

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

LEVEL THE PLAYING FIELD, et al.,)	
)	
Plaintiffs,)	Civil Action No. 1:15-CV-01397-TSC
)	
v.)	
)	
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
)	
_____)	

**BRIEF OF *AMICUS CURIAE* COMMISSION ON PRESIDENTIAL DEBATES IN
SUPPORT OF DEFENDANT’S MOTION FOR SUMMARY JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amicus Curiae* Commission on Presidential Debates hereby certifies that it is a nonprofit, 501(c)(3) corporation. It has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

I. INTRODUCTION

The Commission on Presidential Debates (“CPD”) is a private, nonprofit, 501(c)(3) organization that has sponsored televised general election debates between or among the leading candidates for president in each election cycle since 1988. The CPD invites to participate in its debates any candidate who is qualified under the Constitution to be president, is on the ballot in enough states to garner a theoretical Electoral College majority, and has a level of public support of at least fifteen percent as reflected in the average of five national public opinion polls conducted shortly before the debates.

Plaintiffs prefer a different approach. Through administrative complaints and a petition for rulemaking filed with the Federal Election Commission (“FEC”), Plaintiffs seek to have the government require the CPD (and any other sponsor of general election presidential debates) to invite to participate in its debates at least one candidate who is unable to muster even fifteen percent in the polls. Plaintiffs suggest a signature gathering competition as an alternate path to qualifying for debate participation and achieving their ultimate goal of (as the lead Plaintiff’s name suggests) “level[ing] the playing field.”

While the FEC correctly dismissed Plaintiffs’ complaint and petition for rulemaking for multiple reasons, the CPD seeks to elaborate on a critical point that Plaintiffs have failed to address: their lawsuit seeks relief that would violate the CPD’s First Amendment rights. The sponsorship of a presidential debate involves political speech, and when regulating such speech, the government must tread lightly. The Supreme Court has expressly admonished that “it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.’” *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1450 (2014). The constitutional questions raised by the relief

Plaintiffs seek, and their flawed interpretation of the FEC's regulations, require the dismissal of Plaintiffs' lawsuit.

II. STATEMENT OF INTEREST

The Commission on Presidential Debates. The CPD is a private, nonpartisan 501(c)(3) organization. As a 501(c)(3) organization, it is eligible under federal law to serve as a debate sponsor. *See* 11 C.F.R. § 110.13(a). The CPD's primary mission is to ensure, for the benefit of the American electorate, that general election debates are held every four years between and among the leading candidates who have a realistic (i.e. more than theoretical) chance of being elected for the offices of President and Vice President of the United States. *See* Commission on Presidential Debates, Candidate Selection Criteria, <http://www.debates.org/index.php?page=overview>. The CPD has sponsored general election presidential debates in every election since 1988, and it is planning on bringing a series of high quality, educational debates to the electorate in 2016.

The CPD is an independent organization. It is not controlled by any political party or outside organization and it does not endorse, support, or oppose political candidates or parties. It receives no funding from the government or any political party, political action committee or candidate. The CPD is governed by an independent Board of Directors. The CPD Board presently is jointly chaired by Frank J. Fahrenkopf, Jr. and Michael D. McCurry. Mr. McCurry succeeded CPD co-founder Paul Kirk in 2009. Although at the time the CPD was formed, Messrs. Kirk and Fahrenkopf served, respectively, as chairmen of the Democratic National Committee and Republican National Committee, their terms ended in 1989. In the intervening 25-plus years, no sitting officer of either major party has had any affiliation with the CPD and the major parties have no role whatsoever in running the CPD or setting its policies. In addition

to the Co-Chairs, the current Board consists of the following distinguished Americans, all of whom volunteer their time to serve on the CPD Board:

Howard G. Buffett, *Chairman and CEO, The Howard G. Buffett Foundation*

John C. Danforth, *Former U.S. Senator*

Mitchell E. Daniels, Jr., *President, Purdue University*

Charles Gibson, *Former Anchor, ABC World News with Charles Gibson*

John Griffen, *Managing Director, Allen & Company LLC*

Jane Harman, *Director, President and CEO, Woodrow Wilson International Center for Scholars*

Antonia Hernandez, *President and CEO, California Community Foundation*

Reverend John I. Jenkins, *President, University of Notre Dame*

Jim Lehrer, *Former Executive Editor and Anchor of the NewsHour on PBS*

Newton N. Minow, *Senior Counsel, Sidley Austin LLP*

Richard D. Parsons, *Senior Advisor, Providence Equity Partners LLC*

Dorothy S. Ridings, *Former President, the League of Women Voters and Former President and CEO, Council on Foundations*

