NO._____

IN THE

Supreme Court of the United States

GARY E. JOHNSON, *et al*.,

Petitioners,

v.

COMMISSION ON PRESIDENTIAL DEBATES, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the exclusionary rules for participation in presidential debates established by an agreement between the Commission on Presidential Debates, a joint venture of the Republican and Democratic National Committees, and the presidential nominees of the Republican and Democratic Parties, to destroy or cripple competition by third party nominees or independent candidates in highly commercialized general election campaigns fall within the sweeping ambit of the Sherman Antitrust Act, 15 U.S.C. Sections 1 and 2, and the Clayton Act, 15 U.S.C. Sections 15 and 26.

PARTIES TO THE PROCEEDING

The parties to the proceeding are: Petitioners Gary E. Johnson, Gary Johnson 2012, Inc., Libertarian National Committee, James Gray, Green Party of the United States, Jill Stein, Jill Stein for President, and Cheri Honkala; and, Respondents Commission on Presidential Debates, Republican National Committee, Democratic National Committee, Frank J. Fahrenkopf, Jr., Michael D. McCurry, Barack Obama, and Willard Mitt Romney.

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The opinion of the United States Court of Appeals for the District of Columbia Circuit opinion issued on August 29, 2017, is reproduced in Appendix ("App.") 1a-20a. The opinion is also reported at: 869 F. 3d 976 (D.C.Cir. 2017). The opinion of the United States District Court for the District of Columbia is reproduced in App. 21a-58a. The opinion is also reported at: 202 F.Supp. 159 (D.D.C. 2016).

JURISDICTION

On August 29, 2017, the United States Court of Appeals for the District of Columbia Circuit entered its judgment and opinion affirming the judgment of the District Curt. United States Chief Justice John Roberts entered an order on November 21, 2017, extending the time for filing a petition for a writ of certiorari until December 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1 and 2, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§15 and 26.

STATEMENT OF THE CASE

Candidates in general election presidential campaigns are in the business of providing voters, donors, volunteers, and the public generally with information about themselves and their competitors.

A campaign's purposes are at least two-fold: to attract votes on polling day; and, to push issues onto the national political agenda. In 1992, for instance, independent presidential candidate Ross Perot made a balanced budget a campaign issue, and President William J. Clinton adopted it as a major theme of his presidency. App. 84a

Presidential debates dwarf all other campaign events or elements in their influence on electoral outcomes. The first presidential debates were organized in 1960 between Democratic nominee John F. Kennedy and Republican nominee Richard M. Nixon. App. 87a. But they did not become a fixture of presidential campaigns until 1976. *Id*. President Kennedy attributed his 1960 triumph over Mr. Nixon to his presidential debate performances. App. 84a.

In 1988, the Republican and Democratic National Committees, both private corporate entities formed the Commission on Presidential Debates, also a private District of Columbia corporation to seize organization and sponsorship of presidential debates from the League of Women's Voters. App. 87a-88a. The League had balked at the debate terms and conditions demanded by the nominees of the Republican and Democratic Parties: George H.W. Bush, and Michael Dukakis, respectively. The League elaborated that the "demands of the two campaign organizations would perpetrate a fraud on the American voter." App. 94a.

Respondent Frank Fahrenkopf, former Chairman of the Republican National Committee, 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 from presidential debates is a death knell to a candidate's chances for electoral victory and for influencing the national political agenda. App. 85a. Presidential debates might be fairly characterized as an "essential facility" in general election presidential campaigns. App. 129a. See *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912).

In 2012, Respondents Obama and Romney signed a Memorandum of Understanding (MOU) regarding presidential debates. Among other things, it provided that neither Respondent would "(1) issue any challenges for additional debates [outside the sponsorship of Respondent 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." App. 95a-96a. The MOU also agreed to the CPD's "Nonpartisan Candidate Selection Criteria for 2012 General Election Debate participation." App. 96a-97a. The second of the CPD's three criteria required a candidate to have qualified on sufficient state ballots to have a mathematical chance of winning an electoral college majority. The only two 2012 presidential candidates who satisfied that criteria, other than Respondents Obama and Romney, were Petitioners Johnson and Stein. App. 99a, 104a. In other words, the 2012 presidential debates would have featured four (4) participants with the CPD's second criterion alone.

The CPD's third criterion required that a candidate "have a level of support of at least 15% (fifteen percent) of the national electorate as

determined by five selected public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination" (hereinafter "15% polling threshold.") App.97a-98a. The CPD cryptically refuses to list the identity of the "five selected public opinion polling organizations" at any time during the process of selecting debate participants. The purpose of the 15% polling threshold was not to prevent presidential debates from degenerating into a Tower of Babel, but to cripple or destroy competition from third party or independent candidates in the general election presidential campaign by limiting public information about their candidacies. App. 98a, 104a-105a.

Based on Respondents' jointly established third criterion, Petitioners Johnson and Stein were excluded from the 2012 presidential debates. However, Johnson polled far above the 15% polling threshold in five (5) national independent polls which pitted him against Respondent Obama. App. 99a. The CPD rejected these head-to-head polling results Curiously, Respondent Romney satisfied the CPD's threshold in head-to-head polling against Obama. App. 99a-100a.

Participation in the three, 90-minute long 2012 presidential debates, the Super Bowl of politics, was worth hundreds of millions of dollars in advertising value to Obama and Romney. App. 73a. The debates attracted television viewer audiences of 67. 2 million, 65.6 million, and 59.2 million, respectively. App. 94a-95a. A 30-second advertisement in the 2012 NFL Super Bowl cost $3.5 million dollars to reach a television audience approximating 111.3 million.

Discounting for the lesser audience ratings of the 2012 presidential debates compared with the NFL Super Bowl, the advertising value to Obama and Romney of their participation in 270 commercial-free televised debate time approximated $1 billion dollars.

The exclusions of Petitioners Johnson and Stein from the presidential debates crippled their ability to influence the national political agenda by communicating their views and attracting votes. It impaired competition in campaigning for the presidency by diminishing the volume and diversity of information about the candidates available to the public.

General election presidential campaigns are substantial commercial endeavors. Candidates spend substantial sums for staff, lawyers, accountants, fundraisers, office space, advertising, memorabilia, travel, lodging, polling, focus groups, or otherwise. In August 2012 alone, the Obama campaign expended $4.37 million on staff. App. 82a. The corresponding figure for the Romney campaign was $4.04 million. *Id*. During the 2012 campaign, more than one million television ads were purchased by the Obama and Romney campaigns and their supporters. App. 81a-82a. The Obama 2012 campaign spent $553.2 million, the DNC spent $263.2 million, and the largest Obama SuperPACs spent $58 million. The corresponding figures for Romney were $360.4 million, $284 million for the RNC, and $200 million for Romney SuperPacs. *Id*.

Presidential debates are not only of inestimable value to participants in fundraising and attracting volunteers. They are also awash in corporate money. Corporate sponsors collectively contribute millions of

dollars each election cycle to Respondent CPD. It received $6.8 million in 2007 and 2008, and expended $2.3 million in the latter year. App. 76a-77a. Debate sites throughout the United States have become "corporate carnivals" where sponsors provide lobbying and marketing materials and products to journalists and politicians. App. 77a.

Some presidential campaigns are conducted overwhelmingly for commercial purposes, e.g.., promoting the candidate's own or family's businesses through greater name recognition, notoriety, or otherwise. This Court cannot properly shut its mind to it. *Bailey v. Drexel Furniture Co.,* 259 U.S. 20, 37 (1922).

Seeking treble damages and injunctive relief, Petitioners filed suit against Respondents in the United States District Court for the District of Columbia on September 28, 2015. App. 59a. Among other things, the Complaint alleged that Respondents had violated Sections 1 and 2 of the Sherman Antitrust Act by unreasonably and arbitrarily excluding them from the three commercially and politically invaluable presidential debates for failing the 15 percent polling threshold to restrain competition in campaigning for the presidency, not to keep debate participants to a manageable number or to maximize the number of viewers. App. 73a-102a. Audience ratings for presidential debates climbed when independent candidate Ross Perot was permitted to participate in1992, and plunged when he was excluded in 1996 despite a poll showing 76% of voters wanted him included. App. 83a. A 2000 poll showed that 64% of registered voters wanted Ralph Nader and Pat Buchanan included in the presidential

debates, but they were excluded by the Respondent CPD. *Id.*

The District Court dismissed the Sherman Act claims for lack of standing and failure to state a claim, and the Court of Appeals affirmed. Speaking for a three-judge panel, Judge Janice Brown concluded that Petitioners lacked antitrust standing because "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," *citing Sheppard v. Lee*, 929 F. 2d 496. 498 (9th Cir. 1991). App. 11a. Judge Brown tacitly asserted that for antitrust purposes multi-candidate campaigns for the presidency are indistinguishable from occupying a government office or exercising government power.

REASONS FOR GRANTING THE WRIT

The writ should be granted to decide an important federal question that has not been, but should be, decided by this Court: namely, whether the rules for participation in presidential debates established by an agreement between the Commission on Presidential Debates, a joint venture of the Republican and Democratic National Committees, and the presidential nominees for the Republican and Democratic Parties, to destroy or cripple competition by third parties or independent candidates in commercialized general election presidential campaigns are shielded from scrutiny under Sherman Antitrust Act. Congress cannot be expected to address the issue because it is dominated by the Republican and Democratic Parties.

1. Public confidence in the fairness and outcome of presidential elections.

The White House is by orders of magnitude the most powerful office in the United States. Among other things, the President presides over a budget that exceeds $4 trillion annually, or approximately 20 percent of GNP. The President also serves as commander-in-chief over a vast trillion-dollar military complex that spans the globe.

The stability and tranquility of our Republic depend on public confidence in the fairness of the process by which we elect the President. In *Burroughs* v. *United States,* 290 U.S 534, 545 (1934), more than 80 years ago when presidential power was a fraction of its current size, this Court observed: "The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." This Court added in *Bush v. Gore*, 531 U.S. 98, 109 (2000) that the process of counting presidential votes must be well calculated to sustain the confidence that "all citizens must have in the outcome of elections."

But vote counting is just one element of the presidential election process that influences public confidence in the outcome. Others include "upstream" elements such as voter identification requirements or ballot access rules. The fairness of presidential debates is equally if not more important in securing public confidence in the outcome of presidential elections. As a practical matter, exclusion is the death knell of a candidacy. To paraphrase Justice

Hugo Black in *Terry v. Adams*, 345 U.S. 461 (1953), the only presidential campaign events that have counted since their inception has been presidential debates. The standards for participation must be fair and reasonable if public confidence in the outcome of presidential elections is to be sustained. Whether the Sherman Act's "rule of reason" applies to the concerted action of the Republican and Democratic Parties or their agents in fixing those participation standards is thus of major or substantial national importance militating in favor of granting the writ.

2. Granting the writ is further warranted because the decision below is inconsistent with this Court's decisions in *Associated Press v. United States*, 326 U.S. 1 (1945); *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990), and related cases.

a. Inconsistency with *Associated Press*.

The Court of Appeals summarily dismissed campaigning for the presidency as shielded from antitrust scrutiny in asserting that the "'market' Plaintiffs identify is no more regulated by the antitrust laws than the marketplace of ideas." App. 12a. But the marketplace of ideas *is* regulated by the antitrust laws. This Court explained in *Associated Press v. United States*, 326 U.S. at 20, that application of the antitrust laws to news services like AP engaged in the distribution of news and viewpoints was not only unproblematic. It was imperative:

> "It would be strange indeed…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 dissemination of information from diverse and antagonistic sources is essential to the welfare of the public…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." 326 U.S. at 20.

The Court similarly taught in *Anderson v. Celebreeze*, 460 U.S. 780, 794 (1983), the national importance of facilitating challenges to the Republican and Democratic Party duopoly:

> "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…are served when election campaigns are not monopolized by the existing political parties."

Newspapers, broadcasters, and others compete in the marketplace of ideas for readers, listeners, or viewers yet are governed by the antitrust laws. News and views in *The Wall Street Journal* compete with news and views in *The New York Times*. MSNBC competes with Fox News in distributing a different selection of news and views.

Institutions of higher education compete in the marketplace of ideas yet are subject to the antitrust laws, at least regarding student aid. See *United States v. Brown University, et al.,* 5 F.3d 658 (3rd Cir. 1993). The University of Chicago does not teach the same curriculum with the same ideological slant as does Harvard University. See also *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F. 2d 650 (D.C. Cir. 1970) (accreditation standards for colleges and universities subject to antitrust scrutiny but found reasonable).

In sum, the holding of the Court of Appeals that the marketplace of ideas is categorically outside antitrust scrutiny conflicts with *Associated Press* and related cases. The Court of Appeals also misinterpreted *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) and the Ninth Circuit decision in *Sheppard v. Lee*, *supra*, to confine the Sherman Act to pure "economic" or "commercial" competition. App. 11a.

In *Brunswick Corp.*, the Court addressed the requirement in section 4 of the Clayton Act that to recover treble damages for a violation of the anti-merger provisions of Section 7, Plaintiffs must prove injury to "business or property." The decision correctly concluded that injuries caused by heightened rather than diminished competition were not compensable because mergers prohibited by Section 7 were not intended to protect against greater rather than lesser competition. Section 7 prohibits mergers that *may* lessen competition or *tend* to create a monopoly, not those which may strengthen competition. [Italics supplied]. Nowhere did *Brunswick Corp.* assert that the antitrust laws concern themselves only with economic competition. The Sherman Act applies to nonprofit corporations. See e.g., *NCAA v. Board of Regents,* 468 U.S. 85 (1984); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

The *process* of campaigning for the presidency implicating billions of dollars of commerce may be subject to the antitrust laws even if the prize of holding presidential office is not, just as the *process* of running in the Kentucky Derby is subject to the antitrust laws even if the prize of being the Derby winner is not.[1]

The Congresses that enacted the Sherman and Clayton Acts, moreover, aimed not only to promote economic competition, but to avoid the recognized social and political dangers of concentrated

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[1] The horse racing industry is subject to antitrust regulation, although the reported decisions are scant. *See, e.g.*, *Churchill Downs Inc. v. Thoroughbred Horsemen's Group, LLC*, 605 F.Supp.2d 870 (2009).

monopolistic power. Chief Justice Earl Warren elaborated in *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962):

> "[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."

In denying the Sherman Act's application to presidential debates, the Court of Appeals neglected the purposely vague and latitudinarian text and the expectation that the judiciary would expound a common law of antitrust reflecting changed circumstances. "The language of the Sherman Act…contains no exception." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975). "Language more comprehensive is difficult to conceive." *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944). There is a heavy presumption against implicit and against express statutory exemptions. *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963); *Group Life & Health Ins. Co. v. Royal Drug Co., Inc.,* 440 U.S. 205, 231 (1979). See section c, below. It is inarguable that Congress intended the judiciary to develop an expansive common law of antitrust to prevent its obsolescence caused by unforeseen and unforeseeable changes in

social, political, economic, or other conditions. See Areeda, Kaplow, Edlin, *Antitrust Analysis*, ¶ 104, p. 3 (7th ed. 2013).

The business of insurance is instructive. In 1890, the Sherman Act's authors believed insurance was not "commerce" governed by the Sherman Act. This belief was bolstered or advised by this Court's unambiguous declaration twenty-one (21) years earlier in the *Paul v. Virginia*, 75 U.S. 168, 183 (1869) that insurance policies were not commerce:

> "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale."

More than 70 years later, however, this Court held that insurance was commerce subject to the Sherman Act in *South-Eastern Underwriters Ass'n*, 322 U.S. at 537. The decision rested on three pillars: the mushrooming of the insurance industry in the interim; the comprehensive language of the Sherman Act; and, congressional expectation that the reach of

the antitrust laws would evolve to avoid fossilization. Associate Justice Hugo Black elaborated:

> "Appellees argue that the Congress knew, as doubtless some of its members did, that this Court had, prior to 1890, said that insurance was not commerce, and was subject to state regulation, and that, therefore, we should read the Act as though it expressly exempted that business. But neither by reports nor by statements of the bill's sponsors or others was any purpose to exempt insurance companies revealed. And we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power. [footnote omitted] *Cf. Helvering v. Griffiths,* 318 U. S. 371; *Parker v. Motor Boat Sales,* 314 U. S. 244. We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decision defining the commerce power." 322 U.S. at 557.

Congress immediately responded to *South-Eastern Underwriters* with the McCarran-Ferguson Act, which recognized that the antitrust laws applied to the business of insurance, and created a

limited antitrust exemption for same as explained in *Group Life & Health Ins. Co. v. Royal Drug Co., Inc., supra* at 231:

> By making the antitrust laws applicable to the insurance industry except as to conduct that is the business of insurance, regulated by state law, and not a boycott, Congress did not intend to and did not overrule the *South-Eastern Underwriters* case…[T]hat section [2(b)], and the Act as a whole, embody a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws -- a concept that had prevailed before the *South-Eastern Underwriters* decision.

The congressional authors of the Sherman Act likely also would not have thought that presidential campaigns fell within its ambit in 1890. But like the business of insurance, campaigning for the presidency has metamorphosed from a commercial acorn into a multi-billion-dollar commercial oak over the past century or more. In 1888, Democratic presidential nominee Grover Cleveland did no active campaigning, while his Republican Party rival, Benjamin Harrison, conducted a "front-porch" campaign. Republican campaign expenditures approximated a tiny $3 million for that campaign.

In contrast, one hundred twenty-four (124) years later in 2012, presidential campaign expenditures by the two major party nominees approximated $1.4 billion, including funds raised by selling hats or other

campaign merchandise. App. 81a. General election presidential campaigns have become substantial commercial endeavors. Candidates spend for staff, lawyers, accountants, fundraisers, office space, advertising, memorabilia, travel, lodging, catering, polling, focus groups, computer, cell phone, desks and other equipment rentals or purchases or otherwise. In August 2012 alone, the Obama campaign expended $4.37 million dollars ($4,370,000.00) on staff salaries. The corresponding figure for the Romney campaign was $4.04 million dollars ($4,040,000.00). During the 2012 campaign, more than one million television ads were purchased by the Obama and Romney campaigns and their supporters. The Obama 2012 campaign spent $553.2 million, the DNC spent $263.2 million, and the largest Obama SuperPACs spent $58 million. The corresponding figures for Romney were $360.4 million, $284 million for the RNC, and $200 million for Romney SuperPacs. App. 81a-82a.

Presidential debates are not only of inestimable value to participants in fundraising and attracting volunteers. They are also awash in corporate money. Corporate sponsors collectively contribute millions of dollars each election cycle to Respondent CPD. It received $6.8 million in 2007 and 2008, and expended $2.3 million in the latter year. Debate sites throughout the United States have become "corporate carnivals" where sponsors provide lobbying and marketing materials and products to journalists and politicians. App. 77a.

Even if general election presidential campaigns in 1890 were not conceived by Congress or judicial decisions to constitute "commerce" for purposes of the Sherman Act, that understanding would not foreclose

a contemporary interpretation to the contrary based on the staggering changes in their funding and growth—including the emergence of presidential debates as the "Super Bowl" of politics. That is a central teaching of *South-Eastern Underwriters* which the Court of Appeals ignored.

The Court of Appeals also stumbled in likening presidential campaigns to holding political office or conducting government. Relying on *Sheppard v. Lee*, *supra*, the Court reasoned that presidential campaigns do not involve trade or commerce governed by the Sherman Act because occupying a political office or operating government do not. But the analogy is unpersuasive. It is self-evident that campaigning to win office and the power to govern is distinct from holding the office and running government after electoral success. As a matter of law, there can be only one occupant of an office and one sovereign at a time. In contrast, presidential campaigns featuring multiple competing candidates are both legal and the norm.

b. Inconsistency with *FTC v. Superior Court Trial Lawyers Association*.

The Court of Appeals maintained that presidential campaigns including the Super Bowl of politics cannot constitute commerce within the meaning the Sherman Act because the goal is to win votes and attain or influence government, not to make money. App. 14a. That assertion is irreconcilable with this Court's decision in *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990).

There, trial lawyers boycotted the provision of services to clients under the Criminal Justice Act to influence the District of Columbia government to raise hourly compensation. The boycott was held subject to the antitrust laws because the *process* the lawyers employed to obtain government action was anti-competitive, i.e., restricting the output or supply of legal services.

Petitioner's case closely aligns with *Superior Court Trial Lawyers Association*. It pivots on the *process* employed by Respondents to decisively influence the 2012 presidential election and government policies: namely, holding presidential debates worth approximately $1 billion in advertising time to the participants according to unreasonable terms and conditions, including a 15% polling threshold intended to exclude third party or independent candidates and to restrict public information and knowledge about candidacies. This case and *Superior Court Trial Lawyers Association* are alike in that in both challenge a boycott organized and implemented by *competitors,* not by customers or outsiders. Compare *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (civil rights boycott) with *Eastern States Retail Lumber Dealers' Assn. v. United States*, 234 U.S. 600 (1914) (competitor boycott).

c. Inconsistency with heavy presumption against implied or statutory antitrust immunity.

The Court of Appeals found that campaigning for the presidency is exempt from the antitrust laws; and, that Petitioners' alleged injuries were political and

"simply not those contemplated by the antitrust laws". App. 12a, 18a. The Court of Appeals decision created an implicit blanket "political" exemption from the antitrust laws contrary to the well-established and heavy presumption against such an exemption. *Royal Drug Co., Inc.,* 440 U.S. at 231; *Goldfarb*, 421 U.S. at 787. "Exemptions from the antitrust laws are to be narrowly construed." *Abbott Laboratories v. Portland Retail Druggist Association Inc.*, 425 U.S. 1, 11-12 (1976) (citation omitted). "Implied antitrust immunity is not favored." *Id.*, *quoting United States v. National Assn. Securities Dealers*, 422 U.S. 694, 719 (1975).

Additionally, there is no statutory antitrust exemption for "politics." Congress has not created one. Even if it had, the exemption would be narrowly construed in favor of the strong national policy of competition. *Royal Drug Co., Inc.,* 440 U.S. at 231.

CONCLUSION

The novelty of Petitioner's antitrust theory does not make it suspect or fringe. Judge Richard Posner correctly observed in *Flomo v. Firestone*, 643 F. 3d 1013 (7th Cir. 2011): "There is always a first time for litigation to enforce a norm. There has to be."

The importance to the health of the polity of the antitrust issue presented cannot be overstated. The duopoly Republican and Democratic Parties unceasingly manipulate electoral rules or practices to maintain power and to frustrate popular sentiments. The result is political sclerosis, policy stagnation, and civil restiveness. It is no accident that a plurality of new voters is registering as independents. The

American voting public has indicated that the present duopoly is neither politically necessary nor favored.

Application of the Sherman Act to presidential debates would not challenge a two-party system produced by skill, foresight, and industry. It would challenge only the entrenched duopoly power of the Republican and Democratic Parties fortified by concerted action to unreasonably destroy or cripple competition from third parties or independents in a multi-billion-dollar campaign process to the detriment of voters and the Republic.

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted December 27, 2017.

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APPENDIX

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

Argued April 21, 2017 Decided August 29, 2017

No. 16-7107

GARY E. JOHNSON, ET AL.,
APPELLANTS

v.

