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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