UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DAN LA BOTZ,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	**No. 1:11-cv-01247-BAH**
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

September 23, 2011

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STATEMENT OF FACTS[1]

Plaintiff, Dan La Botz, was the 2010 Socialist Party of Ohio candidate for the United States Senate in Ohio. *See* Complaint at ¶ 11. The Socialist Party of Ohio for the first time in more than fifty years won ballot access in Ohio in 2008. Its access was achieved through a series of federal lawsuits that declared Ohio's ballot access restrictions unconstitutional. *See Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579 (6th Cir. 2006) (holding Ohio's ballot access law for minor parties unconstitutional); *Libertarian Party of Ohio v. Brunner,* 567 F. Supp.2d 1006 (S.D. Ohio 2008) (holding Ohio's new regulations for minor-party access unconstitutional); *Moore v. Brunner*, 2008WL38887639 (S.D. Ohio 2008) (ordering that the Socialist Party candidate for President be included on Ohio's 2008 election ballot).[2] The Sixth Circuit in *Libertarian Party of Ohio v. Blackwell,* 462 F.3d 579, 589 (6th Cir. 2006), the first of these suits, succinctly stated that Ohio's "elections have indeed been monopolized by two parties," and that "[o]f the eight most populous states, Ohio has had by far the fewest minor political parties on its general election ballot."

Ohio's primaries in non-presidential election years, including 2010, are held in May of the general election year. Following his winning the Socialist Party of Ohio's primary for Ohio's

[1] All factual allegations in the context of a Rule 12(b)(6) motion must be taken as true and all reasonable inferences drawn in the Plaintiff's favor. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007) ("faced with a Rule 12(b)(6) motion to dismiss ..., courts must, as with any motion to dismiss for failure to plead a claim on which relief can be granted, accept all factual allegations in the complaint as true."); *Kassem v. Washington Hospital Center,* 513 F.3d 251, 252 (D.C. Cir. 2008) (stating that all reasonable inferences must be drawn in plaintiff's favor when faced with Rule 12(b)(6) motion); *Citizens for Responsibility and Ethics in Washington v. Federal Election Commission*, 2011WL3268079 (D.D.C. 2011) (applying these same standards in an action reviewing FEC action).

[2] Ohio kicked all minor parties off its ballots again in July 2011. Ohio's new law, however, was enjoined in *Libertarian Party of Ohio v. Husted,* 2011WL3957259 (S.D. Ohio, Sept. 7, 2011).

United States Senate seat on May 4, 2010, *see* Complaint at ¶ 15, Plaintiff was duly recognized by Ohio's Secretary of State as a qualified candidate for Ohio's United States Senate seat. *See* Complaint at ¶ 11. Joining Plaintiff on that list of qualified candidates were the Democratic Party's choice, Lee Fisher, *see* Complaint at ¶ 3, and the Republican candidate, Rob Portman. *See* Complaint at ¶ 4.[3]

Not long after the May 4, 2010 primaries, a consortium of eight major newspapers in Ohio known as the Ohio News Organization ("ONO" or "OHNO")[4] began negotiating with the Democratic and Republican Party senatorial candidates about the possibility of a series of televised debates between the two candidates. *See* Complaint at ¶ 19. These negotiations, which began no later than early June 2010, *see* Complaint at ¶ 19, were kept secret from the Plaintiff and Ohio's other qualified senatorial candidates. *See* Complaint at ¶ 30. Neither Plaintiff, nor anyone else outside the consortium and the Democratic and Republican campaigns was aware of the substance of these meetings, or that they were taking place. *See* Complaint at ¶ 30-31.

On September 1, 2010, ONO publicly announced a series of televised debates between Portman, the Republican candidate for United States Senate, and Fisher, the Democratic candidate for United States Senate, to be held on October 4, 8, and 12, 2010. *See* Complaint at

[3] Two additional candidates qualified for Ohio's 2010 United States Senate ballot: Eric Deaton (Constitution Party); and Michael Pryce (no party). A write-in candidate, Arthur Sullivan, also ran, but was not qualified to appear on the ballot. *See* http://www.sos.state.oh.us/SOS/elections/electResultsMain/2010results/20101102senator.aspx (stating results of the 2010 senatorial election in Ohio). Thus, had the ONO simply opened the debates to all ballot-qualified candidates, only five would have been eligible.

[4] The ONO is a for-profit, unincorporated business association consisting of the eight largest newspapers in Ohio, which are all for-profit corporations: 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. *See* Complaint at ¶ 2.

¶¶ 17-20; ONO's Response to Administrative Complaint, dated Oct. 21, 2010, Certified Administrative Record[5] (hereinafter "Adm. Record") (AR0080). Plaintiff was never contacted by ONO or anyone else about possibly being included in these debates. *See* Complaint at ¶ 30. Plaintiff was never informed by ONO before this public disclosure that senatorial debates in Ohio were being staged. *See* Complaint at ¶ 30. ONO never announced to Plaintiff or anyone else before this public disclosure what pre-existing objective criteria were being employed to select the debates' participants. *See* Complaint at ¶¶ 30 and 41. ONO never announced after scheduling these debates and publicly releasing the schedule what pre-existing objective criteria were used to select the two major-party participants. *See* Complaint at ¶ 41.

Plaintiff first learned of the ONO's efforts to schedule debates on July 20, 2010, when a short article ran in the COLUMBUS DISPATCH reporting that "negotiations" were under way. *See* Complaint at ¶ 31. Plaintiff immediately began attempting to uncover the details behind these reported debates. For example, he published a letter-to-the-editor in the DISPATCH on July 25, 2010, asking to be included, *see* Plaintiff's Administrative Complaint at ¶ 20, Admin. Record (AR0008), but received no response from the DISPATCH or anyone else associated with the ONO. On September 5, 2010, Plaintiff sent letters to all of ONO's members requesting that he "be included in the debates which your organization is helping to organize." *See* Complaint at ¶ 32. No one responded. *See* Complaint at ¶ 32. On August 23, 2010, Plaintiff's campaign created an online petition for open and inclusive political debates. Plaintiff's campaign directed the petition toward the attention of Ohio's Secretary of State and asked that the Secretary of State intervene to insure that Plaintiff was allowed to participate in whatever debates were scheduled. *See*

http://www.change.org/petitions/petition-for-inclusive-political-debates-in-ohio (last visited Sept. 15, 2011).

On September 5, 2010, following the ONO's September 1, 2010 announcement that only Portman and Fisher would be included in its debates, Plaintiff sent a letter to the eight newspapers in the ONO consortium asking that he "be included in the debates which your organization is helping to organize." *See* Complaint at ¶ 32. None of the recipients responded. *See* Complaint at ¶ 32.

