

**PETITION TO THE FEDERAL ELECTION COMMISSION  
FOR A RULE-MAKING REGARDING  
SPONSORSHIP OF PRESIDENTIAL DEBATES**

**INTRODUCTION**

This petition for the amendment of a rule is submitted by Harry Kresky, Esq. on behalf of IndependentVoting.org (“IV”). IV is owned and operated by the Committee for a Unified Independent Party, a not-for-profit corporation organized in the State of New York and exempt from federal income tax, pursuant to Section 501(c)(4) of the Internal Revenue Code.

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The mission of IV is to advance the interests of independent voters in all areas of electoral politics and to reform America’s electoral system so it is democratic, fair, and inclusive of all voters and candidates, whether or not affiliated with a major or minor party or unaffiliated. More about its vision and activities can be found at its website, IndependentVoting.org.

This petition would affect 11 C.F.R. Section 110.13(c), the agency regulation that sets forth criteria that debate sponsors must use in selecting participants in candidate debates.

Specifically, it would seek to add a subsection (d) to Section 110.13 stating:

Any staging organization for a debate among candidates for the office of President or Vice President of the United States shall invite to participate all candidates who are qualified to serve in said offices and have achieved a place on the ballot in states which, in the aggregate, are eligible to cast 270 Electoral College Votes.

Two hundred seventy is the number of electoral votes necessary to win the Presidency.

## FACTUAL AND LEGAL GROUNDS

1. The use of polling is not appropriate and discriminates against independent and third-party candidates. On or about September 10, 2014 Level the Playing Field (“Level”) submitted a Petition for Rule-Making. It makes cogent arguments as to why criteria for inclusion based on polling voters as to which candidates they support is unreasonable, unfair, and discriminates against independent and third-party candidates. Level’s petition is annexed hereto, and its arguments regarding this subject are respectfully incorporated herein.

2. It is incumbent upon the Federal Election Commission to promulgate a rule with the actual criteria. The existing rule requires only that debate sponsors:

use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, 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.

11 C.F.R. Section 110.13(c). The objective criteria requirement was adopted by the Federal Election Commission (the “Commission”) in 1996 in response to litigation by independents and other efforts to open up the presidential debates.<sup>1</sup> However, experience with the Commission on Presidential Debates (“CPD”), the sponsor of all such debates since 1988, demonstrates that the existing rule can be subverted to serve the interests of the two major parties at the expense of independent and third-party candidates. Level’s petition demonstrates this. The CPD has been

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<sup>1</sup> See, for example, the dissent of Judge Abner Mikva in, *Fulani v. Brady*, 935 F.2d 1324, 1337 (D.C. Cir. 1991) stating:

The majority's decision precludes judicial inquiry into allegations that the field has been tilted in favor of the major political parties, and seems to rationalize its result by dismissing Dr. Fulani's candidacy as mere grandstanding. Yet the First Amendment requires government neutrality regardless of candidates' supposed motives. I therefore dissent from a decision that insulates from review federal complicity in keeping minor political parties off the national stage.

widely criticized as an instrument of the two major parties,<sup>2</sup> and the Commission runs the risk of being cited for “complicity in keeping minor political parties off the national stage.”<sup>3</sup>

3. However, Level’s proposed alternative criteria are flawed. Level’s petition proposes the following criteria for inclusion in presidential debates:

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 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.<sup>4</sup>

These proposed criteria are deficient in the following respects:

- Petition-signature gathering is elevated to the status of an objective measure of public support beyond what the states already require to access the ballot. The history of the third-party and independent movements includes consistent efforts to reduce ballot-access requirements to level the playing field for non-major-party competitors. Level’s proposal would establish a governmental standard that makes it necessary to exceed existing signature requirements to vie for access to the presidential debates. As Jamin Raskin notes in his book *Overruling*

*Democracy*:

Even if a state had a valid interest in making candidates show a ‘modicum of support’ before finding a place on the ballot, the petition-gathering process does not promote this interest. In every state it is clear that the voter’s signature does *not* express political support for the candidate.<sup>5</sup>

- They severely disadvantage minor-party candidates, at least some of whose parties have already achieved permanent ballot status in a number of states and, therefore, do not have to petition in order to appear on the ballots of those states.

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<sup>2</sup> See, for example, <http://www.opendebates.org/theissue/whatisthecdp.html>. (as of May 27, 2015)

<sup>3</sup> See footnote 1 above.

