Candidate Debates in Ohio: Can Corporations Fund the Major Parties?

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TABLE OF CONTENTS

I. INTRODUCTION

During the gubernatorial election in 2018, Ohio's Democratic (Cordray) and Republican (DeWine) candidates squared off in a series of televised debates in Dayton, Marietta, and Cleveland.[1] Staged by three non-profit corporations (including two private colleges)[2] the debates were a culmination of behind-the-scenes discussions between the DeWine and Cordray campaigns.[3] No other candidates were invited or allowed to participate.[4] No criteria other than their party affiliations were employed to select the

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[1] *See* Jessie Balmert, *Ohio's Governor Race: Cordray, DeWine Set 3 Debates Across State*, CINCINNATI ENQUIRER, https://www.cincinnati.com/story/news/politics/elections/2018/09/07/ohio-governors-race-cordray-dewine-set-3-debates-across-state/1221354002/ [https://perma.cc/K5AA-WJ44] (Sept. 7, 2018).

[2] *See UD to Host First Gubernatorial Debate*, UD NEWS (Sept. 21, 2018), https://udayton.edu/magazine/2018/09/ud-hosts-first-gubernatorial-debate.php [https://perma.cc/2K25-DADH].

[3] *See* Verified Complaint at 2, Libertarian Party of Ohio v. Wilhelm, 465 F. Supp. 3d 780 (S.D. Ohio 2020) (2:19-cv-02501).

[4] *See* Libertarian Party of Ohio v. Wilhelm, 988 F.3d 274, 277 (6th Cir.), *cert. denied sub nom.* Libertarian Party v. Crites, 142 S. Ct. 427 (2021).

participants.[5] The Libertarian (Irvine) and Green (Gadell-Newton) candidates were ignored.[6]

Were Cordray and DeWine squaring off in a federal election, the three debates they arranged would have plainly violated federal election law. The Federal Election Campaign Act (FECA) and accompanying Federal Election Commission (FEC) regulations are clear. Debates between candidates for federal office cannot be constructed as exclusive Democrat-versus-Republican showdowns.[7] Minor and independent candidates must be provided an opportunity to compete.[8]

As explained below, corporate debate staging in Ohio can also, like under the federal model on which Ohio law is based, constitute an illegal campaign contribution, complete with criminal penalties.[9] At bare minimum, corporate debate staging under Ohio law, like under the federal model, must (according to Ohio's statutes) forego simply favoring the two major parties. Staging debates between only Democrats and Republicans, to the exclusion of all others, is just as illegal under Ohio law as it is under the FECA (and federal tax laws for non-profits).

So why does it remain a common practice in Ohio? Ohio's history of excluding minor parties and candidates from ballots[10] has something to do with it. Without minor candidates qualified for the ballot, no one could complain. But that is not the whole of it, as illustrated by Ohio's series of exclusive gubernatorial debates in 2018. Even when minor candidates qualify, corporations in Ohio, with the blessing of the Ohio Elections Commission (OEC), continue to exclude them from debates.[11]

This article uses Ohio's 2018 experience with corporate-backed debates between Cordray and DeWine to dissect Ohio's laws, compare them to the federal laws on which they are based, critique the OEC's performance, and criticize the two major parties' arguments for exclusive debates. While both the Libertarians and Greens filed complaints in 2018 with the OEC challenging DeWine's and Cordray's use of corporate money to fund their

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[5] *See* Libertarian Party of Ohio v. Wilhelm, 465 F. Supp. 3d 780, 783 (S.D. Ohio 2020), *aff'd*, 988 F.3d 274 (6th Cir. 2021), *cert. denied sub nom.* Libertarian Party v. Crites, 142 S. Ct. 427 (2021).

[6] *See* Laura A. Bischoff, *Libertarians File Complaint over Three Ohio Governor Debates*, DAYTON DAILY NEWS (Sept. 25, 2018), https://www.daytondailynews.com/news/local/libertarians-file-complaint-over-three-gubernatorial-debates/k75zugo8XlwpjDxlgQvh1K/ [https://perma.cc/9RFQ-JDDU].

[7] *See* 11 C.F.R § 110.13 (2002).

[8] *Id.* § 110.13(c).

[9] *See* OHIO REV. CODE ANN. § 3599.03(B)(2) (West 2022).

[10] *See* Richard Winger, *Ballot Format: Must Candidates Be Treated Equally?*, 45 CLEV. ST. L. REV. 87, 88 (1997).

