

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

LEVEL THE PLAYING FIELD, et al.,

Plaintiffs,

vs.

FEDERAL ELECTION COMMISSION,

Defendants.

No. 1:15-cv-01397 (TSC)

**AMICUS CURIAE BRIEF OF FAIRVOTE IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT**

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2. Amicus has no parent corporation.
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Pursuant to Judge Chutkan's Minute Order dated March 17, 2016, FairVote submits this brief as *amicus curiae* in support of the Motion for Summary Judgment filed April 6, 2016 by Level the Playing Field, Peter Ackerman, Green Party of the United States, and Libertarian National Committee, Inc. ("Plaintiffs").

STATEMENT OF INTEREST

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

FairVote has previously filed *amicus curiae* briefs in a variety of cases, including cases regarding voter choice in general elections, the role of primary elections, and in cases brought under the Voting Rights Act. *See* Brief for FairVote and the Center for Competitive Democracy as Amici Curiae in Support of Neither Party, *Rubin v. Padilla*, No. 15-135 (U.S. 2015); Brief for FairVote and the Center for Competitive Democracy as Amici Curiae in Support of Neither Party, *Balsam v. Guadagno*, No. 15-39 (U.S. 2015); Brief for FairVote as Amicus Curiae, *Village of Port Chester v. United States*, available at <http://archive.fairvote.org/media/portchester2.pdf>.

Amicus has published articles and comments advocating for and critically analyzing reforms to debate qualification rules. *See, e.g.*, Robert Richie, Re: Petition for Rulemaking from Level the Playing Field to Revise and Amend 11 C.F.R. § 110.13(c) (Dec. 15, 2014), available *AMICUS CURIAE BRIEF OF FAIRVOTE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT*

at <http://www.shapiroarato.com/wp-content/uploads/2014/12/FairVote-Comment-12.15.14.pdf>.

Because of its familiarity with the benefits and drawbacks of debate rules, independent and third party participation in debates, and debate rule reforms, FairVote is particularly well-suited to expound on this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

FairVote agrees with the arguments made by Plaintiffs in their motion for summary judgment, and files separately to expand on the important factual background that goes to the heart of the legal questions they present.

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

Further, the exclusive use of five selected polls with a minimum 15% threshold for inclusion is abnormally harsh. Both in the states and in other nations, debate inclusion rules vary, but are generally far less exclusive than those used by the Commission on Presidential Debates ("CPD"). Debates may be conducted by non-profit organizations operating in the public interest, by the media directly, or by a public agency, and they may follow one set of rules or vary their rules as the election season progresses. In any case, a rule effectively limiting the debates to only two candidates is more limiting than either the state or international norms.

ARGUMENT

FairVote submits this brief to highlight important factual background which tends to suggest that the rules adopted by the CPD cannot be justified by an interest in orderly debates among serious candidates, but rather suggest an interest in preventing competition from those outside the two major parties in the general election. First, polling is too unreliable to be used as an exclusive means of testing for public support. Second, the debate inclusion rules used by the CPD are abnormal, and are out of step with recommended practices for both debates for governor in states and debates for public office in other democratic nations.

I. POLLING DATA IS INCREASINGLY UNRELIABLE

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

Polling in elections relies on asking representative samples of people their answers to various questions and then making inferences from those answers about the opinions and behaviors of the voting public in general. *See generally, What Is Public Opinion Polling and Why Is It Important?*, GALLUP WORLD POLL (2007), available at <http://media.gallup.com/muslimwestfacts/PDF/PollingAndHowToUseItR1drevENG.pdf>. For example, a poll may ask a “likely voter” for whom they would vote were the election held today. *See, e.g., White House 2016: General Election*, POLLINGREPORT.COM, <http://www.pollingreport.com/wh16gen.htm> (last visited April 11, 2016) (summarizing various polls that included who participants would vote for for president “if the election were held today”). Then, the polling agency would weigh respondents according to characteristics such as age, education, race and income so that their sample reflects, as closely as possible, the

