

**\UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

**Gary E. Johnson; Gary Johnson 2012, Inc.;
Libertarian National Committee; James P.
Gray; Green Party of the United States;
Jill Stein; Jill Stein for President; and
Cheri Honkala,**

Plaintiffs,

v.

Case No. 16-7107

**Commission on Presidential Debates;
Republican National Committee;
Democratic National Committee; Frank J.
Fahrenkopf, Jr. Michael D. McCurry;
Barack Obama; and Willard Mitt Romney**

Defendants.

INITIAL BRIEF OF APPELLANTS

NOW COMES Appellants Gary E. Johnson; Gary Johnson 2012, Inc.;
Libertarian National Committee; James P. Gray; Green Party of the United States;
Jill Stein; Jill Stein for President; and Cheri Honkala, who by and through
undersigned counsel file their Initial Brief, as follows.

CORPORATE DISCLOSURE STATEMENT

Counsel for Appellants hereby certifies that Appellant Gary Johnson 2012,
Inc. is a non-stock, non-profit Colorado corporation formed for the purposes of the
2012 Libertarian Party Presidential Campaign. Appellants Libertarian National
Committee, Green Party of the United States and Jill Stein for President are political

parties or campaign entities that do not have stock and are non-profit. The remaining Appellants are individual persons.

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I. JURISDICTIONAL STATEMENT

The District Court exercised subject matter jurisdiction over this case under 28 U.S.C. 1331 and 1337. Plaintiffs-Appellants' claims arose under the Constitution of the United States and under the Sherman Antitrust Act. This Court possesses

jurisdiction under 28 U.S.C. 1291. The appeal seeks review of a final judgment of the District Court dismissing Plaintiffs-Appellants' Sherman Act and First Amendment claims with prejudice on August 24, 2016 (J.A.114), amending the August 5, 2016, Opinion (J.A.085); and, the August 5, 2016, Order (J.A.084), for lack of subject matter jurisdiction and for failure to state a claim under Rule 12 (b) (1) and (3) of the Federal Rules of Civil Procedure. Plaintiffs-Appellants filed a Notice of Appeal from the August 24, 2016, Amended Opinion and Order on September 1, 2016.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in holding that Plaintiffs-Appellants lacked standing because the Complaint failed to allege concrete injury proximately caused by the challenged concerted action of Defendants-Appellees in unreasonably excluding Appellants Gary Johnson and Jill Stein from the 2012 presidential debates despite their qualifications on sufficient state ballots to have a mathematical chance of winning an Electoral College majority.
2. Whether the District Court erred in holding that the Complaint failed to allege facts sufficient to confer antitrust standing.
3. Whether the District Court erred in concluding that the multi-billion dollar business of campaigning for the presidency is not a cognizable market within the scope of the Sherman Act.

4. Whether the District Court erred in holding that the alleged concerted activities of Defendants-Appellees in organizing, sponsoring and participating in presidential debates under terms and conditions calculated to destroy competition in the multi-billion dollar business of campaigning for the presidency was protected by the First Amendment.

5. Whether the District Court erred in holding that limits on impairing freedom of speech or association imposed by the First Amendment should not be applied to Defendants-Appellees' sponsorship and conduct of presidential debates notwithstanding their decisive influence on the outcome of the presidential election and the national political agenda.

III. STATEMENT OF THE CASE

Pursuant to Rule 12 (b) (1) and (3) of the Federal Rules of Civil Procedure, the District Court dismissed with prejudice Appellants' Sherman Act and First Amendment claims. They pivoted on Appellees' concerted actions to destroy competition in the multi-billion dollar business of campaigning for the presidency by unreasonably requiring presidential debate participants to have satisfied a 15% rigged national polling threshold in lieu of qualifying on sufficient state ballots to have a mathematical chance of winning an Electoral College majority. Application of the latter standard would have yielded four (4) debate participants.

Modern presidential campaigns are run like traditional businesses. They operate with permanent staffs, lawyers, accountants, consultants, communications directors, or otherwise. They are commonly awash in hundreds of millions of dollars. Each presidential cycle jumps the record for presidential campaign spending to higher orders of magnitude.

Billions of dollars are spent by the Republican and Democratic Parties and their campaigns and candidates throughout the country on goods and services, including tee-shirts, rental of office space, entertainment, conventions, and advertising. Since 1998, the climbing costs of elections spent almost entirely on behalf of the two major parties and their candidates has spiked from over \$1.6 billion annually to over \$6.3 billion. (J.A. 034).

Presidential campaigns are in the business of providing the public--voters, donors, volunteers, or supporters—with information about themselves and their rivals. The campaigns function like newspapers, but with narrower subject matter. Like newspaper readers, the recipients of presidential candidate information may do nothing. They may be persuaded to vote for a candidate. They may donate time or money to a candidate's campaign. Or they may do many other things protected by the First Amendment to support or oppose a presidential candidate.

Newspaper customers are similar. They may respond to what they read by doing nothing, writing a letter to the editor, purchasing an advertised product, joining a presidential campaign, or doing many other things.

In 1988, the Republican and Democratic National Committees formed the Commission on Presidential Debates (“CPD”) to replace the League of Women Voters (“LWV”) as the sole sponsor, organizer, and conductor of general election presidential debates. (J.A. 023).

The first presidential debates occurred in 1960 between John F. Kennedy and Richard Nixon. (J.A. 026). But the debates did not become a fixture in our political firmament until at least 1976. (J.A. 037). President Kennedy attributed his victory to his debate performances against Mr. Nixon. (J.A. 034).

The CPD stepped in to organize and sponsor the presidential debates because the LWV balked at the debate terms and conditions demanded by the nominees of the two major parties in 1988. (J.A. 042). The League explained that the “demands of the two campaign organizations would perpetrate a fraud on the American voter.” *Id.*

Appellee Frank Fahrenkopf has touted presidential debates as “the Super Bowl of politics.” George Farah, *No Debate: How the Republican and Democratic Parties Secretly Control the Presidential Debates*, p. 1 (7 Stories Press 2004). Exclusion sounds the death knell for a candidate not only for electoral success, but

for influencing the national political agenda by attracting a non-trivial number of votes. (J.A. 034-036).

