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8 Attorneys for Petitioner
 9 NBC Universal, Inc.

10 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

11	NBC UNIVERSAL, INC.,)	Case No.
)	
12	Petitioner,)	Eighth Judicial District Court
)	Case No. A555207
13	vs.)	
)	
14	EIGHTH JUDICIAL DISTRICT)	EMERGENCY PETITION FOR
15	COURT OF THE STATE OF)	WRIT OF PROHIBITION
	NEVADA in and for THE)	
16	COUNTY OF CLARK and THE)	(Immediate Review Requested)
	HONORABLE J. CHARLES)	
17	THOMSON, SENIOR JUDGE,)	
)	
18	Respondent,)	
)	
19	DENNIS J. KUCINICH,)	
)	
20	Real Party in Interest.)	
)	

21 Pursuant to NRAP 21, Petitioner, NBC Universal, Inc., by and through its undersigned
 22 counsel, hereby files the following Emergency Petition for Writ of Prohibition against the Eighth
 23 Judicial District Court of the State of Nevada in and for the County of Clark and the Honorable J.
 24 Charles Thompson.

25 Petitioner further requests that the instant petition receive *immediate review* on grounds that
 26 the district court's order granting injunctive relief requires NBC Universal, Inc. to allow Mr.
 27 Kucinich to participate in a Democratic Presidential Debate scheduled to occur in Las Vegas,
 28 Nevada on *January 15, 2008 at 6:00 p.m. Pacific Standard Time.*



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AFFIDAVIT OF DONALD J. CAMPBELL

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STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

Donald J. Campbell, being first duly sworn, deposes and says:

1. I am a member of the Bar of the State of Nevada and am the senior partner in the firm Campbell & Williams. Our firm represents Petitioner NBC Universal, Inc. ("NBC"). I make this affidavit in support of Petitioner's Emergency Petition for Writ of Prohibition. I am over eighteen years of age, have personal knowledge of the facts set forth herein, and if called as a witness, I could and would testify competently with respect thereto.

2. The following recitation of facts and procedural history are based on my personal knowledge and are supplemented by the Affidavit of Chuck Todd submitted herewith as Exhibit 1 to this Emergency Petition.

3. NBC did not have an opportunity to present any affidavits to the district court in light of the alarming speed between the time the Real Party in Interest, Dennis Kucinich, filed his action and motion for injunctive relief, provided notice to NBC, and when the district court conducted the underlying hearing - all of which occurred in a matter of a couple hours.

4. Mr. Todd was, however, present at the hearing conducted by the district court and the undersigned asked that he be permitted to testify to these same facts. The district court denied NBC's request to present Mr. Todd as a live witness during the hearing.

5. In any event, I have read the following Emergency Petition and know the contents thereof. Said Petition is true of my own knowledge, except for matters therein stated on information and belief, and as to those matters, I believe them to be true.

6. Attached hereto as Exhibit 1 is a true and correct copy of the Affidavit of Charles D. Todd, Political Director for Petitioner NBC Universal, Inc.



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7. Attached hereto as Exhibit 2 is a true and correct copy of the Complaint filed by Mr. Kucinich on January 14, 2008 at or about 10:02 a.m.

8. Attached hereto as Exhibit 3 is a true and correct copy of Mr. Kucinich's Motion for Ex Parte Order for the Issuance of an Injunction filed on January 14, 2008 at or about 11:59 a.m.

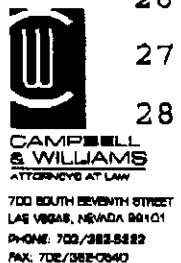
9. Attached hereto as Exhibit 4 is a true and correct copy of NBC Universal's Hearing Brief in Opposition to Request for Injunctive Relief filed in open court at or about 1:30 p.m. on January 14, 2008 just prior to the commencement of the underlying hearing in this matter.

10. The district court, Senior Judge J. Charles Thompson presiding, conducted a hearing on Mr. Kucinich's request for injunctive relief at 1:30 p.m. on January 14, 2008. After listening to brief oral argument from respective counsel, the district court orally advised from the bench that it was granting Mr. Kucinich's request for injunctive relief. The district court thereafter directed counsel to return to his courtroom at 4:00 p.m. on January 14, 2008 so that the parties and the court could finalize a written order.

