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August 15, 2016

Janet H. Brown, Executive Director
Commission on Presidential Debates
1200 New Hampshire Ave NW.
Washington, DC 20036

Dear Ms. Brown,

I write on behalf of the Socially Liberal Fiscally Conservative Policy Education Center Incorporated (Solifico) concerning the 15% opinion polling criterion by which your Commission selects participants in Presidential and Vice Presidential debates. It must be stricken or changed, now. The alternative is for your Commission to lose its status as a tax-exempt charity.

Solifico does not adopt the posture of those would-be debaters who have in the past sued your Commission after they failed to meet your criteria for an invitation. No matter our personal preference, that was the right result for the 2012 candidates, as it was for Ralph Nader before them.

But just as debate participation isn't about them, so too it isn't about you or your Commission. It is about educating and informing the voters of the United States. Your selection criteria deprive them of the opportunity to which they are entitled. Solifico aims to speak for those voters.

To be clear, even as Solifico questions your Commission's selection criteria, we do not impugn your individual or collective motives. Solifico appreciates that you, the Commissioners, and your staff are motivated by a sincere dedication to public service and the best interests of the nation. But, correspondingly, we'd suggest that you not proclaim your well-intended agenda as justifying a wrong-headed approach.

This is not merely being on the wrong side of history; this is about the risk of becoming history.

The law is against you. The facts are against you. The politics are against you. And, if need be, Solifico and the voters for whom it speaks will be against you.

For your Commission to survive, for us all to thrive, you must limit your selection criteria to those consistent with its tax-exempt, charitable purposes and as inherently useful for educating the electorate about those standing for election in the Presidential and Vice Presidential contests.

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The law is against you. Like all tax-exempt, charitable organizations, your Commission cannot participate or intervene in political campaigns, including by the "publishing or distributing of statements" for or against any candidate. 26 U.S.C. 501(c)(3). The only way in which a tax-

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exempt charity may engage in voter education activities, specifically including presenting debates, is to conduct them in a non-partisan manner. *See* Rev. Rul. 78-248 *and* Rev. Rul. 66-256; *see also* Rev. Rul. 76-456, *modifying and superseding* Rev. Rul. 66-258 (educational purpose alone not sufficient to justify otherwise improper conduct).

To conduct itself in a non-partisan manner, a debate sponsor cannot show “bias or preference for or against” particular candidates; there must be “fair and impartial treatment of candidates” without any promotion or advancement of some candidates over others. Rev. Rul. 07-41, at 2. So long as all candidates are invited, a tax-exempt charity acts properly in holding a debate or similar forum. *Id.* at 6; *see, contra, id.* at 5 (violation “likely” when a sponsor invites all candidates but hosts them at different sized events).

The only apparent basis for excluding a “candidate for public office” is to conclude she or he is not standing “as a contestant for an elective public office.” *See* 26 CFR 1.501(c)(3)-1(c)(3)(iii). No distinction is made under the tax code, IRS regulations or any rulings or decisions among major party nominees, minor party nominees, and independent candidates.

Put another way, **bi-partisan is not the same as non-partisan**. You cannot select some but not others from among all those who are legally eligible to, and capable of, competing for election.

In concluding that the law is against you, Solifco cautions you against invoking those several times that your selection criteria – including the 15% opinion polling criterion – have been found acceptable as a matter of federal election law.

As you are well aware, the Internal Revenue Service and the courts reviewing tax code cases apply review standards entirely distinct from those relevant to the Federal Election Commission and courts reviewing election law disputes. If you want to become and be taxed as a for-profit entity, perhaps you can select candidates you prefer without violating federal election laws (which require merely that the criteria be pre-established and objective), but you cannot select preferred candidates without violating the laws governing tax-exempt charities.

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The facts are against you. Your Commission’s fundamentally educational purpose is compromised by the inherent bias or preference of your selection criteria. As the recent debate reform working group noted, the presidential general election debates “have a unique capacity to ... help voters understand their choices.” Annenberg Debate Reform Working Group, *Democratizing the Debates* pg. 6 (2015).

It is true that some facts are with you. Consistent with the legal standards, your Commission’s first two criteria simply confirm whether an individual stands as a contestant for the Presidency or Vice Presidency. One requires evidence of a candidate’s Constitutional eligibility for the office; *i.e.*, whether the individual actually stands for the office as an eligible candidate. *See* U.S. Const. Art. II, Sec. 1, Cl. 5. The other requires evidence of the candidate’s mathematical chance for an

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Electoral College majority; *i.e.*, whether the individual is actually in the contest for a majority of the votes. *See* U.S. Const. Amend. Art. XII.

