

RECEIVED
FEDERAL ELECTION
COMMISSION

RECEIVED
2010 NOV 15 AM 11:28
FEC MAIL CENTER

2010 NOV 15 PM 12:07

OFFICE OF GENERAL
COUNSEL

Perkins
Cole

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 634-9126
EMAIL: MElias@perkinscole.com

607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscole.com

November 15, 2010

Christopher Hughey
General Counsel
Federal Election Commission
999 E Street, NW, 6th Floor
Washington DC 20463

Re: MUR 6383

Dear Mr. Hughey:

This constitutes the response of Fisher for Ohio and Jan Roller, as Treasurer (collectively, the "Committee") to the complaint filed by Dan LaBotz on September 20, 2010. Insofar as it pertains to the Committee, this complaint should be dismissed.

Under 11 C.F.R. § 110.13, media outlets may stage a candidate debate featuring at least two candidates, provided that the debate is not structured to promote or advance one candidate over another. The staging organization "must use pre-established objective criteria to determine which candidates may participate in a debate."¹ The complaint alleges that a series of debates staged by the Ohio Newspaper Organization ("ONO"), featuring Democratic Senate candidate Lee Fisher and Republican Senate candidate Rob Portman, did not comply with 11 C.F.R. § 110.13 and therefore constituted an impermissible corporate contribution under 2 U.S.C. § 441b(a). The complaint further alleges that by "knowingly conspir[ing] with ONO and its corporate members to construct exclusive debates in violation of 11 C.F.R. § 110.13(a)(2)," Mr. Fisher and Mr. Portman knowingly accepted impermissible corporate contributions under 2 U.S.C. § 441b(a).²

The First Amendment's guarantee of press freedom mandates that the Federal Election Commission (the "Commission") give staging organizations (which are press entities) significant

¹ 11 C.F.R. § 110.13(c).

² See Compl. ¶ 43.

71697-0001/LEGAL19575078.2

ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DENVER • LOS ANGELES
MENLO PARK • PHOENIX • PORTLAND • SAN FRANCISCO • SEATTLE • SHANGHAI • WASHINGTON, D.C.

Perkins Cole LLP and Affiliates

13044334280

leeway in how they structure debates. Complaints alleging a violation of section 110.13 "must be addressed in the larger context of the overall statutory exemption of media organizations acting as such from the statutory prohibition on corporate contributions and expenditures made in connection with Federal elections."³ This "larger context, with its implications for First Amendment press freedoms, should have an effect upon the level of evidentiary showing required of media organizations in order for them to meet the standards for staging debates set forth in the Committee's regulations."⁴ For example, the Commission has said that "where the media exemption might apply, general statements by press entities that they complied with the Act, with only minimal descriptions of the criteria may be acceptable."⁵

Given the significant leeway afforded to media staging organizations, Mr. LaBotz's complaint has no merit. The Commission has consistently dismissed complaints by "third party candidates who appeared to receive marginal electoral support and evidence little to no campaign organization."⁶ Mr. LaBotz falls into this category. On Election Day, he finished a distant fifth place, with only 0.68 percent of the vote.⁷ Conversely, Mr. Fisher and Mr. Portman finished with 96.25 percent of the vote combined and were the top two candidates throughout the entire general election period.⁸ Mr. LaBotz's miniscule base of support validates ONO's decision to exclude him from the debate.⁹

Even if ONO did not comply with section 110.13, there would still be no violation by the Committee. The Commission's regulations place the burden of complying with section 110.13 on the staging organization; they do *not* require candidates to independently determine whether the staging organization has complied with section 110.13. In MURs 4451 and 4473, for example, the Commission rejected the Office of General Counsel's recommendation to find reason to believe that the Clinton/Gore and Dole/Kemp committees violated Commission

³ First General Counsel's Report, MURs 4956, 4962, and 4963 (Oct. 25, 2000), at 17-18.

⁴ *Id.* at 18.

⁵ First General Counsel's Report, MUR 5395 (Jan. 13, 2005), at 11.

⁶ General Counsel's Report, MURs 5817, 5827, 5829, 5836, 5847, 5852, 5858, and 5863 (collectively, the "2006 Debate Cases") (Mar. 22, 2007), at 2.

⁷ See <http://vote.sos.state.oh.us/pls/enrpublic/f?p=130:6:0> (last visited on November 11, 2010).

⁸ *Id.*; <http://elections.nytimes.com/2010/forecasts/senate/ohio> (last visited on November 11, 2010).

⁹ See Commissioners Mason, Tower, McDonald, Smith, and Thomas, Statement of Reasons, MUR 5254 (June 11, 2003), at n. 5 (noting that complainant's failure to win more than 2 percent of the vote "validate[d] Hampden-Sydney's use of criteria.").

November 15, 2010

Page 3

regulations by accepting invitations to participate in the 1996 presidential debates.¹⁰

The legislative history of section 110.13 confirms this. When it promulgated the revised version of section 110.13 in 1995, the Commission explicitly stated that section 110.13 does "not require staging organizations ... to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate."¹¹ Because section 110.13 does not even require staging organizations to make their criteria available to candidates (or the public), it cannot possibly require the candidates to independently evaluate the validity of those criteria or the staging organization's compliance with them.

Moreover, Mr. LaBotz's warning letter to the Committee did not establish that ONO had violated section 110.13. Mr. LaBotz's September 10 letter asserted that Mr. Fisher and Mr. Portman were invited "simply because of [their] party affiliation," in violation of 11 C.F.R. § 110.13(c).¹² The letter, however, offered no credible evidence to support this claim. The letter alleges that Mr. LaBotz was never offered an opportunity to demonstrate that he satisfied ONO's criteria. The regulations, however, do not guarantee such an opportunity to every candidate. Likewise, Mr. LaBotz's claim that "no reputable opinion poll in Ohio established that [Fisher and Portman] were the 'top two' official candidates in Ohio for the United States Senate" is belied by every public poll conducted in the race.¹³

At the time it accepted ONO's invitation to participate in the debate, the Committee was unaware that ONO used anything other than objective criteria in selecting candidates to participate. The Committee respectfully requests that the Commission promptly dismiss these complaints.

Very truly yours,



Marc E. Elias

¹⁰ See also First General Counsel's Report, MURs 4956, 4962, and 4963 (dismissing allegations against the Gore and Bradley presidential campaigns for participating in presidential primary debates).

¹¹ Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates; Final Rule, 60 F.R. 64260, 64262 (Dec. 14, 1995); First General Counsel's Report, MURs 4956, 4962, and 4963, at 25 (noting that Commission has "specifically stated that the regulations do not require the criteria to be reduced to writing or shown to candidates in advance.").

¹² While a staging organization may not use the nomination by a major political party as the sole criterion on which to base an invitation, "nomination by a major party may be one of the criteria." 60 F.R. at 64262.

¹³ See <http://elections.nytimes.com/2010/forecasts/senate/ohio> (last visited on November 11, 2010). Even if the ONO had used the Commission on Presidential Debates' criteria, he still would not have qualified to participate, because he was not receiving 15 percent of the popular vote in reputable opinion polls.