On September 6, 2010, Plaintiff phoned Mr. Tom Callinan, editor of the CINCINNATI ENQUIRER, and left a message protesting his exclusion from the debates. *See* Complaint at ¶ 33. Callinan never returned the call. *See* Complaint at ¶ 33. Plaintiff that same day issued a press release calling for inclusion in the debates, but none of the ONO's members responded. *See* Administrative Complaint at ¶ 21, Adm. Record (AR0008).

On September 7, 2010, Plaintiff's campaign launched a new on-line petition targeting the editors of the eight newspapers that joined ONO. *See* Complaint at ¶ 34; http://www.change.org/petitions/view/petition_for_inclusive_senate_candidate_debates_in_ohio (last visited Sept. 15, 2011). In response to this second on-line petition effort, Plaintiff on September 8, 2010 received a written response (via e-mail) from Mr. Bruce Winges, editor and vice-president of the AKRON BEACON JOURNAL. *See* Complaint at ¶ 35. Winges admitted that the ONO "allows *for only the major-party candidates* to debate." *See* Complaint at ¶ 35 (emphasis added). He continued: "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

[5] The Certified Administrative Record was filed by Defendant with its Motion to Dismiss on September 12, 2011. *See* Doc. No. 11.

that voters hear from the two candidates who are clearly the front-runners for the office." *See* Complaint at ¶ 35.

On September 10, 2010, Plaintiff, through legal counsel (Mr. Mark R. Brown), mailed to each of ONO's eight corporate members letters advising that ONO's secretive and exclusive structuring of the debates violated the FECA. *See* Complaint at ¶ 38. On September 14, 2010, ONO responded via an electronically transmitted letter (through its attorney, Mr. Marion Little) to Brown. *See* Complaint at ¶ 39. Little asserted that "the ONO considered front-runner status based on then-existing Quinnipiac and party polling, fundraising reports, in addition to party affiliation." *See* Complaint at ¶ 39. Little did not identify or explain any thresholds, standards, or guidelines for using polls and fundraising to determine "front-runner status." *See* Complaint at ¶ 40. Other than "party affiliation," Little's letter did not identify any reasonable, "pre-existing objective criteria" that would be used to identify candidates who would be invited to the debates. *See* Complaint at ¶ 40.

On September 14, 2010, after receiving Little's electronically-transmitted letter, Brown e-mailed to Little, at the latter's invitation, additional questions about ONO's planned debates. *See* Administrative Complaint at ¶ 32, Adm. Record (AR0010-11). Among the questions posed, Brown asked:

> Is it your position, on behalf of the ONO, that it was prepared to only invite two candidates to these debates?
>
> What objective criteria did Mr. La Botz (or any other candidate) have to satisfy to be invited to the structuring of the senatorial debates or the debates themselves?
>
> When were these criteria reported to the campaigns or otherwise made generally available so that qualified candidates might attempt to satisfy them?

See Administrative Complaint at ¶ 32, Adm. Record (AR0010-11).

Little responded to Brown's follow-up questions via an electronically-submitted letter on September 16, 2010. *See* Complaint at ¶ 42. Little's letter did not answer Brown's questions, but instead made clear that "there was absolutely no showing Plaintiff could ever make to gain an invitation to ONO's debates." *See* Complaint at ¶ 42. Little's letter closed by inviting Brown to meet him at the courthouse if Brown sought additional information. *See* Administrative Complaint, Attachment 12, Adm. Record (AR0054).

On September 10, 2010, Plaintiff mailed letters to the Portman and Fisher campaigns advising them that their participations in the debates organized by the ONO and its corporate members violated the FECA. *See* Complaint at ¶ 43.[6] On September 21, 2010, Plaintiff mailed to the Defendant an Administrative Complaint charging the ONO, its corporate members, and the Fisher and Portman campaigns, with violating the FECA, 2 U.S.C. § 441b(a), as well as 11 C.F.R. § 110.13(c). *See* Complaint at ¶ 44.

Plaintiff's Administrative Complaint specifically requested that the Defendant "investigate the allegations contained in this Complaint, declare that the Respondents are in violation of the Federal Election Campaign Act and applicable FEC regulations, and impose sanctions commensurate with these violations." *See* Administrative Complaint at 11, Adm. Record (AR0013).

[6] Portman's response to the FEC was perfunctory; the Portman campaign essentially claimed that 'if the ONO violated the FECA that is the ONO's problem.' *See* Letter from Natalie K. Baur, dated October 5, 2010, Adm. Record (AR0064). Fisher's response, meanwhile, was more nuanced. The Fisher campaign alluded to the media's First Amendment rights as well as the great latitude the press must enjoy when staging debates. Fisher closed by arguing that if the ONO violated the FECA, then only the ONO would be liable. *See* Letter from Marc E. Elias, dated Nov. 15, 2010, Adm. Record (AR0106-08).

Plaintiff also demanded "EXPEDITED PROCEEDINGS AND EMERGENCY RELIEF," *see* Administrative Complaint at 11, Adm. Record (AR0013) (capitals in original), in an effort to obtain inclusion in the impending debates. Specifically, Plaintiff requested that the Defendant "take whatever action it may deem necessary and appropriate to expedite its proceedings and cause emergency relief to be entered to prevent the ONO's planned debates from taking place without Complainant's participation." *See* Administrative Complaint at 11, Adm. Record (AR0013). "This includes," Plaintiff added, "attempting immediate conciliation under 2 U.S.C. § 437g(4)(A), instituting emergency proceedings in the United States District Court for the Southern District of Ohio in order to obtain a temporary restraining order and/or preliminary injunction prohibiting Respondents from violating the FECA, *see* 2 U.S.C. § 437g(6)(A), and/or referring the matter to the Attorney General of the United States for immediate prosecution. *See* 2 U.S.C. § 437g(5)(C)." *See* Administrative Complaint at 11-12, Adm. Record (AR0013-14).