COMMISSION ON PRESIDENTIAL DEBATES, ET AL.,
APPELLEES

Appeal from the United States District Court for the District of Columbia
(No. 1:15-cv-01580)

Bruce E. Fein argued the cause for appellants. With him on the briefs were *W. Bruce DelValle*.

Lewis K. Loss argued the cause for appellees. With him on the brief were *Uzoma N. Nkwonta*, *Robert F. Bauer*, *Marc E. Elias*, *Elisabeth C. Frost*, *Charles H. Bell Jr.*, *John R. Phillippe, Jr.*, and *William D.*

Coglianese. *Michael S. Steinberg* entered an appearance.

Before: BROWN and PILLARD, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BROWN.

Opinion concurring in Part I and concurring in the judgment filed by *Circuit Judge* PILLARD.

BROWN, *Circuit Judge*: Every four years, we suffer through the celebration of democracy (and national nightmare) that is a presidential election. And, in the end, one person is selected to occupy our nation's highest office. But in every hard-fought presidential election there are losers. And, with quadrennial regularity, those losers turn to the courts. *See, e.g.*, *Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996); *Fulani v. Brady*, 935 F.2d 1324 (D.C. Cir. 1991); *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987). Today's challenge concerns 2012 third-party candidates Gary Johnson and Jill Stein. Their Complaint presents novel claims under antitrust law and familiar First Amendment allegations. The district court dismissed the Complaint, finding Plaintiffs lacked Article III standing, antitrust standing, and in the alternative, failed to state a claim for which relief could be granted. *See Johnson v. Comm'n on Presidential Debates*, 202 F. Supp. 3d 159 (D.D.C. 2016). For the reasons set forth below, we affirm.

I.

Gary Johnson and James Gray ran as the Libertarian Party's presidential and vice presidential candidates in the 2012 elections, while Jill Stein and her running mate Cheri Honkala ran on the Green Party ticket. Both slates qualified on a sufficient number of state ballots to have a mathematical chance of an Electoral College victory. Each was nonetheless excluded from the nationally televised general-election debates.

They claim that they were excluded pursuant to an agreement between the Obama for America and Romney for President campaigns. They allege the parties' agreement, reflected in a memorandum of understanding ("MOU"), stipulated to three presidential debates and one vice presidential debate, and designated dates, locations, moderators, and topics. Those would be the only four debates between the major-party candidates, "except as agreed to by the parties" to the MOU. JA 63. The MOU provided that the Commission on Presidential Debates ("Commission"), a nonprofit organization, would host the debates subject to its willingness to "employ the provisions" of the MOU. JA 64.

Any candidate, other than the signatories, would be invited to participate in the debates only if he or she satisfied certain selection criteria set forth in the MOU. First, the candidate had to be constitutionally eligible to be president. Second, he or she must have qualified to appear on "enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2012 general election." Compl. ¶ 74, JA 45–46. And, third, the candidate had to have achieved a "level of support of at least 15% (fifteen

percent) of the national electorate as determined by" averaging the most recent results of "five selected national public opinion polling organizations." *Id.* ¶ 74, JA 46. Johnson and Stein met the first two criteria, but they fell short of the 15 per cent polled-support threshold.

The third-party candidates, their running mates, their campaigns, and the parties they represented in the 2012 election (collectively, "Plaintiffs" for purposes of this opinion) brought suit, challenging the MOU as an unlawful agreement to monopolize and restrain competition in violation of sections 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1–2. The Complaint alleges a conspiracy with the overall objective to:

> entrench[] market power in the presidential debates market, the presidential campaign market, and the electoral politics market of the two major political parties by exercising duopoly control over presidential and vice presidential debates in general election campaigns for the presidency.

Compl. ¶ 1, JA 15. The Complaint also alleges exclusion of Plaintiffs from the debates "because of hostility towards their political viewpoints" in violation of their First Amendment rights to free speech and association. *Id.* On appeal, Plaintiffs have abandoned their further claim of intentional interference with prospective economic advantage and relations.

Plaintiffs allege they were injured "in their businesses of debating in presidential elections, participating in presidential election campaigns, and engaging in electoral politics." *Id.* ¶ 90, JA 49. They claim to have lost millions of dollars' worth of publicity, campaign contributions, and matching funds that ordinarily would follow participation in the debates, as well as the salaries they would have earned as President and Vice President if they had won. *Id.* ¶ 90, JA 49–50. They sought invalidation of the 15 per cent polled-support requirement, injunctive relief dissolving the Commission and enjoining further collusion between the two major parties, and treble damages under section 4 of the Clayton Act, 15 U.S.C. § 15. They named as defendants the Commission and one of its founders, Frank J. Fahrenkopf, Jr.; Michael D. McCurry, a Commission co-chair; the Republican and Democratic National Committees; and 2012 presidential candidates Barack Obama and Willard Mitt Romney. Compl. ¶ 24–30, JA 23–26. Defendants' interests on appeal are represented primarily by counsel for the Commission.

The district court dismissed the case under Federal Rules of Civil Procedure 12(b)(1) and (6). It held that Plaintiffs lacked Article III standing to litigate their Sherman Act claims because they were based on "wholly speculative" injuries "dependent entirely on media coverage decisions" by nonparties. *Johnson*, 202 F. Supp. 3d at 169. The court also found the alleged harm—lack of media coverage that led to low popularity—preceded their exclusion from the debates. *See id.* Plaintiffs had thus failed to allege injury in fact that was either traceable to the Commission or redressable in this case. We review

the district court's dismissal *de novo*, taking the facts alleged in the Complaint as true and drawing all reasonable inferences in Johnson and Stein's favor. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *Andrx Pharm., Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 805 (D.C. Cir. 2001).

II.

We begin with Plaintiffs' antitrust claims, asking first whether Plaintiffs may properly proceed before this Court on these allegations. "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). Accordingly, the Court must assess Plaintiffs' standing based on "the specific common-law, statutory or constitutional claims that [they] present[]." *Int'l Primate Prot. League v. Administrator of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991).

The "irreducible constitutional minimum of [Article III] standing" requires that a plaintiff demonstrate three elements: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Id.* at 561. But here we also discuss a second type of "standing" doctrine: antitrust (*i.e.* statutory) standing. While Article III standing is a familiar concept common to all cases, antitrust standing is claim-specific. It asks "whether the

plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractor of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983) (citing Daniel Berger & Roger Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809, 813 n.11 (1977); Earl E. Pollock, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ANTITRUST L.J. 5, 6–7 (1966)). We will discuss each in turn.

A.

Plaintiffs' injuries are clearly pleaded in the Complaint; they allege their exclusion from the debates caused them to lose access to television audiences and resulting campaign contributions worth hundreds of millions of dollars. This injury—though shared with many individuals who may have wished to campaign for the presidency but did not join Mitt Romney and Barack Obama on the debate stage—is nonetheless particularized. *See FEC v. Akins*, 524 U.S. 11, 23– 25 (1998); *see also Akins v. FEC*, 101 F.3d 731, 736 (D.C. Cir. 1996) (en banc).[1]

[1] Plaintiffs have adopted a litigation strategy attributing their exclusion to the fifteen percent requirement—presumably reducing the number of similarly-situated persons to those who had obtained a mathematical possibility of victory in the electoral college. *But see* Philip Bump, *So You Want an Independent Candidate for President? You're Running Out of Time.*, WASH. POST (May 5, 2016), https://tinyurl.com/Bump-Article ("To collect [the requisite] signatures [to achieve a mathematical possibility of winning the electoral college], you need one of two things: a lot of organization or a lot of money. . . . [The cost] varies by state, but if we look at the upper end of that [price] range, we're talking about a $5.5 million investment to get on the ballot in all 50 states."). Of course, counsel's

Each excluded individual was uniquely rejected from the debates, and security would no doubt have stopped them each individually had they attempted to take the stage.

Things become far more complicated, however, when we consider whether "a favorable decision" of this Court may "redress[]" Plaintiffs' injury. *Lujan*, 504 U.S. at 561. Plaintiffs' requested relief—whether stated in the form of a request for injunctive relief or damages—amounts to a request for a declaratory judgment stating the Commission is not entitled to exclude particular individuals from its debates. On this point, we must agree with this Court's opinion in *Perot v. Federal Election Commission*: "[I]f this [C]ourt were to enjoin the [Commission] from staging the debates or from choosing debate participants, there would be a substantial argument that the [C]ourt would itself violate the [Commission's] First Amendment rights." 97 F.3d at 559.

Acknowledging this shortcoming hardly determines the merits of Plaintiffs' claims, Concurring Op. 3; it assumes them and reflects on the permissibility of the resulting remedy. The district court's opinion put all parties on notice of the redressability problem. *See Johnson*, 202 F. Supp. 3d at 172– 73 (citing *Perot*, 97 F.3d at 559; *Sistrunk v. City of Strongsville*, 99 F.3d 194, 199–200 (6th Cir. 1996)). Yet Plaintiffs failed to address the point. In so doing, they leave us with, at least, grave doubt as to the constitutionality of any order issued by this Court aimed to redress Plaintiffs' injury.

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particular litigation strategy—the way they choose to characterize the *effect* of the alleged injury—hardly controls our analysis on this point.

B.
i.

In such circumstances, and where a statutory jurisdiction could determine the result, the doctrine of constitutional avoidance permits us to resolve this case on alternative grounds, namely antitrust standing. *See* 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531.15, p.338 (3d ed. 2014) ("If both constitutional and prudential objections are raised to standing . . . it is entirely appropriate to deny standing on prudential grounds if that course is easier, or more clearly right, than to rule on constitutional grounds first."); *see also Kowalski v. Tesmer*, 543 U.S. 125, 129 & n.2 (2004) (assuming plaintiffs satisfied Article III standing and deciding the case on prudential third-party standing grounds).

This Court has acknowledged its "jurisdiction does not turn on antitrust standing." *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 107–08 (D.C. Cir. 2002) (citing *Associated Gen. Contractors of California, Inc.*, 459 U.S. at 535 n.31 ("[T]he focus of the doctrine of 'antitrust standing' is somewhat different from that of standing as a constitutional doctrine."). The concurrence, therefore, suggests we cannot "sidestep" the Article III standing inquiry to resolve this case on antitrust standing grounds. Concurring Op. 1. But proceeding directly to clearly-dispositive, non-jurisdictional, prudential standing analysis is a permissible—even preferable—course in rare cases where jurisdictional, Article III standing

inquiry yields grave constitutional doubt. *See, e.g.*, *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 921 n.2 (D.C. Cir. 1989) ("The dissent suggests that our analysis of standing must proceed from constitutional to prudential requirements. Although that is the oft-stated sequence, the rule of avoidance counsels nonetheless that, where the prudential question is clearly dispositive, we should not reach out to determine the constitutional issue." (citing *Water Transp. Ass'n v. ICC*, 819 F.2d 1189, 1194 (D.C. Cir. 1987); *Calumet Indust., Inc. v. Brock*, 807 F.2d 225, 228 (D.C. Cir. 1986); *Pub. Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 714 (D.C. Cir. 1977)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998) (accepting the proposition that "a statutory standing question can be given priority over an Article III question"). This more flexible approach is especially important in cases like this one, where "constitutional and antitrust standing overlap"—cases "where the plaintiff has not shown any injury caused by the antitrust violation." IIA PHILIP E. AREEDA, ET AL., ANTITRUST LAW ¶ 335a, p. 77 n.7 (4th ed. 2014).

ii.

As relevant here, antitrust standing requires a plaintiff to show an actual or threatened injury "of the type the antitrust laws were intended to prevent" that was caused by the defendant's alleged wrongdoing. *Andrx Pharm., Inc.*, 256 F.3d at 812; *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109–13 (1986) (discussing antitrust standing and the necessity of "antitrust injury" in suits under the Clayton Act).

To understand the scope of antitrust standing, we focus on the bedrock principle of this field: antitrust laws protect market (*i.e.* economic) competition. *Brunswick Corp. v. Pueblo BowlO-Mat, Inc.*, 429 U.S. 477, 488 (1977). Plaintiffs, however, define their injuries as millions of dollars in free media, campaign donations, and federal matching funds—injuries to them as *individual candidates* in a *political contest* for votes. Square peg, meet round hole.

As an initial matter, this Court has clearly held injury to a single competitor does not suffice to constitute an injury to competition. *See Dial A Car, Inc. v. Transp., Inc.*, 82 F.3d 484, 486–87 (D.C. Cir. 1996). Further, and most important, "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." *Sheppard v. Lee*, 929 F.2d 496, 498 (9th Cir. 1991). This conclusion—that an antitrust violation must involve injury to commercial competition—is supported by Plaintiffs' inability to define a commercial market in which they operate. Instead, they discuss the "presidential campaign market," "the electoral politics market," and the "presidential candidates market," Compl. ¶¶ 1, 11, JA 15, 18, and identify their product as "information about themselves or other presidential candidates," Blue Br. 23. While these terms may capture what political scientists call a "political economy," the phrase is merely a term of art. Short of alleging Americans are engaged in a widespread practice of selling their votes—which the Complaint does not do—the

"market" Plaintiffs identify is no more regulated by the antitrust laws than the "marketplace of ideas" or a "meet market."

The injuries Plaintiffs claim are simply not those contemplated by the antitrust laws. Consequently, Plaintiffs' antitrust claims fail to meet the requirements of antitrust standing.

III.

Finally, we turn to Plaintiffs' First Amendment claim. Perhaps in an effort to tack around unfavorable case law, the Complaint states the Commission's debates "exert a *de facto* influence on the outcome of presidential elections" such that exclusion from the debate, "in light of proven political realities, guaranteed [Plaintiffs] to lose." Compl. ¶¶ 110–11, JA 54. Plaintiffs therefore allege the fifteen percent polling criterion, "selected by Defendants with the specific intent of suppressing the viewpoints of third party or independent presidential candidates and to boost the political speech of the two major party nominees," constitutes an "unreasonable burden on free speech or political association in violation of the First Amendment." Compl. ¶¶ 119–20, JA 56; *see also id.* ¶ 130, JA 57 (alleging the fifteen percent requirement "imposes a burden on voting and associational rights in violation of the First Amendment"); *see generally Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

None of these allegations articulate a clear legal claim, let alone identify a cognizable injury. To make matters worse, the Complaint omits entirely any

allegation of government action, focusing entirely on the actions of the nonprofit Defendants. *See, e.g.*, *Rendell-Baker v. Kohn*, 457 U.S. 830, 837–43 (1982) (discussing the state action requirement).

In *Steel Co. v. Citizens for a Better Environment*, the Supreme Court observed that, in some "extraordinary" cases, federal courts may pretermit the jurisdictional threshold and dismiss a claim that is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy." 523 U.S. at 89. The First Amendment claim here fits the bill. Under these circumstances, it would be improper—and indeed impossible—for the Court to conduct a meaningful standing analysis. There may be First Amendment injuries we could invent for Plaintiffs, but those claims were not presented in the Complaint. *See Warth v. Seldin*, 422 U.S. 490, 509–10 (1975) (examining the face of the complaint to determine whether a plaintiff has established Article III standing).

IV.

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

PILLARD, *Circuit Judge*, concurring in Part I and concurring in the judgment:

I join Part I of the majority opinion. I write separately as to Parts II and III because, although I

entirely agree that both the antitrust and First Amendment claims fail, we are a court of limited jurisdiction obligated to decide the Article III standing question before assessing the merits of the claims. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340-42 (2006); *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 528 U.S. 167, 180 (2000). Despite its misleading name, "statutory standing" is not jurisdictional in the Article III sense, as the Supreme Court made clear in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 & n.4 (2014). *See also Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 & nn.17-18, 545-46 (1983) (dismissing case for lack of antitrust injury only after assuming the complaint stated a valid antitrust claim). We thus cannot sidestep the Article III standing inquiry and dismiss instead on statutory "antitrust standing" grounds. "It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998). Because I would dismiss both claims under Rule 12(b)(6) only after determining Article III standing, I concur in the judgment.

The majority's exertions to avoid addressing Article III standing in the ordinary course are puzzling, given that plaintiffs' standing appears to be straightforward under the classic injury-causation-redressability formulation. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). The majority

does not dispute that the plaintiffs ("Johnson and Stein") identify concrete and particularized injury from having been excluded from the 2012 presidential and vice-presidential debates. Maj. Op. at 6 (acknowledging that Johnson and Stein's "injuries are clearly pleaded in the Complaint" and are "particularized"). The court stops short of holding that Johnson and Stein's injury is fairly traceable to the defendants' actions, however, *see id.* at 8 (suggesting they have "not shown any injury caused by the antitrust violation"), and also denies that, in the (admittedly unlikely) event that they were to succeed on the merits of their claims, plaintiffs' injuries would be redressable.

Plaintiffs' allegations satisfy the latter two standing inquiries as readily as they do the first. Johnson and Stein allege that the challenged 15 per cent polled-support requirement was the direct cause of their injury. Had the MOU not imposed that 15 per cent threshold, they would have qualified to participate. *See* Compl. ¶ 83, J.A. 48. Those allegations suffice at the pleading stage to state causation. *See Attias v. CareFirst, Inc.*, No. 16-7108, slip op. at 15 (D.C. Cir. Aug. 1, 2017) ("Article III standing does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be 'fairly traceable' to the defendant."). And the redressability of Johnson and Stein's alleged injury flows from their theory of causation. If they were to prevail, the court could award compensation for the injuries their exclusion caused. *See Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 286-

87 (2008); *see also Cardenas v. Smith*, 733 F.2d 909, 914 (D.C. Cir. 1984) ("A damage claim, by definition, presents a means to redress an injury."); *Renal Physicians Ass'n v. U.S. Dep't of Health and Human Servs.*, 489 F.3d 1267, 1276 (D.C. Cir. 2007) ("[A]t the pleading stage, a party must make factual allegations showing that the relief it seeks will be likely to redress its injury.").

It is that last element of standing—redressability—that the majority cannot swallow, as it anticipates that any court ordered relief would violate the Commission's First Amendment rights. Maj. Op. at 7. I assume the court is correct on that point. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573-74 (1995); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). I disagree only with treating the merits of a First Amendment defense not yet in issue as an obstacle to standing. The majority cites a passing suggestion in *Perot v. FEC* that, if the court were to enjoin presidential debates or the Commission on Presidential Debates' (CPD's) choice of participants, "there would be a substantial argument that the court would itself violate the CPD's First Amendment rights." 97 F.3d 553, 559 (D.C. Cir. 1996). Again, I assume as much. But we did not identify the First Amendment as an obstacle to standing in *Perot*—nor, for example, did the Supreme Court in *Hurley* or *Tornillo*.

A standing inquiry, especially at the motion-to-dismiss stage, should not anticipate the merits—neither of the claim nor, especially, of a potential defense. A conclusion that appellants' claims cannot

be redressed because of a potential First Amendment obstacle would be impermissibly "deciding the merits under the guise of determining the plaintiff[s'] standing." *Information Handling Servs., Inc. v. Defense Automated Printing Servs.*, 338 F.3d 1024, 1030 (D.C. Cir. 2003); *see Warth v. Seldin*, 422 U.S. 490, 500 (1975) (observing that "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"); *In re Navy Chaplaincy*, 534 F.3d 756, 760 (D.C. Cir. 2008) ("In reviewing the standing question, we must be 'careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims.'"). Redressability, like any other aspect of jurisdiction, "is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). The majority explains its order of operations by invoking pre-*Lexmark* cases for dismissal on statutory standing grounds "in rare cases where [the] jurisdictional, Article III standing inquiry yields grave constitutional doubt." Maj. Op. at 8. But, as noted above, the First Amendment concern is not even part of the Article III standing inquiry; Johnson and Stein's standing itself raises no grave or doubtful constitutional question. I would therefore hold that Plaintiffs have Article III standing to bring their antitrust claims before I would dismiss them on their merits.

The majority dismisses the complaint on antitrust standing grounds because plaintiffs do not allege injury to competition, but rather identify harms to

themselves that are "simply not those contemplated by the antitrust laws." Maj. Op. at 10. I agree that the antitrust claim fatally fails to tie the major party candidates' alleged collusion to any anticompetitive harm to an identified commercial market or market participant. The complaint does not articulate a theory under which trade or commerce has been restrained by the MOU. It therefore falls outside the ambit of antitrust regulation, the aim of which is to promote economic competition. *See* I PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 100a at 3-4 (4th ed. 2014); *cf. United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise."); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (describing Sherman Act as "comprehensive charter of economic liberty").

The complaint refers to various "markets," but the defining competitive dynamic of the activities it so labels is political. It alleges, for instance, collusion in the "presidential debates market," the "presidential campaign market," the "electoral politics market," and the "presidential candidates market." Compl. ¶¶ 1, 11, J.A. 15, 18. That flaw is not repaired by the complaint's allegations of various ways in which U.S. presidential campaigns involve a lot of money. The televised debates are expensive to stage, generate revenues for venues and their host localities, and can boost the fundraising of successful participants. *See id.* ¶¶ 35-41, J.A. 29-33. But "the antitrust laws should not regulate political activities 'simply because those activities have a commercial impact.'" *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S.

492, 507 (1988) (quoting *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961)). Nor is antitrust scrutiny triggered every time someone in an activity that involves or affects commerce contends that others have agreed to act in a way that fails equally to enhance the claimant's access to money. Not every joint business venture is an antitrust violation. *See Associated Press v. United States*, 326 U.S. 1, 23 (1945) (Douglas, J., concurring). To be actionable, an agreement must unduly restrain or monopolize trade or commerce. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59-62 (1911).

The majority and I agree that the complaint fails for want of any connection between the major party candidates' alleged collusion in planning and restricting their joint debates and anticompetitive harm to an identified commercial market. But I disagree that the deficiency is only one of antitrust standing. Because the claim would equally be deficient if the plaintiff were the government, which need not prove statutory standing, I would affirm the dismissal as a failure to state a cognizable violation rather than as a statutory standing shortfall. *See* AREEDA, ANTITRUST LAW ¶ 335f at 91.

Part III of the opinion, dismissing Johnson and Stein's First Amendment challenge to their exclusion, also puts the merits cart before the Article III standing horse. I would dismiss this claim, too, for failure to state a claim rather than for want of standing. The constitutional allegations plainly fail the established "state action" requirement. "It is fundamental that the First Amendment prohibits *governmental* infringement on the right of free

speech." *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) (emphasis added). Moreover, a candidate debate is a forum that, even if run by a public entity, could still be nonpublic and impose reasonable, viewpoint-neutral access restrictions without running afoul of the First Amendment. *See Arkansas Educ. Tel. Comm'n v. Forbes*, 523 U.S. 666, 677-78 (1998).

