UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

DAN LA BOTZ,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	**No. 1:13-cv-00997-RC**
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

September 23, 2013

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STATEMENT OF FACTS AND PROCEDURE[1]

Plaintiff, Dan La Botz, was the 2010 Socialist Party of Ohio candidate for the United States Senate in Ohio. *See* Complaint at ¶ 9. The Socialist Party of Ohio for the first time in more than fifty years won ballot access in Ohio in 2008. *See* Complaint at ¶ 30. 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).

Because of a federal court's order in 2011, *Libertarian Party of Ohio v. Husted,* 2011WL3957259 (S.D. Ohio, Sept. 7, 2011), the Socialist Party continues to enjoy ballot access in Ohio as a qualified party.[2] *See* Ohio Secretary of State Directive 2013-02 (Jan. 31, 2013), Continued Ballot Access for Minor Political Parties in Ohio in 2013 (http://www.sos.state.oh.us/SOS/Upload/elections/directives/2013/Dir2013-02.pdf) (last visited

[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] The Sixth Circuit in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 589 (6th Cir. 2006), the first of several suits enjoining Ohio's draconian ballot access laws, 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."

Sept. 16, 2013) (announcing that the Socialist, Green, Libertarian, and Constitution Parties continue to qualify for Ohio's ballots because of the *Husted* decision).

Plaintiff was duly recognized by Ohio's Secretary of State as a qualified candidate for Ohio's United States Senate seat in 2010. Joining Plaintiff on that list of qualified candidates were the Democratic Party's choice, Lee Fisher, and the Republican candidate, Rob Portman. *See* Complaint ¶¶ 12 & 13.[3]

A consortium of eight major newspapers in Ohio known as the Ohio News Organization ("ONO" or "OHNO")[4] announced on September 1, 2010 a series of televised senatorial debates between the Democratic and Republican Party candidates. *See* Complaint at ¶ 24. The negotiations behind these debates began no later than June 2010, *see* Complaint at ¶ 26, and were kept secret from the Plaintiff and Ohio's other qualified senatorial candidates. *See* Complaint at ¶ 33. 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 ¶¶ 33 & 34.

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[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) (last visited Sept. 16, 2013). 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 ¶ 11.

Plaintiff made several attempts following the public announcement of ONO's senatorial debates to contact ONO in an effort to be included. *See* Complaint at ¶¶ 34-36. In response to an on-line petition effort put together by Plaintiff's campaign, 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 ¶ 38. Winges admitted in his e-mail that the ONO "allows *for only the major-party candidates* to debate." *See* Complaint at ¶ 38 (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 that voters hear from the two candidates who are clearly the front-runners for the office." *See* Complaint at ¶ 38.

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 ¶ 41. On September 14, 2010, ONO responded via an electronically transmitted letter (through its attorney, Mr. Marion Little) to Brown. *See* Complaint at ¶ 42. 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 ¶ 42. Little did not identify or explain any thresholds, standards, or guidelines for using polls and fundraising to determine "front-runner status." *See* Complaint at ¶ 42. Little did not refer to any documentation that established the ONO's policy for including and excluding candidates. *See* Complaint at ¶ 43.

On September 16, 2010, Brown e-mailed to Little, at the latter's invitation, three 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 ¶ 45. 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 ¶ 45.

A. MUR 6383.

On September 21, 2010, Plaintiff filed an Administrative Complaint with Defendant, the Federal Election Commission (FEC), charging the ONO, its corporate members, and the Fisher and Portman campaigns, with violating the FECA, 2 U.S.C. § 441b(a); 11 C.F.R. § 110.13(c). *See* Complaint at ¶ 47. Plaintiff's Administrative Complaint (MUR 6383) claimed, *inter alia,* that the ONO's alleged "two frontrunner" policy was designed to simply select the candidates of the Democratic and Republican Parties. *See* Adm. Record (AR0012); Complaint at ¶ 49. Indeed, the "two frontrunner" policy was not a policy employed beforehand at all: rather, it was shorthand for selecting the major-party candidates. *See* Adm. Record (AR0013); Complaint at ¶ 50. Plaintiff 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). Plaintiff also demanded expedited relief. *See* Administrative Complaint at 11, Adm. Record (AR00013).

Defendant dismissed Plaintiff's Administrative Complaint on May 19, 2011. *See* Adm. Record (AR0123). In the interim, the ONO held its scheduled debates and included only the Democratic and Republican candidates. *See* Complaint at ¶ 48. The Republican candidate, Portman, won the November 2010 election. Plaintiff, notwithstanding his exclusion from the debates and his being ignored by Ohio's press, received over 25,000 votes, apparently the single highest showing for a Socialist Party candidate in Ohio since the Great Depression.

