IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

Plaintiffs,

v.

FEDERAL ELECTION COMMISSION

Civil Action No.: 15-cv-1397 (TSC)

BRIEF OF AMICUS CURIAE INDEPENDENT VOTER PROJECT IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Independent Voter Project makes the following disclosure:

1. Amicus is not a publicly held corporation or other publicly held entity.
2. Amicus has no parent corporation.
3. No publicly held corporation or other publicly held entity owns 10% or more of Amicus.
4. Amicus is not a trade association.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

S. Chad Peace is a member of the California State Bar and has been admitted to this court *pro hac vice*. Mr. Peace is an attorney for the Independent Voter Project (IVP) and a partner at the law firm of Peace & Shea LLP. He has no other financial or client interest in the outcome of this litigation, and no attorney for a party has helped write this brief or defrayed the cost of its preparation.

Founded in 2006, *Amicus Curiae* IVP is a 501(c)(4) organization that seeks to educate voters about voters' non-partisan rights and other important public policy issues, to create a climate for otherwise disenfranchised voters to engage in the political process, and to encourage non-partisan voters to vote and participate in the democratic process. IVP is most well-known for authoring California's Proposition 14, passed by the voters in 2010, which established the "top-two" nonpartisan primary California conducts today.

IVP works to educate all eligible voters, regardless of their party preferences, through online and offline voter education programs and participates in legal actions that assert and support every qualified voter's right to participate during all integral stages of the electoral process.

The amicus brief is timely filed pursuant to the Order dated December 2, 2015 and IVP's Motion for Leave granted on March 8, 2016.

INTRODUCTION

The right to representation is a nonpartisan right and a guarantee of our representative democracy. Our political class, however, has allowed an unconditional loyalty to a "two-party system" to shortchange any meaningful discussion of whether partisan representatives are still incentivized to represent the nonpartisan public. Without serious introspection, the two parties will continue to measure their strength by the number of offices they hold, rather than the number of voters they represent. The long-term predictable consequence of using this measuring stick will be a loss of the nonpartisan right to representation altogether.

Over the years, political parties have risen, evolved, and been replaced as the political class adapted to calls from a changing society. Today, however, a substantial plurality of American voters do not feel represented by either of the two major political parties. Yet calls for change go unanswered because the political class from both parties, over several decades, has erected barriers to prevent meaningful electoral competition. From gerrymandering, to closing primaries, to excluding outsiders from public debates, both parties have slowly chipped away at the laws and rules that incentivize the two major parties and their representatives to adapt to new calls for change.

Although we have generally embraced economic theories that recognize the inherent tendency of powerful corporations to engage in collusive and/or

monopolistic behaviors, we have not applied the same analytical principles to our democratic process. When consumers are severely and negatively impacted in the business sector, for example, we recognize the government's responsibility to intervene by removing the barriers to competition. More competition, we generally accept, improves the health of the economy by incentivizing businesses to provide better products and services to their customers.

Yet our modern political theorists have accepted the Republican and Democratic parties' legitimacy within our "two-party system" as so axiomatic that we have allowed them, through their elected and appointed members, to rewrite our laws, promulgate regulations, and establish court precedents without regard to the negative impact that this collusive behavior has on the consumers of democracy; the People. Rather, contemporary legal and scientific analysis is generally limited to the impact of certain laws on the competition between the two parties themselves rather than an analysis of whether a given law incentivizes the two major parties to be more representative of the general public.

We cannot leave it to the Republican and Democratic parties to protect the nonpartisan right to representation. The bipartisan partnership that governs the Commission on Presidential Debates (CPD), for example, is not incentivized to serve the nonpartisan purpose that its tax-deductible status demands. This is because, on its face, the CPD is a private partnership between two minority-representing political parties. And because the CPD has a fiduciary duty to protect

the private partisan interests of its partners, the influence the CPD exerts over our nonpartisan right to a representative democracy must be considered within this context.

Today, for example, 81% of voters believe that it is important to have independent candidates run for office and 65% of voters wish they had the option of voting for an independent candidate for president. Yet the CPD has established rules that ensure only a Republican and a Democrat will participate in the presidential debates. Such a large number of voters must not be denied the right to a robust and inclusive political discourse because it is inconvenient to the existing major parties or because the CPD has a private interest in protecting its bipartisan corporate partners.