Both of plaintiffs' claims lack merit. Before so deciding, however, we must determine whether plaintiffs have standing. To do so, we must take the allegations of the complaint as true and assume the validity of the plaintiffs' legal theory. *Mendoza v. Perez*, 754 F.3d 1002, 1010 (D.C. Cir. 2014) (citing *Holistic Candlers and Consumers Ass'n v. FDA*, 664 F.3d 940, 943 (D.C. Cir. 2012)). Under those requisite assumptions (however ultimately unavailing the claims might be), plaintiffs here have standing to sue. I join Part I but, because this case presents no reason to "pretermit the jurisdictional threshold," Maj. Op. at 11, I concur only in the judgment.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY E. JOHNSON, *et al.*,	)	
	)	
Plaintiffs,	)	**Civil Action**
	)	**No: 15-1580**
v.	)	**(RMC)**
	)	
COMMISSION ON PRESIDENTIAL DEBATES, *et al.*,	)	
	)	
Defendants.	)	

AMENDED OPINION[1]

The Libertarian and Green Parties and their political candidates sought, and failed to receive, invitations to privately-sponsored presidential debates in 2012. They now seek invitations to this year's presidential debates, claiming that the rules that bar their participation violate antitrust law. However, because Plaintiffs have no standing and because antitrust laws govern commercial markets and not political activity, those claims fail as a matter of well-established law. Plaintiffs also allege violations of the First Amendment, but those claims

[1] This Opinion was amended pursuant to the Court's August 15, 2016 Order [Dkt 55].

must be dismissed because the First Amendment guarantees freedom from government infringement and Defendants here are private parties. Finally, Plaintiffs fail to allege facts that could support a claim for intentional interference with prospective business advantage. Defendants' motions to dismiss will be granted.

I. FACTS

Plaintiffs are the Libertarian National Committee, which controls the U.S. Libertarian Party; Gary Johnson, the Libertarian Party's nominee for president in 2012; Gary Johnson 2012, Inc., a corporation that served as the campaign committee for Mr. Johnson in 2012; James Gray, Mr. Johnson's 2012 vice presidential running mate; the Green Party; Jill Stein, the Green Party's nominee for president in 2012; Jill Stein for President, the entity that served as Ms. Stein's campaign committee in 2012; and Cheri Honkala, Ms. Stein's 2012 vice presidential running mate. Plaintiffs brought this suit against: the Republican National Committee (RNC); the Democratic National Committee (DNC); the Commission on Presidential Debates, a nonprofit corporation founded by the RNC and the DNC (Commission); Frank Fahrenkopf, Jr., Commission founder and co-chair; Michael McCurry, Commission co-chair; President Barack Obama, Democratic presidential candidate in 2012; and Willard Mitt Romney, Republican candidate for president in 2012. The Complaint sets forth four counts:

> Count I, combination and conspiracy to restrain interstate commerce in violation of Section 1 of the Sherman Act;
>
> Count II, monopolization, attempt to monopolize, and conspiracy to monopolize in violation of Section 2 of the Sherman Act;
>
> Count III, violation of First Amendment rights of free speech and association; and
>
> Count IV, intentional interference with prospective economic advantage and relations.

Compl. [Dkt. 1] ¶¶ 31-141.

In support of these claims, Plaintiffs allege that Defendants have conspired to entrench market power, to exclude rival candidates, and to undermine competition "in the presidential debates market, the presidential campaign market, and the electoral politics market of the two major political parties by exercising duopoly control over presidential and vice presidential debates in general election campaigns for the presidency." *Id*. ¶ 1. Plaintiffs claim that Defendants intended, and still intend, to exclude rival candidates and impair competition in these "markets" and to narrow voting choices to the candidates from the two major political parties at the expense of the electoral process as well as third party and independent candidates. *Id*. ¶¶ 3-6. Plaintiffs further allege that the Libertarian and Green Party

candidates were excluded from the debates in 2012 "due to hostility towards their political viewpoints." *Id.* ¶ 1.

Each of the three presidential debates between President Obama and Mitt Romney in 2012 was watched by more than 59 million viewers, and each allegedly excluded Plaintiffs Johnson and Stein by agreement between the Commission, the RNC, the DNC, and party nominees President Obama and Mr. Romney.[2] *Id.* ¶ 34(m). The Complaint alleges that the presidential and vice presidential debates have a monetary value of hundreds of millions of dollars. *Id.* ¶ 34. Corporate sponsors collectively contribute millions of dollars in each election cycle to the Commission. *Id.* ¶ 35. Further, presidential debates generate millions of dollars in revenue for the communities in which they are held. *Id.* ¶ 37. Also, the hosts of the debates spend "several millions of dollars in associated direct and indirect costs, including payments of millions of dollars to the Commission." *Id.* ¶ 38. For example, for the 2012 presidential debate in Denver, the University of Denver paid the Commission $1.65 million for production fees. *Id.* Republican and Democratic campaigns spend enormous sums on advertising, rental of office space, staffer salaries, tee shirts, and entertainment. *Id.* ¶¶ 40-44. Allegedly, over $2 billion was spent on the 2012 presidential election,

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[2] The Commission accepts the allegations of the Complaint for the purpose of its motion to dismiss, but insists that the Commission is an independent entity that does not act in concert with any political party or candidate. *See* Comm'n Mot. to Dismiss [Dkt. 40] at 9 n.13.

including sums expended by the campaigns and third parties. *Id*. ¶¶ 40, 44.

Plaintiffs contend that televised debates are essential to presidential and vice presidential candidates, providing candidates with free national advertising and allowing them to compete meaningfully and to communicate their message to the electorate. *Id*. ¶¶ 45-46. They allege:

> To be excluded from the debates is "an electoral death sentence." The media gives non-duopoly, non-major party candidates little or no coverage, and they cannot afford significant, if any national advertising. Hence, they are denied the free, enormous coverage received by the duopoly party candidates through the debates, and they are marginalized in the minds of most people in the U.S. and the media, and considered to be less than serious, peripheral, and perhaps even frivolous candidates.

Id. ¶ 46. Plaintiffs insist that there are no alternative means for national exposure and that "[e]xclusion from the debates guarantees marginalization, a public perception that the excluded candidates are 'unserious,' notwithstanding their talent, records, capabilities, alignments with the views of many, if not most, of American voters, and leadership skills." *Id*. ¶ 47.

The Commission has sponsored the presidential debates since the League of Women Voters withdrew

in 1988; now it is the sole sponsor of all presidential debates. *Id.* ¶¶ 52, 65, 69-70, 100. The Commission allegedly structured the 2012 debates to promote RNC and DNC candidates and to exclude other candidates, *id.* ¶¶ 58-63, and plans to do so again in all future debates, *id.* ¶¶ 66-67.[3]

In each year that presidential debates are held, the Republican and Democratic campaigns enter into a Memorandum of Understanding (MOU). *Id.* ¶ 71; *see also* Compl., Ex. 1 (MOU dated Oct. 2012). In 2012, the MOU was signed by the general counsel to the Obama campaign and the general counsel to the Romney campaign. The MOU provided that the Commission would sponsor the candidates' debate appearances and the candidates would not appear at any other debate without prior consent of the parties to the MOU. The MOU also provided that the parties "agreed that the Commission's Nonpartisan Candidate Selection Criteria for 2012 General Election Debate participation shall apply in determining the candidates to be invited to participate in these debates." *Id.* 73. Those criteria include (1) evidence of "ballot access"—that the candidate qualified to appear on enough State ballots to have a mathematical chance of securing an electoral college majority; [4] and (2) evidence of

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[3] The Complaint acknowledges that Ross Perot was permitted to participate in the presidential debates in 1992, but refers to this as an aberration, permitted only because the RNC and DNC believed that Mr. Perot's presence would serve their party interests. Compl. ¶¶ 70-71.

[4] In 2012, Mr. Johnson and Ms. Stein were each qualified on enough State ballots to have at least a mathematical chance of securing an Electoral College majority. Opp'n [Dkt. 45] at 8. Since the Commission began sponsoring debates in 1998, the

"electoral support"—that the candidate had the support of 15% of the national electorate as determined by averaging public opinion polls from five selected national polling organizations (the 15% Provision).[5] Compl. ¶ 74. The Complaint asserts that the 15% Provision was designed to exclude the participation of third party and independent candidates. *Id.* ¶¶ 75-76, 85-86. Plaintiffs allege that they have been injured in their "businesses of debating in presidential elections, participating in presidential election campaigns, and engaging in electoral politics." *Id.* ¶ 90.

Accordingly, Plaintiffs allege that Defendants have colluded to restrain commerce and monopolize the presidential debates, elections, and politics markets by keeping other parties and candidates out of the debates (and thus out of the electoral competition) and by fixing the terms of participation in the debates to avoid challenges to the Republican or Democratic parties and their candidates. *Id.* ¶ 89 (alleging violation of Section 1 of Sherman Act); *id.* ¶ 104 (alleging violation of Section 2 of Sherman Act).

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following candidates, every one of whom had less than 1% of the popular vote, obtained ballot access in a sufficient number of States to win an Electoral College majority: Lenora Fulani (1988 & 1992); Andre Marrou (1992); Harry Brown (1996 & 2000); John Hagelin (1996 & 2000); Howard Philips (1996 & 2000); Ron Paul (1998 & 2008); Michael Badnarik (2004); David Cobb (2004); Michael Peroutka (2004); Bob Barr (2008); Chuck Baldwin (2008); Cynthia McKinney (2008); and Virgil Goode (2012). *See* Election Results 1998-2000, FEC, http://www.fec.gov/pubrec/electionresults.shtml (last visited July 26, 2016).

[5] The MOU does not specify the criteria for selecting the five national polling organizations.

They further assert that Defendants have violated the First Amendment by suppressing the viewpoints of third party and independent candidates, *id*. ¶ 120, and by burdening and stifling the right to associate, to vote, to form new political parties, and to support third party and independent candidates, *id*. ¶¶ 122, 123, 128, 130. Finally, they contend that Defendants, through their anticompetitive conduct, intentionally interfered with Plaintiffs' expectations of economic advantages and relationships with debate organizers, sponsors, contributors, and media outlets. *Id*. ¶¶ 134-141.

Plaintiffs seek injunctive relief as well as money damages. They ask for (1) a declaratory judgment that Defendants have engaged in unlawful restraint of trade in the presidential debates, elections, and politics markets in violation of Section 1 of the Sherman Act; (2) a declaratory judgment that Defendants have engaged in monopolization of these same markets in violation of Section 2 of the Sherman Act; (3) treble damages for antitrust violations; (4) a declaratory judgment that the 15% Provision used by Defendants violates the First Amendment and entitles them to damages for such violation; (5) damages for Defendants' tortious interference with prospective business advantage and relations; (6) equitable relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, including an order dissolving the Commission to dissolve and an injunction against any further agreement between the RNC and the DNC that would exclude presidential candidates from debates; (7) attorney fees, costs, and interest. Compl. at 46-47 (Relief Requested).

Defendants have moved to dismiss, arguing that Plaintiffs lack standing and that they have failed to state a claim under antitrust law, the First Amendment, or intentional interference. *See* DNC Mot. to Dismiss (MTD) [Dkt. 37]; DNC Reply [Dkt. 47]; RNC MTD [Dkt. 38]; RNC Reply [Dkt. 46]; Romney MTD [Dkt. 39]; Romney Reply [Dkt. 48]; Comm'n MTD [Dkt. 40]; Comm'n Request for Judicial Notice [Dkt. 41]; Comm'n Reply [Dkt. 49].[6] Plaintiffs oppose. *See* Opp'n [Dkt. 45].

II. LEGAL STANDARD

A. Standing and Lack of Jurisdiction

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move to dismiss a complaint, or any portion thereof, for lack of subject matter jurisdiction. Here, Defendants contend that Plaintiffs lack standing to allege violations of antitrust law and thus Counts I and II should be dismissed for lack of jurisdiction. A plaintiff must have standing under Article III of the United States Constitution in order for a federal court to have jurisdiction to hear the case and reach the merits. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 101 (1998); *Grand Council of the Crees v. FERC,* 198 F.3d 950, 954 (D.C. Cir. 2000). Standing is an "irreducible constitutional minimum." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

Because Plaintiffs assert subject matter jurisdiction, they bear the burden of showing that

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[6] President Obama joined in the DNC briefs; Messrs. Fahrenkopf and McCurry joined in the Commission briefs.

such jurisdiction exists. *See Khadr v. United States*, 529 F.3d 1112, 1115 (D.C. Cir. 2008). When reviewing a motion to dismiss for lack of jurisdiction, a court must review the complaint liberally, granting the plaintiff the benefit of all inferences that can be derived from the facts alleged. *Barr v. Clinton*, 370 F.3d 1196, 1199 (D.C. Cir. 2004). Nevertheless, a court need not accept factual inferences that are not supported by the facts alleged in the complaint, nor must a court accept a plaintiff's alleged legal conclusions. *Speelman v. United States*, 461 F. Supp. 2d 71, 73 (D.D.C. 2006). A court may consider materials outside the pleadings to determine its jurisdiction. *Settles v. U.S. Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005); *Coal. for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003).

B. Failure to State a Claim

Defendants also contend that the Complaint fails to state a claim. A motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the adequacy of a complaint on its face. Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain sufficient factual information, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A court must assume the truth of all well-pleaded factual allegation and construe reasonable inferences from those allegations in favor of the plaintiff. *Sissel v. Dep't of Health & Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014). Again, a court need not accept a plaintiff's

inferences if they are not supported by the facts set out in the complaint, *see Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994), and a court need not accept as true a plaintiff's legal conclusions, *see Iqbal*, 556 U.S. at 678. In deciding a motion under Rule 12(b)(6), a court may consider the complaint's factual allegations, documents attached to the complaint as exhibits or incorporated by reference, and matters about which the court may take judicial notice. *Abhe & Svoboda, Inc. v. Chao*, 508 F.3d 1052, 1059 (D.C. Cir. 2007).

Federal Rule of Evidence 201 provides that a court may judicially notice a fact that is not subject to "reasonable dispute because it (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A court may take judicial notice of facts contained in public records of other proceedings, *see Abhe*, 508 F.3d at 1059; *Covad Commc'ns Co. v. Bell Atlantic Co.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005), and of historical, political, or statistical facts, and any other facts that are verifiable with certainty, *see Mintz v. FDIC*, 729 F. Supp. 2d 276, 278 n.5 (D.D.C. 2010). Further, judicial notice may be taken of public records and government documents available from reliable sources. *Hamilton v. Paulson*, 542 F. Supp. 2d 37, 52 n.15 (D.D.C. 2008), *rev'd on other grounds*, 666 F.3d 1344 (D.C. Cir. 2012). For the purpose of this Opinion, the Court takes judicial notice of cited political and statistical facts that the Federal Election Commission has posted on the web. *See* nn.3 & 6, *supra*. The Commission's unopposed Request for Judicial Notice

[Dkt. 41] will be granted only to the extent that this Opinion cites judicially noticed material.

Plaintiffs argue that their claims are "heavily fact bound and implicate testimonies from political, economic, and First Amendment experts" and thus "[t]his case is peculiarly unsuited to motions to dismiss." Plaintiffs rely on commentators and others who hold the opinion that presidential debates should be open to all, or at least more, candidates. *See* Opp'n at 28-29 (quoting political pundit and commentator George Will, former Senator Oliver North, former Federal Election Commission Chair Scott Thomas, author George Farah, and various journalists). In support of their reliance on commentators, Plaintiffs misquote *Twombly* as stating that "the Court must assess the plausibility of the Plaintiff's claims based on experience, the considered view of leading commentators, common sense or otherwise." *See* Opp'n at 28 n.2 (citing *Twombly*, 550 U.S. at 566). *Twombly* does not so credit all "leading" commentators. *Twombly* requires facts:

> In identifying facts that are suggestive enough to render a [Sherman Act] § 1 conspiracy plausible, we have the benefit of the prior rulings and *considered views of leading commentators*, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest

> conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.

Id. at 556-57 (emphasis added). Whether parallel conduct suggests an antitrust conspiracy is not relevant to this case. *Twombly* in no way suggests that district courts generally should accept commentators' political or social policy opinions as governing a judicial opinion, and this Court will not adjudicate Defendants' motions to dismiss here based on individual opinions regarding what the law should be or how elections and campaigns should operate. When reviewing a motion to dismiss for failure to state a claim, the Court accepts the *factual* allegations of the Complaint as true, *see Sissel*, 760 F.3d at 4, and need not accept as true a plaintiff's legal conclusions, *see Iqbal*, 556 U.S. at 678. This Court will follow Supreme Court teachings.

III. ANALYSIS

A. Antitrust Claims

1. Standing Generally

To have Article III standing, a plaintiff must establish: "(1) [he] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a

favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan*, 504 U.S. at 560-61). In *Fulani v. Brady*, 729 F. Supp. 158 (D.D.C. 1990), *aff'd on other grounds*, 935 F.2d 1324 (D.C. Cir. 1991), a court in this district decided the plaintiff had no standing to sue in circumstances similar to those here. Lenora Fulani was the New Alliance presidential candidate in 1988. She sued the Secretary of the Treasury and the Commission on Presidential Debates, seeking to revoke the Commission's tax exempt status and either to bar the Commission-sponsored debates or to require the Commission to include her in the debates. 729 F. Supp. at 159-60. While acknowledging that valuable media exposure and voter recognition is afforded by participation in well-publicized debates, the district court found that Ms. Fulani lacked Article III standing to sue the Commission because she had not alleged an injury that was traceable to the Commission. The Commission merely coordinated and sponsored the debates. Ms. Fulani's alleged injury, the loss of media exposure and voter recognition, was traceable to media decisions regarding whether to cover the debates or her campaign. "If the [Commission] held a debate but no one from the media came to cover it then Fulani would be hard-pressed to assert any injury from her exclusion." *Id*. at 164.

In addition, the district court found that Ms. Fulani's alleged injury was purely speculative:

> [M]edia coverage is dependent upon a number of diverse factors involving the

> structure and quality of the debates, including the number of candidates participating and the stature of those participating. If all eighty-two candidates for President in 1988 were participants in the debates this Court cannot reasonably infer that the debates would actually be broadcast nationally and that there would be millions of viewers. [7] Indeed, even assuming that there was media coverage of a debate which involved every fringe party candidate, this Court cannot reasonably infer what practical value, if any, such a political free-for-all would have for the American voters in terms of candidate recognitions or voter education. Indeed, if such a debate were staged, this Court maintains serious doubt whether major party candidates—who presumably would be the media draw in the first place—would participate.

Id. at 163. Because Ms. Fulani failed to allege a concrete, non-speculative injury traceable to the

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[7] When Mr. Johnson and Ms. Stein ran for president in 2012, there were over 240 declared candidates for president, excluding those seeking the nomination of a major party. *See* 2012 Presidential Form 2 Filers, FEC, http://www.fec.gov/press/resources/2012presidential_form2dt.shtml (last visited July 26, 2016).

Commission, she did not have standing under Article III. *Id*. at 163-164.

Likewise, Plaintiffs in this case have not alleged a non-speculative injury traceable to the Commission. In the same vein as Ms. Fulani, Plaintiffs complain that "[t]o be excluded from the debates is an electoral death sentence" and that exclusion from Commission sponsored debates deprives them of free national advertising that is essential to the Libertarian and Green Party campaigns. Compl. ¶¶ 45-46. Plaintiffs' alleged injuries are wholly speculative and are dependent entirely on media coverage decisions. The alleged injuries—failure to receive media coverage and to garner votes, federal matching funds, and campaign contributions—were caused by the lack of popular support of the candidates and their parties sufficient to attract media attention. It is obvious that Defendants did not cause Plaintiffs' alleged harms when the sequence of events is examined: Plaintiffs' injuries occurred *before* Defendants failed to invite them to participate in the 2012 debates because the lack of an invitation was due to Plaintiffs' failure to satisfy the 15% Provision, *i.e*., the failure to obtain sufficient popular support. Plaintiffs have not alleged a concrete injury traceable to the Commission, and thus they lack standing.

In Opposition, Plaintiffs claim that they have "competitor standing" to sue. Opp'n at 39-40. The doctrine of competitor standing has no bearing on this lawsuit. The doctrine confers standing when the Government takes action that benefits a plaintiff's competitor to the economic detriment of the plaintiff. *See Delta Constr. Co., Inc. v. EPA*, 783 F.3d 1291, 1299 (D.C. Cir. 2015); *see State Nat'l Bank of Big*

Spring v. Lew, 795 F.3d 48, 55 (D.C. Cir. 2015) (the competitor standing doctrine permits a plaintiff to challenge the Government's "under-regulation" of such plaintiff's economic rival). Because this case does not involve government action, "competitor standing" is not relevant to Plaintiff's claims. *See supra*, Section B (finding that there is no state action implicated here).[8]

Without standing, Plaintiffs have not presented a case or controversy under Article III with regard to the antitrust claims. Dismissal of Counts I and II is warranted due to lack of jurisdiction.

2. Antitrust Standing

Further, Plaintiffs have not alleged that they have suffered an antitrust injury andthus they have not alleged antitrust standing. Antitrust standing requires a plaintiff to show an actual or threatened injury "of the type that the antitrust laws were intended to prevent" that was caused by the defendant's alleged wrongdoing. *Andrx Pharm. Inc. v. Biovail Corp. Int'l,* 256 F.3d 799, 806 (D.C. Cir. 2001). Antitrust laws were designed to protect competition, not competitors. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). A plaintiff must allege "anti-competitive effects

[8] *See Buchanan v. Federal Election Comm'n*, 112 F. Supp. 2d 58, 74-75 (D.D.C. 2000) (third party presidential candidate Pat Buchanan sought to participate in Commission-sponsored debates with "competitor standing" to challenge FEC's dismissal of his complaint; even so, the district court affirmed the FEC's dismissal because the 15% Provision was objective, reasonable, and not subject to restrictions imposed by the Federal Election Campaign Act, 2 U.S.C. § 431 *et. seq*.).

resulting from [the defendant's] actions; absent injury to *competition*, injury to a plaintiff as a *competitor* will not satisfy this pleading requirement." *Mizlou Television Network, Inc. v. Nat'l Broad. Co.*, 603 F. Supp. 677, 683 (D.D.C. 1984) (emphasis in original). "[A] plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). Broad allegations of harm to the "market" as an abstract entity do not adequately allege an antitrust injury. *Id.* at 339 n.8; *see Asa Accugrade, Inc. v. Am. Numismatic Ass'n*, 370 F. Supp. 2d 213, 216 (D.D.C. 2005) (failure to allege facts beyond a conclusory statement that "the market as a whole suffered anti-competitive injury," is fatal to a Sherman Act claim). Critically, "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." *Sheppard v. Lee*, 929 F.2d 496, 498 (9th Cir. 1991).

The Complaint alleges Plaintiffs were harmed through loss of publicity, campaign contributions, and salaries the individual candidate Plaintiffs would have received as President or Vice President. Compl. ¶ 92. Harm to individuals is not antitrust injury. Antitrust claimants must allege harm to competition, *see Mizlou*, 603 F. Supp. at 683, or harm to a market, *see Brunswick*, 429 U.S. at 488. Plaintiffs do allege that presidential debates, elections, and politics are "markets" that are harmed by Defendants' failure to invite Plaintiffs to participate in the presidential debates. *Id.* ¶¶ 1, 89-90. But calling political activity a "market place" does not make it so. Plaintiffs make

no attempt to define what they mean by presidential debates, elections, and politics "markets." Their vague reference to "markets" is insufficient to allege injury to competition in any particular market. *See Atlantic Richfield*, 495 U.S. at 339 n.8. As with holding political office, running for political office is not "commerce" under antitrust law. *See Sheppard,* 929 F.2d at 498. Because they have failed to assert an antitrust injury, Plaintiffs lack antitrust standing. For this reason as well, Counts I and II will be dismissed.

