**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| DAN LA BOTZ,<br><br>Plaintiff,<br><br>v.<br><br>FEDERAL ELECTION COMMISSION,<br><br>Defendant. | No. 1:11-cv-01247-BAH<br><br>REPLY |

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

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October 11, 2011

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## I. INTRODUCTION

The defendant Federal Election Commission ("Commission" or "FEC") has moved to dismiss this suit for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Plaintiff Dan La Botz lacks Article III standing to challenge the Commission's dismissal of his administrative complaint against Ohio newspaper entities that sponsored candidate debates in 2010 because he has not alleged a sufficient injury-in-fact that would likely be redressed by a favorable decision in this case. (FEC's Motion to Dismiss ("FEC Mem.") (Doc. 10-1) at 10-16.) Plaintiff's response to the Commission's motion includes a new declaration that supplies only vague "some day" intentions to run again for federal office and no concrete facts about how he would benefit from the purely prospective relief he seeks. (Plaintiff's Response to Defendant's Motion to Dismiss ("Opp.") (Doc. 13); La Botz Declaration ("Decl.") (Doc. 13-1).)[1] These facts starkly distinguish this case from the district court decision on which plaintiff chiefly relies, *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000), in which the plaintiff was indisputably a candidate in an impending election at the time of decision.

Plaintiff has also failed to sustain his burden of showing that the Commission's dismissal of his administrative complaint was contrary to law under 2 U.S.C. § 437g(a)(8). (FEC Mem. at 16-25.) The Commission receives very broad deference when it interprets and applies its own regulation governing candidate debates. And the agency acted well within its discretion in concluding that the Ohio news organizations had applied pre-existing, objective standards within the meaning of 11 C.F.R. § 110.13(c) in choosing to invite only the frontrunner candidates to the

[1] Plaintiff's certificate of service refers to "this Motion," but plaintiff's submission, styled as a "Response," seeks no relief other than denial of the Commission's motion to dismiss. Plaintiff has not filed a cross-motion.

debates, rather than including plaintiff and several other candidates who were polling at about one percent or less. Accordingly, for the reasons stated in the Commission's motion to dismiss and in this reply, plaintiff's suit should be dismissed.

## II. THE COURT SHOULD DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

### A. La Botz Has Not Alleged an Injury-In-Fact and Cannot Show That Any Alleged Injury Is Likely to Be Redressed by the Court

Plaintiff lacks Article III standing because he has alleged no injury-in-fact that the Court could redress regarding his exclusion from the candidate debates sponsored by the Ohio News Organization and its corporate members ("OHNO") in October 2010. It is speculative whether La Botz will again be a candidate at all, let alone that a decision in his favor against the FEC would lead OHNO to include him in any hypothetical debates among federal candidates in the future. Plaintiff's court complaint contains no factual allegations regarding plaintiff's standing to sue the Commission in this suit, except for the suggestion that plaintiff has standing merely because he filed an administrative complaint which later was dismissed by the Commission. As the D.C. Circuit has recognized, however, "(s)ection 437g(a)(8)(A) does not confer standing; it confers a right to sue upon parties who *otherwise* already have standing." *Common Cause v. FEC*, 108 F.3d 413, 419 (D.C. Cir. 1997) (emphasis added). Thus, plaintiff must meet the three requirements for Article III standing: injury-in-fact, causation and redressability. (*See* FEC Mem. at 10-11.) Plaintiff's failure to allege any actual or imminent injury that could be redressed by this Court is fatal to his standing.

Plaintiff claims that he was injured by OHNO's decision to exclude him from the 2010 Ohio senatorial debates, and he now submits a new declaration asserting that "exclusion from the Ohio News Organization's senatorial debate caused me injury-in-fact by giving my opponents a

