UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAN LA BOTZ, Plaintiff, v. FEDERAL ELECTION COMMISSION, Defendant.	No. 13-cv-00997-RC REPLY IN SUPPORT OF MOTION TO DISMISS

FEDERAL ELECTION COMMISSION'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

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I. INTRODUCTION

The Federal Election Commission ("Commission" or "FEC") has moved to dismiss plaintiff Dan La Botz's challenge under 2 U.S.C. § 437g(a)(8) to the Commission's dismissal of his administrative complaint. As the Commission showed in its motion, the Court lacks jurisdiction under Article III because plaintiff is moving to New York and there is no likelihood that he will ever again be eligible to participate in any debate organized by the Ohio newspaper entities ("ONO" or "OHNO") about which he has complained. (*See* FEC Mem. in Support of Mot. to Dismiss ("FEC Mem.") (Doc. 12-1) at 11-14.) The FEC exercised its broad prosecutorial discretion to dismiss plaintiff's administrative complaint — an option the Court itself identified in its prior decision, *see La Botz v. FEC,* 889 F. Supp. 2d 51, 63 n.6 (D.D.C. 2012) ("*La Botz I*") — because the investigation that would be required to resolve inconsistencies in the record would not be a worthwhile use of the agency's limited resources. In any case, plaintiff's complaints about ONO's policy of selecting only the "two frontrunners" for debates and about the FEC's administrative enforcement approach lack merit.

In his Response to the Commission's motion, plaintiff claims the Court still has jurisdiction because his claim is really against Commission "policies," rather than ONO, but section 437g(a)(8) authorizes only challenges to specific FEC enforcement decisions. Plaintiff's efforts to establish jurisdiction based on the potential harm to other candidates are unavailing, particularly in light of recent decisions in this Circuit. Plaintiff also fails to show that the Commission's dismissal was contrary to law. Plaintiff does not even address the discussion of prosecutorial discretion in *La Botz I*, nor does he dispute the Commission's proper reliance on conserving agency resources or the low chance that plaintiff could meet any objective debate participation standard ONO would likely adopt. Instead, plaintiff essentially claims that the

agency has a duty to pursue every potential violation of the statute, but that is not the law. With regard to the purported "policies" challenged, there is no support for plaintiff's claim that ONO cannot "categorically" restrict debates to the two leading candidates. In fact, 11 C.F.R. § 110.13 specifically permits debates with as few as two candidates, as long as they use "pre-established objective criteria" to determine who may participate. *La Botz I*, 889 F. Supp. 2d at 60. And plaintiff's complaints about how the Commission evaluated the evidence — including his claim that the agency should have simply determined that a violation occurred without any investigation — lack merit.

Accordingly, plaintiff's suit should be dismissed.

II. THE COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS

Plaintiff La Botz fails to refute the Commission's showing that there is now no Article III jurisdiction over his challenge to the dismissal of his administrative complaint against ONO. (*See* FEC Mem. at 11-14.) La Botz claims he was impermissibly excluded from ONO's senatorial debates in 2010. But those debates are now over, and although plaintiff's complaint filed with this Court states that he "intends to run again for federal office in the future," it also notes that he will move from Ohio to New York in January 2014 and so any future congressional races "likely [would] be in New York." (Complaint ("Compl.") ¶ 9.) Regardless of whether jurisdiction is analyzed under standing or mootness doctrines, plaintiff has failed to establish it.

In response to the Commission's motion, plaintiff submits a new declaration stating: "I continue to be committed to building a socialist movement in Ohio, New York, and across the United States and to the election of Socialist Party of Ohio and Socialist Party candidates. . . . It is likely that I will run for federal office in the future as a Socialist or for some other minor party regardless of where I am domiciled." (La Botz Declaration (Doc. 13-1) ("La Botz Decl.")