The FEC's May 19, 2011 dismissal of Plaintiff's complaint concluded that the ONO's "two frontrunner" standard was permissible under the FECA and 11 C.F.R. § 110.13(c), and that the ONO had produced substantial evidence establishing that it had actually employed its permissible "two frontrunner" formula to its debates. *See* General Counsel's Report, Adm. Record (AR0115).

B. *La Botz v. Federal Election Commission I.*

This Court reversed the FEC's dismissal in *La Botz v. Federal Election Commission,* 889 F. Supp. 2d 51, 55 (D.D.C. 2012) (*La Botz I*). It never reached the legality of the FEC's determination that a "two frontrunner" or "top two" formula is permissible because it concluded that the only documentation presented by ONO to support its application of this or any other pre-existing objective criteria, a litigation affidavit prepared by an editor for the Columbus Dispatch (a member of ONO), was insufficient. The affidavit, the Court stated, "suffers from two serious flaws." *Id.* at 61.

First, as an evidentiary matter, it was unclear to the Court "why the declarant has first-hand knowledge ... or is otherwise competent to testify to such." *Id.* Second, and more importantly, the Court observed:

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

Id. (footnote omitted).

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

Because the FEC's conclusion that the ONO had applied proper pre-existing objective criteria was not supported by substantial evidence in the record, the Court remanded the matter to the FEC for further proceedings.[5] The Court noted that although it had "no quarrel" with the use of polling data, fundraising reports, and party support to objectively demonstrate a "candidate's viability," *id.* at 63-64, "the current record does not provide reasoned support for the position that ONO actually used these objective benchmarks to choose its debate participants." *Id.* at 64.

[5] While Plaintiff's case was on remand to the FEC, the ONO once again staged a series of debates during the 2012 election cycle between the Republican and Democratic candidates for United States Senate. See *Columbus Dispatch, WBNS, to host senatorial debate,* Ohio News Association (http://www.ohionews.org/2012/09/20/columbus-dispatch-wbns-to-host-senatorial-debate/) (last visited Sept. 16, 2013). As in 2010, the ONO again excluded a minor candidate, Scott Rupert, who had qualified for Ohio's senatorial ballot, from its 2012 debates. According to the ONO's attorney, Rupert was excluded under the same "two frontrunner" formula used to exclude Plaintiff in 2010. See Letter from Marion Little to Jeff Jordan, at 2, Adm. Record (AR 0152) ("OHNO was applying ... the same criteria [to Rupert] that the Commission had previously accepted as part of the dismissal of the original complaint."). Rupert won over a quarter million votes in Ohio's 2012 senatorial election, which translates into over 5% of the total votes cast. *See* http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx (last visited Sept. 16, 2013).

The Court made no mention of whether a "two frontrunner" formula that actually employed polling data, fundraising reports and party support to limit debates to only two candidates would prove consistent with the FECA and federal regulations. The ONO, after all, had presented no acceptable documentation proving that it had employed polling data, fundraising records and party support to select the two frontrunners invited to its debate.

C. MUR 6383 On Remand.

On remand, the FEC, over one dissent, *see* Adm. Record (AR0186), again dismissed Plaintiff's Administrative Complaint. Federal Election Commission, MUR 6383R, Adm. Record (AR0174). It reiterated its prior holding that the ONO's "selection criteria of 'first ensur[ing] the eligibility of the candidates and then par[ing] down the field to the two frontrunners ... were acceptably 'objective'." *Id.* at 7-8, Adm. Record (AR0180-81). In support of its conclusion, the FEC cited this Court's holding in *La Botz I,* 889 F. Supp. 2d at 63-64. *Id.* at 8, Adm. Record (AR0181).

The FEC further ruled that although written documentation is preferred, "undocumented affirmative statements ... will suffice." *Id.,* Adm. Record (AR0181). Because the "ONO did not provide a contemporaneous written standard for its 2010 debates," the FEC ruled, it "must examine the record to analyze whether the ONO did in fact establish its stated selection criteria in advance and employ those criteria in organizing the events." *Id.* at 10, Adm. Record (AR0183). Although the FEC conceded that the available evidence "would suggest that the ONO may not have used pre-existing objective criteria," *id.* at 9, Adm. Record (AR0182), it concluded that Plaintiff had not "conclusively establish[ed] that the ONO used major party status as the sole

selection criteria in 2010, any more than the Marrison affidavit conclusively establishes the contrary." *Id.,* Adm. Record (AR0182).

Given "inconsistent statements concerning the ONO's criteria," *id.* at 10, Adm. Record (AR0183), and "[b]ecause the ONO did not provide contemporaneous written criteria and the record does not otherwise reflect that the ONO reduced its criteria to writing in advance of the debates," *id.,* Adm. Record (AR0183), the FEC determined that it "would need to review the ONO's internal communications, including those of all eight constituent media entities, to determine whether the ONO employed pre-established criteria in 2010." *Id.*, Adm. Record (AR0183). Rather than perform this "resource-intensive" task, *id.,* the FEC exercised its discretion to again dismiss the complaint. *Id.* at 11, Adm. Record (AR0184).