Put simply, the two major parties have complete control over the initial and most important stages of the political process, including the primary elections and the presidential debates. Unless this Court is willing to consider the consequences of the CPD's private control over our public discourse, we risk losing our nonpartisan right to a representative democracy forever.

With these considerations, Amicus argues in support of Plaintiffs' Motion for Summary Judgment and Proposed Order.

ARGUMENT

I. Because of Anticompetitive Election Laws, Including the CPD's Presidential Debate Rules, the Republican and Democratic Parties Have a Private Monopoly Over the Public Election Process That Threatens the Health of Our Representative Democracy.

Representatives serve their entire constituency, not just the members of their political parties.[1] Due in part to onerous ballot access laws for independent and third party candidates,[2] campaign finance regulations that allow political parties to conduct unlimited member communications,[3] and gerrymandering tactics that have caused our political commentators to color districts red and blue as if they belong to a political party and not the people,[4] almost every state requires that a candidate first win a major party primary or caucus for that candidate to be considered 'viable' in the general election.

As a result, and despite almost half of the electorate who now self-identify as independent of either major political party, not a single member of the House of Representatives was elected in 2014 without first winning the majority party's

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[1] *See*, *Evenwel v. Abbott,* 578 U.S. ___ (2016) (holding that, "the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote.")

[2] Thomas Stratmann, *Ballot Access Restrictions and Candidate Entry in Elections*, European Journal of Political Economy*,* 21, 59–71 (2005), http://aceproject.org/ero-en/topics/parties-and-candidates/ballotaccess.pdf

[3] Pippa Norris, *Developments in Party Communications,* Political Parties and Democracy in Theoretical and Practical Perspective (2005), https://www.hks.harvard.edu/fs/pnorris/Acrobat/NDI%20Final%20booklet%20-%20Communications.pdf

[4] *The 2016 Results We Can Already Predict via Politico* (Dec. 29, 2015), http://politicalmaps.org/the-2016-results-we-can-already-predict-via-politico/

primary in a given district.[5] In fact, nearly 100% of the candidates elected to public office in the last 50 years had to first win a major party primary.[6] The consequence of this electoral reality is that nonpartisan voters have a very limited opportunity to participate meaningfully in the selection of the viable candidates, unless they forfeit their First Amendment right not to association with a private political party.[7] On "Super Tuesday" of this year, for example, over 5 million independent voters were excluded from participating in the primary election process because they refused to affiliate with a political party.[8] The number of voters who are longtime members, or recently joined one of the two political parties only because they want an opportunity to cast a meaningful vote during the important primary stage of the election is not easily measureable, but it is significant.[9]

In any case, laws that condition a voter's meaningful participation in the democratic process on joining a private political party robs the People of their

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[5] A compilation of statistics reporting on the 2014 United States House of Representatives elections, available at *United States House of Representative Elections*, Wikipedia (2016), https://en.wikipedia.org/wiki/United_States_House_of_Representatives_elections,_2014.

[6] *Party Divisions of the House of Representatives*, History, Art & Archives of the U.S. House of Representatives (2016), http://history.house.gov/Institution/Party-Divisions/Party-Divisions/

[7] *See Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("…a corollary of the right to associate is the right not to associate.").

[8] This number was calculated by combining the number of non-partisan voters in states holding primary elections on March 1, 2016, referred to as "Super Tuesday." These states include Alabama, Arkansas, Colorado, Georgia, Massachusetts, Minnesota, Oklahoma, Tennessee, Texas, Vermont, Virginia. For further analysis, see Greg Parker, *Millions of Voters Disenfranchised on Super 'Undemocratic' Tuesday*, IVN.us (Mar. 1, 2016), http://ivn.us/2016/03/01/millions-of-voters-disenfranchised-on-super-undemocratic-tuesday/.