¶¶ 7-8.) As plaintiff summarizes in his Response, "[p]laintiff continues to allege that he will likely run for federal office *somewhere* in the United States." (Plaintiff's Response to Defendant's Mot. to Dismiss (Doc. 13) ("Pl. Opp.") at 17 (emphasis added; citations omitted).) But these general statements do not suggest any future moves from New York, let alone a return to Ohio, and so they do not establish any likelihood that La Botz will ever again be eligible for a future candidate debate sponsored by ONO.[1] Thus, the facts supporting jurisdiction have substantially changed since this Court's decision in *La Botz I*, and contrary to plaintiff's claim (Pl. Opp. at 20), the Court can and should re-examine the jurisdictional issue. *See La Botz I*, 889 F. Supp. 2d at 57 (noting that "courts must take . . . pains to ensure that jurisdiction continues to exist throughout all stages of the litigation") (citing *Davis v. FEC*, 554 U.S. 724, 732-33 (2008)). Although in *La Botz I* the Court found jurisdiction in reliance on La Botz's declaration that "it is likely that [he] will run for federal office in Ohio again in the future" (889 F. Supp. 2d at 59 (quoting La Botz declaration)), that simply is no longer the case.[2]

Rather than attempt to establish standing for himself to challenge ONO's standards or demonstrate that the same events are capable of repetition but will evade review, La Botz now claims that ONO is irrelevant because "Plaintiff's complaint runs against the FEC, not the

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[1] Plaintiff's court complaint also states that La Botz "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." (Compl. ¶ 9.) Plaintiff's new declaration is even weaker, merely stating that "I *may* run for President as a Socialist or for some other minor party in the future." (La Botz Decl. ¶ 9 (emphasis added).) In any event, the Commission previously pointed out that there is no allegation or record evidence that ONO has ever sponsored or would ever sponsor presidential debates — instead, all multi-party election presidential debates since 1988 have been sponsored by the Commission on Presidential Debates (FEC Mem. at 13) — and plaintiff does not respond to this point. Thus, La Botz's purported potential presidential candidacy is irrelevant.

[2] In addition, ONO now has adopted new written candidate debate selection criteria, which further reduces the likelihood that La Botz could somehow be harmed by a lack of objective written criteria in the future. (FEC Certified Administrative Record ("AR") at AR0154-AR0156; AR0183 at 10 n.8. *See* FEC Mem. at 3 n.1.)

ONO." According to La Botz, "[t]he question (assuming that Plaintiff must show that he is likely to be harmed again) is whether the FEC's nationwide policy might be used against Plaintiff, wherever in the country he may run for federal office. Because Plaintiff has sworn that he is likely to run for federal office again as a minor-party candidate wherever he is domiciled, the FEC's ruling continues to threaten his participation in future debates." (Pl. Opp. at 17.) Plaintiff adds that "[e]ven if Plaintiff will not run for federal office in Ohio, or anywhere else, in the future, it remains likely that other third-party and independent candidates will." (*Id.* at 18.)

Plaintiff's dramatic pivot would transform this suit from a narrow challenge to the Commission's dismissal of the administrative complaint in MUR 6383R (involving La Botz's exclusion from ONO's 2010 senatorial debates in Ohio) to a broad-based attack on the Commission's purported interpretation of its candidate debate regulations applied to unknown future potential federal candidates in Ohio and unknown future debate sponsors nationwide. Even assuming *arguendo* that the Commission's Factual and Legal Analysis constitutes "binding and precedential interpretations of the FECA" (Pl. Opp. at 22), 2 U.S.C. 437g(a)(8) does not provide a basis to bring a broad regulatory challenge on behalf of all similarly situated entities.[3] The jurisdictional basis for plaintiff's suit merely allows for a challenge to the dismissal of an administrative complaint. And there is generally no Article III jurisdiction "when the issues presented are no longer 'live.'" *La Botz I*, 889 F. Supp. 2d at 58 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

[3] In fact, the Commission may depart from earlier regulatory interpretations as long as it provides a reasoned basis for doing so. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *Williams Gas Processing-Gulf Coast Co. L.P. v. FERC*, 475 F.3d 319, 322 (D.C. Cir. 2006); *Brusco Tug & Barge Co. v. NLRB*, 247 F. 3d 273, 278 (D.C. Cir. 2001).

Nor is there jurisdiction for plaintiff to maintain his suit on behalf of unidentified candidates everywhere, as the Commission explained. (*See* FEC Mem. at 13 n.5.) That is the law in this Circuit at this time, as *Pharmachemie B.V. v. Barr Labs, Inc.*, 276 F.3d 627, 633 (D.C. Cir. 2002), makes clear. Plaintiff does not even mention *Barr Labs*, instead citing only a 26-year-old decision, *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987). Plaintiff's case simply does not fit within the exception to mootness for matters that are capable of repetition yet evading review.

As the Commission explained (Mem. at 12-14), recent decisions in this Circuit in challenges brought under section 437g(a)(8) further undermine plaintiff's argument that there is jurisdiction for his claim. The Court of Appeals recently held that former presidential candidate Ralph Nader could not demonstrate competitive standing because it was too speculative that he would run again for president and thus could again be subjected to the allegedly unlawful actions by those about whom he complained. *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013) (dismissing section 437g(a)(8) suit on standing grounds).

