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Debating Debates: A Discussion of the New York City Campaign Finance Board's Debate Eligibility Requirements for Citywide Elections

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**DEBATING DEBATES: A DISCUSSION OF THE
NEW YORK CITY CAMPAIGN FINANCE
BOARD’S DEBATE ELIGIBILITY
REQUIREMENTS FOR CITYWIDE ELECTIONS**

*Joseph Gallagher & Caitlin Toto**

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INTRODUCTION

The Campaign Finance Board (the “CFB” or the “Board”) is a non-partisan, independent agency in New York City (or the “City”) that

* New York City Campaign Finance Board. The views expressed herein are those of the authors and do not necessarily represent the views of the Campaign Finance Board.

administers the Campaign Finance Program (the “Program”). The Program uses public funds to match and multiply contributions to candidates running for office in the City. The Program currently matches eligible donations from New York City residents at a rate of \$8 to \$1, up to certain caps, meaning a \$10 contribution could be matched with \$80 of public funds for a total of \$90 to the candidate’s campaign. A primary goal of the Program is to promote small donor democracy by amplifying the voice of New Yorkers, while also limiting the influence of wealthy benefactors and special interest groups.¹

The Program grew drastically in the 2021 election cycle due to, *inter alia*, an increase in the matching public funds ratio and a high number of open seats.² These factors led to a record number of participants running for office and a record number of public funds dispensed to candidates.³ While the Program has many benefits, its growth also poses fresh challenges to another key responsibility of the CFB — supervising the debates for the offices of Mayor, Public Advocate, and Comptroller. The CFB, in conjunction with debate sponsors, administers multiple debates in each election cycle and determines debate eligibility criteria for each citywide office.⁴

Selecting appropriate debate eligibility criteria is a difficult process that involves several competing interests. On one hand, the CFB seeks to foster a robust debate that includes all viable candidates, including those that heavily rely on small donations. On the other hand, if a debate is too inclusive, it may become unwieldy and uninformative. In the past, the CFB and its sponsors have adopted debate eligibility criteria that consider a candidate’s aggregate raising and spending, as well as their polling thresholds.⁵ However, relying on these metrics alone may lead to outcomes contrary to the CFB’s mission of promoting small donor democracy.

This Article explores these tensions in light of the rapid growth of the Program and reflects on how the CFB and its debate sponsors have addressed — and may be able to address — these various goals. Part I of this Article provides background on the CFB and the debate

1. Amy Loprest & Bethany Perskie, *Empowering Small Donors: New York City’s Multiple Match Public Financing as a Model for a Post-Citizens United World*, 40 FORDHAM URB. L.J. 639, 666 (2016).

2. N.Y.C. CAMPAIGN FIN. BD., 2021 POST-ELECTION REPORT 9 (2022) [hereinafter 2021 POST-ELECTION REPORT, nycfb.info/PDF/2021_Post-Election_Report.pdf [<https://perma.cc/76LB-V5AY>]].

3. *Id.* at 3.

4. N.Y.C. ADMIN. CODE § 3-709.5 (2023).

5. *See infra* Section I.C.3.

requirements of the Campaign Finance Act.⁶ It also summarizes the CFB's debate eligibility requirements in recent election cycles. Part II of this Article then provides a summary of First Amendment jurisprudence with a specific focus on a government entity's ability to regulate debates. It then highlights and discusses past challenges to the CFB's debate requirements.⁷ Part III of this Article further reflects on how the issue of debate inclusivity could be approached in light of the CFB's missions.⁸ It does so with an eye towards determining how debate structures can be adapted. By way of example, in the 2021 election cycle, the CFB and its sponsors included a debate access pathway that measured a campaign's small donors. Although this pathway more closely connects the debate requirements with the agency's overarching goals, it may not solve the issue of an overcrowded debate stage. Ultimately, these issues present no easy solutions and the CFB will need to continue to analyze debate pathways that both support its mission and foster informative debates.

I. THE CAMPAIGN FINANCE BOARD

A. Origins of the CFB

In 1986, a series of political scandals erupted in New York City that eroded the voters's confidence in public officials.⁹ Most notably, the public learned that several of the City's officials, including Queens Borough President Donald Manes, had been paid and/or promised millions of dollars in bribes from parties seeking contracts with the City government.¹⁰ Although the City had rebounded from municipal scandals in the past, the size of this scheme, and the fact it led to Manes taking his own life, shocked the City at large.¹¹ While many of the perpetrators were sent to prison, the stench of rotten politics continued

6. *See infra* Part I.

7. *See infra* Part II.

8. *See infra* Part III.

9. *See generally* JACK NEWFIELD & WAYNE BARRET, CITY FOR SALE: ED KOCH AND THE BETRAYAL OF NEW YORK (1988).

10. *See* Peter Baida, *The Corrupting of New York City*, 38 AM. HERITAGE 1 (1986), <https://www.americanheritage.com/corrupting-new-york-city> [<https://perma.cc/G2VF-VQT4>]; Josh Barbanell, *Charges Assert Parking Bribes of \$3.8 Million*, N.Y. TIMES (Apr. 11, 1986), <https://www.nytimes.com/1986/04/11/nyregion/charges-assert-parking-bribes-of-3.8-million.html> [<https://perma.cc/AJM7-P77D>].

11. *See* Baida, *supra* note 10; Marlene Aig, *Manes Kills Self Two Months After Slashing Wrist and Ankle*, AP NEWS (Mar. 14, 1986), <https://apnews.com/article/63ed4c9eb199b819727005fa1af4219e> [<https://perma.cc/SLM2-CR64>].

to pervade the air. It became evidently clear that landmark legislation would be required to combat the tide of mistrust.¹²

In February 1988, after years of research primarily stemming from state-city commissions created in response to the scandals, the city enacted the Campaign Finance Act (the “Act”).¹³ The Act expanded campaign finance disclosure requirements, limited contributions, and created the country’s largest public matching funds program (the “Program”).¹⁴ Then-Mayor Ed Koch described the Act as “the most fundamental reform of the political process *ever* enacted by the city” and further noted that “[the] legislation . . . will achieve a more equitable and open system of financing candidates who seek elective office in New York City.”¹⁵ Months later, City voters overwhelmingly ratified amendments to the City Charter, which established the Campaign Finance Board as an independent, non-partisan agency tasked with implementing and overseeing the Act.¹⁶

The Act’s primary purpose was to restrict the influence of private money in politics and to bring greater accountability to the political system.¹⁷ In its initial form, the Program provided, *inter alia*, that

12. Jarrett Murphy, *The Price of Politics: 20 Years of Campaign Finance Reform in New York City*, CITYLIMITS (Oct. 20, 2008), <https://www.thefreelibrary.com/The+price+of+politics%3A+20+years+of+campaign+finance+reform+in+New+. . . -a0190012581> [<https://perma.cc/UQN2-MMU8>]; Richard Meislin, *Friedman Is Guilty With 3 in Scandal*, N.Y. TIMES (Nov. 26, 1986), <https://www.nytimes.com/1986/11/26/world/friedman-is-guilty-with-3-in-scandal.html> [<https://perma.cc/TQP6-ZJ34>].

13. N.Y.C. ADMIN. CODE §§ 3-701–15 (1988); N.Y.C. LOC. LAW 8 (1988) (codified as N.Y.C. ADMIN. CODE §§ 3-701–14). For a more fulsome background of the Campaign Finance Act, see Nicole A. Gordon & Hyla Pottharst Wagner, *The New York City Campaign Finance Program: A Reform That Is Working*, 19 FORDHAM URB. L.J. 605 (1992).

14. See Gordon & Wagner, *supra* note 13, at 608–09. Three municipalities had previously adopted public funds programs: Sacramento County, California, Seattle, Washington, and Tucson, Arizona. See Jeffrey D. Friedlander et al., *The New York City Campaign Finance Act*, 16 HOFSTRA L. REV. 345, 345 (1988) (citing SACRAMENTO COUNTY, CAL., CODE §§ 2.115.100–830 (1988); SEATTLE, WASH., MUN. CODE §§ 2.04.400–470, 600 (1988); TUCSON, ARIZ., ORDINANCE No. 6300 (1988)).

15. *Hearing on Local Laws* (Feb. 29, 1988) (statement of Mayor Koch) (transcript on file with the Hofstra Law Review).