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population in general. *Polling Fundamentals - Total Survey Error*, ROPER CENTER, CORNELL UNIVERSITY, <http://ropercenter.cornell.edu/support/polling-fundamentals-total-survey-error/> (last visited, April 11, 2016). Using these weights, responses are then aggregated to produce estimates of who likely voters actually would vote for, were the election held today, as a means of estimating how actual voters will actually vote when the election is held. *Id.* These estimates are just that: estimates. They always have a degree of uncertainty and a margin of error. Additionally, weaknesses in polling design and execution tend to increase the error associated with polling figures.

One common problem today is that the ability to draw a representative sample can be impeded by a technological or informational barrier. For example, polls historically relied on calling people on their home phones. *See generally*, Michael W. Link, et. al., *Reaching the U.S. Cell Phone Generation*, 71 PUBLIC OPIN. Q. 814 (2007). However, increasingly people rely on mobile phones, with 40 percent of adults no longer owning a landline at all. Jill Lepore, *Politics and the New Machine*, THE NEW YORKER, Nov. 16, 2015, available at <http://www.newyorker.com/magazine/2015/11/16/politics-and-the-new-machine>. Polling agencies have attempted to compensate for this, but either prospective pollees simply do not answer their phones or the lists are compiled from skewed or otherwise unreliable sources, given the absence of the equivalent of a phone book for mobile phones and a federal ban on autodialing to cell phones. *Id.*; Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (1991).

Even with a perfectly representative sample, polling estimates of support have error margins, often as high as 5 to 10 percentage points. *Polling Fundamentals - Total Survey Error*, *supra*. When compounded with these sources of unrepresentativeness in sampling, candidates polling below 15 percent may actually have as much as 25 percent support, certainly high

enough to consider them viable candidates with a viewpoint the voting public deserves to hear in debates.

Inaccurate polls can clash with actual voting results in spectacular ways, eroding public confidence in their use. In March of this year, for example, Bernie Sanders outperformed his polling by over 20 percentage points in the Michigan Democratic primary. Carl Bialik, *Why the Polls Missed Bernie Sander's Michigan Upset*, FIVETHIRTYEIGHT, Mar. 9, 2016, <http://fivethirtyeight.com/features/why-the-polls-missed-bernie-sanders-michigan-upset/>. That upset demonstrated many of the ways polling data can fail to reflect reality. The Michigan polls did not sufficiently correct for their lack of young voters, who disproportionately favored Sanders, even while it overcompensated in attempting to correct for responses from African Americans, a population previously supporting Clinton at higher rates than it did in Michigan. *Id.* That particular example was an outlier, but it serves as an example of how bad errors can be, even when multiple polls by multiple polling agencies are used.

Reliance on polling in the 2012 presidential general election was also misplaced. Polling showed a near-tie between Mitt Romney and Barack Obama, with some—including Gallup—predicting that Mitt Romney would win. *The problem with polls*, THE WEEK, April 10, 2016, <http://theweek.com/articles/617109/problem-polls>. In fact, the president was re-elected by a nearly four percentage point margin, amounting to some 5 million votes. *Id.*

These flaws are likely to erode public confidence in the exclusive use of polling as a metric of public support, especially as reports continue to issue from popular periodicals highlighting them. *E.g.* Cliff Zukin, *What's the Matter With Polling?*, N.Y. TIMES, June 20, 2015, <http://www.nytimes.com/2015/06/21/opinion/sunday/whats-the-matter-with-polling.html>;

Michael Barone, *Why Political Polls Are So Often Wrong*, The Wall Street Journal, Nov. 11, 2015, <http://www.wsj.com/articles/why-political-polls-are-so-often-wrong-1447285797>.