Defendant did not address, let alone resolve, Plaintiff's Administrative Complaint until it dismissed it on May 19, 2011. *See* Complaint at ¶ 54. In the interim, the ONO held its scheduled debates and included only the Democratic and Republican candidates. *See* Complaint at ¶ 45. The Republican candidate, Portman, won the November 2010 election. *See* Complaint at ¶ 46. Plaintiff, notwithstanding his exclusion from the debates, received over 25,000 votes, *see* Complaint at ¶ 47, apparently the single highest showing for a Socialist Party candidate in Ohio since the Great Depression.[7]

[7] Today's Socialist Party USA and its local affiliate the Socialist Party of Ohio are direct descendants of Eugene Debs's Socialist Party of America. Eugene Debs ran for President five times from 1900 to 1920. *See* RAY GINGER, THE BENDING CROSS: A BIOGRAPHY OF EUGENE VICTOR DEBS (1949) (recounting Debs's presidential campaigns). In 1912, Debs won 6% of the popular vote—more than 900,000 votes all told. *See* JAMES CHACE, 1912: WILSON, TAFT & DEBS--THE ELECTION THAT CHANGED THE COUNTRY (2004) (describing the 1912 presidential

ARGUMENT

Defendant concedes that the ONO and its corporate members are subject to the restrictions on debate-staging organizations found in the Federal Election Campaign Act (FECA), 2 U.S.C. § 441b(a). *See* Federal Election Commission's Memorandum in Support of its Motion to Dismiss (hereinafter "FEC Memorandum") at 18. Defendant also concedes that ONO's scheduled debates in Ohio between candidates for the United States Senate are subject to those limitations. *Id.* Specifically, this means that the ONO was required by the FECA and its implementing regulations to follow 11 C.F.R. § 110.13(c), which requires that reasonable, disclosed, "pre-existing objective criteria" be used to select the candidates allowed to participate in debates. *See infra* at 26-32.

The two legal questions[8] presented by Plaintiff's challenge here are:

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election). Debs performed even better in Ohio in 1912, winning 8.69% of Ohio's official vote total, or 90,144 votes. *See* 1912 Presidential General Election Results—Ohio (http://uselectionatlas.org/RESULTS/). In 1920, Debs and the Socialist Party won 57,147 votes in Ohio, or 2.83 % of those cast for President. *See* 1920 Presidential Election Results—Ohio (http://uselectionatlas.org/RESULTS/). In 1928, Norman Thomas, running on the Socialist Party ticket, recorded 8,683 votes in Ohio. *See* 1928 Presidential Election Results—Ohio (http://uselectionatlas.org/RESULTS/). Thomas increased this number in 1932, winning 64,094 Ohioans' votes. *See* 1932 Presidential Election Results—Ohio (http://uselectionatlas.org/RESULTS/). Because of these Socialist successes, the Ohio legislature decided to exclude minor parties. According to Richard Winger, editor of BALLOT ACCESS NEWS, the Socialist Labor Party in 1946 surprisingly won 13,885 votes for Ohio's United States Senate seat and 11,203 votes for Ohio's Governor. *See* Richard Winger, *Ballot Format: Must Candidates be Treated Equally?*, 45 CLEVE. ST. L. REV. 87, 90 (1997). This development, Winger reports, did not please Ohio's legislators. *Id.* In an effort to keep Socialist candidates off the ballot and stop Henry Wallace's "progressive" campaign for President in 1948, the Ohio legislature in 1947 erased party labels from minor candidates' ballot-listings and attempted to prevent independent presidential candidates from using Ohio's petition process. *Id.* at 90-91. In 1951, the Ohio legislature went farther and increased the petition requirement seven-fold for non-major candidates. *Id.* at 92. From that time forward, the Socialist Party of Ohio did not run any candidate for federal office in Ohio, that is, until Plaintiff's 2010 run for the U.S. Senate.

[8] Defendant argues that Plaintiff's challenge presents "only factual issue[s]." *See* FEC Memorandum at 18. Defendant therefore devotes a significant portion of its argument to proving

1. Whether a staging organization subject to the FECA can necessarily exclude all qualified minor-party and independent candidates from a series of televised senatorial debates by employing criteria that are designed to allow only the two Democratic and Republican Party candidates to participate in the debates; and

2. Whether a staging organization subject to the FECA can secretly negotiate with two Republican and Democratic candidates and secretly plan a series of televised debates including only these two candidates while categorically and necessarily excluding all other qualified minor-party and independent candidates.

The Defendant's General Counsel answered the first question in the affirmative. *See* Complaint at ¶ 52 ("The General Counsel concluded that ONO's 'debate selection criteria were pre-existing and objective'"). It ruled that the ONO could categorically exclude all ballot-qualified candidates (including the Plaintiff) who were not running as Democrats or Republicans from its senatorial debates. *See* Complaint at ¶ 7 ("The General Counsel's conclusion, which was accepted by the Commission, was that ONO's ... categorical inclusion of only the 'top-two,' 'frontrunner,' Republican and Democratic candidates, and the categorical exclusion of all other ballot-qualified candidates (including Plaintiff) for Ohio's 2010 U.S. Senate election from its debate as a matter of law satisfied the FECA, 2 U.S.C. § 441b(a), and 11 C.F.R. § 110.13(c).");

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that there exists factual support for ONO's conclusion that the Democratic and Republican candidates were the "two front runners." *See* FEC Memorandum at 18-23. Indeed, Defendant's effort often takes it well-beyond the four corners of Plaintiff's Complaint in search of facts to support its contention that the Republican and Democratic candidates were correctly deemed to be the two front runners. Plaintiff, however, does not challenge the fact that the ONO had sufficient information to conclude that the Democratic and Republican candidates were the two front runners. Rather, Plaintiff's claim is that the ONO cannot legally use this "two front runners" formula, at least not knowing (as it did) that the standard could only be met by the Republican and Democratic candidates. *See infra* at 26-32. Plaintiff's challenge is one of law, not one of fact.

Complaint at ¶ 69 ("The Commission's conclusion that a staging organization's decision to exclude all qualified candidates ... other than the 'top-two' 'frontrunners' ... is permissible, in a state that until that very election unconstitutionally excluded all parties other than the Democratic and Republican Parties, violates the FECA's ban on corporate contributions. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 110.13.").

Defendant's General Counsel reasoned that "given the limited time available to hold the debates and the anticipated large field of candidates," it was permissible for the ONO "to extend invitations only to the frontrunners ...." *See* Complaint at ¶ 50. The General Counsel drew this conclusion notwithstanding the Sixth Circuit's conclusion in 2006 that in Ohio "elections have indeed been monopolized by two parties," and "[o]f the eight most populous states, Ohio has had by far the fewest minor political parties on its general election ballot." *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006). *See* Complaint at ¶ 26 ("Because of unconstitutional ballot access restrictions existing in Ohio before the 2008 election cycle, minor-party candidates, including those running as Socialists, have been routinely and unconstitutionally prevented from running for office in Ohio since the late 1940s.") (citations omitted). Defendant ruled as a matter of law that ONO's top-two approach satisfied the FECA and 11 C.F.R. § 110.13(c), even though the formula necessarily excluded minor-party candidates from ONO's televised debates. *See* Complaint at ¶ 73 ("ONO ... knew to an absolute certainty in May 2010 that the Republican and Democratic candidates ... would constitute the 'two frontrunners' who would be allowed to debate"); Complaint at ¶ 74 ("ONO's ... reliance on their 'top-two' formula necessarily constituted criteria 'designed to result in the selection of certain pre-chosen participants.") (citation omitted). It reached this conclusion even though the ONO's formula made it impossible--and consequently unreasonable as a matter of law, *see infra* at 26-

32--for minor-party candidates to gain inclusion in the debates. *See Buchanan v. Federal Election Commission*, 112 F. Supp.2d 58, 74 (D.D.C. 2000) ("the objectivity requirement *precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it.*" *Id.* (emphasis added).