ARGUMENT

I. Prosecutorial Discretion Does Not Insulate The FEC's Stated Policies.

The FEC announced three policies in its opinion in MUR 6383R. First, it concluded that staging organizations may categorically limit debates to the "two frontrunners" in a federal election. Second, it ruled that staging organizations may rely on oral testimony to support their pre-existing objective criteria. Third, it held that staging organizations do not bear the burden of demonstrating that they have followed pre-existing objective criteria. All three, because they are published as part of the FEC's probable cause determination, represent official positions and policies of the FEC. *See Federal Election Commission v. Beaumont,* 539 U.S. 146, 149 (2003) (stating that the FEC is empowered to "'administer, seek to obtain compliance with, and formulate policy with respect to the federal electoral laws") (citation omitted); *Federal Election Commission v. National Rifle Association of America,* 254 F.3d 173, 185 (D.C. Cir. 2001)

(holding that probable cause determinations made case-by-case represent binding law because "in making probable cause determinations, the Commission fulfills its statutorily granted responsibilities, giving ambiguous statutory language concrete meaning through case-by-case adjudication.").

The FEC devotes the bulk of its Motion to Dismiss to a discussion of prosecutorial discretion. Plaintiff, for its part, does not challenge the FEC's prosecutorial discretion. Rather, Plaintiff challenges the FEC's three rulings--which are now national policy. In particular, Plaintiff challenges the FEC's policy that "two frontrunner" formulas, which categorically limit debates to two candidates and effectively insure that only the major-party candidates can participate, are permissible under the FECA.

Consider, for example, if a staging organization were to adopt a racially discriminatory policy, something like "only white candidates can debate." Following the filing of an administrative complaint, the FEC concludes that it will exercise prosecutorial discretion to dismiss it. In the course of invoking this discretion, the FEC states in a formal opinion that "race is a permissible criterion in staging debates." The FEC's prosecutorial discretion position, argued here, would likewise shield that obviously illegal "race is allowed" policy from being challenged in District Court.

"The 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." *Nader v. Saxbe,* 497 F.2d 676, 679 n.19 (D.C. Cir. 1974). Just as the Department of Justice (and FEC) cannot shield racially discriminatory policies from judicial review by invoking prosecutorial discretion, *see, e.g., Smith v. Meese,* 821 F.2d 1484, 1489 (5th Cir. 1987) ("The plaintiffs in this case, however, do not challenge any particular decision to prosecute or not to prosecute any

individual. Instead, they challenge a policy and pattern of investigatory and prosecutory decisions, alleging that the policy has the effect of depriving them of their constitutional rights to vote and to associate freely."), the FEC cannot insulate its "two frontrunner" policy by magically pulling prosecutorial discretion out of its hat.

The District of Columbia Circuit has noted that even though challengers cannot ordinarily complain about the Justice Department's refusal to enforce campaign finance laws, they still may have "standing to challenge policies adopted by the Justice Department to enforce the FECA." *Nader v. Saxbe,* 497 F.2d at 682 n.30. Likewise, Plaintiff here has continuing standing to argue that the FEC's stated policy on "two frontrunner" debates is illegal under the FECA.[6]

Plaintiff's claim here is one of political discrimination. Plaintiff has alleged that "ONO's belatedly announced 'two frontrunner' formula is the equivalent of simply selecting the candidates of the two major parties for debates in Ohio." *See* Complaint at ¶ 53. ONO's formula, according to Plaintiff, "is a proxy for selecting only the candidates of the two major parties." *Id.* ¶ 52. The FEC has now twice publicly ruled that a staging organization's politically discriminatory "two frontrunner" criterion is permissible under the FECA. This is now the law of the land. If Plaintiff cannot challenge it, no one can. The FEC cannot hind behind the "magical incantation" of prosecutorial discretion.

[6] Another example can be found in the contrast between *Allen v. Wright,* 468 U.S. 737 (1984), and *Coit v. Green,* 404 U.S. 997 (1971), *summarily affirming Green v. Connally,* 330 F. Supp. 1150 (D.D.C. 1971). In the latter, the Supreme Court summarily affirmed a lower court's ruling that an IRS policy authorizing 501(c)(3) status for racially restrictive schools violated the Internal Revenue Code. In the former, the Court ruled that so long as the IRS was not operating under its illegal policy, prosecutorial discretion (through Article III) shielded its enforcement decisions. *Coit* and *Allen* establish that although one cannot ordinarily challenge an agency's enforcement decision (because of prosecutorial discretion), that same agency's policies can be challenged.