[9] For example, at least 180 thousand voters joined the Republican Party in Pennsylvania in order to vote for in the primary election. For more information, see Caitlin McCabe & Chris Palmer, *At Least 180K Join GOP as Pa. Primary Nears*, philly.com, http://articles.philly.com/2016-03-30/news/71903218_1_pennsylvania-voters-party-registrations-john-kasich.

nonpartisan right representative democracy by having an anticompetitive effect on the marketplace of ideas.

A. Both Major Political Parties Have Monopolized the Public Election Process By Limiting the Number of Competitive General Elections.

Both political parties have worked through the state legislatures to protect their party-loyal incumbents by limiting the voting power of nonpartisan voters[10]. They do so, for example, by drawing legislative districts in a way that forces electoral competition to occur during the primary stage of the election.[11] As demonstrated by the recent arguments before the Supreme Court in *Wittman v. Personhuballah*, our party-appointed judges have accepted incumbent protection as a legitimate exercise of state-granted legislative authority,[12] even though such gerrymandering reduces competition in the only nonpartisan stage of the public election process: the general election.[13]

As a result, just 35 of 435 congressional general elections were competitive

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[10] Thomas Stratmann, *Ballot Access Restrictions and Candidate Entry in Elections*, European Journal of Political Economy, 21, 59–71 (2005), http://aceproject.org/ero-en/topics/parties-and-candidates/ballotaccess.pdf.

[11] Carl Hulse, *Seeking to End Gerrymandering's Enduring Legacy*, New York Times (2016), http://www.nytimes.com/2016/01/26/us/politics/seeking-to-end-gerrymanderings-enduring-legacy.html.

[12] *See generally, Wittman v. Personhuballah*, 136 S. Ct. 998 (2016). (Upholding incumbency protection as a legitimate government interest. The court recognized, for example, that "courts have often treated incumbency protection even in this limited context as 'distinctly subordinate' to constitutional and statutory imperatives." The court, therefore, upheld incumbency protection as a legitimate purpose in this case without any extended discussion as to the discriminatory effect that this form of gerrymandering districts has on the right to vote, generally.)

[13] *Does Gerrymandering Cause Polarization*, Princeton University, 14 (2006), https://www.princeton.edu/~nmccarty/gerrymander11.pdf (citing that "the number of competitive districts fell by 92 in 1983, 25 in 1993, and 42 in 2003.")

in 2014.[14] This means that 90% of our representatives are held accountable only by the voters who participate in the major party primary in any given district, and are therefore, not incentivized to represent the rest of the electorate. And because the average voter turnout in the 2014 primaries was just about 10%,[15] a relatively small number of partisan voters exert substantial control over our government. It should be no surprise, therefore, that extreme partisanship is heavily represented by our current Congress.

The natural consequence of our partisan election process, therefore, is the institutionalization of minority rule. Indeed, the interests of the minority-representing political parties are so embedded in the Country's establishment that the Federal Elections Commission (FEC) defends the right of two political organizations to exclusive bipartisan control over our presidential debates, despite the CPD's nonpartisan state mandate.

B. The CPD's 15% Rule Further Monopolizes the Public Election Process By Reducing the Competition Over Ideas and Government Policies.

The CPD's 15% rule inhibits the competition of ideas and governmental policies that are at the core of our electoral process and First Amendment freedoms. Without participating in one of the two parties' private nomination

[14] Joshua Alvarez, *Just 35 of 435 Elections Competitive after 201 years of Gerrymandering*. IVN.us (2013), http://ivn.us/2013/10/25/just-35-of-435-elections-competitive-after-201-years-of-gerrymandering/.

[15] Statistics available at: *Voter Turnout*, United States Election Project (2016), http://www.electproject.org/home/voter-turnout/voter-turnout-data.

processes, a candidate cannot realistically qualify for the presidential debates. And without entrance into the presidential debates, no candidate can challenge the nominees of the two parties in the competition of ideas and governmental policies.

As the Court reasoned in *Williams v. Rhodes* when it struck down the State of Ohio's restrictive election laws that prevented third parties from being placed on the primary election ballot:

> The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties the Republicans and the Democrat – and, in effect, tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them. Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.
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> 393 U.S. 23, 32 (1968).