Plaintiffs-Appellees' Sherman Act and First Amendment claims pivoted on a 2012 Memorandum of Understanding (MOU) (J.A. 062-083) between Democratic presidential nominee Barack Obama and Republican presidential nominee Mitt Romney. The MOU borrowed the CPD's unreasonable 15% national polling criterion for participation in the three 2012 televised presidential debates. That criterion excluded Appellants Johnson and Stein.

The debates were all organized, sponsored, and conducted by the CPD. Their advertising, branding, or other value to Obama and Romney was worth hundreds of millions of dollars in the business of campaigning for the presidency. (J.A. 026).

The number of debate participants would have been winnowed to four (4), including Johnson and Stein, if Appellees' sole criterion was qualification on sufficient state ballots to have a mathematical chance of winning an Electoral College majority. (J.A. 052).

The MOU also required that Democrat nominee Obama and Republican nominee Romney boycott other presidential candidates in debate or joint media appearances outside the sponsorship of the CPD. (J.A. 044).

The Complaint alleged that the *concerted actions* of Mr. Obama, Mr. Romney and the CPD were intended to cripple or destroy competition in the multi-billion

dollar business of campaigning for the presidency. (J.A. 049-050). This was to be accomplished by limiting public information about credible presidential candidates through an exclusionary 15% national polling criterion for participation in presidential debates, i.e., an output limitation agreement. *Id.* Nothing in the Complaint challenged any action by Appellees aimed at influencing government.

In 2012, Gary E. Johnson, nominee of the United States Libertarian Party, and Jill Stein, nominee of the Green Party of the United States, qualified on enough state ballots to have at least a mathematical chance of securing an Electoral College majority. No other presidential candidates in 2012, except the nominees of the two major parties, demonstrated that threshold of popular support. (J.A. 052).

Johnson was twice elected Governor of New Mexico. *Id.*, He attracted more than 1.2 million votes in the 2012 presidential election, approximately the same number garnered by anti-war, Socialist Party presidential nominee Eugene Debs in 1912 and 1920. *Id.* In 2012, Johnson qualified on 48 state ballots. To succeed in that endeavor ordinarily requires the collection of approximately 600,000 signatures from a broad spectrum of the electorate. (J.A. 048). Mr. Johnson polled far in excess of 15% support from the national electorate in five (5) head-to-head national independent polls which pitted Johnson against the Democratic Party presidential nominee, Barack Obama. (J.A. 047).

Plaintiff Stein qualified for federal matching funds in 2012 under the Federal Election Campaign Act. She qualified for the ballot in 36 states and the District of Columbia. (J.A. 022, 048).

In 1988, only two third-party candidates had sufficient ballot access to possess a mathematical possibility of winning an electoral-college majority; in 1992, there were three; in 1996, four; in 2000, five; in 2004, four, in 2008, four; and in 2012, only two. (J.A. 052).

The MOU provided that Defendants Obama and Romney would not “(1) issue any challenges for additional debates [outside the sponsorship of Defendant CPD], (2) appear at any other debate or adversarial forums except as agreed to by the parties, or (3) accept any television or radio air time offers that involve a debate format or otherwise involve the simultaneous appearance of more than one candidate.” (J.A. 044-046, 064).

The MOU additionally included an agreement between Defendants Obama and Romney to use the Defendant CPD’s “Nonpartisan Candidate Selection Criteria for 2012 General Election Debate participation.” (J.A. 064). The third CPD criterion required a showing that “the candidate have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected public opinion polling organization, using the average of those organizations’ most recent publicly-reported results at the time of the determination.” (J.A. 045).

The presidential debates were worth hundreds of millions of dollars to Romney and Obama in 2012. (J.A. 026). The two advertised their political brand and ideas for a cumulative 270 minutes in “the Super Bowl of politics” to a television audience a little more than one-half the size of the NFL Super Bowl’s. (J.A. 065). The debates attracted audiences of 67.2 million, 65.6 million, and 59.2 million, respectively. (J.A. 029). The advertising or branding value of the 270 minutes to Appellees Obama and Romney in competing in the business of campaigning for the presidency approximated \$1 billion if the per-minute advertising rate for the NFL Super Bowl is discounted by 50% to adjust for the lesser audience ratings for the Super Bowl of politics. (The 30-second advertising rate for the 2012 NFL Super Bowl was \$3.5 million).

The Obama and Romney 2012 presidential campaigns spent less than \$1 billion each, including direct expenditures, RNC and DNC expenditures, and Super PAC expenditures. (J.A. 032-033).

In 2012, the presidential debates featuring only Obama and Romney *de facto* narrowed the viable presidential candidates to them. Appellants were crippled in their ability to influence the national political agenda by attracting votes. The denial to Appellants of reasonable access to the presidential debates caused media coverage to wither and voters to dismiss Appellants as fringe. (J.A. 054). Candidates Johnson

and Stein had no feasible alternative to the presidential debates to produce and communicate presidential candidate information. (J.A. 036, 044-046, 051, 064).

Appellees' 15% polling criterion was established for the specific purpose of excluding Johnson, Stein or any other credible competitors to Obama and Romney from the presidential debates. (J.A. 046). The national polling that enabled Romney to satisfy that threshold was head-to-head polling against Democratic nominee Obama. (J.A. 047). Polls virtually never include third party or independent candidates in match-ups against a single major party nominee. (J.A. 047).

According to an empirical analysis by prominent experts in statistics, public opinion, and political strategy, the 15% polling criterion as applicable to non-head-to-head polling can ordinarily be satisfied only by expending approximately \$270 million to acquire the necessary name recognition. (J.A. 048-049).

Modern presidential campaigns have paid staff, accountants, lawyers, fundraisers, communications directors, or otherwise. They sell merchandise or memorabilia, recruit volunteers, advertise, deliver speeches, take polls, and consult focus groups. In August 2012 alone, the Obama campaign spent \$4.37 million in campaign staff, and the Romney campaign spent \$4.04 million on staff payroll; the Obama campaign employed 901 persons, and the Romney campaign 403. (J.A. 033).

The aggregate sums spent during the 2012 presidential cycle including campaign and independent expenditures, was \$2, 621, 415, 792 throughout all 50

States. The Obama campaign spent \$553.2 million, the DNC spent \$263.2 million, and the largest Obama Super PACs spent \$58 million. The Romney campaign spent \$360.4 million, the RNC spent \$284 million, and SuperPACs supporting Romney spent \$200 million. During the 2012 campaign, more than one million television advertisements were purchased by the Obama and Romney campaigns and their supporters. The Obama and Romney campaigns combined spent \$78 million on online advertising. (J.A. 032-033).

