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.

REPLY BRIEF OF APPELLANTS

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I. SUMMARY OF THE ARGUMENT

Appellants Gary Johnson 2012, Inc., Libertarian National Committee, James P. Gray, Green Party of the United States, Jill Stein for President, Cheri Honkala, Gary Johnson and Jill Stein do not claim either a Sherman Act or First Amendment categorical right to have participated in the 2012 presidential debates as a means of campaigning for the presidency in competition with Appellees Barack Obama and Mitt Romney because they were rival candidates, *simpliciter*. Johnson and Stein claim only that (a) the criteria established by Appellees for participation in 2012 failed to satisfy the standard of reasonableness mandated by the statute and the Constitution; and, (b) the agreement between Obama, Romney, and the Bi-Partisan Commission on Presidential Debates (CPD) to establish a fifteen percent (15%) national polling criterion for the purpose of excluding all but the nominees of the Democratic and Republican parties was unreasonable.

Johnson and Stein agree that the statutory and constitutional standard does not prohibit limiting the participants to a reasonable number to avoid a Tower of Babel. Johnson and Stein also agree that requiring them to demonstrate a material, non-trivial level of popular support is not unreasonable. Johnson and Stein plead that they have demonstrated sufficient popular support by qualifying on sufficient state ballots in 2012 to have a mathematical chance of winning an Electoral College majority (which every other third party or independent candidate failed to do).

Historically, the fifteen percent (15%) polling criterion has only arguably been satisfied by the nominees of the two major parties since its inauguration in 2000.The fifteen percent (15%) polling criterion is not reasonably related to either the need for a manageable number of participants or proof that they enjoy substantial popular support. Appellees' continual recitation that Johnson and Stein are claiming an absolute "right" to have participated in the 2012 presidential debates misrepresents the Complaint simply because they were presidential candidates is untrue.

Johnson and Stein also agree that Obama acting independently of Romney and the CPD could have decided to debate, with whom to debate, and if so, the terms and conditions of the debate. Johnson and Stein further agree that Romney possessed a reciprocal independent right. The Complaint, however, alleges that Obama, Romney, and the CPD, *acting in concert,* decided to conduct presidential debates only under the auspices of the CPD and no other organizations; to use the fifteen percent (15%) polling criterion in setting eligibility standards for participation; and, to boycott all rival presidential candidates in joint media appearances. It is commonplace in antitrust jurisprudence that actions innocent when undertaken independently cross into the domain of actionable conspiracy when done in concert with a competitor.

Obama, Romney, and the CPD repeat the error of the District Court by assuming that political and commercial objectives are mutually exclusive. The two

are regularly bundled not only in campaigning for the presidency, but in more traditional business enterprises. The department store Nordstrom had both political and commercial objectives in dropping Ivanka Trump's line of clothing. It wished to express opposition to President Donald Trump while attracting customers who shared that opposition.

Similarly, last January, President Trump issued an executive order suspending immigrant or refugee entry into the United States for three months from seven predominantly Muslim nations. To express political opposition to the order and to attract similarly minded patrons, Howard Schultz, CEO of Starbucks, announced plans to hire 10,000 refugees over the next five years.

Detractors have asserted that President Trump sought the White House as much to promote his commercial brand and business enterprises as to govern. Among other things, the detractors point to Trump International Hotel on Pennsylvania Avenue located in a federal government building. Some presidential candidates may seek election for commercial objectives that would ripen after their service in the White House concluded. Former President Obama and former First Lady Michelle Obama recently auctioned their combined memoirs to Penguin Books for a stunning $65 million.

Campaigning for the presidency brims with commercial objectives actionable as potential antitrust violations under the standard articulated by the Supreme Court

in *FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411 (1990) (holding that Criminal Justice Act lawyers were seeking a commercial or economic objective in boycotting new clients to pressure government to hike their compensation rates). Presidential campaigns routinely include commercial objectives by altering minimum wage or overtime laws, tariffs, the number of immigrant workers, corporate tax rates, business regulations, or interest rates dictated by the Federal Reserve Board.

Finally, for purposes of this appeal, this Court must accept as true the Complaint's factual allegations (fortified by Exhibit 1) that Obama, Romney, and the CPD, *acted in concert* to adopt the fifteen percent (15%) polling criterion with the purpose of excluding Johnson and Stein from the 2012 presidential debates despite their qualifications on sufficient state ballots to have had a mathematical chance of winning an Electoral College majority. Appellees' contrary assertion that "[t]he fundamental factual premise of the complaint…is not true as Appellees have not acted in concert to exclude any candidate from the debates," cannot be the basis for dismissal and must be subject to a trial on the merits, or at minimum additional discovery. (Appellees' Br. p. 5 n.2).

