



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Derek S. Clinger, Esq.  
McTigue & Colombo LLC  
545 East Town Street  
Columbus, OH 43214

JUL 30 2019

RE: MUR 7541  
Rick Neal for Congress and Jason H.  
Calhoun in his official capacity as  
treasurer

Dear Mr. Clinger:

On November 14, 2018, the Federal Election Commission ("Commission") notified your client, Rick Neal for Congress and Jason H. Calhoun in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On July 23, 2019, based upon the information contained in the complaint and information provided by your client and the other respondents, the Commission decided to dismiss the allegation that Rick Neal for Congress and Jason H. Calhoun in his official capacity as treasurer violated 52 U.S.C. § 30118(a). The Commission then closed its file in this matter. A copy of the Factual and Legal Analysis, which more fully explains the basis for the Commission's decision, is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016).

If you have any questions, please contact Thaddeus Ewald, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink that reads "Mark Allen".

Mark Allen  
Assistant General Counsel

Enclosure:  
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 RESPONDENTS: Columbus Metropolitan Club MUR: 7541  
6 Rick Neal for Congress and Jason H.  
7 Calhoun in his official capacity as treasurer  
8 Stivers for Congress and Matthew J.  
9 Yuskewich in his official capacity as treasurer  
10

11 **I. INTRODUCTION**

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13 This matter was generated by a complaint filed with the Federal Election Commission by  
14 the Libertarian Party of Ohio. *See* 52 U.S.C. § 30109(a)(1). It concerns a candidate debate  
15 sponsored by the Columbus Metropolitan Club (“CMC”) on October 19, 2018, for congressional  
16 candidates in Ohio’s 15th District that featured Republican candidate Steve Stivers and  
17 Democratic candidate Rick Neal. The Complaint alleges that CMC impermissibly invited only  
18 the major-party candidates, excluding Libertarian Party candidate Johnathan Miller. The  
19 Complaint alleges that by excluding Miller, CMC made, and Stivers and Neal received,  
20 corporate contributions in violation of the Federal Election Campaign Act of 1971, as amended  
21 (the “Act”).

22 For the reasons discussed below, the Commission dismisses the Complaint’s allegations  
23 pursuant to *Heckler v. Chaney*.<sup>1</sup>

24 **II. FACTUAL BACKGROUND**

25 The Columbus Metropolitan Club states in its response that it is an Ohio corporation  
26 organized under section 501(c)(3) of the Internal Revenue Code and hosts 60-70 public forums

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1 470 U.S. 821 (1985).

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1 annually with a mission to promote community conversation and facilitate discussion on social,  
2 political, economic, and cultural issues.<sup>2</sup>

3 Steve Stivers was a four-term Congressman from Ohio's 15th District when he won the  
4 Republican primary nomination to be a candidate for the general election in 2018.<sup>3</sup> His  
5 authorized committee, Stivers for Congress and Matthew J. Yuskewich in his official capacity as  
6 treasurer (the "Stivers Committee"), had disclosed \$2,415,737.14 in receipts and \$2,292,562.73  
7 in disbursements for the 2018 election cycle as of the 2018 July Quarterly reporting period.<sup>4</sup>

8 Rick Neal won a contested Democratic Party primary election for its nominee for the general  
9 election for the 15th District.<sup>5</sup> Neal's authorized committee, Rick Neal for Congress and Jason  
10 H. Calhoun in his official capacity as treasurer (the "Neal Committee"), disclosed \$921,910.25 in  
11 receipts and \$418,758.93 in disbursements for the 2018 election cycle as of the 2018 July  
12 Quarterly reporting period.<sup>6</sup> Johnathan Miller successfully petitioned as a minor party candidate

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<sup>2</sup> Columbus Metropolitan Club Resp. at 5-6 (Jan. 28, 2019) ("CMC Resp."). The Commission has analyzed CMC and its events in three past matters, including two initiated by the same Complainant (Libertarian Party of Ohio) and one by the same individual (Mark Brown) on their behalf. *See* CMC Resp. at 1 & nn. 3-5; Certification at 2, MUR 5642 (Soros, *et al.*) (finding no reason to believe CMC violated the Act related to staging of a book tour); Certification at 1, MUR 6111 (WOSU Public Media) (finding no reason to believe CMC violated the Act related to staging of a candidate debate in complaint filed by same Complainant); Certification at 1, MUR 6590 (Columbus Metropolitan Club) (dismissing allegation that CMC violated the Act related to staging of a forum with major-party officials in complaint filed by same Complainant via Mark Brown).