competitive advantage." (La Botz Decl. ¶¶ 9-10.) As the Commission has explained (FEC Mem. at 12), however, any competitive injury that La Botz may have suffered from actions taken by OHNO prior to the October 2010 senatorial debates cannot now be redressed. Both the debates and the November 2010 general election have passed, plaintiff has ended his 2010 campaign for U.S. Senate, and he has terminated his principal campaign committee. (*Id.*) Plaintiff neither responds to these arguments nor addresses *Tierney v. FEC,* 538 F. Supp. 2d 99, 102-103 (D.D.C. 2008), *aff'd,* No. 08-5134, 2008WL5516511 (D.C. Cir. Sept. 12, 2008), which dismissed a similar section 437g(a)(8) suit by another former candidate on standing grounds (*see* FEC Mem. at 12). Most fundamentally, La Botz has no response to the dispositive cases that preclude reliance on past injury to establish a "present controversy, or in terms of standing, an injury." *American Soc'y for the Prevention of Cruelty to Animals v. Ringling Bros. and Barnum & Bailey Circus,* 317 F.3d 334, 336 (D.C. Cir. 2003). (*See* FEC Mem. at 13 (citing cases).)

Nor has plaintiff shown any future or continuing injury that could be redressed by this Court and thus could support standing. In his court complaint, plaintiff failed even to suggest that he intends to seek federal office again, let alone that OHNO will sponsor another candidate debate using the same participation criteria that will adversely affect him. Thus, the Commission explained that any potential candidacy and injury are too speculative to demonstrate a likelihood of redressability necessary to support standing. (FEC Mem. at 13-14.) It is well established that a party seeking prospective relief must demonstrate that the threatened injury is real, immediate, and direct, *not* "abstract," "conjectural," or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983).

Plaintiff has failed to cure this fatal standing defect because he has not shown that he will likely be a federal candidate in the future. Plaintiff has not filed a statement of candidacy notifying the Commission that he will be a candidate in any specific future federal election, *see* 2 U.S.C. § 432(e)(1); FEC Mem. at 13, and the declaration he has filed with his responsive brief contains only vague, inconsistent claims that "I am *considering* running for office again," "[i]t is likely I will run for federal office in Ohio again in the future," and "I *may* run for federal office in Ohio's 2012 general election." (La Botz Decl. ¶¶ 7-9 (emphases added). Like the affidavits at issue in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) — which professed "'some day' intentions[,] without any description of concrete plans, or indeed even any specification of *when* the some day will be" — La Botz's declaration does not support a finding of "actual or imminent" injury that the Constitution requires. *Lujan*, 504 U.S. at 564. (*See also* FEC Mem. at 13-14 and n.6 (discussing cases).)

Plaintiff's heavy reliance (Opp. at 18-23) upon *Buchanan* is misplaced. In that case, another district court upheld the Commission's dismissal of an administrative complaint filed by a minor party presidential candidate and found that the sponsoring organization's requirement that candidates show at least fifteen percent voter support was a reasonable, objective criterion that satisfies the Commission's debate regulation. Although the district court also found that the candidate had competitive standing, the case is readily distinguished. In *Buchanan*, the court could have provided meaningful prospective relief; the case was filed and decided prior to both the presidential debates and the general election. The plaintiff was a declared and active candidate in an election to be held fewer than two months from the court's decision. The district court found redressability because, while enforcement provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-457 ("FECA" or "Act"), specified

procedural steps that had to occur before the Commission could file an enforcement suit against the debate sponsor, the district court was "unconvinced that there [wa]s not enough time as a practical matter for the plaintiffs to obtain the relief they seek from the FEC." *Buchanan*, 112 F. Supp. 2d at 69. Here, by contrast, the Commission cannot remedy plaintiff's past injury, and it is speculative whether and when he may run again for federal office. Plaintiff describes these distinctions as "trivial" (Opp. at 21), but in fact they would be dispositive, even if the decision in *Buchanan* were binding precedent.[2]

