schoen, veteran campaign consultant and pollster, which explains that the cost of achieving the name recognition necessary to satisfy the CPD’s rule is prohibitively expensive for an independent or third-party candidate.
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I. OVERVIEW

My name is Douglas Schoen, and I am a political analyst, pollster, and author. My work on politics, current events, and international affairs has been published by *The Wall Street Journal, The Washington Post, Forbes, Fox News, The Huffington Post,* and *Newsmax,* among others. I was a founding partner of the polling firm *Penn, Schoen, Berland,* and more recently, *Schoen Consulting.* At these firms, I have worked on a number of campaigns, including those of Bill Clinton, Hillary Clinton, Jon Corzine, Evan Bayh, Mike Bloomberg, Tony Blair, Silvio Berlusconi, and three Israeli prime ministers.

At these campaigns, I conducted both qualitative and quantitative analysis. One of my main and consistent focuses was on the candidate’s messaging: what themes and arguments were voters most receptive to, and how to structure a campaign to best convey these to the voters. To do so, I had to design and conduct countless polls. This forced me to develop an intimacy with the attitudes, expectations, and realities of the voter, both American and international. My research interests span a range of issues, having written books on topics as far reaching as the Tea Party movement, the waning influence of American moderates, and a history of presidential campaigns, to name a few.

In this memo I explore several questions concerning reform of the selection criteria for presidential debates used by the Commission on Presidential Debates (“CPD”)—which require that a candidate have at least 15% support in national public opinion polls in September of a presidential election year—and the attendant consequences for presidential candidates unaffiliated with a major party:

A. What would an independent candidate running for president reasonably expect to spend in order to meet current requirements to participate in a presidential debate?
B. Is it reasonable to expect an independent candidate to raise the money necessary to meet current requirements to participate in a presidential debate?

C. Is polling in September of the election year an accurate way to measure the viability of an independent candidate?

In my report, I have drawn on academic papers, popular news sources, raw data from the Federal Election Commission (“FEC”), published accounts of past campaigns, and my personal experience in politics. What follows is an overview of the key findings of the research I undertook to answer these questions. A full elaboration and discussion of these findings can be found beginning on page 4 of this document.

II. EXECUTIVE SUMMARY OF KEY FINDINGS

1. What would an independent candidate running for president reasonably expect to spend in order to meet current requirements to participate in a presidential debate?

An independent candidate should reasonably expect to spend approximately $266,059,803 to run a viable campaign capable of reaching 15% support in polls by September of the election year.

This estimation is predicated on the assumption that a candidate would need to achieve name recognition of at least 60% among the general public in order to be able to reach 15% support by the current deadline. The media purchase necessary to take a candidate lacking national name recognition to above 60% name recognition is over $100 million, and even this number should be taken as the minimum. This includes broadcast, cable, and digital media placement costs. The rest of my figure is accounted for by the production of the advertisements as well as general campaign expenditure.
2. Is it reasonable to expect an independent candidate to raise the money necessary to meet current requirements to participate in a presidential debate?

This figure represents a level of financing that is, for all practical purposes, impossible for all but the major-party candidates.

With three candidates vying for access to the same media, costs are likely to be even higher due to the increased competition. Furthermore, an independent candidate may lack the ties with networks and broadcast companies that major parties have, preventing them from buying spots even with sufficient funds. In addition to this, the media will not cover an independent candidate until they are certainly in the debates. Thus, they must pay for all their media, making this prohibitively high number unavoidable.

3. Is polling in September of the election year an accurate way to measure the viability of an independent candidate?

Elections with more than two candidates are prone to distinct volatility in voter support that limits the predictive power of pre-election polling data.

All polling includes assumptions about margin of error, but the presence of a third candidate in a race introduces a level of volatility that makes it especially difficult for pollsters to accurately capture candidate support, and September polling is not reliable enough to assess candidate viability. Pre-election polling in September lacks credibility in determining which candidates are viable enough to be included in the presidential debates in three-way races.

* * *

What follows is a detailed exploration and discussion of these questions and findings.
III. ESTIMATED CAMPAIGN COSTS

A. MEDIA COSTS

Currently, the CPD rules only allow participation from candidates who are polling at or above 15% in national opinion polls in late September and have ballot access in states totaling at least 270 electoral votes, making it mathematically possible for them to win the election. In order to meet the CPD’s 15% requirement, a largely unknown independent candidate would need national name recognition.

Under the current rules, whether an independent candidate running for president will be able to participate in the debates depends on his polling two months before the election. This uncertainty about debate participation, which persists throughout the summer and into September of the election year, precipitates a wider uncertainty which has its own pernicious effects: A candidate is not a serious contender unless he or she participates in the debates. Not knowing whether the campaign is viable, or the candidate credible, the media refuses to pay the campaign much attention.

As one report notes, “Minor party and Independent candidates’ financial disadvantages are compounded by their inability to attract earned media”\(^1\). It is widely acknowledged that non major party candidates lack media attention, and that Americans’ presidential choices are limited by the media to just two\(^3\). Indeed, the media structures its

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1 For purposes of this report, the term “independent candidate” means a presidential candidate running as an independent (i.e., unaffiliated with any party) or as a third-party nominee. It does not encompass candidates who compete in the Democratic and Republican primaries but then drop out to mount independent or third-party bids.


coverage so as to preclude the possibility of an independent generating attention. *Reason*, a libertarian publication, was the only media organization to send someone to follow Gary Johnson, a two term governor of New Mexico who was on the ballot in 48 states 4.

That there was only one reporter charged with covering the Gary Johnson campaign highlights the point made above: the media does not give non major party candidates a chance to present themselves to the voters. This is extremely detrimental to non major party candidates because today, “the ‘viability’ of a political candidate is predicated upon one factor – mainstream media coverage” 5.

As the foregoing demonstrates, it is much more difficult for the independent candidate to build name recognition and support and to raise money.

Deprived of free media attention, the independent candidate must resort to launching a massive national media campaign. On the other hand, the major party candidates, by competing in small state primaries, can build their name recognition without the costs of running a national campaign. Just as Obama’s 2008 victory in the Iowa caucuses catapulted him to national prominence, major party candidates may build a national profile by performing well in states with early primaries. Rick Santorum, who won the Iowa caucuses by 39 votes, spent only $21,980 in the state, or 73 cents per vote 6. But spending nearly $22,000 in such a small, highly watched state had a huge national

---


impact. Before the Iowa caucuses, Santorum was polling below 5% nationally; a week after them, he had jumped to third place among the Republicans, polling above 15%. The primary campaign, which starts in small states with lilliputian media markets but draws immense and free national media, gives underfunded campaigns the chance to build name recognition affordably. The independent candidate, however, is never given this chance.

If I were advising an independent candidate running for president, I would suggest that in order to reach 15% in the polls, to be prudent the candidate would need to plan to raise his or her name recognition to at least 60% among the public at large. Canal Partners Media, a leading corporate and political media-buying firm, estimates that it would cost at least $100,000,000 to buy the ad time necessary to go from near-unknown to 60% name recognition – below I follow the guidelines their plan establishes. Partners at Canal Partners Media have planned the paid media for dozens of political campaigns, including the presidential campaigns of major party nominees. Their estimate is based on recent national awareness campaigns that they have conducted for both political and corporate clients, and reflects what it has cost them in the past to achieve awareness levels of around 60%. I trust their estimate and it is in line with my own experience.

I would advise that any national media campaign incorporate broadcast, cable, and digital advertising. Broadcast is split between national and local buys, and targeting the largest 30 media markets allows a candidate to reach 54% of the country. This, I

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believe, will lead to cost efficiency. Focusing on the largest media markets allows each ad to be seen by more people, and therefore discussed by more people, both virtually and personally. The ads, therefore, have an impact beyond just being aired on television; because they are being seen in the largest media markets – which are often dense areas, or areas where there is constant commuting – the advertisements will be able to impact more people than just those who have viewed the ads. Although any particular campaign strategy will be specific to the candidates and the electorate of the given election year, targeting these 30 markets is an efficient means of reaching the requisite amount of the public, and is therefore a reasonable assumption for purposes of this estimate. A candidate following this plan would thus be buying 250 gross ratings points (GRPs) per week on local broadcasting, for a total 45,000 GRPs.  

This alone would cost an estimated $65,857,500.

National broadcast buys, such as buys on popular morning shows (GMA, Today, Early Show), a limited number of prime time shows (60 Minutes), and popular sporting events (MLB All-Star Game, Ryder Cup, U.S. Open), raise costs further. This minimalist media strategy targets the most viewer-dense television events, giving candidates the greatest effect for their dollar. A national broadcast buy as described above would total 1,145 GRPs and cost an estimated $21,547,845. All told, this moderate broadcast campaign would cost at least an estimated $87,405,345.

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8 A GRP is a unit used to measure the size of the group reached, and is arrived at by multiplying the percentage of the population reached by the frequency with which they see that ad. When I say, then, that an ad has so many GRPs, what I really mean is that so many people have seen it so many times. Achieving higher GRPs means increasing the size of the audience reached and the frequency at which ads are aired.
A study from opinion research firm Ipsos provides a context for these figures: to achieve proper saturation, that is, to reach the desired percentage of the population, traditional advertising only needs to be between 600-700 GRPs, but a political ad should achieve around 1,000 GRPs. This is so because campaigns operate on a shortened time horizon compared to commercial products: a company can afford to build name recognition and product loyalty slowly over several years, whereas a campaign cannot.

Considering this, I believe the plan described by Canal Partners is accurate, and achieves a sufficient level of visibility to generate a considerable amount of name recognition in a short period of time while also keeping an eye towards minimizing costs.

Viewership for television is often divided along demographic lines, like age, gender, and race. Therefore, I would advise that a candidate have a cable campaign to accompany his broadcast buy as a means to specifically target several major demographic groups. A cable buy would have three pillars: a news component, an entertainment component, and a sports component.

For the news component, 215 GRPs would be bought on MSNBC and CNN respectively. The buy would focus on each network’s premier shows – AC360, Erin Burnett, Situation Room, Morning Joe, Rachel Maddow, and Hardball – to reach viewers

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in the most cost-effective way. This would be a total of 430 GRPs on cable news, for a total estimated cost of $5,294,875 ($2,933,775 for MSNBC and $2,861,100 for CNN).

The purpose of the entertainment component is to offset the male-skew of news programs, and to reach influential and engaged media consumers. This would require buying 390 GRPs: 215 GRPs on HGTV, and 175 GRPs on the Food Network. This would cost a combined total of $5,857,350 ($3,274,200 on HGTV and $2,583,150 on the Food Network).

The cable sports buy would target regional and team networks. This allows a level of specificity in picking where a candidate’s message would appear, penetrating into hard-to-reach markets; ads can be inserted into specific games, series, and events. This would be a modest buy of 65 GRPs, which would cost an estimated $1,932,000.

This, to be clear, is not an extravagant cable rollout. Only two news networks and two entertainment networks are being targeted, and sports buys only focus on regional and team networks, not large national programming like games on Fox and ESPN. This restrained cable rollout would cost an estimated $13,584,225.

The final aspect of a media buy would include a digital effort. This includes a vast array of activities: search engine marketing, social media advertising (in this case limited to Facebook), digital radio, mobile advertising, video sites (YouTube, Hulu, etc.), advertising on national news sites (Politico, NYT, LA Times, TPM, etc.), and content integration. This would cost an estimated $5,716,206. While the internet and social media are changing political communications by introducing new ways to reach voters, traditional methods of advertisement remain dominant and critical as far as determining
awareness levels. No serious candidate can expect to rely primarily on lower-cost social media in order to drive awareness, and I would not advise a candidate to do so.

Thus, when broadcast, cable, and digital media placement costs are taken together, the cost for all the spots needed to reach 60% name recognition is $106,705,776.

It is also important to note that the actual costs are likely to be significantly higher since in an election year featuring three viable candidates, or at least three candidates capable and willing to spend the requisite amount of money on advertising, ad markets will be extraordinarily competitive and expensive. It is impossible to predict exactly how prices might increase, but it is enough to understand that they almost certainly will. A simple 5% increase in costs would drive the total up by roughly $5.5 million.

Another factor to consider is that a hypothetical independent candidate may not be able to buy the necessary spots, even if he has the funds. Established campaigns and parties have well-developed relationships with networks, allowing them to often times buy large chunks of ad space all at once. As I can personally verify, campaigns buy ad time in an effort to exclude their opponents from doing so. Because the two major party campaigns are more likely to get the best spots, an independent candidate might have to run a higher volume of ads to reach 60% name recognition. In short, it is nearly impossible to measure exactly how much costs might go up during a presidential election year for an independent candidate. If I were putting together a media campaign for an independent presidential campaign, $106,705,776 is the absolute least that I could imagine it costing.
In 2012 the Romney campaign spent $8,895,978 on media production, and the Obama campaign spent $6,315,301. Using these two numbers as a reference point, I believe an independent candidate would likely pay somewhere between $6 and $9 million, with an optimistic estimate putting the cost of production at roughly $6,200,000. Producing ads and buying the minimum number of placements in order to achieve 60% name recognition would cost an estimated total of $112,905,776. The above figure, as noted, assumed that it would take 60% name recognition among the public at large for an independent candidate to reach 15% in polls. However, research from Ipsos suggests that name recognition would in fact need to be much higher, around 80%13. This constitutes near-universal name recognition, since significant portions of the American electorate simply do not participate politically. It is difficult even for industry professionals to establish the cost of household name recognition, and this can only be attempted with the understanding that costs could vary significantly from any estimate. If we keep media costs linear, and therefore do not factor in diminishing marginal returns, and assume that the media buy described above would yield 60% name recognition, the figure provided from Canal Partners Media can be scaled up. The estimated costs of a media buy to reach 80% national name recognition would be at least $150,541,034. This is a modest estimate, but I would advise a candidate attempting to reach 80% name recognition to expect to spend an amount in this range on media.