Similarly, in this case, the CPD's 15% rule does not merely favor two particular political parties in the competition of ideas and governmental policies, it favors two particular parties – and, in effect, tends to give them a complete monopoly for two main reasons: (1) only the candidates that participate in the major party primaries and caucuses receive the widespread public exposure necessary to meet the 15% threshold,[16] and (2) only the candidates that participate in the presidential debates will be considered viable candidates in the general

[16] Administrative Complaint against the Commission on Presidential Debates, Attorneys for Complainants Level the Playing Field and Peter Ackerman, page 35-36 (2014), http://www.shapiroarato.com/wp-content/uploads/2015/03/Complaint-against-the-CPD-9.10.14.pdf

election. With these two considerations, the CPD's 15% rule gives the two particular party nominees a decided advantage in the competition of ideas and governmental policies. This advantage is in direct conflict with the competitive democracy that our Supreme Court has historically sought to preserve.

Therefore, the CPD's 15% rule reduces the influence of independent and third party candidates, further insulating the two major parties from the meaningful competition over ideas and government policies that is at the core of our electoral process and First Amendment freedoms.

II. The Presidential Party Nomination Process Confuses Voters by Creating the Mere Appearance of Democracy, Because Party Nominees Are Selected By Private Party Rules That Are Not Subject to Constitutional Protections.

The rules of party primaries, caucuses, and other nomination procedures are governed by their private corporate bylaws,[17] and therefore, participants have no constitutionally protected right to cast a meaningful vote in them.[18] Even though presidential primaries and caucuses, for example, are almost exclusively funded by taxpayers and administered by public officials, the courts have held that voters do not have standing to challenge actions taken by party leadership that manipulate

[17] *See, e.g.* Cal. Dem. Party Rules, Art. II, Sec. 2 ("In the event of such [State Party rules] conflict with state laws, state Parties shall be required to take provable positive steps to bring such [state] laws into conformity [with party rules]"); *see also,* Cal. Rep. Party Bylaws, Sec. 1.04(A) ("[T]hese bylaws shall govern and take precedence over the California Elections Code or other law to the contrary.")

[18] *See, Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000), (holding that the corollary of the right of association is the right to not associate.)*; see also***,** *Nader v. Schaffer*, 429 U.S. 989 (1976).

the outcome of the nomination process, and even when those actions are taken after the votes have been cast.[19] As a consequence, voters have been deceived into believing their votes in the party nomination process serves the voters. In reality, the party primaries and caucuses serve the party leadership who have the power to write and change rules outside the reach of our constitutional protections.

For example, the private rules governing the Democratic National Committee's (DNC) nomination process allow for superdelegates to ignore the outcome of a state's primary elections altogether. What could be more confusing to a voter than explaining to them that their vote doesn't really matter in the "Democratic" Party's primary?

Similarly, the nominating process of the Republican National Committee (RNC) is governed by private rules designed to protect party leadership against the will of its members. Delegates are not bound, as most voters would rationally assume, to vote for the candidate who received the majority of the popular vote in the primary elections and caucuses. As a Republican National Committeeman from North Dakota and a member of the RNC's Standing Rules Committee recently explained, "it doesn't make any difference what has happened in terms of primary voters, because they don't count at the convention. It's only the delegates

[19] *See generally*, *Cousins v. Wigoda*, 419 U.S. 477, 493 (1975), (holding that a party convention is the proper forum for determining intra-party disputes, not the courtroom).

at the convention whose votes matter.[20]

Fact is, both major parties promulgate rules that are not democratic. And those voters who choose to participate in the party nomination processes because they believe it is a part of our democratic process have been misled. Therefore, the two major parties' presidential nomination process cannot serve as a surrogate for the representative electoral process that our constitutional democracy demands.

III. Because Neither Major Party Represents the General Public, These Private Actors Cannot Be the Guardians of our Constitutional Democracy.

Although Americans are disassociating with both major political parties at an increasingly rapid rate, our representatives are at the same time becoming more and more partisan.[21] This reality alone should cause us to question the wisdom of entrusting the two parties with exclusive control over any meaningful stage of the election process, including the presidential debates.