Plaintiff also seems to suggest (Opp. at 20-23), again relying heavily on *Buchanan*, that he should be excused from these jurisdictional requirements because the Commission did not timely act on his administrative complaint. That argument is incorrect. Plaintiff criticizes the Commission for failing to resolve his September 21, 2010 administrative complaint prior to the October 2010 Ohio senatorial debates, or in any event, prior to the November 2010 general election. (*See* Opp. at 23 n.13.) Plaintiff emphasizes that he filed his administrative complaint "*before* the debates were held, and well before the November election" (Opp. at 21-22 (emphasis in original)), and he specifically objects to the Commission's grant of an extension of time to Fisher for Ohio, suggesting that plaintiff was further injured by the Commission's alleged "failure" to "timely remedy [OHNO's] wrong" (Opp. at 20). Plaintiff fails to recognize, however, that because his administrative complaint was filed in late September, the statutorily-mandated fifteen-day period for the respondents to submit written responses to the administrative complaint, *see* 2 U.S.C. § 437g(a)(1); 11 C.F.R. § 111.6, would not have expired until mid-October, *after* all three debates had taken place. In particular, even without an extension, the

[2] Plaintiff also relies (Opp. at 23-24) upon *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1997), *vacated* 524 U.S. 11, *on remand*, 146 F.3d 1049 (D.C. Cir. 1998), but, unlike the plaintiffs in *Akins*, La Botz has not alleged an injury-in-fact based on informational injury.

responses by both Fisher for Ohio and OHNO would have been due on October 15 at the earliest. (AR0062, AR0067.) In any event, it is well established that the Commission is not required to complete action on administrative complaints by any predetermined deadline, such as an upcoming federal election. *Perot v. FEC,* 97 F.3d 553, 558-559 (D.C. Cir. 1996); *In re Carter-Mondale Reelection Committee, Inc.,* 642 F.2d 538 (D.C. Cir. 1980). As the D.C. Circuit also recognized in *Perot,* because section 437g(a)(8) specifies that complainants must wait 120 days before challenging the Commission's handling of a pending complaint, the Commission's inability to resolve matters within this four-month period is "neither unlawful nor unreasonable." *Perot*, 97 F.3d. at 559 (citing *FEC v. Rose,* 806 F.2d 1081, 1084-1085 (D.C. Cir. 1986)).

Plaintiff also relies (Opp. at 24-25) on cases involving mootness or prudential standing, including *Becker v. FEC,* 230 F.3d 381 (1st Cir. 2000), and on precedent from other circuits (Opp. at 25-26 n.14), but those cases do not involve *constitutional standing* under Article III, the basis of the Commission's arguments. In particular, plaintiff attempts to conflate the "capable of repetition yet evading review" exception to the mootness doctrine with constitutional standing requirements, but that mootness exception cannot be used to create or maintain an Article III case or controversy that never existed at the outset. Standing is a distinct jurisdictional requirement for all federal litigation, and plaintiff bears the burden of demonstrating that he satisfied all three constitutional standing requirements at the time he filed his complaint. *See* FEC Mem. at 10-11; *Del Monte Fresh Produce Co. v. United States,* 570 F.3d 316, 324 (D.C. Cir. 2009) ("standing is assessed as of the time a suit commences," citing *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 190 (2000)).

For all these reasons, plaintiff has failed to sustain his burden of establishing standing, and plaintiff's complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction.

### B. The Commission's Dismissal of Plaintiff's Administrative Complaint in MUR 6383 Was Not Contrary to Law

Even if plaintiff La Botz could demonstrate Article III standing, he still has not shown that the Commission's dismissal of his administrative complaint in MUR 6383 was "contrary to law" under 2 U.S.C. § 437g(a)(8)(C). Particularly in light of the exceptional deference owed to the Commission, plaintiff cannot demonstrate that the FEC abused its discretion when it found "no reason to believe" that OHNO violated the Act; rather, the agency permissibly concluded that the record as a whole indicates that OHNO applied pre-existing objective standards in selecting participants for its debates, consistent with 11 C.F.R § 110.13(c). As the Commission explained, the General Counsel's Report ("GCR") in MUR 6383 (AR0114-AR0122), which provides the basis for judicial review here, analyzed the administrative complaint and the responses received by the Commission, and concluded that OHNO complied with the debate regulation. The Commission unanimously agreed and properly dismissed plaintiff's administrative complaint. (*See* FEC Mem. at 16-25.) Plaintiff argues that 11 C.F.R. § 110.13(c) requires disclosure of the debate invitation criteria and the inclusion of more than the two frontrunners, but these arguments lack merit.

