COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. MIDDLESEX SUPERIOR COURT
C.A. NO. MICV2002-4100

JILL STEIN and BARBARA JOHNSON,

Plaintiffs,

v.

THE BOSTON GLOBE, WBZ-TV, WCVB-TV, WGBH-TV, WHDH-TV, and NEW ENGLAND CABLE NEWS,

Defendants.

PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, WITH ARGUMENT AND AUTHORITIES

Pursuant to Mass.R.Civ.P. 65, Plaintiffs Jill Stein and Barbara Johnson hereby move the Court to issue a preliminary injunction against The Boston Globe, WBZ-TV, WCVB-TV, WGBH-TV, WHDH-TV and New England Cable News (collectively the "defendants"), precluding the defendants from proceeding with the Massachusetts gubernatorial debate scheduled for the evening of Tuesday, October 1, 2002 unless defendants include the plaintiffs, who are qualified candidates, in the debate as required under Massachusetts law.

RELEVANT FACTS

A consortium of six (6) major media companies is sponsoring a televised public debate between only two of the five qualified gubernatorial candidates for governor of

the Commonwealth of Massachusetts, which debate is scheduled to occur on Tuesday, October 1, 2002. *See* Verified Complaint at para. 1. The corporations making up the consortium are The Boston Globe, WBZ-TV (Channel 4), WCVB-TV (Channel 5), WGBH-TV (Channel 2), WHDH-TV (Channel 7), and NECN (New England Cable News) (collectively "Consortium"). Collectively, these corporations are organizing, financing and advertising the debate between Democratic Candidate Shannon O'Brien and Republican Candidate Mitt Romney. The Consortium is not permitting three other qualified candidates for governor of the Commonwealth – Green Party Candidate Jill Stein, Independent Candidate Barbara Johnson and Libertarian Candidate Carla Howell – to participate in the debate. In fact, in mid-September, 2002, Green Party Candidate Jill Stein and Libertarian Party Candidate Carla Howell were scheduled to participate in the October 1, 2002 debate, but that invitation was withdrawn due to the Consortium. *Id*. at para. 2. The debate host, the Worcester Polytechnic Institute ("WPI"), expressly publicized that "Gubernatorial candidates from the Democratic, Green, Libertarian and Republican Parties have been invited to participate in the debate" and specifically identified Plaintiff Stein and candidate Howell as participants along with O'Brien and Romney. *See* Exhibit A hereto, Affidavit of Jason B. Adkins, Esq. at para. 1 (and Exhibit 1 thereto).

By proceeding with the debate without the plaintiffs (and candidate Howell), the Democratic and Republican Candidates will be indirectly given money and other things of significant value for the purpose of aiding and promoting the election of these two candidates. Defendants have done this by 1) creating and funding a forum that

legitimizes only two parties' candidates and de-legitimizes the other three qualified candidates, particularly plaintiff Stein who suffered the taint of being uninvited; 2) expending monies and advertising to promote the exclusive forum for the Democratic and Republican participants; and 3) funding the forum and primary media coverage to allow only the Democratic and Republican Candidates and Parties to advertise their political ideas, positions and differences (and to urge voters to elect them), which is being done at the expense and clear harm of plaintiffs, and all three excluded candidates generally. *Id*. at para. 16.

Moreover, because the Consortium members have invited only the two major parties, and are advertising the debates in their newspapers and on television and highlighting therein only the two major candidates, and because the Consortium members expressly had the invitations withdrawn from plaintiff Stein (and candidate Howell), the Consortium members are "antagonizing the interests of any political party" in violation of Chapter 55, §§ 8 and 8A by refusing to provide equal airtime to plaintiff Stein and Howell. *Id*. at paras. 17-18. In the present case, each of the three candidates excluded from the October 1, 2002 debate meets the definition of a qualified candidate – a status that is earned through a grueling process that requires a substantial showing of public support (e.g., 10,000 signatures from voters registered with the candidate's party or who were unenrolled) and which takes significant time and effort to achieve. *Id*. at para. 19.

Each of the six corporations comprising the Consortium meets the definition of a media organization. Because these corporations are organizing, financing and advertising the debates between only two of the five qualified candidates, they are acting in violation

of § 8A, and are making illegal contributions to the Democratic and Republican Parties and their candidates. Moreover, the Consortium members are making both "time" and "space" available to only two of five qualified candidates, in the form of extensive television, radio and print media coverage, "at no cost for the purpose of presentation of the candidate's own political advertising." It is clear that the two select candidates will use that "time" and "space" to advertise their own political positions to the public. Therefore, the Consortium members are in direct violation of § 8A. *Id*. at paras. 20-21.