<sup>3</sup> OHIO SECRETARY OF STATE, MAY 8, 2018 PRIMARY ELECTION OFFICIAL CANVASS (2018), <https://www.sos.state.oh.us/globalassets/elections/2018/pri/summaryrep.xlsx> (Republican Party Primary Results).

<sup>4</sup> FEC Form 3, 2018 July Quarterly, *Report of Receipts and Disbursements*, Stivers for Congress (July 14, 2018), <http://docquery.fec.gov/cgi-bin/forms/C00441352/1246826/>.

<sup>5</sup> OHIO SECRETARY OF STATE, MAY 8, 2018 PRIMARY ELECTION OFFICIAL CANVASS (2018), <https://www.sos.state.oh.us/globalassets/elections/2018/pri/summarydem.xlsx> (Democratic Party Primary Results).

<sup>6</sup> FEC Form 3, 2018 July Quarterly, *Report of Receipts and Disbursements*, Rick Neal for Congress (July 15, 2018), <http://docquery.fec.gov/cgi-bin/forms/C00652651/1247833/>.

1 and was certified as a Libertarian Party candidate in the general election.<sup>7</sup> His authorized  
2 committee, the Committee to Elect Johnathan Miller, filed a Statement of Organization with the  
3 Commission but filed no disclosure reports disclosing any receipts or disbursement.<sup>8</sup> On  
4 September 25, 2018, 24 days before the date of the debate in question, Miller's committee filed a  
5 termination report.<sup>9</sup>

6 The central issue in this matter is whether CMC used appropriate selection criteria when  
7 it invited Stivers and Neal to participate in the debate. CMC stated that it used the following  
8 criteria (the "Tiered Criteria") to select the debate participants:

- 9 1. Candidate must be on the ballot as of the date of the Debate AND  
10 2. Must meet all of the other criteria under the Campaign Finance Act ("the Act") AND  
11 a. Must have raised and spent \$100,000 in compliance with the Act as reflected in  
12 the last filing statement prior to the Debate OR  
13 b. Must have achieved at least 5% in any published Poll prior to the Debate. In order  
14 to be used in this section the poll must:  
15 i. Have a margin of error of 4.5% or less  
16 ii. Include all of the candidates on the ballot (for the election for which the poll is  
17 conducted) at the time the poll is taken.

18 If no such poll exists, then section (b) may not be used for Debate eligibility for any  
19 candidate and section (a) will be used to determine Debate eligibility for all candidates on  
20 the ballot for the election for which the Debate is being conducted.<sup>10</sup>  
21

<sup>7</sup> Meeting Minutes from Aug. 6, 2018, FRANKLIN CTY. BD. OF ELECTIONS, at 4-5,  
<https://vote.franklincountyohio.gov/BOEL-website/media/Documents/Board-Meeting-Minutes/2018/2018-08-06.pdf>.

<sup>8</sup> See FEC Form 1, Statement of Organization, Committee to Elect Johnathan Miller (July 20, 2018),  
<https://docquery.fec.gov/cgi-bin/forms/C00639831/1251338/>; *Committee filings*, FEC,  
<https://www.fec.gov/data/committee/C0063983-1/?tab=filings> (last visited June 6, 2019) (Committee to Elect  
Johnathan Miller Filings).

<sup>9</sup> CMC Resp. at 3-4, Ex. A (FEC Form 3, Termination Report, Committee to Elect Johnathan Miller (Sept.  
25, 2018)). The Commission accepted the termination on September 30, 2018. *Id.*, Ex. B (Letter from FEC to  
Kevin Boswick, Treasurer, Committee to Election Jonathan Miller (Sept. 30, 2018)).

<sup>10</sup> CMC Resp. at 6-8.