As the Commission explained, the Act generally prohibits corporate contributions and coordinated expenditures, *see* 2 U.S.C. § 441(b), but the Act provides an exception for "nonpartisan activity designed to encourage individuals to vote," 2 U.S.C. § 431(9)(B)(ii), and the Commission has issued a regulation permitting corporations to sponsor candidate debates if

certain requirements are met. (*See* FEC Mem. at 5-6.) This regulation requires, among other things, that debate sponsors use "pre-established objective criteria."

**1. The Standard of Review Is Exceedingly Deferential**

Plaintiff's claim here is limited to whether the Commission properly interpreted and applied its regulation at 11 C.F.R. § 110.13(c). (*See, e.g.*, Opp. at 15, 16, 17, 26, 33.) La Botz does not directly challenge the Commission's interpretation of the Act as reflected in the current debate regulation, nor could he do so in this section 437g(a)(8) suit. (*See* FEC Mem. at 18 n.7.) Plaintiff also does not question the qualifications of OHNO or its members to stage candidate debates under 11 C.F.R. § 110.13(a). Instead, plaintiff focuses on OHNO's selection and application of criteria for inviting candidates to participate in its October 2010 Ohio senate debates, and he claims that the Commission unlawfully dismissed his administrative complaint because, in his view, the Commission's "conclusion violates the 'plain language' of its own regulations." (Opp. at 32.) In plaintiff's view, therefore, the Commission merits no deference and erred as a matter of law. (*Id.*)[3]

Plaintiff's arguments, however, ignore the fact that the Commission's decision in this matter turned on its interpretation of its own regulation. While courts apply a highly deferential standard of review in all section 437g(a)(8) dismissal cases, deference is at its zenith when the Commission interprets its own regulations. (FEC Mem. at 4, 17 (citing cases)). In other words, when the construction of a regulation is at issue, deference is even more clearly required than when an agency is interpreting its governing statute. *Udall v. Tallman*, 380 U.S. 1, 16 (1965);

[3] Contrary to plaintiff's suggestion (Opp. at 33), *AFL-CIO v. FEC*, 177 F. Supp. 2d 48 (D.D.C. 2001), *aff'd,* 333 F.3d 168 (D.C. Cir. 2003), a suit challenging the Commission's public disclosure of information regarding closed administrative enforcement cases, was brought under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), not under 2 U.S.C. § 437g(a)(8). That case did not involve review of a Commission decision to dismiss an administrative complaint.

*FEC v. National Republican Senatorial Comm.*, 966 F.2d 1471, 1475-76 (D.C. Cir. 1992) (FEC regulatory interpretation "given controlling weight unless it is plainly erroneous or inconsistent with the regulation"). As *Buchanan* explained:

> An agency's construction of its own regulations is entitled to an "exceedingly deferential standard of review" such that the court "'is not to decide which among several competing interpretations best serves the regulatory purpose.'" *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 625 (D.C. Cir. 2000) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, (1994)); *see also Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 52 (D.C. Cir. 1999) (according "substantial deference" to agency's interpretation of its own regulations). * * * As the D.C. Circuit has stated, when a plaintiff is not alleging that the regulation itself violates the statute or the Constitution, "the only circumstance in which we do not defer is where 'an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation.'" *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1294 (D.C. Cir. 1995) (quoting *Thomas Jefferson*, 512 U.S. at 512) (second internal quotation marks and citation omitted).

*Buchanan*, 112 F. Supp. 2d at 70.[4]

**2. The Commission Permissibly Concluded that OHNO Applied Pre-Existing Objective Standards Consistent with the Debate Regulation**

Under the applicable standard of review, the Commission did not abuse its discretion when it dismissed plaintiff's administrative complaint. As explained in the Commission's

