UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DAN LA BOTZ
3503 Middleton Avenue
Cincinnati, OH 45220,

Plaintiff,

VS. No. 13-997

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC, 20463,

Defendant.

COMPLAINT

INTRODUCTION

Plaintiff, Dan La Botz, was the Socialist Party's candidate for the United States Senate in Ohio in 2010. *See La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51, 54 (D.D.C. 2012). Although he and the Socialist Party were fully qualified for Ohio's ballot during that election cycle, he was excluded from a series of senatorial debates staged in Ohio in October of 2010 by a consortium of newspapers and television stations--all corporations in Ohio--known as the Ohio News Organization (ONO). *Id*.

La Botz filed a formal complaint with the Defendant, the Federal Election Commission (FEC), on September 21, 2010, arguing that the ONO failed to comply with the FEC's rules and regulations for debate-staging organizations. *Id.* Under the Federal Election Campaign Act (FECA), corporations (including news organizations) are precluded from making campaign contributions to candidates for federal office. This prohibition is defined broadly to prohibit anything of value, including the many benefits surrounding debates. The FEC, however, has prescribed a safe harbor for news organizations and non-profit corporations; so long as they do

not "endorse, support or oppose political candidates," id. § 110.13(a)(1), do not structure the debates "to promote or advance one candidate over another," id. § 110.13(b)(2); and employ "pre-established, objective criteria," they can sponsor and stage candidates' debates. Id. § 110.13(c). *See La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51, 55 (D.D.C. 2012).

La Botz charged that the ONO had no proper, written pre-existing objective criteria, *id.* at 60, and that the only criteria the ONO employed--its "two frontrunner" standard--"were designed to confine the debate to the two major parties' candidates." *Id.*

The FEC dismissed La Botz's complaint, finding that the ONO's "two frontrunner" standard was permissible, and that the ONO had produced substantial evidence establishing that it had employed pre-existing objective criteria to select the two frontrunners for its series of debates. This Court reversed. *La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51, 55 (D.D.C. 2012). It concluded that the only evidence presented by ONO in support of its pre-existing objective criteria, a litigation affidavit prepared by an editor for the Columbus Dispatch (a member of ONO), "suffers from two serious flaws." *Id.* at 61. First, as an evidentiary matter, it was unclear to the Court "why the declarant has first-hand knowledge ... or is otherwise competent to testify to such." *Id.* Second, and perhaps more importantly, the Court observed:

> [S]uch affidavits raise the risk that they will merely provide a vehicle for a party's post hoc rationalizations. This sole affidavit highlights the absence of any contemporaneous evidence suggesting that ONO employed pre-established selection criteria. Cf. Ponte v. Real, 471 U.S. 491, 509 (1985) ("The best evidence of why a decision was made as it was is usually an explanation, however brief, rendered at the time of the decision."). In particular, ONO has not produced any contemporaneously written formulation of the criteria it purportedly utilized. And while FEC regulations do not specifically require debate staging organizations to reduce their criteria to writing, it is strongly encouraged.

Id. (footnote omitted).

In an accompanying footnote, the Court stated that "[g]iven that eight newspapers were involved in organizing the debates and the inherent difficulty in coordinating this many entities, it would be highly unusual if no contemporaneous evidence existed in the form of meeting notes or e-mail exchanges." *Id.* at 61 n.5.

Because the FEC's decision to dismiss was not supported by substantial evidence, the Court remanded the matter to the FEC. The Court did not resolve whether a "two frontrunner" standard satisfies the FEC's safe harbor requirements for debate-staging organizations. *Compare id.* at 60 n.4 (concluding that criteria need not be publicly disclosed or delivered to potential candidates).