1 According to CMC, it adopted the Tiered Criteria for its 2018 programming on or around  
2 August 6, 2018.<sup>11</sup> CMC further stated that it decided on September 7, 2018, to stage a debate  
3 between candidates in Ohio's 15th Congressional District, conducted candidate research between  
4 September 7 and September 20, 2018, and based on that research applied the Tiered Criteria to  
5 qualify and later invite candidates between September 10 and October 5, 2018.<sup>12</sup> The debate  
6 between Stivers and Neal took place on October 19, 2018.<sup>13</sup> According to CMC, the aggregate  
7 cost of staging the debate was \$6,646, including the venue, catering, administration, marketing,  
8 and the cost of videotaping the debate and posting it on WCMH-TV's website.<sup>14</sup>

9 The Complaint alleges the Tiered Criteria were a *post hoc* rationalization because they  
10 differ from the criterion CMC announced while initially publicizing the debate. The Complaint  
11 asserts that CMC began to publicize the event featuring Stivers and Neal on its website and on a  
12 Facebook event page it created for the debate around September 25, 2018.<sup>15</sup> Around that time,  
13 commenters on the Facebook event page questioned Miller's absence from the planned debate

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<sup>11</sup> *Id.* at 7; Compl. ¶ 30, Attach. F at 3 (E-mail from Andrew Campbell, VP of Programming, CMC to Oliver B. Hall, Atty., Libertarian National Committee (Oct. 22, 2018, 1:09PM)) ("The 2018 criteria were carried over from 2017. The date adopted, actually 'revised' for 2018, would have been on or around Monday August 6th."); *see also* CMC Resp. at 7. CMC's description of this timeline does not identify the criteria other than as "[t]he 2018 criteria." *See* Compl. ¶ 30, Attach. F at 3 (E-mail from Andrew Campbell to Oliver B. Hall (Oct. 22, 2018, 1:09PM)).

<sup>12</sup> Compl. ¶¶ 27, 30, Attach. F at 3-6 (E-mails from Andrew Campbell to Oliver B. Hall (Oct. 22, 2018)); CMC Resp. at 7-8.

<sup>13</sup> Compl. ¶ 33.

<sup>14</sup> CMC Resp. at 9.

<sup>15</sup> Compl. ¶¶ 10, 14, 16 (Nov. 9, 2018); *id.*, Attach. A (CMC Event Page for "15th Congressional District Debate"), Attach. B (Facebook Event Page for "15th Congressional District Debate"). This conclusion is consistent with CMC's representation that it applied the Tiered Criteria to qualify and invite candidates between September 10 and October 5, 2018. *Id.* ¶¶ 27, 30, Attach. F at 3-6 (E-mails from Andrew Campbell to Oliver B. Hall (Oct. 22, 2018)); CMC Resp. at 7-8.

1 and CMC's criteria for inviting candidates.<sup>16</sup> In response, comments posted to CMC's Facebook  
2 account stated that CMC's criteria required that candidates must "receive at least 5% of the  
3 projected vote in any recognized and widely published poll," such as Marist, Quinnipiac, and  
4 Pew, (the "Polling Criterion") to be invited to participate.<sup>17</sup> The debate event page on CMC's  
5 website contained the same Polling Criterion and further specified that "[a]t this time, no other  
6 candidates have provided information that would qualify them to participate in CMC's debate."<sup>18</sup>

7 On October 8, 2018, the Complainant contacted CMC to protest Miller's exclusion from  
8 the debate and to question how CMC applied the Polling Criterion to determine debate  
9 participants because Complainant concluded that there were no qualifying public polls  
10 available.<sup>19</sup> CMC's Vice President of Programming responded by e-mail including the Tiered  
11 Criteria and explaining that was the operative criteria CMC used to select the debate  
12 participants.<sup>20</sup>

13 Thereafter, the Complainant continued contacting CMC in an attempt to reconcile the  
14 apparent inconsistency between the Polling Criterion and the Tiered Criteria and to request

<sup>16</sup> *Id.*, Attach. B (Facebook Event Page for "15th Congressional District Debate").

<sup>17</sup> *Id.* ¶¶ 14-15, Attach. B (Facebook Event Page for "15th Congressional District Debate"). The Polling Criterion roughly corresponds to the second alternative qualification standard articulated in the Tiered Criteria.

<sup>18</sup> *Id.* ¶ 13, Attach. A (CMC Event Page for "15th Congressional District Debate") (screenshot dated Oct. 8, 2018).