The presidential debates market is big business. Debate hosts and the municipalities and States where the hosts are located expend millions of dollars in direct and indirect costs for the economic ripple effects of the debates. In hosting the first 2012 presidential debate, Denver University paid \$1.65 million to the CPD. The Colorado Department of Transportation estimated expenditures of \$30,000-\$40,000 for traffic control and barricades. The City of Denver incurred substantial expenses, including extra policing costs. According to Appellee Michael D. McCurry, for a university to host a presidential debate, “the financial commitment the school makes is a minimum of \$1.5 million,” which is paid to the CPD for production fees. (J.A. 031-032). Centre College spent approximately \$3.3 million to host the 2012 vice presidential debate. Hofstra University spent \$4.5 million to host a 2012 presidential debate. Lynn University paid \$5 million. *Id.*

Corporate sponsors of the presidential debates collectively contribute millions of dollars to the CPD each election cycle. It received 6.8 million in 2007 and 2008, and spent \$2.3 million in 2008. In 2012, the “National Debate Sponsors” who funded the Commission’s activities included Anheuser-Busch Companies, The Howard G. Buffet Foundation, Sheldon S. Cohen (past I.R.S. Commissioner), Crowell & Moring LLP (a law firm), International Bottled Water Association, The Kovler Fund, and Southwest Airlines. They collectively donated millions of dollars to the Commission, and some even piggybacked on the debates to promote their products. (J.A. 029).

Debate sites throughout the United States have become “corporate carnivals” where sponsors provide their marketing and lobbying materials and products to journalists and politicians. (J.A. 029).

The District Court granted Defendants’ Motion to Dismiss with prejudice for want of standing and for failure to state a claim under Rule 12 (b) (1) and (6) of the Federal Rules of Civil Procedure. (J.A. 084). The Court declared that the Complaint failed: (1) to allege any concrete injury to Appellants proximately caused by Appellees (J.A. 123-126)); (2) to allege antitrust injury (J.A. 126-127); and, (3) to allege a commercial market cognizable under the Sherman Act (J.A. 126-130). The Court below further concluded that the First Amendment protected Appellees’ concerted activities. (J.A. 130-132). Finally, the Court maintained that the

limitations on restricting free speech and association imposed by the First Amendment should not be applied to the concerted activities of Appellees in unreasonably excluding Appellants from the presidential debates because no government action was implicated. (J.A. 132-137).

IV. SUMMARY OF THE ARGUMENT

The District Court erred in denying that the concerted actions of Obama, Romney, and the CPD to exclude Johnson and Stein from the presidential debates was the proximate cause of their exclusions from the broadcasts of the debates and the loss of presidential campaign advertising, branding, fundraising or other value worth hundreds of millions of dollars. In the eyes of the law, a defendant's acts are deemed the proximate cause of injuries that were foreseeable. Appellees clearly foresaw that their unreasonable exclusions of Johnson and Stein from the debates would cause them to lose access to television audiences worth hundreds of millions of dollars—concrete injury sufficient to satisfy Article III standing.

The District Court further erred in denying Appellants Sherman Act standing on the theory that the multibillion dollar business of campaigning for the presidency is indistinguishable from holding public office or conducting government. To the contrary, that business of running a presidential campaign is indistinguishable from the newspaper industry which is covered by the Sherman Act. The harm to competition caused by Appellants' unreasonable exclusions from the presidential

debates was the loss of public information about the qualifications of credible presidential candidates essential to the fairness or legitimacy of the presidential electoral process and the national political agenda.

Contrary to the District Court, the multibillion dollar business of campaigning for the presidency involves both politics and commerce. They are not mutually exclusive. The District Court errantly maintained that the concerted actions of Appellees in unreasonably excluding Appellants from the presidential debates fell within the *Noerr-Pennington* exemption from the antitrust laws, i.e., that Appellees' concerted actions were calculated to influence government action. That assertion is unsupportable. Nothing in the Complaint challenges efforts to influence government in any respect.

The District Court again erred in declaring that the challenged concerted actions of Appellees in organizing, sponsoring, and conducting presidential debates were protected by the First Amendment. The Supreme Court repudiated that understanding of the First Amendment in *Associated Press v. United States*, 326 U.S. 1 (1945), a landmark precedent which the District Court completely ignored.

Finally, the District Court wrongly held that First Amendment limitations did not apply to the presidential debates because no government action was implicated. The rationales of *Marsh v. Alabama*, 326 U.S. 501 (1946) and *Terry v. Adams*, 345 U.S. 461 (1953), require a contrary conclusion. Presidential debates are as

dispositive of the outcome of presidential elections as Jaybird Party primaries were to the outcome of county elections in *Terry*, which applied the Fifteenth Amendment to private political activity.

V. ARGUMENT

A. Standard of Review

The standard of review of judgments granting motions to dismiss for want of jurisdiction or failure to state a claim under Rule 12 (b) (6) of the Federal Rules of Civil Procedure is *de novo*. *Abdelfattah v. U.S. Dept. of Homeland Sec.*, 787 F.3d 524, 532-33 (D.C. Cir. 2015); *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 874 (D.C. Cir. 2014).

In so doing, this Court “treat[s] the complaint’s factual allegations as true and **must** grant [the Appellants] the benefit of all inferences that can be derived from the facts alleged.” *Abdelfattah v. U.S. Dept. of Homeland Sec.*, 787 F.3d at 529 (Emphasis added; citations omitted).

B. **The District Court erred in holding that the Complaint failed to allege concrete injury to Johnson and Stein proximately caused by Appellees’ concerted actions to unreasonably exclude them from the 2012 presidential debates.**

The District Court argued that the Complaint failed to allege candidates Johnson or Stein suffered advertising, branding, or fund raising injury proximately caused by the concerted actions of the CPD, Romney, and Obama to exclude them from the 2012 televised presidential debates. According to the District Court, the

proximate cause of Appellants' injuries was the media for deciding to broadcast the debates, not Appellees: "[p]laintiffs' alleged injuries are wholly speculative and are dependent entirely on media coverage decisions." (J.A. 125).

Contrary to the District Court, media coverage of presidential debates was as certain as the force of gravity. In the eyes of the law, Appellees' actions were the proximate cause of all consequences that were foreseeable—including the broadcast of presidential debates without Johnson and Stein.