II. APPELLANTS' REPLY

1. Article III Standing

The Complaint alleged that Johnson and Stein suffered concrete and particularized injury amounting to approximately $1 billion in branding or advertising value in the business of campaigning for the presidency because Obama, Romney, and the CPD arbitrarily and unreasonably excluded them from the 2012 presidential debates by jointly adopting an arbitrary and ill-defined fifteen percent (15%) national polling criterion for the illicit purpose, among other things, of preserving the White House for the nominees of the Democratic or Republican parties. The $1 billion is plausible based on the hundreds of millions who viewed the debates and the advertising rates of the broadcasters. Neither the District Court nor Appellees dispute that figure. The District Court wrongly denied Johnson and Stein Article III standing.

Appellees' argument, at Br. 17, that Appellants lacked standing under *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) is unconvincing. There the Court held that a non-particularized, non-concrete injury in the form of a generalized interest in an equal ability to compete for the presidency failed to satisfy Article III. Candidates Johnson and Stein, in contrast, have never argued a right to an elusive equal ability to seek the White House with Obama and Romney in 2012. Their alleged injury is both particularized and concrete: namely, their arbitrary and

unreasonable exclusion from three (3) presidential debates with Obama and Romney, which granted to the latter and denied to the former $1 billion in advertising or branding value in the business of campaigning for the presidency.

By way of hypothetical to demonstrate the erroneous dismissal below, suppose in 2012, Obama, Romney, and the CPD had agreed that presidential debates would be confined to the Democratic and Republican nominees. Suppose also that Johnson and Stein collectively were polling at 60 percent popular support. According to Appellees and the District Court below, Johnson and Stein would have suffered no cognizable particularized and concrete injury by their arbitrary and unreasonable exclusion from the 2012 presidential debates because there is no statutory, constitutional, or other legal right of any non-Democrat and Republican candidate to participate. (Br. 17-20). is

But that puts the cart before the horse. The District Court never addressed whether either the Sherman Act or the First Amendment imposed an obligation on Obama, Romney, and the CPD to establish criteria for participation in the 2012 presidential debates that satisfied a reasonableness standard; or, whether--if such an obligation was imposed--the fifteen percent (15%) polling criterion was reasonable. Instead, the District Court incorrectly assumed—and Appellees echo that assumption--that the polling criterion was legally unassailable, (although its objective reasonableness was placed under a cloud by a District Court decision in

Level the Playing Field v. FEC, No. 15-cv-1397, 2017 WL 437400, at *10 (D.D.C. Feb. 1, 2017). Thus, according to Appellees, Johnson and Stein suffered no cognizable Article III injury to a protected legal interest for failing to meet that threshold of popular support. But the law is otherwise. The Supreme Court explained in *Bell v. Hood*, 327 U.S. 678, 682 (1946):

> "Jurisdiction... is not defeated…by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits, and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law, and, just as issues of fact, it must be decided after, and not before, the court has assumed jurisdiction over the controversy."

Repeating the District Court's improper conjecture based neither upon facts in evidence nor upon allegations in the Complaint, Obama, Romney, and the CPD speculate that maybe broadcasters would have boycotted the 2012 presidential debates if Johnson and Stein had participated despite their qualifications on sufficient state ballots to have a mathematical chance of winning an Electoral College majority. (Br. 16-17). But that naked speculation fails the plausibility test and is inarguably beyond the four corners of the Complaint.

Broadcasters have invariably covered presidential debates whether or not limited to the nominees of the two major parties, to state otherwise fails the straight-face test. In 1992, three candidates debated: Ross Perot, an independent; William Jefferson Clinton, the Democratic Party nominee; and President George H.W. Bush,

the Republican nominee. Perot was then polling at 7 percent, less than half of Appellees' fifteen percent (15%) polling criterion. The viewership for the three presidential debates was 62.4 million, 69.9 million, and 66.9 million, respectively. Perot's popularity climbed to 19 percent on the day of election. (Perot's startling performance provoked the CPD to the CPD to establish the fifteen percent (15%) polling criterion in 2000. In 1996, the CPD, Republican nominee Robert Dole, and Democratic nominee President Clinton, agreed that only the two major party nominees would participate in the debates. See G. Farah, No Debate, 68-70, 177).