Plaintiff La Botz claims that *Nader* is distinguishable because, in La Botz's view, Nader's "claim was personal and ad hoc; it was not a challenge to an FEC policy, as is the case here, but was a complaint directed at the FEC's lack of enforcement." (Pl. Opp. at 19.) But as discussed above, section 437g(a)(8) only authorizes challenges to Commission dismissals of administrative complaints and this case is identical to *Nader* in that respect. Challenges to FEC regulations and policy statements are not properly brought under section 437g(a)(8). Plaintiff also tries to distinguish *Nader* on the grounds that Nader merely said that he "may run for office again," but didn't say it was "likely," and because Nader did not assert that other candidates would be injured. (Pl. Opp. at 19-20.) However, the key point is that La Botz, like Nader, has

failed to show he is likely to run for any office that could subject him to the same allegedly illegal conduct specified in his administrative complaint. And with regard to whether the potential harm to candidates not even before the Court suffices to show standing, plaintiff fails to mention *Herron for Congress v. FEC*, 903 F. Supp. 2d 9 (D.D.C. 2012), in which this Court held that a candidate alleging campaign finance violations "must demonstrate a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party,'" *id*. at 14 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)).[4] Plaintiff has failed to meet that standard and this Court lacks jurisdiction to consider his claim.

III. THE COMMISSION'S DISMISSAL OF PLAINTIFF'S ADMINISTRATIVE COMPLAINT WAS REASONABLE

Even if this Court finds that it has jurisdiction, the Commission has shown (FEC Mem. at 15-23) that plaintiff La Botz falls far short of meeting his burden to justify overturning the Commission's dismissal of the administrative complaint under the highly deferential standard of review applicable here. The Commission's decision to dismiss the complaint fits squarely within its broad prosecutorial discretion and was not contrary to law.

A. Declining to Conduct a Potentially Difficult and Costly Investigation Was a Sensible Exercise of the Commission's Prosecutorial Discretion

As this Court noted in *La Botz I*, the Commission's prosecutorial discretion is "'considerable.'" 889 F. Supp. 2d at 63 n.6 (citations omitted). It is "surely committed to the Commission's discretion to determine where and when to commit its investigative resources." *Stark v. FEC*, 683 F. Supp. 836, 840 (D.D.C. 1988). In his opposition, plaintiff La Botz fails to meet the substantial burden of demonstrating that the Commission was unreasonable in concluding that further investment of the agency's resources was unwarranted. The Commission

[4] Plaintiff also points out (Pl. Opp. at 17 n.7) that agencies need not impose standing requirements for administrative proceedings, but that of course has no bearing on whether he has standing in this Court.

carefully analyzed the administrative complaint, the supplement, and the responses in its Factual and Legal Analysis in MUR 6383R (AR0188-AR0198). The Commission concluded that the evidence in the record supporting the allegation in the Complaint was too limited to warrant undertaking the resource-intensive investigation that would be required here. (AR0195-AR0198.) In particular, an investigation would have been needed to clarify conflicting evidence in the current record, including seeking and evaluating internal materials from the various ONO members. Such an investigation would be an inefficient use of the Commission's limited resources, particularly in light of the small chance that La Botz could actually benefit by meeting any objective debate participation criteria that ONO would be likely to adopt. (AR0197 & n.9.) The Commission therefore exercised its prosecutorial discretion and dismissed the matter, pursuant to *Heckler v. Chaney*, 470 U.S. 821 (1985), and the agency's policy regarding enforcement dismissals.

Plaintiff fails to provide any valid reason for the Court to second-guess the Commission's decisions regarding use of its investigative resources. Indeed, plaintiff says he "does not challenge the FEC's prosecutorial discretion." (Pl. Opp. at 14.) Significantly, plaintiff does not mention this Court's discussion in *La Botz I* of the possible exercise of prosecutorial discretion given that plaintiff is unlikely to meet any potential objective ONO standard.[5] Plaintiff also does not directly challenge the Commission's reliance on the agency's limited resources or plaintiff's future political viability, which were explicit bases for the agency's exercise of prosecutorial discretion. (Factual & Legal Analysis at 10-11, AR197-AR198.) Plaintiff recognizes the FEC's rationale for the dismissal decision (*see, e.g.*, Pl. Opp. at 13 (referencing the "resource intensive"

[5] The Court stated that "[n]one of this is to say that the FEC is required to reach a different conclusion on remand," and suggested that the Commission's decision to dismiss the complaint "could have been justified entirely by the FEC's prosecutorial discretion, which is 'considerable.'" 889 F. Supp. 2d at 63 n.6 (quoting *Nader v. FEC*, 823 F. Supp. 2d at 65).

task), 29 (same); *see also id*. at 27 ("overbearing burden")), but plaintiff never directly responds to the Commission's conclusions.