But, even more importantly, other key facts are against you. The 15% opinion polling criterion does not address whether an individual is standing as a contestant in the election; that would be ok. Instead, it attempts to assess which individuals are, at a given date, months before the election, projected likely to win the election; that is not ok.

Even beyond being categorically indefensible, the 15% opinion polling criterion is based on factors easily susceptible to bias or preference. Notably, the first two criteria are based on “evidence” while the 15% opinion polling criterion is explicitly founded on mere “indicators.” Despite being tied to a seemingly objective, numerical threshold, this criterion is informed by nothing other than the “advice of a recognized expert or experts” about the polls’ methodological quality, the pollsters’ organizational reputation, and the polls’ frequency. As inherently subjective factors, all will necessarily reflect some bias or preference, regardless of the expertise applied.

Even if defensible in theory, the current 15% threshold cannot be defended in practice. The debate reform working group inadvertently revealed 15% is an arbitrarily high threshold. *See Democratizing the Debates* at 17 (suggesting escalating thresholds, thus revealing that a candidate in a three-way race starting as low as 5% before the first debate could climb to winning plurality shortly after the third and final debate). Moreover, even if not arbitrarily high, this threshold of course relates to a national popular vote average, which is technically irrelevant to a candidate’s ultimate potential for prevailing in the Electoral College of the House of Representatives. This year, for example, a third-party ticket might win only a handful of states and have its Presidential candidate chosen by the House of Representatives.

Your Commission’s own label for the three criteria is telling: you call them “selection” criteria, rather than “eligibility” criteria. To understand the difference, one need simply recall the secondary school difference between those who were chosen for the varsity team and those who simply joined pick-up games in the school-yard. Unlike the varsity coach, you can’t prefer some players to others, simply because some are more likely to win; you have to let everyone onto the field.

There is no way you can maintain both (a) the 15% opinion polling criterion by which you make a “selection” of whom to invite to the debate stage, and (b) your tax-exempt, charitable status, under which you are allowed only to determine who is “eligible” to participate on the debate stage. It is simply a fact – you have to choose one or the other.

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The politics are against you. As the debate reform working group acknowledged, reforms – specifically including to the selection criteria – are needed, lest viewership decline further and the young and at least some people of color stay away. *Id.* at Figs. 1&2. Notably, there are now

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more unaligned voters than either Democrats or Republicans. Gallup, *Record-High 42% of Americans Identify as Independents* (2014) (cited in *Democratizing the Debates* at n.5); see also *Democratizing the Debates* Fig. 3. Even beyond that, perhaps more than half of millennials describe themselves as political independents. Pew Research and Social Demographic Trends, *Millennials in Adulthood: Detached from Institutions, Networked with Friends* (2015) (cited in *Democratizing the Debates* at n.15). Critically for your own interests, viewership of your debates continues to decline, especially among the young and fast-growing communities of color. *Democratizing the Debates* at 6.

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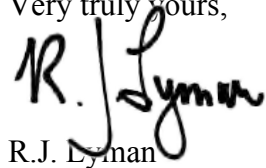
If need be, Solifico and those for whom it speaks will be against you. Absent your timely addressing the problem of the opinion polling criterion, we are inclined to make a referral to the Internal Revenue Service about whether your Commission has violated the limitations on political activity applicable to tax-exempt charitable organizations and perhaps to seek immediate equitable relief in courts of competent jurisdiction. Allowing on the stage more than just the Democratic and Republican nominees will redress, at least for this election cycle, our concerns and forestall our complaint.

Lest you are inclined to take the risk and see how Solifico's actions fare, we'd ask you to consider first the practical effect of striking the 15% opinion polling criterion. In this electoral cycle, there are at most four candidates eligible for inclusion based on your other two criteria. And, for future elections, we'd suggest you look back to those several since you first adopted this criterion; in the most extreme instance, it appears six was the largest total number of candidates (including the Democratic and Republican nominees) who met both the first and second selection criteria. This is far fewer than typically appear in the many major party primary season debates, even late in the nomination process. Striking the 15% opinion polling criterion will help inform the public better and will scarcely dilute the public's ability to have a clear view of each individual candidate's positions and personality.

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As I conclude this letter, Solifico and its supporters ask once again that you and the Commissioners recognize this matter is not about you or any candidates who might appear on the debate stage. In the interest of educating voters young and old, of all races, ethnicities and other characteristics and communities, it is instead about making America great and being stronger together, as we suspect all will readily agree.

Very truly yours,



R.J. Lyman