16. See N.Y.C. CHARTER ch. 46; N.Y.C. CHARTER REVISION COMM’N, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION 24 (1989). The CFB is comprised of five Board members, two of whom are appointed by the Mayor, two of whom are appointed by the speaker of City Council, and one of whom is appointed by the Mayor in consultation with the speaker. See N.Y.C. ADMIN. CODE § 3-708(1). The CFB is non-partisan due to the restrictions on the appointee’s political parties. In particular, the two mayoral appointees cannot be from the same political party and the two speaker appointees cannot be from the same political party. See *id.*

17. See *id.* at 608–09.

private contributions from City residents could be matched at a rate of \$1 to \$1, up to the first \$1,000 per contributor.¹⁸

B. Growth of the Program and Small Donor Democracy

Over the past 30 years, amendments to the Act have increased the powers of the Board and further expanded the impact of small donors.¹⁹ As a result of amendments proposed by a Charter Revision Commission and adopted by voters in the 2018 election, the Program currently matches eligible donations \$8 to \$1 up to monetary caps that vary based on public office.²⁰ To qualify for public funds, candidates must become participants in the Program and demonstrate a degree of local public support by reaching a two-part funding threshold.²¹ Program participants must abide by expenditure limits and strict contribution limits, file detailed disclosure statements, and respond to the Board's requests for documentation to demonstrate the campaign's compliance with the Program.²² Candidates who do not participate in

18. See Loprest and Perskie, *supra* note 1. The CFB was also tasked with overseeing certain voter education initiatives, such as producing a "Voter guide," or a pamphlet that contains information about candidates running for local office. See N.Y.C. CHARTER § 1053.

19. For example, in 2007, the Board was granted broader adjudicatory powers to allow the Board to better enforce a campaign's compliance with the requirements of the Act and Board rules. See N.Y.C. LOC. LAW 34 (2007).

20. For the 2025 citywide elections, the maximum public funds payments for each election are as follows: Mayor (\$7,050,667); Public Advocate and Comptroller (\$4,408,000); Borough President (\$1,586,667); City Council (\$184,000). *Limits and Thresholds*, N.Y.C. CAMPAIGN FIN. BD, <http://www.nyccfb.info/candidate-services/limits-thresholds/2025> [<https://perma.cc/NTS6-VFG2>] (last visited Apr. 6, 2023) (explaining that these figures are 89% of applicable spending limit). To be clear, these caps are for each election, and therefore if a participant runs in both the primary and general election, he or she is eligible for two cycles of public funds. See N.Y.C. ADMIN. CODE § 3-703. For Mayor, Public Advocate, and Comptroller, the maximum matchable amount per contributor is \$250, and the maximum public funds per contributor is \$2,000. *Limits and Thresholds*, N.Y.C. CAMPAIGN FIN. BD, *supra*. For Borough President and City Council, the maximum matchable amount per contributor is \$175 and the maximum public funds per contributor is \$1,400. *Id.*

21. The funding threshold for the 2025 elections are as follows: Mayor (\$250,000 from 1,000 residents); Public Advocate, Comptroller (\$125,000 from 500 residents); Borough President (\$10,000–\$54,721 (varies by borough) from 100 residents); and City Council (\$5,000 from 75 residents). *Limits and Thresholds*, N.Y.C. CAMPAIGN FIN. BD, *supra* note 20. Candidates must also certify agreement to and demonstrate compliance with the requirements of the Act and Board Rules, be on the ballot, have an opponent on the ballot and submit a personal financial disclosure filing with the Conflicts of Interest Board. See N.Y.C. ADMIN. CODE § 3-703.

22. See N.Y.C. ADMIN. CODE §§ 3-701–720.

the Program (“nonparticipants”) are not subject to the full restrictions contained in the Act.²³

The Program has been lauded as a model for promoting transparent, small donor democracy — a system whereby small donations have a material impact on elections and thereby incentivize candidates to be closely engaged with and accountable to constituents — in an era where unregulated big money dominates campaign finance.²⁴ For example, the Program encourages City residents to donate to candidates in their district by multiplying the effect of that donation through public funds.²⁵ Further, by providing matching funds, the Program reduces the need for a candidate to raise large sums of money from wealthy benefactors, thereby incentivizing candidates to directly engage with their constituents.²⁶ Research also shows that women and people of color rely on small donors more often than their male or white counterparts.²⁷ Thus, by amplifying the power of small donations, the Program assists historically underrepresented candidates in running competitive campaigns.²⁸ All of these factors are intended to support a democratic system that is more closely connected to, and representative of, *all* New Yorkers.

Small donor democracy has become prominent in New York City elections, a substantial accomplishment of the Program. In the 2021 primary elections, 94% of candidates participated in the Program, and 84.6% of those candidates’s primary election contributions were “small contributions.”²⁹ In the general election, 81% of candidates participated in the Program and 79% of their general election

23. One of the most notable restrictions that nonparticipants do not need to abide by is an expenditure limit. However, candidates must still timely file disclosure statements and comply with certain other restrictions and contribution limitations. For example, non-participants must still comply with the ban on corporate contributions. See N.Y.C. ADMIN. CODE § 3-718(2).

24. See ANGELA MIGALLY & SUSAN LISS, BRENNAN CTR. FOR JUST., SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 1 (2010), https://www.brennancenter.org/sites/default/files/2019-08/Report_Small-Donor-Matching-Funds-NYC-Experience.pdf [<https://perma.cc/VD5Q-VL4A>]; Michael J. Malbin et al., *Small Donors, Big Democracy: New York City’s Matching Funds as a Model for the Nation and States*, 11 ELEC. L.J. 3, 4 (2012).

25. See Loprest & Perskie, *supra* note 1, at 666.

26. See *id.* at 669.

27. See Gregory Clark et al., *Small Donor Public Financing Plays Role in Electing Most Diverse New York City Council*, BRENNAN CTR. FOR JUST. (Nov. 5, 2021), <https://www.brennancenter.org/our-work/research-reports/small-donor-public-financing-plays-role-electing-most-diverse-new-york> [<https://perma.cc/S9Q6-LJVA>].

28. See 2021 POST-ELECTION REPORT, *supra* note 2, at 19; Clark et al., *supra* note 27.

29. See 2021 POST-ELECTION REPORT, *supra* note 2, at 15–16.

contributions constituted “small contributions.”³⁰ Furthermore, New York City residents represented 71.6% of primary election individual contributions and 70.1% of general election individual contributions.³¹

The Program has also grown dramatically in recent years.³² In the 2021 primary election cycle, the Program dispensed a record \$109.9 million in public funds to 280 candidates (compared to \$32.2 million in 2013 and \$9.4 million in 2017), 62.8% of whom were first-time public funds recipients.³³ In the 2021 general election, the Program dispensed approximately \$17 million to 77 candidates (compared to \$6.1 million in 2013 and \$8.2 million in 2017), 49.1% of which were first time public funds recipients.³⁴ Much of this growth can be attributed to an increase in the matching public funds ratio from \$6 to \$1 to \$8 to \$1 and the fact that many elected officials were term limited.³⁵

The results of the 2021 elections were historic. New Yorkers elected the most diverse City Council in the City’s history.³⁶ In particular, “women, who are 52 percent of residents, . . . increase[d] their representation on the city council from 27 percent now to 61 percent People of color, who are 68 percent of residents, . . . increase[d] their representation on the council from 51 percent to 67 percent.”³⁷ These momentous results have been attributed, in part, to the reach of the Program during these elections.³⁸ In fact, 97% of

30. *See id.* at 4. “Small contributions are those equal to or less than \$250 to citywide candidates and equal to or less than \$175 for contributions to Borough President and City Council candidates. This includes contributors residing outside of New York City and inside New York City.” *Id.* at 4 n.3.

31. *See id.* at 4.

32. *See id.* at 10 n.9.

33. *See id.* at 1.

34. *See id.* There were more open seats in election year 2013, explaining the drop in public funds between 2013 and 2017. *See id.*

35. 2021 POST-ELECTION REPORT, *supra* note 2, at 41.