On remand, the FEC again once again dismissed La Botz's complaint. It first reiterated its conclusion that the ONO's "selection criteria of 'first ensur[ing] the eligibility of the candidates and then par[ing] down the field to the two frontrunners ... were acceptably 'objective'." MUR 6383R, at 7-8 (May 24, 2013). Indeed, the FEC erroneously claimed that this Court had endorsed this position. *Id.* at 8 (citing *La Botz,* 889 F. Supp. 2d at 63-64). Next, the FEC ruled that although written documentation is preferred, "undocumented affirmative statements ... will suffice." MUR 6383R, at 8. Because the "ONO did not provide a contemporaneous written standard for its 2010 debates," the FEC ruled, it "must examine the record to analyze whether the ONO did in fact establish its stated selection criteria in advance and employ those criteria in organizing the events." *Id.* Although the FEC conceded that the available evidence "would suggest that the ONO may not have used pre-existing objective criteria," *id.* at 9, it also ruled that Plaintiff had not "conclusively establish[ed] that the ONO used major party status as the sole selection criteria in 2010, any more than the Marrison affidavit conclusively establishes the contrary." *Id.* Given "inconsistent statements concerning

the ONO's criteria," *id.* at 10, and "[b]ecause the ONO did not provide contemporaneous written criteria and the record does not otherwise reflect that the ONO reduced its criteria to writing in advance of the debates," *id.,* the FEC concluded that it "would need to review the ONO's internal communications, including those of all eight constituent media entities, to determine whether the ONO employed pre-established criteria in 2010." *Id.* Rather than perform this "resource-intensive" task, *id.,* the FEC exercised its discretion to again dismiss the complaint. *Id.* at 11.

The FEC erred as a matter of law in three ways. First, its continuing insistence that staging organizations may categorically limit debates to the "two frontrunners" contradicts the holdings of this Court, the FECA, and the FEC's own regulations.[1]

Second, its reward for not producing contemporaneous documentation ignores this Court's ruling in *La Botz.* This Court in *La Botz* stated that post hoc rationalizations--which is all ONO has proffered--cannot alone constitute substantial evidence. There must be some form of supporting documentation--whether it is contained in e-mails, meeting notes, or formal policies.

Third, its shifting of the burden of proof away from staging organizations violates well-established law. The burden of proving that one qualifies for exemptions or is protected by safe harbors is on the party claiming protection. If ONO cannot produce the needed evidence to satisfy this burden, then its debates violated the FECA. Neither Plaintiff nor the FEC is required to engage in an "intensive review" of the consortium's internal dealings and records. And for this reason, the FEC's reliance on prosecutorial discretion collapses.

PROCEDURAL HISTORY

[1] Compounding this error is the FEC's apparent belief that this Court somehow approved this erroneous conclusion in *La Botz.*

1. This action is brought by Plaintiff, Dan La Botz, against Defendant, the Federal Election Commission (FEC or Commission), to remedy the Commission's wrongful dismissal of Plaintiff's administrative complaint (MUR 6383R) against the Ohio News Organization (ONO), its corporate members, the senatorial campaign of Robert Portman, and the senatorial campaign of Lee Fisher.

2. Plaintiff filed his administrative complaint with the Commission on or about September 21, 2010, alleging that ONO and its corporate members had scheduled a series of televised debates between Portman, the Republican candidate for U.S. Senate in Ohio, and Fisher, the Democratic candidate for the same U.S. Senate seat in Ohio, in violation of the Federal Election Campaign Act (FECA), 2 U.S.C. § 441b(a), and 11 C.F.R. § 110.13(c).

3. Acting on advice of its General Counsel, the Commission dismissed Plaintiff's administrative complaint on May 19, 2011. *See* MUR 6383.

4. The FEC concluded that ONO's and its corporate members' categorical inclusion of only the "top-two," "frontrunner," Republican and Democratic candidates, and categorical exclusion of all other ballot-qualified candidates (including Plaintiff) from its senatorial debates as a matter of law satisfied the FECA, 2 U.S.C. § 441b(a), and 11 C.F.R. § 110.13(c).

5. The FEC further found that there existed substantial evidence, through an affidavit filed by Ben Marrison, editor of the Columbus Dispatch, demonstrating that the employed pre-existing objective criteria to select the two frontrunners.

6. This Court reversed the FEC's dismissal of Plaintiff's administrative complaint. *See La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51 (D.D.C. 2012). It concluded that ONO failed to present substantial evidence that it employed pre-existing, objective criteria. In

reaching this result, the Court emphasized that ONO had failed to produce any contemporaneous, written documentation of its criteria. This proved fatal to ONO's claimed exemption.