Instead, plaintiff challenges three statements in the Commission's Factual and Legal Analysis in MUR 6383R, which plaintiff describes as "controversial legal conclusions" that "constitute the policies of the FEC and, if not set aside, binding and precedential interpretations of the FECA," even describing them as "now the law of the land." (Pl. Opp. at 15, 22.) However, the Commission simply applied long-established regulations and enforcement practices. Plaintiff disagrees with the Commission's approach to this matter, but as explained infra pp. 3-4, his new claims really amount to policy disagreements, and they lack merit.

Plaintiff strains to analogize this case to situations in which the government asserted prosecutorial discretion in response to claims of illegal racial or other discrimination (Pl. Opp. at 14-15), claiming that he has suffered "political discrimination" that must be addressed, but the issue here is whether the Commission's dismissal of plaintiff's complaint against ONO was reasonable. In fact, the Commission's dismissal would be proper even if there were substantial evidence that ONO violated FECA. The very nature of prosecutorial *discretion* is that the government is not required to pursue all possible violations of law.[6] Ultimately, plaintiff's position would effectively mean that the Commission has a duty to proceed every time some

[6] Plaintiff quotes *Nader v. Saxbe*, 497 F.2d 676 (D.C. Cir. 1974), which states that "[t]he decisions of this court have never allowed the phrase 'prosecutorial discretion' to be treated as a magical incantation which automatically provides a shield for arbitrariness," 497 F.2d at 679 n.19 (quoting *Med. Comm. for Human Rights v. SEC*, 432 F. 2d 659, 673 (D.C. Cir. 1970)), and other decisions that predate the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985). (*See* Pl. Opp. at 14-15 & n.6.) However, plaintiff does not address *Heckler* or any of the more recent court decisions on prosecutorial discretion relied upon by the Commission (other than *La Botz I*). (*See* FEC Mem. at 16-19.) Plaintiff also does not mention the Commission's policy statement, *FEC Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16, 2007). The Commission's decision to invoke prosecutorial discretion on the specific record in this matter was sufficiently supported and explained under current law.

evidence indicates a possible violation, but as discussed in the Commission's opening brief, an agency is "not bound to launch full-blown proceedings simply because a violation of the statute is claimed." *Porter Cnty. Chapter of Izaak Walton League of Am. v. NRC*, 606 F.2d 1363, 1369 (D.C. Cir. 1979). Rather, "[i]t may properly undertake preliminary inquiries in order to determine whether the claim is substantial enough under the statute to warrant full proceedings. The appropriate agency official has substantial discretion to decline to initiate proceedings based on this review, at least where, as here, he gives reasons for denying or deferring a hearing." *Id.* (citing cases). In this case, plaintiff La Botz simply cannot meet his burden to show that the Commission's dismissal was unreasonable.

B. Plaintiff's New Claims Lack Merit

Plaintiff La Botz makes several claims regarding ONO's candidate selection criteria and the Commission's review of the evidence. These claims are beside the point in light of the agency's prosecutorial discretion rationale, but in any event the claims are without merit.

1. Plaintiff has failed to show that a "two frontrunner" debate participation standard based on voter support levels is contrary to law

La Botz claims that the Commission's decision to dismiss his administrative complaint was unlawful because the decision allows ONO to limit its Ohio senatorial debates to the "two frontrunners." (*See* Compl. at 4, ¶ 65.) But as plaintiff admits (Pl. Opp. at 14, 23, 24), the Commission's debate regulation, 11 C.F.R. § 110.13, does permit ONO to sponsor debates with as few as two candidates, as long as they use "pre-established objective criteria to determine which candidates may participate in a debate," such as polling and other data measuring public support, as this Court recognized. *La Botz I*, 889 F. Supp. 2d at 60.[7] Plaintiff claims (Pl. Opp.