LEGAL ARGUMENT

The standard for the allowance of a motion for preliminary injunction is well established. The moving party bears the burden of showing that (1) there is a likelihood of success on the merits; (2) the injunction is necessary to prevent irreparable harm to the moving party; and (3) the risk of irreparable harm to the moving party in the absence of an injunctive relief outweighs the risk of irreparable harm to the adverse party if the injunction is granted. *See Packaging Industries Group v. Cheney*, 380 Mass. 609, 617 (1980). The plaintiff in the instant action has satisfied this burden.

A. Likelihood of Success On The Merits

The central and simple issue in this is case is whether defendants must include all qualified candidates in the October 1, 2002 gubernatorial debate sponsored by defendants – a Consortium of the major media companies in Massachusetts whose purpose includes, without limitation, sponsoring, organizing, financing and advertising the gubernatorial debate – particularly where defendants acted to block two of the then-four qualified candidates for governor from participating even though they had previously been invited

and scheduled to participate. *See* Verified Complaint at para. 14.

It cannot be disputed that plaintiffs Stein and Johnson are qualified candidates, *see id*. at para. 19, or that gubernatorial debates are an integral part of the overall electoral process for electing the next governor of Massachusetts. Because the Consortium members acted to have qualified candidates Stein and Howell uninvited from the debates – after it was determined and advertised that these two candidates would be participating – the defendants have improperly changed an already open forum into a selective one that violates Stein's (and Howell's) rights to equal treatment under G.L. c. 55, § 8A, and "antagonized" the Green Party's and Libertarian Party's interests in violation of § 8.

Defendants' wrongful conduct, as described above, violates both these Massachusetts statutes. First, under G.L. c. 55, §8, defendants are precluded from "aiding, promoting or preventing the . . . election of any person to public office, or aiding or promoting or antagonizing the interest of any political party." By deliberately choosing to allow only Mr. Romney and Ms. O'Brien to participate in a publicly aired debate on October 1, 2002, defendants are clearly "aiding' and "promoting" these candidates, while, by uninviting the other qualified candidates they are "antagonizing" the interest of candidates Stein and Howell and the political parties they represent. As such, defendants have violated the clear and unambiguous requirements of §8.

Moreover, because the defendant media companies have created and financed the debate forum, they have become news-makers rather than just reporters of the news. However, media companies may conduct themselves differently from other corporations pursuant to § 8A, but only so long as they provide the free media equally to all qualified

candidates in an election. They have failed to properly do so here. Defendants are providing Mr. Romney and Ms. O'Brien valuable time and space, but not candidates Stein, Johnson and Howell as required by G.L. c. 55, §8A ("A media organization [which includes defendants] may make time or space available to a qualified candidate at no cost or at reduced cost for the purpose of presentation of the candidate's own political advertising; provided, however, that: (a) time of the same duration and the same market value or the same amount of space and for the same market value is made available to all other qualified candidates for the same office for the same election . ."). In the present case, the gubernatorial debate is scheduled to be aired widely on at least the defendant-television (and radio) stations, and The Boston Globe. By providing candidates Romney and O'Brien with this significant and exclusive opportunity to promote and advertise their political views (and advocate for their election) without providing candidates Stein, Johnson and Howell with the same opportunity, defendants have violated the clear and unambiguous requirements of G.L. c. 55, §8A.

The defendants cannot have it both ways. Either the media defendants' expenditures must be provided equally to all qualified candidates per § 8A, or they are unlawful contributions per § 8. Defendants cannot dispute that traditional political advertising is big business for the media corporations and that they sell, rather than give that time away. In this context, the prohibitions in § 8A become relevant the only time the media companies do give candidates free time for their political advertising – when there is a media sponsored debate. Thus, the exclusive October 1st debate falls squarely within the ambit of prohibited conduct under § 8A.

Defendants have also violated § 8A by advertising widely the scheduled debates and the Democratic and Republican participants. These advertisements clearly convey the political message that only these two candidates have legitimacy in the gubernatorial race and that only they will be made available to voters by the media Consortium to learn about their political views. Thus, the defendants' advertisements of the debates and two candidate-participants are themselves political advertisements akin to the Democratic and Republican candidates' own paid advertisements that the major parties are the only real contenders.