Olympia Snowe, *Former U.S. Senator*

Shirley M. Tilghman, *Former President, Princeton University*

The CPD obtains the funds required to produce its debates every four years and to support its ongoing voter education activities from the communities that host the debates and, to a lesser extent, from corporate, foundation, and private donors. Donors have no input into the management of any of the CPD's activities and have no input into the process by which the CPD selects debate participants.¹

¹ Plaintiffs strenuously challenge, but provide no legitimate evidence to dispute, the CPD's independence. They rely heavily on CPD Board members' isolated references to "bipartisanship" (rather than "nonpartisanship") and other events that transpired nearly thirty years ago, but the only remotely contemporaneous evidence they offer is a list of *personal* political contributions and other examples of CPD members, in their individual capacities, engaging in the political process. *See, e.g.*, Pls.' Mem. in Supp. of Mot. for Summ. J. ("Pls.' Mot.") 14-16, ECF No. 37. The FEC rightfully dismissed these allegations as ignoring the key distinction between acts committed in a board member's official capacity and acts committed in his or her personal capacity. Notably, even the IRS respects this distinction in determining whether an organization participated in a political campaign in violation of section 501(c)(3). *See, e.g.*, Tax Guide for Churches & Religious Organizations, IRS Pub. 1828, 2012 WL 8144695, at *7 (Jan. 1, 2012)

Candidate Selection Criteria. One of the most challenging issues faced by any debate sponsor is candidate selection. As noted, the nonpartisan, voter education goal of the CPD's debates is to afford the members of the public an opportunity to sharpen their views, in a focused debate format, of the leading candidates who have a realistic chance of being elected President and Vice President of the United States. The CPD's approach to candidate selection has been driven by this goal.

Scores of candidates run for president every election cycle, including dozens who do not seek the nomination of either major party. *See 2012 Presidential Form 2 Filers*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/press/resources/2012presidential_form2pty.shtml (last visited May 11, 2016) (reporting over 240 declared candidates who were not identified as members of the Democratic or Republican party). The CPD applies its nonpartisan candidate selection criteria in the final weeks of a long general election campaign. The CPD's selection criteria have always sought to identify the individuals whose public support has made them the leading candidates.²

In addition, candidates for federal office are not required to debate. History teaches that it is speculative at best to assume that the leading candidates would agree to share the stage with candidates enjoying only scant public support. *See, e.g.*, Pls.' Statement of Material Facts ¶ 33. Thus, a sponsor of general election debates that aims to provide the electorate with a focused debate that includes the leading candidates faces a difficult task. The sponsor needs to be

(recognizing that a religious leader's endorsement of a candidate in his or her individual capacity does not constitute political campaign intervention by the section 501(c)(3) tax exempt church); *see also* Letter from Lee Ann Elliott, Chairman, FEC, to Michael A. Nemeroff (May 31, 1984), A.O. 1984-12, 1984 WL 1022490 (acknowledging the distinction between a 501(c)(3) organization, and the political action committee created by its board members in their individual capacities). Few if any organizations would qualify for 501(c)(3) status if their members were prohibited from supporting candidates or otherwise participating in the political process *in an individual capacity*.

² Even when the debate sponsor is a state actor (unlike the CPD) and, therefore, subject to the limitations of the First Amendment when issuing debate invitations, the Supreme Court has expressly approved as lawful the sponsor's exclusion of a candidate based on his or her lack of voter support. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 683 (1998).

inclusive enough to invite each of those candidates, *regardless of party affiliation*, whose level of public support genuinely qualifies him or her as a leading candidate. At the same time, the sponsor should not take an approach so inclusive that invitations to candidates with scant public support deprives the public of the opportunity to see debates that include the candidates in whom they have the greatest interest. The CPD strives to strike this balance in an appropriate fashion.³

FEC regulations require a debate sponsor to make its candidate selection decisions on the basis of “pre-established, objective” criteria. *See* 11 C.F.R. § 110.13(c). After a thorough and wide-ranging review of alternative approaches to determining who is invited to participate in the general election debates it will sponsor, the CPD adopted, on October 28, 2015, its 2016 Non-Partisan Candidate Selection Criteria. Under the 2016 criteria, in addition to being constitutionally eligible, candidates must appear on a sufficient number of state ballots to have a mathematical chance of winning a majority vote in the Electoral College, and have a level of support of at least 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. The polls to be relied upon will be selected based on the quality of the methodology employed, the reputation of the polling organizations, and the frequency of the polling conducted. The CPD will identify the selected polling organizations well in advance of the time the criteria are applied. Although only adopted for 2016 after a thorough review of alternatives, the 2016 criteria and fifteen percent threshold are substantially the same as those employed by the CPD since 2000.⁴ Notably, the fifteen

³ *See Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991) (acknowledging that it is speculative at best to assume the leading candidates would agree to share the stage with candidates enjoying only scant public support).