In 1996, Perot was excluded from the two presidential debates, which were confined to the nominees of the two major parties: President William Jefferson Clinton and Senator Robert Dole. Viewership dwindled to 46.1 million and 36.3 million, respectively. Like the District Court, Appellees cannot point to anything in the history of presidential debates or even the decisional dynamics of broadcasters to support their self-serving speculation that if Johnson and Stein had participated in the 2012 presidential debates television coverage would have disappeared. There can be no question but that this issue is a factual question for summary judgment or trial, not in a Rule 12 (b) motion to dismiss.

The causal nexus between the injuries to Johnson and Stein and their exclusions from the 2012 presidential debates is far less attenuated than the alleged nexus that was held sufficient for standing in *United States v. SCRAP,* 412 U.S. 669

(1973). There, the appellees (S.C.R.A.P.–"Students Challenging Regulatory Agency Procedures") alleged that a general railroad rate increase permitted by the Interstate Commerce Commission would cause increased use of non-recyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area. The railroads contended that the appellees could never prove that a general increase in rates would have this effect, which was essential to their environmental injury claim. The Court upheld SCRAP's standing, and explained:

> "But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who had not used the natural resources that were claimed to be affected. If, as the railroads now assert, these allegations were in fact untrue, then the appellants should have moved for summary judgment on the standing issue and demonstrated to the District Court that the allegations were sham and raised no genuine issue of fact." 412 U.S. at 2416-17 (footnotes omitted).

Moreover, even if the District Court's speculation of a broadcaster boycott of presidential debates were true, Johnson and Stein would still have suffered injury (albeit of a lesser order of magnitude) by their exclusions. Newspaper coverage of the debates would have been enormously valuable to them and would have boosted the number and prominence of post-debate broadcast interviews.

Appellees also speculate that maybe Obama and Romney would have called off the debates if Johnson and Stein had been permitted to participate, although neither has submitted an affidavit or made representations to that effect and there is nothing within the four corners of the Complaint to suggest this bizarre scenario. In 1992, Clinton and Bush did not shy from debating Perot when he was polling at 7 percent. In any event, if Obama and Romney had refused to debate, this lawsuit would never have been brought; and, the two would have forfeited $1 billion in advertising or branding advantage over Johnson and Stein. Finally, as *SCRAP* teaches, Obama, Romney, and the CPD can make the above-referenced argument in a motion for summary judgment by attempting to demonstrate that there is no disputed issue of material fact that Obama and Romney both would have refused to debate if Johnson and Stein were participants.

In 1992, Perot entered presidential debates with 7 percent popular support. He ended his presidential campaign with 19 percent support—an almost threefold increase. It smacks of frivolity for Appellees to maintain that the exclusions of Johnson and Stein from the 2012 presidential debates caused no injury to their popular support but simply represented pre-existing conditions. (Br. 24).

Appellees again conflate standing with the merits in arguing that Appellants' injuries cannot be redressed because the damages relief requested would be barred by the First Amendment. (Br. 19-20). That legal argument goes to the merits of

Johnson's and Stein's Sherman Act claims. Appellees do not dispute that money damages would in fact redress the injuries to them caused by their allegedly unreasonable and wrongful exclusions from presidential debates.

Appellees erroneously argue that if Johnson and Stein have Article III standing to litigate the reasonableness of the fifteen percent (15%) polling criterion because they qualified on sufficient state ballots to have a mathematical chance of winning an Electoral College majority, then all of the more than 200 declared presidential candidates in 2012 who did not satisfy that substantial threshold of popular support would also have standing. (Br. 24 n. 14). Justice Hugo Black amplified in *Bell v. Hood*, *supra*, at 326-327:

> "[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction, or where such a claim is wholly insubstantial and frivolous."

It would be equally frivolous to contend that requiring a material level of public support as a condition for participation in presidential debates is unreasonable because it is self-evident that a debate with hundreds would be a farce.

2. **Antitrust Standing**

Commercial and political objectives mix or overlap in campaigning for the presidency. In the 2016 presidential race, for instance, Republican nominee Trump

bought and sold at handsome mark-ups "Make America Great Again" hats worth millions of dollars to finance his election campaign. See *The Washington Post, The Fix*, "How many hats has Donald Trump bought anyway?" by Phillip Bump, June 29, 2016. Those transactions did not lose their commercial character simply because the hats contained a campaign slogan or because the funds were employed to fund Trump's presidential campaign.