As Plaintiffs demonstrate in their brief, the way the CPD uses polling data to determine inclusion in the presidential general election debates virtually guarantees that only two candidates will qualify. No candidate who did not run in the Democratic or Republican primary has ever met the 15 percent threshold in the general election—not even Ross Perot, who participated in the 1992 general election debates before that threshold was instituted. That fact, combined with the unreliability of polls described here, creates a serious risk of unjustifiably excluding one or more serious and potentially viable presidential candidates from the debates.

For example, when candidates for the Republican nomination for president this year began participating in debates, only Donald Trump and Ben Carson polled higher than 15 percent on average, with Marco Rubio in third polling at about 10 percent on average. Dan Balz, *The debate over debates: Why should polls pick winners and losers?*, THE WASHINGTON POST, Nov. 7, 2015, https://www.washingtonpost.com/politics/the-debate-over-debates-why-should-polls-pick-winners-and-losers/2015/11/07/1e107b86-84d7-11e5-9afb-0c971f713d0c_story.html. This demonstrates how a large field of serious candidates can split polling totals, causing nearly every candidate to apparently poll poorly. Under those circumstances, candidates invited to debate and candidates excluded may both be well within the margin of error of the poll from each other, effectively making the exclusions arbitrary. In the Republican primary debates, it meant that governors of New York, Louisiana, and Virginia never had a chance to present their case to Republican primary voters; in a general election to which the 15 percent threshold applies, it means the loss of important perspectives on the future of the country.

II. THE CPD INCLUSION CRITERIA ARE ABNORMALLY HARSH

The degree to which the CPD inclusion rules harshly exclude candidates who might otherwise contribute meaningfully to the debate can be seen in how out of step those rules are with recognized best practices in debates for the office of governor in states and in debates for public office in other nations.

In states, debates are often held by nonpartisan public interest organizations like the League of Women Voters, who also conducted presidential debates prior to the two major parties creating the CPD in 1987. *See*, Renee Davidson, *4 Reasons You Should Watch a Candidate Debate*, LEAGUE OF WOMEN VOTERS, Oct. 7, 2014, <http://lwv.org/blog/4-reasons-you-should-watch-candidate-debate>; *The League of Women Voters and Candidate Debates: A Changing Relationship*, League of Women Voters, <http://lwv.org/content/league-women-voters-and-candidate-debates-changing-relationship> (last visited April 11, 2016). The media also sponsors debates directly, sometimes in coordination with a particular venue. *See, e.g.*, Paul Merrill, *Maine governor hopefuls face off in first debate*, WMTW NEWS 8, Oct. 8, 2014, <http://www.wmtw.com/news/maine-governor-hopefuls-face-off-in-first-debate/29007466> (describing a gubernatorial debate between three candidates held by a media corporation and noting the plan to hold a second).

When the League of Women Voters sponsors a debate, it typically invites every candidate on the ballot, and sometimes includes write-in candidates as well. *See, e.g.*, *Guidelines for Debates and Forums*, LEAGUE OF WOMEN VOTERS WISCONSIN, July, 2014, <http://www.lwvwi.org/Members/GuidelinesforDebates.aspx>; *League of Women Voters (LWV) Candidate Forum Guidelines*, League of Women Voters San Diego, http://www.lwvsandiego.org/files/CANDIDATE_FORUM_GUIDELINES.pdf (last visited April

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11, 2016) (emphasizing to “[i]nvite all candidates”). When media sponsors debates, they adopt their own inclusion rules, presumably to maximize the newsworthiness of the event. *See, e.g.*, Lepore, *supra* (“It would make better television” to include Carly Fiorina in an early debate among Republican candidates, despite her relatively low polling numbers at the time). When a state agency sponsors debates, it ordinarily uses rules more inclusive than those adopted by the CPD. *See, e.g.*, ARIZ. REV. STAT. ANN. § 16-956(A)(2) (2011) (instructing the Arizona Clean Elections Commission to sponsor debates and invite all candidates).