[11] *See* Balmert, *supra* note 1.

exclusive series of debates,[12] no official opinion was delivered.[13] The OEC dismissed the challenges within minutes of the conclusion of the oral argument[14] and in its written notice released weeks later simply stated it "found no violation."[15] One of the OEC's members, meanwhile, told a journalist after the dismissal that "he didn't think the minor parties had the law on their side. Debates featuring only the Democratic and Republican candidates are nothing new in Ohio."[16] An administrative appeal to the Franklin County Court of Common Pleas was quickly stayed and then dismissed for lack of jurisdiction.[17] OEC dismissals are left to prosecutorial discretion, it ruled, and cannot be appealed.[18]

One of the reasons for the OEC's dismissal of the minor parties' complaints (obviously) was the composition of the OEC. Six of its seven members under Ohio law must be members of the two major parties.[19] The seventh member, meanwhile, cannot be a member of a minor party.[20] The deck is thus stacked against minor parties, with the OEC repeatedly refusing to investigate minor-party complaints against the major parties.[21]

Whether this sort of stacked deck should be constitutionally tolerable presents a fascinating question,[22] one that will likely be addressed by the Supreme Court in due course. My inquiry here, however, is whether the OEC got it right when it dismissed the minor parties' complaints. In doing so, I

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[12] *See generally* Reply to Libertarian Party of Ohio Response to Cordray, Dewine, and Candidate Campaigns' Motion to Dismiss, Libertarian Party of Ohio v. City Club, Ohio Elections Comm'n No. 2018G-031 (Dec. 3, 2018), on file with Franklin County Clerk Common Pleas, Libertarian Party of Ohio v. Ohio Elections Comm'n, No. 19-cv-1376; *see also* Ohio Elections Comm'n, Meeting Agenda & Staff Attorney Recommendation (Dec. 6, 2018), at 2, on file with Franklin County Clerk Common Pleas, Libertarian Party of Ohio v. Ohio Elections Comm'n, No. 19-cv-1375. There were four virtually identical complaints filed all together, two each by the Green Party and Libertarian Party, Numbers 2018G-026, 031, 032, and 033. *See* Ohio Elections Comm'n, Meeting Agenda & Staff Attorney Recommendation (Dec. 6, 2018), at 2.

[13] *See* Julie Carr Smyth, *Ohio Election Panel Tosses Minor Political Parties' Debate Complaint*, COLUMBUS DISPATCH (Dec. 7, 2018), https://www.dispatch.com/story/news/politics/2018/12/07/ohio-election-panel-tosses-minor/6750601007/ [https://perma.cc/5X8L-6EF9].

[14] *See id.*

[15] *See* Notice of Appeal from Decision and Finding of the Ohio Elections Commission at Exhibit 1, Libertarian Party of Ohio v. Ohio Elections Comm'n, No. 19-cv-1376 (Franklin Cnty. Common Pleas, Feb. 14, 2019).

[16] Smyth, *supra* note 13.

[17] *See* Libertarian Party of Ohio v. Ohio Elections Comm'n, No. 19-cv-1375, at *10, 12 (Franklin Cnty. Common Pleas, May 4, 2020).

[18] *See, e.g.*, Billis v. Ohio Elections Comm'n, 766 N.E.2d 198, 198 (Ohio Ct. App. 10th, 2001).

[19] *See* Libertarian Party of Ohio v. Wilhelm, 988 F.3d 274, 274 (6th Cir. 2021), *cert. denied sub nom.* Libertarian Party v. Crites, 142 S. Ct. 427 (2021).

[20] *Id.*

[21] *See, e.g.*, Earl v. Ohio Elections Comm'n, 2016-Ohio-7071, at ¶ 21–22.

[22] *See Wilhelm*, 988 F.3d at 279.

assess (1) the argument (made jointly by DeWine and Cordray) that changes to Ohio's campaign finance laws in 2004 authorized corporate staging of exclusive debates, and (2) the OEC staff attorney's belatedly offered reasons for supporting this claim. I say the reasons were offered belatedly because the OEC's attorney filed with the official administrative record his recommendation that DeWine and Cordray be fined for violating Ohio law,[23] a recommendation that the OEC duly ignored. Only after the Libertarians filed an action in federal court (challenging the OEC's composition),[24] did the OEC's attorney reverse course and "find" what he claimed was his true written recommendation (which was not part of the official record) to the contrary.[25] Unlike his official recommendation, the staff attorney's newly discovered document included reasons for allowing exclusive debates, reasons that are explored below.[26]

This article proceeds in two parts. First, because Ohio's campaign finance law is modeled on federal law, a discussion of that federal model is in order. Next comes a description of Ohio's campaign finance law, including an analysis of the major parties' claim that because of changes made in 2004 it substantially differs from federal law. An assessment of the OEC attorney's post-record reasons for agreeing with the major parties is included. In sum, the major parties' argument that things changed in 2004 in Ohio is specious. To the extent the OEC accepted the argument (the evidence points in that direction) one must seriously question the OEC's commitment to political neutrality.

II. DEBATES UNDER FEDERAL LAW

The Federal Election Campaign Act and regulations promulgated by the Federal Election Commission provide that sponsors of federal electoral debates must either be media organizations[27] or non-profit organizations as defined in 26 U.S.C. §§ 501(c)(3) and (4).[28] Non-media, for-profit

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[23] Ohio Elections Comm'n, Meeting Agenda & Staff Attorney Recommendation, *supra* note 12, at 2.