36. Clark et al., *supra* note 27; *see also* 2021 POST-ELECTION REPORT, *supra* note 2, at 18.

37. Clark et al., *supra* note 27; *see also* 2021 POST-ELECTION REPORT, *supra* note 2, at 18.

38. *See* Clark et al., *supra* note 27; Ese Olumhense, *How Small-Dollar Public Financing Helped NYC Elect Its Most Diverse City Council Ever*, CITYLIMITS (Nov. 16, 2021), <https://citylimits.org/2021/11/16/how-small-dollar-public-financing-helped-nyc-elect-its-most-diverse-city-council-ever/> [<https://perma.cc/BE8E-S4UT>]. The 2021 election cycle was also the first in which the ranked-choice voting occurred, adopted pursuant to a 2019 ballot measure. N.Y.C. CHARTER REVISION COMM’N, FINAL REPORT OF THE 2019 NEW YORK CITY CHARTER REVISION COMMISSION 21 (2019), <https://static1.squarespace.com/static/5bfc4cecf7fde7d3719c06/t/5d38b344e1a74300019fb400/1563996998970/DraftFinalReport.pdf> [<https://perma.cc/R8GK-D52J>].

women and people of color elected to the City Council participated in the Program.³⁹

The Program has inspired and influenced similar public funds initiatives across the country, such as those in Portland, Oregon, Denver, Colorado, and Washington D.C.⁴⁰ Most recently, New York State passed legislation creating the New York State Public Campaign Finance Program, largely modeled off of the CFB Program.⁴¹ Like the CFB Program, many of these other jurisdictions have adopted systems whereby small donations are multiplied and matched with public funds. New York's public funds program, for example, will match eligible donations for statewide offices at a \$6 to \$1 ratio.⁴² In Portland and Denver, eligible donations are currently matched at a rate of \$9 to \$1.⁴³

C. CFB Debate Program

In addition to administering the Program, the CFB has several other duties related to voter engagement and elections, one of which is to manage the City's robust debate program.⁴⁴ In particular, candidates who receive public funds may be required to participate in debates overseen by the CFB and sponsored by a non-partisan organization.⁴⁵ These mandatory debates were not a requirement under the original Act, but were introduced in order to accomplish the dual policy goals of incentivizing candidates to join the Program and ensuring that candidates who receive public funds engage with constituents on important issues.

39. See Clark et al., *supra* note 27.

40. See PORTLAND, OR., CODE 2.16 (2022); DENVER, COLO., CODE, §§ 15-48-60; D.C. CODE §§ 1-1163.01-.06; *see also* OPEN AND ACCOUNTABLE ELECTIONS PROGRAM, PORTLAND CITY BUDGET OFF. 15 (2017-18), <https://www.portlandoregon.gov/cbo/article/675022#PAGE=15> [<https://perma.cc/D46M-LML8>] (“[T]he Commissioner’s office wrote the code for the new program based on programs that were known to be successful, including those from Los Angeles, New York City, and a local jurisdiction in Maine.”).

41. See N.Y. ELECTION LAW 14-207; 9 N.Y.C. R. & REGS. 6221.

42. See 9 N.Y.C. R. & REGS. 6221.20(f)(1); *New York State Public Campaign Finance Program*, N.Y. STATE, <https://pcfb.ny.gov/program-overview> [<https://perma.cc/43T6-EXXD>] (last visited Apr. 6, 2023).

43. See *Small Donor Elections Administrative Rules, Chapter 2.16, Rule 7(E)*, CITY OF PORTLAND, OR., https://www.portland.gov/sites/default/files/2022/2022-small-donor-elections-administrative-rules-as-of-feb-15-2022_0.pdf [<https://perma.cc/36V8-UC49>] (last visited Mar. 27, 2023); DENVER, COLO., CODE, § 15-56(a).

44. See N.Y.C. ADMIN. CODE § 3-709.5(3).

45. See *infra* Section I.C.2.

1. *Origins of the Mandatory Debates and the General Debate Requirements*

In the 1993 mayoral election, candidates Rudolph Giuliani and incumbent David Dinkins failed to agree on a debate format and ultimately refused to meet on a debate stage. Their disagreement turned on whether to include a minor party candidate, George Marlin, in the debates, with Dinkins advocating for the inclusion of Marlin and Giuliani opposing inclusion.⁴⁶ Both Dinkins and Giuliani received public funds through the Program, which created backlash and spurred discussion about whether these candidates had a duty to the public to debate each other given that they had accepted taxpayer money.⁴⁷ The *Daily News* conveyed this sentiment in an editorial highlighting that “[b]oth men took public money to run and then deprived voters of a potentially defining encounter.”⁴⁸ The editorial argued that “[the campaign finance law] should be rewritten to force debates in the future.”⁴⁹

Implementing a government-mandated debate had seldom been attempted. In the years that followed, interest groups debated about the scope and practicality of such a law.⁵⁰ For example, parties disagreed on whether the requirement should be tied to receiving public funds, or whether candidates from independent parties should be included.⁵¹ By 1996, there was sufficient political support from City

46. Vivian S. Toy, *Giuliani and Council Agree On Bill Requiring Debates*, N.Y. TIMES (Oct. 31, 1996), <https://www.nytimes.com/1996/10/31/nyregion/giuliani-and-council-agree-on-bill-requiring-debates.html> [<https://perma.cc/4MXA-K34H>]; N.Y.C. CAMPAIGN FIN. BD., *A DECADE OF REFORM* 13, 83 (1998) [hereinafter *A DECADE OF REFORM*], https://www.nycffb.info/PDF/per/98_PER-Vol.I.pdf [<https://perma.cc/J8WA-ZJQF>]; Sam Roberts, *Dinkins and Giuliani Agree to Debate*, N.Y. TIMES (Nov. 2, 1989), <https://www.nytimes.com/1989/11/02/nyregion/dinkins-and-giuliani-agree-to-debate.html> [<https://perma.cc/3BSL-EVT3>]; see also N.Y.C. CAMPAIGN FIN. BD., *THE DEBATE DEBATE* 1 (1994), http://www.nycffb.info/PDF/issue_reports/1994-06.PDF [<https://perma.cc/D8TH-7PGR>] [hereinafter *THE DEBATE DEBATE*].

47. See *A DECADE OF REFORM*, *supra* note 46, at 83–84.

48. See *id.* at 83 (quoting Editorial, *Debate Flop Shows Campaign Law Loopholes*, DAILY NEWS (October 31, 1993)).

49. See *id.*

50. Mandatory debate requirements for publicly financed candidates had been enacted by New Jersey in 1989, Los Angeles in 1990, and Kentucky in 1992, with “varying degrees of success.” *A DECADE OF REFORM*, *supra* note 46, at 83.

51. See Toy, *supra* note 46. Interestingly, the CFB, along with several other good government groups, originally opposed tying mandatory debates to the receipt of public matching funds, believing that doing so would deter candidates from joining the Program. See *THE DEBATE DEBATE*, *supra* note 46, at 7. Any additional Program requirements were a cause concern because, at the time, public funds were only

Council and then-Mayor Giuliani to pass section 3-709.5 of the New York City Administrative Code, which mandated that participants on the ballot (i.e. those eligible for public funds) and those running for citywide office — mayor, public advocate, and comptroller — partake in pre-election debates.⁵²

Today, a participating candidate may be required to partake in four debates during the election cycle: two at the primary stage and two at the general election stage.⁵³ If a participant fails to partake in a required debate, they will be liable for return of any public funds previously received in connection with the election for which such debate is held.⁵⁴ In addition, the participant is ineligible to receive any further public funds for that election and may be subject to a civil penalty.⁵⁵ Pursuant to the Act, nonparticipants have no right to be included in the debates, but they *may be* invited if they otherwise meet the eligibility requirements.⁵⁶

Board-chosen sponsors administer these debates.⁵⁷ While the Board has latitude in selecting the sponsors, the Act requires that the sponsors be non-partisan organizations that are unaffiliated with a political party or with any holder of or candidate for public office.⁵⁸ Further, the sponsor cannot have endorsed any candidate prior to the debates they sponsor.⁵⁹ The chosen sponsors are often media organizations that can both administer and broadcast the debate. For example, past sponsors have included NY1, WABC, WCBS, and WNBC.⁶⁰

matched at a rate of \$1 to \$1 and participation rates were substantially lower than they are today. *See id.*

52. *See* N.Y.C. ADMIN. CODE § 3-709.5. In 2004, § 3-709.5 was amended to require that limited participants also partake in the debates. A limited participant is a candidate who files a certification to join the Program and is subject to the Program's spending limits, but who will entirely self-finance his or her campaign. Limited participants are not eligible to receive public funds and may not accept any contributions except from the candidate itself. *See* N.Y.C. ADMIN. CODE § 3-717 (2019).

53. *See* N.Y.C. ADMIN. CODE § 3-709.5(1)(a).