13 See Expert Report of Dr. Clifford Young, dated Sept. 5, 2014, submitted as an exhibit to the Complaint of Level the Playing Field and Peter Ackerman against the Commission on Presidential and its directors, filed with the Federal Election Commission.
B. ADDITIONAL COSTS

Campaigns incur a host of other costs other than paid media. These costs, detailed below, are part and parcel of running a campaign. They are necessary for the candidate to communicate his message, seek press attention, attract volunteers, get on the ballot, comply with election law, etc. To be sure, not all of them directly relate to the acquisition of name recognition as directly as advertising does. But they are necessary for the candidate to obtain favorability and, ultimately, votes. After all, political advertisements must advertise something, and that something is an operational campaign, which involves a myriad of moving parts. For example, ads refer to the candidate’s positions, but these positions must be developed in papers written by a policy team, which in turn might need its own small research staff. I believe a campaign is holistic, at least in that one cannot view its parts discretely, saying X is supererogatory but Y is necessary. On the contrary, a campaign is a single entity with each part of it being essential to any competitive campaign.

It is also important to note that I am using figures from the entire presidential campaign, even though the task at hand ostensibly is to suggest a budget that could get a candidate to 15% in the polls by September of an election year. I do not feel comfortable – nor do I believe would other advisors – creating a partial budget for a campaign. In other words, it does not strike me as prudent to advise a client to develop a strategy and campaign structure up until a certain point and then, essentially, make a new plan on the fly. Instead, it is much better to create a working budget for the entire campaign, with the intention of reevaluating throughout. This is advisable, and perhaps even necessary, because donors, supporters, and volunteers will be disturbed by the lack of a complete
election plan; no one is going to invest their emotions, efforts, or resources into a campaign that only has a plan to go part of the way. Also, it is not always possible to separate costs between months: perhaps the campaign must sign leases for various headquarters that extend through November, or make commitments to television networks, or staff.

In order to calibrate their message, chart campaign strategy, and evaluate progress, campaigns need polling. In 2012 Romney spent $8,204,469.9, and Obama spent $10,632,718.86 on polling.\footnote{The data on campaign spending for the Romney and Obama campaigns was taken from reports available on the FEC’s website. See Details for Candidate: P80003353 (Mitt Romney), Federal Election Commission, http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=P80003353&tabIndex=1 (last visited Sept. 3, 2014); Details for Candidate: P80003338 (Barack Obama), Federal Election Commission, http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=P80003338&tabIndex=1 (last visited Sept. 3, 2014).}

In addition, the Romney campaign spent $1,149,581.10 on legal fees, while the Obama campaign spent $2,879,057.43.

Running a campaign requires a large staff and therefore a large payroll. The Romney campaign spent $19,358,245.08 on payroll, while the Obama campaign spent nearly double that, $38,232,173.08. Staff requires facilities, and in 2012 the Romney campaign spent $2,060,237.14 on rent and utilities bills, while the Obama campaign spent $2,225,324.04 on rent and occupancy. A candidate and his staff must travel from event to event. The Romney campaign spent $13,361,101 on travel expenses, while the Obama campaign spent $21,271,608.

Campaigns tend to file small charges and minor purchases as credit card expenses. The Romney campaign paid $2,237,003.46 for these expenses, and the Obama campaign paid $9,477,728.60.
Direct mail is another necessity if an independent campaign aims for widespread name recognition and issue awareness. The Romney campaign spent $11,954,177.52 on direct mail printing and postage, while the Obama campaign spent a more modest $3,466,697.90.

The Romney and Obama campaigns each spent slightly more than $8 million on campaign events and event consulting.

The Romney campaign paid $1,191,444.61 in bills for security. This security, of course, is in addition to the secret service protection he received. It is not clear an independent candidate would receive such protection.

The Romney campaign spent $6,144,121.04 on design and printing services, while the Obama campaign spent $11,543,896.26 on similar services.

The Romney campaign spent over $17,000,000 on telemarketing and managing telemarketing data, while the Obama campaign spent $23,144,244.22.

Taking this information into account, any partial budget that I would endorse for an independent presidential campaign I were consulting, one that aimed to run a serious campaign capable of competing with the two major parties, would be no less than $133,026,467, or 75% of Mitt Romney’s major campaign spending in 2012 excluding media. This number represents part of what I believe an independent would have to spend if they wanted to reach 15% and compete in the debates.

I arrived at this figure – 75% of the partial Romney budget – by comparing the budgets of viable presidential campaigns from the last decade. Since in the most recent election the Romney campaign spent less than the Obama campaign did, I chose their number as a starting point. From there, I determined how much less an independent
campaign could realistically spend. In 2012, the Romney campaign spent 77% as much as the Obama campaign did; in 2008, the McCain campaign spent 46% as much as the Obama campaign did\textsuperscript{15}; in 2004, the Kerry campaign spent 90% as much as the Bush campaign did\textsuperscript{16}. The mean of these numbers is 74%. In the current environment it appears that a presidential campaign can spend, depending on the election cycle, as little as 45% of what a larger campaign is spending and still be competitive. Based on this historically inflected range, and supposing that this range might persist into the future, it is my opinion that the budget I have constructed is a good guide as to what is considered the industry norm. It is important to remember that the decision makers who came up with these numbers were themselves motivated by cost efficiency and tried to spend as little as possible. The numbers, therefore, themselves serve as commentary: they are each campaign’s statement, so to speak, about how little they could spend.

This trend would apply to an independent campaign. 75% sits comfortably in the middle of this range and is close to its mean, and I would not recommend anything less to a serious candidate. Indeed, my personal experience on a number of campaigns, at the congressional, senate, and presidential levels, confirms this technical analysis. Further, using this method, the independent campaign would be spending 75% as much as the second largest campaign, which in turn would be spending 75% as much as the largest campaign. This means that the independent campaign would be spending 56.25% as much as the largest campaign.


Those who say this is supposing an independent campaign would spend more than is necessary are not considering the unique political context in which an independent would be running. In a two-way race, the political reality for each major party, in a way, puts a ceiling on the amount of money each major party campaign will spend. For instance, there are states Republicans never worry about, and states Democrats never worry about. Thus, in a two-way race, their campaigns are not truly national – in 2012, there were only 13 states in which both campaigns together spent over $1,000,000 on advertisements17. The independent candidate, however, would not benefit from the entrenched structures – both actual and ideological – that allow major party candidates to compete on such a reduced map. The independent candidate, in order to have any chance of winning, would likely have to increase the playing field, bringing states that are not contested in a two-way race into play. This suggests that an independent, even if he runs a fiscally disciplined campaign, will have to spend a great deal because the campaign map will be larger than the typical two-way race. Thus, my proposition that an independent campaign could get by spending 75% as much as the smaller campaign may be too modest.

C. ESTIMATE OF TOTAL COSTS

Table 1 on the following page provides an accounting of all major campaign costs for Obama and Romney in 2012. There are, however, numerous miscellaneous costs associated with each campaign that it does not make sense to detail, each cost itself being modicum. When all these minor costs add up, though, they represent a significant amount

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of money. In sum, the total costs for the Obama campaign in 2012 was $598,709,622, and the total cost for the Romney campaign in 2012 was $460,505,714.

Even if we suppose that a bare-bones campaign can get by with only spending money on the most necessary and major budget items (Table 1), we are still left with an astronomically high number.

The Romney campaign spent $177,368,609.53 on all major campaign costs, excluding buying ad spots. We exclude ad spots from this figure because Romney already benefitted from a high degree of name recognition. Instead we use the figure that Canal Partners Media provided, as that figure was arrived at with the specific needs of an independent candidate with little-to-no national name recognition in mind. Taking the $133,026,467 in major campaign costs arrived at above, we add the media cost figure Canal Partners Media estimated for 60% national name recognition. From here, we add the cost of ballot access that Americans Elect paid in 2012 to get $253,221,474.

Elections become more expensive each cycle, and so any estimate based on 2012 numbers must be adjusted for campaign cost inflation. In 2004, the two major campaigns spent a combined total of $654,967,245, in 2008 $1,062,895,257, and $1,116,828,064 in 2012. If costs grow at the same rate that they did between 2008 and 2012 (5.07%),

18 In 2012, Americans Elect sought ballot access as a political party, and reached the level of signatures necessary to get on the ballot in 41 states. The cost of that ballot access effort was $13,489,231.


my proposed campaign budget for an independent candidate would be $266,059,803. In other words, if I were working on an independent presidential campaign in 2016, I would like to see a budget at around that number. Anything less and I would not believe that the campaign had a chance. Based on my years of experience both as a practitioner and student of politics, this is the number I would advise my campaign to be prepared to spend.

The arithmetic is summarized below.

**TOTAL INDEPENDENT CAMPAIGN COST (SUMMARY 1)**

<table>
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<th>Description</th>
<th>Amount</th>
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</thead>
<tbody>
<tr>
<td>Romney campaign spending on major items:</td>
<td>$242,368,609.53</td>
</tr>
<tr>
<td>Romney campaign spending on major items excluding spending on media buys:</td>
<td>$177,368,609.53</td>
</tr>
<tr>
<td>Barebones independent campaign (75% of Romney costs):</td>
<td>$133,026,467 (+ ballot access costs $13,489,231)= $146,515,698</td>
</tr>
<tr>
<td>$146,515,698 + $106,705,776 = $253,221,474</td>
<td></td>
</tr>
<tr>
<td>Independent campaign budget + media buy, with growth in campaign spending factored in:</td>
<td>$266,059,803</td>
</tr>
</tbody>
</table>

Furthermore, this number is just a baseline—I have assumed that costs will be linear, but in reality they are likely to grow exponentially as media buys become more competitive and the marginal cost of voter support increases.
Simply put, there is no way of telling exactly how expensive a modern election with three competitive candidates will be. The unique circumstances of such an election will likely drive costs upwards and excite/frighten partisan donors to give more than they have in the past.

**My recommended $266 million budget should thus be considered an absolute minimum for an independent candidate who wishes to reach 15% national name recognition by September and secure participation in the debates.**

Tables itemizing campaign costs can be found on the following pages.
## SUMMARY OF MAJOR 2012 CAMPAIGN COSTS

### (TABLE 1)

<table>
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<tr>
<th>Item</th>
<th>Romney Campaign</th>
<th>Obama Campaign</th>
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<tr>
<td>Ad spots(^{23})</td>
<td>$65 million (Only includes summer buys)</td>
<td>$153.4 million (Only includes summer buys)</td>
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<tr>
<td>Ad production</td>
<td>$8,895,978</td>
<td>$6,315,301</td>
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<td>Campaign Event Costs</td>
<td>$4,871,947.32</td>
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<td>Consulting(^{24})</td>
<td>$79,496,572.34</td>
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<td>$1,149,581.10</td>
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<td>Mailing</td>
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<td>Polling</td>
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<td>$6,144,121.04</td>
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<td>$2,060,237.14</td>
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<td>Telemarketing</td>
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<td>Travel</td>
<td>$13,361,101</td>
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<tr>
<td>Total</td>
<td><strong>$242,368,609.53</strong></td>
<td><strong>$292,624,720.16</strong></td>
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\(^{22}\) The data for this table and Tables 2 and 3 were drawn from the Romney and Obama campaign finance reports filed with the FEC. Those reports can be accessed online via the FEC’s Candidate and Committee Viewer portal, located at http://www.fec.gov/fecviewer/CandCmteTransaction.do.

\(^{23}\) For a more detailed breakdown of money spent on ad buys, see Table 4 below.

\(^{24}\) For a more detailed breakdown of money spent on consulting, see Tables 2 and 3 below.
### ROMNEY CONSULTING BUDGET (TABLE 2)

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<thead>
<tr>
<th>Consulting Field</th>
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<tbody>
<tr>
<td>Audio Visual</td>
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<td>Communications</td>
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<td>Compliance</td>
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<td>Digital</td>
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<td>Direct Mail</td>
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<td>Field</td>
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<td>Fundraising</td>
<td>$9,781,244.03</td>
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<td>Policy</td>
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<td><strong>Total</strong></td>
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### OBAMA CONSULTING BUDGET (TABLE 3)

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<td>Accounting</td>
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<td>Media</td>
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<td>Research</td>
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<tr>
<td>Strategic</td>
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<tr>
<td>Technology</td>
<td>$4,092,481.32</td>
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<tr>
<td><strong>Total</strong></td>
<td><strong>$6,538,327.17</strong></td>
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</table>

<table>
<thead>
<tr>
<th>Week</th>
<th>Romney campaign</th>
<th>Obama campaign</th>
<th>Total by campaigns, committees, and PACs</th>
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<tr>
<td>April 30 - May 6</td>
<td>$50 ($50 per average spot)</td>
<td>$790,670 ($366 per average spot)</td>
<td>$4.4 million ($753 per average spot)</td>
</tr>
<tr>
<td>May 7 – 13</td>
<td>$0</td>
<td>$3 million ($521 per average spot)</td>
<td>$8 million ($689 per average spot)</td>
</tr>
<tr>
<td>May 14 – 20</td>
<td>$405,080 ($342 per average spot)</td>
<td>$4.6 million ($455 per average spot)</td>
<td>$11 million ($594 per average spot)</td>
</tr>
<tr>
<td>May 21 – 27</td>
<td>$1.4 million ($349 per average spot)</td>
<td>$4.8 million ($422 per average spot)</td>
<td>$10.9 million ($488 per average spot)</td>
</tr>
<tr>
<td>May 28 – June 3</td>
<td>$1.4 million ($343 per average spot)</td>
<td>$4.9 million ($412 per average spot)</td>
<td>$11.1 million ($477 per average spot)</td>
</tr>
<tr>
<td>June 4 – June 10</td>
<td>$2.1 million ($348 per average spot)</td>
<td>$4.4 million ($492 per average spot)</td>
<td>$10.8 million ($482 per average spot)</td>
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<td>June 11 – June 17</td>
<td>$2.3 million ($356 per average spot)</td>
<td>$5.4 million ($410 per average spot)</td>
<td>$11.7 million ($426 per average spot)</td>
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<td>June 18 – June 24</td>
<td>$2.2 million ($336 per average spot)</td>
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<td>June 25 – July 1</td>
<td>$3.1 million ($340 per average spot)</td>
<td>$9.4 million ($350 per average spot)</td>
<td>$21.5 million ($474 per average spot)</td>
</tr>
<tr>
<td>---------------</td>
<td>-----------------------</td>
<td>------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td></td>
<td>$3.2 million ($365</td>
<td>$3.5 million ($370</td>
<td>$3.4 million ($364</td>
</tr>
<tr>
<td></td>
<td>per average spot)</td>
<td>per average spot)</td>
<td>per average spot)</td>
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<tr>
<td></td>
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</tbody>
</table>
IV. FUNDRAISING DISADVANTAGES FOR INDEPENDENTS

A plurality of donations to the Romney and Obama campaigns were under $200. Assuming that the average individual donation was $200—although it was likely smaller, we are using a high figure to present the *best case fundraising scenario*—and assuming 3% of people solicited decided to donate—an optimistic estimate (especially for an independent as opposed to a major party candidate) drawn from my personal campaign experience—it would take presentations to over 44,343,300 people to raise the necessary funds for a presidential campaign capable of reaching the debates under current standards. A summary of the arithmetic is below.