[24] *See* Libertarian Party of Ohio v. Wilhelm, 465 F. Supp.3d 780, 783–84 (S.D. Ohio 2020), *aff'd*, 988 F.3d 274 (6th Cir. 2021), *cert. denied sub nom.* Libertarian Party v. Crites, 142 S. Ct. 427 (2021).

[25] *See* Plaintiffs' Response to Defendants' First Motion for Protective Order at 3, Exhibit 3, R.E. 24-3, Libertarian Party of Ohio v. Wilhelm, 465 F. Supp. 3d 780 (S.D. Ohio 2020) (No. 2:19-cv-02501).

[26] *See infra* Part II. B.

[27] *See* 11 C.F.R. § 110.13(a)(2).

[28] *See id.* § 110.13(a)(1); *Public Debates*, FEC, https://www.fec.gov/help-candidates-and-committees/making-disbursements-ssf-or-connected-organization/public-debates/#:~:text=Corporate%2Flabor%20donations%20permitted,of%20staging%20a%20candidate%20debate [https://perma.cc/CC4H-34HX].

corporations are barred from staging debates.[29] The underlying reason is the one-hundred-year-old federal ban on corporate contributions.[30] As stated in *Level the Playing Field v. Federal Election Commission*,[31] "[t]he debate staging regulation . . . acts as an exemption to the general ban on corporate contributions to or expenditures on behalf of political campaigns or candidates."[32] It "prevent[s] debate staging organizations . . . from operating as conduits for corporate contributions made to benefit only one or two candidates from the Democratic and Republican parties—via the much-watched prime-time debates . . . ."[33]

Because debate staging requires coordination with candidates, it "is actually a contribution or expenditure made to the participating political campaigns"[34] in the absence of compliance with federal regulations.

These federal regulations allow limited corporate subsidization in debate-staging by non-profits and media entities in "recognition of the importance that debates play in informing the electorate."[35] For this same reason, "the FECA allows [for-profit] corporations to defray the costs of nonpartisan televised debates" by donating funds to a proper staging organization.[36] The non-profit (or media) staging organizations themselves, however, must comply with "certain conditions . . . to ensure that the debates remain nonpartisan:"[37](1) the non-profit (or media) staging organizations may not "endorse, support or oppose political candidates,"[38] (2) the debate itself cannot be structured "to promote or advance one candidate over another,"[39] and (3) "pre-established, objective criteria" must be used to select the candidates.[40] "Staging 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."[41] Staging organizations (i.e., non-profit corporations or media organizations)

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[29] *See* 52 U.S.C. § 30118(a); La Botz v. Fed. Election Comm'n, 889 F. Supp.2d 51, 54–55 (D.D.C. 2012).

[30] J. Michael Bitzer, *Tillman Act of 1907 (1907)*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1051/tillman-act-of-1907 [https://perma.cc/8YAC-TNG7].

[31] Level the Playing Field v. Fed. Election Comm'n, 232 F. Supp.3d 130, 135 (D.D.C. 2017).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] La Botz v. Fed. Election Comm'n, 889 F. Supp. 2d 51, 54 (D.D.C. 2012).

[36] *Id.* at 54–55 (citing Hagelin v. Fed. Election Comm'n, 411 F.3d 237, 238 (D.C. Cir. 2005)).

[37] *Id.* at 55.

[38] 11 C.F.R. § 110.13(a)(1).

[39] *Id.* § 110.13(b)(2).

[40] *Id.* § 110.13(c).

[41] Buchanan v. Fed. Election Comm'n, 112 F. Supp. 2d 58, 74 (D.D.C. 2000) (quoting 60 Fed. Reg. 64262 (1995)).

cannot simply select candidates based on their political affiliations or build criteria that are impossible for new and/or minor parties to meet.[42]

A. *Federal Tax Laws*

While federal election laws do not apply to state elections and debates, federal tax laws do.[43] The Treasury Department has interpreted the Internal Revenue Code to limit how tax-exempt organizations conduct debates.[44] Tax-exempt organizations must "provide[] fair and impartial treatment of candidates, and . . . not promote or advance one candidate over another . . . ."[45] As under federal campaign finance laws, these twin requirements mean that staging organizations either must invite all qualified candidates or employ neutral, pre-existing criteria to make their selections.[46] Colleges, universities and other tax-exempt entities (like the three that staged the Cordray/DeWine debates in Ohio) thus cannot consistent with federal tax law limit debates — whether state or federal — to major-party candidates.

B. *BCRA Additions in 2002*

Federal law has banned coordinated corporate contributions to candidates for over one hundred years.[47] Because debates are by nature coordinated with candidates, this ban on corporate contributions has long provided the base-line for limiting corporate involvement in debates.[48] As explained above, corporate involvement has accordingly been carefully restricted.