7. On remand, the FEC once again dismissed Plaintiff's administrative complaint. *See* MUR 6383R. The FEC again ruled that ONO's "two frontrunner" standard constituted a proper pre-existing criterion. It further ruled that ONO was under no obligation to document its pre-existing, objective criteria with contemporaneous writings. Lastly, it shifted the burden of producing evidence away from ONO and concluded that the difficulty of uncovering ONO's criteria justified a discretionary dismissal.

8. Plaintiff files this timely challenge to the FEC's dismissal of MUR 6383R.

PARTIES

9. Plaintiff was the ballot-qualified, 2010 Socialist Party candidate for U.S. Senate in Ohio. As noted in this Court's prior opinion, *La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51, 59 (D.D.C. 2012), Plaintiff has previously declared that he intends to run again for federal office in the future. Plaintiff reiterates that declaration with the following caveat: because he will be moving to New York in January 2014, the congressional offices he runs for in the future will likely be in New York. Plaintiff also asserts that notwithstanding his move to New York he is likely to run for President as the Socialist Party candidate in the future and therefore is likely to again appear on Ohio's federal election ballot.

10. The FEC is an independent agency within the federal government charged with enforcing the Federal Election Campaign Act, which regulates federal elections, including elections for the U.S. Senate.

11. The ONO is a for-profit, unincorporated business association consisting of the eight largest newspapers in Ohio, which are all for-profit corporations organized under the laws

of Ohio: The Toledo Blade, the (Canton) Repository, the (Cleveland) Plain Dealer, the Columbus Dispatch, the Cincinnati Enquirer, the Dayton Daily News, the Akron Beacon Journal, and the (Youngstown) Vindicator.

12. Lee Fisher was the ballot-qualified, 2010 Democratic candidate for U.S. Senate in Ohio. He was invited to and appeared in ONO's senatorial debates with knowledge of Plaintiff's exclusion and Plaintiff's charge that ONO was violating the FECA.

13. Rob Portman was the ballot-qualified, 2010 Republican candidate for U.S. Senate in Ohio. He was invited to and appeared in ONO's senatorial debates with knowledge of Plaintiff's exclusion and Plaintiff's charge that ONO was violating the FECA.

JURISDICTION AND VENUE

14. This action arises under the FECA, 2 U.S.C. § 431, *et seq.*, and the Declaratory Judgment Act, 28 U.S.C. § 2201. Jurisdiction of this Court is conferred by 2 U.S.C. § 437g(8)(A) and 28 U.S.C. § 1331. The action is commenced against the Commission within 60 days of the Commission's dismissal of Plaintiff's administrative complaint. *See* 2 U.S.C. § 437g(8)(B).

15. Venue is proper in the District of Columbia under the FECA, 2 U.S.C. § 431g(8)(A).

CAMPAIGN FINANCE LAWS AND REGULATIONS

16. Section 441b(a) of the FECA prohibits corporations from making contributions or expenditures "in connection with" any federal election. "Contribution or expenditure" is defined to include "any direct or indirect payment, or any services, or anything of value, or gift .., to any candidate, campaign committee, or political party or organization." 2 U.S.C. § 441b(b)(2).

17. A corporation or collection of corporations, like ONO, that finances and stages debates involving candidates for federal office must comply with FEC regulations to avoid § 441b(a)'s prohibition on corporate contributions.

18. As explained by this Court in *La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51, 55 (D.D.C. 2012), "corporations may provide financial backing to organizations that stage debates, but only if certain conditions are met to ensure that the debates remain nonpartisan. 11 C.F.R. § 114.4(f). In particular, FEC regulations require that the debate staging organization may not "endorse, support or oppose political candidates," id. § 110.13(a)(1), and the debate cannot be structured "to promote or advance one candidate over another," id. § 110.13(b)(2). When determining which candidates may participate in the debate, the debate staging organization must employ "pre-established, objective criteria." Id. § 110.13(c)."

19. Section 110.13(c) further demands that corporate staging organizations "not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. § 110.13(c).