It is important to understand what I mean by “presentations.” A presentation is not necessarily a unique appeal by phone or in-person to a potential donor. Instead, a presentation is any interaction the campaign has with a voter that explicitly or implicitly touches on the subject of fundraising. Many advertisements—both digital and on television—implicitly ask for donations, for example. 44,343,300 people is about one fifth of the adult population, which is a dauntingly high number of appeals to make, unique or not.

Of course, the assumption for average donation can vary depending on the candidate, as well as the time the donation is made. In the 2012 presidential election, for example, Barack Obama’s campaign disclosed that the average donation to his campaign and the Democratic National Committee was $65.89. Those small donations are the

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product of Obama’s concentrated online “microtargeting” efforts, meant to reach as far as possible to draw in campaign contributions. Candidates may, with this especially accurate, far-reaching, and internet-based solicitation method, be able to claim the politically desirable statistic that they receive more small donations than their opponent, an edge up intended to prove a link between the candidate and a supportive middle class.

Still, many of these variables for establishing an assumed average contribution amount come down to strategy. In contrast to Obama’s far-reaching, small donation approach, Romney received more support from the RNC and his super PAC than did Obama from the DNC and his super PAC.

Because the maximum donation for an individual to a candidate in any race is $2,600, candidates who appeal to donors with more money may be inclined to do so through those PACs. For that reason, I left out anything over that amount when coming up with my average donation of $200. This figure is meant to represent the probable average disclosed donation of a candidate who is able to appeal to those donating small sums as well as those giving several hundred dollars.

**DONORS NEEDED (SUMMARY 2)**

<table>
<thead>
<tr>
<th>Money needed:</th>
<th>$266,059,803</th>
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</thead>
<tbody>
<tr>
<td>Plurality of donations: under $200</td>
<td>hypothetical average donation size: $200</td>
</tr>
<tr>
<td>Donations of $200 needed:</td>
<td>$266,059,803/$200 = 1,330,299 donations</td>
</tr>
<tr>
<td><strong>Required amount of solicitations, supposing that 3% of potential donors contacted agrees to donate:</strong></td>
<td>1,330,299/0.03 = 44,343,300 solicitations required</td>
</tr>
</tbody>
</table>

25
V. POLLING INACCURACY

It is my belief that, by their nature, elections with more than two candidates do not lend themselves to the same accuracy in polling as head-to-head campaigns. This belief is substantiated by a significant amount of data and shared by other experts. Indeed, 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 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 of 10.1% in the mid-election polls for those 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\(^\text{28}\).

Such a significant error is too significant to base assumptions about candidate viability on. Pre-election polling in September already lacks credibility in determining which candidates are viable enough to be included in the presidential debates, even in races with only two contenders. Thus, the findings of *FiveThirtyEight* further call into question polling data when there is a third candidate. A hypothetical third candidate can

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be polling at 5% against his two opponents, excluding him from the debate due to the 15% participation standard. However, because of the pronounced error in a three-way race – 15.3% on average – that candidate could still finish with 20% of the vote. This highlights the absurdity of using poll data to gauge support of third-party candidates.

Perhaps, though, three way polls are not inaccurate per se, but still lack predictive power due to the volatility of three-way races. Each poll might represent an accurate snapshot of a rapidly shifting landscape, and, being only a snapshot, is unable to capture the shift. When I say “inaccuracy”, hence, I do not mean that the polls necessarily have not captured the voters’ sentiments at the time the poll was conducted, but that they are inaccurate in terms of predicting the final election results. In other words, the inaccuracy extends to the polls’ ability to capture and therefore anticipate quick shifts in voter preferences, not to their ability to discover how voters feel at the moment, however ephemeral that may be.

The inaccuracy of pre-election polling when a third candidate is involved is further exacerbated by the difficulty a pollster faces in identifying an appropriate sample of likely voters. As we have seen with the recent failure of Eric Cantor’s pollster to predict his primary election defeat, an error in sampling can lead to large errors in results that go undetected until Election Day. As Lynn Vavreck has described in the New York Times, and as I can personally affirm, pollsters who produce pre-election polls must arrive at some estimate of who they think will vote in that election. In other words, the true accuracy of a poll is contingent upon how right that pollster got the sample. As Vavreck puts it, “Pollsters don’t shoot balls between fixed goal posts, they shoot horseshoes around a fixed stake. . . . Being on the wrong court, however, is a much bigger
Herein lies the problem with a race between three or more candidates – identifying the right sample becomes exponentially more difficult. This is largely in part 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.

When Jesse Ventura successfully ran for governor in 1998, Minnesota lead the nation in voter-turnout due to the influx of first time voters. One in six voters, nearly 17% of the electorate, registered to vote on Election Day. According to exit polls, 12% of the electorate would not have voted had Ventura not been on the ballot. Non major party candidates represent new views, or new combinations of tried and trusted views. The excitement that builds around them – if they are given proper media attention – and the effect it has creating first time votes, is understandable yet hard to anticipate exactly.

When these difficulties in sampling are combined with the inaccuracies I describe above that apply to any poll taken two months before the election, we are left with a very foggy picture of what will happen on Election Day in a three-candidate race. It is something other pollsters and I go to great efforts attempting to account for, but the simple fact is that polling of independents is inherently unreliable.

Further statistical research firm Ipsos. Using an Ipsos model based off of decades of polling data and electoral returns, we can predict the chance of polling volatility and


error excluding serious candidates with the potential for significant appeal from the debates. The implications of this model are discouraging for non-major party hopefuls and give us a clearer picture of just how insurmountable the 15% obstacle is for these candidates. A candidate receiving 20% of the vote on Election Day, a slightly better performance than that of Ross Perot in 1992, would still have a nearly one out of four (24.32%) chance of being excluded from the debates under the CPD’s rule due to the lack of predictive power in polling in third-party races. This is absurd. The volatility/error of three-way polling are too great to ignore, and it is ridiculous to suppose that such a standard – which, because of its lack of predictive power, is little more than arbitrary – should be used to determine something as seminal as participation in the presidential debates.

Dated: New York, NY
September 5, 2014

Douglas Schoen

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31 See Expert Report of Dr. Clifford Young, supra n.13.
The Petition for Rulemaking that Level the Playing Field has filed with the FEC. The Petition includes a proposed new rule based on a signature drive competition. A supplemental brief with additional evidence in support of the Petition was filed on 11/26/14 and is included with this exhibit.
BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Petition for Rulemaking re:
Sponsorship of Candidate Debates

PETITION FOR RULEMAKING

SHAPIRO, ARATO & ISSERLES LLP
500 Fifth Avenue
40th Floor
New York, New York 10110
Phone: (212) 257-4880
Fax: (212) 202-6417

Attorneys for Petitioner
Level the Playing Field
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<td>23</td>
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<td>CONCLUSION</td>
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<td><strong>Exhibit 3</strong></td>
<td>Expert Report of Dr. Clifford Young, dated Sept. 5, 2014</td>
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<td><strong>Exhibit 5</strong></td>
<td>Excerpts of <em>CNN/ORC Poll</em>, CNN (Feb. 14, 2012), <a href="http://i2.cdn.turner.com/cnn/2012/images/02/14/rel2c.pdf">http://i2.cdn.turner.com/cnn/2012/images/02/14/rel2c.pdf</a></td>
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<tr>
<td><strong>Exhibit 9</strong></td>
<td>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, <a href="http://www.fec.gov/disclosurehs/hsnational.do">http://www.fec.gov/disclosurehs/hsnational.do</a></td>
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Exhibit 18  Walter Shapiro, John Anderson: The Nice Guy Candidate, The Atlantic (Feb. 1, 1980)

Exhibit 19  Excerpts of Newton Minow & Craig L. LaMay, Inside the Presidential Debates: Their Improbable Past and Promising Future (2008)

Exhibit 20  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/


Exhibit 23  Excerpts of Steven Rosenstone et al., Third Parties in America (1996)

Exhibit 24  Excerpts of J. David Gillespie, Politics at the Periphery (1993)

Exhibit 25  Tom Morgenthau, Citizen Perot, Newsweek, Nov. 9, 1992
Exhibit 26  Sandy Grady, *Without Ross Perot, There Would Be No Deficit Deal*, Orlando Sentinel, Aug. 5, 1993


INTRODUCTION

It has been 22 years since the American public heard from someone other than the Democratic and Republican candidates during the presidential debates, even though a majority of Americans are eager for a candidate who presents an alternative to the two major parties. 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.\(^3\)

The Commission on Presidential Debates (“CPD”) is preventing the American people from hearing the independent candidate they desire. The CPD denies voters the opportunity to hear an alternative to the Democratic and Republican nominees by using polling to determine which candidates to invite to the debate. The CPD will only invite a candidate to participate in the presidential debates if he or she is at 15% or higher in mid-September opinion polls on the premise that a candidate polling less than 15% is not a viable contender for the presidency.

This use of polling as the deciding factor in debate admission is inconsistent with the Federal Election Commission’s rules governing debate sponsorship, as well as the purposes underlying those rules. The FEC authorizes organizations like the CPD to host debates on the theory that the debates will serve a voter educational purpose. It requires debate sponsors to use objective, unbiased criteria that are not designed to exclude third-party or independent

\(^{3}\) Id. at 21, 53.
candidates. The use of polling as the decisive factor in debate admission undermines these purposes. Polling criteria are inherently biased against third-party and independent candidates in two key ways.

First, nonmajor-party candidates do not have the same access as a Democrat or Republican to an abundance of free media to boost their name recognition. Without a high profile primary process or a guaranteed spot in the debates, a third-party or unaffiliated candidate can expect little press coverage. That means the candidate has to rely on paid media to garner name recognition and get his or her message to the voters. Any credible campaign consultant will advise the candidate that the cost of achieving the name recognition necessary to reach 15% would cost at least $113 million in paid media alone, and over $250 million in total campaign expenses. These are unprecedented sums that no third-party or independent candidate has ever come close to raising.

Second, even if it were possible for anyone other than a self-funded billionaire to amass these vast resources, it could be for nothing. The error-prone and arbitrary nature of polling three-way races could still shut a qualified and otherwise viable candidate out of the debates. Polling in three-way races is particularly inaccurate. Data shows that, two months before the election, polls in three-way races have an average error of 8%. With an error rate that large, polls will frequently show that a candidate has less support than necessary to meet a polling threshold, even though the candidate in fact has the requisite support. For example, if a debate sponsor requires a candidate to have 15% support to participate in the debates, there is a 40.2% percent chance that a candidate who actually has 17% support would still be excluded from the debates due to inaccurate polling. And even apart from this inaccuracy, 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 polling cutoff.

Given these biases, a requirement that candidates must meet a polling threshold to participate in debates (like the CPD’s) effectively institutionalizes the Democratic and Republican candidates as the only options with which the voters are presented. A third-party or independent candidate who is excluded from the debates loses the opportunity to take the stage against the major party nominees and demonstrate that he or she is a better alternative; the media does not cover the candidate; and the candidate does not get the public exposure necessary to compete. The “determination” that a candidate is not viable because he or she lacks a certain amount of support becomes a self-fulfilling prophecy.

That is not how debates in our democracy should work. Debates should be forums for candidates to appeal to voters, helping voters to decide how to cast their support. The use of biased polling measures as a decisive factor in debate admission skews the process to deny voters legitimate alternatives, and undermines the educational purposes debates are supposed to serve. In this Petition for Rulemaking, Petitioner Level the Playing Field respectfully requests that the FEC amend its debate regulations to end the partisan manipulation of the presidential debate process and restore integrity to these integral campaign events. The FEC should conduct a rulemaking to revise and amend 11 C.F.R. § 110.13(c), the regulation governing the criteria for candidate selection that corporations and broadcasters must use in order to sponsor candidate debates. The amendment should (A) preclude sponsors of general election presidential and vice-presidential debates from requiring that a candidate meet a polling threshold in order to be admitted to the debates; and (B) require that any sponsor of general election presidential and
vice-presidential debates have a set of objective, unbiased criteria for debate admission that do not require candidates to satisfy a polling threshold to participate in debates.

**STATUTORY AND REGULATORY BACKGROUND**

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

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, and corporate funding of a public forum in which a candidate can appear to influence voters would typically be subject to FECA’s strictures. The FEC has in fact recognized that corporate funding of candidate debates creates "the real or apparent potential for a quid pro quo" corrupt payment and jeopardizes the "integrity and fairness of the [debate] process." 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.

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5 2 U.S.C. § 441b(a).
6 See, e.g., id. § 434.
7 See id. § 431(8)(A), 9(A).
8 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.").
9 Corporate and Labor Organization Activity; Express Advocacy and Coordination With Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995).
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. The rationale for this exception is that debates can serve a nonpartisan, voter education purpose, rather than be a contribution to favored candidates. 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.” 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.” 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.” 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. In light of this purpose, the FEC determined that corporate funding of nonpartisan debates should not be prohibited.