The media has never boycotted a single presidential debate, the "Super Bowl of politics." Coverage drives up audience ratings and advertising rates. The 2012 presidential debates were in fact broadcast. They attracted audiences of 67.2 million, 65.6 million, and 59.2 million, respectively.

The District Court speculated that if the presidential debates had included Johnson and Stein because they had qualified on sufficient state ballots to have a mathematical chance of winning an Electoral College majority, then broadcasters might have boycotted the events. Nothing in the record, experience, or common sense supports that imaginative fantasy. There was a virtual certainty that broadcasters would have covered the debates if they had included four (4) participants because of the allure of audience ratings and premium advertising rates. Broadcasters covered the 1992 debates that featured three (3) candidates, including the independent candidate Ross Perot. Presidential primary debates are routinely

broadcast with as many as ten participants. There is no broadcasting history that suggests viewers would not watch presidential debates with four participants. There were more viewers in 1992 when there were three (3) participants than in 1996 when there were only two (2). Indeed, viewership climbed in 1992 when Independent candidate Ross Perot was permitted to debate the two major party nominees. When Perot was excluded in 1996, viewership dropped. (J.A. 028).

In sum, Appellees knew for a certainty that the 2012 Super Bowl of politics would be broadcast; and, that the exclusions of Appellants would cause them to lose staggering advertising, branding, fund raising, and other value worth hundreds of millions of dollars in the multibillion dollar business of campaigning for the presidency. Appellees' actions were the proximate cause of Appellants' losses if they were reasonably foreseeable, which they were. *Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99 (N.Y. 1928); PROSSER & KEETON ON TORTS, Sections 41-45 (5th Ed. 1984).

Even if the 2012 presidential debates had not been broadcast, Appellants' exclusions would still have caused them foreseeable injury (albeit of lesser magnitude) in lost public stature, prestige, and fund raising ability associated with debating the presidential nominees of the two major parties.

The District Court obtusely maintained that injuries to Appellants Johnson and Stein occurred before Appellees excluded them from presidential debates

because their injuries flowed from their failure to satisfy the third criterion's allegedly illegal 15% polling threshold. (J.A. 125). But if anything is cognizable as Article III injury proximately caused by a defendant, it is foreseeable injury to the plaintiff directly caused by the defendant's allegedly illegal actions.

Additionally, the Supreme Court explained in *Flast v. Cohen*, 392 U.S. 83, 99 (1968): “[t]he ‘gist of the question of standing’ is whether the party seeking relief has ‘alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’” *Id.*, quoting *Baker v. Carr*, 369 U. S. 186, 204 (1962).

Appellants Johnson and Stein have enormous personal stakes in the outcome of their Sherman Act and First Amendment claims that assure a sharpened and adversarial illumination of the legal issues to enable this Court to make correct decisions. If their personal stakes were tiny, they would not have initiated this litigation. Judge Learned Hand observed: “I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death.” See “*The Deficiencies of Trials to Reach the Heart of the Matter*”, *3 Lectures on Legal Topics* 89, 105 (1926). If Appellants Johnson and Stein are successful, they will be entitled to handsome treble damage recoveries, attorney’s fees, and other relief. They have

a stake in the outcome of this litigation to insure a forceful presentation of their legal arguments.

The District Court denied that Appellants Johnson and Stein had standing as competitors of Appellees in the multibillion dollar business of campaigning for the presidency because the Complaint failed to allege government action that purportedly gave Appellees a competitive advantage over them. (J.A. 125-126). But that was not the Appellants' standing argument. Appellants alleged direct competition between Johnson and Stein and Romney and Obama in the business of campaigning for the presidency; and, that the former suffered an enormous competitive handicap because of the concerted actions of the latter to unreasonably exclude them from presidential debates and boycott them in joint media appearances.

In sum, the District Court erred in dismissing the Complaint for want of Article III standing.

C. The District Court erred in holding that Appellants failed to allege facts sufficient to establish antitrust standing.

The District Court wrongly insisted that the multibillion dollar business of campaigning for the presidency does not involve a marketplace or commerce within the ambit of the Sherman Act. *Id.*

The output or product produced by competitors in the business of campaigning for the presidency is information about themselves or other presidential candidates. They hope the information will elicit donations, volunteer services,

votes, or other support from the public. The allegedly illegal concerted actions of Romney, Obama and the CPD constituted an output limitation agreement, i.e., an agreement to limit the output of presidential candidate information. That objective would be effectuated by unreasonably excluding Johnson and Stein from the 2012 presidential debates; boycotting presidential debates except those sponsored by the CPD; and, boycotting joint media appearances with Johnson or Stein.

Among other things, Appellees' output limitation agreement enabled the two major party nominees to escape questioning by Johnson and Stein or by a sponsor independent of the Democratic and Republican parties. Competition in the business of campaigning for the presidency was harmed because the public was less well informed about the qualifications of credible presidential candidates in choosing to align themselves politically, make contributions, volunteer services, or otherwise.

Output limitation agreements are classic violations of the antitrust laws. *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 99 (1984) (“By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade.”)

The District Court asserted without elaboration that the multi-billion dollar business of campaigning for the presidency is tantamount to holding a political office. (J.A. 127). But the distinctions are monumental. Holding a political office

does not place the officeholder in competition with anyone else. Only one person can occupy an office at a time. Thus, there can be no concerted action in holding a political office that would trigger section 1 of the Sherman Act. Further, occupying a political office cannot constitute monopolization under Section 2 because the law precludes more than one occupant at a time.

In contrast, the business of campaigning for the presidency features competitors, paid staff, fund-raising, voter education, travel, lodging, food, and advertising expense, sales of candidate paraphernalia, professional and consulting fees, and other earmarks of traditional businesses.

The District Court cited *Sheppard v. Lee*, 929 F. 2d 496, 498 (9th Cir. 1991), for the proposition that “neither the business of conducting the government nor the holding of a political office constitutes ‘trade or commerce’ within the meaning of the Sherman Act.” *Id.* True enough, but beside the point. Campaigning for the presidency is neither the business of conducting government nor the holding of a political office. It is a private business undertaking.

The District Court asserted that calling political activity a market place does not make it so. *Id.* True. But the District Court’s *ipse dixit* denying that any politically connected activity can be a marketplace similarly doesn’t make it so.