II. Plaintiff Has Continuing Article III Standing.

The FECA confers broad standing. In *Federal Elections Commission v. Akins,* 524 U.S. 11, 19 (1998), for example, 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)). The FECA "is unusual in that it permits a private party to challenge the FEC's decision *not* to enforce." *Chamber of Commerce of U.S. v. Federal Election Commission,* 69 F.3d 600, 603 (D.C. Cir. 1995) (citing 2 U.S.C. § 437g(a)(8); *Federal Election Commission v. National Right to Work Comm.,* 459 U.S. 197, 200-01 (1982)).

This Court ruled in *La Botz I*, 889 F. Supp.2d at 56, that Plaintiff has satisfied Article III's standing requirements: "La Botz alleges that he was injured when he was excluded from the debates. If his exclusion violated the FECA, this injury suffices for the purposes of Article III." (Citation omitted). "The second element of standing is easily satisfied here: causation may be established simply by alleging that the FEC failed to enforce the laws it was designed to implement." *Id*. (citations omitted). And in terms of the redressability prong, the Court stated: "It is enough that upon remand, the FEC could determine that ONO violated FEC regulations by using criteria that systematically disfavored third-party candidates." *Id*.

The Court in *La Botz I*, 889 F.Supp.2d at 58-59, also rejected the FEC's claim that Plaintiff's challenge was rendered moot by the intervening election. Plaintiff's complaint, it found, fell neatly within the 'capable of repetition yet evading review exception': "La Botz argues that his case falls within this exception, and the court agrees." *Id*. at 58. In response to the FEC's

claim that La Botz "has not shown that 'the same complaining party would be subjected to the same action again'," *id*. at 59, the Court pointed out that "many courts have concluded that a plaintiff need only show that others similarly situated might suffer a comparable harm in the future." *Id*. (citations omitted). Rather than resolve this point, however, the Court noted that "La Botz has run for office in the past and he declares that 'it is likely that [he] will run for federal office in Ohio again in the future'." *Id*. Thus, the Court concluded he had continuing standing.

Because his wife has taken a job in New York and he will relocate with her in January of 2014, Plaintiff no longer alleges that he will run for congressional office in Ohio. *See* Complaint at ¶ 9; Declaration of Dan La Botz at ¶ 6 (attached as Exhibit A). Still, Plaintiff continues to allege that he will likely run for federal office somewhere in the United States. *See* Declaration of Dan La Botz at ¶ 8; Complaint at ¶ 9.

The FEC argues that because Plaintiff has moved from Ohio, and will therefore not likely be excluded from the ONO's debates in the future, he now lacks standing. The FEC's position ignores two important points. First and foremost, Plaintiff's complaint runs against the FEC, not the ONO. Plaintiff claims the FEC's stated policy that "two frontrunner" formulas are permissible violates the FECA. The FEC has nationwide authority and jurisdiction to regulate debates in federal elections. The 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 again for federal office as a minor-party candidate wherever he is domiciled, the FEC's ruling continues to threaten his participation in future debates.[7]

[7] As far as Plaintiff's Administrative Complaint against the ONO is concerned, Article III's standing requirement is irrelevant. *See, e.g., Envirocare of Utah, Inc. v. Nuclear Regulatory Commission,* 194 F.3d 72, 75 (D.C. Cir. 1999) ("The Commission rightly pointed out ... that it is

Second, this Court pointed out in *La Botz I*, 889 F. Supp.2d at 59, that "many" federal courts have ruled it sufficient that other potential candidates are likely to harmed. Even 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. Indeed, experience indicates that it is very likely that minor candidates will run for federal office in Ohio and be excluded by the ONO from its debates.

In addition to the four qualified minor parties in Ohio, that is, the Socialist Party, the Libertarian Party, the Constitution Party, and the Green Party, *see* Ohio Secretary of State Directive 2013-02 (Jan. 31, 2013)[8] (recognizing continuing ballot access in Ohio for these minor parties), unaffiliated ("independent") candidates are not uncommon. The record makes clear that the ONO continues to sponsor exclusive debates between the Republican and Democrat candidates for federal office. The 2010 senatorial debates (from which Plaintiff was excluded) provide only one example. In 2012 the ONO again sponsored debates for Ohio's United States Senate seat and again only invited the two major-party candidates. See *Columbus Dispatch, WBNS, to host senatorial debate,* Ohio News Association (describing ONO's debates and noting that only the Democratic and Republican candidates were involved).[9] A qualified independent candidate, Scott Rupert, who wound up winning over 250,000 votes, *see* Ohio Secretary of State,

not an Article III court and thus is not bound to follow the law of standing derived from the 'case or controversy' requirement. Judicially-devised prudential standing requirements ... are also inapplicable to an administrative agency acting within the jurisdiction Congress assigned to it."). Thus, whether the ONO, as opposed to some other debate sponsor in some other location, is likely to exclude Plaintiff from its debates in the future is not controlling.