[4] Of course, contrary to plaintiff's suggestion (Opp. at 17), the Commission has not claimed that its administrative enforcement decisions are "insulated from review," and in the agency's 35-year history some of its decisions have been set aside, but that unsurprising fact does not alter the highly deferential standard of review here. Plaintiff cites (Opp. at 18 n.10) several cases where the Commission's handling of administrative complaints were held unlawful, but some of these involved alleged delay, not dismissal, *DSCC v. FEC*, No. 95-0349, 1996 WL 34301203 (D.D.C. 1996), or were remanded for a more adequate explanation for the dismissal decision, *Utility Workers Union of America, Local 369, AFL-CIO v. FEC*, 691 F. Supp. 2d 101 (D.D.C. 2010). Plaintiff cites only two cases, both more than fifteen years old, in which the Commission's dismissals were held unlawful, *DSCC v. FEC*, 918 F. Supp. 1 (D.D.C. 1994), and *Common Cause v. FEC*, 729 F. Supp. 148 (D.D.C. 1990). Of course, this list includes only a subset of section 437g(a)(8) dismissal cases filed against the Commission, and ignores other cases where the Commission's dismissal has been upheld. *See, e.g., Hagelin v. FEC*, 411 F. 3d 237 (D.C. Cir. 2005); *Buchanan*, 112 F. Supp. 2d 58.

opening brief (FEC Mem. at 18), the only factual issue La Botz raises in this suit is whether OHNO applied pre-existing objective criteria in selecting which candidates could participate in its 2010 Ohio senate debates. The Office of General Counsel determined, based on its review of the record, that OHNO's debate selection criteria were pre-existing and objective under 11 C.F.R. § 110.13(c), noting in a report that they were "consistent with a number of different criteria the Commission has previously found to have been acceptably 'objective,' including percentage of votes [that] a candidate received in a previous election; the level of campaign activity by the candidate; his or her fundraising ability and/or standing in the polls; and eligibility for ballot access." (GCR at 5 (AR0119) (citing prior FEC enforcement matters).) The Commission, after considering the Office of General Counsel's analysis of the record, unanimously found no reason to believe a violation of the Act had occurred. (AR0123.) The record amply supports that decision. (*See* FEC Mem. at 17-25.)

Plaintiff argues in essence that debates cannot be limited to the two leading candidates if they are the two major parties' nominees, but the Commission's regulation specifically permits debates to include only two candidates, and it forbids the use of major party affiliation as the *sole* objective criterion. Plaintiff argues that OHNO has effectively admitted that major party affiliation was the sole criterion, but that is a serious distortion of the record. Plaintiff relies on an initial, ambiguous three-sentence email message he received from an editor and executive with one newspaper (AR0037), though plaintiff acknowledges that he received a more detailed explanation of the selection process and criteria from OHNO's counsel (AR0019-AR0020) just a few days later and still several weeks before the October 2010 debates. (Opp. at 10.) Plaintiff also acknowledges that OHNO filed a lengthy written submission with the Commission responding to the administrative complaint in MUR 6383 (AR0077-AR0104), and that this

response was accompanied by a sworn affidavit from Benjamin Marrison, editor of the Columbus (Ohio) Dispatch (AR0083-AR0085). (Opp. at 31.) The General Counsel's Report in MUR 6383 (AR0115; AR0123) discussed and relied upon these submissions (AR0117). These fuller and more authoritative explanations made clear that OHNO relied on accepted objective measures like polling data and not simply on party affiliation. Plaintiff asserts that neither OHNO nor the Commission has identified any evidence that OHNO "actually applied" pre-existing objective criteria (Opp. at 31), but this claim is refuted by OHNO's response to the administrative complaint and the accompanying affidavit, both of which were submitted pursuant to the Commission's procedures, *see* 2 U.S.C. § 437g(a)(1); 11 C.F.R. § 111.5, and were subject to the penalties of perjury under 18 U.S.C. § 1001. Plaintiff has cited no record evidence to support his interpretation of the facts other than one short email, which was contradicted by OHNO's later submissions and the Marrison affidavit.