20. This Court in *Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000), stated that "statements by the regulation's drafters strongly suggest that the objectivity requirement [of 11 C.F.R. § 110.13(c)] precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it."

21. This Court in *Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000), stated that "[s]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants." (Quoting FEC statement supporting 11 C.F.R. § 110.13(c)).

22. This Court in *La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51, 61 (D.D.C. 2012), emphasized the necessity of staging organizations producing contemporaneous documentary evidence, stating that ONO's single post hoc affidavit "highlights the absence of any contemporaneous evidence suggesting that ONO employed pre-established selection criteria. *Cf*. *Ponte v. Real*, 471 U.S. 491, 509 (1985) ("The best evidence of why a decision was made as it was is usually an explanation, however brief, rendered at the time of the decision.")." It continued: "In particular, ONO has not produced any contemporaneously written formulation of the criteria it purportedly utilized. And while FEC regulations do not specifically require debate staging organizations to reduce their criteria to writing, it is strongly encouraged." *Id.* (footnote omitted).

23. In an accompanying footnote in *La Botz*, 889 F. Supp.2d at 61 n.5, the Court reiterated the ease with which staging organizations can supply contemporaneous documentary evidence: "[g]iven that eight newspapers were involved in organizing the debates and the inherent difficulty in coordinating this many entities, it would be highly unusual if no contemporaneous evidence existed in the form of meeting notes or e-mail exchanges."

FACTUAL ALLEGATIONS

24. On September 1, 2010, ONO and its corporate members publicly announced that they were sponsoring a series of debates between Fisher, the Democratic Party's candidate for Ohio's United States Senate seat, and Portman, the Republican Party's candidate for Ohio's United States Senate seat.

25. The three debates were financed and otherwise sponsored by ONO and its corporate members, and all were televised by either independent broadcasters or broadcasters owned by or affiliated with ONO's corporate members.

26. ONO, its corporate members, and the Fisher and Portman campaigns commenced negotiations surrounding the formats of the debates and which candidates were to be included (and excluded) in June 2010.

27. The debates negotiated by ONO, its corporate members and the Fisher and Portman campaigns were scheduled to be held (and in fact were held) in Cleveland, Toledo and Columbus during the month of October 2010.

28. All three of ONO's debates between Portman and Fisher were broadcast live on local television, either through independent broadcasters or broadcasters affiliated with ONO's corporate members.

29. A panel of four newspaper reporters drawn from the eight corporate members of ONO was used to question the two candidates at all three debates. The moderators were journalists affiliated with one of the eight newspapers' partnering broadcast stations. ONO's corporate members fully financed all aspects of the televised debates.

30. Because of unconstitutional ballot access restrictions existing in Ohio before the 2008 election cycle, *see Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006); *Libertarian Party of Ohio v. Brunner*, 567 F. Supp.2d 1006 (S.D. Ohio 2008), minor-party candidates, including those running as Socialists, have been routinely and unconstitutionally prevented from running for office in Ohio. This began in the late 1940s and extended until 2008. *See*, *e.g.*, *Anderson v. Celebrezze,*460 U.S. 780 (1983) (describing Ohio's unconstitutional exclusion of John Anderson from 1980presidential election); *Williams v. Rhodes*, 393 U.S. 23

(1968) (describing Ohio's unconstitutional exclusion of Socialist Labor Party from 1968 presidential election).

31. Ohio's unconstitutional exclusion of minor-party candidates for sixty-plus years from its ballots has led Ohio's primary news outlets, including the eight corporate members of ONO, to habitually and presumptively focus exclusively on the two major parties. Ohio news organizations, especially those corporations that have joined to form the ONO, regularly ignore candidates who are not affiliated with either the Democratic or Republican Parties.

32. Ohio's unconstitutional exclusion of parties other than the Democratic and Republican Parties has insured that the candidates of these two parties will for the foreseeable future always be the two frontrunners, regardless of the criteria used to select them.