[7] The Commission's regulation does explicitly prohibit the use of "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), and the Commission did not approve the use of

at 22) that the regulation does not permit ONO to "categorically" limit its debates to two participants, but plaintiff offers no support for that interpretation of the regulation; the regulation simply requires that debates have at least two participants. *See* 11 C.F.R. § 110.13(b). Plaintiff also argues that ONO's selection of the two "frontrunner" candidates is tantamount to selecting the two major party candidates, and that such a practice improperly excludes minor party candidates like La Botz with very low levels of public support. (Pl. Opp. at 23-24.) But these same claims found no support in the Court's decision in *La Botz I*. (*See* FEC Memo. at 23-25.)[8] In any event, plaintiff's apparent claim that sponsoring organizations must select a level of public support low enough to ensure that at least some minor party or independent candidates are invited to participate in a debate (Pl. Opp. at 24) has no statutory or regulatory basis. Plaintiff emphasizes that "an agency 'is not at liberty to depart from its own [clear] rules' and . . . no deference is accorded such an agency decision to depart" (Pl. Opp. at 21 (citations omitted)), but plaintiff has identified no such conflict with FECA or Commission regulations. And plaintiff concedes that the participation criteria for debates sponsored by the Commission on Presidential Debates, which require at least 15% standing in opinion polls and thus almost always have included only the nominees from the two major political parties (except Ross Perot in 1992), are not "illegal under the FECA." (Pl. Opp. at 24.) It is undisputed that plaintiff La Botz did not

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such a sole criterion in this matter. Instead, as the Commission made clear, it has permitted sponsoring organizations to utilize a variety of factors to select candidates for debates. (AR0194.)

[8] Plaintiff also seeks to rely in its arguments on the merits (Pl. Opp. at 23) on matters outside the administrative record, which is not permitted in this agency review matter. "[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less than did the agency when it made the decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F. 3d 44, 47 (D.C. Cir. 2013) (quoting *Walter O. Boswell Memel Hosp. v. Heckler*, 749 F. 2d 788, 792 (D.C. Cir. 1984).

come close to this 15% threshold in Ohio in 2010.[9] Of course, to the extent that plaintiff seeks to directly challenge the FEC's debate regulations, such a challenge is not permissible in a suit brought under 2 U.S.C. § 437g(a)(8).

Plaintiff also claims that allowing ONO to sponsor debates with only the two leading candidates is not "reasonable" where the criteria are "designed to result in the selection of certain pre-chosen" candidates or are set "'so high' that only the two major-parties can reach them." (Pl. Opp. at 25-26 (quoting *Buchanan v. FEC*, 112 F. Supp. 58, 74 (D.D.C. 2000)).) And plaintiff asserts that ONO's 2010 "two frontrunners" formulation was designed with this intent, relying solely on the Winges email. (Pl. Opp. at 8-9.) However, that email is of uncertain evidentiary value and is contradicted by other evidence. (AR0195-AR0197.) And although plaintiff relies heavily on *Buchanan*, that case did not create binding precedent that allowing only two candidates to debate is unlawful, even if the usual result is a debate with only the major party candidates. Thus, plaintiff's reliance on the case is misplaced.[10]

In the end, plaintiff's "two frontrunners" claim boils down to a policy disagreement. That claim should be addressed to Congress or the Commission in its rulemaking capacity, not this Court.

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[9] (Factual & Legal Analysis at 10 n.9 (AR0197).) Plaintiff's related hypothetical (Pl. Opp. at 25) is irrelevant because his administrative complaint did not involve a candidate polling 32% and did not involve a candidate polling within two percentage points of both major party candidates.

[10] *Buchanan* noted that "statements by the regulation's drafters *strongly suggest* that the objectivity requirement precluded debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it." 112 F. Supp. 2d at 74 (emphasis added). But *Buchanan* also stated that "[i]n view of the substantial deference I must accord to the FEC's interpretation of its own regulations," the court could not conclude that it was plainly erroneous for the Commission to find that the 15% support level set by the Commission on Presidential Debates was "objective" for purposes of 11 C.F.R. § 110.13(c). *Buchanan* ultimately upheld the Commission's interpretation of its regulation.