The Commission's duty is to make factual determinations based on its assessment of the full record before it, and these determinations are entitled to deference. Indeed, when the facts permit the drawing of differing inferences, "the finder of fact 'alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court.'" *New Valley Corp. v. Gilliam*, 192 F.3d 150, 156 (D.C. Cir. 1999) (quoting *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 361-62 (1965)). *See also Schoenbohm v. FCC*, 204 F.3d 243, 246 (D.C. Cir. 2000) (the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence) (quoting *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966)). Plaintiff characterizes OHNO's response to the administrative complaint as a "belated, post-hoc rationale" and describes the

accompanying Marrison affidavit as a "*post*-litigation rationalization." (Opp. at 31 (emphasis in original).) In plaintiff's view, "[e]ven if Marrison's explanation is true, it is only a post-debate recollection of [OHNO's] formula and cannot satisfy the command of 11 C.F.R. § 110.13(c)." (Opp. at 31.) However, the Commission is entitled to examine all the facts presented, and it can rely on sworn declarations that report on past events. La Botz presents no evidence that calls into question the Commission's reliance, in part, on the Marrison affidavit.[5]

Plaintiff does not dispute that OHNO had sufficient information to conclude that the Democratic and Republican candidates were the "two front runners" (Opp. at 13-14 n.8); rather, plaintiff argues that OHNO cannot use a "'two front runners' formula" when it results in the selection of only the two major-party candidates. (*Id.* at 13-14 n.8.) In this regard, plaintiff contends that such debates would "promote the major-party candidates over all others," and would therefore violate the requirement in 11 C.F.R. § 110.13(b)(2) that sponsors "not be structured 'to promote or advance one candidate over another.'" (Opp. at 27.) Plaintiff even suggests that all five major and minor party candidates who had qualified for the general election ballot for U.S. Senate in Ohio should have been invited to participate in the debate. (*Id.* at 7 n.3.)

Contrary to plaintiff's suggestion, however, the Commission's regulation explicitly permits debate sponsors to select which candidates to invite, and it does not set limits on the number of candidates, except that the "debates [must] include at least two candidates." 11 C.F.R. § 110.13(b)(1). As plaintiff concedes, under the Commission's regulation "[t]he

[5] To the extent that plaintiff may challenge the General Counsel's Report's lack of discussion of one email, there is no requirement in administrative law that an agency's explanation for its decision must recite or discuss each piece of evidence, whether supportive or adverse, that formed part of the record. *See, e.g., United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 529 (1946) (agency is not compelled to annotate to each finding the evidence supporting it); *cf. BellSouth Corp. v. FCC*, 162 F.3d 1215, 1224 (D.C. Cir. 1999) (the agency is not required to author an essay for the disposition of each application) (quoting *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1191-92 (D.C. Cir. 1983)).

choice of which objective criteria to use is largely left to the discretion of the staging organization." (Opp. at 27 (quoting 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995).) And the express language of the regulation plainly does not require *more* than two candidates.

The initial debate regulation adopted by the Commission in 1979 contained two subsections — former 11 C.F.R. § 110.13(a), which described qualified staging organizations, and former 11 C.F.R. § 110.13(b), which specified the required debate structure. This latter provision merely stated that "[t]he structure of debates . . . is left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." 11 C.F.R. § 110.13(b) (1980).

In the 1995 rulemaking, which added current 11 C.F.R. § 110.13(c), the Commission specifically rejected suggestions that the agency "should establish reasonable, objective, nondiscriminatory criteria to be used by staging organizations in determining who must be invited to participate in candidate debates" or should "allow staging organizations to use their own pre-established sets of reasonable, objective, nondiscriminatory criteria, provided the criteria are subject to Commission review and are announced to the candidates in advance." 60 Fed. Reg. 64262. Instead, in 1995 the Commission adopted new 11 C.F.R. § 110.13(c), which merely required sponsoring organizations to use "pre-established objective criteria." The Explanation and Justification ("E&J") explicitly recognized that the "objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes there are too many candidates to conduct a meaningful debate." *Id.*[6] In fact,

[6] As noted previously (FEC Mem. at 21-22), this was one of the arguments advanced by OHNO in support of its decision to limit the number of candidates it invited to its 2010 Ohio senatorial debates. (AR0082.)

the Commission's E&J explicitly states that the rules "continue the [Commission's] previous policy of permitting staging organizations to decide which candidates to include in a debate, so long as the debate includes at least two candidates." 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995). *See* 44 Fed. Reg. 39,348 (July 5, 1979); 44 Fed. Reg. 76,734 (Dec. 27, 1979).[7]

The E&J for the 1995 debate regulation thus confirms the Commission's intent to continue to confer broad discretion upon sponsoring organizations to establish their own objective selection criteria and to conduct debates between just two candidates based on such criteria. This history directly refutes plaintiff's contention that the debate regulation must be interpreted to prohibit debates between two candidates when there are other qualified candidates on the ballot who might be placed at a competitive disadvantage.