11. Counsel for the parties and Judge Thompson met at or about 4:00 p.m. on January 14th, but were unable to agree upon the content of the proposed order presented by Mr. Kucinich's counsel. Instead, Judge Thompson made certain modifications to the proposed order and directed Kucinich's counsel to resubmit the same at 8:00 a.m. on January 15, 2008. The district court thereafter entered its Order Granting Temporary Restraining Order on the morning of January 15th.

12. Attached hereto as Exhibit 5 is a true and correct copy of the district court's Temporary Restraining Order.

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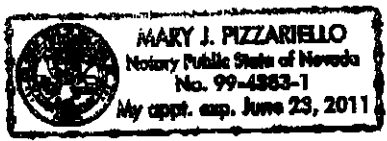
13. Affiant further says naught.

DATED this 15th day of January, 2008.

Donald J. Campbell
DONALD J. CAMPBELL

SUBSCRIBED and SWORN to before me
this 15 day of January, 2008.

Mary J. Pizzarello
NOTARY PUBLIC in and for said
County and State



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POINTS AND AUTHORITIES1
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28**I. INTRODUCTION**

NBC Universal, Inc. ("NBC") seeks an Emergency Writ of Prohibition to obtain relief from an unprecedented order entered by the district court below in favor of Real Party in Interest, Dennis J. Kucinich ("Kucinich"). Specifically, the lower court granted a temporary restraining order that not only requires NBC to allow Mr. Kucinich to participate in the Democratic Presidential Debate scheduled for January 15, 2008 at 6:00 p.m. Pacific Standard Time, it goes so far as to enjoin the debate from taking place at all if Mr. Kucinich is not included. NBC is not aware of any legal authority that would support such a brazen violation of a news organization's First Amendment rights.

The district court granted injunctive relief despite an unbroken line of legal authorities holding that district courts -- particularly state district courts -- lack jurisdiction to decide complaints brought under the Communications Act of 1934, as amended, because exclusive jurisdiction resides with the Federal Communications Commission. The district court instead premised its jurisdiction on the nebulous concept that the underlying matter "affects the public interest." Such a finding is untenable under controlling case law. Moreover, the temporary restraining order was entered based upon a motion of which NBC had less than two hours notice, an undeveloped record and a cursory hearing at which the district court refused to permit live testimony.

For these and other reasons set forth more fully below, NBC requests the issuance of an emergency writ vacating the lower court's temporary restraining order and authorizing NBC to proceed with tonight's debate under the format chosen as part of its journalistic discretion.

II. STATEMENT OF FACTS

NBC owns MSNBC, a cable news network that provides live news coverage, political analysis and documentary programming. NBC and MSNBC are privately owned. In other words,



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1 they are not state actors. In anticipation of the January 19, 2008 Democratic Caucus in Nevada
2 (which is privately operated and not supported with taxpayer dollars), MSNBC is scheduled to air a
3 Democratic Presidential Debate on January 15, 2008 at Cashman Field in Las Vegas, Nevada.

4 On or about December 27, 2007, Jenny Backus, a debate consultant to the Democratic Party,
5 advised the seven campaigns for the Democratic candidates that invitations to the January 15 debate
6 would be extended based on certain criteria. At the time, the criteria for invitation were that the
7 candidates had to finish in first, second, third, or fourth in either the Iowa Caucus or New
8 Hampshire Primary or be included in the top four in one of six credible random-sample telephone
9 national news media polls conducted since the Iowa Caucus. The Iowa Caucus occurred on January
10 3, 2008, after which Senators Joseph Biden and Christopher Dodd withdrew from the race for the
11 Democratic Presidential nomination.
12

13 In the Gallup Poll conducted January 4-6, 2008 shortly after the Iowa Caucus, Hillary
14 Clinton and Barack Obama each obtained the support of thirty-three (33%) of those surveyed, John
15 Edwards obtained the support of twenty percent (20%) of those surveyed, Mr. Kucinich obtained
16 the support of three percent (3%) of those surveyed, and Bill Richardson obtained the support of one
17 percent (1%) of those surveyed. The poll had a margin of sampling error of +/- three (3) percentage
18 points, thereby making it unclear as to whether Mr. Kucinich or Mr. Richardson finished fourth in
19 the subject poll.
20