Independent corporate expenditures are different. The Supreme Court in *Buckley v. Valeo* ruled in 1971 that federal campaign finance restrictions prohibited independent corporate expenditures for communications that in "express terms advocate the election or defeat of a clearly identified candidate for federal office."[49] So-called "issue-advertising" that did not identify or target particular candidates, however, remained (arguably) permissible.[50] Corporations could accordingly avoid the federal ban on corporate contributions "by creating and airing advertisements that avoid the specific

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[42] *See* La Botz v. Fed. Election Comm'n, 889 F. Supp. 2d 51, 51 (D.D.C. 2012).

[43] Rev. Rul. 86-95, 1986-2 C.B. 73.

[44] *See infra* note 46 and accompanying text.

[45] Rev. Rul. 86-95, 1986-2 C.B. 73. *See also* Rev. Rul. 2007-41, 2007-25 I.R.B.

[46] *See* John Pomeranz & Rosemary E. Fei, *Tax Exempt Organizations and Political Activity*, 28 PRAC. TAX LAW. 17, 18 (2014); Fulani v. League of Women Voters Education Fund, 882 F.2d 621, 629 (2d Cir. 1989).

[47] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 343 (2010).

[48] *See id.*

[49] Buckley v. Valeo, 424 U.S. 1, 44, 44 n.52 (1976).

[50] *See id.* at 44.

language that the Supreme Court said expressly advocates the election or defeat of a candidate."[51]

In order to fill this gap in federal campaign finance laws, Congress in 2002 enacted the Bipartisan Campaign Reform Act (BCRA).[52] The BCRA placed new restrictions on a subset of federal candidate advertising called "electioneering communications."[53] The definition of electioneering communications in the BCRA included only advertising transmitted by "broadcast, cable, or satellite communications,"[54] and the new restrictions prohibited corporations from financing or funding any electioneering communication that "(1) [refers] to a clearly identified Federal candidate; (2) [are] transmitted within certain time periods before a primary or general election; and (3) [are] targeted to the relevant electorate."[55] The FEC explained when the BCRA was put in place that these new "electioneering communications provisions focus on the key elements of when, how, and to whom a communication is made . . . ."[56]

The BCRA also added disclosure and reporting requirements for communications and activities that are otherwise allowed.[57] Electioneering communications that are broadcast outside the BCRA's temporal window, for example, are not prohibited, but they may need to be reported.[58] Corporations remained free following the enactment of the BCRA, moreover, to pay for or support communications that did not fall under the new broadcast, "electioneering communication" definitions and rules.[59] At least so long as the corporate support for those communications was not otherwise prohibited.

The BCRA allowed several categorical exemptions from the definition of "electioneering communication." Print and other non-broadcast media, including bumper stickers, yard signs, posters and billboards, were

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[51] Electioneering Communications, 67 Fed. Reg. 65190, 65190 (Oct. 23, 2002) (to be codified at 11 C.F.R. pts. 100, 114); *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 132 (2003).

[52] *HR 2356 – Bipartisan Campaign Reform Act of 2002*, CONGRESS.GOV, https://www.congress.gov/bill/107th-congress/house-bill/2356 [https://perma.cc/DMB3-4RR3].

[53] *Id.*

[54] Electioneering Communications, 67 Fed. Reg. at 65190.

[55] *Id.*; *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 320–21 (2010). The ban also extended to national banks, foreign nationals and labor organizations. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 132 (2003); *HR 2356 – Bipartisan Campaign Reform Act of 2002*, *supra*, note 52, at Sec. 203, 303.

[56] Electioneering Communications, 67 Fed. Reg. at 65191.

[57] *See* FEC Policy Statement: Interim Reporting Procedures, 67 Fed. Reg. 71075, 71075–76 (Nov. 29, 2002) (to be codified at 11 C.F.R. pts. 104, 106, 300).

[58] *See* Indep. Inst. v. Fed. Election Comm'n, 216 F. Supp. 3d 176, 186 (D.D.C. 2016).

[59] *See* FEDERAL ELECTION COMMISSION, CAMPAIGN GUIDE: CORPORATIONS AND LABOR ORGANIZATIONS 77–79 (2018), https://www.fec.gov/resources/cms-content/documents/colagui.pdf [https://perma.cc/T5T8-7KAH] (describing expenditures for independent communications that are allowed).

exempted,[60] and a "press exception" was put in place.[61] An exemption for permissible expenditures that were already adequately regulated was also included.[62] This latter "exemption's purpose . . . is to avoid requiring political committees to report the same expenditures twice."[63]

