



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Brett G. Kappel, Esq.  
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750 9th Street, N.W., Suite 750  
Washington, DC 20001

JUL 30 2019

RE: MUR 7541  
Columbus Metropolitan Club

Dear Mr. Kappel:

On November 14, 2018, the Federal Election Commission ("Commission") notified your client, Columbus Metropolitan Club, 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 other respondents, the Commission decided to dismiss the allegation that Columbus Metropolitan Club 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, appearing to read "Mark Allen".

Mark Allen  
Assistant General Counsel

Enclosure:  
Factual and Legal Analysis

10074747-100114

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

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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).

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

<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>

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<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/C00639831/?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

<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

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<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

<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).

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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

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<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.