21 On January 9, 2008, Ms. Backus, the Nevada Debate Consultant, sent an e-mail
22 communication to the Kucinich Campaign inviting Mr. Kucinich to appear at the January 15th
23 debate. On January 10, 2008, as Joseph Biden and Christopher Dodd did before him, Bill
24 Richardson dropped out of the race for the Democratic Presidential nomination. In light of the
25 dwindling number of candidates for the Democratic Presidential nomination, new criteria for the
26 January 15th debate were adopted based on these changed circumstances. The revised criteria
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1 required that invited candidates must have finished first, second or third in either the Iowa Caucus
2 or the New Hampshire Primary.

3 On January 11, 2008 at approximately 9:00 a.m., Chuck Todd, NBC's Political Director,
4 advised the Kucinich campaign of the revised debate criteria and that Mr. Kucinich no longer
5 qualified thereunder. The revised criteria governing the January 15th debate are viewpoint neutral
6 and are in no way designed to exclude any particular candidate based on his or her views. Instead,
7 the revised criteria represent a good faith editorial choice of a privately-owned cable network to
8 limit debate participants based on the status of their campaigns.
9

10 III. PROCEDURAL HISTORY

11 Mr. Kucinich filed a Complaint against NBC on January 14, 2008 at or about 10:00 a.m.
12 that morning. See Attached Exhibit 2. The Complaint asserted two causes of action; breach of
13 contract, and breach of duty under the Federal Communications Act, specifically 47 U.S.C. §
14 315(a). *Id.* at ¶¶ 14-19. At or about 11:59 a.m., Mr. Kucinich filed a Motion for Ex-Parte Order for
15 the Issuance of an Injunction. See Attached Exhibit 3. Mr. Kucinich's Complaint and Ex Parte
16 Motion sought to enjoin NBC from conducting the January 15th Democratic Presidential Debate
17 unless it included Mr. Kucinich as a participant.
18

19 The district court scheduled the matter to be heard at 1:30 p.m. the same day. Given the
20 exceedingly short timeframe between the time NBC was served with Mr. Kucinich's moving papers
21 and the time set for hearing, NBC only had time to file a limited three-page brief in response to the
22 matters raised by Mr. Kucinich. See Attached Exhibit 4. Nevertheless, NBC advised the court of
23 the jurisdictional problems that plagued Mr. Kucinich's papers and expressly reserved its right to
24 raise any other applicable defenses when time permitted. See *id.* at pp. 1-3.
25

26 The district court, Senior Judge J. Charles Thompson presiding, conducted a hearing on Mr.
27 Kucinich's request for injunctive relief at 1:30 p.m. on January 14, 2008. Despite NBC's express
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1 request to present its Political Director, Mr. Todd, as a live witness during the hearing, the district
2 court refused. After listening to brief oral argument from respective counsel, the district court orally
3 advised from the bench that it was granting Mr. Kucinich's request for injunctive relief. The district
4 court thereafter directed counsel to return to his courtroom at 4:00 p.m. on January 14, 2008 so that
5 the parties and the court could finalize a written order.

6 Counsel for the parties and Judge Thompson met at or about 4:00 p.m. on January 14th, but
7 were unable to agree upon the content of the proposed order presented by Mr. Kucinich's counsel.
8 Instead, Judge Thompson made certain modifications to the proposed order and directed Kucinich's
9 counsel to resubmit the same at 8:00 a.m. on January 15, 2008. The district court thereafter entered
10 its Temporary Restraining Order on the morning of January 15th. This Emergency Petition
11 followed immediately thereafter.
12