The sole limitation in section 110.13(c) upon a sponsoring organizations' discretion to select candidates for general election debates is the requirement that "staging organization(s) shall not use nomination by a particular political party as the *sole* objective criterion to determine whether to include a candidate in a debate." 11 C.F.R. § 110.13(c) (emphasis added). Contrary to plaintiff's suggestion, however, this limit does not prevent sponsors from considering a candidate's major or minor party nomination status. Indeed, the E&J explicitly states that "in situations where, for example, candidates must satisfy three of five objective criteria, nomination by a major party may be one of the criteria." 60 Fed. Reg. at 64,262. The E&J merely reiterates that "nomination by a particular political party, such as a major party, may not be the sole criterion used to bar a candidate from participating in a general election debate." *Id.* [8]

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[7] The Federal Register notices containing the Explanations and Justifications for the regulation are available on the Commission's web site at http://www.fec.gov/law/cfr/ej_citation_part110b.shtml.

[8] The E&J noted that this was a significant change from the Commission's prior debate regulations, which had "expressly allowed staging organizations to restrict general election

Contrary to plaintiff's suggestion (Opp. at 15-16, 28-30), while the E&J indicates that the revised rules are not intended to permit the use of discriminatory criteria, 60 Fed. Reg. at 64,262, neither the statute nor the regulation provides any indication that debate sponsors should weigh the history of minor parties or remedy alleged past discrimination against them.

In sum, OHNO's submissions to the Commission in this case demonstrate that OHNO applied multiple criteria and did not base its candidate selection exclusively upon party affiliation. Nevertheless, plaintiff contends that "otherwise objective and pre-existing" criteria, such as those applied by OHNO, "are simply unreasonable" if they result in the selection of only the two major-party candidates. (Opp. at 27-28.) Relying on the district court decision in *Buchanan,* 112 F. Supp. 2d at 74, plaintiff suggests that OHNO's criteria were "designed to result in the selection of certain pre-chosen participants," and argues that OHNO "cannot set standards so high that only the two major-parties can reasonably achieve them." (Opp. at 28; internal quotation marks omitted.) Plaintiff fails, however, to point to any evidence that OHNO's pre-existing selection criteria were "designed" as a subterfuge to ensure that particular candidates would be the chosen participants. More generally, plaintiff's argument proves too much: Pre-existing, objective criteria may often lead to predictable results about who will be invited to a debate. But otherwise reasonable criteria do not suddenly become unreasonable because the results they cause are not a surprise.

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debates to major party candidates." *Id.* Under the prior regulations, sponsors could invite only major party candidates and there was no obligation to invite minor party candidates, unless only one major party candidate accepted the invitation to debate. *See* former 11 C.F.R. § 110.13 (1980). Indeed, the E&J for the 1979 regulations stated that "[a]n organization staging a debate may invite candidates to participate in a debate on the basis of party affiliation. Hence, such an organization could stage a general election debate to which only major party candidates are invited." 44 Fed. Reg. 76,734, 76,735 (Dec. 27, 1979).

Moreover, plaintiff's arguments regarding the ability of minor party candidates to qualify for candidate debates is undermined by his concession that even under the criteria set by the Commission on Presidential Debates — which require that candidates receive at least fifteen percent support in the polls — Reform Party candidate Ross Perot was invited to participate in the 1992 presidential debates. (Opp. at 29.) As the *Buchanan* court recognized, several other candidates, such as George Wallace and John Anderson, have reached this threshold as well and have been invited to participate in general election debates. *Buchanan*, 112 F. Supp. 2d at 74. "Thus, third party candidates have proven that they can achieve the level of support required by the CPD." *Id.* As the *Buchanan* court stated, "[w]hile a lower threshold of support might be preferable to many, such a reading is neither compelled by the regulation's text nor by the drafters' intent at the time the regulation was promulgated. Accordingly, deference to the FEC's interpretation is warranted." *Id.*