In order to avoid redundant restrictions, the BCRA also exempted debates. Section 434(f)(3)(B)(iii) of title 2 stated (and continues to state as re-codified[64]) that "electioneering communication" does not include a communication which "constitutes a candidate debate or forum conducted pursuant to regulations adopted by the Commission, or which solely promotes such a debate or forum and is made by or on behalf of the person sponsoring the debate or forum."[65] The FEC explained that "if the conduct of a debate does not meet the requirements of § 110.13 [and employ pre-existing objective criteria], any corporate or labor organization funding for such a debate would constitute a prohibited contribution or expenditure."[66] Because debates and communications about debates were already heavily regulated under existing federal law, there was no need to house them within the terms of BCRA.[67]

Not only did the FEC make plain that the BCRA was not overwriting existing limitations on corporate contributions, so did the Supreme Court. In *Citizens United v. Federal Election Commission*, the Court described what the Congress had accomplished with the BCRA:

> Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.[68]

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[60] Electioneering Communications, 67 Fed. Reg. at 65196 (discussing 11 CFR 100.29(c)(1) exemptions which include "communications appearing in print media, including a newspaper or magazine, handbills, brochures, bumper stickers, yard signs, posters, billboards, and other written materials, including mailings; communications over the Internet, including electronic mail; and telephone communications").

[61] *See id.* at 65197 (discussing 11 CFR 100.29(c)(2)); Fed. Election Comm'n, Advisory Opinion Letter 2010-08 (June 11, 2010), https://www.fec.gov/updates/ao-2010-08-film-production-distribution-costs-qualify-for-press-exemption/ [https://perma.cc/XKC3-S6FN].

[62] Electioneering Communications, 67 Fed. Reg. at 65197.

[63] *Id.* (discussing 11 CFR 100.29(c)(3)).

[64] *See* 52 U.S.C. § 30104(f)(3)(B)(iii).

[65] *Id.*; Electioneering Communications, 67 Fed. Reg. at 65198 (quoting 2 U.S.C. 434(f)(3)(B)(iii)).

[66] Electioneering Communications, 67 Fed. Reg. at 65198.

[67] *See id.*

[68] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 320 (2010) (emphasis added) (citing McConnell v. Fed. Election Comm'n, 540 U.S. 93, 204 (2003); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 249 (1986)).

The BCRA changed none of this. It simply placed added restrictions on independent activities that arguably were not previously regulated.

To be sure, the Court in *Citizens United* invalidated the BCRA's ban on independent corporate "electioneering communications."[69] But it was careful to state that coordinated expenditures were still unlawful: "[b]y definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate."[70] Because debate staging is necessarily coordinated with candidates, neither the BCRA nor the Supreme Court's decision in *Citizens United* says anything about the practice.[71] To this day the federal ban on corporate debate staging outside the conditions described above has remained firmly in place.

That courts and the FEC have continued to recognize pre-existing debate regulations in the aftermath of the BCRA and *Citizens United* proves the point.[72] In *La Botz v. Federal Election Commission*, for example, the U.S. District Court for the District of Columbia in 2012 ruled that a consortium of news organizations in Ohio needed to employ pre-existing objective criteria when staging a federal senatorial debate.[73] Neither the consortium nor the FEC even attempted to argue that the BCRA's definition of "electioneering communications" insulated debates from previously established rules.[74]

III. OHIO'S CORPORATE CONTRIBUTION LAW

Both prior to 2004 and after, Ohio has (as it has for over a century)[75] barred corporations from making contributions to, or paying expenditures on behalf of, candidates for public office.[76] This prohibition is today codified in § 3599.03(A)(1) of the Ohio Revised Code, which specifically states that outside a handful of exceptions (which are discussed below),

> [N]o corporation, [and] no nonprofit corporation . . . directly or indirectly, shall pay or use, or offer, advise, consent, or agree to pay or use, the corporation's money or property . . . for or in aid of or opposition to a political party [or] a candidate for election or nomination to public office . . . .[77]

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[69] *See id.* at 365–66.

[70] *Id.* at 360 (citing Buckley v. Valeo, 424 U.S. 1, 46 (1976)).

[71] *See generally id.*

[72] *See*, *e.g.*, Columbus Metropolitan Club, MUR 7541 (FEC July 30, 2019), pp. 8–9, https://www.fec.gov/files/legal/murs/7541/19044474605.pdf [https://perma.cc/3FRJ-2YHS].

[73] La Botz v. Fed. Election Comm'n, 889 F. Supp. 2d 51, 60, 63 (D.D.C. 2012).

[74] *See* Level the Playing Field v. Fed. Election Comm'n, 232 F. Supp. 3d 130, 135 (D.D.C. 2017).

[75] *See* Ohio Elections Comm'n, Opinion Letter 2010ELC-02, at 1 (Sept. 2, 2010).

[76] *See* OHIO REV. CODE ANN. § 3599.03(A)(1) (West 2022); *id.* § 3517.082.

[77] *Id.* § 3599.03(A)(1).