[8] http://www.sos.state.oh.us/SOS/Upload/elections/directives/2013/Dir2013-02.pdf (last visited Sept. 16, 2013).

[9] http://www.ohionews.org/2012/09/20/columbus-dispatch-wbns-to-host-senatorial-debate/ (last visited Sept. 16, 2013).

Ohio Election Results,[10] was not allowed to participate in these debates by the ONO because he was not one of the "two frontrunners." *See* Letter from Marion Little to Jeff Jordan, at 2, Adm. Record (AR 0152) ("OHNO was applying ... the same criteria [to Rupert] that the Commission had previously accepted as part of the dismissal of the original complaint.").[11]

Given this history, it is very likely that the ONO will continue its practice of inviting only the Republican and Democratic candidates to its debates in the future.

The FEC suggests that *Nader v. Federal Election Commission,* __ F.3d __ (D.C. Cir. 2013), somehow proves that this Court was wrong about Article III in *La Botz I.* *Nader* is inapposite for a number of reasons, not the least of which is its context. Nader charged that the FEC refused to investigate "in-kind contributions of legal services to the efforts of the John Kerry campaign to keep Nader's name off the ballot." *Id*. at __. His 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. "He asks," the court noted, "the FEC to compel information from participants in the ballot contests in the hope of showing that they violated the prohibitions on undisclosed 'contributions' and 'expenditures' ...." *Id*. at _. He did not claim that he was likely to run again, nor did he assert that other candidates would be subjected to the same tactics he

[10] http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2012Results.aspx (last visited Sept. 16, 2013).

[11] The ONO staged Ohio gubernatorial debates between only the Republican and Democratic candidates. The Libertarian and Green Party candidates were excluded. *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).

complained of in the future. "Because this amounts to seeking disclosure to promote law enforcement," the court concluded, "Nader asserts an injury that is not sufficiently concrete to confer standing." *Id*. at __.

In the present case, this Court has already determined that Plaintiff possessed Article III standing in the first instance to challenge the FEC's actions. That is the law of this case. *See LaShawn A. v. Barry,* 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) ("The same issue presented a second time in the same case in the same court should lead to the same result."). Had the FEC disagreed with this Court's conclusion about standing in *La Botz I*, it was free to appeal. It did not. Even if *Nader* were inconsistent with this Court's conclusion in *La Botz I,* and it is not, it would not replace this Court's prior conclusion that Plaintiff possessed standing. That is the law of this case.

Mootness is a bit different, for the simple reason that a new fact has emerged. Because Plaintiff is moving to New York, the case--though not moot when originally decided--may have become moot. Notwithstanding Plaintiff's anticipated move, however, his case remains alive. It is not moot.

This Court observed in *La Botz I,* 889 F. Supp. 2d at 59, that the bulk of authority, including a case in this Circuit, *Johnson v. Federal Communications Commission,* 829 F.2d 157, 159 n.7 (D.C. Cir. 1987) (observing that case was capable of repetition yet evading review because "effects on minor-party candidacies, will persist in future elections"), holds that the 'capable of repetition yet evading review' doctrine does not depend on a particular candidate's actually being injured again. It is enough that the "effects on minor-party candidacies will

persist in future elections." *Johnson*, 829 F.2d at 159 n.7. *Nader* does not address this, let alone change the established law referred to in *La Botz I.*

Here, Plaintiff has alleged and sworn that he is likely to run again for federal office. *See* Declaration of Dan La Botz at ¶ 8. This campaign will be subject to the FEC's challenged policy that a "two frontrunner" formula is permissible. Even if the focus is on federal elections in Ohio, it is likely that future minor-party candidates will run and experience the same harm, at both the hands of the ONO and the FEC. Indeed, an independent candidate, Scott Rupert, who ultimately won a quarter million votes in Ohio's 2012 senatorial election experienced the exact same injury under the exact same policy at the hands of the ONO. *See* note 5, *supra.* Plaintiff's case therefore falls under the 'capable of repetition yet evading review' doctrine and is not moot.

III. The FEC Erred as a Matter of Law.

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.").

Although the FEC couched its dismissal in the language of "prosecutorial discretion," it preceded its exercise of this discretion with three controversial legal conclusions--legal conclusions that constitute the policies of the FEC and, if not set aside, binding and precedential interpretations of the FECA. *See Federal Election Commission v. Beaumont,* 539 U.S. 146, 149 (2003) (stating that the FEC is empowered to "'administer, seek to obtain compliance with, and formulate policy with respect to the federal electoral laws") (citation omitted); *Federal Election Commission v. National Rifle Association of America,* 254 F.3d 173, 185 (D.C. Cir. 2001) (holding that probable cause determinations (and even advisory opinions) are binding law because "in making probable cause determinations, the Commission fulfills its statutorily granted responsibilities, giving ambiguous statutory language concrete meaning through case-by-case adjudication.").