Internationally, debates are also usually the domain of the media, and they typically invite more than two candidates for presidential elections. *See Parties and Candidates*, THE ACE ENCYCLOPAEDIA, ACE, <http://aceproject.org/ace-en/topics/pc/pcc/pcc07> (last visited April 11, 2016); *see also Television debates*, ACE, <http://aceproject.org/epic-en/CDTable?view=country&question=ME059> (last visited April 11, 2016) (table listing countries along with comments on how televised debates are conducted, if at all, in that country). When countries do adopt public regulations regarding debate inclusion, they use standards more inclusive than those of the CPD. For example, Canada permits participation by any candidate from a political party with representation in the House of Commons (five parties) with a consistent polling threshold of only 5 percent. Nick Anstead, *We need to look at other parliamentary democracies for ideas about how to run televised debates*, MEDIA POLICY PROJECT BLOG, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, <http://blogs.lse.ac.uk/mediapolicyproject/2014/10/15/we-need-to-look-at-other-parliamentary-democracies-for-ideas-about-how-to-run-televised-debates/> (last visited April 11, 2016).

Germany follows a similar rule, allowing participation (in the first round of debates) by representatives of parties with a presence in the Bundestag, which amounts to a 5 percent

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threshold as well. *Id.* Germany's practice also highlights another way of balancing the goals of inclusion with an orderly and informative process common in other nations: they narrow the inclusion rules over a series of debates. Nick Anstead, *Televised Debates in Parliamentary Democracies*, MEDIA POLICY PROJECT, THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, 10–11 (January, 2015). In the first round, representatives of any party in the Bundestag may participate, but the second round is limited to only three candidates. *Id.* In the U.S., debates also go from more inclusionary (in the primaries) to exclusionary (in the general election), but the primary debates are no exception for inclusion general election debates, when nominees from different political parties and independent candidates face each other before a national audience.

In fashioning its rules prior to the 2015 election season, the United Kingdom considered the examples of countries like Canada and Germany to adopt a best practice. *Id.* at 13. It ultimately included seven candidates in its national debate in April, 2015. *See, Leaders' debate: ICM/Guardian poll puts Miliband ahead - just*, theguardian, April 2, 2015, <http://www.theguardian.com/politics/blog/live/2015/apr/02/leaders-debate-fergus-collins-and-miliband-go-head-to-head-with-other-parties-live>. More inclusive debate rules helped to change the conversation in the United Kingdom, allowing the Liberal Democrats to rise in prominence. A similar phenomenon had occurred in Canada; the New Democratic Party, traditionally a third party, rose to second-place in 2011; and in 2015, the Liberal Party went from third place to first place.

This is not to suggest that the U.S. should be bound by international norms. Instead, it is evidence that CPD has adopted a rule that is not justified by ordinary debate inclusion rules, such as orderly debates among serious candidates with viewpoints reflective of public opinion. Rather, it better reflects a rule designed to prevent competition. *See*, Larry Diamond, *Ending the* AMICUS CURIAE BRIEF OF FAIRVOTE IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Presidential-Debate Duopoly, THE ATLANTIC, Mary 8, 2015,

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

CONCLUSION

As Plaintiffs rightfully point out, this issue goes directly to the question of the future of American democracy. Evidence suggests that the CPD harshly excludes candidates to the extent that not only are many important viewpoints unheard in presidential debates, but viable candidates may fail to qualify or choose not to run in the first place because they would fail to qualify. The unreliability of polls is such evidence, suggesting that the CPD is less interested in testing for public support than they are with creating an artificial barrier. Similarly, the degree to which the rule is abnormally harsh suggests that it is unjustifiable by the interest in an orderly debate. For the foregoing reasons, the Court should grant summary judgment for Plaintiffs.

DATED: April 13, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2016, I electronically filed the foregoing *Amicus Curiae* Brief of FairVote in support of Plaintiffs' Motion for Summary Judgment with the Clerk of the Court of the U.S. District Court of the District of Columbia by using the CM/ECF system, which will accomplish electronic notice and service for all counsel of record.

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