13 IV. ISSUES PRESENTED AND THE RELIEF SOUGHT

14 The primary issue presented here is whether the district court acted in excess of its
15 jurisdiction by granting injunctive relief that requires NBC to allow Mr. Kucinich to participate
16 in the January 15th debate based on the equal time provisions embodied in 47 U.S.C. § 315(a) of
17 the Communications Act of 1934, as amended (the "Act"), when it has been universally held that
18 complaints under the Act: (i) do not give rise to a private cause of action; and (ii) must be
19 pursued before the Federal Communications Commission, not state courts. The Act, moreover,
20 does not even apply to programming being aired on a national cable network as opposed to the
21 broadcast networks. Finally, even though Mr. Kucinich did not raise the issue below, the
22 exclusion of Mr. Kucinich based on the revised criteria does not run afoul of the First
23 Amendment as the United States Supreme Court has made clear that even where state actors are
24 involved – which is not the case here – a television station does not have to grant unlimited
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1 access to a candidate debate. If anyone's First Amendment rights are being infringed, they are
2 MSNBC's.

3 The relief sought is a Writ of Prohibition from this Court (i) finding that the district court
4 acted in excess of its jurisdiction, and (ii) vacating the injunctive relief awarded by the district
5 court. Simply put, NBC requests that this Court authorize it to proceed with the January 15th
6 debate under its revised criteria without Mr. Kucinich.

7
8 **V. REASONS WHY THE WRIT SHOULD ISSUE**

9 **A. A Petition For Writ Of Prohibition Is The Proper Vehicle To Determine
10 Whether A Lower Tribunal Has Acted In Excess Of Its Jurisdiction.**

11 This Court may issue a writ of prohibition when the district court has acted in excess of its
12 jurisdiction, and petitioner has no plain, speedy and adequate remedy in the ordinary course of law.
13 NRS 34.320; NRS 34.330. That is exactly the case here where the district court not only exceeded
14 its jurisdiction, but lacked any jurisdiction in the first instance. This Court has granted a petition for
15 a writ of prohibition to review an order denying a motion to dismiss based on jurisdictional grounds.
16 *See Gaming Control Bd. v. Breen*, 99 Nev. 320, 661 P.2d 1309 (1983) (granting petition and
17 holding that district court was without jurisdiction to review Gaming Control Board's determination
18 that club was justified in refusing to pay winning keno ticket). Here, the time for filing a motion to
19 dismiss has not even occurred. Nonetheless, NBC raised the jurisdictional defects in its brief
20 response below and reasserts them now. *See Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990)
21 (subject matter jurisdiction is not waivable and can be raised at any time).
22

23 **B. 47 U.S.C. § 315(a) Does Not Apply To MSNBC Because It Is A National Cable
24 Programming Network, Not A Broadcaster, For Purposes Of The
25 Communications Act of 1934.**

26 Mr. Kucinich's claims are premised on NBC's alleged violation of duties under 47 U.S.C §
27 315(a) of the Communications Act of 1934, as amended, also known as the equal time provision
28 ("section 315"). *See Exhibit 2 at ¶¶ 18-19.* The district court's order granting injunctive relief is



1 likewise premised on NBC's alleged failure to comply with this provision of the Act. See Exhibit 5
2 at ¶ 1. Section 315, subject to certain exceptions, imposes equal time requirements on stations
3 that air programming regarding candidates for public office over broadcast networks. The Act
4 does not, however, apply to debates being presented on a national cable programming network
5 by a private entity. See 47 C.F.R. § 76.205(a). Even if Section 315(a) were incorrectly
6 construed to apply to MSNBC, the law is clear that (1) debates are exempt from the requirements
7 of Section 315(a), and (2) the selection of debate participants is entirely within the reasonable
8 journalistic judgment of the presenter. Thus, the FCC has ruled repeatedly that "a [broadcast]
9 station's determination of the newsworthiness of an event will not be challenged absent evidence
10 of the broadcaster's intent to advance a particular candidacy." Letter to Arthur R. Block, Esq.
11 From Milton O. Gross, Chief, Political Programming Division, FCC, 7 FCC Rcd 1784 (1992),
12 citing *King Broadcasting*, 6 FCC Rcd 4998 (1991). In the absence of such evidence, the FCC
13 has ruled that "the newsworthiness of an event is left to the reasonable news judgment of
14 professionals." *King Broadcasting, Co.*, 6 FCC Rcd at 4999. Mr. Kucinich has presented no
15 evidence whatsoever that the reasonable news judgment of MSNBC's professionals should be
16 disturbed.
17
18