Defendant effectively answered the second question in the affirmative, too, *see* Complaint at ¶ 80 ("The Commission's conclusion that secret criteria and negotiations can legally be used to select candidates for senatorial debates and otherwise satisfies 11 C.F.R. § 110.13 is contrary to law"), though the General Counsel's Report did not address this specific issue and offered no explanation for why secret negotiations are consistent with the FECA's commands. *See* Complaint at ¶ 78 ("ONO and its corporate members kept their intent to limit their debates to the Republican and Democratic candidates secret from Plaintiff and the public for several months until the eve of the debates, when only after repeated requests and public demands by Plaintiff was their 'top two' 'front running' explanation revealed.").

Only now in its Motion to Dismiss, *see* FEC Memorandum at 24, does the Defendant explain that secrecy is permissible: "there is no requirement that debate sponsors publicly disclose the criteria. Nor is there any requirement that sponsors notify all candidates who are not selected and offer them an opportunity to challenge the sponsor's decision." *Id.* Staging organizations, Defendant argues, can therefore lawfully keep their negotiations with the two major parties, as well as whatever criteria they employ, secret from the public and all other ballot-qualified candidates. *See* Complaint at ¶¶ 8-9.[9] Notwithstanding the FEC's admonishment

[9] This Court in *Utility Workers Union of America, Local 369, AFL-CIO v. Federal Election Commission*, 691 F. Supp. 2d 101, 106 (D.D.C. 2010), ruled that the FEC is under an obligation to provide explanations for dismissing administrative complaints. In the face of an explanatory void in the administrative record, "the Court cannot sustain the FEC Order ... and the proper

in 1995 that "*those staging debates would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate,*" 60 Fed. Reg. 64260-01 (1995 WL 735941) (emphasis added), *see infra* at 32, Defendant now argues that they need not.

Both legal conclusions violate the FECA and its implementing Regulations. *See infra* at 26-32. Both legal conclusions are reviewed *de novo, see Virginia Society for Human Life, Inc. v. Federal Election Commission,* 263 F.3d 379, 392 (4th Cir. 2001) ("legal conclusions are reviewed *de novo*"), since "an agency 'is not at liberty to depart from its own [clear] rules' and ... no deference is accorded such an agency decision to depart." *Chamber of Commerce of United States v. Federal Election Commission,* 69 F.3d 600, 603 (D.C. Cir. 1995) (quoting *Reuters Ltd. v. FCC,* 781 F.2d 946, 947-49 (D.C.Cir.1986)). *See also Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) ("the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rule-making, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."). Both conclusions should be reversed because they are contrary to law.

Defendant's dismissal, moreover, is not insulated from review by any form of "agency discretion" not to pursue enforcement. The District of Columbia Circuit has made clear on several occasions that 2 U.S.C. § 437g(a)(8), the FECA's judicial review mechanism, "is unusual

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course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." As in *Utility Workers Union,* "[h]ere, neither the FEC Order nor the precedent it cites enable the Court to discern the FEC's rationale," *id.* at 106, for dismissing Plaintiff's claim that the ONO illegally, secretly negotiated with the two major parties. At bare minimum, then, remand is in order for an explanation by the FEC.

in that it permits a private party to challenge the FEC's decision *not* to enforce." *Chamber of Commerce of United States v. Federal Election Commission,* 69 F.3d 600, 603 (D.C. Cir. 1995). "[I]if no majority [on the FEC] finds 'reason to believe,' the FEC dismisses the complaint, and the complainant may seek district court review of whether the dismissal is 'contrary to law.'" *See also Democratic Congressional Campaign Committee v. Federal Election Commission,* 831 F.2d 1131, 1134 (D.C. Cir. 1987) (observing that dismissals of administrative complaints are reviewable under 2 U.S.C. § 437g(a)(8) and can be set aside if contrary to law).[10]

I. Plaintiff Has Article III Standing.

The FECA confers very broad standing. In *Federal Elections Commission v. Akins,* 524 U.S. 11, 19 (1998), the Supreme Court observed that "Congress has specifically provided in FECA that '[a]ny person who believes a violation of this Act ... has occurred, may file a complaint with the Commission.'" (Quoting 2 U.S.C. § 437g(a)(1). "'Any party aggrieved by an order of the Commission dismissing a complaint filed by such party'," the Supreme Court noted, "'may file a petition'" in the District Court seeking review of that dismissal. 424 U.S. at 19 (quoting 2 U.S.C. § 437g(a)(8)(A)).

This Court, relying on *Akins* and the language of the FECA, concluded in *Buchanan v. Federal Election Commission,* 112 F. Supp. 2d 58, 65 (D.D.C. 2000), that the FECA was intended to "cast the standing net broadly—beyond the common-law interest and substantive

[10] The FEC has been reversed on a number of occasions for improperly dismissing or failing to timely pursue administrative complaints. *See, e.g., Utility Workers Union of America, Local 369, AFL-CIO v. Federal Election Commission,* 691 F. Supp.2d 101 (D.D.C. 2010) (remanding because FEC failed to explain its dismissal); *Democratic Senatorial Campaign Committee v. Federal Election Commission,* 1996WL34301203 (D.D.C. 1996) (granting summary judgment to plaintiff where FEC failed to diligently pursue administrative complaint); *Democratic Senatorial Campaign Committee v. Federal Election Commission,* 918 F. Supp. 1 (D.D.C. 1994) (reversing FEC's dismissal of administrative complaint); *Common Cause v. Federal Election Commission,*

statutory rights upon which 'prudential" standing traditionally rested." "Thus," this Court stated, the "FECA's statutory scheme was specifically designed to accommodate suits such as plaintiffs' which challenge the FEC's dismissal of an administrative complaint." *Id.* This Court in *Buchanan* therefore specifically recognized that candidates who are excluded from debates, and then have their administrative complaints dismissed by the Federal Election Commission, have Article III standing to challenge the FEC's decision in District Court.