The OEC has issued several formal opinions over the years describing the scope of this prohibition. In 1997, for instance, it advised that "the use of a [corporate] logo on an endorsement letter is considered a corporate contribution in violation of R.C. § 3599.03."[78] In 2015, it stated that

> [T]he prohibitions in R.C. § 3599.03, . . . are against the use of any of the corporation's property. The property of a corporation encompasses not only its cash on hand, but also its products, its physical property such as plant and equipment, and, in the case at issue in this opinion request, its intellectual property and goodwill such as service marks, trademarks and logos.[79]

Of course, corporations presumably remain free under Ohio law (just like under federal law) to treat candidates like any other customers.[80] According to the Ohio Elections Commission in 2002, they might even be able to provide some services, like internet hosting, to candidates that are not made available to the general public.[81] But when they do, the Commission made clear in that same ruling that Ohio law requires that corporations "must assure that any and all candidates can take advantage of this offer, both now and as long as such an offer is open in the future, regardless of their political affiliation."[82] The same must logically hold for debate staging under Ohio law.

Unlike federal law with federal elections, unfortunately, Ohio law has never formally spelled this out in terms of debates.[83] Unlike the FEC, the OEC has not formally expressed an opinion.[84] Where the FEC has promulgated regulations allowing non-profit corporations and media organizations to sponsor non-exclusive debates using pre-existing objective criteria, Ohio law has remained silent.[85] Ohio has no regulations allowing corporate sponsorship of debates, prohibiting it, or stating conditions for properly staged debates.[86] One can thus argue that any debate staged with any corporate resources is prohibited by § 3599.03. Even if the invited candidates could pick up all the corporate costs (which they never do anyway), the debates would still be arguably illegal under § 3599.03. But this only reinforces the conclusion that at bare minimum § 3599.03 prohibits corporations from playing favorites with candidates.

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[78] Ohio Elections Comm'n, Opinion Letter 97ELC-05, at 2 (Sept. 12, 1997).

[79] Ohio Elections Comm'n, Opinion Letter 2015ELC-01, at 2 (Jul. 23, 2015) (quoting Ohio Elections Comm'n, Opinion Letter 97ELC-05 (Sept. 12, 1997)).

[80] *See* TREVOR POTTER & MATTHEW T. SANDERSON, POLITICAL ACTIVITY, LOBBYING LAWS & GIFT RULES GUIDE § 10:13 (3d ed. 2021) (stating that corporate "goods or services in the ordinary course of its business at the usual and normal charge (i.e., when it simply acts as a vendor)" are not impermissible corporate contributions).

[81] *See* Ohio Elections Comm'n, Opinion Letter 2002ELC-04, at 1–2 (July 25, 2002).

[82] *Id.* at 2.

[83] *See supra* notes 75–77 and accompanying text.

[84] *See supra* Part I.

[85] *See supra* Part I and notes 75–77.

[86] *See* OHIO REV. CODE ANN. §§ 3599.03(A)(1), 3517.082, 3517.1011 (West 2022).

A. *Ohio's 2004 Restrictions on Electioneering*

In 2004, faced with the same loophole in its laws that Congress had corrected with the BCRA, Ohio passed legislation mirroring (in many instances with verbatim language) the restrictions found in the BCRA.[87] Ohio's new "electioneering communication" rules, codified at O.R.C. § 3517.1011, defined "electioneering communications" in precisely the same way the BCRA did.[88] Like federal law, Ohio's new law prohibited making "any broadcast, cable, or satellite communication that refers to a clearly identified candidate using any contributions received from a corporation or labor organization" within 30 days of an election.[89] It also provided that "[a]ny coordinated electioneering communication is an in-kind contribution,"[90] meaning that it would be illegal coming from a corporation.

Nothing in Ohio's new electioneering communication law purported to repeal existing regulations of, and prohibitions on, corporate aid through contributions and expenditures. Like its federal counterpart in the BCRA, Ohio's electioneering communications law exempted from the definition of electioneering communication (in language virtually identical to that used by the BCRA and its implementing regulations) communications and activities that either (1) were not broadcast,[91] (2) were already sufficiently regulated, including corporate expenditures,[92] or (3) were constitutionally protected under the First Amendment.[93] Using the precise same language used in the BCRA, moreover, Ohio's 2004 electioneering communication law exempted candidate debates, stating that "[a] communication that constitutes a candidate debate or forum or that solely promotes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum"[94] does not constitute an "electioneering communication."[95]

In order to weave this new electioneering communication law into Ohio's campaign finance scheme, § 3599.03(A)(1)'s ban on corporate contributions was amended to reference § 3517.1011's regulation of electioneering communications along with several other laws that allow measures of corporate participation in the electoral process.[96] Section 3517.082 of the Ohio Revised Code, for instance, allows for the creation of corporate PACs.[97]

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[87] *See* Ohio Right to Life Soc'y v. Ohio Elections Comm'n, 2008 WL 4186312, at *2 (S.D. Ohio 2008).