<sup>19</sup> *Id.* ¶ 19.

<sup>20</sup> *See id.*, Attach. C (E-mails between Andrew Campbell and Mark R. Brown, Atty., Libertarian Party of Ohio (Oct. 8, 2018)), Attach. D (Letter from Oliver B. Hall and Mark R. Brown to CMC (Oct. 10, 2018)), Attach. G (attachment to Oct. 8, 2018 e-mail from Andrew Campbell to Mark R. Brown, including the Tiered Criteria). This appears to be the first time that CMC acknowledged the Tiered Criteria.

1 documentation to prove that CMC “actually applied” the Tiered Criteria.<sup>21</sup> Three days after the  
2 debate took place, CMC again responded to the Complainant and provided additional  
3 information regarding its internal processes for determining the debate criteria, including the  
4 timeline during which it adopted the criteria, researched candidate qualifications, and determined  
5 invitations.<sup>22</sup> After this communication, the Complainant filed the Complaint with the  
6 Commission.

7 The Complaint alleges CMC failed to use pre-established objective criteria to invite  
8 debate participants and instead used only Stivers and Neal’s major-party affiliations as the  
9 selection criteria in violation of the Act and Commission regulations.<sup>23</sup> The Complaint contends  
10 that the Tiered Criteria constitute a *post hoc* rationalization that CMC invented after it realized  
11 that neither Stivers nor Neal could have satisfied the Polling Criterion discussed on Facebook  
12 and CMC’s website because there were no polls on which to rely.<sup>24</sup> As a result, the Complaint  
13 alleges, CMC made and the Stivers Committee and the Neal Committee knowingly accepted  
14 corporate contributions in violation of the Act.<sup>25</sup>

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<sup>21</sup> *Id.*, Attach. D (Letter from Oliver B. Hall and Mark R. Brown to CMC (Oct. 10, 2018)), Attach. E (E-mails between CMC and Mark R. Brown (Oct. 8-10, 2018)). At one point during these conversations, CMC offered to include Miller in the debate if he “can meet the conditions detailed in” the Tiered Criteria. *Id.* ¶ 25, Attach. E at 1 (E-mail from Jane Scott, President & CEO, CMC, to Mark R. Brown (Oct. 10, 2018, 3:24PM)).

<sup>22</sup> *Id.* ¶ 30, Attach. F at 4-6 (E-mail from Andrew Campbell to Oliver B. Hall (Oct. 22, 2018, 12:36PM)); *see also supra* notes 11-12.

<sup>23</sup> Compl. ¶¶ 50-59.

<sup>24</sup> *Id.* ¶¶ 44-47, 54-57.

<sup>25</sup> *Id.* ¶ 3.

1 CMC, the Stivers Committee, and the Neal Committee respond that CMC staged the  
2 debate using pre-established, objective criteria (the Tiered Criteria) and Miller was ineligible  
3 under those criteria, noting that Miller's committee disclosed no contributions received or  
4 expenditures made and thus never qualified as a candidate under the Act.<sup>26</sup> The Stivers  
5 Committee and the Neal Committee, on the other hand, raised and spent well above the \$100,000  
6 required by the Tiered Criteria.<sup>27</sup> CMC further argues the total cost of staging the debate was *de*  
7 *minimis* and thus further action on the Complaint would be wasteful.<sup>28</sup>

### 8 III. LEGAL ANALYSIS

9 The Act and Commission regulations prohibit "any corporation whatever" from making  
10 contributions to a federal candidate and his or her authorized committee.<sup>29</sup> Likewise, candidates  
11 and their authorized committees are prohibited from knowingly accepting or receiving corporate  
12 contributions.<sup>30</sup> A "contribution" includes "any gift, subscription, loan, advance, or deposit of  
13 money or anything of value"<sup>31</sup> and an "expenditure" includes "any purchase, payment,  
14 distribution, loan, advance, deposit, or gift of money or anything of value."<sup>32</sup> However, the Act

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<sup>26</sup> CMC Resp. at 5-8, Exs. A-B; Stivers for Congress Resp. at 2 (Jan. 29, 2019); Rick Neal for Congress Resp. at 1-2 (Dec. 3, 2018) (detailing reported financial activity for Rick Neal for Congress, Stivers for Congress, and Committee to Elect Johnathan Miller); *see also* 52 U.S.C. § 30101(2)(A) ("candidate" definition based on \$5,000 in contributions received or expenditures made); 11 C.F.R. § 100.3(a)(1) (same).