Suppose Henry Ford had urged the public to buy Ford motor vehicles to provide him profits to enable him to campaign for the presidency. The motor vehicle transactions would not have escaped antitrust scrutiny simply because the proceeds of the commercial activity furthered a political ambition. To suggest otherwise is disingenuous.

The business of campaigning for the presidency involves competition between private persons who have determined to become candidates, and their provision of information about themselves, their ideas, and their rivals to attract popular support, i.e., competition in providing presidential candidate information to the public. The arbitrary and unreasonable exclusion of Johnson and Stein from the 2012 presidential debates significantly reduced available presidential candidate information. Less was known by the public not only about Johnson and Stein, but also about Obama and Romney who escaped questions or criticisms from the Libertarian and Green Party nominees. In addition, Appellees' refrain (Br. 29-31)

that confining presidential debates to the nominees of the two major parties enlarges rather than diminishes presidential candidate information is contrary to common sense and historical experience, as the Ross Perot phenomenon elaborated above demonstrates, and is otherwise unsupported by anything in the record *sub judice*.

The District Court and Appellees again conflate standing with the merits in arguing that Johnson's and Stein's injuries proximately caused by their exclusions from presidential debates were attributable to their failures to satisfy Appellees' fifteen percent (15%) polling criterion which they posit was legal. (Br. 31-32). But that legal question was not decided by the District Court. Johnson's and Stein's claim that the polling criterion was arbitrary, unreasonable, and violated the Sherman Act has yet to be adjudicated.

Obama, Romney, and the CPD also contend that Johnson and Stein lack standing to challenge their concerted agreement to adopt the fifteen percent (15%) polling criterion because a third-party debate sponsor (which Obama and Romney had agreed to boycott) might have independently adopted that same criterion without violating the antitrust laws. (Br. 32-33). That argument is ludicrous. An illegal method of accomplishing a result is not excused simply because someone else could have accomplished the same result using legal methods. Suppose two gasoline retailers agree to fix the price of gasoline at $5.00 per gallon. A purchaser would not be denied standing to challenge the price fixing conspiracy on the theory that a non-

conspiring retailer might have independently charged $5.00 per gallon without violating the Sherman Act.

3. Campaigning for the Presidency Has Commercial Objectives and Thus the Means of Campaigning Is Subject to Antitrust Scrutiny under *FTC v. Superior Court Trial Lawyers Ass'n.*

Obama, Romney, and the CPD echo the District Court in repeatedly insisting that campaigning for the presidency has exclusively political objectives; and, that the means used in campaigning are beyond the ambit of the Sherman Act. (Br. 33-41). Neither statement is defensible.

In *FTC v. Superior Court Trial Lawyers Ass'n,* 493 U.S. 411, District of Columbia lawyers boycotted Criminal Justice Act work to pressure the government to hike their compensation for CJA legal services. The Court affirmed application of the antitrust laws to the boycott, and characterized the boycott's objective as economic or commercial. 493 U.S. at 422-423. Appellees agree with this characterization. See Br. 40.

Campaigning for the presidency has numerous commercial objectives. Candidates routinely campaign to increase the minimum wage to obtain higher compensation for labor. That same commercial objective was present in *Superior Court Trial Lawyers Ass'n., i.e.,* increased compensation for CJA legal services. Candidates campaign for higher tariffs or trade barriers to obtain higher earnings for the protected industries, including higher wages for their employees.

Candidates campaign to limit immigrant workers to obtain higher compensation for citizen workers. Candidates campaign for lower corporate tax rates to increase the after-tax profits of corporations. These examples are but the tip of the iceberg of commercial objectives that feature in campaigning for the presidency. Depending on the presidential candidate, the commercial objectives could also include promoting the business enterprises of the candidate himself or his family, for example, hotels or clothing. Justice John Paul Stevens, writing for the majority in *Superior Court Trial Lawyers Ass'n,* made explicit that if activities have a commercial objective to be obtained through government action, the *means* by which the objective is sought is subject to antitrust scrutiny:

> "[I]n the *Noerr* case the alleged restraint of trade was the intended *consequence* of public action; in this case the boycott was the *means* by which respondents sought to obtain favorable legislation." 493 U.S. at 424-25.