3. Failure to Allege Injury to a Commercial Market

Moreover, Plaintiffs' failure to allege injury to competition in a commercial market constitutes a failure to state an antitrust claim. Counts I and II attempt to allege restraint of trade and monopoly in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2. The Sherman Act regulates markets. To state a § 1 claim, a plaintiff must allege (1) an antitrust injury to the relevant market that also injured plaintiff; (2) defendants entered into some agreement, (3) the agreement either did or was intended to restrict trade unreasonably in the relevant market, and; (4) it affected interstate commerce. *Asa Accugrade*, 370 F. Supp. 2d at 215. To state a § 2 claim, a plaintiff must allege facts showing the acquisition or maintenance of monopoly power in the relevant market through willful exclusionary conduct. *See United States v. Microsoft,* 253 F.3d 34, 50 (D.C. Cir. 2001). Plaintiffs bear the burden to plead a relevant market for their Sherman

Act claims. *See Meijer, Inc. v. Barr Pharms., Inc.*, 572 F. Supp. 2d 38, 53 (D.D.C. 2008).

The Sherman Act is aimed at business combinations with commercial objectives. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959). "[A]ntitrust laws regulate business, not politics . . . ." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991). When a case involves political opponents and political objectives, not commercial competitors or market place goals, antitrust laws do not apply. *Counsel for Emp. & Econ. Energy Use v. WHDH Corp.*, 580 F.2d 9, 12 (1st Cir. 1978); *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 140-41 (1961) (exempting anticompetitive restraints arising from efforts to influence governmental action; the Sherman Act "condemns trade restraints, not political activity"). Plaintiffs claim that the presidential debates constitute "commerce" regulated by antitrust law because of the incidental economic impact of debates, *i.e.*, the monies spent on debate sponsorship fees, the revenues earned by debate hosts, the sales of t-shirts and other campaign paraphernalia. Plaintiffs also attempt to amend their Complaint by alleging in their Opposition a new type of injury: reduction of voter education output. Opp'n at 41. It is unclear what, precisely, "voter education output" might be, but it appears to refer to ideas, not products or services that are traded in a commercial marketplace, and thus this claim does not allege a cognizable antitrust injury. *See DataCell ehf v. Visa, Inc.*, No. 1:14-cv-1658, 2015 WL 4624714, at *7 (E.D. Va. July 30, 2015) ("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.")

The Supreme Court has soundly rejected assertions like those advanced by Plaintiffs. "Antitrust laws should not regulate political activities simply because those activities have a commercial impact." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 507 (1988) (internal quotation marks and citation omitted). Plaintiffs' claims are based on competition among candidates for political office. Without doubt, Presidential debates are quintessential political activities. While Plaintiffs point to the millions of dollars that campaigns spend on elections and the revenue generated by communities that host debates, such incidental commercial activity does not convert the debates and campaigns from political to commercial activity.

Plaintiffs also contend that the Sherman Act applies to political activity because there is no express exception for political activity in the statute. Opp'n at 6, 35. Plaintiffs' logic is faulty. The Sherman Act expressly applies only to restraints of "trade or commerce." Congress did not need to include an exception for political activity because the statutory language does not include political activity in the first place.

Indeed, courts have repeatedly rejected attempts to impose the antitrust laws on political conduct. In *Council for Emp't & Econ. Energy Use v. WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), the First Circuit affirmed the district court's dismissal of an antitrust claim against broadcasters who provided free air time

to the plaintiff's political opponent. The First Circuit emphasized that the case involved political opponents and political objectives, not commercial competitors and marketplace goals, and 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 scope of the Sherman Act. *Id*. at 12. In *Sheppard v. Lee*, 929 F.2d 496 (9th Cir. 1991), a plaintiff claimed that defendants violated the antitrust laws by firing plaintiff when he declared his candidacy for a position on the county board of supervisors. The Ninth Circuit upheld the dismissal of the Sherman Act claim because "antitrust laws post no barriers to the suppression of competition for the holding of any particular office or position, elected or otherwise. . . ." *Id*. at 499-500.

Moreover, this Court could not require Defendants to include Plaintiffs in the debates because such an order would violate the First Amendment prohibition on forced speech and forced association. "[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party v. Wisconsin*, 450 U.S. 107, 122 (1981). That is, freedom of association "plainly presupposes a freedom not to associate." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). The Supreme Court has stated clearly and often that the First Amendment freedom of speech includes the right to speak freely *and* the right to refrain from speaking. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977). "The essential thrust of the First Amendment is to

prohibit improper restraints on the voluntary public expression of ideas" and "[t]here is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985) (citation omitted; emphasis in orginal).

For example, the Supreme Court has rejected "right of access" laws. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), a newspaper had attacked the character and record of a political candidate and a "right of reply" statute required the paper to print the candidate's response. *Id.* at 244. The Supreme Court held that the statute violated the First Amendment because the government could not coerce the press into printing the candidate's reply. *Id.* at 256-58. Relying on *Tornillo*, in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557 (1995), the Court held that veterans could exclude a gay group from the veterans' privately-organized parade. The veterans planned to convey their own political message and the First Amendment forbade the court from mandating that they alter the expressive content of the parade by including the homosexual group's message. *Id.* at 572-73. *See also Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996) (rejecting claim by third party candidate who sought to be included in Commission debates, and opining that "if the court were to enjoin the [Commission] from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the [Commission's] First Amendment rights"); *Sistrunk v. City of Strongville*, 99 F.3d 194, 199-200 (6th Cir. 1996) (the

Bush campaign and the City of Strongville did not violate a plaintiff's First Amendment right by denying her admission to a campaign rally on public property, as the rally organizers had a First Amendment right to hold a rally "without having to tolerate simultaneous discordant statements" and plaintiff had other avenues of expression).[9]

In support of their claim that the Sherman Act requires Defendants to include Plaintiffs in the presidential debates, Plaintiffs point to *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR), Inc.*, 547 U.S. 47 (2006). In *Rumsfeld*, the Supreme Court held that the military could recruit on law school campuses. The Court explained that this did not impinge on First Amendment rights because the school's decision to permit recruiters on campus was not "inherently expressive" and that the "schools are not speaking when they host interviews and recruiting receptions." *Id.* at 49. *Rumsfeld* is inapposite, as Defendants' decisions regarding whether to sponsor a debate and who participates constitute political speech, protected by the First Amendment. *See Hurley*, 515 U.S. at 575 (choice not to include a group in a parade is protected by the First Amendment).

B. First Amendment Claim

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[9] Plaintiffs mistakenly assert a right to participate in the debates in light of *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (upholding a right to protest in a private shopping center). *PruneYard* has no application here, as its holding was based on broad rights provided by the California Constitution. The U.S. Constitution, not the California Constitution, is at issue here.

Plaintiffs allege that Defendants have violated their right to free speech and free association by excluding them from the presidential debates. It is fundamental that the First Amendment binds only the actions of the Government and does not apply to actions of private persons or entities. *Pub. Utilities Comm'n v. Pollak,* 343 U.S. 451, 461 (1951); *Granfield v. Catholic University of Am.,* 530 F.2d 1035, 1046-47 (D.C. Cir. 1976); *Nat'l Conservative Political Action Comm. (NCPAC) v. Kennedy*, 563 F. Supp. 622, 626 (D.D.C. 1983), *aff'd*, 729 F.2d 863 (D.C. Cir. 1984). The First Amendment "provides no protection against private behavior, no matter how egregious." *Montano v. Hedgepeth*, 120 F.3d 844, 848 (8th Cir. 1997).

Previously, the Natural Law Party and third party candidate Ross Perot brought a First Amendment claim against the Commission. *See Hagelin v. FEC*, Case Nos. 96-2132 & 962196 (THH), 1996 WL 566762 (D.D.C. Oct. 1, 1996), *aff'd on other grounds sub nom. Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996). There, the plaintiffs advanced statutory and constitutional claims and sought a preliminary injunction prohibiting the Commission from using certain selection criteria in choosing which candidates would appear at the presidential debates. The district court denied the injunction, finding that there was no likelihood of success on the merits on any of plaintiffs' claims; with regard to the constitutional claims, the Court emphasized that there was no evidence that the Commission was a state actor. *Id*. at *6.

Plaintiffs expressly concede that Defendants are not government actors. *See* Opp'n at 48. Plaintiffs do not make claims against the individual defendants in their official capacities and they do not sue them as

state actors. They allege that President Obama and Mr. Romney are liable as individuals because they entered into "collusive agreements" during the 2012 election to sustain the Commission's "monopoly" over presidential debates. *See* Compl. ¶¶ 29-30. President Obama is sued for his actions as a candidate, not for any actions he took as President. Similarly, Plaintiffs' allegations against Messrs. Fahrenkopf and McCurry are claims against them in their individual capacities. Plaintiffs contend that Mr. Fahrenkopf collaborated to take the debates from the League of Women Voters and to dictate the terms of the debates creating the RNC and DNC's "duopoly," *id.* ¶ 27, and that Mr. McCurry actively participated in the "monopoly arrangement" between the RNC, the DNC, the Commission, and the candidates, *id.* ¶ 28.

Plaintiffs seek to expand the law broadly by arguing that Defendants should be treated as government actors because they sponsor presidential debates that "perform the same historical role that public parks or comparable venues did in educating the public about politics and candidates," *i.e.*, the debates function as a "surrogate public park." Opp'n at 49. Plaintiffs reason that Defendants should be treated as government actors like a private party who controls a company town, citing *Marsh v. Alabama*, 326 U.S. 501 (1946). *Marsh* is not analogous. There, the Supreme Court upheld the right to leaflet in a company town because the private party controlled the entire town and all "essentially public forums." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 134 (1973) (discussing *Marsh*). Here, Defendants have not assumed the attributes of a municipality and do not control all public areas. In

contrast to the operation of a town (ordinarily a public function), the hosting of a political debate is not a public function "because the First Amendment protects private parties' rights to put on (and select the content of) debates." *DeBauche v. Trani*, 191 F.3d 499, 509 (4th Cir. 1999). Moreover, just because a private party performs a public function does not necessarily mean the private entity becomes a state actor. *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987) (the U.S. Olympic Committee serves the public by coordinating athletics, but it is not a government actor). The fact that Defendants serve the public by coordinating presidential debates does not make their actions "state action" for purposes of the First Amendment.

Even when televised debates are hosted by a state actor, courts have held that such debates do not constitute a "public forum" to which there is a First Amendment right of access. *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 669, 677-82 (1998). In *Forbes*, a state agency owned and operated a television network that hosted debates. The Supreme Court found that the state agency did not violate the First Amendment when it excluded from a televised debate an independent candidate for Senate whom it believed had insufficient support to be considered a "serious" contender for office. *Id.* at 682-83. "[T]he debate was a nonpublic forum, from which [the agency] could exclude Forbes in the reasonable, viewpoint neutral exercise of its journalistic discretion." *Id.* at 676. *See also Chandler v. Georgia Public Telecomm. Comm'n*, 917 F.2d 486, 489 (11th Cir. 1990) (a state agency "chose to air a debate between only the Democratic and Republican

candidates because it believed such a debate would be of the most interest and benefit to the citizens of Georgia. Such a decision promotes [the agency's] function, was 'reasonable' and was 'not an effort to suppress expression merely because public officials oppose the speaker's view."); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (a state may deny candidates ballot access for failure to reach a significant modicum of voter support). Plaintiffs view themselves as champions of the public interest, insisting that open debates necessarily promote democracy. However, the Supreme Court in *Forbes* evaluated a demand for debate access more realistically, noting:

> Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide the safe course is to avoid controversy, and by so doing diminish the free flow of information and ideas. In this circumstance, a government–enforced right of access inescapably dampens the vigor and limits the variety of public debate.

Forbes, 523 U.S. at 681 (internal citations and quotations omitted). Because Plaintiffs fail to allege facts demonstrating government action, the First Amendment claim will be dismissed.

Taking another tack, Plaintiffs argue the Defendants' monopoly over the presidential debates is similar to the Jaybird Party primaries invalidated in *Terry v. Adams*, 345 U.S. 461 (1953), because of the importance of the debates in presidential elections. In *Terry*, a private political party called the "Jaybird Party" held racially-restrictive primary elections that excluded African-Americans. The Court treated the Jaybird Party as a state actor, and found that "[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." *Id*. at 469. Plaintiffs insist that the Commission-sponsored debates exert an influence on elections comparable to the influence of the Jaybird Party's private club elections for county-wide elections in Texas and that "[j]ust as candidates who failed to prevail in the Jaybird Party's 'private club' elections were, in light of proven political realities, guaranteed to lose in official county-wide races, a presidential candidate who is excluded from presidential debates has zero chance of winning the general presidential election." Compl. ¶ 111.

The D.C. Circuit has considered and rejected this very claim in *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987). The Circuit held that the plaintiffs "stated no legally cognizable claim to participate in the broadcast debates." *Id*. at 162. The Circuit expressly distinguished *Terry* because that case was "concerned with banishment of candidates and voters from the political arena, not with overcoming disadvantages in money and image frequently encountered by minor-party candidates." *Id*. at 165. Unlike *Terry*, the exclusion of petitioners from the presidential debates

in *Johnson* "did not prevent them from waging an effective campaign or deny voters the opportunity to exercise their First Amendment rights by casting their votes for petitioners" because "petitioners were able to gain ballot access in nineteen states, qualify for public campaign financing, and receive enough votes to finish fifth in the field of 228 presidential candidates." *Id.* at 165. Further, the exclusion of the *Johnson* petitioners from the debates did not "exclude them altogether from television campaigning . . . [because] as much as any candidate they were entitled to purchase advertising time at the lowest available rates." *Id.*

Further, based on a misapprehension of law, Plaintiffs claim that "Defendants acted pursuant to a judicially enforceable MOU, which is analogous to the racially restrictive private covenants outlawed in *Shelley v. Kramer*, 334 U.S. 1 (1948)." Opp'n at 49-50. The Court in *Shelley* did not "outlaw" restrictive covenants but instead found that they were not enforceable by the courts because to do so would constitute unconstitutional state action. 334 U.S. at 844-47. *Shelley* simply does not apply, as no party here asks this Court to enforce the MOU.[10]

C. Claim for Intentional Infliction With Prospective Economic Advantage/ Relations

Under D.C. law, the elements of a claim for tortious interference with prospective economic advantage are (1) the existence of a valid business

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[10] The Obama campaign and the Romney campaign are the sole parties to the MOU. They are not parties in this case and have not sought judicial enforcement of the MOU.

relationship or other expectancy; (2) knowledge of the relationship or expectancy on the part of the interferor; (3) intentional interference causing termination of the relationship or expectancy or causing a failure of performance by one of the parties; and (4) resultant damage. *McNamara v. Picken*, 866 F. Supp. 2d 10, 15 (D.D.C. 2012) (describing D.C. law); *see also Bennett Enters. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.C. Cir. 1995).[11] A plaintiff must allege "business expectancies, not grounded on present contractual relationships, but which are commercially reasonable to expect." *McNamara*, 866 F. Supp. 2d at 15 (quoting *Sheppard v. Dickstein, Shapiro, Morin & Oshinsky*, 59 F. Supp. 2d 27, 34 (D.D.C. 1999); *see also McManus v. MCI Commc'ns Corp.*, 748 A.2d 949, 957 (D.C. 2000) (citing *Carr v. Brown,* 395 A.2d 79 (D.C. 1978)). "A valid business expectancy requires a probability of future contractual or economic relationship and not a mere possibility." *Robertson v. Cartinhour*, 867 F. Supp. 2d 37, 60 (D.D.C. 2012) (describing D.C. law; finding that an imagined economic gain from a nonexistent business is mere speculation).

A plaintiff must plead the existence of a valid business expectancy with specificity. *Command Consulting Grp., LLC v. Neuraliq, Inc.*, 623 F Supp. 2d 49, 53 (D.D.C. 2009) ("[T]he claimant's failure to

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[11] Note that a plaintiff cannot establish liability without a strong showing of intent to disrupt ongoing business relationships. *Marshall v. Allison*, 908 F. Supp. 2d 186, 202 (D.D.C. 2012), *aff'd*, 554 F. App'x 20 (D.C. Cir. 2014). Because this case is at the pleading stage, the Court focuses on the question of whether the Plaintiffs have stated a claim, not on whether the Plaintiffs could prove liability.

plead the existence of a valid business expectancy requires dismissal of the claim."); *Sheppard*, 59 F. Supp. 2d at 34 (plaintiff's failure to identify facts demonstrating future business relations or to allege any specific future business relationship required dismissal of the intentional interference claim). In order to state a claim, a plaintiff also is required to plead affirmative, intentional acts of interference. *See Benedict v. Allen*, No. 001923 (CKK), 2001 U.S. Dist. LEXIS 26293, at *21-23 (D.D.C. June 14, 2001). Mere refusal to deal is insufficient. Restatement (Second) of Torts § 766 comment b (1999). The Restatement (Second) of Torts explains further:

> Deliberately and at his pleasure, one may ordinarily refuse to deal with another, and the conduct is not regarded as improper, subjecting the actor to liability. One may not, however, intentionally and improperly frustrate dealings that have been reduced to the form of a contract. There is no general duty to do business with all who offer their services, wares or patronage; but there is a general duty not to interfere intentionally with another's reasonable business expectancies of trade with third persons, whether or not they are secured by contract, unless the interference is not improper under the circumstances. Restatement (Second) of Torts § 766 comment b.

Plaintiffs make only bare bones allegations of intentional interference:

> 134. Defendants' anticompetitive, exclusionary conduct as described herein gives rise to common law liability for intentional interference with prospective economic advantage and prospective contractual or business relations.
>
> 135. At all relevant times, Plaintiffs had legitimate expectations of economic relationships with third parties, including presidential debate organizers and sponsors, contributors, and media outlets.
>
> 136. The prospective relationships would have provided economic and other benefits to Plaintiffs but for Defendants' tortious and anticompetitive exclusionary conduct.
>
> 137. At all relevant times, Defendants knew of Plaintiffs' prospective contractual and economic relationships with third parties, as well as with the Commission but for the exclusionary conduct and demands of the RNC, DNC, and the individual defendants.

138. Defendants willfully engaged in unlawful, anticompetitive, and exclusionary acts and practices with the intent to disrupt Plaintiffs' prospective contractual and economic relationships.

139. The foregoing acts and practices, and the continuing course of the RNC's, DNC's, the Commission's and Fahrenkopf's anticompetitive and tortious conduct, deliberately and directly resulted in the interference with Plaintiff[s'] prospective contractual and business relations.

140. The foregoing acts and practices, and the continuing course of Defendant's anticompetitive and tortious conduct, directly and proximately caused Plaintiffs to suffer injury and damages to their business and property.

141. Defendants RNC, DNC, the Commission and Fahrenkopf committed these tortious acts with deliberate and actual malice, illwill, and specific knowledge that their actions constituted an outrageous, willful and wanton disregard of Plaintiff[s'] legal rights.

Compl. ¶¶ 134-141. Because these allegations are devoid of specifics, the Complaint fails to state a claim for intentional interference. *See Command Consulting*, 623 F Supp. 2d at 53; *Sheppard*, 59 F. Supp. 2d at 34. Nor have Plaintiffs pled affirmative, intentional acts of interference. *See Benedict*, 2001 U.S. Dist. LEXIS 26293, at *21-23. The claim that Defendants would not permit the Libertarian and Green party candidates to be part of the presidential debates is a "refusal to deal" allegation, one that is insufficient to plead an intentional interference claim as a matter of law. *See* Restatement (Second) of Torts § 766 cmt. b.

In their opposition to the motions to dismiss, Plaintiffs failed to counter Defendants' argument that the intentional interference claim was insufficiently specific. *See* Opp'n at 54-55 (restating the general and vague allegations of the Complaint). "It is well understood in this Circuit that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded." *See Hopkins v. Women's Div., Gen. Bd. of Global Ministries*, 284 F. Supp. 2d 15, 25 (D.D.C. 2003), *aff'd,* 98 F. App'x. 8 (D.C. Cir. 2004). In essence, Plaintiffs have conceded the issue. The tortious interference claim will be dismissed.

IV. CONCLUSION

For the reasons stated above, the Commission's unopposed Request for Judicial Notice [Dkt. 41] will be granted in part and denied in part. It will be granted only to the extent that the Court expressly cited judicially noticed material in this Opinion.

Further, the motions to dismiss [Dkts. 37, 38, 39, 40] will be granted and this case will be dismissed. Plaintiffs' motion for hearing [Dkt. 50] will be denied as moot. A memorializing Order accompanies this Opinion.

Date: August 24, 2016 /s/

ROSEMARY M. COLLYER
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GARY E. JOHNSON, *et al.*,	)	
	)	
Plaintiffs,	)	**Civil Action**
	)	**No: 15-1580**
v.	)	**(RMC)**
	)	
COMMISSION ON PRESIDENTIAL DEBATES, *et al.*,	)	
	)	
Defendants.	)	

ORDER

For the reasons stated in the Opinion issued contemporaneously with this Order, it is hereby

ORDERED that the unopposed Request for Judicial Notice filed by the Commission on Presidential Debates, Frank Fahrenkopf, and Michael McCurry [Dkt. 41] is **GRANTED IN PART AND DENIED IN PART**; it is granted only to the extent that the Court expressly cited judicially-noticed material in the Opinion; and it is

FURTHER ORDERED that Defendants' motions to dismiss [Dkts. 37, 38, 39, 40] are **GRANTED** and this case is **DISMISSED**; and it is

FURTHER ORDERED that Plaintiffs' motion for hearing [Dkt. 50] is **DENIED** as moot.

This is a final appealable Order. *See* Fed. R. App. P. 4. This case is closed.

Date: August 5, 2016 /s/
ROSEMARY M. COLLYER
United States District Judge

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA	
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. **Committee on Presidential Debates; Republican National Committee; Democratic National Committee;**	Honorable Judge: Rosemary M. Collyer Civil Action No:15-CV-1580 **JURY TRIAL DEMANDED**

Frank F. Fahrenkopf, Jr.; Michael D. McCurry; Barack Obama; and, Willard Mitt Romney, Defendants.	