19 **C. The District Court Lacks Jurisdiction To Consider Private Claims Based On 47**
20 **U.S.C. § 315(a) Of The Act.**

21 The district court found that it had jurisdiction over the underlying action because it "is a
22 matter which affects the public interest." See Exhibit 5 at ¶ 1. Respectfully, that a matter may
23 affect the public interest is not a sufficient basis to confer jurisdiction on a state district court.
24

25 It has been universally held that complaints arising under section 315 do not give rise to
26 private causes of action:

27 There is, however, no private cause of action under Section 315(a). *Belluso v.*
28 *Turner Communications, Corp.*, 633 F.2d 393, 397 (5th Cir. 1980); *Forbes v.*
Arkansas Educational Television Communication Network Foundation, 22 F.3d



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1 1423, 1427 (8th Cir. 1994), *rev'd on other grounds*, 523 U.S. 666, 118 S.Ct.
2 1633 (1998) ("There is no private cause of action to enforce [the statute] . . .").
3 The proper course of action for a candidate seeking to enforce Section 315(a) is
4 to seek relief from the Federal Communications Commission ("FCC"), and then
5 appeal, if necessary, to a court of competent jurisdiction. *Forbes*, 22 F.3d at
6 1427 (citing *DeYoung v. Patten*, 898 F.2d 628, 633-35 (8th Cir. 1990); *see also*
7 *Belluso*, 633 F.2d at 397 ("the Commission has promulgated rules and
8 regulations which provide a candidate aggrieved by a violation of section 315(a)
9 an administrative remedy."))

10 *Palmer v. Fox Broadcasting Corp.*, 2002 WL 31027440 at *1 (E.D.La. Jan. 15, 2002). In
11 *Palmer*, the mayoral candidate excluded from the debate in that action argued that he had only
12 learned of his exclusion from the debate just days earlier and, thus, lacked sufficient time to seek
13 relief from the FCC. *Id.* at *2. The federal district court acknowledged that federal courts may
14 have discretion to excuse a claimant's failure to exhaust his administrative remedies in
15 "extraordinary circumstances," but declined to do so in that instance because the plaintiff had
16 "made no attempt to contact the FCC to obtain a determination of the propriety of defendants'
17 actions." *Id.* The court rejected the plaintiffs' other claims and denied his motion for injunctive
18 relief. *Id.* at **3-4.

19 *Sagan v. Pennsylvania Public Television Network*, 544 A.2d 1309 (Pa. 1988), *cert.*
20 *denied*, 488 U.S. 998, 109 S.Ct. 773, 102 L.Ed.2d 766 (1989) is likewise directly on point. In
21 *Sagan*, a legally qualified candidate for the United States Senate in the Pennsylvania primary
22 election sought injunctive relief in the Commonwealth Court of Pennsylvania alleging that he
23 had been excluded from a televised debate in violation of section 315. *Id.* at 1310. The
24 Commonwealth Court dismissed Sagan's complaint on grounds it lacked jurisdiction. *Id.* at
25 1310-1311. The Supreme Court of Pennsylvania affirmed on the basis that section 315 does not
26 give rise to a private cause of action and that the United States Congress had pre-empted the field
27 of political broadcasting:

28 Cases interpreting both the 'equal opportunities' and 'fairness' provisions
of section 315 agree that federal law is preemptive, that private rights of action



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are not part of the machinery devised by Congress for control over the activities of the Corporation for Public Broadcasting, and that enforcement of the statute and vindication of the public interest are vested in the Federal Communications Commission.

Congress has legislated comprehensively in the area of political broadcasting. It established the Federal Communications Commission, which has provided that a complainant seeking redress for denial of equal opportunities should complain to that Commission. Congress has provided for administrative sanctions and enforcement of the Commission's orders. Appellant's complaint seeking injunctive relief and damages in the Commonwealth Court . . . must fade when viewed in the bright light of the federal legislative plan. It was brought in the wrong forum, against the wrong defendants, and partially sought the wrong relief.