33. ONO's and its corporate members' sponsorship of the 2010 debates was negotiated exclusively with the campaigns of Portman and Fisher. Plaintiff was never contacted about his availability; was never notified of ONO's negotiations with the Fisher and Portman campaigns, was never asked by ONO, its members, or the Fisher and Portman campaigns, about his desire to be included in the debates; was never invited to submit polling data or financial information; was never informed of any criteria used for deciding who would be in the debates; and was never afforded an opportunity to demonstrate that he satisfied any criteria for inclusion in the debates.

34. Plaintiff only learned of the negotiations surrounding the debates because he read a news article in the July 20, 2010 issue of the Columbus Dispatch reporting that negotiations were under way between ONO, its corporate members, and the Portman and Fisher campaigns.

35. On September 5, 2010, following the ONO's and its corporate members' first public announcement that Portman and Fisher had agreed to three debates, Plaintiff sent a letter to each of ONO's corporate members requesting that he "be included in the debates which your

organization is helping to organize." None of the recipients responded to any of Plaintiff's efforts.

36. On September 6, 2010, Plaintiff personally phoned Mr. Tom Callinan, editor of the Cincinnati Enquirer, and left a message protesting his exclusion from the debates. Callinan never returned the call.

37. On September 7, 2010, Plaintiff's campaign launched an online petition targeting the editors of the eight newspapers comprising the ONO and demanding an explanation for Plaintiff's exclusion from the debates.

38. Following this online petition effort, Plaintiff received on September 8, 2010, a response from Mr. Bruce Winges, editor and vice-president of the Akron Beacon Journal, one of the eight corporate members of ONO, describing ONO's criteria for inclusion in the debates:

> The Ohio News Organization generally follows the structure used by the Commission on Presidential Debates, which allows for only the major-party candidates to debate. The logic is sound: In a television debate format, when time constraints limit the number of questions and answers to be heard, it is of the utmost importance that voters hear from the two candidates who are clearly the front-runners for the office. While we have and will continue to write about third-party candidates when warranted, including them in debates limits Ohioans' ability to hear answers from the top candidates on issues critical to the state's future.

39. Contrary to Winges' assertion, the Commission on Presidential Debates has never, and does not now, automatically preclude minor candidates from participating in its debates. It does not select, and never has selected, only the "top two," "frontrunners," who everyone knows are going to be major-party candidates. Instead, the Commission on Presidential Debates today follows "pre-existing objective criteria," that is, whether a candidate objectively polls 15% of the popular vote prior to the structuring of the debate and has qualified in enough states to supply a mathematical chance of winning in the Electoral College. *See Becker v. Federal Election Commission*, 230 F.3d 381, 386 (1st Cir. 2000).

40. ONO's "two frontrunner" formula is nothing like that ever used by the Commission on Presidential Debates. The Commission on Presidential Debates, which was formed in 1988, during the 1992 and 1996 presidential elections invited the two major candidates to debate as well as candidates who had "a 'realistic chance' of success in the general election." Eric B. Hull, Note, *Independent Candidates' Battle Against Exclusionary Practices of the Commission on Presidential Debates*, 90 Iowa L. Rev. 313, 320 (2004).

41. On September 10, 2010, Plaintiff, through legal counsel (Mark Brown), sent via United States Mail a letter to each of ONO's corporate members advising them that the ONO's exclusive structuring of the debates violated the FECA and demanding that Plaintiff be included in the debates.

42. On September 14, 2010, ONO and its corporate members responded via an electronically transmitted letter (through counsel) to Brown, stating that "the ONO considered front-runner status based on then-existing Quinnipiac and party polling, fundraising reports, in addition to party affiliation."

43. ONO's response to Brown did not identify nor explain what thresholds a qualified candidate needed to meet, nor did it cite to any documents or information that established any pre-existing objective criteria before exclusive invitations were handed out based on party affiliation, that is, affiliation with the Republican and Democratic Parties.

44. ONO's belatedly announced "two frontrunner" formula, which admittedly considered party affiliation, was never publicly disseminated nor made known to Plaintiff or anyone else outside the small circle of eight ONO corporate members and the Portman and Fisher campaigns before September 8, 2010 —long after the debates had been finalized and Plaintiff excluded.