First, it ruled that the ONO's "two frontrunner" formula--which categorically limits a debate to only two candidates--was a permissible debate-staging criterion under the FECA.

Second, it ruled that a debate sponsor, like the ONO, can prove the existence of pre-existing objective criteria it employed without written evidence.

And third, it ruled that a debate sponsor, like the ONO, does not bear the burden of proving its pre-existing objective criteria. As explained above, none of these three policies can be shielded from judicial review by the FEC's ultimate invocation of prosecutorial discretion. Plaintiff addresses each in turn.

A. The FEC's Policy Allowing Debate-Staging Organizations to Employ a "Two-Frontrunner" Formula Violates the FECA.

The FEC reiterated in its most recent dismissal of Plaintiff's administrative complaint that ONO's "selection criteria of 'first ensur[ing] the eligibility of the candidates and then par[ing] down the field to the two frontrunners ... were acceptably 'objective'." Federal Election

Commission, MUR 6383R, at 7-8 (May 24, 2013); Adm. Record (AR0180-81). The FEC supported this conclusion with a casual reference to this Court's decision in *La Botz I,* 889 F. Supp. 2d at 63-64. *Id.* at 8, Adm. Record (AR0181). Indeed, the FEC argues to this Court that its language in *La Botz I* conclusively establishes that "two frontrunner" formulas are legal under the FECA: "plaintiff's challenge to the 'two frontrunner' standard has already been resolved and plaintiff's claim here is frivolous." Memorandum in Support of Motion to Dismiss at 25.

Plaintiff disagrees with the FEC's interpretation of *La Botz I.* In fact, Plaintiff is baffled by it. The ONO does not even read the opinion in this fashion.[12] The Court in *La Botz I* merely observed that staging organizations may use polling data, campaign contributions, and party support as measures in their pre-existing objective criteria. (Plaintiff has never claimed the contrary.) It did not say that "polling data, campaign contributions and party support may permissibly be used to select the two frontrunners who will be allowed to debate."

Nor does the recognition of polling data and campaign contributions as permissible measures of candidates' worth necessarily imply that staging organizations can limit debates to the top two candidates. After all, these same measuring sticks could just as easily be used to select a single candidate (which would be clearly illegal under 11 C.F.R. § 110.13(b)), the top

[12] Two weeks after this Court handed down its decision in *La Botz I*, the ONO replaced its *de jure* criterion of excluding all but the top-two, that is, Democratic and Republican, candidates with a *de facto* formula designed to achieve the same result. *See* Letter from Mark R. Brown to Anthony Herman, Adm. Record (AR0130); 2012 Candidate Selection Criteria fpr Senatorial Debate(s), Adm. Record (AR0140). The "new" formula continues to expressly discriminate against minor candidates by automatically qualifying the two major-party candidates while requiring that minor candidates not only demonstrate poll support of 10% (like the major-party candidates), but also show they have "raised at least $500,000" in support. *See* B.3.a. & b., Adm. Record (AR0141). The major candidates need not show any financial support. Consequently, major-party candidates will always qualify for the ONO's debates under this *de facto* formula, while minor candidates never will. Scott Rupert, for example, who won over 250,000 votes for the United States Senate as an independent candidate, raised less than $5,000. *See* Letter from Marion Little to Jeff S. Jordan, at page two n.1, Adm. Record (AR0152). Plaintiff's contributions were similar.

three candidates, the top four candidates, or (from the other end) to exclude candidates who do not meet identified levels of support (which is what the Commission on Presidential Debates (CPD) does with its 15% polling requirement). All that *La Botz I* said is that staging organizations may use polling data, campaign contributions and party support as objective measures under § 110.13(c). This says nothing about the level of support that can be required or the number of candidates who can share the stage.