11 See id.
14 Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,734.
15 Id.
16 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).
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 must be either 501(c)(3) or (c)(4) nonprofits that “do not endorse, support, or oppose political candidates or political parties” or media outlets that “are not owned or controlled by a political party, political committee or candidate.”\(^\text{17}\) And sponsors “shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.”\(^\text{18}\) The resulting debate must be nonpartisan too, and cannot favor one candidate over other.\(^\text{19}\) 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.”\(^\text{20}\)

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 the debate” and may not rely solely on nomination by particular parties.\(^\text{21}\) To be objective, a criterion “must be free of content bias, and not geared to the selection of certain pre-chosen participants.”\(^\text{22}\) Under this definition, objectivity means more than subject to verifiable measurement. It incorporates a “reasonableness” requirement.\(^\text{23}\) Thus, as one federal court has

\(^{17}\) 11 C.F.R. § 110.13(a).

\(^{18}\) Id. § 110.13(c).

\(^{19}\) See id. § 110.13(b)(2) (prohibiting debate sponsors from “structur[ing] the debates to promote or advance one candidate over another”).

\(^{20}\) Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. at 76,735.

\(^{21}\) 11 C.F.R. § 110.13(c).

\(^{22}\) First General Counsel’s Report at 7, MUR 5395 (Dow Jones) (Jan. 13, 2005) (internal quotation marks omitted).

explained, a criterion that “only the Democratic and Republican nominees could reasonably achieve” does not satisfy the FEC’s rules.\textsuperscript{24}

If and only if a debate staging organization satisfies these criteria may it use corporate money to pay for candidate debates.\textsuperscript{25}

**REASONS TO GRANT THE PETITION**

Given FECA and the FEC’s purposes – ensuring nonpartisan, educational debates and reasonable, objective criteria for debate admission – debate selection criteria that measure candidate viability deserve careful scrutiny. Unlike criteria relating to eligibility for office or access to the ballot, viability is a tenuous and subjective concept. As a result, determinations about which candidates are viable can easily be used as a pretext for corrupt political discrimination.

This concern is not novel. Before the FEC adopted its current debate regulations, its General Counsel recommended that debate sponsors be prohibited from using “[s]ubjective evaluations of whether an individual is a significant, major or important candidate” and “[p]olls or other assessments of a candidate’s chances of winning the nomination or election” as debate participant selection criteria.\textsuperscript{26} Those recommendations reflected the very real concern that viability determinations could be a smokescreen for the kind of partisan rigging that the debate regulations prohibit.

Although the FEC did not explicitly adopt its General Counsel’s recommended prohibition on the use of polling twenty years ago, it is time to revisit that issue. Since the FEC adopted the present debate rules, the CPD has sponsored presidential and vice presidential

\textsuperscript{24} Id.
\textsuperscript{25} See 11 C.F.R. § 114.4(f).
\textsuperscript{26} Memorandum from Lawrence M. Noble \textit{et al.}, to Commissioners of the Federal Election Commission, dated Feb. 8, 1994, at 74, Federal Election Commission Agenda Document 94-11.
general election debates in five election cycles. Not once in that span has the CPD invited a third-party or independent candidate to the debates. Beginning in 2000, the CPD has achieved that exclusion by requiring that a candidate have 15% support in an average of five national polls taken in early to mid-September to gain entry to the debates.

The CPD’s reliance on polling to determine invitation to the debates is incompatible with the purposes underlying the debates rules and FECA. As explained in detail below, the CPD’s rule excludes third-party and independent candidates by design by setting a threshold that they cannot reasonably expect to meet. For this reason, the CPD’s rule violates the existing rules on debate sponsorship, as detailed in a complaint that Petitioner has filed with the FEC. But the problem is not limited to the current 15% threshold. Any reliance on polling to determine debate access will systematically disfavor third-party and independent candidates. The result is a system that entrenches the two parties rather than enhancing the public debate. And by excluding third-party and independent candidates, reliance on polling to select debate participants will also undermine the educational goals the debate rules are meant to further.

For all of these reasons, Petitioner requests that the FEC amend its rule on debate sponsorship. The amended rule should (A) preclude sponsors of general election presidential and vice-presidential debates from requiring that a candidate meet a polling threshold in order to be admitted to the debates; and (B) require that any sponsor of general election presidential and vice-presidential debates have a set of objective, unbiased criteria for debate admission that do not require candidates to satisfy a polling threshold to participate in debates.

27 See Complaint of Level the Playing Field and Peter Ackerman against the Commission on Presidential Debates and its directors, filed with the Federal Election Commission simultaneous to the filing of this petition.
I. POLLING-BASED CANDIDATE SELECTION CRITERIA EXCLUDE THIRD-PARTY AND INDEPENDENT CANDIDATES

A. Even Seemingly “Attainable” Polling Thresholds Can Be Out Of Reach For Third-Party And Independent Presidential Candidates

The CPD’s 15% rule may appear to be a reasonable threshold for third-party and independent candidates to achieve. In reality, it is an unreasonable criterion fixed to guarantee a preordained result in which only the Democratic and Republican nominees for president qualify for the debates.

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. 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 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. It is likely, moreover, that the necessary name recognition is much higher, approaching 80% or above.

29 Id. at ¶¶ 10, 24-28.
30 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.
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. 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% name recognition among Republican voters in May 2011. By February 13, 2012, his name recognition had increased to 85% among all Americans. Santorum, however, spent no more than $13.1 million on his campaign up to that point. Similarly, Herman Cain saw his name recognition increase from 21% among Republican voters in March 2011 to 78% among

31 See id.


33 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 5.

Republican voters by the end of October 2011 at a cost to his campaign of less than $16 million. 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. 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 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; 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.”39 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.40 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.41 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, broad-based advertising blitz that included ad buys on national broadcast television, cable television, and digital media.42 The media purchase necessary to take a near-unknown candidate to this level of name recognition is $106 million.43 The candidate would have to spend an

40 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 13. 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 14. 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.
41 Schoen Report (Exhibit 11) at 11.
42 Id. at 6-10.
43 Id. at 10.
additional $6 million to produce the content to fill that media purchase.\textsuperscript{44} And to achieve 80% – the more likely amount necessary – the candidate would have to spend $150 million on paid media.\textsuperscript{45}

No third-party or independent candidate has ever raised $113 million, much less $150 million.\textsuperscript{46} 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 \textit{win} the Republican nomination in 2012.\textsuperscript{47}

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.\textsuperscript{48} 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).\textsuperscript{49} A third-party or independent candidate, moreover, has to spend money to coordinate the massive signature gathering effort that is necessary to achieve ballot access, which could cost upwards of $13 million or more.\textsuperscript{50} 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

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\textsuperscript{44} Id. at 11.
\textsuperscript{45} Id.
\textsuperscript{46} 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.
\textsuperscript{48} See Schoen Report (Exhibit 11) at 12-16.
\textsuperscript{49} Id. at 17; \textit{see} id. at 14-16.
\textsuperscript{50} Id. at 17 n.8.
million to mount a competitive bid and achieve poll results of 15% or more in September.\textsuperscript{51}

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.\textsuperscript{52}

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).\textsuperscript{53}

In 2012, the plurality of individual donations to the major party candidates was considerably less, under $200.\textsuperscript{54} 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 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

\textsuperscript{51} Id. at 18.
\textsuperscript{52} Id. at 17-18.
\textsuperscript{54} Schoen Report (Exhibit 11) at 24.
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.

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. 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, and Anderson competed in the Republican primary for president in 1980. 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.\footnote{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. \footnote{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. \textit{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 29. A Harris poll over the same time period had Perot at 9\%. \textit{Id.}} See Newton Minow & Craig L. LaMay, \textit{Inside the Presidential Debates: Their Improbable Past and Promising Future} 56 (2008), submitted herewith as Exhibit 19 (2008). \textit{Id.}} As for Ross Perot in 1992, he would not have satisfied the CPD’s present rule; on the eve of the debates, Perot was polling at or below 10\%.\footnote{Id.}

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 LaFollette), and 1948 (Henry Wallace and Strom Thurmond).\footnote{Id.} 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.\footnote{Id.} 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.

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In sum, the CPD’s rule requires a non-Republican or Democratic candidate to demonstrate significant level of support at a point in time when the media and public have focused intently on only the Republic 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. The upshot is that the CPD’s 15\% rule guarantees a preordained result: Democratic and Republican candidates will be
included in the debate, and third-party and independent candidates will be shut out. That is clearly not what the FEC intended when promulgating the debate sponsorship regulations.

**B. Polls Are Poor Measures Of Third-Party And Independent Candidate Viability That Systemically Disfavor Them**

One might argue in response to the foregoing that there is no problem with a polling-based requirement per se, only with a polling requirement set too high, like at 15%. That would be mistaken. As a threshold matter, although the foregoing analysis is keyed to achieving 15% in vote share, the cost of achieving even 10% would still be daunting. More fundamentally, any polling-based prerequisite to admission is ill-suited to measuring the viability of a third-party or independent candidate.

First, polling 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. An unaffiliated candidate might meet or exceed the 15% threshold if he or she had sufficient name recognition. Polling ignores that possibility.

Second, a polling prerequisite to debate admission leaves third-party and independent candidates at the mercy of arbitrary decisions of pollsters and debate sponsors 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,

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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 sponsor relies on choose not to test his or her support. A debate sponsor’s selection of which polls to rely on is also subject to manipulation. If a sponsor does not commit to using a particular poll or polls ahead of time, it can cherry pick from among the myriad polls that exist in order to engineer a specific outcome. For example, if a sponsor, like the CPD, relies on an average of 5 polls, it could select from the numerous polls available a set of five that shows the candidate below the polling threshold, whereas another set of 5 polls would yield an average above the threshold. Finally, 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 to determine debate inclusion. The difference between meeting a polling threshold could be whether the debate sponsor relied on a poll completed a day before the candidate had a positive turn in the news cycle, or a day after. Indeed, a debate sponsor can manipulate the results: it can hasten its “determination” if a candidate hovering around the polling threshold 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. If a pollster’s prediction about who will vote is incorrect, the accuracy of its pre-election polls will suffer. 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.

63 Young Report (Exhibit 3) at ¶¶ 43, 43a-43c.
64 See id. at ¶¶ 43d-43e.
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. Thus, even if a pollster chooses to test the support of a third-party or independent candidate, there is a 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 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.

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.

Statistical analysis proves this to be true. The increased inaccuracy of polling in three-way races will lead to a significant number of false results: because of the inaccuracy of polling, polling thresholds will often exclude candidates who actually satisfy them. New research shows

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65 Schoen Report (Exhibit 11) at 28.
66 Id. at 26-27.
that in three-way gubernatorial races, the average absolute difference between a poll taken two months before the election and the final result is 8.04%. At that error rate, a hypothetical candidate with 17% support would nonetheless fail to satisfy a 15% polling threshold 40.2% of the time. In contrast, at the same 8.04% error rate, a hypothetical candidate with 42% support would only fail to satisfy the same threshold .04% of the time. In other words, 4 out of 10 times, the threshold would 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 polling threshold 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, using a polling threshold as a prerequisite for debate access will systematically reduce a third-party or independent candidate’s chance of being invited to debate.

II. POLLING-BASED CANDIDATE SELECTION CRITERIA ARE INCONSISTENT WITH THE VOTER EDUCATION PURPOSE OF THE DEBATE RULES

Reliance on a mandatory polling threshold to determine access to general election presidential debates does not just fix the system against third-party and independent candidates. It also runs counter to the voter educational purpose the debate regulations are supposed to further.

If the purpose of debates is to educate voters, as the FEC has explained, reliance on polling to determine who the voters should hear puts the cart before the horse. Debates enable

67 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 3) at ¶ 34.
68 Id. at ¶ 56.
69 Id. at ¶ 66.
70 Id.
candidates to gain support, especially third-party and independent candidates; polling thresholds deny 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. The lack of public exposure to third-party and independent candidates that is inherent in our election system makes the risk of a poll failing to capture a candidate’s potential for popular appeal high. Polling does not account for these differences in name recognition that create this risk. In light of this risk, to exclude 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, polling thresholds do not measure the public’s views about who it wants to hear from 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. The CPD’s rule denied voters that chance.

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.

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71 See supra n.62.
73 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
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.” Elections set the public agenda by prioritizing among the many pressing issues of the day. They enable the public to 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. 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. 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. 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

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75 See Anderson v. Celebreeze, 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, 250-51 (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 orthodoxy 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.”).

76 See Steven Rosenstone et al., Third Parties in America 56 (1996), submitted herewith as Exhibit 23.

77 See J. David Gillespie, Politics at the Periphery 27 (1993), submitted herewith as Exhibit 24.
administration. 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. Polling thresholds drastically curtail the voices and viewpoints heard in the debates, effectively preventing the democracy-enhancing functions that the debates could otherwise have.

III. NONPARTISAN, NONDISCRIMINATORY ALTERNATIVES EXIST TO DETERMINING CANDIDATE VIABILITY

Petitioner does not oppose using debate selection criteria that take into account viability of a contender in the general presidential election. The sheer number of declared candidates for president requires some limiting principles to govern debate access. Petitioner does not even oppose a debate sponsor allowing candidates to participate if they meet a polling threshold, so long as the sponsor provides an alternative avenue for gaining entry to debates that does not rely on polling. Petitioner does not believe that the FEC needs to specify what that other avenue should be or to adopt a specific set of criteria to govern access to the general election presidential debates. But it is worth noting that polling is not necessary to measure the viability of candidates for our nation’s highest office. Workable alternatives exist that can measure viability in a truly neutral and objective way without reliance on polling.