Id. at 1312-13. The same reasoning applies with equal force here.

Despite the district court's finding in its order that "exigent circumstances of the timing of the debate did not provide for effective relief through the administrative process," *see* Exhibit 5 at ¶ 1, the reality is that nowhere in the record did Mr. Kucinich make any showing of what, if any, efforts he undertook to seek relief from the FCC. Very recently, Mr. Kucinich filed a similar action against ABC News for excluding him from a debate prior to the New Hampshire Primary. In that case, Mr. Kucinich first filed an Emergency Complaint with the FCC. *See* Exhibit 4 at Ex. 2. Thus, Mr. Kucinich knew of the obligation to first seek relief from the FCC, but failed to do so here.¹ In the end, Mr. Kucinich has made absolutely no showing that a Nevada state district court has jurisdiction to hear this matter.

D. The First Amendment Protects MSNBC's Right To Exercise Editorial Discretion Over Who May Participate In A Debate Disseminated By A National Cable Programming Network.

It is worth noting that Mr. Kucinich never advanced a cause of action that his First Amendment rights were being violated by his exclusion from the debate. This is for good reason

¹ When that action did not succeed, Plaintiff thereafter filed suit against ABC, and lost on grounds the state court in New Hampshire did not have jurisdiction because ABC is a private entity and no state actor was involved. A copy of the ABC opinion is attached hereto as part of Exhibit 4. Again the same reasoning applies here.



1 as Kucinich never suffered any such infringement.² The same cannot be said for MSNBC as the
2 district court's order undoubtedly infringes on this private media entity's First Amendment
3 rights. Consider for a moment the practical effect of the lower court's order. The government
4 (through the court) is compelling a private media actor to give access to a speaker it has
5 otherwise chosen not to feature. Such compulsion is a clear violation of longstanding
6 constitutional dogma.

7
8 In *Miami Herald Publishing Co. v. Tornillo*, for example, the Supreme Court grappled
9 with a lower court's order directing a newspaper to publish a political candidate's reply to an
10 editorial and cast aside the notion that judges should act as de facto editors:

11 The Court has expressed sensitivity as to whether a restriction or requirement
12 constituted the compulsion exerted by government on a newspaper to print that
13 which it would not otherwise print. The clear implication has been that any such
14 compulsion to publish that which "reason" tells them should not be published"
15 is unconstitutional.

16 418 U.S. 241, 256, 94 S.Ct. 2831, 2838-39, 41 L.Ed.2d 730 (1974). This is true even if the
17 media outlet "would face no additional costs to comply with a compulsory access law and would
18 not be forced to forgo publication of news or opinion by the inclusion of a reply." *Id.* at 258, 94
19 S.Ct. at 2839.

20 Nor is the result any different where the editorial decision of a court is being forced upon
21 a news broadcaster as opposed to a member of the print media. Indeed, in *CBS, Inc. v.*
22 *Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973), the
23 Supreme Court recognized that Congress has consistently rejected attempts to impose upon

24 ² Even in the context of state actors, which MSNBC is not, debate sponsors may exclude otherwise
25 qualified candidates from televised debates based on a reasonable, viewpoint neutral exercise of editorial
26 discretion. See, e.g., *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673, 118 S.Ct. 1633,
27 140 L.Ed.2d 875 (1998); *Johnson v. Federal Communications Commission*, 829 F.2d 157, 161-63
28 (D.C.Cir. 1987) (minority candidates for president and vice-president had no right recognized by the
Federal Communications Act or First Amendment to be included in televised debates); *Palmer, supra*;
Smith v. Greater San Antonio Chamber of Commerce, 2005 WL 859265 (W.D.Tex. April 15, 2005)
(denying registered candidate's motion for injunctive relief requiring networks to include him in televised
debate).



1 broadcasters a common carrier right of access to all persons wishing to speak out on public
2 issues:

3 Under a constitutionally commanded and Government supervised right-
4 of-access system urged by respondents and mandated by the Court of Appeals,
5 the [Federal Communications] Commission would be required to oversee far
6 more of the day-to-day operations of broadcasters' conduct, deciding such
7 questions as whether a particular individual or group has had sufficient
8 opportunity to present its viewpoint and whether a particular viewpoint has
9 already been sufficiently aired. Regimenting broadcasters is too radical a
10 therapy for the ailment respondents complain of.