54. N.Y.C. ADMIN. CODE § 3-709.5(9).

55. *See* N.Y.C. ADMIN. CODE § 3-709.5(9); *see also id.* § 3-709.5(11).

56. *See id.* § 3-709.5(5)(b)(ii).

57. *See id.* § 3-709.5(3).

58. *See id.* § 3-709.5(4).

59. *See id.*

60. Bobby Cuza, *First Republican Mayoral Debate Turns Into a Shoutfest*, NY1 (May 26, 2021), <https://www.ny1.com/nyc/all-boroughs/decision-2021/2021/05/27/first-republican-mayoral-debate-turns-into-a-shoutfest> [https://perma.cc/A4GH-A4FS]; *Watch the First In-Person NYC Mayoral Debate*, WABC (June 3, 2021), <https://abc7ny.com/mayoral-debate-nyc-2021-mayor-race/10664770/> [https://perma.cc/G2T7-2529]; Amanda Tukaj, *The 2017 City Election Debate Schedule*

2. Eligibility Requirements

The Act also directs how the Board and sponsors are to draft debate eligibility requirements. In particular, the Act mandates that criteria for determining a candidate's eligibility must be non-partisan, objective, and non-discriminatory.⁶¹ The Act also codifies certain substantive requirements. In particular, pursuant to a 2016 amendment, a candidate must raise and spend an amount equal to 2.5% of the campaign's expenditure limit in order to participate in the first debate.⁶² The second debate is reserved for "leading contenders" who are to be chosen based on "additional non-partisan, objective, and non-discriminatory criteria set forth in any agreement between the sponsor and the board."⁶³ These standards, which are intentionally vague, leave considerable discretion to the Board and its sponsors.

3. 2017 and 2021 Debate Requirements

The CFB and its sponsors have historically selected debate criteria that measure candidates's aggregate financial activities (i.e. aggregate raising and spending) and polling results. However, as further discussed herein, the CFB has recently moved away from criteria that only encompasses these metrics in an attempt to include debate pathways that may be better indicators of candidate viability and align

Is Here, GOTHAM GAZETTE (June 9, 2017), <https://www.gothamgazette.com/city/6984-the-2017-city-election-debate-schedule-is-here> [<https://perma.cc/KT83-DFZW>]; *NBC 4 New York to Host Three Mayoral Debates in 2013*, NBC N.Y. (June 13, 2013), <https://www.nbcnewyork.com/news/local/host-new-york-city-mayoral-debates-2013-elections-campaign-finance-board/1998106/> [<https://perma.cc/M4C2-U4MS>].

61. N.Y.C. ADMIN. CODE § 3-709.5(5)(b); N.Y.C. LOC. LAW 58 (2004).

62. This financial threshold was adopted in 2016 in response to a Board staff recommendation in the 2013 Post-Election Report. *See* N.Y.C. LOC. LAW 169 (2016). Board staff made this recommendation because it believed that "[a]n increased standard, tied to the expenditure limit, is a better objective indicator of viability." Prior to this amendment, candidates were required to have raised and spent an amount equal to or greater than 20% of the threshold for public funding for such office. In effect, the 2016 amendment more than tripled the amount required to be raised in order to be eligible for the first debate. *See* COMM. ON GOVERNMENTAL OPERATIONS, COMMITTEE REPORT ON PROPOSED INTEREST NO. 987-A (2016), [https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2513780&GUID=2E26ED01-75B2-4C56-BDA5-CFAEA8BEA895&Options=ID|Text|&Search=\[https://perma.cc/87SN-8RM6\]](https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2513780&GUID=2E26ED01-75B2-4C56-BDA5-CFAEA8BEA895&Options=ID|Text|&Search=[https://perma.cc/87SN-8RM6]). Only contributions raised and spent in compliance with the Act are counted and the amount does not include outstanding liabilities or loans. *See* N.Y.C. ADMIN. CODE §§ 3-703 (2), 3-709.5 (5)(b)(i). For information about expenditure limits for each citywide office eligible for public funds, *See* N.Y.C. CAMPAIGN FIN. BD., LIMITS & THRESHOLDS, SPENDING LIMITS (2021), <https://www.nycfb.info/candidate-services/limits-thresholds/2023/> [<https://perma.cc/EK7S-V28K>].

63. N.Y.C. ADMIN. CODE § 3-709.5(5)(b)(i).

more closely with the agency’s mission of small donor democracy. This section summarizes the 2017 and 2021 debate requirements for the mayoral elections to demonstrate the various types of criteria the CFB and its sponsors have recently adopted. This section also briefly discusses the outcomes of using the chosen debate criteria. Although the CFB and its sponsors also hold debates for the public advocate and comptroller elections, only the mayoral debates are assessed for purposes of this Article since these requirements are often the most rigorous.⁶⁴

a. 2017 Mayoral Debate Requirements

The following chart illustrates the debate requirements in the 2017 primary mayoral election:

Table 1

FIRST DEBATE	SECOND DEBATE (FOR “LEADING CONTENDERS”)
(i) raise and spend 2.5% of the expenditure limit for Mayor (\$174,225). ⁶⁵	(i) meet all of the requirements for the First Debate and (ii) receive (a) an endorsement from an elected official or (b) an endorsement from a membership organization, or (c) “significant media exposure” ⁶⁶

In the second debate, the CFB implemented requirements that sought to measure a candidate’s viability through endorsements and media exposure, unique measures of public support.⁶⁷ The two participants in the first Democratic primary debates, Bill de Blasio and Sal Albanese, qualified by meeting the fundraising and spending

64. See N.Y.C. CAMPAIGN FIN. BD., NEW YORK CITY’S OFFICIAL 2017 DEBATE PROGRAM PARTICIPANT CRITERIA FOR MAYORAL DEBATES (2017) [hereinafter 2017 ELIGIBILITY CRITERIA], https://www.nycfb.info/pdf/2017_Debate_Program_Criteria.pdf [<https://perma.cc/FYJ9-WV5D>].

65. *Id.* at 2

66. Significant media exposure was defined as requiring at least twelve instances of the candidate’s name on television, radio or in print media, in the general circulation area of the election. Any article or news piece that merely mentioned the names of candidates did not qualify as an appearance.

67. See 2017 ELIGIBILITY CRITERIA, *supra* note 64.

thresholds and by receiving significant media exposure.⁶⁸ No candidate qualified for a debate through the endorsement criteria.

The below chart illustrates the debate requirements in the 2017 general mayoral election.⁶⁹ Instead of relying on criteria measuring endorsements or media exposure, these requirements focused on a campaign’s raising and spending metrics and polling results:

Table 2

FIRST DEBATE	SECOND DEBATE (FOR “LEADING CONTENDERS”)
(i) raise and spend \$500,000 or (ii) raise and spend 2.5% of the expenditure limit for Mayor (\$174,225) and achieve at least 8% in the most recent poll conducted by Marist or Quinnipiac.	(i) meet all of the requirements for the First Debate and (ii)(a) raise and spend \$1,000,000 or (b) raise and spend 2.5% of the expenditure limit for Mayor (\$174,225) and achieve at least 15% in the most recent poll conducted by Marist or Quinnipiac. ⁷⁰

All candidates in the general election debates—Bill de Blasio (Democrat), Nicole Malliotakis (Republican), and Richard “Bo” Dietl (Dump the Mayor)—qualified by meeting the fundraising and spending thresholds.⁷¹ The polling thresholds were unavailable as a

68. *Campaign Finance Summary for Sal Albanese (2017)*, N.Y.C. CAMPAIGN FIN. BD., https://www.nyccfb.info/VSApps/CandidateSummary.aspx?as_cand_id=AU&as_election_cycle=2017&cand_name=Albanese,%20Sal%20F&office=Mayor&report=summ [<https://perma.cc/UL4U-U5JQ>] (last visited Apr. 6, 2023); *Campaign Finance Summary for Bill de Blasio (2017)*, N.Y.C. CAMPAIGN FIN. BD., https://www.nyccfb.info/VSApps/CandidateSummary.aspx?as_cand_id=326&as_election_cycle=2017&cand_name=de%20Blasio,%20Bill&office=Mayor&report=summ [<https://perma.cc/TX6Y-FJRM>] (last visited Apr. 6, 2023).

69. The criteria has been simplified for purposes of this Article. For the full criteria see 2017 ELIGIBILITY CRITERIA, *supra* note 64.

70. *Id.* at 4.