Plaintiff's argument here is that simply limiting debates to the top two candidates, knowing that under any combination of polling and financial data they will be the candidates of the Democratic and Republican Parties, is not permissible under the FECA, FEC regulations and this Court's pronouncements. This question was not answered in *La Botz I.*

Turning to the merits of Defendant's argument that the FECA allows a "two frontrunner" formula, it is true that 11 C.F.R. § 110.13(b) allows sponsors to stage debates with as few as two candidates. This is a far cry, however, from authorizing staging organizations to categorically restrict their debates to two candidates. Take the Commission on Presidential Debates (CPD). It does not restrict its presidential debates to the "top two" candidates. It does not employ a "two frontrunner" formula, although at one time its "realistic chance" methodology came close to doing just that. It was because the CPD recognized that its "realistic chance" formula was of questionable legality that it switched to its current criteria, which demand that participants reach 15% in opinion polls and enjoy a mathematical chance of winning in the Electoral College. *See* Eric B. Hull, Note, *Independent Candidates' Battle Against Exclusionary Practices of the Commission on Presidential Debates,* 90 IOWA L. REV. 313, 320 (2004). That its debates frequently involved only two candidates did not render them illegal under the FECA. That is all

§ 110.13(b) says, and that is all it means. It does not mean that the CPD, or anyone else, can simply choose the top two candidates.

Consider what it would mean, moreover, if the FEC's position were to be endorsed by this Court. By announcing that it is just taking the "two frontrunners," a staging organization (like the CPD) could exclude a candidate who is polling 32% (versus the top two candidates' 34% and 34%, respectively) and raising significant sums of money. This is clearly not what § 110.13(b) means by saying that staging organizations can stage debates with as few as two candidates. Section 110.13(b) is only pointing out that if staging organizations otherwise employ reasonable pre-existing objective criteria, they can hold their debates even though only two candidates qualify. They cannot hold a debate with one candidate.

Section 110.13(c) solves this case. It requires not only that staging organizations employ pre-existing objective criteria, but implicitly includes the additional requirement that criteria be "reasonable." The FEC has formally explained § 110.13(c) in this way:

> [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).

Interpreting this language and § 110.13(c), this Court specifically ruled that criteria that are "designed to result in the selection of certain pre-chosen participants" necessarily violate the FECA. *Buchanan v. Federal Election Commission,* 112 F. Supp.2d 58, 74 (D.D.C. 2000) (quoting an FEC statement). Further, this Court in *Buchanan* concluded that the FECA does not allow debate sponsors to set standards "so high" that only the two major-parties can reach them:

"[t]aken together, these statements by the regulation's drafters strongly suggest that the objectivity requirement [in § 110.13(c)] *precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it.*" *Id.* (emphasis added).

The ONO's "two frontrunners" formula fails both prongs. It is "designed to result in the selection of certain pre-chosen participants," that is, the candidates of the two major parties in Ohio, and by definition--because it excludes any candidate beyond the top two--it selects "a level of support so high that only the Democratic and Republican nominees could reasonably achieve it." It is, after all, more restrictive than criteria demanding 33% or better at the polls and millions of dollars in fundraising.

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 categorically selecting only the Republican and Democratic candidates for debates. A "two frontrunner" policy does exactly that, especially in states, like Ohio, that have for years illegally excluded minor parties from ballots.

This does not mean, of course, that staging organizations must invite all qualified candidates. They need not. But what they must do is announce reasonable pre-existing objective criteria that afford all qualified candidates an equal opportunity to gain access. The debate staging organization cannot say "only two." If a third candidate can meet the criteria, he or she too must be allowed to participate.

The ONO (and the FEC) claim that it does not matter who the two frontrunners are--one might be a minor-party candidate. Of course, this was not true in 2010, as ONO has failed to produce any documentation at all suggesting that it would have allowed any candidate other than the Republican and Democrat to debate. But what about the future?

For the future, the ONO has adopted a new debate policy, which automatically grants the candidates of the two major parties debate access while requiring that minor party candidates, in order to qualify, poll 10% and raise $500,000. *See* note 12, *supra.* Although no longer excluded *de jure,* minor candidates are excluded *de facto.*

The ONO, simply put, is vested in the two major parties. Its new *de facto* formula, like its old *de jure* formula, requires that the two major-party candidates be included. It would never write a formula that threatened their inclusion. It is beyond belief, then, that its *de jure* "two frontrunner" policy was designed as a politically neutral tool that might be used to exclude major-party candidates. There certainly is no documentation supporting such a claim.

B. The FEC's Conclusion that Oral Evidence is Sufficient to Prove Pre-existing Objective Criteria Contradicts this Court's Conclusion.

The FEC ruled on remand that although written documentation is preferred, "undocumented affirmative statements ... will suffice." Federal Election Commission, MUR 6383R, at 8; Adm. Record (AR0181). Because the ONO had not come forward with a "contemporaneous written standard for its 2010 debates," the FEC reasoned, it had to peruse the record, presumably including oral testimony from ONO officials, "to analyze whether the ONO did in fact establish its stated selection criteria in advance and employ those criteria in organizing the events." *Id.* It was this overbearing burden, the FEC concluded, that justified its invoking prosecutorial discretion to dismiss the administrative complaint.

As this Court explained in *La Botz I,* 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. These debates, however, must meet the criteria found in 11 C.F.R. § 110.13(c), that is, that they employ reasonable, objective *pre-existing* criteria.