<sup>27</sup> Compl., Attach. C (E-mail from Andrew Campbell to Mark R. Brown (Oct. 10, 2018, 1:19PM) (citing FEC disclosure reports)); *see also* Rick Neal for Congress Resp. at 2 (same).

<sup>28</sup> CMC Resp. at 8.

<sup>29</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

<sup>30</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b).

<sup>31</sup> 52 U.S.C. § 30101(8)(A)(i).

<sup>32</sup> *Id.* § 30101(9)(A)(i).



1 exempts “nonpartisan activity designed to encourage individuals to vote or register to vote” from  
2 the definition of “expenditure.”<sup>33</sup> The Commission’s implementing regulations include “[f]unds  
3 provided to defray costs incurred in staging candidate debates in accordance with the provisions  
4 of 11 C.F.R. §§ 110.13 and 114.4(f)” within that exemption.<sup>34</sup> They also permit “[n]onprofit  
5 organizations described in 26 U.S.C. §§ 501(c)(3) or (c)(4) and which do not endorse, support, or  
6 oppose political candidates or political parties” to “stage candidate debates in accordance with  
7 this section and 11 C.F.R. § 114.4(f).”<sup>35</sup> CMC is a 501(c)(3) organization that does not appear to  
8 endorse, support, or oppose political candidates or parties.<sup>36</sup>

9       The Commission’s regulations leave the structure of the debate to the discretion of the  
10 staging organization, provided that the debate includes at least two candidates, the organization  
11 does not arrange the debates in a manner that promotes or advances one candidate over another,  
12 and the criteria for candidate selection are pre-established and objective.<sup>37</sup> For general election  
13 debates, staging organizations shall not use nomination by a particular party as the sole objective  
14 criterion to determine debate eligibility.<sup>38</sup> The Commission has explained that section 110.13  
15 does not require that candidate selection criteria be reduced to writing or be made available to all  
16 candidates but that staging organizations “must be able to show that their objective criteria were

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<sup>33</sup> *Id.* § 30101(9)(B)(ii).

<sup>34</sup> 11 C.F.R. §§ 100.92, 100.154.

<sup>35</sup> *Id.* § 110.13(a)(1).

<sup>36</sup> CMC Resp. at 5-6; *see also* Factual & Legal Analysis (“F&LA”) at 6, MUR 6111 (“There is no available information to suggest that [CMC] endorses, supports, or opposes any political candidates or political parties.”).

<sup>37</sup> 11 C.F.R. §§ 110.13(b), (c).

<sup>38</sup> *Id.* § 110.13(c).

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1 used to pick the participants, and that the criteria were not designed to result in the selection of  
2 certain pre-chosen participants.”<sup>39</sup>

3 CMC’s debate featured two candidates, and the Complaint does not challenge the  
4 arrangement of the debate as promoting or advancing any one candidate. Nor does the  
5 Complaint dispute the objectivity of any criteria at issue in this matter. The sole issue in this  
6 matter is whether CMC used *pre-established* criteria to determine which candidates would  
7 receive debate invitations.

8 CMC articulated a timeline of events during which it claims it planned the debate and  
9 used the Tiered Criteria to extend invitations to Stivers and Neal, but not Miller.<sup>40</sup> If the Tiered  
10 Criteria was not devised *post hoc* and CMC indeed devised and applied the Tiered Criteria as  
11 stated, CMC likely satisfied the requirements of 11 C.F.R. § 110.13.<sup>41</sup> Further, CMC has  
12 organized federal candidate debates in the past and is likely familiar with Commission

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<sup>39</sup> Explanation and Justification, Corporate and Labor Organization and Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995) (“E&J”).