Political activity is a market place when it involves billions of dollars of commerce as alleged in the Complaint in the 2012 business of campaigning for the

presidency. Suppose a presidential candidate sold \$100 million worth of “Make America Great” caps to promote his candidacy. It would be illogical to deny that such commerce did not involve a marketplace for caps because a significant or exclusive motivation for the sales was political.

Contrary to the assumption of the District Court, there is no bright line between business and politics. Ohio Senator Mark Hanna observed as early as 1895: “There are two things that are important in politics. The first is money and I can’t remember what the second one is.”

The District Court faulted the Complaint for failing to allege a cognizable antitrust marketplace. (J.A. 127). But the multibillion dollar business of campaigning for the presidency implicates an obvious marketplace: the selling of candidate ideas and characteristics to voters through campaign stops, social media, websites, television and radio appearances, speeches, endorsements, white papers, advertisements, campaign strategies, or otherwise. The buyers in the marketplace respond with campaign donations, endorsements, volunteer work, election-day votes, or all of the above.

The campaign donations of the DeVos family to candidates supporting charter schools and taxpayer-funded vouchers for private and religious schools show how a political marketplace works. According to *The Washington Post* (“Watchdogs see conflict with DeVos family’s donations to Senators on panel,” A5, January 8, 2017):

“[Betsy DeVos, nominated as Secretary of Education] has previously said that her family expects a return on investments in political candidates and causes...

“Now I simply concede the point...They are right. We do expect some things in return. We expect to foster a conservative governing philosophy consisting of limited government and respect for traditional American values.”

The District Court’s reliance on *Sheppard* for the proposition that “running for political office” is not commerce under the antitrust laws was misplaced. *Id.* The panel of the United States Court of Appeals for the Ninth Circuit expressly stated: “Dismissal of *Sheppard*’s case was proper because neither the business of conducting government nor the holding of political office constitutes ‘trade or commerce’ within the meaning of the Sherman Act.” 929 F. 2d. at 498. The Court said nothing about the multi-billion dollar business of running for the presidency of the United States or campaigning for any other political office.

Sheppard was a road maintenance worker on the Navajo Indian reservation who was fired pursuant to local law because he filed petitions declaring his intention to run for a seat on the Apache County Board of Supervisors. *Sheppard* never alleged that he either mounted a campaign for the Board or that the business of campaigning for the Board constituted trade or commerce within the meaning of the Sherman Act. The Court of Appeals never addressed that issue.

In sum, the District Court erred in holding that the Complaint failed to allege antitrust injury on the theory that the multi-billion dollar business of campaigning for the presidency does not entail trade or commerce under the Sherman Act.

D. The District Court erred in concluding that the Complaint failed to allege a commercial market under the Sherman Act.

The District Court asserted: “When a case involves political opponents and political objectives, not commercial competitors or market place goals, antitrust laws do not apply.” (J.A. 128). That assertion cannot withstand scrutiny. It falsely assumes that political opponents and political objectives cannot overlap with commercial competitors or market place goals.

Suppose the two leading presidential contenders agree to fix the price of their political T-shirts to boost their campaign war chests. Is there any doubt that the price fixing would violate the Sherman Act despite a political motivation for the agreement between the two opponents? The District Court’s statement would wrongly bestow antitrust immunity on price fixing, a per se antitrust violation.

None of the cases cited by the District Court support its breathtaking political immunity doctrine.

City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 383 (1991), relied upon by the District Court (J.A. 128), does not support a wholesale politics exemption from the antitrust laws. The Court there held that attempts to influence government action—which implicates freedom of speech or the right to petition—

are not governed by the Sherman Act. Writing for the majority, Justice Antonin Scalia explained: “[T]he federal antitrust laws also do not regulate the conduct of private individuals in seeking anticompetitive action from the government,” a principle first enunciated in *Eastern R.R. President’s Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-141 (1961).

The Complaint, however eschews challenge to any action of Appellees seeking to influence government action. The Complaint challenges alleged anticompetitive concerted actions of Appellees divorced from government involvement.

The District Court’s invocation of *Counsel for Emp. & Econ. Energy Use v. WHDH Corp.*, 580 F. 2d 9, 12 (1st Cir. 1978), was even more off point. (J.A. 128-129). There, a political committee alleged broadcasters had violated the antitrust laws by agreeing to provide an amount of free advertising time to supporters of an initiative petition which the committee opposed. Plaintiff and Defendants were not competitors. Moreover, Defendants were seeking to comply with their obligation to air conflicting viewpoints under the Fairness Doctrine of the Federal Communications Commission. They had no anticompetitive objective. The case had nothing to do with concerted action by competitors in the business of campaigning for the presidency or other political office to cripple or destroy their rivals.

The First Circuit in *WHDH* stated that “access to the public media by expressly political organizations for the purpose of influencing political decisions of the general electorate” was not within the ambit of the Sherman Act. 580 F. 2d at 12. Appellants in this case have never sought access to the media and never sued media defendants. The Complaint *sub judice* challenged only the concerted actions of Appellees in establishing unreasonable terms for participation in presidential debates for the purpose of destroying competition in the multibillion dollar business of campaigning for the presidency by limiting public information about the views and character of credible candidates.

Suppose the broadcasters in *WHDH* had agreed to fix the price of political advertising involving the initiative petition at \$500,000 per minute. It is inconceivable that the Court of Appeals would have upheld such a naked restraint of trade as shielded from antitrust scrutiny because the price-fixing involved political advertising.

The District Court also erred in maintaining that ideas are not within the ambit of the antitrust laws. (J.A. 129). Newspapers compete in selling ideas. *The Wall Street Journal* is not *The New York Times*. *The Washington Post* is not *The Washington Times*. Books, radio, television, drama, movies, and opera compete in selling ideas. All of these activities are covered by the antitrust laws. See e.g.,

Associated Press v. United States, 326 U.S. 1 (1945); *Lorain Journal v. United States*, 342 U.S. 143 (1951).