71. See *Campaign Finance Summary for Bill de Blasio (2017)*, *supra* note 68; *Campaign Finance Summary for Nicole Malliotakis (2017)*, N.Y.C. CAMPAIGN FIN. BD., https://www.nyccfb.info/VSApps/CandidateSummary.aspx?as_cand_id=2071&as_election_cycle=2017&cand_name=Malliotakis,%20Nicole&office=Mayor&report=summ [<https://perma.cc/E9LE-SUSP>] (last visited Apr. 6, 2023); *Campaign Finance Summary for Richard “Bo” Dietl (2017)*, N.Y.C. CAMPAIGN FIN. BD., https://www.nyccfb.info/VSApps/CandidateSummary.aspx?as_cand_id=1975&as_election_cycle=2017&cand_name=Dietl,%20Richard%20A&office=Mayor&report=summ [<https://perma.cc/FTT6-QQ7E>] (last visited Apr. 6, 2023).

qualifying metric because no polling organization ran a “qualified poll”; that is, the organizations did not conduct a poll that included every candidate on the ballot for Mayor.⁷² Even with only three candidates, the first general election debate was criticized in the media for being “rowdy and rambunctious,” because the candidates “interrupted” and “shout[ed]” at each other.⁷³

Subsequent to the 2017 elections, the CFB believed that the overall experience of the election cycle “suggest[ed] that contributions and spending alone are not the optimal way to determine debate participation.”⁷⁴ For example, Dietl qualified for the debate by raising just over \$1,000,000 (the financial threshold for the leading contenders debate) which included over one hundred \$4,950 contributions, the maximum contribution allowed in the election cycle.⁷⁵ Dietl’s fundraising accomplishment was not borne out in the election results. Despite being one of three candidates to qualify for the debate stage, he finished sixth out of seven candidates on the ballot.⁷⁶ Therefore, in an attempt to move debate requirements away from aggregate financial thresholds, the CFB’s 2017 Post-Election Report recommended that there should be a pathway to eligibility that incorporated small dollar contributions, which would also further align with the CFB’s goal of bolstering small donor democracy.⁷⁷

b. 2021 Mayoral Debate Requirements

In furtherance of the goals set out in its 2017 Post-Election Report, the CFB and its sponsors attempted to include additional pathways for debate participation eligibility in the 2021 election cycle. These 2021

72. See Exhibit 2 to Emergency Affirmation, *Albanese v. N.Y.C. Campaign Fin. Bd.*, 158731/2017 (N.Y. Sup. Ct. Oct. 5, 2017); Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunctive Relief at 3-5, *Albanese v. N.Y.C. Campaign Fin. Bd.*, 17-cv-6254 (E.D.N.Y. Oct.29, 2017).

73. Shane Goldmacher, *Five Takeaways From the New York City Mayoral Debate*, N.Y. TIMES, (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/nyregion/mayoral-debate.html> [<https://perma.cc/3JRV-WHT6>].

74. N.Y.C. CAMPAIGN FIN. BD., KEEPING DEMOCRACY STRONG: NEW YORK CITY’S CAMPAIGN FINANCE PROGRAM IN THE 2017 CITYWIDE ELECTIONS 130 (2017) [hereinafter KEEPING DEMOCRACY STRONG], https://www.nycffb.info/pdf/2017_Post-Election_Report_2.pdf [<https://perma.cc/7527-9UL3>].

75. See *Campaign Finance Summary for Richard “Bo” Dietl (2017)*, *supra* note 71.

76. See N.Y.C. BD. OF ELECTIONS, STATEMENT AND RETURN REPORT FOR CERTIFICATION: GENERAL ELECTION 11/07/2017, at 56 (2017), https://vote.nyc/sites/default/files/pdf/election_results/2017/20171107General%20Election/00001100000Citywide%20Mayor%20Citywide%20Recap.pdf [<https://perma.cc/CK2R-HMDS>].

77. KEEPING DEMOCRACY STRONG, *supra* note 74, at 130.

requirements also need to be viewed within the lens of ranked-choice voting. In particular, the 2021 election cycle was the first in which the City administered a ranked choice voting system in primary elections, which was adopted pursuant to a 2019 ballot measure.⁷⁸ Under this system, voters rank up to five candidates for each office in the primary election and an “instant runoff” counting method ensues.⁷⁹

i. Democratic Primary Debate

The below chart illustrates the debate requirements in the 2021 Democratic primary mayoral election. As seen, the CFB included a pathway to debate eligibility that measured a candidate’s small dollar donations:

Table 3

FIRST DEBATE	SECOND DEBATE (FOR “LEADING CONTENDERS”)
(i) raise and spend 2.5% of the expenditure limit for Mayor (\$182,150) ⁸⁰	(i) meet the requirements for the First Debate and (ii) meet the public funds threshold by raising at least \$250,000 in matchable contributions, including at least 1,000 matchable contributions of \$10 or more, or (b) raise and spend a minimum of \$2,250,000 or (c) achieve at least 7% in the most recent poll conducted by Marist. ⁸¹

78. 2019 N.Y.C. CHARTER REVISION COMM’N, FINAL REPORT (2019), <https://static1.squarespace.com/static/5bfc4cecf7fde7d3719c06/t/5d38b344e1a74300019fb400/1563996998970/DraftFinalReport.pdf> [<https://perma.cc/36D3-HN2C>].

79. *See id.* at 84. In a ranked-choice voting system, a candidate will prevail if they receive more than 50% of first-choice votes. If this does not occur, the candidate with the least amount of first-choice votes is eliminated, and voters who selected the eliminated candidate have their votes transferred to their second-choice candidate. The process repeats until two candidates remain, and then the candidate with the most votes wins the election. *See id.* at 21–22.

80. 2017 ELIGIBILITY CRITERIA, *supra* note 64, at 2.

81. N.Y.C. CAMPAIGN FIN. BD., 2021 NYC DEBATES SCHEDULE & ELIGIBILITY CRITERIA 3–4 (2021) [hereinafter 2021 ELIGIBILITY CRITERIA], https://www.nyccfb.info/pdf/2021_Debates_ScheduleCriteria_20210916.pdf?_gl=1*1c_vvpo*_ga*MTY3ODYwNDgwNy4xNjUzNDE5NzIw*_ga_WP1EW44Q75*MTY1MzQxOTcxOS4xLjEuMTY1MzQxOTczMy40Ng [<https://perma.cc/R9SN-GZQT>]. In order to be used in this subsection (c), the poll must: have a margin of error of 4.5% or

Eight candidates were eligible for, and participated in, the first round Democratic primary debates. Given the high number of candidates on the Democratic ticket, the CFB and debate sponsors ran two first round Democratic primary election debates, providing candidates with additional time to communicate their views.⁸² The “leading contenders” for the Democratic primary election debate included the same eight candidates as the first debate.⁸³

ii. General Election Requirements

The debate requirements for the general mayoral race were the same as those for the Democratic mayoral primary, with one key difference. Namely, the alternative polling threshold for the leading contenders ((ii)(c) above) debate was eliminated:⁸⁴

Table 4

FIRST DEBATE	SECOND DEBATE (FOR “LEADING CONTENDERS”)
(i) raise and spend 2.5% of the expenditure limit for Mayor (\$182,150) ⁸⁵	(i)(a) meet the public funds threshold by raising at least \$250,000 in matchable contributions, including at least one thousand (1,000) matchable contributions of \$10 or more, or (ii) raise and spend a minimum of \$2,250,000. ⁸⁶

less, include all of the candidates on the ballot (for the election for which the poll is conducted) at the same time the poll is taken, and be conducted between the date of the ballot certification and Tuesday, June 8, 2021. *See id.* at 4.

82. N.Y.C. Campaign Fin. Bd., *ABC, NBC, and Spectrum News NY1 to Host Live Televised Debates for New York City’s 2021 Elections* (Mar. 11, 2021), <https://www.nyccfb.info/media/press-releases/abc-nbc-and-spectrum-news-ny1-to-host-live-televised-debates-for-new-york-citys-2021-elections/> [<https://perma.cc/6C42-7F6A>].

83. One candidate in this debate, Dianne Morales, qualified by meeting the small donor threshold. *See Campaign Finance Summary for Dianne Morales (2017)*, N.Y.C. CAMPAIGN FIN. BD., <https://www.nyccfb.info/ftmsearch/Candidates/Contributions?ec=2021&rt=can&cand=2242&stmt=&trans=ABC> [<https://perma.cc/5TCC-J347>] (last visited Apr. 6, 2023).