Petitioners have devised one such alternative. The new rule would work as follows: On April 30 of an election year, any candidate, party, or nominating process with ballot access in states that collectively have at least 270 Electoral College votes would notify the CPD of that

79 See Rosenstone et al. (Exhibit 23), supra n.76, at 224; Gillespie (Exhibit 24), supra n.77, at 19.
access. If there is more than one, then whoever has gathered the most signatures as part of the ballot access process will participate in the debates with the Democratic and Republican nominees.

This new rule builds on the existing legitimating function of the ballot access process. Ballot access laws reflect a state’s decision of the demonstrated level of support necessary to warrant the serious step of including a candidate among the choices citizens are given on Election Day. The minimum number of signatures necessary to achieve ballot access in states comprising 270 electoral votes represents the collective and objective political judgment of who can qualify to run for President. Achieving that number alone is a significant mark of a candidate’s seriousness. Indeed, since 1988, the greatest number of third-party or independent candidates to meet this minimum in any given election was five (in 2000), and was often three or less.\textsuperscript{80}

Of course, given the historic prize of entry into the debates, the competition to gain the most signatures will be vigorous and propel competitors well beyond the minimum. As a result, a legitimate third candidate will emerge. The winner should plan to stop 6 to 8 million people in the streets with the hope of 4 million signing.\textsuperscript{81} The cost and scale of that endeavor – requiring at least $13 million or more and a coordinated, nationwide network of staffers and volunteers – would not be insurmountable, but is substantial enough to ensure that only someone with significant fundraising and operational capacity could win.\textsuperscript{82} And by virtue of having gotten the

\textsuperscript{82} Id. at ¶¶ 16-20.
signatures of a broad cross section of Americans, the winner will have demonstrated popular appeal. 83

Petitioner believes that fundraising ability, operational capacity, and countable, numerical demonstrations of popular support (like fundraising totals or attendance at rallies) are reasonable considerations for debate selection. The signature drive competition provides an objective, fair, and measurable way to implement those criteria.

83 Id. at ¶¶ 21-25.
CONCLUSION

Although it is only 2014, the presidential election campaign for 2016 will soon commence. Qualified individuals will soon begin weighing whether to run as a third-party or independent candidate, if they have not already begun doing so. Assessing whether there is a realistic chance to participate in the presidential general election debates will be a significant part of their calculus. Under the present system, there is no realistic chance that qualified third-party or independent candidates will gain entry into the debates. And this will remain the case so long as debate sponsors require candidates to meet a polling threshold in order to be permitted to debate; under the status quo, the debates can remain a rigged game that deprive voters of the viable alternative choice so many want to hear. For all of the reasons set forth herein, the FEC should amend its debate sponsorship regulation, 11 C.F.R. § 110.13, to (A) preclude sponsors of general election presidential and vice-presidential debates from requiring that a candidate meet a polling threshold in order to be admitted to the debates; and (B) require that any sponsor of general election presidential and vice-presidential debates have a set of objective, unbiased criteria for debate admission that do not require candidates to satisfy a polling threshold to participate in debates.

Respectfully submitted,

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Attorneys for Petitioner Level the Playing Field

26
November 26, 2014

VIA FEC.GOV

Robert M. Knop,
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice 2014-13, Rulemaking Petition: Candidate Debates

Dear Mr. Knop:

We represent Level the Playing Field, a nonpartisan, nonprofit corporation that petitioned the Federal Election Commission on September 11, 2014 to initiate a rulemaking to revise and amend the FEC’s regulations governing the sponsorship of candidate debates. We write to provide the FEC with additional evidence in support of the Petition.

The Petition argues that rules requiring presidential candidates to meet a minimum polling threshold to gain access to general election debates are inconsistent with the FEC’s regulations governing debate sponsorship and their underlying purposes. In particular, the Petition demonstrates how polling thresholds systematically discriminate against third-party and independent candidates. One cause of this bias, among others, is the inaccuracy of pre-election polling. First, debate sponsors can rely on polls taken well in advance of the election, which are more inaccurate; the Commission on Presidential Debates (“CPD”), for instance, relies on polls taken approximately two months prior to Election Day. Second, races with a serious third-party or independent contender are prone to distinct volatility. As a result of these factors, polling in three-way races is 8% off two months before the election. At that level of inaccuracy, polls can falsely exclude candidates with support at or near a polling threshold a significant percentage of the time. See Petition at 18-20.

As demonstrated below, the most recent election results highlight the inaccuracy of pre-election polls, thereby underscoring the biased nature of polling thresholds.

I. Pre-election Polls Were Grossly Inaccurate Because Polling Firms Failed To Accurately Predict Which Voters Would Turn Out

Polling thresholds are meant to measure support. But polls are only accurate if those conducting the poll select the right sample, i.e. correctly anticipate who will turn out to vote. See
Petition at 18-19. Polls are frequently very inaccurate because they are conducted using unreliable samples, and this most recent election demonstrates the point.

Polling firms failed to predict low Election Day turnout by typical Democratic voters. See Sam Wang, The Polls Failed To Predict A Republican Landslide. Here’s Why., The New Republic (Nov. 5, 2014), http://www.newrepublic.com/article/120147/2014-midterm-predictions-poll-aggregators-hit-midterm-curse, submitted herewith as Exhibit A; Barnini Chakraborty, Election results looked nothing like the polls -- what gives?, FoxNews.com (Nov. 7, 2014), http://www.foxnews.com/politics/2014/11/07/pollsters-miss-predictions-in-key-races/, submitted herewith as Exhibit B. As a result, in state after state, polls were abysmal predictors of the final results. In Kansas, for instance, pre-election polls on average showed Greg Orman with a 7.2% lead two months before the election, and a 0.8% lead going into Election Day; he lost by 10.8%. In Virginia, pre-election polls showed Mark Warner with lead of 15% two months out, and a lead of 10.2% in the final polls. Yet Warner won by a mere 0.8% margin. The following table summarizes how many pre-election polls missed the mark.
**Polling Errors In The 2014 Midterm Elections**

<table>
<thead>
<tr>
<th>State</th>
<th>Winner's Margin of Victory</th>
<th>Winner's Lead/Deficit, 2 Months Out</th>
<th>Winner's Lead/Deficit, Final Polls</th>
<th>Polling Error, 2 Months Out</th>
<th>Polling Error, Final Polls</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kansas Senate</td>
<td>Roberts +10.8</td>
<td>Roberts -7.2</td>
<td>Roberts -0.8</td>
<td>18</td>
<td>11.6</td>
</tr>
<tr>
<td>Arkansas Senate</td>
<td>Cotton +17.0</td>
<td>Cotton +2.4</td>
<td>Cotton +7</td>
<td>14.6</td>
<td>10</td>
</tr>
<tr>
<td>Maryland Governor</td>
<td>Hogan +4.7</td>
<td>No data</td>
<td>Hogan -5.2</td>
<td>N/A</td>
<td>9.9</td>
</tr>
<tr>
<td>Kentucky Senate</td>
<td>McConnell +15.5</td>
<td>McConnell +5.2</td>
<td>McConnell +5.8</td>
<td>10.3</td>
<td>9.7</td>
</tr>
<tr>
<td>Virginia Senate</td>
<td>Warner +0.8</td>
<td>Warner +15</td>
<td>Warner +10.2</td>
<td>14.2</td>
<td>9.4</td>
</tr>
<tr>
<td>Iowa Senate</td>
<td>Ernst +8.5</td>
<td>Ernst -1.2</td>
<td>Ernst +2.4</td>
<td>9.7</td>
<td>6.1</td>
</tr>
<tr>
<td>Illinois Governor</td>
<td>Rauner +4.8</td>
<td>Rauner +1.4</td>
<td>Rauner -0.8</td>
<td>3.4</td>
<td>5.6</td>
</tr>
<tr>
<td>Kansas Governor</td>
<td>Brownback +3.9</td>
<td>Brownback -4.6</td>
<td>Brownback -1.2</td>
<td>8.5</td>
<td>5.1</td>
</tr>
<tr>
<td>Georgia Senate</td>
<td>Perdue +7.9</td>
<td>Perdue +2.6</td>
<td>Perdue +3</td>
<td>5.3</td>
<td>4.9</td>
</tr>
<tr>
<td>North Carolina Senate</td>
<td>Tillis +1.7</td>
<td>Tillis -3.6</td>
<td>Tillis -0.6</td>
<td>5.3</td>
<td>2.3</td>
</tr>
</tbody>
</table>

This kind of inaccuracy is a recurring problem. Polls have been similarly flawed in one direction or the other in the 1994, 1998, 2002, 2006, and 2012 elections. See Nate Silver, *The Polls Were Skewed Toward Democrats*, FiveThirtyEight.com (Nov. 5, 2014, 9:08 a.m.), http://fivethirtyeight.com/features/the-polls-were-skewed-toward-democrats/, submitted herewith as Exhibit D.

Moreover, this widespread inaccuracy occurred without the complicating factor of a viable third-party or independent candidate. The 2014 Senate and gubernatorial races cited

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1. The final election results and polling data used to create this table came from RealClearPolitics.com. Copies of that data are submitted herewith as Exhibit C.
2. The Winner’s Lead/Deficit, 2 Months Out is, in most cases, the average of the eventual winner’s lead or deficit in the five latest polls from the period August 1, 2014 to September 4, 2014. Some races, however, did not have five polls taken in that period. For those races, the Winner's Lead/Deficit, 2 Months Out is the average of the eventual winner’s lead or deficit in the five latest polls taken from the period August 1, 2014 to September 30, 2014.
3. The Winner’s Lead/Deficit, Final Polls is the average of the eventual winner’s lead or deficit in the last five polls taken before the election.
above were typical two-person, head-to-head contests, and thus were not subject to the increased volatility of races with three viable candidates. See Petition at 18-19. The fact that this serious inaccuracy occurred in conditions that are easier to poll underscores the problems in reliance on polling thresholds to determine third-party and independent candidates’ access to the presidential debates.

II. Averaging Did Not Reduce The Inaccuracy Of The Polls

The current presidential debate sponsor, the CPD, purports to make its debate access determination on an average of multiple polls, and may argue against the Petition on the ground that this averaging reduces the risk of polling inaccuracy. Yet averaging multiple polls did not prevent severe inaccuracy in this most recent election. The errors reflected in the table above compare the final results not to one poll, but to an average of five polls, i.e. an average comparable to the CPD’s average. Those averages were still way off; there were errors in polls taken two months before Election Day of between 8% and 18% in six races.

Commentators who have aggregated polling data have found similar results. One report found that pre-election polling underestimated the Republican share of the vote in Senate races by an average of 5.3%. Sam Wang, The Polls Failed To Predict A Republican Landslide. Here’s Why., The New Republic (Nov. 5, 2014), http://www.newrepublic.com/article/120147/2014-midterm-predictions-poll-aggregators-hit-midterm-curse, submitted herewith as Exhibit A. Another found that, on average, pollsters overestimated Democratic vote share by 4% in Senate races and 3.4% in gubernatorial races. See Exhibit D.

The proliferation of web sites that average poll results may in fact be contributing to polling inaccuracy and reducing any potential benefits of poll averaging. As Nate Silver explains, there is evidence that “pollster ‘herding’ — the tendency of polls to mirror one another’s results rather than being independent — has become a more pronounced problem.” Id. Thus, averaging polls does not necessarily reduce inaccuracy. It may cause inaccuracy to proliferate, as pollsters copy inaccurate results in order to find comfort in the “herd.”

* * *

One might argue that these polling errors affect the poll numbers of all candidates, not just third-party and independent candidates. That is no answer to the charge of bias against third-party and independent candidates inherent polling thresholds. When it comes to meeting the CPD’s 15% threshold, for example, polling inaccuracy systematically disfavors third-party and independent candidates. As explained in the Petition, a candidate with support at or just above the 15% threshold can be up to 1000 times more likely to face exclusion from the debates as a result of polling inaccuracy than a candidate polling at or above 40%. See Petition at 19-20.

Because a third-party or independent candidate is much more likely to be near the 15% threshold, the risks of polling inaccuracy fall overwhelmingly on them, and not on major-party candidates.

For these reasons and those set forth in the Petition, Level the Playing Field respectfully requests that the FEC grant the Petition.

Sincerely,

[Signature]

Alexandra A.E. Shapiro

Encls,
Change the Rule

Exhibit V - Michael Arno’s explanation of a signature drive competition that can be used to determine access to the presidential debates in an objective way that allows a viable, moderate third choice to emerge.
EXPERT REPORT OF MICHAEL ARNO

1. My name is Michael Arno. I am the founder of Arno Political Consultants (“APC”), a company specializing in managing the qualification of ballot measures and candidates around the country and the world. I first began managing the qualification of ballot measures and candidates to a ballot in 1979, when I founded my company. Over the past 35 years, I have managed the qualification of nearly 700 issues and candidates to the ballot in 41 states and hundreds of cities, towns and counties across the country, and my company has collected more than 120 million signatures to qualify nearly 500 ballot initiatives in twenty states.

2. At the time that I founded APC, there was no real method for managing signature gathering drives, and so I created efficient processes to enhance the chances for success. The majority of the processes we have created at APC are used today by every other company that manages ballot access qualification. APC and I have also been sought out for work abroad. I have worked on signature gathering efforts with Ukrainians as they split from the Soviet Union in 1991 and on signature drives in France and Russia.

3. I have testified on ballot access issues in front of half a dozen state legislatures and have been used as an expert witness in dozens of legal cases. In 1991, I was called on by the European Parliament to help them draft their first attempt at citizen legislating. Later I was brought back to help them establish what is now the European Citizens’ Initiative (“ECI”) and have advised groups considering using the ECI process.

BACKGROUND

5. The Commission on Presidential Debates (“CPD”) sponsors presidential debates held in the fall before the general election. The CPD has established three criteria to govern who is included in the debates: 1) the candidate must fulfill the constitutional requirements to be president, 2) the candidate must have ballot access in sufficient states to win a majority of Electoral College votes, and 3) the candidate must average a vote share of at least 15% in five public polls in September of the presidential election year.