COMPLAINT

Plaintiffs Gary E. Johnson ("Johnson"), Gary Johnson 2012, Inc. ("GJ 2012"), Libertarian National Committee ("LNC"), James P. Gray ("Gray"), Green Party of the United States ("Green Party"), Jill Stein ("Stein"), Jill Stein For President ("Stein Committee") and Cheri Lynn Honkala ("Honkala") hereby complain against Defendants Commission on Presidential Debates ("the Commission"), Republican National Committee ("RNC"), Democratic National Committee ("DNC"), Frank F. Fahrenkopf, Jr. ("Fahrenkopf"), Michael D. McCurry ("McCurry"), Barack Obama ("Obama"), and Willard Mitt Romney ("Romney"), seeking equitable relief and an award for treble and other damages, and demanding trial by jury of the matters triable by jury, allege as follows:

I. NATURE OF THE ACTION

1. This action challenges a per se continuing illegal conspiracy or agreement between the RNC, the DNC, and the Commission, with the direction, assistance, and collusion, over the course of many years, of several co-conspirators and affiliated persons, including Fahrenkopf, McCurry, Obama, Romney, and other

presidential candidates of the Republican and Democratic Parties. The conspiracy commenced prior to the formation of the Commission, and no Defendant has withdrawn or abandoned it. The overall objective was and continues to be the entrenchment market power in the presidential debates market, the presidential campaign market, and the electoral politics market of the two major political parties by exercising duopoly control over presidential and vice presidential debates in general election campaigns for the presidency. That objective was achieved in 2012 when the individual Plaintiffs were arbitrarily excluded substantially because of hostility towards their political viewpoints from presidential and vice presidential debates between the nominees of the two major parties organized and conducted by Defendants on October 3, 2012, October 11, 2012, October 16, 2012, and October 22, 2012, respectively.

2. The continuing unlawful agreement seeks several illicit ends.

3. The first is to acquire, maintain, and exercise duopoly control of the multi-million dollar market in organizing, promoting, sponsoring, and fundraising for holding general election presidential and vice-presidential debates to artificially advantage the Democratic and Republican Party candidates, to exclude all rival candidates, and to impair competition in the marketplace of ideas and the marketplace of the candidates themselves. These debates are broadcast nationally on television and radio by major broadcasters, command huge audiences, and constitute a cognizable "presidential debates market" under federal antitrust laws.

4. The second illicit end is to acquire, maintain, and exercise duopoly control over, and to exclude and severely undermine competition in, the multi-billion dollar market of organizing, promoting, fundraising for, and engaging in general presidential and vice-presidential election campaigns. The business of campaigning for the presidency and vice-presidency constitutes a cognizable "presidential elections market" for purposes of the antitrust laws.

5. The third illicit end is to acquire, maintain, and exercise duopoly control over, and to exclude and severely undermine competition in, the multi-billion dollar market in organizing, promoting, fundraising for, and engaging in political election campaigns throughout the nation at the federal, state, and local levels. This business constitutes a cognizable "political campaign market" for purposes of the antitrust laws.

6. A fourth illicit end is to narrow *de facto* voting choices in general presidential and vice presidential elections to the nominees of the two major parties and their views at the expense of a fair, evenhanded and informative electoral process that would include serious third party or independent candidates.

7. Additional illicit ends are to exclude all others, including previous or arguably neutral campaign debate sponsors such as the League of Women Voters and the Citizens' Debate Commission, from organizing, promoting, sponsoring, and holding general election presidential and vice-presidential debates broadcast on television and radio by major national broadcasting companies ("presidential debates"); to prohibit and exclude all presidential candidates excepting the candidates of the two major parties from participating in the presidential debates,

which is an "essential facility" to a viable presidential campaign; and, to stymie or prevent the growth of a political party that could meaningfully challenge the stranglehold of the two major parties on the United States electoral system at every level of government, which is itself a multi-billion dollar cognizable political campaign market controlled by a Republican and Democratic Party duopoly and exercised for anti-competitive purposes.

8. This action challenges the per se illegal continuing horizontal boycott of Plaintiffs by the RNC and the DNC, utilizing their jointly created and maintained Commission, as the barrier to entry in each of the above-referenced cognizable markets. The boycott has been conceived and executed with the direction, assistance, and collusion, over the course of many years, of several co-conspirators and affiliated people, including Fahrenkopf, McCurry, Obama, Romney, and other presidential candidates of the Republican and Democratic Parties.

9. This conspiracy or agreement among Defendants violates the antitrust laws, the First Amendment, and District of Columbia tort law. It excludes from presidential debates (1) presidential candidates other than the nominees of the Republican and Democratic Parties (the "duopoly nominees") unless the latter agree otherwise; and (2) of other sponsors such as the Citizens' Debate Commission, which has sought to organize, promote, sponsor, and hold the presidential debates, and the League of Women Voters, which has organized, promoted, sponsored, and held presidential debates in the past but has been prevented from doing so since 1987 by the

RNC, DNC, the Commission and those who have directed, assisted, and colluded with them.

10. This action challenges the per se illegal continuing conspiracy between the RNC, DNC, and the Commission, with the direction, assistance, and collusion of several co-conspirators and affiliated people over the course of many years, including Defendants Fahrenkopf, McCurry, Obama, Romney, and other presidential candidates of the Republican and Democratic Parties with the purpose of restraining trade in the organizing, promoting, sponsoring, and holding of presidential debates through the creation and maintenance of the Commission, a joint venture of the RNC and the DNC. The Commission, the RNC, and DNC have succeeded in monopolizing the market in organizing, promoting, sponsoring, fundraising for, and holding presidential debates; in monopolizing the market in organizing, promoting, fundraising for, and engaging in presidential election campaigns; and, in monopolizing the national political elections market to entrench the Republican and Democratic Parties.

11. This action challenges Defendants' illegal continuing monopolization of, attempt to monopolize, and conspiracy to monopolize (a) the presidential debates market; (b) the presidential elections market; (c) the presidential candidates market; and, (c) the electoral politics market, in violation of Section 2 of the Sherman Act.

12. This action challenges under the First Amendment the unreasonable limitation imposed by Defendants, including the Commission, the RNC, and the DNC, on the opportunity of third party or independent presidential or vice presidential

candidates to participate in presidential debates organized, sponsored, and conducted by them as an integral part of presidential elections despite their ballot qualifications in sufficient states to win an electoral-college majority.

13. Plaintiffs seek recovery of treble damages based on their losses proximately caused by Defendants' violations of Sections 1 and 2 of the Sherman Act; equitable relief, including dissolution of the Commission, and an injunction against further barriers, boycotts or other agreements that would either unlawfully restrain trade, would violate the First Amendment, or would violate District of Columbia tort law by precipitating the exclusion from presidential debates of presidential candidates who have obtained ballot access in a sufficient number of states to win an electoral-college majority.

II. JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331; 28 U.S.C. 1337(a); and, 28 U.S.C. § 1367. Plaintiffs' claims arise under the United States Constitution, the Sherman Act and the laws of the District of Columbia. Plaintiffs seek monetary damages, costs, and attorneys' fees under, inter alia, 15 U.S.C. §15(a), 15 U.S.C. §26. This Court has personal jurisdiction over the Commission, RNC, and DNC because they are inhabitants, are found, transact business, and have their principal places of business, in the District of Columbia. Further, the actions of the Commission, the RNC, and the DNC giving rise to the claims herein occurred in the District of Columbia. This Court has personal

jurisdiction over Obama because he is an inhabitant, is found, transacts business, and has his principal place of business in the District of Columbia. This Court has personal jurisdiction over Romney because he transacts, and has transacted, business, and his actions giving rise to the claims herein occurred, in the District of Columbia. This Court has personal jurisdiction over Fahrenkopf and McCurry because their principal places of business in their capacities as Co-Chairs of the Commission are, and their actions giving rise to the claims herein occurred, in the District of Columbia.

15. Venue is proper in this Court as to the Commission pursuant to 15 U.S.C. §§ 22 and 28 U.S.C. §1391 (c). Venue is proper in this Court as to all Defendants pursuant to 28 U.S.C. §1391 (b) because a substantial part of the events giving rise to the claims herein occurred in the District of Columbia. Also, the RNC, the DNC, and the Commission are found in the District of Columbia.

III. PARTIES

A. Plaintiffs

16. The Libertarian National Committee controls and manages the affairs and resources of the United States Libertarian Party, the nation's third largest political party. Founded in 1971, the Libertarian Party has nominated presidential candidates during every presidential election since its formation, including Ed Clark in 1980, who appeared on the ballots in all states and the District of Columbia; David Bergland in 1984, who received the third greatest number of votes in the presidential election; Ron Paul

in 1988, who was on the ballot in 46 states and the District of Columbia and received the third most votes in the presidential election; Andre Marron in 1992, who was on the ballot in every state and the District of Columbia; Harry Browne in 1996, who was on the ballot in every state and the District of Columbia – the first time in history a "third party" earned ballot status in all 50 states and the District of Columbia in successive presidential elections; Harry Browne again in 2000, who headed a ticket of 1,436 Libertarian Party candidates, including 256 candidates for the U.S. House of Representatives; Michael Badnanik in 2004, who was on the ballot in 48 states; Bob Barr in 2008, who led a ticket in an election in which fifty Libertarians were elected or re-elected; and Co-Plaintiff Gary Johnson in 2012, who received 1,275,951 votes, in an election during which six of the Libertarian Party candidates for office also received collectively in excess of one million votes.

17. The Green Party of the United States was created from citizen concern with, among other things, ecology, civil rights, and peace. Ralph Nader was the presidential candidate of several state Green Party organizations in 1996, with a self-imposed campaign spending limit of $5,000. The Association of State Green Parties (which changed its name to the Green Party of the United States in 2001) nominated Ralph Nader to be its presidential candidate again in 2000, when he received 2,833,105 votes (2.7 percent of all votes cast). In 2004, the Green Party's presidential candidate was David Cobb, who earned ballot access in 28 states. The Green Party presidential candidate in 2008 was former six-term Congresswoman Cynthia McKinney, who achieved ballot access in 31 states and

the District of Columbia, which collectively comprised more than 70% of popular votes and 68% of electoral votes. In 2012, the Green Party presidential candidate, Jill Stein, was the second (after Ralph Nader in 2000) to qualify for matching funds from the Federal Election Commission and qualified for ballots in 36 states and the District of Columbia, representing 81.6% of the electoral votes. Plaintiff Stein was denied inclusion in the 2012 presidential debates by the Commission, and dint of agreements between Romney, Obama, and their agents. Notwithstanding the exclusion, Stein received 0.36% of the popular vote.

18. Gary E. Johnson was twice elected Governor of New Mexico. He was the Libertarian Party candidate for president in 2012. Plaintiff Johnson was denied inclusion in the 2012 presidential debates. Notwithstanding the denial, Johnson attracted more than 1.2 million votes, the high-water mark for a Libertarian Party candidate. He participated in two Republican primary election debates during the 2012 campaign. After the second, he ranked first among participants in Google searches. Johnson was excluded from all three 2012 general election presidential debates by the Commission and by agreements between Romney, Obama, and their agents held on October 3, 16, and 22, respectively.

19. Jill Stein is a physician and environmental health advocate. She was the Green Party candidate for president in 2012. She received federal matching funds for her campaign, yet was excluded by the Commission, and by the Democratic and Republican presidential candidates from participating in the general election presidential debates on October 3, 16, and 22, respectively. She qualified for the ballot in 36

states and the District of Columbia. Stein debated in the 2002 campaign for Massachusetts governor against, among others, Mitt Romney. *The Boston Globe* referred to her as "the only adult in the room."

20. James P. Gray, a former Judge of the Superior Court of Orange County, California, was the 2012 Libertarian Party vice-presidential nominee and running mate of Johnson. Gray was excluded from the debate between vice-presidential candidates Paul Ryan and Joe Biden on October 11 because of the policies, practices, and agreement by and between the Commission, RNC, and DNC and the Republican and Democratic presidential candidates, Mitt Romney and Barack Obama.

21. Cheri Honkala, an anti-poverty advocate, was the 2012 Green Party vice-presidential nominee and running mate of Stein. Honkala was excluded from the debate between vice-presidential candidates Paul Ryan and Joe Biden on October 11 because of the policies, practices, and agreement by and between the Commission, RNC, and DNC and the Republican and Democratic presidential candidates, Mitt Romney and Barack Obama.

22. Gary Johnson 2012, Inc. is a corporation that served as the campaign committee for Johnson-Gray campaign for president and vice-president in 2012. The committee was responsible for raising campaign funds, paying campaign bills, and accounting for campaign revenues and expenses.

23. Jill Stein for President is the entity that served as the campaign committee for Stein and Honkala's campaign (the "Stein/Honkala Campaign") for president and vice-president in 2012. The committee was responsible for raising campaign funds, paying

campaign bills, and accounting for campaign revenues and expenses.

B. Defendants

24. The Commission on Presidential Debates is a District of Columbia corporation that, despite its founding by the RNC and DNC, has received status as a 501(c) (3) non-profit organization by the Internal Revenue Service. Its stated purpose is to make nationally televised general election presidential debates a bipartisan instrument solely in the control of the Republican and Democratic parties. Since hijacking the presidential and vice-presidential debates from the independent, non-partisan League of Women Voters in 1988, the Commission has been the exclusive entity for organizing, overseeing, and conducting the nationally televised presidential and vice-presidential debates. The Commission follows the dictates of the RNC and DNC and the presidential nominees of the Republican and Democratic parties (the "duopoly parties").

25. The Republican National Committee is a national political committee that develops and promotes the Republican Party political platform and coordinates fundraising and campaign strategies for Republican Party candidates. The RNC, with the assistance and collusion of others, created and sustains the Commission. Instructed by the RNC and DNC, the Commission has exclusively organized and conducted the nationally televised presidential and vice-presidential debates since 1988 and excluded debate participants other than those chosen and

approved by the RNC, DNC, and the Republican and Democratic presidential candidates.

26. The Democratic National Committee is a national political committee that develops and promotes the Democratic Party political platform and coordinates fundraising and campaign strategies for Democratic Party candidates. The DNC, with the assistance and collusion of others, created and sustains the Commission. At the instruction of the RNC and DNC, the Commission has exclusively organized and conducted the presidential and vice-presidential debates since 1988 and excluded debate participants other than those chosen and approved by the RNC, DNC, and the Republican and Democratic presidential candidates.

27. Frank F. Fahrenkopf, a former chair or co-chair of the RNC (from 1983-1989), was a founder of the Commission. Mr. Fahrenkopf and the chair of the DNC agreed that the RNC and DNC should collaborate to wrench the presidential and vice-presidential debates from the independent, non-partisan League of Women Voters. That agreement was ratified by the RNC and DNC in 1985. Since that time, the RNC, DNC, and the duopoly nominees have dictated all of the terms and conditions relating to presidential and vice-presidential debates. They include qualifications for participation, and a prohibition on either of the duopoly nominees from appearing on television or radio with any other candidate. Fahrenkopf has been a co-chair of the Commission from its founding until the present, and currently serves as co-chair with Michael D. McCurry.

28. Michael D. McCurry is a former press secretary for the Clinton Administration. He has been a member

of the Board of Directors of the Commission. At present, McCurry is co-Chair. He actively participates in the monopoly arrangement between the Commission, the RNC, the DNC, and the Republican and Democratic candidates for president to exclude all others from participating in the presidential and vice-presidential debates.

29. Barack Obama is at present the President of the United States. He was the Democratic Party candidate for president in 2008 and 2012. Individually, and through at least one agent, Robert Bauer,[1] Obama entered into collusive agreements during both campaigns that were intended to and succeeded in sustaining the monopoly of the Commission in organizing and conducting general election presidential and vice-presidential debates. The agreements excluded from participation all candidates other than the Republican and Democratic nominees, and prohibited either of the duopoly nominees from even appearing on television or radio with any other candidate.

30. Mitt Romney is a former Governor of Massachusetts. He was the Republican Party candidate for president in 2012. Individually, and through at least one agent, Ben Ginsberg,[2] Romney entered into collusive agreements during his campaign that were intended to and succeeded in sustaining the monopoly of the Commission in organizing and conducting the general election presidential and vice-presidential debates. The agreements exclude from participation candidates other than the Republican and Democratic nominees, and prohibit either of the

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[1] Memo of Understanding, 2012, see attached Exhibit "1".

[2] Memo of Understanding, 2012, see attached Exhibit "1".

duopoly nominees from even appearing on television or radio with any other candidate.

FIRST CLAIM FOR RELIEF

COMBINATION AND CONSPIRACY TO RESTRAIN INTERSTATE COMMERCE IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT

31. Plaintiffs incorporate by reference each of the foregoing paragraphs as if they were fully set forth herein.

32. Commerce in the national presidential debates market, the presidential campaign market, and the political elections market is substantial.

33. The Defendants' illegal conduct in connection with each of these markets affects interstate commerce, among other things, in the numerous ways.

34. The publicity and exposure to the general public throughout the United States provided to participating candidates in the presidential and vice-presidential debates has a monetary value of hundreds of millions of dollars. For instance:

a. In 1960, between 70[3] and 73.5[4] million people viewed the first televised presidential debate, between John F. Kennedy and Richard M. Nixon, with persons in two-thirds of the nation's 45 million

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[3] "The Kennedy-Nixon Presidential Debates," Museum of Broadcast Communications Encyclopedia of Television, http://www.museum.tv/eotv/kennedy-nixon.htm

[4] *Minow and LaMay, Inside the Presidential Debates, Introduction*

television households (88% of all households[5]) watching.[6]

b. More than 115 million persons in the United States watched or listened to at least some part of the four 1960 presidential debates.[7]
c. Between 62.7 million and 69.7 million people viewed the three presidential debates in 1976 (between President Gerald R. Ford and Jimmy Carter), with 47.8-53.5% of households engaged.[8]
d. The debate between independent candidate, John Anderson, and Ronald Reagan, in which President Carter refused to participate, was viewed by 55 million persons.[9]
e. 80.6 million people viewed the one debate in 1980 between President Carter and Ronald Reagan, with 58.9% of households engaged.[10]
f. The first and second debates in 1984 between President Reagan and Walter Mondale attracted audiences

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[5] George Farah, *No Debate*, p. 4.
[6] *Minow and LaMay, Inside the Presidential Debates, Introduction*
[7] *Minow and LaMay, Inside the Presidential Debates, Introduction*
[8] Nielsen – "Highest Rated Presidential Debates 1960 to Present (10-06-2008)
[9] Jim Mason, *No Holding Back: The 1980 John B. Anderson Presidential Campaign*, p. 390.
[10] Nielsen – "Highest Rated Presidential Debates 1960 to Present (10-06-2008)

of 65.1 million, and 67.3 million, respectively.[11]

g. The first and second debates in 1988 between George H.W. Bush and Michael Dukakis also attracted audiences of 65.1 million and 67.3 million, respectively.[12]

h. The three 1992 presidential debates, which included William Jefferson Clinton, Ross Perot, and George H.W. Bush attracted 62.4 million[13], 69.9 million[14], and 66.9 million viewers, respectively.[15]

i. In the 1996 race between President William Jefferson Clinton and Bob Dole, the presidential debates audience dwindled to 46.1 million and 36.3 million, respectively, for the first and second debates. They excluded Ross Perot by agreement between the Commission and the major party nominees.

j. In the 2000 campaign between Al Gore and George W. Bush, when the Commission and the major party

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[11] Nielsen - "Highest Rated Presidential Debates 1960 to Present (10-06-2008)

[12] Nielsen - "Highest Rated Presidential Debates 1960 to Present (10-06-2008)

[13] Commission on Presidential Debates – Debate history www.debates.org/index.php?page=debate-history

[14] Nielsen - "Highest Rated Presidential Debates 1960 to Present (10-06-2008)

[15] Nielsen - "Highest Rated Presidential Debates 1960 to Present (10-06-2008)

nominees blocked the inclusion of Ralph Nader and Patrick Buchanan, only 46.6 million, 37.5 million and 37.7 million people viewed the first, second, and third debates, respectively.[16]

k. The first, second, and third presidential debates in 2004 between President George W. Bush and John Kerry attracted audiences of 62.4 million, 46.7 million, and 51.1 million, respectively.[17]

l. In the 2008 race between Barack Obama and John McCain, the three presidential debates garnered 52.4 million, 63.2 million, and 56.5 million viewers, respectively.[18]

m. The three debates in 2012 between President Obama and Mitt Romney, which excluded Plaintiffs Johnson and Stein by agreement between the Commission, the RNC, the DNC, and the major party nominees, attracted 67.2 million, 65.6 million and 59.2 million viewers, respectively.[19]

35. The corporate sponsors of the presidential debates collectively contribute millions of dollars each

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[16] Commission on Presidential Debates – Debate history www.debates.org/index.php?page=debate-history

[17] Commission on Presidential Debates – Debate history www.debates.org/index.php?page=debate-history

[18] Commission on Presidential Debates – Debate history www.debates.org/index.php?page=debate-history

[19] Commission on Presidential Debates – Debate history www.debates.org/index.php?page=debate-history

election cycle to the Commission. 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. Buffett 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 piggy-backed on the debates to promote their products or to lobby for public policies that would benefit them.

36. Debate sites throughout the United States have become "corporate carnivals" where sponsors provide their marketing and lobbying materials and products to journalists and politicians.[20] In 2012, three original corporate sponsors – Philips Electronics, BBH New York (a British advertising firm), and the YWCA – withdrew after supporters of Johnson, Stein, and other "third-party" or independent candidates pushed for their debate inclusion without result.[21]

37. The presidential debates generate millions of dollars of revenues for communities and universities where they are held.

a. The final presidential debate in 2012 was hosted by Lynn University. That debate yielded $13.1 million in immediate economic impact for the Palm Beach County economy, including

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[20] "Deterring Democracy," under heading "Corporate Sponsorship."

[21] Harrison Wills, "Debate Commission's Own Hot Topic," October 2, 2012

approximately $1.7 million in increased spending by local residents, more than $63 million in publicity value for Lynn University and the community, and an increase of 22% in bed taxes. Spending in the area by delegates and members of the news media from every state in the country was almost $3 million. The 4,060 members of the media who traveled to the community to cover the debate spent an estimated $2,662,000, which included lodging expenses of an estimated $655,000. The publicity value of 33,208 news stories and total news circulation of 348,395,606 was estimated at $63,724,378.[22]

b. It was projected that the Denver area could realize $10-15 million in positive direct, tangible economic impact from Denver University hosting the first 2012 presidential debate, including jobs for construction and maintenance crews building media risers, fences, scaffolding and other facilities, and increases in hotel and restaurant revenues.[23] In addition,

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[22] "Lynn's debate produced millions in positive economic impact and publicity" http://www.lynn.edu/about-lynn/news-and-events/news/lynn2019s-debate-produced-millions-in-positive-economic-impact-and-publicity-for-the-community

[23] "Denver debate's economic estimates vary; will it be $10M? $15M?," Sept. 28, 2012 – Denver Business Journal http://www.bizjournals.com/denver/print-edition/2012/09/28/debates-economic-estimates-vary-will.html?page=all

Denver University estimated a fifteen percent (15%) increase in student applications in 2013 due to exposure of the university in connection with the debate.[24]

c. After hosting the presidential debate for the first time in 2008, Hofstra University witnessed more than an 11 percent increase in applicants.[25]

d. Centre College in Danville, Kentucky, experienced a surge of 20 percent more applicants following its hosting of a vice-presidential debate in 2000,[26] and a substantial increase in alumni donations following its hosting of the 2012 vice-presidential debate. According to firms contracted by Centre College, the media hits related to the 2012 vice-presidential debate were valued at $53,025,372.32.[27]

38. Hosts of the presidential debates, and the municipalities and states in which they are located, spend several millions of dollars in associated direct and indirect costs, including payments of millions of

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[24] "DU spent $1.6 million on debate, local governments also putting money," http://www.thedenverchannel.com/news/call7-investigators/du-spent-16-million-on-debate-local-governments-also-putting-money

[25] http://www.nytimes.com/2012/10/16/education/presidential-debates-raise-hofstra-universitys-image.html?_r=0

[26] http://www.nytimes.com/2012/10/16/education/presidential-debates-raise-hofstra-universitys-image.html?_r=0

[27] https://www.centre.edu/centre-college-calculates-media-value-of-vice-presidential-debate/

dollars to the Commission. For instance, in connection with hosting the first 2012 presidential debate, Denver University paid $1.65 million to the Commission; the Colorado Department of Transportation estimated it would spend $30,000-40,000 on traffic control and barricades to direct traffic; and the City of Denver incurred substantial expenses, including additional policing costs.[28] According to Defendant McCurry, for a university to host a presidential debate, "the financial commitment the school makes is a minimum of $1.5 million," which goes to the Commission for production fees.[29] Centre College spent about $3.3 million to host the 2012 vice-presidential debate.[30] Hofstra University spent $4.5 million to host a 2012

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[28] "DU spent $1.6 million on debate, local governments also putting money," http://www.thedenverchannel.com/news/call7-investigators/du-spent-16-million-on-debate-local-governments-also-putting-money

[29] "Why Most Colleges Don't Want to Host a Presidential Debate," 10-22-12 http://www.thedailybeast.com/articles/2012/10/22/why-most-colleges-don-t-want-to-host-a-presidential-debate.html

[30] "Why Most Colleges Don't Want to Host a Presidential Debate," 20-22-12 http://www.thedailybeast.com/articles/2012/10/22/why-most-colleges-don-t-want-to-host-a-presidential-debate.html; "Presidential Debate College Hosts See High Costs, Greater Recognition," http://www.huffingtonpost.com/2012/10/22/presidential-debate-college-lynn-university_n_2000513.html

presidential debate.[31] Lynn University paid $5 million.[32]

39. The commerce in the presidential elections, presidential candidates and political elections markets with a nexus to Defendants' illegal conduct substantially affects interstate commerce.