84. *See 2021 ELIGIBILITY CRITERIA*, *supra* note 81, at 8–9.

85. 2017 ELIGIBILITY CRITERIA, *supra* note 64, at 2.

86. 2021 ELIGIBILITY CRITERIA, *supra* note 81, at 3–4.

For the first general election debate, both the Democratic and Republican candidates met the financial threshold to qualify. Eric Adams, the Democratic candidate for mayor, qualified for the “leading contenders” debate under both qualifying criteria, and the Republican candidate, Curtis Sliwa, qualified for the “leading contenders” debate by meeting the public funds and small donor criteria alternative.⁸⁷

The 2021 debates could be deemed a success in terms of inclusivity, as a wide array of candidates were eligible. It also implemented a pathway to the debates that incorporated small donor contributions, which tied the mandatory debates more closely to the CFB’s mission. However, even with two first-round debates, having eight candidates on the Democratic primary debate stage limited the time that each candidate could speak. It also may have made it difficult for these candidates to fully communicate their platform.⁸⁸ The 2021 debates also raised the question of whether—and to what extent—the “leading contenders” debate should be more exclusive than the first-round debate(s). In particular, Administrative Code section 3-709.5 indicates that the second “leading contenders” debate is intended to be more selective than the first-round debate, but in 2021, the same eight candidates appeared in both rounds.⁸⁹

II. DEBATE ELIGIBILITY LEGAL LANDSCAPE

Before further introspection of the CFB and the sponsors’ debate eligibility criteria, it is important to understand the constitutional limits that the government must adhere to when developing such requirements. Because political debates are one of the most effective ways that candidates can communicate their platform to voters, many campaigns prioritize debate appearances as an element of their

87. See *Campaign Finance Summary for Eric J. Adams (2021)*, N.Y.C. CAMPAIGN FIN. BD., https://www.nycfb.info/VSAApps/CandidateSummary.aspx?as_cand_id=1545&as_election_cycle=2021&cand_name=Adams%2c+Eric+L&office=Mayor&report=summ; [https://perma.cc/8QCN-ZZDF] (last visited Apr. 7, 2023); *Campaign Finance Summary for Curtis Sliwa (2021)*, N.Y.C. CAMPAIGN FIN. BD., https://www.nycfb.info/VSAApps/CandidateSummary.aspx?as_cand_id=2618&as_election_cycle=2021&cand_name=Sliwa,%20Curtis&office=Mayor&report=summ [https://perma.cc/7SZB-VBWE] (last visited Apr. 7, 2023).

88. See Dana Rubinstein, *Who’s the Front-Runner? 5 Takeaways From the First Mayoral Debate*, N.Y. TIMES (Feb. 1, 2021), <https://www.nytimes.com/2021/02/01/nyregion/debate-mayor-nyc.html> [https://perma.cc/HHA2-B4LW].

89. See N.Y.C. ADMIN. CODE § 3-709.5 (“[T]he second debate for a primary, general, or special election shall include only those participating candidates or limited participating candidates who the sponsors have also determined are leading contenders . . .”).

strategy, and, if excluded, vigorously challenge eligibility requirements in court. While candidates have contested debate eligibility requirements under a number of theories, the requirements are often challenged under the First Amendment.⁹⁰ This Part provides an overview of the First Amendment's forum doctrine as developed by the Supreme Court and explains how debates, including those supervised by the CFB, have been analyzed within this structure.

A. First Amendment Analysis

The First Amendment guarantees that “Congress shall make no law . . . abridging the freedom of speech.”⁹¹ It is well understood, however, that there are limits to this right, and that the government may regulate speech in certain instances. The Supreme Court has recognized that the ability of the government to restrict speech on public property will often depend on the property's accessibility to the public.⁹² While certain public spaces act as a foundation of expressive activity, the “First Amendment does not guarantee access to property simply because it is owned or controlled by the government.”⁹³ To assist in this analysis, the Supreme Court has generally recognized three categories of government fora: (i) traditional public forum, (ii) designated public forum, and (iii) non-public forum.⁹⁴

Before 1997, whether a state-sponsored debate was a limited public forum or a non-public forum was unresolved. A limited public forum (sometimes referred to as a designated public forum), exists where “the government opens a non-public forum but limits the expressive activity to certain kinds of speakers or to the discussion of certain subjects.”⁹⁵ A key aspect of a limited public forum is that, although the subject-matter of the speech is tailored, the government makes the property

90. *See, e.g.,* Ayyadurai v. Univ. of Mass., No. 18-11929-RGS, 2018 WL 5253210 (D. Mass. Oct. 22, 2018); *Piccolo v. N.Y.C. Campaign Fin. Bd.*, No. 05-7040, 2007 WL 2844939, at *6–7 (S.D.N.Y. Sept. 28, 2007); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998).

91. U.S. CONST. amend. I.

92. *U.S. Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 129 (1981).

93. *Id.*

94. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015).

95. *Hotel Emps. & Rest. Emps. Union, Loc. 100 v. City of N.Y. Dep't of Parks & Rec.*, 311 F.3d 534, 545 (2d Cir. 2002) (internal citations omitted). Courts have inconsistently defined the relationship between the designated public forum and the limited public forum, and some courts have conflated the definitions. Most recently, the Supreme Court held that the limited public forum is fully distinct from the designated public forum. *See Walker*, 576 U.S. at 215 .

generally available to a specific type of speaker.⁹⁶ In other words, the government must not intend that access to the forum be selective.⁹⁷ In these circumstances, strict scrutiny applies to speech that falls within the category for which the forum was created.⁹⁸ This means that the government must have a compelling interest to limit the speech and the restriction must be narrowly tailored.⁹⁹ Subject matters outside the designated category of the forum are subject to reasonableness and viewpoint neutrality requirements.¹⁰⁰

A non-public forum, by contrast, is property that the government has “not opened for expressive activity by members of the public,” such as airport terminals and military bases.¹⁰¹ Unlike limited public forums, where the forum is generally available to a type of speaker, non-public forum access is reserved to specific individuals who must first obtain permission to gain access.¹⁰² The government has more leeway to restrict speech in a non-public forum, as restrictions are only subject to reasonableness and viewpoint neutrality requirements.¹⁰³

In *Arkansas Education Television Commission v. Forbes*, the Supreme Court established that a selective state-sponsored debate is a non-public forum and, as such, a government entity may restrict speech so long as the restrictions are reasonable and viewpoint neutral.¹⁰⁴ In particular, in the months leading up to the 1992 Congressional elections, debate sponsor Arkansas Education Television Commission (“AETC”) excluded Ralph Forbes, an independent candidate for Congress, from a debate after making a “bona fide journalistic judgement that [its] viewers would best be served by limiting the

96. See *Hotel Emps.*, 311 F.3d at 545 (citing examples of limited public forum, including state university meetings open to student groups and open school board meetings).

97. See *id.*

98. See *id.*

99. See *id.*

100. See *id.* at 546; *Silberberg v. Bd. of Elections of N.Y.*, 272 F. Supp. 3d 454, 468 (2017).

101. See *Hotel Emps.*, 311 F.3d at 546; *Silberberg*, 272 F. Supp. 3d at 468.

102. See *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998).

103. See *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985); *Silberberg*, 272 F.Supp.3d at 468; see also *Rogers v. N.Y.C. Transit Auth.*, 680 N.E.2d 142, 146 (1997) (discussing non-public forum and noting that “authorization of certain speech activities by the government—or a quasi-governmental entity . . . —will not be deemed to transform an otherwise nonpublic forum into a wholly open public forum freed of any reasonable regulation regimens”); *Forbes*, 523 U.S. at 680 (finding televised public debate to be non-public forum because of the government’s process of selecting of eligible candidates); *Silberberg*, 272 F.Supp.3d at 478 (finding a ballot to be a non-public forum).