<sup>40</sup> CMC Resp. at 7-8. Although CMC communicated to the Libertarian National Committee on October 22, 2018, that it adopted debate criteria on or about August 6, 2018, CMC did not identify the criteria other than as “[t]he 2018 criteria.” *Id.* ¶ 30, Attach. F at 3 (E-mail from Andrew Campbell to Oliver B. Hall (Oct. 22, 2018, 1:09PM))

<sup>41</sup> E&J, 60 Fed. Reg. at 64,262 (“Staging organizations must be able to show that their objective criteria were used to pick the participants....”); *see also* F&LA at 2, MUR 6703 (WCVB) (staging organization employee stated she “investigated whether the candidates met each of the criteria, determined that Complainant failed to meet... them, and did not receive any information from Complainant... regarding his ability to meet them.”); FGCR at 29, MURs 4956, 4962, 4963 (Gore 2000, *et al.*); Certification at 1-2, MURs 4956, 4962, 4963 (Nov. 29, 2000) (finding no reason to believe debate violations occurred based upon the Office of General Counsel’s recommendation where “questions d[id] arise with regard to the timing of the application of the selection criteria” because the respondents stated the “selection criteria were used,” the criteria appeared objective, Commission regulations do not require selection criteria be reduced to writing or be made available to candidates, and the excluded candidates had displayed a “low level” of campaign organization and activity).

1 regulations pertaining to staging debates due to its past involvement in the enforcement  
2 process.<sup>42</sup>  
3 Some of the available information, however, raises questions over whether CMC  
4 “actually used” criteria that were pre-established.<sup>43</sup> CMC initially stated on its website and  
5 social media account that it used the Polling Criterion to determine invitations to the debate.<sup>44</sup>  
6 The Polling Criterion appears inoperable, however, because there was no public polling available  
7 on the Ohio’s 15th congressional district race in the period before the debate.<sup>45</sup> Further, it  
8 appears that Stivers and Neal were invited to participate in the debate sometime before  
9 September 25, 2018, but the first time the Tiered Criteria was identified to the Complainant was  
10 October 8, 2018.<sup>46</sup> Finally, CMC’s Response to the Complaint did not explain why it announced

<sup>42</sup> Cf. MUR 5642 (Soros, *et al.*); MUR 6111 (WOSU Public Media); MUR 6590 (Columbus Metropolitan Club).

<sup>43</sup> See Compl. ¶ 40 (citing *La Botz v. FEC*, 889 F. Supp. 2d 51, 64 (D.D.C. 2012) (“[T]he current record does not provide reasoned support for the position that [the staging organization] *actually used* these objective benchmarks to choose its debate participants.” (emphasis added))).

<sup>44</sup> *Id.* ¶¶ 13-15, Attach. A (CMC Event Page for “15th Congressional District Debate”), Attach. B (Facebook Event Page for “15th Congressional District Debate”). It is unclear when the event page on CMC’s website was created. Likewise, there is no date of creation listed on the Facebook event page, but the earliest comments are dated September 25, 2018. *Id.*, Attach. B.

<sup>45</sup> See *id.* ¶¶ 16-18.

<sup>46</sup> See *id.* ¶¶ 10, 14, 19, Attach. C (E-mails between CMC and Mark R. Brown (Oct. 8, 2018)), Attach. D (Letter from Oliver B. Hall and Mark R. Brown to CMC (Oct. 10, 2018)), Attach. G (attachment to Oct. 8, 2018 e-mail from CMC to Mark R. Brown, including the Tiered Criteria). Complainant’s counsel described a conversation he had with CMC’s Andrew Campbell on October 8, 2018, in which Campbell allegedly acknowledged the Tiered Criteria were never published like the Polling Criterion was. Compl., Attach. E at 3 (E-mail from Mark R. Brown to Jane Scott (Oct. 8, 2018)). Subsequently, CMC cited the Tiered Criteria on or about October 18, 2018 in pre-debate correspondence with the Stivers Committee. See *Stivers for Congress Resp.* at 2.

1 the Polling Criterion, if in fact it used the Tiered Criteria.<sup>47</sup> These discrepancies could support an  
2 inference that the Tiered Criteria were a *post hoc* rationalization.<sup>48</sup>

3 Nevertheless, the Commission exercises its prosecutorial discretion and dismisses the  
4 allegations because this matter does not warrant further use of the Commission's limited  
5 resources in light of the following considerations. First, Miller was no longer a candidate under  
6 the Act when the debate occurred.<sup>49</sup> Moreover, Miller's campaign had accepted no contributions  
7 and made no disbursements.<sup>50</sup> The Commission has relied on such inactivity as a basis for  
8 dismissal in the past.<sup>51</sup> Second, the amount of potential contributions from CMC to the invited  
9 candidates is comparatively modest: CMC states that it paid only \$6,646 for the debate, and we

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<sup>47</sup> For instance, it is possible that the CMC employee in charge of the Facebook account or the website was not aware of the actual criteria used by CMC or that this person provided a shorthand, inaccurate version of the criteria since publishing the entire criteria in the context of the Facebook comments section or a website event announcement page would be cumbersome.