⁴ *See Buchanan v. Fed. Election Comm’n*, 112 F. Supp. 2d 58, 75 (D.D.C. 2000) (noting that “[i]t is difficult to understand why it would be unreasonable or subjective to consider the extent of a candidate’s electoral support prior to the debate . . .” and upholding the FEC’s determination that the CPD’s fifteen percent threshold was objective and lawful).

percent threshold was also relied upon by the League of Women Voters prior to the CPD's formation in 1987. *See* League of Women Voters Educ. Fund, Resp. at 6, MUR 1287 (1980), *available at* http://www.fec.gov/disclosure_data/mur/1287.pdf.

The CPD's determination with respect to participation in the first-scheduled debate will be made after Labor Day 2016, but sufficiently in advance of the first-scheduled debate to allow for orderly planning. Invitations to participate in the vice-presidential debate will be extended to the running mates of each of the presidential candidates qualifying for participation in the CPD's first presidential debate. Invitations to participate in the second and third scheduled presidential debates will be based upon satisfaction of the same multiple criteria prior to each debate.

The CPD adopted its 2016 criteria based on the recommendations of a working group of its Board chaired by former League of Women Voters President Dorothy Ridings, who serves as a CPD Director. At the time the criteria were announced, Ms. Ridings stated, "We considered a wide array of approaches to the candidate selection issue. We concluded that CPD serves its voter education mission best when, in the final weeks of the campaign, based on pre-established, published, objective and transparent criteria, it identifies those individuals whose public support places them among the leading candidates and invites them to debate the issues of the day. We also concluded that the best available measure of public support is high-quality public opinion polling conducted near the time of the debates." Commission on Presidential Debates: An Overview, <http://www.debates.org/index.php?page=overview>.

Ms. Ridings also noted that, "Under the CPD's non-partisan criteria, no candidate or nominee of a party receives an automatic invitation. The CPD's objective criteria are applied on the same basis to all declared candidates, regardless of party affiliation or lack thereof." *Id.* Ms. Ridings explained, "During the course of the campaign, the candidates are afforded many

opportunities in a great variety of forums to advance their candidacies. The purpose of the criteria is to identify those candidates whose support among the electorate places them among the candidates who have a realistic chance of being elected President of the United States.” Ms. Ridings added, “The realistic chance need not be overwhelming, but it must be more than theoretical.” *Id.*

Also at the time the 2016 criteria were adopted, CPD Co-Chairs Frank J. Fahrenkopf, Jr. and Michael D. McCurry noted that, “It is appropriate for a debate sponsor to take the campaign as it finds it in the final weeks leading up to Election Day. The CPD’s debates are not intended to serve as a springboard for a candidate with only very modest support. Participation in the debates is determined by the level of public support a candidate enjoys as Election Day approaches.” *Id.*

This Litigation. Plaintiffs challenged the CPD’s nonpartisan criteria by filing a complaint and a petition for rulemaking before the FEC. The complaint alleged that the CPD’s criteria violate the FEC’s regulations and various provisions of the FECA, and the petition for rulemaking urged the FEC to prohibit debate sponsors from using polling thresholds as the only criterion for selecting debate participants. The FEC dismissed both, finding that the CPD had complied with the applicable laws, that the use of polling is consistent with applicable regulations, and that additional restrictions on candidate selection criteria were unnecessary. As a result, Plaintiffs filed this action in which they allege that the FEC’s rulings are contrary to law.