<sup>4</sup> Level’s petition, pp. 23-24,

<sup>5</sup> *Overruling Democracy, The Supreme Court vs. The American People* (Routledge 2004), p. 110)

The April, 2015 issue of *Ballot Access News* reports that the Libertarian Party has ballot status in 30 states.<sup>6</sup> It make no sense to set up a debate-qualifying framework that compels the Libertarian candidate to commit labor and money to collect signatures that are not needed for ballot access in order to compete for the sole non-major-party slot in the presidential debates.

- The April 30 deadline is arbitrary and is in advance of the deadlines most states have established for filing signatures. According to the April 2015 *Ballot Access News*, only two states have petitioning deadlines prior to April 30 for either independent or third-party candidates.<sup>7</sup> Further, the April 30 deadline is long before most states engage in certifying the validity of signatures collected.
- At a time when 42 percent of Americans are independent, the April 30 deadline does not allow for the emergence of an independent candidacy in response to developments in the ongoing nominating process which continues well beyond April 30.
- According a slot in the presidential debates to the candidate who collects the most ballot-access signatures potentially rewards the candidate with the wealthiest supporters and also over-determines how candidates spend the funds available to them. The collection of petition signatures does not play a significant role in educating voters or in advancing a particular political vision. As Raskin points out, it is a bureaucratic exercise with little real value.<sup>8</sup>

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<sup>6</sup> <http://ballot-access.org/2015/05/04/april-2015-ballot-access-news-print-edition/>, (as of May 27, 2015), item 15.

<sup>7</sup> *Id.*

<sup>8</sup> "In truth, no one really knows what the signature means. It probably expresses the voter's hazy assent to the proposition that the candidate should not be denied a place on the ballot simply because he or she did not collect enough signatures. Thus, if it is a 'modicum of support' we are seeking to establish, we should not force the candidates to collect thousands of signatures from pedestrians and strangers willing to grant them a democratic right that is rightfully theirs. Rather, we should require the candidates to provide a signed statement by one hundred or

- A contest as to who can collect the most signatures by an early cutoff date encourages the collection and submission of signatures taken from persons not legally qualified to sign, or other forms of fraud.

4. The rule sought in this petition is objective, fair, inclusive, and not subject to manipulation. If we accept the proposition that the fundamental principle of democracy is that the voters choose who holds public office, then a debate format that does not give voters the opportunity to see and hear all of the eligible candidates is unacceptable. Criteria that further limit who can participate usurp the voters' role in the electoral process.

The criteria proposed by petitioner herein is objective, fair, inclusive, and respects the voters' right to make an educated choice in the general election:

Any staging organization for a debate among candidates for the office of President or Vice President of the United States shall invite to participate all candidates who are qualified to serve in said offices and have achieved a place on the ballot in states which, in the aggregate, are eligible to cast 270 Electoral College Votes.

Some will no doubt argue that this could place too many candidates on the debate stage. However, Level's petition notes that since 1988, in only one year was the number of independent or third-party candidates who would qualify under this rule greater than three.<sup>9</sup> Moreover, the Democratic and Republican presidential primary debates often include more than three candidates. For example, in 2012 the Republican debates included as many as nine candidates. And in 2008 (when there was no Democratic incumbent) the Party's debates included as many as eight candidates.<sup>10</sup>

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two hundred people that they actually plan to vote for the candidate. Of course, this procedure would underscore the dubiousness of the whole inquiry, because the state has no valid interest in deep-sea fishing in the political waters of civil society before an election. Let the candidates appear on the ballot; this is where they belong." *Overruling Democracy, supra*, pp. 110-11.

<sup>9</sup> Level petition, p. 24.

<sup>10</sup> [http://en.wikipedia.org/wiki/Republican\\_Party\\_presidential\\_debates,\\_2012](http://en.wikipedia.org/wiki/Republican_Party_presidential_debates,_2012);  
[http://en.wikipedia.org/wiki/Democratic\\_Party\\_presidential\\_debates,\\_2008](http://en.wikipedia.org/wiki/Democratic_Party_presidential_debates,_2008)

CONCLUSION

For the reasons set forth above, 11 C.F.R. Section 110.13, the agency regulation that sets forth criteria that debate sponsors must use in selecting participants in candidate debates, should be amended to add a subsection (d) stating:

Any staging organization for a debate among candidates for the office of President or Vice President of the United States shall invite to participate all candidates who are qualified to serve in said offices and have achieved a place on the ballot in states which, in the aggregate, are eligible to cast 270 Electoral College Votes.

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Respectfully submitted,



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