<sup>48</sup> Compl. ¶¶ 46-48; *see also id.* ¶ 49 (arguing the Tiered Criteria are suspect "because they contradict the previously publicly announced [Polling C]riterion (which was impossible to use), and which continued to be announced as late as October 8, 2018 on CMC's web page and on its Facebook page"). In MUR 6383R, the Commission noted that a "possibly contradictory set of criteria... would suggest that the [staging organization] may not have used pre-established objective criteria." F&LA at 9, MUR 6383R (Ohio News Organization, *et al.*). The Commission nevertheless exercised its prosecutorial discretion and dismissed the matter. *See id.* at 10-11.

<sup>49</sup> In fact, he filed his termination report on September 25, 2018—the latest date Complainant alleges CMC could have extended invitations to Stivers and Neal—and the Commission accepted his termination on September 30, 2018. *See* Compl. ¶¶ 10, 14, 16; CMC Resp. at 3-4, Ex. A (FEC Form 3, Termination Report, Committee to Elect Johnathan Miller (Sept. 25, 2018)), Ex. B (Letter from FEC to Kevin Boswick, Treasurer, Committee to Election Jonathan Miller (Sept. 30, 2018)). We do note, however, that his name still appeared on the ballot for the election. *See* OHIO SECRETARY OF STATE, NOVEMBER 6, 2018 GENERAL ELECTION OFFICIAL CANVASS (2018), [https://www.sos.state.oh.us/globalassets/elections/2018/gen/2018-11-06\\_statewidecounty\\_miami.xlsx](https://www.sos.state.oh.us/globalassets/elections/2018/gen/2018-11-06_statewidecounty_miami.xlsx) (showing Miller receiving approximately 2% of votes cast).

<sup>50</sup> *Committee filings*, FEC, <https://www.fec.gov/data/committee/C00639831/?tab=filings> (last visited June 6, 2019) (Committee to Elect Johnathan Miller Filings).

<sup>51</sup> *See, e.g.*, F&LA at 10 & n.9, MUR 6383R (Ohio News Organization, *et al.*) ("[A]t the time he filed his Complaint, [the excluded candidate] had filed a Statement of Candidacy, but had not filed a Statement of Organization establishing a campaign committee."); FGCR at 4 n.3, MUR 5650 (University of Arizona) ("[Excluded candidate] neither registered with nor reported to the Commission, and may not have received sufficient contributions or made sufficient expenditures to qualify as a candidate within the meaning of [the Act].").

1 have no information to the contrary. The amount of any contribution would have to be  
2 apportioned between the Stivers and Neal Committees for a total contribution of \$3,323 each.<sup>52</sup>  
3 The Commission dismissed a past matter involving CMC and the same Complainant where the  
4 overall cost of the debate was modest.<sup>53</sup> Third, the record is not clear as to which criteria was  
5 actually used to select the debate participants, but given the first two factors identified above, an  
6 investigation into these facts may be unnecessary.

7 Accordingly, the potential violations here do not warrant further expenditure of  
8 Commission resources and the Commission exercises its prosecutorial discretion and dismisses  
9 the allegations that CMC made, and the Stivers and Neal Committees received, prohibited  
10 corporate contributions.<sup>54</sup>

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<sup>52</sup> F&LA at 5, MUR 6590 (Columbus Metropolitan Club) (citing Statement of Reasons, Comm'rs Hunter, Weintraub, McGahn, Bauerly, Petersen, and Walther at 3, MUR 6459 (Iowa Faith & Freedom Coal.)).

<sup>53</sup> *Id.* (dismissing where \$2,740 in costs would have to be apportioned between two committees).

<sup>54</sup> *Heckler v. Chaney*, 470 U.S. 821 (1985).