104. 523 U.S. at 678.

debate.”¹⁰⁵ The Eighth Circuit had ruled in favor of the candidate, holding that the debate was a designated public forum to which all candidates “‘legally qualified to appear on the ballot’ had a presumptive right of access.”¹⁰⁶

The Supreme Court rejected this view, holding that the debate was a non-public forum.¹⁰⁷ In coming to this conclusion, the Court reasoned that AETC did not intend the debate stage to be generally available to an entire class of speakers (i.e. all candidates on the ballot). For example, the debate was not open-microphone, and eligibility was reserved for specific participants.¹⁰⁸ These factors showed that AETC clearly intended access to the debate stage to be selective in format, supporting a finding that the forum was non-public.¹⁰⁹ The Court also expressed concerns that a finding to the contrary would ultimately hamper speech.¹¹⁰ In particular, if the debate were a limited or designated public forum, the government would have less power to control the debate stage because its decision to exclude a speaker would more often be analyzed under a strict scrutiny standard.¹¹¹ The Court held that government entities may forgo airing debates if it were “faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other,” therefore leading to less speech.¹¹² Indeed, the Court cited the Nebraska Educational Television Network’s cancellation of a scheduled debate as a direct result of the Eighth Circuit’s ruling.¹¹³

The Court then concluded that AETC’s debate participation restrictions satisfied the requisite standard for non-public forum. Namely, the decision to exclude the candidate was not based on

105. *Id.* at 671.

106. *Id.* at 672 (internal citations omitted). Although the *Forbes* courts used the term “designated public forum,” the language used in the decisions shows that the term was used to describe what the Court today defines as the “limited public forum.” *See id.* at 677; *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015).

107. As an initial matter, the Court explained that under most circumstances, broadcasts by public entities are not subject to a forum analysis due to the substantial editorial discretion needed to select programming. *See Forbes*, 523 U.S. at 674. Candidate debates, however, present an exception to this rule due to their nature as political speech and “exceptional significance in the electoral process.” *Id.* at 675–76. Therefore, public debates were a forum of some type and subject to some level of scrutiny.

108. *See id.* at 676.

109. *See id.* at 680.

110. *See id.* at 681.

111. *See id.*

112. *Id.*

113. *See Forbes*, 523 U.S. at 681.

viewpoint and was otherwise non-discriminatory.¹¹⁴ In particular, the record was clear that AETC excluded Forbes because he had generated no considerable public support by voters or the media, and he appeared to have very little financial backing.¹¹⁵

While *Forbes* has met some criticism, primarily on how it has affected a third-party candidate's ability to access debates,¹¹⁶ it is settled that candidate debates are non-public fora. Therefore, access to a debate "can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."¹¹⁷ A court is afforded a fair amount of deference in determining "reasonableness," as the requirements are to be analyzed in light of the "purpose of the forum and all the surrounding circumstances."¹¹⁸ Although these terms can seem ambiguous, since *Forbes*, courts have created a fairly clear framework on the types of restrictions that are permissible in debate settings. Courts have consistently upheld restrictions that require a

114. *Id.*

115. Specifically the court cited the five following reasons: (1) "the Arkansas voters did not consider him a serious candidate"; (2) "the news organizations also did not consider him a serious candidate"; (3) "the Associated Press and a national election result reporting service did not plan to run his name in results on election night"; (4) Forbes "apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission"; and (5) "there [was] no 'Forbes for Congress' campaign headquarters other than his house." *Id.* at 682–83.

116. See e.g., Tim Cramm, *The Designated Nonpublic Forum: Remediating the Forbes Mistake*, 67 ALB. L. REV. 89, 158 (2003) ("[T]he current rules work a tremendous hardship on the political viability of any third party or independent candidate"); Francis J. Ortman, III, Note, *Silencing the Minority: The Practical Effects of Arkansas Educational Television Commission v. Forbes*, 49 CATH. U. L. REV. 613 (2000).

117. *Cornelius v. N.A.A.C.P. Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)

118. *Id.* at 809.

certain level of public support¹¹⁹ or fundraising,¹²⁰ holding that such measures objectively establish the status of a candidate. For example, it is well settled that a polling requirement, which is often in the range of 5–15%, is a viewpoint neutral and reasonable criterion of measuring public support.¹²¹

B. Challenges to the CFB's Debate Requirement

The CFB has prevailed in several constitutional challenges to its debate requirements. For example, in August 2005, Arthur Piccolo filed a complaint against the CFB arguing, in relevant part, that he was improperly denied access to the 2005 New York City primary mayoral debate.¹²² Piccolo was ineligible to participate because he did not timely file his certification and he did not meet the debate criteria. At the time, the criteria for the first round primary debate included, *inter alia*, that all participants poll at five percent or higher in selected polls.¹²³ For the second debate, candidates must have been able to raise or spend at least \$250,000 and poll at ten percent or higher in the selected polls.¹²⁴ The Court rejected Piccolo's claims and held that the CFB's polling and financial thresholds "are acceptable forms of

119. *See* *Level the Playing Field v. Federal Election Commission*, 961 F.3d 462, 468 (D.C. Cir. 2020) (noting that "[t]he [Federal Elections] Commission thus acted reasonably in determining that a 15% polling threshold is an objective requirement"); *Ayyadurai v. Univ. of Mass.*, No. 18-11929, 2018 WL 5253210, at *2–3 (D. Mass. Oct. 22, 2018) (using the framework of *Forbes* to find that debate eligibility criterion that included, *inter alia*, that candidates meet a 10% polling threshold did not violate the First Amendment); *Libertarian Nat'l Comm. Inc. v. Holiday*, Civ. No. 14-63, 2014 WL 5111583, at *8–9 (E.D. Ky. Oct. 11, 2014) (same); *Johnson v. Suffolk Univ.*, No. 02-12603, 2002 WL 31426734, at *2 (D. Mass. Oct. 28, 2002) (applying *Forbes* to hold that a private newspaper's decision to exclude candidate from a debate at a public university on the grounds that he did not meet the 15% threshold of public support was reasonable and viewpoint-neutral); *Ala. Libertarian Party v. Ala. Pub. Television*, 227 F. Supp.2d 1213, 1216–19 (M.D. Al. 2002) (finding that Alabama Public Television's criterion that a candidate have voter support of at least 5% for participation in a gubernatorial debate was reasonable and viewpoint-neutral).

120. *See* *Palmer v. Fox Broad. Corp.*, No. 02-0108, 2002 WL 31027440, at *3–4 (E.D. La. 2002) (holding that broadcaster requirements that candidates must raise \$50,000 and be among the leading candidates in public support polls in order to participate in mayoral debates were viewpoint neutral restrictions in a nonpublic forum and therefore valid).

121. *Level the Playing Field*, 961 F.3d at 468; *Ayyadurai*, 2018 WL 5253210, at *3 (determining that a 10% polling requirement was a viewpoint neutral and reasonable restriction); *see also* *Libertarian Nat'l Comm. Inc.*, 2014 WL 5111583, at *6 n.5.

122. *See* *Piccolo v. N.Y.C. Campaign Fin. Bd.*, 2007 WL 2844939, at *1 (S.D.N.Y. Sept. 28, 2007).

123. *Id.* at *7.

124. *Id.* at *6–7.

viewpoint-neutral and reasonable debate-eligibility criteria.”¹²⁵ The court also rejected the candidate’s ancillary arguments under the First and Fourteenth Amendments, finding that there was no evidence of any intentional discrimination on the basis of a protected class and the certification deadline did not impermissibly burden voters’s rights.¹²⁶

More recently, 2017 mayoral candidate Sal Albanese facially challenged the debate eligibility criteria laid out in section 3–709.5 of the Act and 2017 Debate Rules. As noted above, the 2017 Debate Rules provided that each participant in the “leading contenders” debate in the general mayoral election must have either (A) raised or spent \$1,000,000 or (B) raised and spent 2.5% of the expenditure limit (\$174,225) *and* reached at least 15% in a qualified poll.¹²⁷ Albanese did not raise or spend \$1,000,000 and, as a result, he intended to rely on Option B. However, the Debate Rules provided that Option B was only available if a poll was “qualifie[d].”¹²⁸ No polls ultimately met these requirements.¹²⁹ As a result, Albanese was excluded from the debate. In the days leading up to the “leading contenders” debate, Albanese sought a temporary restraining order preventing the CFB from administering the debate.¹³⁰ In a simple order, Judge Dearie of the District Court for the Eastern District of New York denied the Plaintiff’s relief.¹³¹ In doing so, the Court found that “financial criteria may be a logical measure of a candidate’s strength,” and that there is a “genuine public interest in limiting debates to candidates perceived as viable.”¹³² The Court further recognized that there was “no evidence to suggest that the . . . [r]ules,” or debate eligibility criteria “[were] partisan, subjective, or discriminatory.”¹³³

125. *Id.* at *21.

126. *Id.* at *12–14.