In *La Botz I,* 889 F. Supp. 2d at 55, this Court rejected the very approach employed here by the FEC to identify pre-existing objective criteria. The Court rejected as insubstantial a litigation affidavit prepared by an editor for the Columbus Dispatch (a member of ONO)--the only evidence presented to the FEC in support of the ONO's allegedly pre-existing objective criteria. The Court observed:

> [S]uch affidavits raise the risk that they will merely provide a vehicle for a party's post hoc rationalizations. This sole affidavit *highlights the absence of any contemporaneous evidence* suggesting that ONO employed pre-established selection criteria. In particular, ONO has not produced any *contemporaneously written formulation* of the criteria it purportedly utilized. And while FEC regulations do not specifically require debate staging organizations to reduce their criteria to writing, it is strongly encouraged.

Id. (footnote omitted and citation omitted) (emphasis added).

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

The Court in *La Botz I* did not state that "undocumented affirmative statements ... will suffice." It did not say that oral testimony can be sufficient. It clearly stated the opposite; that "contemporaneous written formulations," or at least "contemporaneous evidence in the form of meeting notes or e-mail exchanges," are needed. The FEC's policy to the contrary, which led it to dismiss based on prosecutorial discretion, cannot be sustained. Had the FEC focused on contemporaneous written evidence, it would have been clear that the ONO had none. Had the FEC followed this Court's command, no further investigation would have been needed.

C. The FEC Erroneously Relieved the ONO of its Burden of Proof.

Compounding its error in stating that oral evidence is sufficient, the FEC erroneously relieved the ONO of its burden of demonstrating that it employed reasonable pre-existing objective criteria. The FEC concluded that because of "inconsistent statements concerning the ONO's criteria," Federal Election Commission, MUR6383R at 10, Adm. Record (AR0183), and "[b]ecause the ONO did not provide contemporaneous written criteria and the record does not otherwise reflect that the ONO reduced its criteria to writing in advance of the debates," *id.,* it "would need to review the ONO's internal communications, including those of all eight constituent media entities, to determine whether the ONO employed pre-established criteria in 2010." *Id.* Rather than perform this "resource-intensive" task, *id.,* the FEC exercised its discretion to again dismiss the complaint. *Id.* at 11, Adm. Record (AR0184).

This Court in *Buchanan,* 112 F. Supp.2d at 74, stated that "[s]taging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants." This Court in *La Botz I*, 889 F. Supp. 2d at 61, observed that "ONO has not produced any contemporaneously written formulation of the criteria it purportedly utilized." Both opinions squarely place the burden of production on the staging organizations.

Placing the burden on staging organizations to produce documentation showing that they have complied with § 110.13's safe harbor is consistent with common legal principles teaching that "[i]t is the burden of the party claiming the exemption ... to prove entitlement to it." *Senior Citizens Stores, Inc. v. United States,* 602 F.2d 711, 713 (5th Cir. 1979). *See also Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 175-76 (1983) ("The general rule ... is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption."); *Fund for the Study of Economic Growth and Tax Reform v. IRS*, 161 F.3d 755, 759 (D.C. Cir. 1998)("the burden is on the taxpayer seeking exemption to demonstrate that it is in fact entitled to tax-exempt status"); *St. David's Health Care System v. United States*, 349 F.3d 232, 234 (5th Cir. 2003) ("The burden was on St. David's to prove that it qualified for a tax exemption.").

As this Court explained in *La Botz I,* 889 F. Supp.2d at 54-55, the FECA prohibits corporations from making contributions of any kind to candidates. Corporations may sponsor debates (which might otherwise constitute impermissible contributions), but only if they comply with regulations promulgated by the FEC. As stated in both *Buchanan* and *La Botz I,* the staging organization must demonstrate that it qualifies under the exemption by proving that it employed pre-existing objective criteria. When it cannot do so, the corporation is in violation of the FECA. Here the ONO has done nothing more than submit a litigation affidavit, which this Court has

already found to be insufficient. It has failed to produce evidence demonstrating that it qualifies for the exemption. The FEC is under no obligation to search through the ONO's records and take testimony from its officials. Had it properly placed the burden of production on the ONO, the FEC would not have had to conduct any further investigation, because the record unequivocally demonstrates that ONO failed to carry its burden. It would have not been in a position to invoke prosecutorial discretion.

CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss should be DENIED. The FEC's dismissal of Plaintiff's Administrative Complaint should be REVERSED and the matter REMANDED to the FEC for further proceedings consistent with the Court's instructions.

Respectfully submitted,

/s/ Oliver B. Hall

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CERTIFICATE OF SERVICE

I certify that on the 23rd of September, 2013, 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
Oliver B. Hall