Plaintiff, moreover, is *required* to first exhaust his administrative remedies before he can sue the ONO directly in federal court. *See Becker v. Federal Election Commission,* 230 F.3d 381, 384 (1st Cir. 2000) (observing that as-applied challenges must proceed first before the FEC). Only if Plaintiff prevails in this Court can he avail himself of that right. *See Akins v. Federal Election Commission,* 101 F.3d 731, 739 (D.C. Cir. 1997) (describing 2 U.S.C. § 437g(a)(8)(C) as allowing complainants to "bring their own civil action to remedy the violation of the law" if the FEC fails to "conform" to the court's order). Should the FEC refuse to conform its conduct to the orders that issue from this Court, Plaintiff will then and only then be permitted to pursue a direct action in federal court against ONO, Portman and Fisher. This right to proceed directly against ONO, Portman and Fisher depends on this Court's reviewing the FEC's action. Refusing review would deny to Plaintiff this statutory right.

In boilerplate fashion, Defendant seeks to litigate once again the claim it lost in *Buchanan.* It charges that Plaintiff here, a qualified candidate who was excluded from debates in Ohio and whose Administrative Complaint was dismissed by the Defendant, lacks Article III standing. Defendant contends that Plaintiff suffered no injury-in-fact. Defendant claims that

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729 F. Supp. 148 (D.D.C. 1990) (holding FEC's dismissal of administrative complaint was improper).

Plaintiff can obtain no redress since the election is over. Defendant incorrectly claims that Plaintiff's Administrative Complaint only sought declaratory and injunctive relief. *See* Administrative Complaint at 11-12, Adm. Record (AR0013-14) (demanding any and all relief authorized by law).

As in *Buchanan*, Plaintiff is a political competitor, one running against the candidates who were illegally included in the debates. Plaintiff was necessarily injured by his exclusion from those debates. *See, e.g.*, Complaint at ¶¶ 3, 4, 11, 45 & 84 (describing Plaintiff, Fisher and Portman as qualified candidates in Ohio who were running for the same office, that ONO's debates were held illegally without Plaintiff's participation, and that Fisher and Portman "knowingly conspired with ONO and its corporate members to construct exclusive debate that prohibited any candidates other than a Republican and Democrat from participating in violation of the FECA"). *See also* Attachment A (Declaration of Dan La Botz) at ¶ 10.

Plaintiff was further injured by Defendant's failure to properly apply federal law and timely remedy ONO's wrong. This Court in *Buchanan* 112 F. Supp. 2d at 65, made clear that "competitor standing" is a sufficient injury-in-fact for purposes of Article III. It quoted *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 626 (2d Cir.1989), to support its conclusion:

> In this era of modern telecommunications, who could doubt the powerful beneficial effect that mass media exposure can have today on the candidacy of a significant aspirant seeking national political office. ... In our view, the loss of competitive advantage flowing from the League's exclusion of Fulani from the national debates constitutes sufficient “injury” for standing purposes, because such loss palpably impaired Fulani's ability to compete on an equal footing with other significant presidential candidates. To hold otherwise would tend to diminish the import of depriving a serious candidate for public office of the opportunity to compete equally for votes in an election, and would imply that such a candidate could never challenge the conduct of the offending agency or party.

This Court in *Buchanan* rightly noted that "[p]recluding candidates from challenging the CPD's debate rules under the FECA would leave few others to do so." 112 F. Supp.2d at 65. Indeed, accepting the Defendant's argument would completely insulate FEC decisions from review. *Id.* at 65-66 ("if I were to accept the FEC's argument, the FEC's decisions regarding the legality of debate criteria would be rendered largely unreviewable despite the fact that minor party candidates such as Buchanan would likely suffer substantial harm to their electoral prospects. This cannot be.").

Defendant also challenges Plaintiff's standing under the causation requirement of Article III. Again, however, this issue was resolved in *Buchanan*, 112 F. Supp. 2d at 68: "As the Supreme Court has ... recently noted, 'if the reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason.'" (Quoting *Federal Elections Commission v. Akins*, 524 U.S. 11, 25 (1998)). The *Buchanan* Court explained that the staging organization and major-party participants "are not intervening causal agents sufficient to break the chain of causation." 112 F. Supp. 2d at 68. The alleged 'independent actors', this Court observed in *Buchanan*, 112 F. Supp. 2d at 68, "are not in a position to make 'unfettered choices' completely beyond the court's or the FEC's control. They are constrained by the FEC's regulatory framework which requires that debate-staging organizations use objective criteria and not endorse, support, or oppose any candidate or party."

Of course, Plaintiff's case differs from Buchanan's in that Plaintiff's *judicial* challenge here cannot be resolved before the November 2010 election. This difference, however, is trivial under Article III. Plaintiff filed his Administrative Complaint with Defendant, which he was

required to do by law, *before* the debates were held, and well before the November election. Defendant, for its part, did not resolve Plaintiff's claims for eight months--meaning that by the time Plaintiff *could* seek judicial relief the election was long past.

Defendant's argument that Plaintiff cannot now obtain timely judicial relief was rejected in *Buchanan,* 112 F. Supp. 2d at 69. There, the Defendant argued that there was not enough time on remand to address Buchanan's charges. Thus, the FEC argued, there was no reasonable likelihood of redress; Buchanan had no standing. *Id.*

This Court responded that "there is nothing to prevent the FEC from expediting its review." *Id.* "More fundamentally," it added, "if the FEC's own enforcement procedures could frustrate the plaintiffs from challenging the agency's decision, then the FEC's decisions regarding the propriety of debate criteria or other election-related matters often would be unreviewable." *Id.* The *Buchanan* Court quoted the D.C. Circuit's opinion in *Akins v. Federal Election Commission,* 101 F.3d 731, 738 n.7 (D.C. Cir. 1997) (en banc),[11] for the proposition that "[i]f such [an] injury were not redressable, once an election ended virtually all electoral conduct would be beyond review. Such a result would read FECA's judicial review provision out of the statute without any constitutionally sound rationale." 112 F. Supp. 2d at 69 (citation omitted).

Likewise, if the Defendant's argument here were accepted, the FEC could defeat judicial review by simply delaying dismissal until after the election. With elections, of course, problems ordinarily are not identified years beforehand; they make themselves known only weeks (and sometimes, if one is lucky, months) before the election. Here, for example, Plaintiff did not

[11] As noted by this Court in *Buchanan,* the D.C. Circuit's judgment in *Akins* was vacated and remanded on other grounds by the Supreme Court. *Federal Elections Commission v. Akins,* 524 U.S. 11 (1998). The Supreme Court's ruling did not address or change the D.C. Circuit's discussion of redressability, which as demonstrated by *Buchanan* remains sound.

learn of ONO's plan to include only the Democratic and Republican candidates in the debates until September 14, 2010. After repeated attempts to cure the problem through the ONO, Plaintiff filed his Administrative Complaint with the Defendant, as he was required to do by law, on September 21, 2010. Plaintiff requested that Defendant expedite its proceedings and award emergency relief before the debates and before the November election. Defendant did nothing until May 19, 2011.[12]

This is not meant necessarily to criticize the Defendant's apparent lack of interest in Plaintiff's charges.[13] Rather, it illustrates what this Court said in *Buchanan*, 112 F. Supp. 2d at 69: "[i]f such [an] injury were not redressable, once an election ended virtually all electoral conduct would be beyond review. Such a result would read FECA's judicial review provision out of the statute without any constitutionally sound rationale."