The District Court's reliance on *DataCell ehf v. Visa., Inc.*, No. 1:14-cv-1658, 2015 WL 4624714, at *7 (E.D. Va. July 30, 2015), to support the sweeping proposition that ideas disseminated through news or political campaigns escape antitrust scrutiny was ill-conceived. In *DataCell*, two credit card companies allegedly violated the antitrust laws by instructing their licensees to stop payment processing for DataCell and its partner, Sunshine Press, after controversy had been ignited by the latter's website, WikiLeaks. Plaintiff and Defendants were not competitors. Defendants were not in the business of selling ideas. They were in the business of licensing credit cards. The Complaint alleged that Defendants "injured the media market by suppressing the market place [sic] of ideas." *Id.*

In dismissing the claim, the District Court noted that the Complaint failed to allege any facts or inferences from facts showing the media market was harmed. In obiter dicta, the Court asserted, "If the products in DataCell's markets are ideas, then the antitrust laws cannot help DataCell. Congress created antitrust laws to protect free market competition, not to protect the free exchange of ideas."

That statement was much too sweeping. It completely ignored the antitrust gospel of the Supreme Court in *Associated Press, supra*. In that case, the publishers of more than 1200 newspapers formed AP as a membership cooperative association

to collect, assemble, and distribute news obtained by direct employees, employees of the member newspapers, or otherwise. If the newspaper market is anything, it is a marketplace of ideas. *Associated Press*, 326 U.S. at 3.

AP By-Laws prohibited AP members from selling news to non-members, and endowed each AP member with virtual veto power over membership sought by non-member competitors. *Id.* at 8-9. The Supreme Court affirmed a three-judge federal district court holding that the By-Laws violated the Sherman Act by burdening access to AP news, which provided AP members a substantial competitive advantage over non-members in the newspaper business. *Id.* at 23.

AP argued “that the restrictive By-Laws should be treated as beyond the prohibitions of the Sherman Act, since the owner of the property can choose his associates and can, as to that which he has produced by his enterprise and sagacity, efforts or ingenuity, decide for himself whether and to whom to sell or not to sell.” *Id.* at 14-15. Justice Hugo Black, writing for the Court, retorted that the AP By-Laws were *collective*, not individual decisions, and that independent businessmen were acting in unlawful combination. *Id.* at 16.

The Court concluded that it was of no moment to the Sherman Act that AP news was not *indispensable* to newspaper operations, or that rival news agencies were available to non-AP members. It was enough to establish a violation that non-AP member newspapers would more than likely be at a “competitive disadvantage”

without AP news in competing with an AP member. The Court's conclusion rested on the district court's finding that "AP is a vast, intricately reticulated organization, the largest of its kind, gathering news from all over the world, and the chief single source of news for the American press, universally agreed to be of great consequence." *Id.*, 326 U.S. at 18.

Speaking for the majority, Justice Hugo Black answered AP's argument that application of the Sherman Act to compel AP newspaper members to share news or associate with non-member competitors violated its First Amendment rights as follows:

"[T]he argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment...It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. [footnote omitted] The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."

Associated Press, 326 U.S. at 21.

The District Court completely ignored *Associated Press* in wrongly concluding that competition in ideas can never be an ingredient of a cognizable antitrust market under the Sherman Act.

The District Court's reliance on *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 597 (1988), was also unwarranted. (J.A. 129). The case rejected the argument that actions bristling with politics, i.e., undertaken for the purpose of the enactment of laws or other government action, were immune from antitrust scrutiny. If it were otherwise, the Court reasoned, "Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms." *Id.* at 503.

The District Court was deaf to Justice William Brennan's admonition in *Allied Tube* of the need for great care before sweeping activity with a political nexus into the protective ambit of *Noerr-Pennington*: "[i]t is admittedly difficult to draw the precise lines separating anticompetitive political activity that is immunized despite its commercial impact from anticompetitive commercial activity that is unprotected despite its political impact...." *Id.* at 507 n.10.

The District Court's reasoning contradicts the Supreme Court's decision in *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990). There,

Justice John Paul Stevens, writing for the majority, denied antitrust immunity to a lawyers' collective boycott in refusing representation of indigent criminal defendants under the Criminal Justice Act. The boycott's purpose in *FTC v. Superior Court Trial Lawyers Association* was to exert pressure on government to enact legislation to raise the compensation rates for CJA work. *Id.*, 493 U.S. 411.

The District Court's reasoning in this case is directly contrary to the Supreme Court's holding and would have granted the boycotting lawyers immunity under the theory that no political activity is within the reach of the Sherman Act. (J.A. 129). ("Congress did not need to include an exception for political activity because the statutory language does include political activity in the first place."); *see* 493 U.S. 424-25.

In sum, contrary to the District Court, the multibillion dollar business of campaigning for the presidency - including competition between candidates based on views and character - is a cognizable antitrust market under the Sherman Act.

E. The District Court erred in holding that the alleged concerted activities of Appellees in organizing, sponsoring and participating in presidential debates with unreasonable terms and conditions calculated to destroy competition in the multi-billion dollar business of campaigning for the presidency was protected by the First Amendment.

The District Court argued that it "could not require Defendants to include Plaintiffs in the debates because such an order would violate the First Amendment prohibition on forced speech and association." (J.A. 130). The District Court

ignored the fact that Appellants were seeking damages, not an order compelling their participation in the 2012 or any other presidential debates.

More important, Appellants have never argued an absolute right of participation. Neither have they questioned the rights of Appellees Romney and Obama individually to have decided the terms and conditions under which they would participate in presidential debates. The Complaint *sub judice* challenges Appellees' *concerted actions*, just as the complaint in *Associated Press* challenged the *concerted actions* of newspaper competitors. The Complaint acknowledged the right of Appellees to set reasonable terms and conditions for participation in presidential debates, but alleged the terms and conditions they chose were unreasonably exclusionary and superfluous to insuring only credible candidates were on the stage.

Associated Press rejected the AP's claim that it enjoyed a limitless First Amendment right to determine with whom to associate in the collection and distribution of news or ideas:

“Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. [footnote omitted] The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.”

326 U.S. at 21.

Appellees do not enjoy more First Amendment protection than AP did. Appellees are not even news organizations which enjoy premium First Amendment protection because they provide organized expert scrutiny of government. See Address by Justice Stewart, Yale Law School (Nov. 2, 1974), reprinted, except for opening courtesies, in Stewart, "*Or of the Press*," 26 HASTINGS L.J. 631 (1975). When they engaged in concerted activity to destroy or severely handicap their credible rivals by diminishing public access to presidential candidate information, Appellees lost the First Amendment protection that might have been afforded individual actions.