40. The aggregate sum spent on the 2012 presidential election (during the 2012 election cycle) was $2,621,415,792[33], which includes money spent by the campaigns and third parties. Expenditures by both campaigns were made in 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.[34] The Romney campaign spent $360.4 million, the RNC spent $284 million, and Super PACs supporting Romney spent $200 million.[35] During the 2012 campaign, more than one million television ads

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[31] "Why Most Colleges Don't Want to Host a Presidential Debate," 20-22-12 http://www.thedailybeast.com/articles/2012/10/22/why-most-colleges-don-t-want-to-host-a-presidential-debate.html; "Presidential Debate College Hosts See High Costs, Greater Recognition," http://www.huffingtonpost.com/2012/10/22/presidential-debate-college-lynn-university_n_2000513.html

[32] "Presidential Debate College Hosts See High Costs, Greater Recognition," http://www.huffingtonpost.com/2012/10/22/presidential-debate-college-lynn-university_n_2000513.html

[33] "The Money Behind the Elections," https://www.opensecrets.org/bigpicture/

[34] John Hudson, "The Most Expensive Election in History by the Numbers," http://www.thewire.com/politics/2012/11/most-expensive-election-history-numbers/58745/

[35] John Hudson, "The Most Expensive Election in History by the Numbers," http://www.thewire.com/politics/2012/11/most-expensive-election-history-numbers/58745/

were purchased by the Obama and Romney campaigns and their supporters.[36] Combined, the Obama and Romney campaigns spent $78 million on online advertising throughout the nation.[37]

41. Republican and Democratic presidential candidate campaigns have enormous staffs nationwide that are paid millions of dollars each month to work in the presidential electoral campaign market. In August 2012 alone, the Obama campaign spent $4.37 million on campaign staff; and, the Romney campaign spent $4.04 million on staff payroll. During August 2012, 901 persons were paid to work on the Obama campaign; and, 403 persons were on the Romney campaign staff.[38]

42. Commerce in the presidential elections, presidential candidates, presidential campaign and electoral politics markets includes the intra-party and inter-party electoral competitions for national office, which are largely and artificially limited to the duopoly parties under a "two-party system" that continues to dominate the markets and results in the exclusion of other parties or independents. The duopoly control of the markets in electoral politics has been achieved and fortified by the Commission not through talent, better ideas, success in achieving stated goals, the aspirations of the voters, or efficiencies, but through

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[36] John Hudson, "The Most Expensive Election in History by the Numbers," http://www.thewire.com/politics/2012/11/most-expensive-election-history-numbers/58745/

[37] John Hudson, "The Most Expensive Election in History by the Numbers," http://www.thewire.com/politics/2012/11/most-expensive-election-history-numbers/58745/

[38] Matt Gold, "Obama campaign had twice the staff as Romney last month at same cost," The Los Angeles Times, September 24, 2012

anti-competitive measures, including control of the presidential debates by the duopoly parties and the Commission for the sole and exclusive benefit of the RNC and DNC.

43. This control is exercised to block access to the debates for all other parties and candidates, notwithstanding that a majority of people in the United States support inclusion of some of those parties and candidates in the presidential debates, and the registration of a plurality of voters as independent according to a 2011 Gallop Poll. (For instance, a 1996 poll showed that 76% of voters wished Ross Perot included in the debates.[39] A 2000 poll showed that 64% of registered voters wanted Ralph Nader and Patrick Buchanan included in the debates.[40]) The commerce in the presidential elections, presidential candidates, presidential campaign and electoral politics markets with a nexus to Defendants' illegal conduct in restraint of trade substantially affects interstate commerce.

44. Billions of dollars are spent by and on behalf of the duopoly parties and their campaigns and candidates throughout the country, on everything ranging from tee-shirts, rental of office space, entertainment and conventions to advertising. Since 1998, the persistently increasing costs of elections, spent almost entirely by or on behalf of the duopoly

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[39]http://articles.sun-sentinel.com/1996-09-20/news/9609200140_1_debate-commission-presidential-debates-state-ballots

[40] http://opendebates.org/theissue/15percent.html

parties and their candidates has climbed from over $1.6 billion annually[41] to over $6.3 billion.[42]

45. Televised presidential and vice-presidential debates have become "essential facilities" for any presidential or vice-presidential candidate seeking to (a) meaningfully compete for election to office; and/or (b) communicate his/her message to people throughout the United States in a way that may influence policies irrespective of candidate victory. In 1992, Ross Perot made budget deficits a national issue through his participation in presidential debates permitted with the consent of the two major party candidates for ulterior motives. Participation by presidential and vice-presidential candidates in televised presidential and vice-presidential debates is an "essential facility" to fund-raising, media exposure, ability to attract volunteers, name recognition, voter support, philosophical or ideological branding, and popular credibility or goodwill necessary to conduct the business of a meaningful presidential or vice presidential campaign.

John F. Kennedy attributed his election victory to his debates with Richard M. Nixon[43]. Jimmy Carter attributed his successful campaign in 1976 and his failed campaign in 1980 to his debate performances.[44] When Ross Perot was allowed to debate the duopoly parties' presidential candidates in 1992, the extent of his public support almost tripled – from 7% in the polls

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[41] https://www.opensecrets.org/bigpicture/

[42] http://www.opensecrets.org/news/2013/03/the-2012-election-our-price-tag-fin/

[43] Farah, p 2.

[44] Farah, p 2.

to 19% of the vote.[45] Although not on a presidential level, Jesse Ventura demonstrated the importance of debate inclusion when he won Minnesota's gubernatorial election after he participated in candidate debates. Ventura's poll numbers were at10% before being "permitted" to participate in the Minnesota gubernatorial election debates.

46. To be excluded from the debates is "an electoral death sentence."[46] The media gives non-duopoly, non-major party candidates little or no coverage, and they cannot afford significant, if any, national advertising. Hence, they are denied the free, enormous coverage received by the duopoly party candidates through the debates,[47] and they are marginalized in the minds of most people in the U.S. and the media, and considered to be less than serious, peripheral, and perhaps even frivolous candidates.

47. There are no alternative means for presidential and vice-presidential candidates to acquaint themselves to the American public that even approaches the exposure provided by the presidential debates. Exclusion from the debates guarantees marginalization, a public perception that the excluded candidates are "unserious," notwithstanding their talent, records, capabilities, alignments with the views of many, if not most, of American voters, and leadership skills.

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[45] http://en.wikipedia.org/wiki/Ross_Perot

[46] Farah, p. 2, quoting Jamin Raskin, *Overruling Democracy*

[47] Bernard C. Barmann, "Third-Party Candidates and Presidential Debates: A Proposal to Increase Voter Participation in National Elections," Columbia Journal of Law and Social Problems (1990 Issue 23), p. 449.

48. Even if not victorious (although in 1860 Abraham Lincoln did win as a "third-party" candidate when he ran as a Republican against a Democrat and a Constitutional Union candidate), third-party candidates provided national media coverage equivalent to the candidates of the duopoly parties would exert a material influence on the political dialogue and, ultimately, on national policies. For instance, after Ross Perot was allowed to debate Bill Clinton and George H.W. Bush in 1992, the national political dialogue became far more robust, particularly the issue of national deficits, which had previously been ignored. After Teddy Roosevelt ran as the candidate of the Progressive Party in 1912, many policies for which he aggressively advocated became law, including the direct election of senators, women's suffrage, the minimum wage, an eight-hour workday, unemployment insurance, and old-age pensions.[48]

49. Cooptation and absorption by the duopoly parties of the positions of third-party candidates who have been able to get their message out to the U.S. public is a proven means of bringing about constructive changes supported by a large segment of the population, including the enactment of the Sherman Act of 1890. When those third-party candidates are marginalized and deprived of media coverage because they are not included in presidential debates, the capacity for such influence on important issues is dramatically diminished and public policy stagnates.

50. During the entire history of televised presidential debates, only one third-party candidate – Ross Perot in 1992 -- has participated in debates with

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[48] Thomas L. Friedman and Michael Mandelbaum, *That Used to Be Us,* p. 339.

the two duopoly party candidates (and only with their permission coming with ulterior motives). Only once has a third-party or independent candidate participated in a televised debate with one duopoly party candidate – in 1980. The incumbent president, Jimmy Carter, refused to participate in a debate that would have included John Anderson, a popular independent candidate. Anderson then debated Republican challenger Ronald Reagan under the aegis of the League of Women Voters. In every other presidential debate, the duopoly party candidates and/or the sponsor/organizer of the debates has excluded anyone other than the duopoly party candidates from participation.

51. The first nationally televised presidential debates occurred in 1960, when John F. Kennedy and Richard M. Nixon debated four times. No presidential debates were held during the next three elections because of the refusal of one or both of the duopoly candidates to participate. Beginning in 1976, the non-partisan, independent League of Women Voters organized and sponsored the presidential debates, until they were hijacked from the organization in 1988 by the Commission on Presidential Debates, the RNC, and the DNC. The motivation for the hijacking was to endow the RNC, the DNC and their presidential candidates with complete control over the debates to entrench the two major parties and avoid situations as in 1980 when the debate organizer (the League of Women Voters) independently required the inclusion of a non-duopoly party candidate (John Anderson) despite the opposition of one of the duopoly party candidates (President Carter)--even to the point of his

refusal to participate in the debate. Presidential debates have been held in every election since 1976.

52. With a desire and intention to control the presidential debates, including the exclusion of candidates other than the duopoly party candidates unless otherwise agreed by them, and to exclude all other parties and their candidates from meaningful competition in presidential elections, specifically, and, in the electoral politics market, generally, the RNC and DNC, through their then-Chairpersons, Fahrenkopf and Paul Kirk, with the collusion of the 1988 duopoly party candidates, wrenched control over the presidential debates from the League of Women Voters .

53. The DNC and RNC, through Fahrenkopf and Kirk, agreed to form the Commission, with the intention and result of forcing the League of Women Voters out of the relevant markets, notwithstanding its proven ability to organize and conduct presidential debates with a nonpartisan, independent stance.

54. The Commission is the alter ego of the RNC and the DNC.

55. The Chairs of both the RNC and the DNC were the Co-Chairs of the Commission at its inception.

56. The Commission endorsed and supported the RNC and the DNC and their political candidates in 2012 or otherwise.

57. The Commission opposed the Plaintiffs, as candidates and as political parties; as well as opposing any other non-RNC and non-DNC political party or candidate in 2012.

58. The Commission structured the 2012 presidential debates to promote or advance the duopoly candidates, as a single monopolistic entity for

purposes of these allegations, over any other candidates and nominees of other political parties, which included Plaintiffs.

59. The admitted goal of the Commission at its birth was to create and maintain a monopoly, and sole control, over the presidential debates, and maintain monopoly control over the presidential debates market, the presidential elections market, and the electoral politics market. That conspiratorial objective has never been withdrawn or abandoned by the Commission.

60. The Commission has succeeded not because of talent, leadership, effectiveness, efficiency, commitment to the public interest, or representation of the views or desires of the majority of U.S. voters, but because of the monopolistic lock maintained by the RNC, the DNC, and the Commission over presidential debates. That power has been exercised to exclude debate participants other than candidates of the RNC and DNC duopoly parties, and to exclude non-partisan, independent organizers and sponsors of the presidential debates who would organize and implement the debates in the interest of the public rather than in the interest of maintaining the monopoly power of the duopoly parties and their corresponding interest in assuring that only the candidates of the duopoly parties are known, heard, and seen by voters.

61. Continuously, since the earliest discussions between representatives of the RNC (particularly Fahrenkopf) and the DNC regarding the plan to solely control the presidential debates market, the DNC, RNC, Fahrenkopf, and, after its formation, the Commission sought, through the control of the

presidential debates market, to control the presidential elections market and the electoral politics market, and to exclude other parties and candidates from all three markets or to render them non-competitive.

62. In 1984, Fahrenkopf, in unlawfully maneuvering to acquire control over the presidential debates with DNC Chair Charles Manatt, disclosed his duopoly motive: "I am a believer and I think chairman Manatt is that the two major political parties should do everything in their power to strengthen their own position. We're party builders."[49] In other words, the two aimed to employ their joint monopoly power through anti-competitive means to exclude others from presidential debates or their sponsorship, notwithstanding their talent, quality of leadership, effectiveness, efficiency, commitment to the public interest, or representation of the views or desires of a majority of voters.

63. The monopolization purpose of maintaining the duopoly parties' control over the presidential debates market (later characterized as "joint appearances" in the 1985 agreement described below) through the formation of the monopolistic Commission was explicitly described in a written, judicially enforceable agreement ("Memorandum of Agreement on Presidential Candidate Joint Appearances) by Fahrenkopf and Paul Kirk in 1985, acting as chairs of their respective duopoly parties:

> It is our *bi*partisan view that a primary responsibility of each major political

[49] George Farah, *No Debate*, p. 28.

> party is to educate and inform the American electorate of its fundamental philosophy and policies as well as its candidates' positions on critical issues. One of the most effective means of fulfilling that responsibility is through nationally televised joint appearances conducted between the presidential and vice-presidential nominees of *the two major political parties* during general election campaigns. Therefore . . . future joint appearances should be *principally and jointly sponsored and conducted by the Republican and Democratic National Committees*. (Emphasis added.)[50]

64. That 1985 memorandum was appended to a report of a group of Democratic and Republican representatives called "Commission on National Elections," which made clear the intention of the RNC and the DNC, and its representatives and agents, that the duopoly parties should wrest control of the presidential debates from the League of Women Voters. That report suggests a conspiracy to illegally restrain trade in the presidential debates, presidential elections, and electoral politics markets in stating:

> The commission therefore urges the *two parties to assume responsibility for sponsoring and otherwise ensuring that presidential candidate joint appearances are made a permanent*

[50] Memorandum, http://opendebates.org/theissue/memo.jpg

> *and integral part of the presidential election process*. If they do so, the commission believes that the parties will strengthen both the process and *themselves*.[51] (Emphasis added.)

65. In 1986, the DNC and RNC explicitly ratified an agreement between Fahrenkopf and Kirk "for the [two] parties to take over presidential debates."[52]

66. Serving as chairs (or co-chairs) of their duopoly parties and concurrently as co-chairs of the Commission, Fahrenkopf stated that the Commission would not likely look favorably on including third-party candidates in the debates. Kirk said the Commission should exclude third-party candidates from the presidential debates.[53]

67. The exclusion of candidates other than those of the duopoly parties is and has been, since the formation of the Commission monopoly, intended to cement the two-party duopoly control of the Democratic and Republican parties in all relevant markets. In 1987, the RNC and DNC issued a joint press release referring to the Commission as a "bipartisan, non-profit, tax-exempt organization formed to implement joint sponsorship of general election presidential and vice-presidential debates, starting in 1988, by the national Republican and Democratic committees between their respective

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[51] Open Debates, "*Revealing History*," http://opendebates.org/theissue/strengthenmajorparties.html

[52] George Farah, *No Debate*, p. 30

[53] George Farah, *No Debate*, p. 30-31

nominees."[54] (Emphasis added.) This joint press release expressed Fahrenkopf' s and Kirk's intention to brandish the joint monopoly power of the Democratic and Republican parties to assert permanent, exclusive control over the presidential debates market. The two are quoted as follows: "We have no doubt that with the help of the Commission we can forge a permanent framework on which *all future* presidential debates between the nominees of the *two* political parties will be based." (Emphasis added.)

68. The RNC's and DNC's duopolistic control and, through the Commission, the monopolistic restraint of trade in the presidential debates market, the presidential elections market, the presidential candidates market and the electoral politics market was further evidenced by the fact that Fahrenkopf and Paul Kirk, the chairs of the RNC and the DNC, respectively, also served as co-chairs of the Commission. The dual office holding guaranteed that the two major parties would exclusively control the Commission for the benefit of themselves and their candidates, and thereby monopolize the presidential debates market, the presidential elections market, and the electoral politics market, while excluding all others, including Plaintiffs.

69. In 1988, the Commission and the League of Women Voters initially agreed that the former would sponsor the first presidential debate and the latter the second. But when the Commission was presented with a Memorandum of Understanding secretly negotiated by the George H.W. Bush and Michael Dukakis campaigns dictating debate details, including the

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[54] http://www.opendebates.org/theissue/the Commissionrelease.pdf

participants, the audience, and the format, the League of Women Voters withdrew. Its press release explained that the "demands of the two campaign organizations would perpetrate a fraud on the American voter…The League has no intention of becoming an accessory to the hoodwinking of the American people."[55]

70. The Commission then became, and currently remains, the sole presidential debate sponsor, strengthening and maintaining its monopoly over the presidential debates in the service of its creators: the RNC, the DNC, and the two major party candidates. The duopoly nominees, with the aid and assistance of the RNC and DNC, in 1988 and from 1992 until the present, have conspired with the Commission to exclude from the presidential debates other candidates, notwithstanding their talent, leadership skills, effectiveness, efficiency, commitment to the public interest, or representation of the views or desires of a voting plurality or majority. The 1992 presidential race was an aberration. The two major party candidates permitted the participation of Ross Perot because both believed his presence would boost their respective presidential ambitions.

71. During every year in which presidential debates are held, the duopoly party candidates or their designated agents meet secretly and negotiate a now standardized judicially enforceable written agreement, termed a "Memorandum of Understanding" ("Memo of Understanding"). Their purpose and effect are to unreasonably restrain commerce in the presidential debates market, the

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[55] George Farah, *No Debate*, p. 33.

presidential elections market, and the electoral politics market. Among other things, the agreement customarily provides that the candidates will only debate each other and will not debate anyone else in any forum. An exception was made in 1992—despite the Commission's opposition--when the two major party candidates permitted the participation of Ross Perot because both believed his presence would enhance their respective prospects for victory.

72. The agreements further provide that the candidates will cooperate only with the Commission and no other debate organizer or sponsor; that the candidates will refrain from appearing on any television or radio program with any other candidate; and, that the candidates will not issue any challenges for additional debates.

73. In 2012, Obama and Romney, individually and through their agents, Robert Bauer and Ben Ginsberg, respectively, agreed in a judicially enforceable Memo of Understanding to an unreasonable restraint of trade and joint monopolization over the presidential debates market, the presidential elections market, and the electoral politics market. See 2012 Memo of Understanding, attached hereto as Exhibit "1". The objective was to exclude anyone other than Obama and Romney, including Plaintiffs Stein and Johnson, from the 2012 debates, and to exclude any debate organizers or sponsors other than the Commission. The MOU provided:

> a. "The parties agree that they will not (1) issue any challenges for additional debates, (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."
>
> b. "The Campaigns agree that the Commission [on Presidential Debates] shall sponsor the debates, subject to its expression of a willingness to employ the provisions of this agreement in conducting these debates."
>
> c. "The parties agree that the Commission's Nonpartisan Candidate Selection Criteria for 2012 General Election Debate participation shall apply in determining the candidates to be invited to participate in these debates."
>
> d. "If one or more candidates from campaigns other than the two (2) signatories are invited to participate pursuant to those Selection Criteria, those candidates shall be included in the debates, if those candidates accept the terms of this agreement."

74. The Commission's three-part "Candidate Selection Criteria for 2012 General Election Debate", was designed and intended to exclude any candidate from participating in the 2012 presidential debates other than the nominees of the two major parties (Defendants DNC and RNC), notwithstanding the documented desires of most voters during prior presidential races and the registration of a plurality of

voters as "Independents" (i.e., neither Republican nor Democrat) for additional participants:

1. EVIDENCE OF CONSTITUTIONAL ELIGIBILITY

The Commission's first criterion requires satisfaction of the eligibility requirements of Article II, Section 1 of the Constitution. The requirements are satisfied if the candidate:

a. is at least 35 years of age;
b. is a natural born citizen of the United States and a resident of the United States for fourteen years; and
c. is otherwise eligible under the Constitution.

2. EVIDENCE OF BALLOT ACCESS

The Commission's second criterion requires that the candidate qualify to have his/her name appear on enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2012 general election. Under the Constitution, the candidate who receives a majority of votes in the Electoral College, at least 270 votes, is elected President regardless of the popular vote.

3. INDICATORS OF ELECTORAL SUPPORT

The Commission's third criterion requires that the candidate have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly-reported results at the time of the determination.

75. The third criterion, which requires support by at least 15% of the national electorate, as determined by five selected national public opinion polling organizations (the "15% polling criterion"), was arbitrarily and capriciously set by the Commission, approved by the RNC and the DNC, and adopted by both Romney and Obama as part of their agreement in restraint of trade and to enable the Commission, the RNC and the DNC to monopolize the presidential debates market, the presidential elections market, and the electoral politics market.

76. The 15% polling criterion was set purposefully unreasonably high by Defendants solely to exclude the participation of any candidates or parties in the presidential debates market and the presidential elections market except for the two major party nominees and the two major parties, respectively. It was understood, engineered and expected by Defendants that no candidate could ever reach a level of 15% national support in five national polls on the eve of the debates.

77. Additionally, and further evidencing the anticompetitive motives of Defendants, the 15% polling criterion is facially flawed. The pollsters may decline to identify a third party or independent candidate as a possible choice for poll respondents. In that event, that candidate could never reach the polling benchmark irrespective of his popular support.