For this very reason, elections have for time-out-of-mind constituted the classical exception to Article III's continuing injury requirement. For example, in *Akins v. Federal*

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[12] Defendant repeatedly references its enforcement discretion and posits that this discretion somehow defeats and denies judicial review. *See* FEC Memorandum at 16-17. The D.C. Circuit in *Akins v. Federal Election Commission*, 101 F.3d 731, 738 (D.C. Cir. 1997), clearly rejected this argument: "If that factor were to mean that an agency's *legal* determination was not reviewable, that would virtually end judicial review of agency action."

[13] Still, it is worth noting that Defendant, notwithstanding Plaintiff's request for expedited relief, granted to the Fisher campaign an extension until November 15, 2010 in which to respond to Plaintiff's Administrative Complaint. *See* Letter from Kim Collins, dated Oct. 21, 2010, Adm. Record (AR0105). This ensured that no agency action would be taken on Plaintiff's Administrative Complaint before the October debates; nor would it be taken before the November election. Plaintiff has no hesitation indicting the ONO, which kept its formula for the debates secret for at least four months before disclosing it to Plaintiff's lawyer following its public announcement of the exclusive debates on September 1, 2010. Had the ONO been transparent with its two-major-party-candidates formula, Plaintiff could have mounted his challenge sooner, thereby giving the Defendant and this Court more time before the election to address the merits of Plaintiff's complaint. The ONO's secrecy should not be rewarded.

Election Commission, 101 F.3d 731 (D.C. Cir. 1997), where the plaintiffs challenged the Defendant's dismissal of their administrative complaint claiming that a group (AIPAC) was a "political committee" required to register and disclose contributions, the FEC argued that standing was lacking; after all, the FEC asserted, the challenged group was now barred by another law from making future contributions. *See* 101 F.3d at 739 n.7. The court responded that "[t]his is a *non sequitur*; [plaintiffs] claim that they are injured because AIPAC was permitted to avoid registering ... and disclosing its *past* receipts and expenditures. That disclosure of past activities would presumably affect voters in the future. If such injury were not redressable, once an election ended virtually all electoral conduct would be beyond review." *Id.* at 739 n.7.

Here, the same principle applies. Plaintiff complains about his exclusion from a past debate. Assuming that the FEC were to properly find that the ONO, Portman, and Fisher violated the FECA, it could impose fines on all three. This would "presumably" deter future violations and "presumably affect voters in the future" as well as future candidates. Denying standing, in contrast, would insulate the wrongs at issue here from judicial review.

Put another way, this case, like all election challenges filed by candidates who (as competitors) are excluded from ballots and debates, is "capable of repetition, yet evading review." The Supreme Court has routinely used this exception to Article III's continuing injury requirement to preserve federal challenges to electoral practices challenged by prospective candidates after elections have passed. No caveat has been created for the Federal Election Commission. In *Davis v. Federal Election Commission,* 554 U.S. 724, 735 (2008), for example, the Supreme Court stated that challenges to FEC decisions "fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review."

(Quoting *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007)).

Becker v. Federal Election Commission, 230 F.3d 381 (1st Cir. 2000), presents a specific example in the context of challenges to the Defendant's debate-staging requirements. There, Ralph Nader challenged the Defendant's rules that allowed corporations to fund the 2000 presidential debates. Notwithstanding the fact that the debates and election had passed, the First Circuit found that Nader continued to have standing:

> this subsequent redressability problem is one of mootness, not standing. And the FEC conceded at oral argument that Nader's case is not moot. As other courts have held in similar cases, this sort of case qualifies for the exception to mootness for disputes "capable of repetition, yet evading review": corporate sponsorship of the debates is sure to be challenged again in future elections, yet, as here, the short length of the campaign season will make a timely resolution difficult.

Id. at 389 (citations omitted). This Court has likewise applied the "capable of repetition, yet evading review" exception to challenges made against FEC decisions and requirements on a number of occasions. *See Shays v. Federal Election Commission*, 424 F. Supp. 2d 100 (D.D.C. 2006) (applying "capable of repetition yet evading review exception to challenge made against FEC); *Alliance for Democracy v. Federal Election Commission*, 335 F. Supp. 2d 39 (D.D.C. 2004) (same); *Natural Law Party v. Federal Election Commission*, 111 F. Supp.2d 33 (D.D.C. 2000) (same). *See also Real Truth About Obama, Inc. v. Federal Election Commission*, 2011 WL 2457730 (E.D. Va., June 16, 2011) (same).[14]

[14] An often misstated requirement is that a candidate must claim that she will run for office again to invoke the "capable of repetition, yet evading review" exception. *See Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 951 (D.C. Cir. 2005) ("For an action to be 'capable of repetition' there must be 'a reasonable expectation that the same complaining party would be subjected to the same action again.'"). Courts that squarely address the issue, however, have routinely rejected this dictum. *See, e.g., North Carolina Right to Life Committee Fund for Independent Political Expenditures v. Leake*, 524 F.3d 427, 435 (4th Cir. 2008) (rejecting the

II. The FEC's Legal Conclusions Contradict the FECA.

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). The FECA defines "contribution or expenditure" to include "any direct or indirect payment ... or gift ... to any candidate, campaign committee, or political party or organization." *Id.* § 441b(b)(2). In addition, the FECA's general definition section also addresses the term "expenditure," defining it 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).

The general prohibition on corporate expenditures admits an exception for debate-staging organizations. Under the FEC's regulatory scheme, corporate contributions and expenditures may be used to defray the costs of conducting candidate debates that are staged by proper, nonpartisan debate-staging organizations.[15] These debates, however, must meet the criteria found in 11 C.F.R. § 110.13.

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argument that an ex-candidate's claims are capable of repetition, yet evading review "only if the ex-candidate specifically alleges an intent to run again in a future election"); *Moore v. Hosemann*, 591 F.3d 741, 744 (5th Cir. 2009) ("in election cases we have [held that] ... 'even if it were doubtful' that the plaintiff would again be affected by the allegedly offending election statute, 'precedent suggest[ed] that [the] case [was] not moot, because other individuals certainly [would] be affected by the continuing existence' of the statute."); *Schaefer v. Townsend*, 215 F.3d 1031, 1033 (9th Cir.2000) (candidate need not allege that he plans to run again); *Merle v. United States*, 351 F.3d 92, 95 (3d Cir. 2003) (same). In any case, Plaintiff here has included a declaration stating the he likely will run for federal office again in Ohio. *See* Attachment A at ¶¶ 7, 8, & 9 (Declaration of Dan La Botz).