III. ARGUMENT

A. A Debate Sponsor’s Selection of Candidates to Participate in the Debate is Protected by the First Amendment.

The CPD and other debate sponsors engage in protected speech and expressive conduct: they develop candidate selection criteria, identify the candidates who meet the criteria, and invite

them to debate in a forum created by the debate staging organization. *Forbes*, 523 U.S. at 674 (debate sponsor's compilation of the speech of third parties is a communicative act); *Perot v. Fed. Election Comm'n*, 97 F.3d 553, 559 (D.C. Cir. 1996) (“[I]f this court were to enjoin the CPD from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the CPD’s First Amendment rights.”). *See also Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (holding that a parade organizer is a speaker that has the autonomy to choose the content of his own message). The Supreme Court has cited *Hurley* in acknowledging the expressive acts of a public broadcaster that sponsored candidate debates, *Forbes*, 523 U.S. at 674, as did the D.C. Circuit when it acknowledged that enjoining the CPD from staging debates would be unconstitutional, *Perot*, 97 F.3d at 559. In other words, it is well settled that restrictions on candidate selection criteria implicate debate sponsors’ First Amendment rights. *See also DeBauche v. Trani*, 191 F.3d 499, 509 (4th Cir. 1999) (“[T]he First Amendment protects private parties’ rights to put on (and select the content of) debates.”)

B. Plaintiffs Seek to Impose Unconstitutional Restrictions on the CPD and other Debate Sponsors.

“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (internal quotation marks omitted). Congress enacted the FECA to limit *quid pro quo* corruption and its appearance, but the Supreme Court has recognized that its restrictions “operate in an area of the most fundamental First Amendment activities.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). As a result, the Court determined that restrictions on political speech imposed by the Act or by the FEC’s regulations must be drawn and construed narrowly to target *quid pro quo* corruption or some other sufficiently important government interest in order

to avoid “unnecessary abridgment of First Amendment rights.” *McCutcheon*, 134 S.Ct. at 1446 (quoting *Buckley*, 424 U.S. at 25).

When the FEC adopted the candidate debate rules at issue in this lawsuit, it was mindful of the First Amendment interests at stake. The agency sought to strike the appropriate balance between the FECA’s objectives and the rights of debate sponsors and candidates by tailoring its regulations to target *quid pro quo* corruption, while avoiding any further restrictions that would unduly inject government into the debate over who should govern. *See* Corporate and Labor Organization Activity, 60 Fed. Reg. 64, 260, 64, 262 (Dec. 14, 1995), *available at* 1995 WL 735941. Thus, rather than impose its own pre-established set of criteria as some commenters suggested, the agency left to debate staging organizations the discretion to “decide which candidates to include in the debates.” *Id.* The requirement that staging organizations use pre-established, objective criteria was imposed specifically to avoid the appearance of a *quid pro quo*, the only government interest deemed sufficient by the Supreme Court to justify the FECA’s restrictions on political speech. *See, e.g., Wisc. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139, 143 (7th Cir. 2011) (identifying *quid pro quo* corruption as “the only governmental interest strong enough to justify restrictions on political speech”). Had the FEC gone further and narrowed debate sponsors’ discretion in selecting the pre-established objective criteria on which they would rely, the rule would not have survived constitutional scrutiny. It would have imposed restrictions on speech that went beyond what was required to avoid *quid pro quo* corruption, and the Supreme Court has unequivocally disclaimed any permissible government interest in leveling the playing field among candidates. *See McCutcheon*, 134 S. Ct. at 1450. A rule that would place additional restrictions on a debate sponsor’s discretion, on top of the regulations already in place, is exactly the type of “prophylaxis-upon-prophylaxis”

approach that the Supreme Court has warned against to avoid the unnecessary abridgment of political speech. *Id.* at 1444.⁵

Plaintiffs' effort in this lawsuit plainly is not directed at addressing *quid pro quo* corruption. It is designed to advance a particular political goal that the Supreme Court has stated is not a permissible objective of the federal election laws. The relief Plaintiffs seek runs afoul of the First Amendment.

CONCLUSION

For the reasons stated above, the CPD respectfully requests that the Court grant the FEC's motion for summary judgment and dismiss Plaintiffs' lawsuit.

⁵ It is no answer to suggest that the CPD may retain its selection criteria by registering as a political action committee ("PAC") and disclosing its contributors and expenditures. *See* Pls.' Mot. 7. That would require the CPD, a 501(c)(3) organization, to transform itself into a PAC, or to create a separate organization to stage the debates. Neither option allows the CPD in its current form to engage in the political speech challenged here, and that, by itself, violates the CPD's First Amendment rights. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337 (2010). As the Supreme Court also explained in *Citizens United*, "PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations." *Id.* To condition the CPD's speech on its willingness to navigate this regulatory labyrinth imposes a prior restraint that cannot be justified by any sufficiently important government interest. *See id.* at 334.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, I electronically filed the foregoing with the Clerk of the United States District Court for the District of Columbia by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully submitted,

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