[88] *See id.*; *see also* § 3517.1011(A)(7)(a)(i)–(ii).

[89] *See* § 3517.1011(H).

[90] *See id.* § 3517.1011(G).

[91] *See id.* § 3517.1011(A)(7)(b)(i).

[92] *See id.* § 3517.1011(A)(7)(b)(iii).

[93] *See id.* § 3517.1011(A)(7)(b)(ii).

[94] *Id.* § 3517.1011(A)(7)(b)(iv).

[95] *See* OHIO REV. CODE ANN. § 3517.1011(A)(7)(b) (West 2022).

[96] *See id.* § 3599.03(A)(1).

[97] *See id.* § 3517.082.

Section 3599.03(A)(1) thus excepts it from its ban on corporate contributions.[98] Sections 3517.101 and 3517.1012(A)(2) allow corporate gifts of up to $10,000 for office furnishings for candidates, and this too is accordingly excepted from § 3599.03.[99] Section 3517.1013(B) allows corporate donations of up to $10,000 for get-out-the-vote activities, and it is duly excepted.[100] The same goes for § 3517.1014(C)(1), which allows for corporate donations to officeholders' transition funds,[101] and § 3599.031, which allows employers to set up segregated accounts for employee political action contributions.[102] They are accordingly likewise excepted from § 3599.03(A)(1).[103]

To make this clear, § 3599.03(E) further provides that gifts and donations made under §§ 3517.101, 3517.1012(A)(2), 3517.1013(B), and 3517.1014(C)(1) do "not constitute . . . violation[s] of this section."[104] Section 3517.1011, meanwhile, is not included in § 3599.03(E).[105] Nothing in § 3599.03 similarly says that activities specified in section 3517.1011 do not constitute violations of this section.[106]

B. *Major Parties' Arguments*

In defense of their series of exclusive debates, Cordray and DeWine focused on § 3517.1011 and claimed it offered a categorical exception for debates to § 3599.03's ban on corporate contributions. They argued that because § 3599.03 was amended in 2004 to except "activities specified in" § 3517.1011, corporate moneys can now be used to stage debates: "Ohio law prohibits a corporation from using its money or property for or in aid of a candidate except to carry out activities specified in section 3517.1011."[107] Among the activities specified in R.C. 3517.1011, they argued, are ". . . communication that constitutes a candidate debate or forum . . . ."[108] Even though debates are "specified" in the statute as not being "electioneering

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[98] *See id.* § 3599.03(A)(1).
[99] *Id.*; *id.* §§ 3517.101, 1012(A)(2).
[100] *See id.* § 3599.03(A)(1); *id.* § 3517.1013(B).
[101] OHIO REV. CODE ANN. § 3599.03(A)(1) (West 2022); *id.* § 3517.1014(C)(1).
[102] *See id.* § 3599.031(A).
[103] *See id.* § 3599.03(A)(1).
[104] *Id.* § 3599.03(E)(1)–(4).
[105] *See id.*
[106] *See id.*
[107] *See* Reply to Libertarian Party of Ohio Response to Cordray, Dewine, and Candidate Campaigns' Motion to Dismiss at 3, Libertarian Party of Ohio v. City Club, Ohio Elections Comm'n No. 2018G-031 (Dec. 3, 2018), on file with Franklin County Clerk Common Pleas, Libertarian Party of Ohio v. Ohio Elections Comm'n, No. 19-cv-1376.
[108] *Id.*

communications," Cordray and DeWine claimed they fell into the exception in § 3599.03 for "electioneering communications."[109]

The OEC's attorney agreed with this argument in his unofficial recommendation (discovered after litigation commenced in federal court).[110] He asserted (without citing authority) that Ohio's restrictions on corporate contributions are "for any partisan political purpose" rather than "any electoral activity – this activity appears to be non-partisan and for the benefit of the electorate and not intended for the benefit of any particular candidate or campaign."[111] Further, "[a]llowance for activities related to R.C. 3517.1011 is not merely window dressing but substantial in that specific allowance for 'debate' does not require additional explanation or additional standards for how to allow for debate in a candidate contest."[112] Thus, he did not "believe that this type of activity is prohibited and I do believe that this type of activity is not a contribution, either direct or in-kind."[113]

The argument mustered by the major parties (and belatedly seconded by the OEC attorney) is creative, to be sure. But it is far from convincing. First and foremost, the argument contradicts the stated intent (described above) behind the BCRA, which Ohio copied, as well as the Internal Revenue Code, which prohibits non-profits from staging exclusive debates. The BCRA, according to the FEC, overrides nothing in existing debate law: "pursuant to the operation of [CFR] §§ 110.13 and § 114.4(f), if the conduct of a debate does not meet the requirements of § 110.13, any corporate or labor organization funding for such a debate would constitute a prohibited contribution or expenditure."[114] The exception for debates in the BCRA's definition of "electioneering communications" was not meant to free debates from regulation. It simply meant (and continues to mean) that debates are not regulated under the BCRA.