6. I have been tasked with evaluating a proposal for a signature drive competition that would be used to select a third participant, other than the Democratic or Republican nominees, for the CPD debates held in the fall of each presidential election year. Under this proposal, a party, nominating process, or candidate other than the nominee of the Democratic or Republican parties (for brevity, this report will refer to a party, nominating process, or candidate as simply a candidate) would have to first meet the threshold of obtaining ballot access in states representing at least 270 Electoral College votes. Any candidate who met that threshold would be eligible to compete for a third spot in the debates. If more than one candidate met that threshold, the candidate that gathered the greatest number of signatures in the ballot access process as of April 30 would be guaranteed an invitation to the presidential debates.

7. In this report, I have drawn on my knowledge of and experience with the ballot access process to evaluate the proposed competition. Based on that knowledge and experience, I conclude that the winner of the proposed competition would be a presidential candidate with the potential to appeal to and ultimately win broad electoral support. What follows is a discussion of my reasons for that conclusion.
ESTIMATING THE NUMBER OF SIGNATURES NECESSARY TO WIN THE COMPETITION

8. Access to the presidential debates is vital to any presidential campaign. The debates are one of, if not the, most watched events of the campaign, and they therefore provide an unparalleled opportunity for a candidate to communicate his or her message. In the history of general election presidential debates, third-party or independent candidates have only had that opportunity in two election cycles, and the last time one such candidate appeared in the debates was more than twenty years ago. Given the importance of participating in the debates and third-party and independent candidates’ typical exclusion from them, one would expect nonDemocratic and Republican candidates to hotly contest the proposed signature competition.

9. One cannot be sure of the number of signatures that the eventual winner of the competition will gather, but it is possible to make an informed estimate. The proposed signature competition is not without parallels. In other contexts, our democracy relies on signature collection as a means of obtaining the right to be placed before the voting public. Chief among these contexts are access to the ballot as a presidential candidate and for citizen-sponsored ballot initiatives or state constitutional amendments. The signature gathering process and experience in these contexts provides a basis for estimating a likely winning number for the competition.

10. It is not easy to gain access to the presidential ballot in all 50 states. Because of past performance, the nominees of the Democratic and Republican parties automatically have universal ballot access. That is not true for third parties or independent candidates.

11. For independent candidates – that is, candidates running without any party affiliation whatsoever – obtaining universal ballot access would require conducting signature
drives. The total number of signatures the independent candidate will need in 2016 for universal ballot access is approximately 1,049,512.¹

12. For minor or third party candidates – that is, candidates running as the nominee of a party other than the Democratic and Republican parties – gaining ballot access is even harder. New and/or minor parties are often required to collect in some cases a sizeable number of signatures to demonstrate popular support.² To qualify for the ballot in all 50 states, a new third-party would have required 1,767,765 signatures in 2012.³

13. Although the competition would not require presidential candidates to gain access in all 50 states, in practice presidential candidates typically attempt to gain ballot access in as many jurisdictions as resources allow. The benefits of that strategy are many, including increasing the candidate’s credibility; increasing his or her ability to compete for Electoral College votes; and increasing his or her ability to obtain sufficient popular votes to qualify for public campaign financing in the next election. Seeking access in as many jurisdictions as possible also minimizes the adverse competitive consequences if a candidate’s efforts to obtain ballot access fail in one state or another.

14. Other relevant data points are the signature requirements to place initiatives and constitutional amendments on state ballots. In most states, the number of signatures required for placing an initiative on the ballot range from 3% to 10% of registered voters. For example,

¹ This number is subject to change somewhat, because in some states the number of signatures required is a function of voter turnout in the prior election, and thus will not be determined until after the 2014 election.

² In certain states, a third party can obtain ballot access for its eventual nominee without obtaining signatures. The most common alternate avenue of access is sufficient popular vote performance in prior elections in the state. The national third parties that typically field candidates for presidential office have access to very few state ballots under these alternative methods.

³ The requisite number for 2016 will be similar, but not identical. In some states, the precise number of signatures required to obtain ballot access as a third party is a function of voter turnout in the prior election or the number of registered voters, and thus changes from cycle to cycle.
constitutional changes in Florida require 8% of votes cast in the last presidential election to reach the ballot – nearly 700,000 net valid signatures; California proponents need 8% of votes cast for governor, or more than 807,000 signatures; and Ohio requires 10% of votes cast for governor and has an additional barrier that the same threshold must be met in 44 of the state’s 88 counties. This works out to more than 500,000 net valid signatures. In all cases, it is advised that ballot issue proponents collect an additional 25-30% of the net valid signatures required in order to make up for signatures from non-registered signers and an insurance pad of signatures since most states only allow a single filing of petitions with no ability to cure deficiencies in order to reach the ballot.

15. The presidential ballot access signature drives and voter initiative signature drives described above draw intense resources and often intense interest and can require more than 1 million signatures. A national contest for access to the presidential debates, the winner of which would share a stage with the Democratic and Republican nominees for president, would certainly drive even greater competition and interest. Based on my experience, I estimate that such a contest could easily produce a winning number of 4 million or more signatures.

THE RESOURCES NECESSARY TO COLLECT SIGNATURES

16. The resources necessary to mount any national signature drive campaign are significant. This is clear from the small number of third-party and independent candidates who qualify for ballot access in states comprising a majority of Electoral College votes. Since 1988, the greatest number of such candidates to meet that threshold in any given election was five (in 2000), and was often three or less. The resources necessary to gather the signatures required to win the proposed competition would be significant.
17. In 2012, I managed the ballot access process for Americans Elect, which sought ballot access in all 50 states as a minor party. A signature drive campaign of that magnitude required significant planning and coordination. Our planning began in August 2010. We began collecting signatures in August 2010 and had reached a level of qualification in 41 states by May 2012, collecting approximately 3,850,000 signatures. That effort required 1500 signature gatherers, and a management and support staff of more than 50 people. The cost of reaching the ballot was more than $13 million. That cost includes paying the staff that runs the signature campaign, paying for persons to collect signatures, legal costs related to ballot access, and travel and other incidentals as needed.

18. This $13 million figure for the Americans Elect drive is consistent with other signature campaign drives I have run. My firm recently managed the qualification of constitutional amendments in both California and Illinois. In California, the overall budget to collect 1.2 million signatures was nearly $5 million. In Illinois, the cost to collect just under 600,000 signatures to reach the ballot was more than $1.7 million.

19. These experiences provide a useful barometer for estimating the cost of winning the proposed debate signature drive competition. Extrapolating from the data above, the cost of obtaining 4 million signatures could be approximately $13 million or more. Even if one assumes that the winning campaign could obtain cost savings or greater efficiencies, in my experience, I am confident that the cost of obtaining 4 million signatures could not be less than two-thirds of the $13 million figure.

THE WINNING CANDIDATE WOULD HAVE THE POTENTIAL FOR BROAD ELECTORAL APPEAL

20. The campaign that won the signature drive competition would be a campaign with the potential for broad electoral appeal. The resources and level of coordination to win a
national competition of this magnitude alone demonstrate the ability to develop and organize an effective campaign apparatus. Obtaining 4 million signatures is also a significant demonstration of popular support.

21. When creating ballot access and state and local initiative rules, legislators have recognized the need for substantial proof of support from citizens for candidates and ballot issues to be placed before the voters. Signatures have long been considered an appropriate measure of popular support. The act of signing requires a voter to go on the public record with a signature attesting that the candidate or initiative deserves to be considered at the polls. Accordingly, more than two dozen states have allowed the collection of signatures to be a standard for expression of support for ballot measures and all but a handful of states use a signature-gathering threshold for candidates and minor parties to reach the ballot. Moreover, 4 million signatures would be more than 3% of the total turnout in the 2012 presidential election. Achieving support from that proportion of the electorate is similar to the judgment of numerous states for the amount of support necessary to grant initiatives or third parties access to the ballot.

22. Gaining signatures also requires communicating the campaign’s message to voters through 1-on-1 voter contact. Any signature drive campaign develops messaging for the signature gatherers to deliver to the public. Signature gatherers are employed with a script to communicate the campaign’s message, and must be prepared to respond to voter questions. That is particularly important with candidates or parties that are not well known, as people routinely ask questions about what the candidate or party for which signatures are sought stands for in order to decide whether to sign. Thus, as a campaign collects signatures, it is communicating a

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4 There is not a single state citizen referendum or ballot access law that allows a referendum proponent or candidate to simply conduct a public opinion poll – or several polls – to demonstrate enough popular support to gain ballot access.
honored message to millions of voters, and in a personal way. And this kind of personal contact is a key to developing lasting political support – numerous studies have shown that one-on-one contact is the most effective way to mobilize supporters.\(^5\)

23. The 4 million signatures will also come from a broad section of the population. The signature gathering will occur in all different types of cities and towns, and different types of locations; the resulting signatures will therefore come from every state, from every demographic group, from every party affiliation and non-affiliation, and from every age group. When gaining ballot access, a candidate or candidate’s representatives will be meeting millions of people – based on response rates from other signature drive efforts, getting 4 million signatures would likely require soliciting at least 6-8 million people for their signature.

24. The success of solicitations will, of course, depend on the candidate’s appeal. In my experience, the conversion rate – the percentage of people solicited who decide to sign – differs based on the candidate’s platform. For example, I managed an attempt by a wealthy individual to qualify for the ballot as a presidential candidate in 1992. His political views were outside the mainstream and, as a result, far fewer people were willing to sign a ballot access petition on his behalf – it was very difficult to convince people to sign. Conversely, in my experience, candidates who hold views that are more in the political mainstream (and thus appealing to more voters) have much higher conversion rates. This in part reflects the random nature of the solicitation process. A signature gatherer does not know the politics of a person he or she stops on the street. Since it is more likely that that person is in the political mainstream

\(^5\) See Lessons from Recent GOTV Experiments, Yale University Institute for Social and Policy Studies, http://gotv.research.yale.edu/?q=node/10 (last visited Aug. 6, 2014) (“[M]any results suggest that it is the dynamic interaction of authentic person-to-person contact that is most important in determining whether a method will successfully mobilize voters.”).
than at the political fringes, a candidate in the mainstream is more likely to gain that person’s support.

25. In light of the number of signatures and voter solicitations needed, the cost of sustaining such an effort, the wide range of demographic groups that will be represented in the millions of signatures collected, and the higher conversion rate for more mainstream candidates, it is my opinion that winning the signature drive competition will constitute a significant demonstration of a candidate’s ability to obtain broad electoral support.

THE SIGNATURE DRIVE COMPETITION CAN BE CONDUCTED IN A FAIR AND TIMELY FASHION

26. A significant virtue of the signature drive competition is that it provides an easily quantifiable metric – determining the winner only requires counting the signatures. A third-party accounting firm could be utilized to count and certify the number of signatures in support of each candidate, and it could implement measures to detect and prevent fraud. In doing so, both candidates and the CPD will have a reliable way to determine who has collected the most signatures. The competition will also ban fraudulent and illegal practices, as well as require candidates to certify that they complied with all the relevant state laws governing ballot access petitions. This will serve as additional deterrents to fraud. Moreover, candidates competing for the spot in the debates will have an incentive to police the activity of their competitors and thus root out any fraud or illegal activity (e.g. paying people to sign). For these reasons, I do not believe there is a significant risk of misconduct affecting the competition.

27. Existing state laws also provide natural start and end dates for the competition. Virtually all states have laws establishing start dates for candidates to begin gathering signatures for ballot access, some as early two years before the collection. Under the competition, a candidate could not begin collecting signatures in a state until the state permits signature
collection to begin for purposes of ballot access. Deadlines for when signatures must be presented to state agencies vary as well, but April 30 is a sensible cutoff date for various reasons. First, some states will have already had their signature deadlines for third-party qualification at or before that date. Second, even in states with later deadlines, viable candidates plan for and execute signature collection well before the deadlines. And other aspects of the ballot access process in some states, like identifying and certifying presidential electors in connection with the ballot access petition (which some states require), necessarily require advance planning. Third, April 30 also corresponds to when a significant number of major party primary elections will have been held; indeed, in almost all cycles, the two major party’s candidates will be decided by April 30, and thus two of the participants in the fall debates will be set. April 30 is thus a natural deadline for the completion of the signature drive competition since it enables identification of the third debate participant to occur roughly contemporaneously. At that point, all three candidates will be on a level playing field six months prior to an election.

Dated: Sacramento, California
September 5, 2014

Michael Arno

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6 Some states permit collection of signatures at any time. For these states, the competition could begin no earlier than the earliest date provided for under any state’s law for collecting signatures.
Change the Rule

Exhibit VI is a second study by Doug Schoen showing that, under a system where debate access is determined by a signature drive competition, an independent candidate can run a competitive campaign at a significantly less cost than required by the CPD’s present rules.
THE IMPACT OF PRESIDENTIAL DEBATE REFORM

Douglas Schoen
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OVERVIEW

In this report, we look at how reforming the Commission on Presidential Debates’ (CPD) selection criteria could help increase the viability of a non-major party candidate by lowering the necessary costs that such a candidate would need to have a realistic chance at being selected to participate in a debate. Currently, the CPD currently requires that a candidate have at least 15% support in national public opinion polls in September of a presidential election year in order to gain entry to the presidential debates. This report considers an alternative method for determining debate access. The new rule would work as follows: On April 30 any candidate, party, or nominating process with ballot access in states that collectively have at least 270 Electoral College votes would notify the CPD of that access. If there is more than one, then whoever has gathered the most signatures as part of the ballot access process will participate in the debates with the Democratic and Republican nominees. Under this rule, the winner of the signature drive competition will know on May 1 that he or she is guaranteed access to the fall presidential debates.

This report will address the following questions:

1. **How would reforming the debate selection criteria affect campaign costs for a non-major party candidate?**

2. **Are reform proposals such as using an earlier poll date or a lower mandatory support threshold more effective criteria to assess candidate viability and determine debate access?**
What follows is an overview of the key findings of the research we undertook to answer these questions. A full elaboration and discussion of these findings can be found beginning on page 6 of this document.