In sum, campaigning for the presidency has multiple commercial objectives. Thus, the *means and methods* of campaigning for the presidency, including presidential debates, are within the ambit of the antitrust laws.

Obama, Romney, and the CPD agree that *Associated Press v. United States,* 326 U.S. 1 (1945) held that news and views are commerce; and, that newspapers are subject to the antitrust laws. (Br. 40, 47). But they insist that "ideas" which earmark campaigning for the presidency are distinct from news and views and thus escape antitrust scrutiny. The distinction is unpersuasive.

Justice Oliver Wendell Holmes in his majestic dissent in *Abrams v. United States*, 250 U.S. 616 (1919) spoke of a "free trade in ideas" which he viewed as indistinguishable from free trade in opinions, speech, or other expression protected by the First Amendment:

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out." *Id.*, 250 U.S. at 630.

Contrary to Appellees' assertions, Justice Holmes did not think free trade in "ideas" lacked concreteness, or worry that proving injury to the trade would be problematic. (Br. 40-41). Indeed, his dissent found injury to that trade in the government's suppression of two leaflets that assailed United States intervention in Russia against the Bolsheviks to crush the Russian Revolution in the aftermath of World War I.

News and the expression of views cannot be divorced from ideas – be they inane or sublime. As any newspaper reader knows, news stories are characteristically fraught with ideological baggage. The same news event is not treated the same in *The Washington Post*, *The New York Times*, and *The Wall Street Journal* or the *Independent Journal Review*, all of which have their signature ideological prejudices.

Appellees urge that "a marketplace of 'ideas' is speculative, and that proving "injury to the exchange of ideas would be highly speculative." Br. 40. But injury to free trade in ideas caused by the Spanish Inquisition, Stalin's show trials, the Tiananmen Square massacre, and McCarthyism were concrete and the exact opposite of highly speculative.

By way of further illustration, colleges and universities compete for students based upon the ideas they teach. The University of Chicago, for instance, teaches a different curriculum than Yale. If a group of universities conspired to refrain from teaching Aristotle, Plato, Machiavelli, John Locke, and Voltaire to diminish competition for students, the Sherman Act would apply.

On May 22, 1991, the U.S. Department of Justice filed an antitrust complaint against the eight Ivy League schools and M.I.T. alleging that the schools colluded to raise tuition rates and reduce financial aid awards to certain admitted applicants. The same day, the Ivy League schools settled the complaint by signing a consent decree which, among other things, prohibited them from jointly fixing tuition or financial aid and from exchanging financial aid information on admitted applicants. See R. Morrison, *Price Fixing Among Elite Colleges and Universities*, University of Chicago Law Review: Vol 59, Issue 2, Article 9.

Campaigning for the presidency, which includes the presidential debates, is not immune from Sherman Act scrutiny simply because competition in ideas is

involved or implicated.

4. First Amendment Defense

According to Appellees, the First Amendment endows the presidential nominees of the two major parties with an absolute right to determine whether or not to debate and, if so, with whom. (Br. 41-47). Under that First Amendment theory, the nominees would be authorized to categorically exclude from presidential debates women, men, blacks, whites, Asians, Native American Indians, Hispanics, Jews, Muslims, atheists, members of the LGBTI community, or any other group—including non-members of the Democratic or Republican parties like Johnson and Stein. Appellees articulate no limiting principle to their categorical exclusionary view. If Appellees are correct in their interpretation of the First Amendment, then no legal challenge to the criterion for presidential debates set by the CPD and the nominees of the two major parties could ever succeed. Even Congress by statute would be powerless to disturb anything the CPD and the nominees decided about participation in the debates.

Appellees' absolutist argument parrots the argument made in *Associated Press*. It was rejected by Justice Hugo Black, writing for the majority, for reasons grounded in the First Amendment, not in the commercial objectives of newspapers:

> Finally, the 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 nongovernmental 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." 326 U.S. at 19 -20.

Appellees insist that: "Without a commercial motive present, *Associated Press* does not apply." Br. 46. But there is not a syllable in Justice Black's landmark opinion that even insinuates a commercial motive was remotely a factor in any manner relevant to his First Amendment analysis. Moreover, the methods of campaigning for the presidency *have commercial objectives*, as elaborated, *supra*. Thus, according to *Superior Court Trial Lawyers Ass'n*, the *means* by which the campaigns are conducted, including presidential debates, are subject to the antitrust laws.