Second, nothing in the text of § 3517.1011 indicates any intent to legalize corporate expenditures, let alone contributions, for debates. Instead, the section simply removes debates from the definition of "electioneering communications" subject to the restrictions imposed by that section.[115]

Third, § 3599.03(A)(1) says nothing specifically about debates, but instead simply excepts the "activities specified in section[] . . . 3517.1011."[116] The activities "specified" in § 3517.1011, meanwhile, can only be read to include

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[109] *Id.*

[110] *See* Plaintiffs' Response to Defendants' First Motion for Protective Order at 3, Exhibit 3, R.E. 24-3, Libertarian Party of Ohio v. Wilhelm, 465 F. Supp. 3d 780 (S.D. Ohio 2020) (No. 2:19-cv-02501).

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Electioneering Communications, 67 Fed. Reg. 65190, 65198 (Oct. 23, 2002) (to be codified at 11 C.F.R. pts. 100, 114) (footnote omitted).

[115] *See* OHIO REV. CODE ANN. § 3517.1011(A)(7)(b)(iv) (West 2022).

[116] *Id.* § 3599.03(A)(1).

the "electioneering communications" described by the statute. It cannot be interpreted to include the universe of activities (including debates) that do not constitute electioneering communications. If it did, after all, the argument would prove far too much. "Contributions," "gifts," "deposits," and "payments" are also mentioned in § 3517.1011.[117] Exceptions in § 3517.1011 include "communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; communications over the internet, including electronic mail; or telephone communications."[118] If the major parties' argument were correct, all of these activities would, following adoption of Ohio's BCRA in 2004, now be permissible. Corporations could coordinate gifts to candidates, purchase bumper stickers and yard signs for them, and place coordinated print ads on their behalf in newspapers.

An additional problem for the major parties' argument is § 3599.03(E), which states that each of the other excepted activities, but not those "specified" in § 3517.1011 (Ohio's BCRA-analog), "do[] not constitute . . . violation[s] of this section."[119] If § 3599.03 was meant to exclude everything mentioned in Ohio's electioneering communication statute, § 3517.1011, from treatment as corporate contributions, why did it not include § 3517.1011 in § 3599.03(E)?

The only credible interpretation of the "specified activities" exception in § 3599.03 is that when corporate money or property is properly used for "electioneering communications," it is not necessarily to be treated as a corporate contribution under § 3599.03. Because it may still be— coordinated electioneering communications, for example, are expressly made in-kind contributions by § 3517.1011(G)—it is not categorically protected from treatment under § 3599.03. But § 3517.1011's intent was not to itself convert independent electioneering communications into unlawful corporate contributions.

The staff attorney's belated claim that Ohio's restrictions on corporate contributions are limited to "partisan political purpose[s]" as opposed to "any electoral activity," meanwhile, is equally problematic.[120] Nothing in § 3599.03 says that.[121] While it is true that some corporate expenditures, like get-out-the-vote monies, are not prohibited under Ohio law, candidate debates under federal law have never been treated as acceptable get-out-the-vote equivalents notwithstanding the existence of a similar federal exception.[122] Regardless of

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[117] *See id.* § 3517.1011(A)(4).
[118] *Id.* § 3517.1011(A)(7)(b)(i).
[119] *Id.* § 3599.03(E)(1).
[120] *See supra* notes 110–113 and accompanying text.
[121] *See* § 3599.03.
[122] *See Conducting Voter Registration and Get-Out-the-Vote Drives*, FED. ELECTION COMM'N, https://www.fec.gov/help-candidates-and-committees/making-disbursements-ssf-or-connected-organization/conducting-voter-registration-and-get-out-the-vote-drives-

whether exclusive debates are "for the benefit of the electorate and not intended for the benefit of any particular candidate or campaign,"[123] as the staff attorney claimed, they plainly violate federal law. There is nothing in Ohio law to suggest a differing outcome. To the contrary, the Ohio Elections Commission in 2002 itself ruled that the availability of corporate largesse only avoids the restriction found in § 3599.03 when it "is equally available to any and all candidates . . . ."[124]

IV. CONCLUSION

Corporations in Ohio cannot legally stage exclusive debates for the Democrats and Republicans. Section 3599.03 of the Ohio Revised Code precludes it. Ohio's 2004 "electioneering communication" amendment does not override this prohibition. Ohio law, like the federal law on which it is based, requires that all qualified candidates be treated equally.

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corporation-labor-organization/ [https://perma.cc/4KLK-4DX8] ("A corporation or labor organization may conduct registration and GOTV drives directed at the general public.").

[123] *See supra* notes 110–113 and accompanying text.

[124] Ohio Elections Comm'n, Opinion Letter 2002ELC-04, at 2 (July 25, 2002).