2. Plaintiff has failed to identify any unlawful conduct in how the Commission evaluated the evidence in this matter

Plaintiff also contends (Pl. Opp. at 29-31) that the Commission erred by not insisting that ONO produce contemporaneous written documentation to show that it used pre-existing objective criteria to select candidates for the 2010 senatorial debates, and plaintiff also claims that it was error for the agency even to contemplate an administrative investigation to identify the actual selection criteria ONO applied, rather than summarily determining that ONO violated the law because it did not produce such documentary evidence. However, as the Commission explained (FEC Mem. at 25-27), there is no support for the claim that the agency must obtain a certain type or amount of evidence in deciding whether to proceed with an investigation, much less any requirement that the agency always proceed—or summarily find probable cause to believe a violation occurred without any investigation at all.

First, as the Court correctly recognized in *La Botz I*, the Commission's regulations "do not specifically require debate staging organizations to reduce their criteria to writing." *La Botz I*, 889 F. Supp. 2d at 62. Instead, "it is strongly encouraged." *Id.* Thus, contrary to plaintiff's suggestion, the regulation itself neither requires contemporaneous documentation nor prescribes any presumption or penalty for failure to produce such documentation in response to an administrative complaint. Instead, as the Commission's Analysis in MUR 6383R stated:

> To establish that the criteria were set in advance of selecting debate participants, 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. at 64,262. The Commission has advised, but has not interpreted its regulations to require, organizations to document the objective criteria used to select candidates and provide it to candidates. *Id.* Reducing criteria to writing and providing it to candidates would afford staging organizations a ready basis to demonstrate that they had established their criteria in advance. But written criteria are not the only acceptable method of proof under Commission precedent. Rather, "undocumented affirmative statements submitted by or on behalf of respondents"

> will suffice so long as "the evidence shows that the criteria were used in a manner consistent with the media organization's affirmative statements."

(AR0181 (quoting First General Counsel's Report in MURs 4956, 4962, 4963 (Union Leader Corp, *et al.*)).)[11] The Commission's Analysis concluded that "ONO did not provide a contemporaneous written standard for its 2010 debates, so the Commission 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." (AR0181.)

Moreover, nothing in *La Botz I* would *preclude* an investigation to evaluate contemporaneous evidence that the Commission concluded would be needed to resolve factual inconsistencies. Indeed, this Court noted 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*." 889 F. Supp. 2d at 62 n.5 (emphasis added). The Court's decision envisioned not only that the agency might undertake an investigation but also the type of evidence that might exist. Thus, plaintiff's claim that the "Court rejected the very approach employed here by the FEC to identify pre-existing objective criteria" (Pl. Opp. at 28) is baseless.[12]

Finally, plaintiff claims not only that the Commission improperly shifted the burden of proof away from ONO, but also that the agency was actually required to make a determination

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[11] The First General Counsel's Report in MURs 4956, 4962 and 4693 is available at http://eqs.nictusa.com/eqsdocsMUR/0000128A.pdf.

[12] While the Court did express skepticism of "post-hoc rationalizations," that discussion was in the context of evaluating whether the Commission's first dismissal was supported by substantial evidence. The Court's conclusion that the post-hoc affidavit was insufficient to support a dismissal on the merits — a finding that there was no reason to believe a violation occurred — does not establish a prospective evidentiary rule for Commission enforcement actions. Indeed, it was in this context that the Court explicitly stated that the Commission might have dismissed the complaint based on prosecutorial discretion. 889 F. Supp. 2d at 63 n.6.

against ONO without any investigation because the debate sponsor did not sufficiently prove the propriety of its selection criteria at the initial stage of the Commission's review. (Pl.'s Opp. at 29-31.) The Commission did discuss how debate sponsors might show that they used acceptable criteria, but the agency reached no conclusions as to the application of any evidentiary burdens generally. (*See* FEC Mem. at 26.) More fundamentally, there is no support for the notion that the Commission must make an adverse determination against a sponsoring entity without any investigation simply because the initial evidence regarding its debate participation standards is inconclusive. Thus, plaintiff's arguments on this point are also without merit.[13]

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in the Commission's motion, the Court should dismiss the complaint in this matter for lack of subject matter jurisdiction pursuant to Fed. R. Civ. Proc. 12(b)(1) or, in the alternative, for failure to state a claim pursuant to Fed. R. Civ. Proc. 12(b)(6).

Respectfully submitted,

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[13] Plaintiff also suggests (Pl. Opp. at 30) that ONO's situation here is similar to that of a taxpayer claiming immunity from a tax, citing cases stating that such a taxpayer must prove entitlement to an exemption. But this case is not about whether ONO is entitled to some "exemption" from the Commission's usual debate sponsorship rules; debate sponsors are not presumed to have violated the law in the way that taxpayers are presumed to owe applicable taxes.

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