78. There are no prescribed standards as regards polling methodologies and protocols to be utilized to determine the 15% polling criterion, such as the questions to be used and the choices to be presented to the respondents. There are no standards for determining which organizations qualify as "national

public opinion polling organizations," who is responsible for commissioning the polls, or whether a candidate could choose to rely on the best five national poll results if more are conducted. In sum, a candidate is denied fair notice of what is type of national polling is required to satisfy the 15% polling criterion. It invites manipulation by Defendants to exclude any third party or independent candidates from presidential debates. None has ever satisfied the 15% polling criterion since its inception.

79. In point of fact, Plaintiff Johnson polled far in excess of the 15% polling criterion in five (5) head-to-head 2012 national independent polls against Obama, yet was not permitted to participate in any of the 2012 presidential debates.

80. Upon information and belief, Romney was permitted to participate in the 2012 presidential debates based solely upon satisfaction of the 15% polling criterion in similar head-to-head polling exclusively against Obama. The identical head-to-head methodology was not employed by Defendants in denying Plaintiffs participation in presidential debates for failing the 15% polling criterion.

81. The 15% polling criterion did not constitute a pre-established objective criterion to determine which candidates may participate in a presidential debate sponsored by the Commission.

82. Additionally, in 2012, Plaintiffs Johnson and Stein attained ballot access in sufficient states to win an electoral-college majority, which ordinarily would require collecting approximately six hundred thousand (600,000) signatures from a broad spectrum of the electorate.

83. Plaintiffs Stein, Honkala, Stein Committee and the Green Party also qualified for federal matching funds under the Federal Elections Campaign Act. Plaintiffs Johnson and Stein, their running mates and their respective parties were nonetheless excluded from the 2012 presidential debates for failing the exclusionary, arbitrary and capricious and anti-competitive 15% polling criterion.

84. Plaintiffs were denied fair notice of the terms and conditions of national public opinion polling that must be performed by five national public opinion organizations to satisfy the 15% polling criterion in 2012.

85. By agreeing in their secret 2012 Memo of Understanding that the Commission's polling criterion would "apply in determining the candidates to be invited to participate in [the 2012 presidential] debates," Obama and Romney, in unlawful conspiracy and purposeful collusion with the Commission and the RNC and the DNC, guaranteed that the two would monopolize the three 2012 presidential debates and the three above-referenced cognizable antitrust markets.

86. 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 polls can ordinarily be satisfied only by expending approximately $270 million to obtain necessary name recognition-a staggering sum which underscores its exclusionary intent and effect in the presidential debates market, the presidential campaign market, the electoral politics market.

87. Obama and Romney also agreed in their Memo of Understanding to unreasonably restrain trade and

to monopolize the three relevant markets, by agreeing that any candidate who might miraculously satisfy the 15% polling criterion would also be required to consent to the exclusion of others either as debate participants or sponsors.

88. The duopoly party candidates and their representatives set the judicially enforceable terms of the debates, including the topics, locations, participants, moderators, format, and many other details which are dutifully executed by the Commission, to unreasonably restrain trade and to monopolize the above-referenced cognizable antitrust markets.

89. Defendants have combined, contracted, colluded and conspired with each other to unreasonably and substantially restrain interstate trade and commerce in the presidential debates market, the presidential elections market, the presidential candidates market and the electoral politics market in violation of Section 1 of the Sherman Act, 15 U.S.C. §1.

90. As a direct and proximate result of the unlawful agreements and practices by and between Defendants, Plaintiffs have been injured in their businesses of debating in presidential elections, participating in presidential election campaigns, and engaging in electoral politics. Plaintiffs have been unfairly deprived of free competition in the presidential debates market, the presidential elections market, and the electoral politics market and have lost millions of dollars in publicity value and capacity to communicate their messages to the people of the United States; millions of dollars in campaign contributions; millions of dollars in matching federal campaign funds; and, in the case of the individual Plaintiffs, the salaries they

would have received if elected to offices of President or Vice-President of the United States, respectively, in 2012.

91. Defendants have denied Plaintiffs proper notice to enable them to comply with the arbitrary and capricious barriers to participation in the applicable markets, thereby making it impossible for Plaintiffs to avoid the monopolistic design, effect and impact of Defendants' actions and inactions set forth herein in violation of Section 1 of the Sherman Act, due process, and fundamental fairness.

92. As a direct and proximate result of the Defendants' unlawful agreements and anticompetitive, exclusionary practices, Plaintiffs have suffered actual damages in an amount to be determined at trial, including, inter alia, loss of revenue, loss of profits, and increased costs.

SECOND CLAIM FOR RELIEF

MONOPOLIZATION, ATTEMPT TO MONOPOLIZE, AND CONSPIRACY TO MONOPOLIZE IN VIOLATION OF SECTION 2 OF THE SHERMAN ACT

93. Plaintiffs incorporate by reference each of the foregoing paragraphs as if they were fully set forth herein.

94. The RNC and DNC have monopolized the presidential debates market, the presidential elections market, and the electoral politics markets through numerous anticompetitive practices.

95. The RNC, DNC, and the Commission, with the collusion of the other named Defendants and others, have engaged in competitively unreasonable practices

that have created a dangerous probability of monopolizing and have in fact monopolized the presidential debates market, the presidential elections market, and the electoral politics market.

96. The RNC and DNC conspired to create and to control the Commission with the objective of jointly monopolizing the presidential debates market, the presidential elections market, and the electoral politics market.

97. Through the creation, control, manipulation and maintenance of the Commission, the RNC, DNC, and the Commission have controlled and monopolized the presidential debates, to which access is an "essential facility" for Plaintiffs and others who wish to compete in the presidential debates market, the presidential elections market, and the electoral politics market.

98. Participation in the debates has been, and is, an "essential facility" to the fund-raising, media exposure, ability to attract volunteers, name recognition, voter support, philosophical or ideological branding, and popular credibility or goodwill necessary to conduct the business of a meaningful presidential campaign.

99. The monopolization by the RNC, DNC, and the Commission of every aspect of the presidential debates—an essential facility--obligated them to permit the participation of Plaintiffs Johnson and Stein in the 2012 election cycle on reasonable, nondiscriminatory terms and to abandon their exclusionary and unreasonably anti-competitive 15% polling criterion.

100. Since 1988, the Commission, RNC, and DNC have exercised exclusive control of the presidential debates to the exclusion of all others.

101. The Plaintiffs and others who seek to compete in the presidential debates are unable practically or reasonably to duplicate the essential presidential debates facility, particularly since the candidates of the duopoly parties invariably agree to refrain from debating or appearing on television or radio programs with any other candidates.

102. The RNC, the DNC, the Commission, and the individual Defendants have denied Plaintiffs and others access to the presidential debates and have denied others who have sought to organize or sponsor presidential debates access to presidential debates, particularly through the quadrennial Memos of Understanding entered into by candidates of the RNC and DNC duopoly parties. They stipulate that the two major party nominees will cooperate only with the Commission in participating in presidential debates. And the Commission slavishly accepts the terms and conditions of the Memos of Understanding.

103. Without creating a proverbial Tower of Babel, the RNC, DNC, and the Commission could abandon the 15% polling criterion in favor of a less prohibitive presidential debates filter. Applying the first two of the three criteria already set by the Commission for debate inclusion, for instance, would limit debate participants other than the two major party nominees to a manageable few. 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.[56]

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[56] http://opendebates.org/theissue/15percent.html

104. Defendants have monopolized the presidential debates market, the presidential elections market, the presidential candidates market and the electoral politics market by acquiring, maintaining and exercising power to (1) keep parties, candidates and their ideas divergent from the duopoly parties out of meaningful electoral competition; (2) fix the terms and conditions of presidential debates to avoid embarrassment or challenges to the two major party nominees; (3) exclude competition in all the above-referenced cognizable antitrust markets; (4) exclude any other entities or organizations, such as the independent and public-interest-promoting League of Women Voters and the Citizens' Debate Commission, from organizing or sponsoring presidential debates; and (5) exclude candidates other than the nominees of the duopoly parties from participating in presidential debates.

105. Defendants have intentionally and willfully conspired to monopolize the markets by way of the acts described herein. A substantial amount of interstate commerce has been affected by the attempt and conspiracy to monopolize and actual monopolization of the above-referenced antitrust markets.

106. As a direct and proximate result of the unlawfully anticompetitive and exclusionary conduct by Defendants described herein, Plaintiffs have been injured in their businesses and property, including lost campaign contributions, volunteers, media exposure, name recognition, philosophical or ideological branding, voter support, and public credibility and valuable goodwill. Plaintiffs have been deprived of the benefits of free competition in the presidential debates market, the presidential elections market, and the

electoral politics market, and have been injured by Defendants' refusals to deal with them, and incurred increased costs, decreased revenues, and the loss of valuable benefits possible only from participation in presidential debates.

107. Defendants have denied Plaintiffs proper notice to enable them to comply with the arbitrary and capricious barriers to participation in the applicable markets, thereby making it impossible for Plaintiffs to avoid the monopolistic design, effect and impact of Defendants' actions and inactions set forth herein in violation of Section 2 of the Sherman Act, due process, and fundamental fairness.

108. As a direct and proximate result of Defendants' unlawful conduct, Plaintiffs have suffered actual damages in an amount to be determined at trial, including, inter alia, loss of revenue, loss of profits, and increased costs.

THIRD CLAIM FOR RELIEF

VIOLATION OF FIRST AMENDMENT RIGHTS OF FREE SPEECH AND ASSOCIATION

109. Plaintiffs incorporate by reference each of the foregoing paragraphs as if they were fully set forth herein.

110. The presidential debates organized by Defendants exert a *de facto* influence on the outcome of presidential elections comparable to the influence of the Jaybird Party's organized private club elections on Fort Bend, Texas, official county-wide elections recounted by the United States Supreme Court in *Terry v. Adams,* 345 U.S. 461 (1953).

111. Just as candidates who failed to prevail in the Jaybird Party's "private club" elections were, in light of proven political realities, guaranteed to lose in official county-wide races, a presidential candidate who is excluded from presidential debates has zero chance of winning the general presidential election. Indeed, it has never happened since presidential debates commenced in 1960, more than a half-century ago.

112. As an established political reality, presidential debates narrow the viable general presidential candidates to the nominees of the two major parties, just as the Jaybird Party's "private club" elections narrowed the number of viable candidates to county-side offices to one — the Jaybird Party's nominee.

113. Presidential debates organized and conducted by Defendants have become an integral part, indeed the predominant part, of the elective process that determines who will be President of the United States, the post powerful office in the nation and the world.

114. The terms and conditions of presidential debates set forth in the Memos of Understanding between the two major party nominees are intended to be judicially enforceable, as were the racially restrictive covenants in *Shelley v. Kramer,* 334 U.S. 1 (1948). The prospect of judicial enforcement power hangs like a Sword of Damocles to force adherence Memos of Understanding negotiated by the two major party nominees.

115. Strict judicial scrutiny of those exclusionary terms and conditions is urgent because the political processes which ordinarily can be expected to redress popular grievances are skewed in favor of the two major parties and their candidates and against third

parties or independents or their candidates. Exemplary of the bipartisan legislative bias are political gerrymandering, the winner-takes-all rule, ballot access laws, and campaign finance laws. All are geared to entrench the two major parties. The Republican and Democratic Members of Congress would scoff at any effort of Plaintiff's to redress their grievances though legislation that would undermine their own stranglehold on the multi-billion dollar business of politics.

116. Thus, the Democracy in Presidential Debates Act (H.R. 791, 102nd Cong., 1st Sess. 1991) introduced by Representative Timothy Penny of Minnesota was dead on arrival. Among other things, the Act would have required participation in presidential debates, which would have been organized by nonpartisan entities, to include candidates who had received primary federal matching funds and had qualified for the ballot in at least forty states.

117. The supreme political significance of presidential elections justifies a unique constitutional jurisprudence.

118. The organization and conduct of presidential debates by Defendants, including rules governing participation, are subject to the constraints of the First Amendment because of their integral role in electing the President of the United States according to the rationale of *Terry*.

119. The fifteen percent (15%) polling criterion for participation in presidential debates constitutes an unreasonable burden on free speech or political association in violation of the First Amendment.

120. The fifteen percent (15%) threshold was selected by Defendants with the specific intent of suppressing

the viewpoints of third party or independent presidential candidates and to boost the political speech of the two major party nominees.

121. The fifteen percent (15%) threshold is superfluous to confining presidential debate participants to a reasonable number consistent with the objective of an informed electorate. As referenced above, a participation standard that required qualification on ballots in sufficient states to win an electoral-college majority would both promote voter education and prevent an unmanageable number of debaters.

122. The fifteen percent (15%) threshold gives the two old, established parties a decided advantage over the candidates of any third party or independent characteristically struggling for existence, and thus place substantial burdens on the First Amendment right to associate.

123. The First Amendment right to form a party for the advancement of political goals means little if that party's presidential nominee can be arbitrarily excluded from presidential debates and denied an equal opportunity to win votes.

124. The right to vote for president is heavily burdened if that vote can be cast—as a practical matter-for only one of the two major party nominees who participated in presidential debates when other third party or independent candidates are clamoring for debate participation.

125. There is no compelling interest in Defendants' fifteen percent (15%) polling criterion as a condition for participation in presidential debates.

126. The criterion does not simply promote a "two-party system;" it favors two particular parties-the

Republicans and the Democrats — and in effect tends to give them a complete monopoly on the White House.

127. Competition in ideas and government policies should be the alpha and omega of the presidential electoral process and of First Amendment freedoms.

128. To permit Defendants the power to confine presidential debates to the nominees of the two major parties would stifle the growth of new or fledgling parties or independent candidates who work to increase their strength year to year.

129. To permit Defendants the power to confine presidential debates to the nominees of the two major parties is unreasonable in light of the purposes served by the debates.

130. The fifteen percent (15%) polling criterion imposes a burden on voting and associational rights in violation of the First Amendment.

131. As a direct and proximate cause of Defendants' violation of the First Amendment, Plaintiffs have been injured in their businesses and property, including lost campaign contributions, volunteers, media exposure, name recognition, philosophical or ideological branding, voter support, public credibility and valuable goodwill.

132. As a direct and proximate cause of Defendants' violation of the First Amendment, Plaintiffs have suffered actual damages in an amount to be determined at trial, including, inter alia, loss of revenue, loss of profits, and increased costs.

FOURTH CLAIM FOR RELIEF
INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE AND RELATIONS

133. Plaintiffs incorporate by reference each of the foregoing paragraphs as if they were fully set forth herein.
134. Defendants' anticompetitive, exclusionary conduct as described herein gives rise to common law liability for intentional interference with prospective economic advantage and prospective contractual or business relations.
135. At all relevant times, Plaintiffs had legitimate expectations of economic relationships with third parties, including presidential debate organizers and sponsors, contributors, and media outlets.
136. The prospective relationships would have provided economic and other benefits to Plaintiffs but for Defendants' tortious and anticompetitive exclusionary conduct.
137. At all relevant times, Defendants knew of Plaintiffs' prospective contractual and economic relationships with third parties, as well as with the Commission but for the exclusionary conduct and demands of the RNC, DNC, and the individual defendants.
138. Defendants willfully engaged in unlawful, anticompetitive, and exclusionary acts and practices with the intent to disrupt Plaintiffs' prospective contractual and economic relationships.
139. The foregoing acts and practices, and the continuing course of the RNC's, DNC's, the Commission's and Fahrenkopf's anticompetitive and

tortious conduct, deliberately and directly resulted in the interference with Plaintiff's prospective contractual and business relations.

140. The foregoing acts and practices, and the continuing course of Defendants' anticompetitive and tortious conduct, directly and proximately caused Plaintiffs to suffer injury and damages to their business and property.

141. Defendants RNC, DNC, the Commission, and Fahrenkopf committed these tortious acts with deliberate and actual malice, ill-will, and specific knowledge that their actions constituted an outrageous, willful and wanton disregard of Plaintiff's legal rights.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully pray that judgment be entered in their favor on all Counts, and that Plaintiffs be granted the following relief:

> 5. Adjudge and declare that Defendants have engaged in unlawful restraints of trade in violation of Section 1 of the Sherman Act and Section 4 of the Clayton Act, 15 U.S.C. §15 (2012).
>
> 6. Adjudge and declare that Defendants have engaged in continued monopolization, attempts to monopolize, and conspiracies to monopolize the presidential debates market, the presidential elections market, and the electoral politics market in the United States in violation of Section 2 of the Sherman Act and

Section 4 of the Clayton Act, 15 U.S.C. §15 (2012).

7. Award Plaintiffs treble the amount of damages each sustained as a result of the violations of the antitrust laws alleged herein during the past four years, pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15 (2012).

8. Adjudge and declare that the fifteen percent (15%) polling criterion used by Defendants violates the First Amendment, award Plaintiffs damages directly and proximately caused by the violation, and enjoin enforcement of the criterion.

9. Award Plaintiffs damages attributable to Defendants' tortious interference with Plaintiffs' prospective economic advantages and relations, including but not limited to, an award of punitive damages.

10. Equitable relief pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26 (2012), including (a) an order compelling the dissolution of the Commission; and (b) an injunction against any further boycott or other agreement in restraint of trade between the RNC and the DNC or any of their candidates or their agents, or involving the Commission that would exclude from presidential debates candidates who have obtained sufficient state ballot

access to win an electoral-college majority.

11. Award Plaintiffs their attorneys' fees, costs, and disbursements in this action, pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15 (2012).

12. Award Plaintiffs their prejudgment interest in this action, pursuant to Section 4 of the Clayton Act, 15 U.S.C. §15 (2012).

13. Grant Plaintiffs such other and further relief as may be just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, Plaintiffs demand a trial by jury of all claims and issues so triable.

Dated this 29th day of September, 2015.

s/ Bruce Fein
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1. MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding constitutes an agreement between Obama for America and Romney for President (the "campaigns") regarding the rules that will govern debates in which the campaigns participate in 2012. This agreement shall be binding upon the campaigns.

1. Number, Dates, Time, Locations, Topics

(a) Presidential Debates

Date	Location
Wednesday, October 3	University of Denver Denver, CO
Tuesday, October 16	Hofstra University Hempstead, NY
Monday, October 22	Lynn University Boca Raton, FL

(b) Vice Presidential Debate

Date	Location
Thursday, October 11	Centre College Danville, KY

(c) Each debate shall begin at 9 p.m. Eastern Daylight Time.

(d) The parties agree that they will not (1) issue any challenges for additional debates, (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.

(e) The topic of the October 3 (First Presidential) debate shall be domestic policy. The topic of the October 22 (Third Presidential) debate shall be foreign policy. The October 11 (Vice Presidential) debate and the October 16 (Second Presidential) debate shall not be limited by topic and shall include a balance of questions on topics including foreign policy and national security, on the one hand, and domestic and economic policy on the other.

2. Sponsorship

(a) The two campaigns will participate in four debates sponsored by the Commission on Presidential Debates (the "Commission"). The Campaigns agree that the Commission shall sponsor the debates, subject to its expression of a willingness to employ the provisions of this agreement in conducting these debates. In the event the Commission does not so agree, the two campaigns jointly reserve the right to determine whether an alternate sponsor is preferable. The parties agree that the Commission's Nonpartisan Candidate Selection Criteria for 2012 General Election Debate participation shall apply in determining the candidates to be invited to participate in these debates.

3. Participants

If one or more candidates from campaigns other than the two (2) signatories are invited to participate pursuant to those Selection Criteria, those candidates shall be included in the debates, if those candidates accept the terms of this agreement. Any modifications to this agreement

must be agreed upon by each of the signatories to this agreement as well as all other candidates selected to join the debate.

4. Moderator

(a) Each debate will have a single moderator;

(b) The parties have accepted the Commission's recommendations of the below-listed moderators. The Commission shall provide each moderator with a copy of this agreement and shall use its best efforts to ensure that the moderators implement the terms of this agreement.

(i) Jim Lehrer for the First Presidential debate, October 3, 2012 at the University of Denver.

(ii) Candy Crowley for the Second Presidential debate, October 16, 2012 at Hofstra University.

(iii) Bob Schieffer for the Third Presidential debate, October 22, 2012 at Lynn University.

(iv) Martha Raddatz for the Vice Presidential debate, October 11, 2012 at Centre College.

5. Rules Applicable to All Debates

The following rules shall apply to each of the four debates:

(a) Each debate shall last for ninety (90) minutes, with the time commencing from the start of the moderator's opening to the conclusion of the moderator's closing.

(b) For each debate, there shall be no opening statements. There shall be a 2 minute closing statements in the First debate, a 90 second closing in the Vice President debate, and for the Third Presidential debate, the campaigns will resolve the choice between a 90 second and a 2 minute closing by coin toss. There will be no closing

statement in the Second Presidential Town Hall debate. The order of these closing statements shall be determined by coin toss.

(c) No props, notes, charts, diagrams, or other writings or other tangible things may be brought into the debate by any candidate, including portable electronic devices, and prior to the beginning of the debate, the Commission will verify as appropriate that the candidates have complied with this subsection. No candidate may reference or cite any specific individual sitting in a debate audience (other than family members) at any time during a debate. If a candidate references or cites any specific individual(s) in a debate audience, or if a candidate uses a prop, note, or other writing or other tangible thing during a debate, the moderator must interrupt and explain that reference or citation to the specific individual(s) or the use of the prop, note, or other writing or thing violates the debate rules agreed to by that candidate.

(d) Notwithstanding subparagraph S(c), the candidates may take notes during the debate on the size, color, and type of blank paper each prefers and using the type of pen or pencil that each prefers. 1be staff of the candidate will place such paper, pens, and pencils on the podium, table, or other structure to be used by the candidate in that debate.

(e) The candidates may not ask each other direct questions during any of the four debates.

(f) The order of questioning shall be determined as follows: The Commission will conduct a coin toss at least seventy-two (72) hours before the First Presidential debate (October 3). At

that time, the winner of the coin toss shall have the option of choosing, for the October 3 debate, whether to take the first or second question. At that time, the loser of the coin toss will have the choice of question order for the October 22 (Third Presidential) debate. For the October 16 (Second Presidential-Town Hall) debate, there shall be a separate coin toss, with the winner choosing whether to take the first or second question. The Commission shall set a time at least seventy-two (72) hours before the October 16 (Second Presidential-Town Hall) debate at which the candidates shall make their choices for that debate.

(g) President Obama shall be addressed by the moderator as "Mr. President" or "President Obama". Governor Romney shall be addressed by the moderator as "Governor" or "Governor Romney".

(h) The candidates shall not address each other with proposed pledges.

(i) In each debate, the moderator shall:

(i) Open and close the debate and enforce all time limits. Where a candidate exceeds the permitted time for comment, the moderator shall interrupt and remind both the candidate and the audience of the expiration of the time limit and call upon such candidate to observe the strict time limits that have been agreed upon herein.

(ii) Use his or her best efforts to ensure that the questions arc reasonably well balanced in all debates and within the designated subject matter areas of the October 3 (First Presidential) debate and October 22 (Third Presidential) debate in terms of addressing a wide range of issues of major public

interest facing the United States and the world.