**EXECUTIVE SUMMARY OF KEY FINDINGS**

1. *How would reforming the debate selection process affect campaign costs of a non-major party candidate?*

   If guaranteed access to the debates by May 1 of the election year, an independent candidate would be able to run a campaign with significantly reduced costs. I estimate that a candidate could avoid at least $171,254,109 in costs if guaranteed access to the debates.

   Participation in the debate would decrease the scale of large media buys necessary to achieve the needed name recognition, saving the candidate nearly the full cost of an 18-week intensive campaign.

2. *Are reform proposals such as an early polling date or a lower mandatory threshold more effective criteria to assess candidate viability and determine debate access?*

   Ideas to reform the debate access criteria include using polling data from May or earlier, as well as lowering the necessary support from 15%. Such proposals fall short in accurately selecting the most viable presidential candidates for debate participation.
I. IMPACT OF DEBATE ACCESS

A. IMPACT ON COST

Gaining access to the presidential debates by May 1 of the election year would radically lower costs for an independent candidate, making a presidential campaign a much more affordable prospect. Elsewhere, I have estimated the expenses of for an independent presidential campaign, approximately 40% of which go toward media buys, which are necessary to boost an independent’s name recognition. Specifically, I would advise that an independent candidate for the presidency budget to spend more than $106 million on paid media, as part of an overall campaign budget of over $266 million, in order to have a realistic shot of qualifying for the debates under the CPD’s present rule. An independent candidate needs to spend such amounts over a sustained period of time for greater name recognition because the media devotes most airtime to the two-party candidates, resulting in less free coverage for an independent.

That there was only one reporter charged with covering the Gary Johnson campaign highlights the point made above: the media does not give non major party candidates a chance to present themselves to the voters. This is extremely detrimental to non-major party candidates because today, “the ‘viability’ of a political candidate is predicated upon one factor – mainstream media coverage”1.

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1 Chris Hinyub, Third party candidates still face innumerable political obstacles, IVN (Mar. 31, 2010), http://ivn.us/2010/03/31/third-party-candidates-still-face-innumerable-political-obstacles/.
When the media does deign to cover non-major party candidates, its coverage is often derisive to the point of being contumelious. Examples include references to non-major party candidates as “also-rans” and “spoilers,” and the much more egregious instance in 1992 when the *Washington Post* ran a feature suggesting Ross Perot should pick a guerrilla, Prince Charles, or Jack Kevorkian as his running mate. Indeed, this sad reality is reflected in the voters, who have begun to internalize the narrative that non-major party candidates are inherently extreme or just plain wacky.

Increased name recognition and free coverage are not the only advantages that derive from participating in a presidential debate. The novelty of being an independent in a presidential debate, coupled with a satisfactory or above-average debate performance, has the potential to generate widespread media attention. And simply participating in a presidential debate would increase the quality and quantity of relationships that an independent campaign has with media, in turn improving the volume and favorability of the coverage. While the value of the free media attention an independent candidate receives from being in a debate is difficult to quantify, it would certainly reduce media costs for the campaign dramatically. Furthermore, participating in a presidential debate gives an independent candidate the credibility they need to raise funds more widely.

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Most importantly, if the independent candidate is guaranteed a spot in the debate by May 1, there is no reason for him to run the major national media campaign necessary to satisfy the CPD's existing 15% rule that I have described elsewhere. If guaranteed to share the stage with the two major party candidates, the candidate would garner much more free media over the course of the campaign. He could spend a fraction of the money on advertising that otherwise would be necessary to achieve name recognition. Theoretically, I might advise the independent candidate to forgo almost the entire national media campaign to either conserve resources or allocate them elsewhere. I believe he could still do fine in the polls leading into the debate as a result of the new media attention. And even if his poll numbers dropped, he would not be forced to start spending money because the rule change guarantees him a spot in the debate, no longer making polls the determinants of campaign spending (of course, if resources allow, the candidate might still decide to the spend the money). Elsewhere, I have estimated that a candidate should plan to spend at least $106,705,776 on media buys to satisfy the existing CPD debate access rule. If he chose to follow through with only the national broadcast buy ($21,547,845), he would save $85,157,931, and, I believe, would still be able to reach a large national audience.

Running fewer ads will accordingly lower the amount of money spent on ad production and consulting. Further, the independent candidate need not poll as compulsively as he would have before. Under the old regime, the independent candidate would have to run fairly extensive polls throughout the summer to make sure his campaign was near 15%. Now, however, pre-debate polling is no longer a
necessity, whereas it is under the current rules. The independent candidate, with
the rule change in place, could afford to forgo pre-debate polling entirely so as to
compete more effectively with fewer resources.

Similarly, I would advise the independent campaign to cut its travel expenses
and its budget for campaign events, as the candidate would not have to travel as
much. Under the old regime, every campaign stop was crucial as it was a necessary
tactic to boost name recognition. Under the new rules, however, the independent
candidate could afford to forgo some campaign events as a means to reduce costs. A
guaranteed spot in the debate is also a guaranteed spot in the national media
coverage of the election. This will introduce the independent candidate to voters
that, without benefitting from a spot in the debate, the independent would have to
introduce himself to, at his or her own expense. Even if this does not become the
case, if the media continues to neglect the independent candidate, the independent
will not feel an existential pressure to bolster his or her name recognition because
many people will see him or her in the actual debates. In other words, a guaranteed
spot in the debates will likely both increase exposure, and eliminate the dangers of
low pre-debate exposure, thus allowing the independent to limit campaign events
and reduce costs.

To be sure, the only reason I would feel comfortable advising the
independent candidate to skip these normal campaign features – pre-debate polling,
local media buys, an extensive travel schedule, to name a few – as a means to save
money is because being guaranteed debate access makes them, if not
supererogatory, at least non-essential. That is, although they remain important
parts of a campaign, the independent candidate does not have to spend money on them, and thus can compete more effectively with fewer resources. The campaign is finally afforded the ability to preserve its scarce resources, whereas now, under the current debate regime, a candidate is compelled by political reality to spend.

As momentum and media attention build, and name recognition spreads, the independent candidate is likely to see a swell in the number of volunteers his campaign is receiving. The volunteers would reduce payroll costs, one of the single largest expenditures of the Romney and Obama campaigns. The increase in volunteers would likely have a ripple effect, reducing costs in everything from polling to telemarketing to mailing.

Because the independent candidate would not have to run an intensive national campaign for 18-weeks prior to the debates, I would suggest that the above suggested budget be cut by 50%. Based on my experience, I am certain that the campaign, if it were guaranteed a spot in the debates and thus guaranteed a degree of serious media coverage, could responsibly make these cuts without jeopardizing the electoral viability of the campaign. This puts the total cost of the campaign at $94,805,694.

In other words, eliminating the current debate criteria and replacing them with a competition based on ballot access signatures, saves an independent campaign at least $177,768,449. The arithmetic is summarized below:
Debate Access Savings (Summary 1.1)

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost</th>
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</thead>
<tbody>
<tr>
<td>Cost of independent campaign activities without guarantee of debate:</td>
<td>$146,515,698</td>
</tr>
<tr>
<td>Cost of independent campaign activities with guarantee of debate:</td>
<td>$73,257,849</td>
</tr>
<tr>
<td>Cost of independent campaign activities with guarantee of debate plus</td>
<td>$94,805,694</td>
</tr>
<tr>
<td>reduced media buy:</td>
<td></td>
</tr>
<tr>
<td>Money saved from debate access:</td>
<td>$171,254,109</td>
</tr>
</tbody>
</table>

B. IMPACT ON FUNDRAISING

In addition to the money saved, I believe that the independent candidate will likely receive more donations. As his campaign gains credibility by appearing in the debates, it will attract more potential donors.

With their effectively universal name recognition, Obama and Romney were able to raise $715,677,692 and $446,135,997 respectively. Of course, a large portion of these donations came from big donors that will likely remain loyal to the major parties. However, the Obama campaign was able to raise $233,215,440 from
small individual contributions, while the Romney campaign was able to raise $79,806,091 from small individual contributions⁴.

These two figures can be used to come up with an estimate for how many donations the independent candidate would receive: the average of these two numbers is **$156,510,766**.

Using this figure as a base, a generous estimate would be that an independent with limited recognition could raise money at least at 5-10% of the rate of the major candidates, meaning that an independent candidate would likely raise between **$7,825,538.3 and $15,651,076.6**. However, being guaranteed debate access in May would cause the rate of fundraising to increase as the independent candidate’s campaign builds credibility and recognition, and if the independent candidate performs at least passably during the debates it will go up further.

If this occurs it is reasonable to suppose that an independent campaign could attract small individual donors at the rate of 20-30% of the major campaigns, putting its fundraising range between $31,302,153.20 and $46,953,229.80.

**Debate access could therefore increase the funds raised by an independent candidate by between $23,476,614.9 and $31,302,153.2.**

Fundraising with Debate Access (Summary 1.2)

Average of amount raised by Romney and Obama campaigns from small individual contributions:

$156,510,766

Weakly performing independent candidate (5-10% of Romney-Obama average):

$156,510,766 \times (.05), \ $156,510,766 \times (.10) = \\
$7,825,538.3 \ to \ $15,651,076.6

Moderately performing independent candidate (20-30% of Romney-Obama average):

$156,510,766 \times (.20), \ $156,510,766 \times (.30) = \\
$31,302,153.20 \ to \ $46,953,229.80

Difference in estimated fundraising:

($31,302,153.20 - $7,825,538.3) \ to \ ($46,953,229.80 - $15,651,076.6)

**Impact of debate access on independent campaign fundraising:**

$23,476,614.9 \ to \ $31,302,153.2
II. ALTERNATIVE REFORM PROPOSALS

A. Polling Before September

As has been shown, the sustained campaign that would be necessary to garner enough name recognition and support to reach 15% in the polls by September would be prohibitively expensive. However, it is a mistake to solve this problem by basing the debate selection criteria on polling done in or earlier than September as well.

Poll numbers far-removed from Election Day do not accurately measure viability. Simply review May or summer polls from modern presidential elections and it will become obvious that they are unable to predict outcomes with any real accuracy. In May of 1980, President Carter was beating Governor Reagan by 8%, and Rep. Anderson was polling at 21%; in May of 1988, Governor Dukakis was beating Vice President Bush by 16%; in May of 1992, Perot was tied with President Bush, 10% ahead of Governor Clinton. Even in the elections in which May polls had the eventual winner leading at the time, they did not predict the margin accurately. The same trend holds true for polls taken in June, July, and August: polling months away from Election Day lacks predictive power.

In short, if the debate selection criterion is supposed to be in some way derived from the idea of viability, it makes no sense to use polls that come out at least half a year from Election Day; they have questionable predictive accuracy and therefore cannot offer any insight into national viability of independent candidates.
Further, this will not solve the problem identified earlier, namely, that an independent candidate would have to pay his way to national name recognition. The spending would be somewhat reduced as it would not have to be sustained over an entire summer, but it would still require that an independent candidate have a war chest large enough for a national media campaign.

The costs of running a campaign are such that, if the debate rules remain unchanged, only an independently wealthy candidate, one with an already high degree of name recognition, can make a credible run for the White House without the backing of one of the major parties. For example, former New York City Mayor Michael Bloomberg has national name recognition and enough money of his own to make a viable independent presidential run. But the presidency should be open to more people than just America’s economic elite. There will not likely be an abundance of civic-minded uber-rich leaders who want to run for public office. Instead, the rules must be designed to embody a more democratic and egalitarian paradigm.

B. Lowering The Polling Threshold

Perhaps an obvious reform would be to lower the requirement from 15% down to 10% or even 5%. Surely, as some might argue, this would make it easier for non-major party candidates to appear in the debates. Despite this, it would also bring up new issues that are equally undesirable. In 1968, George Wallace, in Gallup’s survey, polled over 15% from July until Election Day – in September, in three separate polls, he reached 19%, 21%, and 20%. This highlights a troubling fact: even as the rules currently stand, regional oddities have a real chance of
making it to the debate; Wallace barely won more than 10% of the vote outside of the deep South. The likelihood of this happening again is only increased if the poll requirement is lowered. An important point is here underscored: national poll data does not imply electoral viability. It makes no attempt to differentiate between regional and national appeal. We certainly believe that our proposed reform, which guarantees that a candidate have national appeal, as well as be capable of organizing and capitalizing on that appeal, better measures viability than polling.

C. Spoiler Concerns

Many opponents of reform argue that it is useless to include an independent candidate in the debates because voters, thinking that the independent will be a spoiler, will not vote for him. This concern is neither grounded in fact, nor is it relevant. As one can see in both 1992 and 1996, millions of Americans felt comfortable casting their vote for Ross Perot. His national vote share stands as testament to the fact that voters are unafraid to support independent candidates who appear to be viable.

Furthermore, this is not a relevant concern for the CPD. It is the job of the CPD to present the voters with viable choices, not to rank those choices, excluding some to help others. If a voter decides that a candidate is only a spoiler, then he or she will not vote for him; it is a concern for the voters to take into account, not the CPD.
Change the Rule

Exhibit VII - The Directors of the CPD
Directors of the Commission on Presidential Debates

The American people know it is impossible to win the Presidency without being in the national debates. What they may not know is that the 17 directors of the Commission on Presidential Debates, listed below, control the rules for who gets into those debates.

According to FEC regulations, debate sponsors must not “endorse, support, or oppose political candidates or political parties.”

Without question, every current director has had an extraordinary career and has offered exceptional service to America. Unfortunately, it is not clear if the directors of the CPD, as a group, will be seen by the voting public as objective in their rule making.

Can the CPD - for the first time in history - design a rule to allow an independent candidate into the debates at least 6 months before the election?

Frank J. Fahrenkopf, Jr. (R) – Co-chair of the CPD since 1987
Michael D. McCurry (D) – Co-chair of the CPD since 2009
John C. Danforth (R) – Director of the CPD since at least 1997
Newton N. Minow (D) – CPD Director since at least 1997
Richard D. Parsons (R) – CPD Director since 2010
Mitchell E. Daniels, Jr. (R) – CPD Director since 2014
Jane Harman (D) – CPD Director since 2014
Leon Panetta (D) – CPD Director since 2014
Alan K. Simpson (R) – CPD Director since 2000
Olympia Snowe (R) – CPD Director since 2014
Howard G. Buffett (R) – CPD Director since at least 1997
John Griffen – CPD Director since 2010
Antonia Hernandez (D) – CPD Director since at least 1997
John I. Jenkins – CPD Director since 2011
Dorothy Ridings (D) – CPD Director since at least 1997
Shirley Tilghman (D) – CPD Director since 2014
Charles Gibson – CPD Director since 2014
Change the Rule

Exhibit VI -- A study by Doug Schoen showing that, under a system where debate access is determined by a signature drive competition, an independent candidate can run a competitive campaign at a significantly less cost than required by the CPD’s present rules.
Independents and the Presidential Debate System

Douglas E. Schoen, LLC
August 29, 2014
Overview

• Douglas E. Schoen, LLC conducted a survey with a random sample of 1,000 likely voters across the country from July 14 – 28, 2014.
• The purpose of this survey was to test voter opinion on reforming presidential debates to include independent candidates.
• The margin of sampling error for this poll is +/-3%.
Overview

• There is overwhelming support for making changes to the Presidential debate system.

  o Sixty-six percent of voters think the debates could do a better job informing the public
  o A majority of voters want Independent candidates to be included in Presidential debates
  o Nearly three quarters of voters agree that the debate system actually “sabotages the electoral process,” as Walter Cronkite put it
Overview

• Our survey found that there is deep dissatisfaction with the two-party system in America.

  o Two-thirds of voters feel the political process has gotten worse in the last few years
  o Over 80 percent (83%) say that we need substantial political reforms in America
  o A majority of voters (53%) report to be unsatisfied with the two-party system
Overview: Voter Dissatisfaction with the Two-Party System

- A plurality of voters (24%) say they are dissatisfied with the two party system because they feel the two parties only serve the extremes.

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<thead>
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<td>15%</td>
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<tr>
<td>Two parties are corrupt</td>
<td>15%</td>
</tr>
<tr>
<td>Two party system is not responsive to issues facing the country</td>
<td>15%</td>
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</tbody>
</table>
Overview

- Voters give negative ratings to both Republicans and Democrats.
  - The Democratic Party’s negative ratings have steadily increased over the past two years, going from 40% in Sept. 2012 to 45% in June 2013 to 48% today.
  - The Republican Party’s negative ratings have followed a similar pattern, going from 50% in Sept. 2012 to 55% in June 2013 to a record high 64% today.
Disapproval of Congress is at record highs:

- 83% of Americans disapprove of the job Congress is doing, up from 69% in March 2014.
- Close to 60% disapprove of the job Congressional Democrats are doing, up from 57% at this time last year.
- And 68% of Americans disapprove of the job Congressional Republicans are doing, up from 62% in 2012.
Overview

- Dissatisfaction is rooted in out-of-touch political parties that are perceived to only fight and not compromise.
  
  - Americans feel that the two-party system is broken because it serves the extremes of their parties and not the middle. Ninety-one percent of Americans are frustrated that elected officials fight as opposed to addressing our major problems. And 89% wish that politicians would work together and compromise.
Overview: Our Political System is Broken

- Taken together, an overwhelming majority (86%) see our political system as broken and no longer serving the interests of ordinary people.
Overview: Voters are Frustrated with Elected Officials

And 89% wish that politicians would work together and compromise so that we can move forward.

![Bar chart showing 89% agree and 9% disagree that politicians should work together and compromise so we can move forward.](chart.png)
Overview

• Almost all of those surveyed (93%) are familiar with presidential debates.

• However, there is an overwhelming feeling that the debates don’t do enough to inform the general public and could be improved.

• 66% of respondents said that the debates could do a better job in informing the electorate while only 27% said they have done as good a job as possible.
Overview: Presidential Debates

- Virtually all respondents (93%) are familiar with Presidential debates.
And while almost all of those surveyed are familiar with presidential debates, close to two-thirds (66%) feel the debates could do a better job informing the public.
Overview: Improving Presidential Debates

• We asked voters what innovations they thought would improve the debates. The top five innovations were:

1. If the candidates’ responses didn’t feel pre-planned (52%)
2. If a candidate from outside the two parties was included in the debates (50%)
3. If the candidates went into more depth on the issues (50%)
4. If the moderator asked more hard-hitting questions (49%)
5. If a wider range of issues were discussed (48%)
Overview: Improving Presidential Debates

- A majority of voters (52%) say they would like it if the candidates’ answers weren’t pre-planned. And 50% of voters said they’d like to see a candidate from outside the two main parties and if the candidates went more in-depth on the issues.
Overview:

• We tested two arguments for reforming the presidential debate system to include candidates from outside the two parties. Both were convincing to a majority of voters.

• **Seventy-two percent** found Walter Cronkite’s argument that the debates actually “sabotage the electoral process” and “defy meaningful discourse” a convincing reason to reform the presidential debate system.

• **Fifty-five percent** found the fact that the current Co-Chair of the Commission on Presidential Debates has said that the **goal of the debates is to build up the main two parties** to be a convincing reason to reform the presidential debate system.
Overview: Reforming Presidential Debates

- Cronkite’s argument for reforming the Presidential debate system gets strong support from 72% of voters.

The Debates “Sabotage the Electoral Process” and “Defy Meaningful Discourse”

- Convincing reason to reform the presidential debate system: 72%
- Not convincing reason to reform the presidential debate system: 20%
Overview: Reforming Presidential Debates

- And the fact that current Co-Chair of the Commission on Presidential debates has said that the goal in running the Presidential debates is to exclude independent candidates was a convincing argument to reform the Presidential debate system for 55% of voters.

![Bar chart showing reasons for reforming the presidential debate system]
Overview

• To a large degree, voters hold the media responsible for poor coverage of the candidates and issues.

• A solid majority (60%) do not have confidence that the media will provide good coverage of all relevant candidates and issues during the next presidential election.
Overview: Support for Independent candidates

- There is a great deal of support for independent candidates to participate more in the political process.
  - Eighty-one percent say it’s important to have independent candidates run for office.
  - Sixty-five percent often feel that the Democrat candidate is too far left and the Republican candidate is too far to the right and would like the option to vote for an independent candidate.
  - And over three quarters (76%) say it is important to elect independents to break the partisan gridlock in Washington.
Overview: Voters Want Independent Candidates to Run for Office

- It is important to a strong majority (81%) of the American people to have independent candidates run for office.
Overview: Independent Candidates

• Moreover, 62% say that they are likely to vote for an independent candidate in the 2016 presidential election.

• But at the same time, 64% of voters worry that if they vote for an independent candidate they will be wasting their vote and end up with the candidate or party they least prefer.
Overview: Arguments for Independents

• There are a number of persuasive arguments as to why voters feel we need to elect Independent candidates:

  ✓ 91% of Americans believe we need to elect someone who can produce real change and who isn’t a career politician.
  ✓ 86% feel that the parties control who gets elected to office, not the voters.
  ✓ 86% believe that the main two parties are too beholden to special and corporate interests to create any meaningful change.
  ✓ 67% think that the Democrats and Republicans have both failed to solve the country’s problems
Overview: Independents

• A plurality of voters (42%) feel that having an Independent president would **improve the situation in Washington**.

• And nearly two thirds (63%) think that an independent president could be **more effective** or **just as effective** as a president from the two major parties.
Overview: Key Conclusions

The messages that will work best in favor of independent candidates are:

1. That they will produce real change
2. That they aren’t career politicians
3. That they aren’t beholden to special or corporate interests
4. That the voters are in charge of the electoral process, not the Democrats or Republicans
5. That Democrats and Republicans haven’t solved American’s problems
Overview: Key Conclusions

• There is strong interest in reforming the presidential debate process in America so that it better informs the public.

• A majority of Americans support integrating Independent candidates into presidential debates and feel it would improve the debates for a majority of voters, making it a worthwhile endeavor.
Overview

• The following slides present the main findings from the survey.
Summary of Main Findings
Voters Unsatisfied with the Political System

- Voters feel strongly that the political process in America has gotten worse in the last few years.
Voters Unsatisfied with the Political System

- A majority (53%) of voters report to be unsatisfied with the political system.
Main Reasons Americans are Unsatisfied with the Two-Party System

• A plurality of voters (24%) say they are unsatisfied with the two party system because they feel the two parties only serve the extremes.

Percent unsatisfied

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</tbody>
</table>
Presidential Obama’s Negative Ratings are Increasing

- Between January and July of 2014, President Obama’s Unfavorable rating increased from 40% to 56%.
Democrat Party’s Negative Ratings are Increasing

- The percentage of voters who rate the Democrat Party unfavorably has grown from 40% in 2012 to 48% today. What used to be a clear favorable rating for the Democrats has disappeared.
The Republican Party’s negative ratings have increased even more than the Democrats’, currently at record high 64%.
Today, more than 80% of American disapprove of the job Congress is doing. This is a 14 point increase from earlier this year.
A majority of Americans disapprove of the job both Congressional Democrats and Republicans are doing.
Ninety-one percent of Americans are frustrated that elected officials only seem to fight instead of addressing major problems.
Frustration with Elected Officials

- And 89% wish that politicians would work together and compromise so that we can move forward.
The Broken Political System

- Taken together, an overwhelming majority (86%) see our political system as broken and no longer serving the interests of ordinary people.
The Broken Political System

- Over three-quarters of voters (77%) are angry at elected officials and want them out of office.

I am angry and want to throw them all out

- 77% Agree
- 19% Disagree
Moreover, 83% believe that we need substantial political reforms as opposed to only 10% who think the system is working well.
Presidential Debates

• While almost all of those surveyed are familiar with presidential debates, close to two-thirds (66%) feel the debates could do a better job informing the public.
Improving Presidential Debates

- A majority of voters (52%) say they would like it if the candidates’ answers weren’t pre-planned. And 50% of voters said they’d like to see a candidate from outside the two main parties and if the candidates went more in-depth on the issues.
Reforming Presidential Debates

- We tested two arguments for reforming the presidential debate system to include candidates from outside the two parties. Both were convincing to a majority of voters.

- Seventy-two percent found Walter Cronkite’s argument that the debates actually “sabotage the electoral process” and “defy meaningful discourse” a convincing reason to reform the presidential debate system.

- Fifty-five percent found the fact that the current Co-Chair of the Commission on Presidential Debates has said that the goal of the debates is to build up the main two parties to be a convincing reason to reform the presidential debate system.
Reforming Presidential Debates

The Debates “Sabotage the Electoral Process” and “Defy Meaningful Discourse”

- **Convincing reason to reform the presidential debate system**: 72%
- **Not convincing reason to reform the presidential debate system**: 20%

The chart shows that 72% of respondents believe there is a convincing reason to reform the presidential debate system, while 20% do not. This suggests a strong majority opinion favoring reform.
Reforming Presidential Debates

The Debates Exclude Independent Candidates

- **55%** Convincing reason to reform the presidential debate system
- **36%** Not convincing reason to reform the presidential debate system
Reforming Presidential Campaigns and Elections

• Debates aren’t the only problem: **voters feel that the campaigns and elections themselves need to be reformed.**

• A majority of voters (53%) do not believe that there is appropriate regulatory oversight of presidential campaigns or think that they are conducted with an eye towards fairness.

• And 52% of voters do not have confidence in the FEC to competently and fairly regulate presidential elections.
Reforming Presidential Campaigns and Elections

There is Appropriate Regulatory Oversight Over Presidential Campaigns

- Agree: 40%
- Disagree: 53%

The FEC can Competently and Fairly Regulate Presidential Elections

- Agree: 39%
- Disagree: 52%
Low Confidence in the Media

- We asked respondents if they have confidence that the media will provide good coverage of all relevant candidates and issues during the next presidential election and found that 60% did not.
The vast majority of voters do not think candidates from the two major parties effectively represent the American people. Sixty-six percent of voters say we need a broader range of candidates while only 23% believe the main two parties represent the American people, up from 57% in 2011.
Voters Want Independent Candidates to Run for Office

- It is important to a strong majority (81%) of the American people to have independent candidates run for office.
Independents Can Break Partisan Gridlock

• Over three quarters of voters (76%) believe it is important to elect independents to break partisan gridlock in Washington.

[Bar chart showing 76% in blue, 13% in brown, x-axis: Electing independents to break partisan gridlock]
Independents Will Cover the Middle

- Americans feel that Democrat candidates are too far left and Republican candidates too far to the right in presidential elections. They want the option to vote for an independent in the middle.

Would like the option to vote for an independent candidate in the middle of the political spectrum
Independents Will Cover the Middle

- The same is true in local and statewide office elections.

Would like the option to vote for an independent candidate in the middle of the political spectrum:

- Agree: 61%
- Disagree: 32%
Why Voters Want Independent Candidates

- Voters want to elect independents to produce change (91%); so that voters will have control over who gets into office instead of the parties (86%); and to get around special and corporate interests (86%).

Reasons to vote for an independent: 91% - Produce change, 86% - Voter control instead of political parties, 86% - Take out special/corporate interests, 67% - Democrats and Republicans have failed.
Sixty-two percent of voters are likely to vote for an independent candidate for president.
But Voters are Worried About Wasting Their Vote on an Independent Candidate

- A majority of voters (64%) reported that they worry that voting for an independent candidate will be wasting their vote and they will get the party they like the least.
Strong Support for an Independent President

• Nevertheless, a plurality of voters (42%) think that having an independent president would improve the situation in Washington.

• Nearly two thirds (63%) think an independent president would be more or just as effective as a Democrat or Republican president.
Strong Support for Independent Candidates

- 42% support for an Independent President helping the Legislative Process
- 14% support for an Independent President hurting the Legislative Process

- 63% support for an Independent President being more or just as effective as a Democrat or Republican
- 19% support for an Independent President being less effective