127. *See* 2017 ELIGIBILITY CRITERIA, *supra* note 64.

128. *Id.* For a poll to have been qualified during the 2017 election cycle, it must (1) have had a margin error of 4.5% or less, (2) include all the candidates on the ballot and (3) be conducted between the date of the ballot certification and October 27, 2017. *Id.*

129. *See id.*

130. *See generally* Verified Complaint, Albanese v. N.Y.C. Campaign Fin. Bd., No. 17-cv-6254 (E.D.N.Y. Oct. 26, 2017).

131. *See generally* Order, Albanese v. N.Y.C. Campaign Fin. Bd., No. 17-cv-6254 (E.D.N.Y. Oct. 31, 2017).

132. *Id.*

133. *Id.* Albanese also challenged the debate requirements in state court after it was determined that he was not eligible for the first general debate. *See* Albanese v. N.Y.C. Campaign Fin. Bd., No. 5386, 2017 WL 4782374 (N.Y. App. Div. Oct. 19, 2017). The New York Supreme Court denied Albanese’s request for a temporary restraining order on October 5, 2017, and the New York State Appellate Division denied Albanese’s appeal on October 6, 2017. *See id.*

The *Forbes* line of cases and CFB litigation reveal that courts will uphold debate standards so long as they reasonably measure the strength and popular support of a candidate. Although courts have only explicitly upheld CFB criteria involving polling standards and aggregate financial thresholds, the standard is quite deferential, leaving room for other types of reasonable pathways that measure a candidate's support. It is likely that candidates will continue to challenge the CFB's requirements due to the importance of debates in a campaign's strategy. However, given the deferential standard set by the court, the litigation risk should not hinder the agency in its attempts to create innovative eligibility requirements that promote viable candidates while also being in line with the agency's small donor democracy mission.

III. LOOKING AHEAD

As detailed above, the CFB and its sponsors have historically selected debate eligibility criteria that focuses on candidates's aggregate financials and polling results.¹³⁴ Although these criteria may be beneficial in determining eligibility and have been explicitly upheld by courts, they do not solve all the challenges discussed herein. For example, while aggregate raising and spending criteria may promote a small and controlled debate, this criterion may impede access to non-traditional candidates who may not have widespread support reflected in such metrics. This metric may also promote non-viable candidates who rely on fewer, large donors. As the Program continues to grow and candidates rely more heavily on small donations, this problem may be exacerbated. Thus, viable candidates may be excluded and non-viable candidates may end up in debates. Therefore, relying on such metrics may lead to results contrary to the CFB's mission.

While a polling threshold may be a better indicator of candidate viability, this criterion presents challenges as well. Because a poll must be accurate, timely, and objective, the CFB and its sponsors must regulate which polls can be "qualified" polls for purposes of debate criteria. In the past, polls have been required to include all candidates on the ballot, account for specific time frames and have small margins of error.¹³⁵ In light of these requirements, it is not uncommon for no polls to meet these specifications, as was the case in the 2017 general mayoral election. As participation in the Program increases and more

134. See *supra* Section I.C.3.

135. See 2017 ELIGIBILITY CRITERIA, *supra* note 64; 2021 ELIGIBILITY CRITERIA, *supra* note 81.

candidates run for office, running a poll that meets the qualifications set forth by the CFB and sponsors will only become more difficult.¹³⁶ And while the CFB can consider expanding the definition of “qualified” poll, doing so may lead to candidates qualifying for debates on the basis of inaccurate or subjective polls which runs contrary to the goal of determining viable candidates. Therefore, while the polling and financial metrics should not be abandoned, additional indicators of political viability should be explored.

The CFB and its sponsors tried to address some of these concerns in the 2017 elections by including pathways to eligibility that focused on candidate endorsements from “membership organizations” and the candidate receiving “significant media coverage.”¹³⁷ Although these criteria provide a creative departure from the typical financial and polling thresholds and may indicate the viability of a candidate, they present challenges as well. In particular, these criteria are comprised of external data that the CFB must verify, and therefore may be harder to authenticate in a short time frame. As such, these requirements are more administratively burdensome than criteria based on campaign finance data, which is information that the CFB already possess as a result of candidates’s disclosure statements. In addition, the terms “membership organization” and “significant media coverage” are challenging to define.¹³⁸ Consequently, these pathways were excluded from the 2021 Debate Eligibility Requirements.

On the contrary, the small dollar donor requirement in the 2021 election presents a pathway that better aligns with the CFB’s mission, may discern viable candidates and is easily administrable. Although it will take several election cycles to comprehensively understand the influence of this pathway, it is intended to better enable debate access to grass-roots candidates, which is fully consistent with the goals of the Program. The pathway may also be a genuine indicator of public support given that it measures the number of contributors. Further, this criterion holds statutory and constitutional significance. As discussed, measures of public support have consistently been upheld as a reasonable and viewpoint neutral debate eligibility metric.¹³⁹ Further,

136. See Memorandum of Law in Opposition to Plaintiff’s Motion for Preliminary Injunctive Relief at 3–5, *Albanese v. N.Y.C. Campaign Fin. Bd.*, 17-cv-6254 (E.D.N.Y. Oct.29, 2017) (discussing various polls that did not qualify in the 2017 elections due to a failure to include all candidates)

137. See *supra* Section I.C.3.a.

138. See 2017 ELIGIBILITY CRITERIA, *supra* note 64.

139. See *Palmer v. Fox Broad. Corp.*, No. 02-0108, 2002 WL 31027440, at *3–4 (E.D. La. Jan. 15, 2002).

this pathway is easy to define and verify. Because the CFB already has data on a campaign's small donors in connection with the Program, the CFB and its sponsors can more quickly analyze these eligibility requirements. This is an important administrative factor because analyzing debate eligibility often requires a quick turnaround.

Although the small donor criterion is promising, at the same time, the CFB and its debate sponsors must consider the possibility that this pathway will lead to an overcrowded debate stage. Indeed, some media outlets voiced this opinion following the 2021 Democratic primary debates, which hosted eight candidates.¹⁴⁰ This is a concern that should not be overlooked given that it may undercut a key purpose of having debates in the first place. Namely, debates are intended to create a forum that is educational to the public and informs constituents on their candidates's views.

One solution that could be explored is splitting candidates into multiple first round debates and then choosing more selective criteria for the "leading contenders" debate.¹⁴¹ As noted in Section I.C, in the 2021 Democratic primary, the CFB and sponsors held two, first round debates, with each eligible candidate appearing in both debates. This remains a viable option to alleviate a crowded debate as it gives candidates additional aggregate airtime. However, it should also be considered whether splitting candidates into two, first round debates (such that the candidates are not all on the stage at the same time) would be more effective, as doing so may allow the candidates to dive deeper into the issues at each debate. Indeed, it may be permissible under the Act to split the first-round primary debate into two parts, with each eligible candidate participating in only one part.¹⁴² Although this creates certain challenges — such as deciding how to split the candidates, whether to ask the same questions at each debate, and whether a media organization has the capacity, airtime, or bandwidth to produce multiple debates — the competing concerns of hosting a manageable, educational debate with viable candidates may justify this proposal.

140. *See supra* Section I.C.3.b.

141. Moving forward, debate inclusivity will also need to be studied through the lens of the ranked-choice voter system. As noted, voters in primary elections can now rank up to five candidates on their ballot. While this issue does not explicitly involve debate criteria and therefore is outside the scope of this piece, debate sponsors will have to think about debate structure such that it compliments a ranked-choice voting system.

142. *See* N.Y.C. ADMIN. CODE § 3-709.5(1)(a).

CONCLUSION

The 2021 elections were an inflection point for the Program. As noted, a record number of candidates participated and received public funds, and it was the first New York City election to employ ranked-choice voting. Program participants in the 2021 election were substantially supported by small dollar contributions and most individual contributions were given by New York City residents. As the Program continues to grow and more candidates run for office, it will become only more important to ensure that the debate eligibility criteria also promote the underlying mission of the CFB. Further, including a small donor requirement is a promising solution to ensure that debates provide a chance for all viable candidates to communicate their platforms. However, selecting debate eligibility criteria requires the balancing of various interests. While it is important that the CFB fosters an inclusive debate with all viable candidates, a debate that is too inclusive may be unwieldy and uninformative. Although changes to the debate structure should be explored, these tensions will likely remain for the foreseeable future. As such, the CFB and its sponsors will need to continue to explore and test creative, mission-driven criteria each election cycle.