Contrary to Appellees (Br. 44-45), that conclusion does not run afoul of *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557

(1995). There the Court upheld the First Amendment right of a parade organizer to exclude participants who wished to convey dissident views that would have contradicted the parade message. Justice David Souter explained that the First Amendment principle that informed the decision was the "fundamental rule of protection…that a speaker has the autonomy to choose the content of his own message." *Id.*, 515 U.S. at 573.

The speech of Obama and Romney in the 2012 presidential debates would not have been impaired or obstructed in any way by the inclusions of Johnson and Stein because they uniquely had qualified on sufficient state ballots to have a mathematical chance of winning an Electoral College majority. Similarly, Ross Perot's presence in the 1992 presidential debates left the messages of the Democratic nominee Clinton and the Republican nominee Bush unimpaired and undiminished, and perhaps expanded.

Permitting Johnson and Stein on the debate stage with Obama and Romney would not have transgressed the latter's First Amendment rights. In *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), the Court denied that the Solomon Amendment requiring colleges and universities to provide equal recruiting access for the military to their campuses violated their First Amendment right to oppose "Don't ask, Don't tell." Chief Justice John Roberts explained:

> "Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (plurality opinion); accord, *id.*, at 268 (Marshall, J., concurring in judgment); see also *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 841 (1995) (attribution concern "not a plausible fear"). Surely students have not lost that ability by the time they get to law school." 547 U.S. at 65.

In sum, the First Amendment did not endow Obama, Romney, and the CPD, acting in concert, a limitless right to decide on the selection criterion for participation in presidential debates.

5. **First Amendment Claim**

At Br. 47-53, Appellees exhibit their misunderstanding of the teachings of *Terry v. Adams*, 345 U.S. 461 (1953) and *Marsh v. Alabama*, 326 U.S. 501 (1946), by disputing the First Amendment's application to presidential debates organized and conducted by the Democratic and Republican parties through the CPD in concert with the nominees of the two major political parties: namely, that form should not be exalted over substance when fundamental constitutional rights are at stake.

Thus, in *Terry*, the Court observed that the private Jaybird Party elections were conclusive in determining the winner of the sequel Democratic Party primaries governed by state law. Accordingly, the Fifteenth Amendment applied to the private action because they were full dress rehearsals for the Democratic primaries

conducted under government auspices. Appellees do not dispute that participation in presidential debates is indispensable to winning the election or influencing national policies, i.e., they are tantamount to full dress rehearsals for the presidential balloting in November.

In *Marsh*, a company town was subjected to the First Amendment because otherwise the town's residents would *de facto* have been denied rights of free speech and association--cornerstones of democracy.

Appellees seek to turn First Amendment jurisprudence into a petrified forest by arguing against its application to any non-traditional function of government. (Br. 51). But as Justice Holmes taught in The Path of the Law: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." 10 Harvard Law Review 457 (1897). In any event, a modern government function *is* the public sponsorship of televised candidate debates. In *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), for instance, a state-owned television broadcaster, the AETC, sponsored four congressional candidate debates and one senatorial candidate debate in 1992. A First Amendment challenge to the selection criteria for participation in the Third Congressional District debate failed

on the merits, but not because the First Amendment had no application to the sponsorship of televised candidate debates.

Saint Paul preached in 2 Corinthians 3: 6: “For the letter killeth, but the spirit giveth life.” Participation in presidential debates today is indispensable to influencing the national political agenda or the winner of the presidential election. The unique national importance of presidential elections to the nation’s destiny justifies subjecting the criteria for participation in presidential debates to a reasonableness test under First Amendment. Otherwise, the debates will foster continued political stagnation and suppress the emergence of diverse viewpoints or policy ideas necessary for the health of the state. Justice John Paul Stevens taught in *Anderson v. Celebreeze*, 460 U.S. 780 (1983):

> “Historically, political figures outside the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the *status quo* have, in time, made their way into the political mainstream. *[Citations and footnote omitted]*. In short, the primary values protected by the First Amendment -- "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U. S. 254, 270 (1964) -- are served when election campaigns are not monopolized by the existing political parties.” 460 U.S. at 794.

III. CONCLUSION

For the foregoing reasons and the reasons set forth in Appellants’ Initial Brief, the District Court’s judgment dismissing the Complaint should be reversed,

and Plaintiffs-Appellants should be permitted to prove their claims to enlarge voter information and choices in presidential elections.

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2017, I electronically served on counsel of record the foregoing Appellants' Reply Brief by filing same 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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