Contrary to the District Court, the Supreme Court's decisions in *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981) and *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), are not to the contrary. (J.A. 130). Those cases concerned the right of private organizations with professed ideological or philosophical unity to shield themselves from outsiders who would frustrate or confuse the advancement of their beliefs. In this case, Romney and Obama were political adversaries. They were not organizations. They had no common ideological or philosophical convictions. When the two debated, they were not associating with one another to advance a common objective or philosophy. They were disputing one another. Neither diluted the

other's messages. They associated to compete for votes and money, and the association had no enduring existence.

Appellants' participation in the debates would not have interfered with any unity between Romney and Obama because none existed. Participation would not have blunted or impaired the ability of the two major party nominees to communicate their discrete ideological or philosophical convictions or beliefs. The audience would not have attributed the beliefs or views of Johnson and Stein to Romney and Obama, or vice versa. There would have been no cognizable associational or expressive harm to either major party nominee by the participations of Johnson and Stein in presidential debates, just as there was none in *Associated Press* by requiring AP members to admit new members and to associate with them on reasonable terms.

Appellees' *concerted action* in this case to unreasonably exclude Appellants from presidential debates or joint media appearances distinguish each of the cases relied upon by the District Court below: *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Of Boston*, 515 U.S. 557 (1995); *Perot v. FEC*, 97 F. 3d (D.C. Cir. 1996); and, *Sistrunk v. City of Strongville*, 99 F. 3d 194 (6th Cir. 1996). None of these cases involved concerted action among competitors. (J.A. 131).

In sum, the District Court erred in concluding that the concerted actions of Appellees in unreasonably excluding Appellants from the 2012 presidential debates for the purpose of crippling or destroying competition in the multibillion dollar business of campaigning for the presidency were protected by the First Amendment.

E. The District Court wrongly dismissed Appellants' First Amendment claim.

Appellants argued that the presidential debates—the Super Bowl of politics—should be constrained by the First Amendment because of their decisive role in the election of the President and the national political agenda.

President John F. Kennedy attributed his debate performances against Richard Nixon to his victory at the polls. A candidate's exclusion from the debates is not only a death knell to electoral success, but a death knell to influencing national policy by attracting a material number of votes. The 1992 presidential elections are illustrative of the importance of presidential debates in campaigning for the presidency. Independent Ross Perot was permitted to debate William Jefferson Clinton and George H.W. Bush.

Perot injected balanced budgets into the presidential campaign, a topic that would otherwise have been slighted by the major party nominees. Mr. Perot climbed from 7 percent popular support when the debates began to 19 percent on polling day. Despite his defeat by President Clinton, Mr. Perot's balanced budget plank became

a centerpiece of the Clinton Administration. Leon Panetta, Clinton's Director of the Office of Management and Budget, has highlighted balanced budgets as a signal achievement of the Clinton presidency. Leon Panetta, *Worthy Fights* pp. 103-122 (Penguin Press 2014).

The Supreme Court has recognized that form should not be exalted over substance in adjudicating first-order constitutional rights. In *Marsh v. Alabama*, 326 U.S. 501 (1946), the Court treated a company town as a state actor in evaluating its ban on the distribution of religious literature. The company operated as a *de facto* municipality. The purpose of the First Amendment would have been crippled if customary methods of exercising free speech were eliminated simply because citizens resided in a *de facto* rather than in a *de jure* municipality.

In *Terry v. Adams*, 345 U.S. 461 (1953), the "Jaybird Party," a private political party, organized primary elections that excluded blacks. As a political reality, winning that primary election meant assured victories in the Democratic primary and the general election. The latter simply rubber-stamped the Jaybird Party's primary election results. The Court condemned the private racially-exclusive primaries: "[i]t violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election."

The violation was not cured simply because voters could fully participate in the Democratic primary and general election pursuant to the Supreme Court's ruling in *Smith v. Allwright*, 321 U.S. 649 (1944), or otherwise. It wasn't cured by the ability of black voters to cast write-in votes, vote for independent or third-party candidates, or form a new political party. What counted were political realities, as Justice Hugo Black emphasized:

“The only election that has counted in this Texas [Fort Bend] county for more than 50 years has been that held by the Jaybirds from which Negroes were excluded. The Democratic primary and the general election have become no more than the perfunctory ratifiers of the choice that has already been made in Jaybird elections from which Negroes have been excluded.”

Both *Marsh* and *Terry* teach that in determining whether a private actor should be subject to restrictions imposed by the Constitution, the decisive question is whether the purpose of the constitutional limitation would be defeated or severely impaired if it did not regulate the private activity at issue. This is a fact-specific determination ordinarily requiring discovery and an exploration of the impact of the challenged private party's actions on the vindication of constitutional rights or interests.

A fair presidential election process is at the apex of constitutional concerns. An unfair process not only undermines the legitimacy of the victor, but also the legitimacy of the victor's mandate. If the public is shortchanged in obtaining access to information about credible presidential candidates, votes will be less well-

informed and important national issues may be neglected. The winner will be less likely to reflect a genuine national consensus.

The cornerstones of the presidential election process are the presidential debates. An uninvited candidate has zero chance of either winning, of having his views influence the victor, or of raising serious money to disseminate his own views. For good or for ill, the public perceives a non-participant as a marginal, fringe player unworthy of attention.

In 2012, the advertising, branding, or fund-raising value of presidential debate participation by Appellees Obama and Romney approached a staggering \$1 billion, which provided them a monumental advantage over their credible rivals. That sum is greater than what the two major party nominees spent from their own resources. As a political reality, presidential debates narrow the candidates on presidential ballots to the debate participants. Voters seeking a winner - which include the vast majority - have no other viable choices.

To be sure, a non-participant in presidential debates could still receive write-in votes and could still appear on the ballot. But in *Terry v. Adams*, exclusion from the Jaybird Party did not prohibit the excluded candidates or voters from writing in the names of other candidates or otherwise voting in the Democratic primary or general election. But these options did not deter the Court from concluding that the

Jaybird Party primary was in fact a full dress rehearsal for the Democratic primary and general election, and was thus governed by the Fifteenth Amendment.

The District Court wrongly argued that in *Marsh*, there were no other alternatives to religious leafleting, whereas here Appellants campaigned independently of participation in presidential debates in 2012. (J.A. 133-134). The distinction will not wash. In *Marsh*, religious information could have been disseminated by radio outside the control of the company town. The leafleters might have sought to rent space to deliver sermons or to sell religious literature to the company town's residents. The key to the *Marsh* holding was that these alternatives were far less attractive methods for communicating religious information than leafleting was. That advantage caused the Court to subject the company's leafleting ban to the First Amendment.