[15] 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." 11 C.F.R. § 110.13(a). Plaintiff and Defendant agree that the ONO is a proper debate-staging organization; that is, ONO is not controlled by a political party and is a bona fide news organization.

First, the candidate debate 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). Second, debate staging organizations are required to use "pre-established objective criteria to determine which candidates may participate in the debate …." 11 C.F.R. § 110.13(c). In particular, the FEC's regulations state that "[f]or general election debates, staging organizations shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate." *Id.*[16]

Section 110.13(c)'s "pre-established objective criteria" requirement carries with it two necessary requirements. First and foremost is the command that staging criteria be "reasonable." Next is the requirement that they be transparent.

A. Reasonableness Precludes Confining Debates to the Two Major Parties.

In its statement explaining § 110.13(c), the FEC explained that

> [g]iven that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established objective criteria to avoid the real or apparent potential for a quid pro quo, and to ensure the integrity and fairness of the process. The choice of which objective criteria to use is largely left to the discretion of the staging organization. *The suggestion that the criteria be "reasonable" is not needed because reasonableness is implied.*

60 Fed. Reg. 64260-01 (1995 WL 735941) (emphasis added).

This reasonableness requirement ensures that the selection of criteria, even those that are otherwise objective and pre-existing, are not left completely to the discretion of staging

[16] Because the FECA prohibits "any candidate" from "knowingly … accept[ing] or receiv[ing] any contribution prohibited by this section," 2 U.S.C. § 441b(a), Fisher and Portman were also included in Plaintiff's Administrative Complaint. Fisher and Portman knowingly conspired with ONO and its corporate members to construct exclusive debates in violation of 11 C.F.R. § 110.13(c). Plaintiff, after all, notified the Fisher and Portman campaigns on September 10, 2010 that the debates sponsored by the ONO and its corporate members violated the FECA. *See*

organizations. Some criteria are simply unreasonable. In particular, "[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." *Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000) (quoting an FEC statement). Further, debate sponsors cannot set standards so high that only the two major-parties can reasonably achieve them. The *Buchanan* Court made this clear: "[t]aken together, these statements by the regulation's drafters strongly suggest that the objectivity requirement *precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it.*" *Id.* (emphasis added). By definition, then, the ONO's application of its "top two frontrunners" formula in Ohio violates § 110.13(c).

Because staging organizations cannot use criteria that only the Democratic and Republican candidates can reasonably meet, they *a fortiori* cannot simply and categorically exclude all other candidates from the debates. Section 110.13(c)'s reasonable, pre-existing, objective criteria requirement prohibits debate sponsors from simply selecting the Republican and Democratic candidates. Because staging organizations cannot stage debates "to promote or advance one candidate over another," 11 C.F.R. § 110.13(b), neither can they stage debates to promote the two major-party candidates over all others. Simply put, § 110.13(c) prohibits staging organizations from categorically excluding minor-party candidates from major-party debates. In states like Ohio, where minor parties have been illegally excluded from ballots for generations, it prohibits staging organizations from simply selecting the "top two" candidates, who staging officials know are the Republican and Democratic candidates.

Complaint at ¶ 43. Still, Fisher and Portman chose to participate in the debates and thereby knowingly accepted the unlawful corporate contributions.

The ONO's "only the major-party candidates" criterion, *see* Complaint at ¶ 35 (quoting the vice-president of an ONO member as stating that ONO "allows for only the major-party candidates to debate"),[17] and the Defendant's approval of it, are unprecedented. The Commission on Presidential Debates (CPD), for example, has never utilized this kind of formula. During the 1992 and 1996 presidential elections, the CPD's formula was tied to candidates who possessed "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). Under this formula, non-major candidates (like Ross Perot in 1992) were invited to debates. CPD did not categorically limit its debates to the two major candidates; it never categorically excluded all others. It did not because it could not legally do so.

Following the Supreme Court's decision in *Arkansas Educational Television v. Forbes*, 523 U.S. 666 (1998), which the CPD felt threatened its "realistic chance" criterion, *see* Hull, *supra*, at 322, the CPD publicly announced new criteria requiring that candidates reach 15% in opinion polls and have a mathematical chance of winning in the Electoral College. *Id.* This was the standard sustained by this Court in *Buchanan.* Like its forebear, this standard does not categorically exclude minor-party candidates. It does not categorically limit presidential debates

[17] That this is truly the ONO's formula is corroborated by how ONO staged its gubernatorial debates in Ohio in 2010. Those debates for governor in Ohio in 2010 likewise excluded all minor-party candidates, while including only the two major-party candidates. *See* http://www.ohio.com/news/ohio-gubernatorial-debate-to-be-replayed-1.172767 (last visited Sept. 19, 2011) (stating that ONO sponsored gubernatorial debates in Ohio in 2010); http://www.10tv.com/content/stories/2010/09/15/story-columbus-gubernatorial-candidates-campaign-claims.html (last visited Sept. 19, 2011) (stating that only Republican and Democratic candidates participated in gubernatorial debates); http://www.votespisak.org/governor/ (last visited Sept. 15, 2011) (Green Party gubernatorial candidate complains that he and the Libertarian Party candidate were not invited to ONO's gubernatorial debates).

to the two major-party candidates. CPD does not do this because it cannot lawfully do so. Limiting debates in this manner violates § 110.13(c).[18]

B. Objectivity Demands Transparency.

In order to "avoid the real or apparent potential for a quid pro quo, and to ensure the integrity and fairness of the process," *see* 60 Fed. Reg. 64260-01 (1995 WL 735941), § 110.13(c)'s "pre-established objective criteria" requirement demands transparency from the staging organization. Debate-staging cannot be kept secret. Criteria must be testable; and in order to be testable they must be disclosed.

This Court in *Buchanan v. Federal Election Commission*, 112 F. Supp.2d 58, 73 (D.D.C. 2000), explained the transparency requirement found in § 110.13(c):

> Although the term "objective" is not defined in the regulation, it has generally been described by courts as referring to evidence of "the sort that can be supplied by disinterested third parties," "that can be discovered and substantiated by external testing," or evidence that is undistorted "by personal feelings or prejudices and that are publicly or intersubjectively observable or verifiable, especially by scientific methods." Objective representations have also been described "as 'representations of previous and present conditions and past events, which are susceptible of exact knowledge and correct statement.'"