11 *Id.* at 126-27, 93 S.Ct at 2098 (broadcasters were not prohibited from having a policy of refusing
12 to accept paid editorial advertisements by individuals and organizations wishing to present their
13 views on public issues).

14 In this instance, MSNBC is entitled to even more protection from government intrusion
15 into the editorial process than CBS was in the DNC case because it is not a broadcaster but,
16 rather, a national cable programming network to which section 315 of the Act does not even
17 apply. *See supra* at pp. 10.

18 **E. Mr. Kucinich's Contract Claim Is Likewise Meritless.**

19 Mr. Kucinich also asserted a claim for breach of contract based on the invitation to
20 participate in the January 15 debate that was extended to him on January 9th and his acceptance
21 thereof. *See Exhibit 2* at ¶¶14-17. The district court relied on this theory as an additional basis
22 to support entry of the temporary restraining order. *See Exhibit 5* at ¶ 1. This, too, exceeded the
23 lower court's jurisdiction.

24 The acceptance of an invitation to participate in the debate, which was extended when the
25 prior criteria were still in effect, does not constitute a binding contract that obligates a cable
26 network to include a candidate in a political debate. Mr. Kucinich's argument confuses
27 acceptance of an invitation to appear on television with acceptance of an offer to enter into a
28



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1 contract.³ If such an unprecedented theory is adopted here, it would mean that news
 2 organizations would be forbidden from making timely decisions about who or what to feature in
 3 their programming based on daily developments in news for fear that a previously invited guest
 4 could assert a breach of contract claim. This makes no sense. If, for example, the shoe was on
 5 the other foot, does anyone genuinely believe that MSNBC would have a legitimate basis to
 6 assert a breach of contract claim and obtained injunctive relief against Mr. Kucinich or, for that
 7 matter, any other invited guest if they opted not to appear on a given program after originally
 8 agreeing to do so? Of course not.

10 Though styled breach of contract, Mr. Kucinich's claim is nothing more than an
 11 illegitimate private cause of action designed to impose an equal access requirement that entirely
 12 undermines the wide journalistic freedoms enjoyed by news organizations under the First
 13 Amendment. *See Tornillo, supra; CBS, supra.* As such, it cannot support the temporary
 14 restraining order entered here.

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27 ³ "To constitute consideration, a performance or return promise has to be bargained for. A
 28 performance or returned promise is bargained for if it is sought by the promisor in exchange for his
 promise and is given by the promisee in exchange for that promise." *Pink v. Busch*, 100 Nev. 684, 688,
 691 P.2d 456, 459 (1984) (quoting Restatement (Second) of Contracts § 71(1)(2) (1982)).



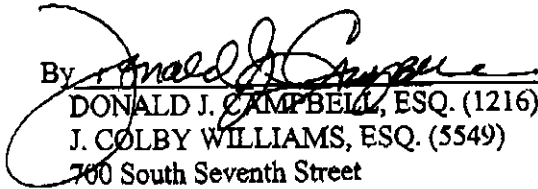
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VI. CONCLUSION

Based on the foregoing, NBC respectfully requests that this Court issue a Writ of Prohibition finding that the district court lacks jurisdiction in this matter, that the district court acted in excess of its jurisdiction when granting injunctive relief to Mr. Kucinich, and ordering that the Temporary Restraining Order requiring MSNBC to include Mr. Kucinich in the January 15, 2008 Democratic Presidential Debate be vacated.

DATED this 15th day of January, 2008.

CAMPBELL & WILLIAMS

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CERTIFICATE OF SERVICE

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I hereby certify that on the 15th day of January, 2008, I served via hand delivery and facsimile, a true and correct copy of the foregoing *Emergency Petition for Writ of Prohibition* to the following:

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Fax No. (702) 369-2110

The Honorable J. Charles Thompson
Senior Judge, Eighth Judicial District Court
Regional Justice Center
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Las Vegas, Nevada 89155

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