45. Via an electronically-submitted letter to Brown dated September 16, 2010, ONO made clear to Brown that there was absolutely no showing Plaintiff could ever make to gain an invitation to ONO's debates. The debates were confined to the two frontrunning candidates, that is, the Republican and the Democratic candidates for Ohio's U.S. Senate seat.

46. On September 10, 2010, Plaintiff, through counsel, sent to the Portman and Fisher campaigns letters (via U.S. Mail) advising them that their participation in the debates organized by the ONO and its corporate members violated the FECA, 2 U.S.C. § 441b(a), and 11 C.F.R. § 110.13(c).

47. Plaintiff on or about September 21, 2010 filed an administrative complaint with the Commission claiming that ONO, its corporate members, and the Fisher and Portman campaigns, under the events described above, violated the FECA, 2 U.S.C. § 441b(a), and 11 C.F.R. § 110.13(c).

48. The debates described above between the Republican candidate, Portman, and the Democratic candidate, Fisher, were held as planned without Plaintiff's or any other candidate's participation.

49. ONO staged the aforementioned debates by simply selecting the candidates of the Democratic and Republican Parties; no other criteria were employed.

50. ONO's belatedly announced "two frontrunner" formula was never employed before the debates were planned and agreed to by Portman and Fisher.

51. ONO has produced no contemporaneous documentary evidence suggesting, let alone proving, that it employed a pre-existing "two frontrunner" formula that used pre-existing objective criteria (other than major party status) to identify the two frontrunners.

52. ONO's belatedly announced "two frontrunner" formula is a proxy for selecting only the candidates of the two major parties for debates.

53. ONO's belatedly announced "two frontrunner" formula is the equivalent of simply selecting the candidates of the two major parties for debates in Ohio.

54. ONO's belatedly announced "two frontrunner" formula violates the FECA.

VIOLATIONS

55. The Federal Election Campaign Act (FECA) prohibits corporations from making contributions or expenditures "in connection with" any federal election. 2 U.S.C. § 441b(a).

56. The FECA defines "contribution or expenditure" to include "any direct or indirect payment, or any services, or anything of value, or gift ... to any candidate, campaign committee, or political party or organization." *Id.* § 441b(b)(2).

57. The general prohibition described in ¶ 55 is subject to three exemptions and safe harbors, which permit corporate funds to be used for limited purposes, including: (1) internal corporate communications; (2) nonpartisan registration and get-out-the-vote campaigns by a corporation directed to its stockholders and executive and administrative personnel and their families; and (3) the establishment of a separate segregated fund used for political purposes. *Id.* § 441b(b)(2)(A)-(C).

58. The FECA's general definition section defines the term "expenditure" to include any payments made "for the purpose of influencing any election for Federal office," *id.* § 431(9)(A)(i), but not to include "nonpartisan activity designed to encourage individuals to vote or to register to vote." *Id.* § 431(9)(B)(ii).

59. The FEC's regulatory scheme provides an exemption from the FECA's prohibition on corporate contributions and expenditures when they are used to defray the costs of conducting exempt candidate debates meeting the criteria described in 11 C.F.R. § 110.13.

60. Under 11 C.F.R. § 110.13(a), debate staging organizations must either be nonprofit organizations that "do not endorse, support, or oppose political candidates or political parties," or news organizations that are "not owned or controlled by a political party, political committee or candidate."

61. The only permissible mechanism for ONO and its corporate members to stage debates involving federal candidates is for ONO and its corporate members to comply with the terms of 11 C.F.R. § 110.13.

62. Under 11 C.F.R. § 110.13(b), candidate debates staged by appropriate staging organizations must include at least two candidates and not be structured "to promote or advance one candidate over another." 11 C.F.R. § 110.13(b).

63. Under 11 C.F.R. § 110.13(c), debate staging organizations are required to use "pre-established objective criteria to determine which candidates may participate in a debate," and "shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate."

64. In explaining the intent behind 11 C.F.R. § 110.13, the Commission has formally stated that "[s]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants." *See Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000) (quoting FEC statement).