The only logical and viable remedy to ensure that defendants comply with G.L. c. 55, §8A is to enjoin the debates unless the plaintiffs and the other qualified candidate are allowed to participate in the October 1, 2002 gubernatorial debate and any other such debates in the future.

In anticipation of the defendants' arguments, plaintiffs distinguish and show there is no merit to the arguments contained in the Advisory Opinion of Massachusetts Office of Campaign and Political Finance ("OCPF"), AO-98-23 (October 15, 1998) which concerned a gubernatorial debate, sponsored by media, that excluded a qualified candidate from participating. *See* Exhibit B hereto. In that matter, the complainant had not previously been invited to participate in the debates by the debate host, and then excluded on the eve of the debates by the media sponsors as happened to candidates Stein and Howell. Moreover, the advisory opinion has no force of law. It was not reached through notice and comment rulemaking under G.L. c. 30A, but rather was issued just

seven days after it was requested by a candidate for office.[1] An agency interpretation of a statute is not entitled to judicial deference where it is issued without any notice or opportunity for comment and, like the OCPF advisory opinion, does not purport to represent legislative rulemaking, unless the agency interpretation is independently compelling. *See Barnhart v. Walton*, 122 S.Ct. 1265, 1271-72 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

At the outset, the OCPF advisory opinion states on page 1:

> Initially, I note that a broadcaster may exclude a candidate from a debate if exclusion is based on a 'reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment.'" citing *Arkansas Educational Television Comm. V. Forbes* 140 L Ed 2d 875, 890 (1998) (Public television station could exclude an independent candidate from a planned televised debate since (1) the debate was a nonpublic forum with selective access for individual speakers and (2) the exclusion was reasonable and not based upon objections to the candidate's views.)

(Emphasis added.) While the advisory opinion does not rely on the interpretation of federal law for state law purposes, the *Forbes* case is further distinguishable because, unlike in that case, Plaintiff Stein was an invitee of the October 1st debate (as was Howell). Moreover, the debate in *Forbes* was being sponsored by a single television station, unlike here where the debate is sponsored by a near media monopoly of the major newspaper and television stations in crucial media markets. In addition, unlike *Forbes*,

[1] It is worth noting that the author of the advisory opinion, the Director of the Office of Campaign and Political Finance, is appointed by a vote of "[t]he state chairmen of each of the two leading political parties, the state secretary, and a dean of a law school located in the commonwealth . . . ." G.L. c. 55, § 3.

the forum here had been opened to all then-qualified candidates for governor. The subsequent barring of qualified candidates on the virtual eve of the debates improperly changed the nature of the forum from open to exclusionary, from all qualified candidates to just two. The *Forbes* Court recognized that even for a nonpublic forum, the speaker selection process must be "reasonable" for the forum. *Id.* at 523 U.S. 666, 682 (1998). Furthermore, in *Rosenberger v. Rector and Visitors of Univ. of Va*, 515 U.S. 819, 829 (1995), the Supreme Court held that "once it has opened a limited forum,… the State must respect the lawful boundaries it has itself set." Here, the defendants closed what had been an open forum, which action harmed Plaintiff Stein (and Plaintiff Johnson who later became a qualified candidate) and Howell, which cannot be defended as reasonable. Not only does the change to the forum highlight the candidates favored (and in some cases endorsed) by the media sponsors, but the sudden exclusion of Stein on the eve of the debates cast her in a negative light publicly and amongst her own Massachusetts Green Party and other supporters. *See, e.g.,* Exhibit C, Affidavit of Jill E. Stein at para. 3 (stating that her campaign had notified her supporters about her participation in the debates to show her campaign's credibility as a vehicle for advancing the views of its constituencies). Since Stein's sudden exclusion from the debates by defendants conveyed the message that the dominant media establishment in the critical media markets in the Commonwealth believes she is no longer a credible candidate, her exclusion was not reasonable, including because it "antagonized" her Party's interests in violation of c. 55, § 8.[2]

[2] Predictably, defendants will argue that they decided to exclude plaintiffs and Howell

The Massachusetts statutes define what "reasonable" means – media companies must provide equal access to all candidates per § 8A or comply with § 8, including by refraining from "antagonizing" the interests of political parties. In this case, defendants have violated both standards.