In this case, as in *Marsh*, the alternatives to campaigning for the presidency outside participation in presidential debates were vastly less attractive—the difference between playing in the NFL Super Bowl and playing flag football in a back yard.

Other cases relied upon by the District Court are easily distinguishable. *DeBauche v. Trani*, 191 F. 3d 499, 509 (4th Cir. 1999), concerned a single debate among selective Virginia gubernatorial candidates. A governorship is far less important to the nation's political stability and the legitimacy of government

officials than is the presidency of the United States. Moreover, there was no showing that participation in the debates was indispensable to electoral success. Finally, there was no showing of the advertising, fund raising or branding value of the debates to the business of campaigning for governor.

San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522 (1987), a Lanham Act case concerning the United States Olympic Committee, whose importance to the functioning of the Constitution and national political stability is trifling.

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998), is unconvincing because it concerned a debate among Senate candidates, not candidates for the presidency; there was no showing that participation in the debates was indispensable to electoral success or influence; and, there was no showing that the selection criteria for participation were unreasonable. In contrast, Appellants here make precisely that allegation, i.e., that Appellees' 15% national polling threshold was unreasonable. A criterion requiring qualification on sufficient state ballots to have a mathematical chance of winning an Electoral College majority would have excluded all but four presidential candidates from presidential debates in 2012—a number far short of cacophony.

Chandler v. Georgia Public Telecomm. Comm'n, 917 F. 2d 486 (11th Cir. 1990) is unpersuasive because the election at issue was the relatively obscure

position of lieutenant governor of Georgia; the selection criteria were “reasonable;” there was no showing that participation in the debate was indispensable to electoral success or influence; and, there was no showing that participation in the debate gave a dispositive advertising, branding, or fund raising advantage to the participants over their rivals.

Jenness v. Fortson, 403 U.S. 431 (1971) is inapposite because the Court there applied a reasonableness test to ballot access rules. A reasonableness test is precisely what Appellants sought in challenging Appellees’ presidential debates qualification criteria, in particular the 15% national polling threshold.

The District Court also wrongly relied on this Court’s decision in *Johnson v. F.C.C.*, 829 F.2d 157 (D.D. Cir. 1987). There, a presidential nominee of the Citizens Party, Sonia Johnson, sought inclusion in the 1984 presidential debates sponsored by the League of Women Voters. Johnson argued, among other things, that her exclusion would violate the First Amendment because presidential debates decisively influence the outcome of the general presidential election. This Court stated the argument as follows:

“Petitioners contend...that participation in nationally-televised presidential and vice-presidential debates is now a prerequisite to election. They insist...that their exclusion from the debates effectively excluded them from the ballot and denied voters sympathetic to their cause their First Amendment right to associate through the election and to cast their votes effectively for the candidate of their choice.”

Johnson v. F.C.C., 829 F. 2d at 164.

The Court misread *Terry* in rejecting plaintiff's exclusion argument in *Johnson v. F.C.C.* The Court errantly reasoned, "[s]ince the winners of Jaybird Party elections typically ran without opposition in Democratic primaries and general elections, black voters were effectively deprived of meaningful participation in the election of county officials." *Id.* However, *Terry* did not deny that black voters were free to cast write-in ballots, run candidates in the Democratic primary, form a new political party with its own nominees for county office, or otherwise participate in county elections. These methods of participation might have been less influential in the election of county officials than participation in the Jaybird Party primary. But the inability of a group of voters to elect a candidate of their choice does not mean their participation in the electoral process was devoid of meaning. In the District of Columbia, for example, Republican Party members are not denied meaningful participation in elections to Mayor or non-voting delegate to the United States Congress simply because their chances of selecting a Republican Party winner are infinitesimal.

Terry instructed that the demonstrable political consequences of a practice must be examined to determine whether constitutional limitations should be triggered. Judge Spottswood Robinson noted in the *Johnson v. F.C.C.* decision that "voters were not hindered in their ability to cast their votes for petitioners or

otherwise take part in the electoral process merely by virtue of petitioner's exclusion from the televised debates." But the same observation could have been made of the blacks excluded from participation in the Jaybird Party primary elections in *Terry*.

As noted above, the disenfranchised black voters in Fort Bend, County could fully participate in the Democratic primary election, in the general election, cast write-in votes for persons they supported, form new political parties, and otherwise do all those things that are available under the First Amendment to influence the outcome of the primary or general elections—including the purchase of advertising, leafletting, participation in voter registration campaigns, or delivering public speeches. Yet those voting or campaign opportunities did not prevent the Supreme Court from applying the Fifteenth Amendment to the private Jaybird Party.

This case is also distinguishable on its facts from *Johnson v. F.C.C.* Here, the two major party nominees agreed to boycott any presidential debates host other than the CPD, the alter ego of the Republican and Democratic Parties. In *Johnson v. F.C.C.*, the League of Women Voters did not prohibit the major party nominees from debating with other sponsors who might have invited Appellants to participate. In addition, here the two major party nominees expressly agreed in writing to boycott rival candidates Appellants Johnson and Stein in any joint media appearances, which made participation in the presidential debates even more critical to them than they were to the plaintiff in *Johnson v. F.C.C.*

At a minimum, Appellants herein should have been permitted discovery to prove as a factual matter that in 2012 their exclusions from the presidential debates under the conditions set forth in the MOU impaired their ability to influence the outcome of the general election every bit as much as the exclusions of black voters in the Jaybird Party primaries handicapped their ability to influence the outcomes of the Democratic primary and general elections for county offices in Fort Bend County.

The District Court erred in dismissing Plaintiffs' First Amendment claim with prejudice for failure to state a claim under Rule 12 (b) (6) of the Federal Rules of Civil Procedure.

VI. CONCLUSION

The District Court's judgment dismissing the Complaint with prejudice with no opportunity to amend should be reversed and this case remanded.

Respectfully submitted this 31st day of January, 2017.

s/ Bruce Fein

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, I electronically served on counsel of record both the foregoing Appellants' Initial Brief and the Joint Appendix, by filing each with the Clerk of the United States Court of Appeals for the District of Columbia by using the CM/ECF system.

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