As of January 2016, Gallup reports that 42% of Americans identify as politically independent. Democratic and Republican registration has reached near historic lows, with just 29% of Americans identifying as Democratic, and just 26%

[20] Haugland further contends that the requirement to bind convention delegates only to primary results was repealed in 1980. Letter from Curly Haugland, RNC National Committeeman for North Carolina, to Members of the RNC (March 11, 2016), http://dailycaller.com/wp-content/uploads/2016/03/CURLY_HAUGLAND.pdf

[21] Michael Dimock, Carroll Doherty, Jocelyn Kiley, & Russ Oates, *Political Polarization in the American Public*, Pew Research Center (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/

as Republican.[22] This is the fifth consecutive year where at least four in ten American adults identify as political independents, prompting Gallup to report that "Americans' attachment to the two major political parties in recent years is arguably the weakest Gallup has recorded since the advent of its polls.[23]"

In Florida, for example, despite being a closed primary state where only party members can participate in the primaries, the number of independent voters has grown by one million voters in the last 10 years. At the same time, the Democratic Party experienced an increase of just 300,000 new members, and the Republican Party just 200,000.[24] That means that twice as many voters who took the time to register to vote would rather forgo their opportunity to vote at a meaningful stage of the election than associate themselves with a private political party.

Yet, every single one of Florida's state and federal representatives are members of either the Democratic or Republican Party. Further, at a national level, partisan incumbents have close to a 95% re-election rate,[25] despite the 84% of Americans who disapprove of the way Congress is handling its job,[26] and just 9%

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[22] *Democratic, Republican Identification New Historic Lows*, Gallup (Jan. 2016), http://www.gallup.com/poll/188096/democratic-republican-identification-near-historical-lows.aspx.
[23] *Id.*
[24] *Nerdscreen: Rise of the Independents*, NBC (2015), http://www.nbcnews.com/meet-the-press/nerdscreen-rise-independents-n386911.
[25] *Congress has 11% Approval ratings but 96% Incumbency Rate*, Politifact (2014), http://www.politifact.com/truth-o-meter/statements/2014/nov/11/facebook-posts/congress-has-11-approval-ratings-96-incumbent-re-e/
[26] *Congress and the Public*, Gallup (March 2016), http://www.gallup.com/poll/1600/congress-public.aspx

of all voters who think the average member of Congress listens to the voters who are not members of their party.[27] It should be no surprise, therefore, that the extreme partisanship in Florida and nationwide has been so undemocratically divisive.[28]

This is because, as the power of nonpartisan voters to participate in the electoral process is diminished, the major parties are incentivized by law to be responsive to the more partisan base that remains. Furthermore, because political parties are not state actors, the Federal Election Commission has an obligation to scrutinize any attempt by the two private parties to further diminish the power and influence of the public. But they have not done so.

The CPD is a state-sanctioned and tax-deductible organization that governs one of the most important components of our democratic election process: the conversation between the viable candidates for the next President of the United States and the citizens of this great nation. But because the CPD is a partnership between two parties that have a competitive self-interest in reducing the influence of competitors, it is a natural and predictable consequence that its actions will often conflict with its nonpartisan purpose. That the 15% rule has the effect of limiting the presidential debates to a competition between only the Republican and

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[27] *Congress Still Ranks Low in Public's Eye*s, Rasmussen (Dec. 2015), http://www.rasmussenreports.com/public_content/archive/mood_of_america_archive/congressional_performance/congress_still_ranks_low_in_the_public_s_eyes

[28] Ledge King, *Florida Legislators: More Partisan Than Most*, Florida Today (March 5, 2016), http://www.floridatoday.com/story/news/2016/03/05/florida-legislators-more-partisan-than-most/81364102/.

Democratic nominees is evidence under any political theory that embraces a healthy competition over ideas and government policies that this bipartisan partnership cannot be trusted as the guardians of our constitutional democracy.

Therefore, this court should safeguard our constitutional democracy from the CPD's bipartisan partnership that has colluded against it.

IV. Conclusion

Anticompetitive election laws, including the CPD's presidential debate rules have given the Republican and Democratic parties a private monopoly over the public election process. Such a monopoly threatens the health of our democracy and all of its institutions. Therefore, the court should grant Plaintiffs' Motion for Summary Judgment.

Dated this 13th day of April, 2016.

Respectfully submitted,

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