With regards the remainder of the OCPF advisory opinion, at page 2, it relies for its conclusions on a definition of advertising that is unduly narrow. Clearer definitions support plaintiffs' position. *See, e.g.*, *Webster New College Dictionary* (Merriam-Webster) (to "advertise" is defined as: to make known to: notify… to make publicly and generally known… to call public attention to esp. by emphasizing desirable qualities so as to arouse a desire to buy or patronize...."; similarly "advertising is defined as: "the action of calling something to the attention of the public esp. by paid announcements…"). Of course, that is precisely what political advertisements do – promote the candidates' desirable qualities, including by distinguishing them from the other candidates. The fact that the "space" and "time" will be paid for by the defendant corporations, and not the two candidates themselves, is immaterial to the definition of advertising and goes to the heart of the issue in this lawsuit.[3]

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from the debates because of their supposed-low polling results. But the Boston Globe poll published yesterday shows Candidates Stein and Howell have 4% support *each* (up to 9% each with the margin of error) and candidate Stein had a far greater favorable to unfavorable rating than any of the other candidates. *See The Boston Globe,* O'Brien Leads Romney in Poll, Sept. 29. 2002 at 1. Of course, defendants will not cite any polls that support the proposition that third-party candidates be excluded from the debates, which is the precise issue here.

[3] To the extent the defendant media companies have endorsed a gubernatorial candidate – as The Boston Globe did for Shannon O'Brien in the primary – then the defendants'

Moreover, to suggest, as the advisory opinion does on page 2, that a debate is distinct from political advertising because it means "to engage in an argument by discussing opposing points" utterly misses the point. Political candidates do not advertise in a vacuum, but in an environment where the other candidates advertise too, and where each candidate not only sells her own virtues, but distinguishes and often attacks their opponents. The mere fact that the Democratic and Republican candidates in Tuesday's debate will not *control* all aspects of the message in the debate (as the advisory opinion finds dispositive at page 2) ignores the fact that only these two campaigns will be advertised by defendants as legitimate, and only these two candidates' political views will be conveyed over the airwaves to voters. Thus, only two candidates will be given highly-valuable time and space to convey their own political advertisements to the voters. The three other ballot-qualified candidates' political advertisements of their own views will be shut out by the very media establishment that dominate and control the airwaves in a crucial media market in the Commonwealth. Finally, the advisory opinion fails to consider that the media companies – by advertising that only two candidates are credible by virtue of their exclusive inclusion in the debates – have themselves engaged in political advertising (e.g., as to who is legitimate) for only two parties, which is an unlawful contribution under G.L. c. 55, § 8. The defendants' actions here crossed the line from covering the news to making it, which conduct is prohibited for all corporations, including those that happen to operate media outlets.

In light of defendants' wrongful and exclusionary conduct and flagrant violation

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exclusionary actions are further tainted.

of Massachusetts law, plaintiffs have demonstrated a likelihood of success on their contention that the gubernatorial debate sponsored by defendants and scheduled for October 1, 2002 will not comply with Massachusetts election laws unless all qualified candidates for governor are allowed to participate, including plaintiffs.

B. Plaintiffs Will Suffer Immediate and Irreparable Harm If Injunctive Relief Is Not Granted

The potential irreparable harm to plaintiffs is clear. In the absence of an injunction, plaintiffs will be excluded from the crucial gubernatorial debate sponsored by defendants and scheduled for the evening of October 1, 2002. The entire basis for this lawsuit is predicated on events scheduled to occur on October 1, 2002, and without the injunctive relief plaintiffs are entitled to under Massachusetts law, the principle claims in the lawsuit will become moot. It would be fundamentally unfair to plaintiffs to have them litigate this matter, vindicate their rights, and then if successful, have no viable means of recovery. Obviously, no monetary award can compensate plaintiffs for being excluded from the debate, which will have a profound affect on their campaign for the November 5th gubernatorial election. Time is short – the debate is tomorrow and the election is only five weeks away – and the electorate will be watching this debate. There is no substitute for the plaintiffs' participation in this debate.

Harms to the fairness and integrity of an election cannot be remedied after the election has passed. *See Council of Alternative Political Parties* v. *Hooks*, 121 F.3d 876, 883 (3rd Cir. 1997) (in a ballot access case, holding that "[i]f the plaintiffs lack an adequate *opportunity* to gain placement on the ballot in this year's election, this

infringement on their rights cannot be alleviated after the election") (emphasis added); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978); *Devine v. Rhode Island,* 827 F. Supp. 852 (D.R.I. 1993); *see also Lucas v. Townsend*, 486 U.S. 1301 (1988) (individual Justice grants injunction barring bond referendum election). If this Court does not provide swift relief, plaintiffs' injuries will be irreparable because the debate will be over. The imminent harms caused and threatened by the defendants' actions warrant immediate preliminary injunctive relief.