[18] Defendant makes much of the fact that Plaintiff never polled more than 1% in Ohio. The first poll to allow voters to express support for Plaintiff, however, came out several months after the ONO had already decided to only invite the two major-party candidates. *See* Complaint at ¶ 28. Indeed, this September 5, 2010 poll was released after the ONO publicly announced its scheduled debates between the two major-party candidates on September 1, 2010. *See* Complaint at ¶ 17. Plaintiff's polling could therefore not have had any impact on the ONO's choice. More importantly, Plaintiff's polling and fundraising are beside the point. ONO has admitted that regardless of what Plaintiff polled or raised, he would not have been invited. *See* Complaint at ¶ 42. The ONO categorically included only the two major-party candidates; it categorically excluded all other qualified candidates. *See* Complaint at ¶ 35. Nothing is gained by surmising what the ONO could have legally done to exclude the Plaintiff; the fact is that it did not take the lawful steps required by the FECA to stage its "major-party only" debate.

(Citations omitted). The *Buchanan* Court's logic is unshakeable. Indeed, the FEC concedes in its own motion that in order to be "objective," a staging organization's criteria must be subject to "external testing" and "publicly or intersubjectively observable or verifiable." FEC Mem. at 23 (quoting *Buchanan*, 112 F. Supp.2d at 73). In order to be discoverable, observable, testable and verifiable, criteria must be disclosed. They cannot be kept secret.

ONO's belated, post-hoc rationale cannot correct its failure to disclose any pre-existing objective criteria before extending invitations to the Democratic and Republican candidates. The fact is that neither the ONO nor the Defendant have identified *any* evidence suggesting that ONO actually applied any *pre*-existing, reasonable, objective criteria. Defendant points to a post-litigation affidavit filed by Benjamin Marrison, editor of the COLUMBUS DISPATCH, as proof that ONO abided by § 110.13(c)'s requirements. *See* FEC Memorandum at 21. The Marrison affidavit, however, at most constitutes a *post*-litigation rationalization of the ONO's action. Marrison's explanation was not memorialized or disseminated before the debates. Even if Marrison's explanation is true, it is only a post-debate recollection of ONO's formula and cannot satisfy the command of 11 C.F.R. § 110.13(c). It hardly satisfies ONO's burden that it *show* it employed *pre*-existing objective criteria. [19]

[19] Defendant's additional assertion that ONO satisfied § 110.13(c)'s disclosure requirement on September 14, 2010, *see* FEC Memorandum at 23, "several weeks prior to the debates," *id.* at 24, allowed Plaintiff to argue for inclusion, *id.*, and "considered his submission but decided not to change their approach," *id.*, cannot be taken seriously. First, the September 14, 2010 disclosure came two weeks after the debate schedule between Portman and Fisher was finalized and formally announced on September 1, 2010. Second, ONO did not reconsider its decision to exclude Plaintiff; indeed, its attorney, Little, made clear in his September 16, 2010 letter to Brown that there was absolutely nothing Plaintiff could do to gain inclusion in the debates. *See* Complaint at ¶ 42 (Little "made clear to Brown that there was absolutely no showing Plaintiff could ever make to gain an invitation to ONO's debates"). Third, ONO only "disclosed" what it did because one of its agents, Winges, had truthfully informed the Plaintiff that ONO only allowed major-party candidates to debate, *see* Complaint at ¶ 35, and then only after Plaintiff's

The FEC has in the past recognized this necessary component of pre-existing objectivity. In its statement explaining the meaning of § 110.13(c), the FEC observed that while § 110.13(c) did not expressly require that criteria be committed to writing and disclosed to all candidates, it implicitly did:

> *those staging debates would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate*. This will enable staging organizations to show how they decided which candidates to invite to the debate. Staging 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.

60 Fed. Reg. 64260-01 (1995 WL 735941) (emphasis added).

ONO's secret negotiations with the two major-party candidates and its refusal to disclose the criteria it was using cannot be tolerated. If § 110.13(c) is to have teeth of any kind, staging organizations must be required to disclose their criteria to all qualified candidates. Here, the ONO did not disclose its alleged criteria until after scheduling its exclusive debates. Indeed, but for Plaintiff's persistence, he would never have learned that ONO simply invited the Republican and Democratic candidates and excluded everyone else.

CONCLUSION

The FEC asks that the Court "defer" to its judgment that ONO's participation criteria were "consistent with Commission regulations." FEC Memorandum at 17. But the agency is not entitled to deference when its conclusion violates the "plain language" of its own regulations.

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attorney had sent correspondence to the ONO advising it of this fact and the fact that ONO was thereby violating the FECA. *See* Complaint at ¶¶ 38 & 39. Last, the September 14 and 16 disclosures came only *two weeks* before the first scheduled debate, set for October 4, 2010, and was hardly what one might call a timely disclosure. It was clearly not meant to afford Plaintiff

American Federation of Labor v. Federal Election Commission, 177 F. Supp. 2d 48, 59 (D.D.C. 2001), *aff'd*, 333 F.3d 168 (D.C. Cir. 2003). On the contrary, errors of law like those described above are grounds for setting agency action aside. *See id.* (holding FEC's post-investigation disclosure practice contrary to law).

ONO's secret and categorical exclusion of all but the Democratic and Republican candidates cannot be reconciled with the plain language of the FEC's regulations, which require that staging organizations use "pre-established objective criteria," prohibit them from using party affiliation as the "sole objective criteria," and bar the promotion or advancement of "one candidate over another." 11 C.F.R. § 110.13(b), (c). ONO admittedly relied on party affiliation alone, Complaint at ¶ 35, and only retracted this admission after receiving notification that its action was illegal. Complaint at ¶¶ 38-39. Even then, ONO's attorney admitted that there was "no showing" plaintiff could make that would qualify him for inclusion in the debates that ONO had negotiated, finalized and publicly announced. *See* Complaint at ¶ 42. To this day, ONO has failed to articulate <u>any</u> criteria beyond its post hoc assertion of a "top two," "frontrunner" standard, which applied to candidates in Ohio necessarily and unlawfully excludes all but the two major-party candidates. *See Buchanan*, 112 F. Supp.2d at 74. Regardless of whether ONO simply selected the two major-party candidates or employed a top-two formula, the result is the same--several qualified minor-party candidates in Ohio (including Plaintiff) were secretly and categorically excluded from ONO's series of televised debates. Debates staged in this fashion contradict 11 C.F.R. § 110.13 and the FECA.

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any opportunity to participate in the debates. As evidenced by Little's invitation in his September 16 letter to meet Brown at the courthouse, it was litigation posturing, pure and simple.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I filed this Motion and accompanying Declaration with the Court using its electronic filing mechanism which will serve all counsel of record.

/s/ Oliver B. Hall
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