**3. The Commission's Debate Regulation Does Not Require That the Candidate Selection Criteria Be Publicly Disclosed, and in Any Event, Plaintiff Knew OHNO's Criteria Well Before the 2010 Debates**

La Botz argues (Opp. at 30-32) that OHNO's candidate selection criteria for the 2010 Ohio Senate debates were unlawful because the criteria were not disclosed to plaintiff earlier in the selection process, but as the Commission demonstrated (FEC Mem. at 24-25), there is simply no requirement in 11 C.F.R. § 110.13(c) that debate sponsors notify all candidates of the selection criteria or offer them an opportunity to provide input into the sponsor's selection decision. Nevertheless, in this case plaintiff was in fact provided information regarding OHNO's selection criteria before the debates, and he actually presented written objections that OHNO considered. Thus, even though the debate regulation does not require any procedure for candidates' comments, plaintiff in fact had an opportunity to be heard.

Plaintiff claims that the requirement of "pre-established objective criteria" requires greater "transparency" from debate sponsors than OHNO provided here, but plaintiff provides no authority for his assertion that "objectivity demands transparency." (Opp. at 30.) Indeed, plaintiff acknowledges that the term "objective" is not defined in the debate regulation, and plaintiff concedes (Opp. at 32) that the regulation "did not expressly require that criteria be committed to writing and disclosed to all candidates." Nevertheless, plaintiff quotes general statements from *Buchanan* suggesting that the objective criteria must be "discoverable," "observable," "testable," and "verifiable" (Opp. at 30-31), terms that plaintiff interprets as requiring some advance disclosure to candidates. But those statements say nothing of the sort. While candidate selection criteria obviously must be disclosed at some point if a debate sponsor is the subject of an administrative complaint filed with the Commission, that does not speak to the timing of disclosure in the absence of a Commission inquiry, let alone require any sort of due process for candidates.

In any event, OHNO disclosed its selection criteria to plaintiff before the first debate (*see* FEC Mem. at 24), and OHNO provided additional detail in its response to the administrative complaint filed with the Commission. Thus, the Commission was able to gather sufficient information to determine whether OHNO's selection criteria were sufficiently objective to satisfy the debate regulation. It is the Commission's role, not plaintiff's, to decide whether debate selection criteria are lawful, and that determination need not be made before a debate takes place. If a debate sponsor wants to reduce the risk of an administrative complaint alleging unlawful selection criteria, it has the right to seek an advisory opinion from the Commission before it implements those criteria, but neither FECA nor the debate regulation requires a debate sponsor to request such an opinion. *See* 2 U.S.C. § 437f.

Plaintiff quotes a portion of the E&J for the Commission's 1995 revision of the debate regulation stating 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" (Opp. at 32 (quoting 60 Fed. Reg. at 64,262, italics omitted)), and plaintiff suggests that this statement means the criteria must be disclosed in advance. But plaintiff conspicuously omits the phrase that immediately precedes the quoted language — "the new rules *do not require* staging organizations to do so," 60 Fed. Reg. at 64,262 (emphasis added) — which completely belies plaintiff's suggestion that debate criteria must be disclosed before the debate. Similarly, plaintiff quotes the next two sentences in the E&J, which explain that early disclosure "will enable staging organizations to show how they decided which candidates to invite to the debate" and help debate sponsors "show that objective criteria were used to pick the participants . . ." In context, however, these sentences clearly were intended only as advisory suggestions to help staging organizations make the required evidentiary showing should their criteria later be challenged.

Thus, plaintiff has failed to show that the Commission's decision to dismiss the administrative complaint in MUR 6383 was unlawful under the highly deferential standard of review applicable to cases involving the interpretation of agency regulations that are brought under 2 U.S.C. § 437g(a)(8).

## III. CONCLUSION

For the foregoing reasons and those set forth in the Commission's opening memorandum, the Commission respectfully requests that the Court dismiss the complaint in this litigation for

lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) or, in the alternative, for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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October 11, 2011