COUNT ONE
(The "Two Frontrunner" Formula)

65. Paragraphs 1 through 64 are incorporated into Count One.

66. The Commission's conclusion that a staging organization's categorical decision to exclude all qualified candidates for a particular federal office other than the "two frontrunners" from its series of televised debates is permissible, in a state that had for sixty years before the election cycle excluded candidates from any party other than the Democratic and Republican Parties, contradicts the FECA's ban on partisan corporate contributions and the FEC's regulatory exemptions. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 110.13.

67. The Commission's endorsement of a formula that not only set the "level of support so high that only the Democratic and Republican nominees could *reasonably* achieve it," *Buchanan v. Federal Election Commission,* 112 F. Supp.2d at 74 (emphasis added), but which also limited televised debates to the two major-party candidates who had been identified months in advance by ONO, contradicts the FECA's ban on corporate contributions and the FEC's regulatory exemptions. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 110.13.

68. The Commission's ruling that ONO's belatedly announced "two frontrunner" formula satisfied the FECA and the FEC's regulatory exemptions is contrary to law, arbitrary and capricious and an abuse of discretion.

69. Regardless of whether otherwise proper pre-existing objective criteria, like polls and fundraising, are used to identify the "two frontrunners" in an election, the "two frontrunner" formula approved by the FEC violates the FECA's ban on corporate contributions and the FEC's regulatory exemptions. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 110.13.

70. Because ONO's reliance on its belatedly announced "two frontrunner" formula necessarily constituted criteria "designed to result in the selection of certain pre-chosen participants," *see Buchanan v. Federal Election Commission*, 112 F. Supp.2d 58, 74 (D.D.C. 2000) (quoting FEC statement), the FEC's endorsement of this formula contradicts the FECA's ban on corporate contributions and the FEC's regulatory exemptions. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 110.13.

COUNT TWO
(The Contemporaneous Documentation Requirement)

71. Paragraphs 1 through 64 are incorporated into Count Two.

72. The Commission's holding that no contemporaneous documentation of any sort is required to satisfy 11 C.F.R. § 110.13's exemption contradicts the FECA, the FEC's regulations, and this Court's holding in *La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51 (D.D.C. 2012).

COUNT THREE
(Shifting the Burden of Proof Away from Staging Organizations)

73. Paragraphs 1 through 64 are incorporated into Count Three.

74. The FEC's holding that ONO is not required to submit any evidence "to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants," *Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000), contradicts this Court's express holding in *Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000), the FECA and the FEC's implementing regulations, as well as common legal principles teaching that "[i]t is the burden of the party claiming the exemption ... to prove entitlement to it." *Senior Citizens Stores,*

Inc. v. United States, 602 F.2d 711, 713 (5th Cir. 1979). *See also Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 175-76 (1983) ("The general rule ... is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption."); *Fund for the Study of Economic Growth and Tax Reform v. IRS*, 161 F.3d 755, 759 (D.C. Cir. 1998)("the burden is on the taxpayer seeking exemption to demonstrate that it is in fact entitled to tax-exempt status"); *St. David's Health Care System v. United States*, 349 F.3d 232, 234 (5th Cir. 2003) ("The burden was on St. David's to prove that it qualified for a tax exemption.").

DEMAND FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

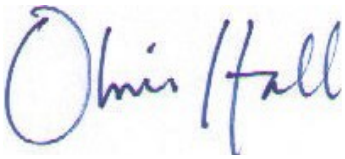
1) declare that the Commission's dismissal of Plaintiff's administrative complaint was contrary to law, an abuse of discretion and arbitrary and capricious;

2) remand the matter to the Commission with an order to conform to the declaration within 30 days; and

3) grant such other and further relief as may be appropriate, including an award of attorney's fees and litigation expenses pursuant to 28 U.S.C. § 2412(d)(1)(A).

Dated: July 1, 2013

Respectfully submitted,



Oliver B. Hall
D.C. Bar No. 976463
CENTER FOR COMPETITIVE DEMOCRACY
P.O. Box 21090
Washington, DC 20009
(202) 248-9294 (ph)
(202) 248-9345 (fx)
oliverhall@competitivedemocracy.org

Counsel of Record

Mark R. Brown
303 E. Broad Street
Columbus, OH 43215
(614) 236-6590
mbrown@law.capital.edu