Inclusion in these debates confers a decisive imprimatur of electability and acceptability on the invitees. Because the debates exclude all but select candidates, those events inevitably amount to powerful advertising on behalf of the invited candidates. Candidates who are not invited to participate would have to spend thousands of dollars to secure comparable television advertising; achieving the same imprimatur of "objective" electability, if possible, would cost untold thousands more. This benefit to the major party debate participants erects a huge financial barrier in the path of independent and third-party candidates.

"[A] burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson v. Celebrezze*, 460 U.S. 780, 793-794 (1983); *see also Brown* v. *Hartlage*, 456 U.S. 45, 53 (1982) ("[First Amendment] guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office") (*quoting Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 271-72 (1971)).

The Supreme Court has long recognized the "real and appreciable impact on the

exercise of the franchise" that voters face under an electoral system which disfavors certain candidates on the basis of wealth. *Bullock* v. *Carter*, 405 U.S. 134, 144 (1972) (invalidating candidate filing fees); *Lubin* v. *Panish*, 415 U.S. 709 (1974) (same).[4]

The defendants' conduct here irreparably harms plaintiffs and candidate Howell by unreasonably excluding them from the crucial debates on October 1st, and unlawfully antagonizes the interests of the parties they represent.

C. Defendants Will Not Suffer Irreparable Harm If Injunctive Relief Is Granted

Plaintiffs seek to have the debate include Plaintiffs Stein and Johnson (and candidate Howell) as required under Massachusetts law and only seek to stop the gubernatorial debate scheduled for October 1, 2002 from proceeding if they are not permitted to participate. Because the debate will proceed as scheduled if plaintiffs' motion is allowed, there is no conceivable harm to defendants.[5] Moreover, plaintiffs do

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[4] For over three decades, the U.S. Supreme Court "has recognized the constitutional right of citizens to create and develop new political parties"—a right "derive[d] from the First and Fourteenth Amendments." *Norman* v. *Reed*, 502 U.S. 279, 288 (1992) (citing *Anderson*, 460 U.S. at 794); *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968)). "The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees." *Colorado Republican Federal Campaign Comm'n* v. *FEC*, 518 U.S. 604, 609 (1996) (plurality opinion). The right to "broaden the base of public participation in and support for its activities" is a core element of any party's associational rights. *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). The Supreme Court has also noted that "the primary values of the First Amendment . . . are served when election campaigns are not monopolized by the existing political parties." *Anderson*, 460 U.S. at 794.

[5] Certainly, the media establishment is capable of including multiple candidates in debates as demonstrated by the recent democratic primary debates involving numerous

not wish or intend to interfere with the news media's news gathering, first amendment or related undertakings. This lawsuit is not intended nor does it seek to require media organizations and entities to provide equal time and space in the news coverage of political campaigns to all candidates. But here, the news media is not gathering news and reporting it. Rather, they are creating, sponsoring and paying for the single most important series of events in any political process -- the debates between and among the candidates for public office – and promoting only their chosen candidates. It cannot be reasonably disputed that debates this close to Election Day are perhaps the most important opportunity in a political campaign for a candidate to promote and advertise his or her political positions and ideas to the voters. By interpreting G.L. c. 55, §§8 and 8A to govern the way political debates are organized and structured, the Court is not making a broad ruling that would affect the way media organizations and entities cover political campaigns. Rather it is narrowly construing the Massachusetts statutes such that when media organizations go beyond merely covering political campaigns and begin organizing, financing and promoting political events – and acting like king-makers in deciding which invited candidates' are to be suddenly excluded on the eve of the debate – then the Court will scrutinize these matters to ensure fairness and compliance with Massachusetts law.

Thus, while there is no immediate or irreparable harm to defendants if the preliminary injunction is granted since the debate will proceed as scheduled, irreparable harm exists for plaintiffs without the requested injunctive relief.

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candidates.

WHEREFORE, based on the foregoing, plaintiffs respectfully request that the Court allow this Motion and issue a preliminary injunction ordering defendants to include plaintiffs in the gubernatorial debate scheduled for October 1, 2002.

Respectfully submitted,

By Jill Stein and Barbara Johnson,

By their attorneys,

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