(iii) Vary the topics on which he or she questions the candidates and ensure that the topics of the questions are fairly apportioned between the candidates, except that in the First Debate, the moderator shall apportion the questions within the broad topic areas announced by the Commission for that debate.

(iv) Use best efforts to ensure that the two candidates speak for approximately equal amounts of time during the course of each debate and within each segment of each debate.

(v) Use any reasonable method to ensure that the agreed-upon format is followed by the candidates and the audience.

(vi) Alternate between the candidates the one responding first to questions.

(vii) At no debate shall the moderator ask the candidates for a "show of hands" or similar calls for response.

6. Additional Rules Applicable to the October 3 and October 22 Debates

For the October 3 (First Presidential) debate, the candidates will appear at podiums. For the October 22 (Third Presidential) debate, the candidates shall be seated jointly at a table, in a style similar to previous presidential debates employing that format. The October 3 (First Presidential) debate and October 22 (Third Presidential) debate shall be governed by the rules set forth in section 5 and the following additional rules:

(a) There shall be no audience participation in the October 3 (First Presidential)

debate and October 22 (Third Presidential) debate. Except as provided by the agreed upon rules of the October 16 town hall debate, members of the debate audience will be instructed by the moderator before the debate goes on the air and by the moderator after the debate goes on the air not to applaud, speak, or otherwise participate in the debate by any means other than by silent observation, as further provided and enforced under section 9(a)(viii). The moderator shall direct the first question to the candidate determined by the procedure set forth in subparagraph S(f) of section 5.

(b) The October 3 First Presidential debate and the October 22 Third Presidential debate shall be broken into six, 15-minute segments. Each segment will begin with the moderator introducing a topic and giving each candidate 2 minutes to comment on the topic. After these initial answers, the moderator will facilitate an open discussion of the topic for the remaining approximately 8 minutes and 45 seconds, ensuring that both candidates receive an equal amount of time to comment. The candidates will reverse the order of response to the next and subsequent questions.

(c) At no time during the October 3 First Presidential debate shall either candidate move from his designated area behind his respective podium. At no time during the October 22 Third Presidential debate shall either candidate move from his designated area seated behind the table.

7. Additional Rules Applicable to the October 16 Debate

The October 16 (Second Presidential) debate will be conducted in an audience participation ("Town Hall") format. This debate shall be governed by the rules set forth in section 5 (as applicable), and the staging of the debate, including the audience size, will be determined by the Commissioner producer in consultation with, and subject in its details to, the agreement of both candidates, to achieve consistency with the traditional Town Hall format. In addition, there shall be the following additional rules:

(a) There shall be no audience participation in the October 16 (Second Presidential- Town Hall) debate other than as described below. Other than for an audience member asking a question as permitted by this section, at the start of the October 16 (Second Presidential-Town Hall) debate and in the event of and in each instance whereby an audience member(s) attempts to participate in the debate by any means thereafter, the moderator shall instruct the audience to refrain from any participation in the debate as described in section 9(a) (viii) below. The moderator shall facilitate audience members in asking questions to each of the candidates, beginning with the candidate determined by the procedure set forth in subparagraph 5(f). The answer segments will be structured as follows: A question is asked of Candidate A. That candidate will respond to the question for up to 2 minutes. Candidate B will then have 2 minutes to respond. Following those initial answers, the moderator will invite the candidates to respond to the previous answers, beginning with Candidate A, for a total of

2 minutes, ensuring that both candidates receive an equal amount of time to comment. In managing the two-minute comment periods, the moderator will not rephrase the question or open a new topic. The candidates will reverse the order of responses to the next question.

(b) After completion of the discussion of the first question, the moderator shall call upon another audience member to direct a question to the candidate who did not respond initially to the first question, and follow the procedure outlined in paragraph 7(a) above. Thereafter, the moderator shall follow the procedures in this paragraph by calling upon another audience member to ask a question of the first candidate and shall continue to alternate the candidate who first answers each successive question.

(c) With respect to all questions:

(i) The moderator shall select the questioners, but she may not "coach" the questioners.

(ii) As set forth in section 7(e), questioners shall not be allowed to make statements, speeches, or comments. They must ask their question as originally submitted and selected by the moderator and make no other comments.

(iii) The moderator will not ask follow -up questions or comment on either the questions asked by the audience or the answers of the candidates during the debate or otherwise intervene in the debate except to acknowledge the questioners from the audience or enforce the time limits, and invite candidate comments during the 2-minute response period.

(iv) The two campaigns shall agree upon a

method for selection of the audience for the town hall debate pursuant to subparagraph (f) below.

(d) The audience members shall not ask follow-up questions or otherwise participate in the extended discussion, and the audience member's microphone shall be turned off after he or she completes asking the questions.

(e) Prior to the start of the debate, audience members will be asked to submit their questions in writing to the moderator. No third party, including the Commission and the campaigns, shall be permitted to see the questions. The moderator shall approve all questions to be posed by the audience members to the candidates. The moderator shall ensure that the audience members pose to the candidates a balance of questions on foreign policy and national security, on the one hand, and domestic and economic policy on the other. The moderator will further review the questions and eliminate any questions that the moderator deems inappropriate. At least seven (7) days before the October 16 (Second Presidential-Town Hall) debate, the moderator shall develop, and describe to the campaigns, a method for selecting questions at random while assuring that questions are reasonably well balanced in terms of addressing a wide range of issues of major public interest facing the United States and the world. Each question selected will be asked by the audience member submitting that question. If any audience member poses a question or makes a statement that is in any material way different than the question that the audience member earlier submitted to the moderator for review, the

moderator will cut-off the questioner and advise the audience that such non-reviewed questions are not permitted. Moreover, the Commission shall take appropriate steps to cut-off the microphone of any such audience member who attempts to pose any question or statement different than that previously posed to the moderator for review. The moderator will inform the audience of this provision prior to the start of the debate.

(f) Subject to the consultation and agreement procedure affecting staging, as described in this section, the debate will take place before a live participating audience of persons who shall be seated and who describe themselves as likely voters. These participants will be selected by the Gallup Organization ("Gallup"), using a methodology approved in writing by the campaigns. Gallup shall have responsibility for selecting the nationally demographically representative group of voters. At least fourteen (14) days prior to October 16 (Second Presidential-Town Hall) debate, Gallup shall provide a comprehensive briefing on the selection methodology to the campaigns, and both campaigns shall approve the methodology. Either campaign may raise objections on the methodology to Gallup and to the Commission within twenty-four (24) hours of the briefing, and Gallup shall revise the methodology accordingly.

(g) Participants selected shall not be contacted directly or indirectly by the campaigns before the debate. The Commission shall not contact the participants before the debate other than for logistical purposes.

8. Additional Rules Applicable to October 11

(Vice Presidential) Debate

For the debate between the two candidates for Vice-President, the candidates will be seated at a table following the same basic rules and staging provisions (except as otherwise noted here) for the October 22 (Third Presidential) debate. There shall be no audience participation of any kind. The stage position for each candidate shall be determined by a flip of the coin, witnessed by the campaigns' representatives, no less than 72 hours before the start of the debate.

(a) The moderator shall ask questions of each candidate in alternating order with the recipient of the first question determined by a flip of the coin, witnessed by the campaigns' representatives, no less than 72 hours before the start of the debate. When asked a question, the first candidate will have two minutes in which to respond, the second candidate will have two minutes to comment on the response , and then the moderator will lead a 4 minute 15 second minute discussion with the time to be evenly divided between the candidates.

(b) There will be no opening statements. Each candidate shall have two minutes in which to make a closing statement with the order of those statements determined by a flip of the coin, witnessed by the campaigns' representatives, no less than 72 hours before the start of the debate. The moderator shall take steps to ensure that each candidate has the full two minutes provided in this paragraph, and the Commission shall take steps to ensure that the closing statements are included in

the nationwide broadcast, notwithstanding any other provision in this agreement.

(c) If there are any discrepancies between this paragraph and any other provision of this agreement, the provisions of this paragraph shall govern. Any issues not anticipated by this paragraph or the agreement shall be resolved at the debate site by the campaigns' representatives and, failing a resolution, by a coin flip.

(d) Each campaign will advise the moderator of the choice of address that it would prefer.

9. Staging

(a) The following rules apply to each of the four debates:

(i) All staging arrangements for the debates not specifically addressed in this agreement shall be jointly addressed and agreed to by representatives of the two campaigns. In this regard, the Commission staff -- including the broadcast producer -- shall meet at least once daily and simultaneously with a representative of each campaign, and the Commission shall provide reasonable daily access to the stage and debate site, on an equal basis but not simultaneously, for each campaign.

(ii) The Commission will conduct a coin toss at least seventy-two hours before the October 3 (First Presidential) debate. At that time, the winner of the coin toss shall have the option of choosing stage position for the October 3 debate; the loser of the coin toss will have first-choice of stage position for the October 22 (Third Presidential) debate. The loser of the coin toss or his representative shall

communicate his stage position choice by email to the Commission and to the other campaign at least seven ty-two *(12)* hours before the October 22 (Third Presidential) debate. The stage position for the October 16 (Second Presidential-Town Hall) debate will be determined by a coin toss to take place at least seventy-two *(12)* hours before the debate. The stage position for the October 11 (Vice Presidential) debate will be determined by a separate coin toss to take place at least seventy-two *(12)* hours before that debate.

(iii) For the October 3 (First Presidential) debate, October 11 (Vice Presidential), October 16 (Second Presidential-Town Hall) debate, and October 22 (Third Presidential) debate, the candidates shall enter the stage simultaneously, from opposite ends of the stage, upon a verbal cue by the moderator after the program goes on the air, proceed to center stage, shake hands, and proceed directly to their positions.

(iv) Except as provided in subparagraph (d) (viii) of this paragraph 9, TV cameras will be locked into place during all debates. They may, however, tilt or rotate as needed to frame the candidate or moderator.

(v) Except as provided in subparagraph 9(d) (viii), TV coverage during the question and answer period shall be limited to shots of the candidates or moderator, and in no case shall any television shots be taken of any member of the audience (including candidates' family members) from the time the first question is asked until the conclusion of the closing statements, if any. When a candidate is speaking, either in answering a question or making his closing

statement, TV coverage will be limited to the best of the Commission's ability to the candidate speaking. To the best of the Commission's abilities, there will be no TV cut-aways to any candidate who is not responding to a question while another candidate is answering a question or to a candidate who is not giving a closing statement while another candidate is doing so.

(vi) The camera located at the rear of the stage shall he used only to take shots of the moderator and will not show the notes taken by the candidates.

(vii) For each debate, each candidate shall have camera-mounted, timing lights corresponding to the timing system described in section 9(b) (vi) below positioned in his or her line of sight. The candidates will, have a countdown clock for all the 2-minute responses and any closing statements.

(viii) All members of the debate audience will be instructed by the moderator before the debate goes on the air and by the moderator after the debate goes on the air not to applaud, speak, or otherwise participate in the debate by any means other than by silent observation, except as provided by the agreed upon rules of the October 16 town hall debate. The moderator shall also state that, should an audience member fail to comply with this requirement, he or she will be subject to removal from the audience and from the facility. In the event of and in each instance whereby an audience member(s) violates this requirement, the moderator shall restate the instruction for the entire audience and shall also use his or her best efforts to enforce this provision, as appropriate,

against the specific audience members failing to comply with the instructions pursuant to this subparagraph.

(ix) The Commission shall use best efforts to maintain an appropriate temperature as agreed to by the campaigns.

(x) Each candidate shall be permitted to have a complete, private production and technical briefing and walk-through ("Briefing") at the location of the debate on the day of the debate. The order of the Briefing shall be determined by agreement or, failing candidate agreement, a coin flip. Each candidate will have a maximum of one (1) hour for this Briefing. Production lock-down will not occur for any candidate unless that candidate has had his or her Briefing. There will be no filming, taping, photography, or recording of any kind (except by that candidate's personal photographer) allowed during the candidates' Briefing. No media, other than as stated herein, will be allowed into the auditorium where the debate will take place during a candidate's Briefing. All persons, including but not limited to the media, other candidates and their representatives, and the employees or agents of the Commission, other than those necessary to conduct the Briefing, shall vacate the debate site while a candidate has his or her Briefing. The Commission will provide to each candidate's representatives a written statement and plan which describes the measures to be taken by the Commission to ensure the complete privacy of all briefings.

(xi) The color and style of the backdrop will be recommended by the Commission and agreed to by representatives of the campaigns. The Commission

shall make its recommendation known to the campaigns at least seventy-two (12) hours before each debate. The backdrops behind each candidate shall be identical.

(xii) The set will be completed and lit no later than 3 p.m. at the debate site on the day before the debate will occur.

(xiii) Each candidate may use his or her own makeup person, and adequate facilities shall be provided by the Commission at the debate site for makeup.

(xiv) In addition to Secret Service personnel and other provision for official support as required by law and standard protocols for the President, each candidate will be permitted to have one (2) pre-designated staff member in the wings or in the immediate backstage area during the debate at a location to be mutually agreed upon by representatives of the campaigns at each site. All other staff must vacate the wings or immediate backstage areas no later than five (5) minutes before the debate commences. A PL phone line will be provided between each candidate's staff work area and debate. No photos shall be taken from the wings by these photographers during the debate. Photos taken by these photographers may be distributed to the press as determined by each candidate. In addition, the press pool accompanying each candidate shall be included in a pool to be formed by the Commission for pre- and post-debate photography from the buffer zone, the broadcast producer.

(xv) Each candidate shall be allowed to have one (1) professional still photographer present on the

stage before the debate begins and in the wings during the debate as desired and on the stage immediately upon the conclusion of the

(b) In addition to the rules in subparagraph (a), the following rules apply to the October 3 (First Presidential) debate:

(i) The Commission shall construct the podiums and each shall be identical to view from the audience side. The podiums shall measure fifty (50) inches from the stage floor to the outside top of the podium facing the audience and shall measure forty-eight (48) inches from the stage floor to the top of the inside podium writing surface facing the respective candidates, and, otherwise shall be constructed in the style and specifications recommended by the Commission, shown in Attachment A, and approved by the campaigns. There shall be no writings or markings of any kind on the fronts of the podiums. No candidate shall be permitted to use risers or any other device to create an impression of elevated height and no candidate shall be permitted to use chairs, stools, or other seating devices during the debate.

(ii) Each podium shall have installed a fixed hardwired microphone, and an identical microphone to he used as backup per industry standards, and approved by the campaigns.

(iii) The podiums will be equally canted toward the center of the stage at a degree to be determined by the Commission's producer and approved by the campaigns. The podiums shall be 10' apart; such distance shall be measured from the left-right center of a podium to the left-right center of the other podium.

(iv) The moderator will be seated at a table so as to be positioned in front, between, and equidistant from the candidates, and between the cameras to which the candidates direct their answers.

(v) At least ten days before each debate, the Commission shall submit for joint approval of the campaigns a diagram for camera placement, set design, and room configuration to include the audience seating breakdown.

(vi) Time cues in the form of colored lights will be given to the candidates and the moderator when there are thirty (30) seconds remaining, fifteen (15) seconds remaining, and five (5) seconds remaining, respectively for the two (2) minute and other timed answers. Pursuant to Section 5G) (i), the moderators shall enforce the strict time limits described in this agreement. Each candidate will have a countdown clock which will show the seconds left in any two minute answer or closing statement.

(c) In addition to the rules in subparagraph (a), the following rules apply to the October 16 (Second Presidential-Town Hall) debate:

(i) The candidates shall be seated on director chairs (with backs) before the audience, which shall be seated in approximately a horseshoe arrangement as symmetrically as possible around the candidates. Consistent with the terms of Section 7, the precise staging arrangements will be determined by the Commission's producer subject to the approval of representatives of both campaigns.

(ii) The chairs shall be identical and have backs and a footrest and shall be approved by the

candidates' representatives.

(iii) Each candidate shall have a place to put a glass of water and paper and pens or pencils for taking notes (in accordance with section (d)) of sufficient height to allow note taking while sitting on the chair, and which shall be designed by the Commission, subject to the approval of representatives of both campaigns.

(iv) Each candidate may move about in a pre-designated area, as proposed by the Commission and approved by each campaign, and may not leave that area while the debate is underway. The pre-designated areas of the candidates may not overlap.

(v) Each candidate shall use a wireless handheld microphone (with appropriate back- up) to allow him to move about and to face different directions while responding to questions from the audience.

(vi) At least ten days before each debate, the Commission shall submit for approval by the campaigns a diagram for camera placement, set design, and room configuration to include the audience seating breakdown.

(vii) At least seven (7) days before the October 16 (Second Presidential-Town Hall) debate, the Commission shall recommend a system of time cues subject to approval by both campaigns and consistent with the cues described in section 9(b)(vi).

(viii) Notwithstanding sections 9 (a)(iv) and (v), a roving camera may be used for shots of an audience member only during the time that the audience member is asking a question.

(ix) Prior to the start of the debate, neither the moderator nor any other person shall engage in a "warm up" session with the audience by engaging in a question or answer session or by delivering preliminary remarks. The moderator shall inform the audience of the rules of the debate, including the instruction that any audience member chosen to ask a question must ask the question he or she submitted, as described in Sections 7 (a) and (e).

(d) In addition to the rules in subparagraph (a), the following rules apply to the October 11 (Vice-Presidential) debate and the October 22 (Third Presidential) debate:

(i) The candidates shall be seated at a table similar to the design used in prior Presidential and Vice-Presidential debates with the moderator facing the candidates with his back to the audience and the candidates appearing on either side of the moderator. The precise design of the table and staging arrangements will be determined by the Commission subject to the approval of representatives of both campaigns. The Commission will submit a design for the table to the campaigns as soon as practicable but in no event later than 10 days before the Vice-Presidential debate. The same table and design will be used for the October 22 Third Presidential Debate.

(ii) The chairs shall be swivel chairs that can be locked in place, shall be identical and shall be approved by the candidates' representatives.

(iii) Each candidate shall have a place to put a glass of water and paper and pens or pencils for taking notes (in accordance with section (d)).

(iv) Each candidate and the moderator shall

have a wireless lapel microphone, and an identical microphone to be used as a backup.

(v) At least ten days before both debates, the Commission shall submit for approval by the campaigns a diagram for camera placement, set design, and room configuration to include the audience seating breakdown.

(vi) At least seven (7) days before the October 11 (Vice Presidential debate) and the October 22 (Third Presidential) debate, the Commission shall recommend a system of time cues subject to approval by both campaigns and consistent with the cues described in section 9(b)(vi).

(vii) The candidates shall remain seated throughout these two debates.

10. Ticket Distribution and Seating Arrangements

(a) The Commission shall be responsible for printing and ensuring security of all tickets to all debates. Each campaign shall be entitled to receive directly from the Commission one-third of the available tickets (excluding those allocated to the participating audience in the October 16 debate), with the remaining one-third going to the Commission.

(b) In the October 16 Town Hall debate, the participating audience shall be separated from any nonparticipating audience, and steps shall be taken to ensure that the participating audience is admitted to the debate site without contact with the campaigns, the media, or the nonparticipating audience.

(c) The Commission shall allocate tickets to the campaigns in such a manner as to ensure that

supporters of each candidate do not sit in a block and are interspersed with supporters for the other candidate and interspersed with tickets distributed by the Commission. For the October 3 (First Presidential) debate, October 11 (Vice Presidential) debate, and October 22 (Third Presidential) debate, the family members of each candidate shall be seated in the front row, diagonally across from the candidate directly in his line of sight while seated or standing at the podium. For the October 16 (Second Presidential) debate, the family members of each candidate shall be seated as mutually agreed by representatives of the campaigns.

(d) Any media seated in the auditorium shall be accommodated only in the last two (2) rows of the auditorium farthest from the stage. Two (2) still photo stands may be positioned near either side of the television camera stands located in the audience. (A media center with all necessary feeds will be otherwise available.)

(e) Tickets will be delivered by the Commission to each candidate's designated representative by 12:00 noon on the day preceding each debate. The Commission will invite from its allotment (two (2) tickets each) an agreed upon list of officeholders such as the U.S. Senate and House Majority and Minority Leaders, the Governor and Lieutenant Governor of the State holding the debate and in the case of the October 16 (Second Presidential debate) that metropolitan area, an appropriate list of other public officials and the President of the University sponsoring the debate. The Commission shall not favor one candidate over the other in the distribution of its allotment of

tickets.

11. Dressing Rooms/Holding Rooms

(a) Each candidate shall have a dressing room available of adequate size so as to provide private seclusion for that candidate and adequate space for the staff the candidate desires to have in this area. The two (2) dressing rooms shall be comparable in size and in quality and in proximity and access to the debate stage.

(b) An equal number of other backstage rooms will be available for other staff members of each candidate. Any rooms located next to the media center shall be located so that each campaign has equal proximity and ease of access to the media center. Each candidate's rooms shall be reasonably segregated from those designated for the other candidate. If sufficient space to accommodate the above needs is not available at a particular debate facility, the Commission shall provide trailers or alternative space mutually agreeable to the candidates' representatives at the Commission's expense. Space that is comparable in terms of size, location, and quality shall be provided to the two campaigns. These rooms shall be made available at least seventy-two *[12)* hours in advance of the beginning of each debate.

(c) The number of individuals allowed in these rooms or trailers shall be determined solely by each candidate in conjunction with the Secret Service.

(d) The Commission shall insure that each campaign is provided with a television feeds that are on-air (as opposed to only the in-house feed from the production truck). The campaigns agree

that these televisions and hook -ups are to be provided at their own expense.

12. Media

(a) Each candidate will receive not fewer than eighty (80) press passes for the Media Center during the debate and more if mutually agreed upon by the campaigns.

(b) The Commission will be responsible for all media credentialing.

13. Survey Research

The sponsor of the debates agrees that it shall not, prior to two days after the Presidential Inauguration of 2013, release publicly or to the media or otherwise make publicly available any survey research (including polls or focus group results or data) concerning the performance of the candidates in the debate or the preferences of the individuals surveyed for either candidate.

14. Complete Agreement

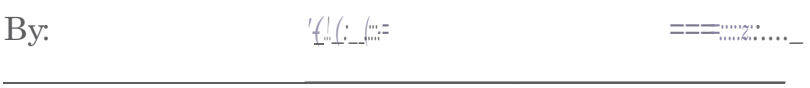
This memorandum of understanding constitutes the entire agreement between the parties concerning the debates in which the campaigns will participate in 2012.

15. Amendments

(a) This Agreement will not be changed or amended except as agreed and confirmed in writing by those persons who signed this Agreement their designees.

16. Ratification and Acknowledgement

Agreed and Accepted:

By: 

Printed Name: Robert Bauer

Title: General Counsel, Obama for America
Executed on October 3, 2012

Agreed and Accepted:

By:

Printed Name: Ben Ginsberg

Title: General Counsel, Romney for President
Executed on October _____, 2012

STATUORY PROVISIONS INVOLVED

Sherman Anti-Trust Act, § 1, 15. U.S.C. §1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

Sherman Anti-Trust Act, § 2, 15. U.S.C. §2:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

Clayton Act §4, 15 U.S.C. §15:

"(a) Amount of recovery; prejudgment interest
Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue

therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof."

Clayton Act §16, 15 U.S.C. §26:

"Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff."