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3 **JENSEN & ASSOCIATES, APC**
4 *Trial Lawyers*
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7 (714) 662-5528

8 Attorneys for Plaintiffs

9 **United States District Court**
10 **Central District of California**

11 GARY E. JOHNSON; JAMES P. GRAY) Civil Action #
12 and GARY JOHNSON 2012, INC.,)
13 Plaintiff) VERIFIED COMPLAINT FOR
14 vs.) DECLARATORY AND INJUNCTIVE
15 FEDERAL ELECTION COMMISSION,) RELIEF
16 Defendants.) **THREE-JUDGE COURT**

17
18 **PRELIMINARY STATEMENT**

19 1. This is an action for declaratory and injunctive relief against the United States
20 Federal Election Commission (“FEC”) to enforce federal law concerning
21 financing of presidential election campaigns, and specifically to compel the FEC
22 to make disbursement of pre-general election funding as provided by statute. 26
23 U.S.C. §9011 (b) (2) provides that this suit be heard and determined by a court
24 comprised of three judges in accordance with 28 U.S.C. §2284.

25
26 **JURISDICTION AND VENUE**

1 2. This Court has jurisdiction over this case, brought under the Presidential
2 Campaign Funding Act, 26 U.S.C. §9001, *et seq.*, pursuant to Section 9011 (b) (2)
3 thereof, which provides that “The district courts of the United States shall have
4 jurisdiction of proceedings instituted pursuant to this subsection.” Plaintiffs have
5 elected to bring this action for declaratory and injunctive relief pursuant to that
6 subsection to “implement this chapter”. Jurisdiction is also conveyed by 28 U.S.
7 C. §1331.

8 3. Venue is proper in this Court because Plaintiff James P. Gray is a resident of the
9 City of Newport Beach, and County of Orange, California, and thus of this
10 district, and under 28 U.S.C. 1391 (e) (1) (C), venue is proper where any plaintiff
11 resides if no real property is involved and the case is against an agency of the
12 United States. Defendant Federal Election Commission is an agency of the United
13 States.

14
15 **PARTIES**

16 4. Plaintiff Gary E. Johnson is the former Governor of the State of New Mexico, a
17 resident of that state, and the nominee of the Libertarian Party for the office of
18 President of the United States. Plaintiff James P. Gray is a retired judge of the
19 Superior Court of the State of California for the County of Orange, and is the
20 nominee of the Libertarian Party for Vice President of the United States. Their
21 authorized campaign committee is Plaintiff Gary Johnson 2012, Inc, and it is
22 based in Salt Lake City, Utah. The names of Johnson and Gray will appear this
23 November as candidates for president and vice president on the ballots of not less
24 than 47 states, and confirmation of the same has been received from those states,
25 and from the District of Columbia. These jurisdictions have 495 combined votes
26 in the electoral college.

1 5. Defendant FEC is the government agency with the obligation under the
2 Presidential Election Campaign Fund Act, 26. U.S.C. §9001, *et seq.* to disburse
3 pre-general election federal funds to candidates.

4
5 **FACTS**

6
7 6. The Presidential Election Fund Act (“the Act”) was enacted in the late-1960's to
8 provide for federal funding of presidential general election campaigns. The Act
9 provides for funding for not only the two major-party candidates but for third
10 party candidates as well. Funding is available, under specified circumstances,
11 both prior to the general election and, separately, after the general election. This
12 lawsuit involves only the former, which is referred to herein as “pre-general
13 election funding”.

14 7. On May 5, 2012, Plaintiff Johnson received the nomination of the Libertarian
15 Party for President of the United States, and Plaintiff Gray received the
16 nomination of the Libertarian Party for Vice President of the United States. The
17 Libertarian Party, which was founded in 1971, is the third-largest political party
18 in the United States. In the 30 states of the union where voters are allowed to
19 register by party, over 282,000 are currently registered Libertarians. Hundreds of
20 Libertarians have won election throughout the country at the state and local levels,
21 and thousands of candidates have appeared on ballots seeking election. Its
22 nominees for President and Vice President have appeared on ballots in every
23 presidential election from 1972 onwards. Millions of votes have been cast for
24 these candidates.

- 1 8. The scheme for pre-general election funding for third party candidates is set forth
2 in 26 U.S.C. §9004 (a)(2)(A)¹ which provides, *in its entirety*, that, “[t]he eligible
3 candidates of a minor party in a presidential election shall be entitled to payments
4 under section 9006 equal in the aggregate to an amount which bears the same ratio
5 to the amount allowed under paragraph (1) for a major party as the number of
6 popular votes received by the candidate for President of the minor party, as such
7 candidate, in the preceding presidential election bears to the average number of
8 popular votes received by the candidates for President of the major parties in the
9 preceding presidential election.” Johnson is an “eligible candidate” within the
10 ambit of this section, as that term is defined in §9002(4) and §9003(a) and (c).
- 11 9. On May 8, 2012, through counsel², plaintiffs applied by letter to the FEC for
12 public funds for the general election, asserting their entitlement to such funding
13 under §9004 (a)(2)(A). It will be noted that this provision imposes no additional
14 requirement relating to the same presidential candidate having run in the
15 presidential election four years earlier. It will also be noted that the following
16 section, §9004 (a)(2)(B), as distinct from subsection (A) provides funding under
17 to candidates who do meet an additional criteria, and the funding provided in
18 subsection (B) is derived from a different mathematical calculation than the
19 funding authorized by subsection (A), and would necessarily result in much
20 greater funding—a much larger amount-- than under subsection (A).
- 21 10. On June 11, 2012, at the FEC’s request, plaintiffs sent a separate letter to the FEC
22 requesting funding, and a true copy of this letter is attached hereto as Exhibit 2.
23 Subsequently, on June 27, 2012, also at the FEC’s request, plaintiffs sent the FEC

25 ¹All further statutory references are to 26 U.S.C., unless otherwise noted.

26 ²A true copy of this letter is attached hereto as Exhibit 1.

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a Letter Agreement in connection with their application, and a true copy of this is attached hereto as Exhibit 3. The request made by the plaintiffs included a request for an extension of time, and subsequently the FEC granted this time extension.

11. In 2008, the Democrat nominee for president received 69,498,215 votes; the Republican nominee for president received 59,498,240; the Libertarian nominee for president received 523,713 votes. The average of the two major party votes is 64,498,228. The Libertarian nominee thus received 523,713/64,498,228, or .81% of the average vote of the major party candidates.
12. This election cycle, the major party candidates will each receive \$92,241,400.00. Based on this, Plaintiffs are entitled to receive .81% of that number, which is \$747,115.34. The FEC has failed to distribute any funds to Plaintiffs, and has taken the position that Plaintiffs are ineligible for funding, notwithstanding the plain language of §9004 (a)(2)(A).

COUNT ONE

Declaratory and Injunctive Relief

13. Plaintiffs incorporate and restate the allegations in Paragraphs 1 through 12 above.
14. An actual dispute has arisen between Plaintiffs and Defendant, namely that Plaintiffs claim they are entitled to pre-general election funding as set forth above, the Defendant claims Plaintiffs are ineligible for such funding. A judicial determination of this dispute is necessary.
15. Pre-election funding and post-election funding serve entirely different purposes. Unless Plaintiffs receive their pre-election entitlement *before* the general election, it is of little use, because the election will have already taken place. The amount

1 of the funding to which plaintiffs are presently entitled is so significant that it
2 *could* make the difference between winning and losing. Even more likely is the
3 impact the receipt by plaintiffs before the general election of pre-election funding
4 would have on plaintiffs' subsequent entitlement to *post*-general election funding.
5 Post general-election funding requires that the Johnson/Gray ticket receive a
6 certain threshold percentage of votes in the general election, and the likelihood of
7 Plaintiffs meeting this threshold is dramatically greater if they receive the pre-
8 election funding in time to spend it to support their candidacy.

- 9 16. Unless an injunction issues mandating that the FEC disburse the pre-general
10 election funding to which the Plaintiffs are entitled, they will be gravely and
11 irreparably harmed and no amount of money could adequately compensate them.
- 12 17. Accordingly, Plaintiffs are entitled to a mandatory injunction directing the
13 immediate payment of the pre-election funds they have applied for, such that
14 payment be received in advance of the general election this November.

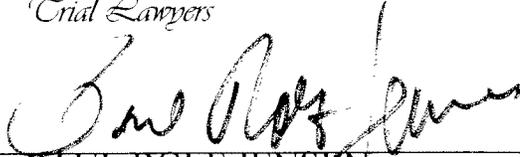
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16 **RELIEF REQUESTED**

17 WHEREFORE, plaintiffs pray for a judicial declaration that they are entitled to
18 pre-general election campaign funding, and for a mandatory injunction directly the FEC
19 to immediately disburse to plaintiffs the sum of \$747,115.34. Further, plaintiffs pray
20 for their costs of suit, and for such other and further relief as the Court may deem just
21 and equitable.

22
23 September 24, 2012

Respectfully submitted,

JENSEN & ASSOCIATES, APC
Trial Lawyers

24
25
26 By: 

PAUL ROLF JENSEN
Attorneys for Plaintiffs

27
28

EXHIBIT 1



Via FedEx #874768666937

8 May 2012

Anthony Herman, Esq., General Counsel
Federal Election Commission
999 "E" Street, N.W.
Washington, D.C. 20463

2012 MAY 14 AM 11:56
OFFICE OF THE
GENERAL COUNSEL
FEDERAL ELECTION COMMISSION

Dear Mr. Herman,

I am counsel to former New Mexico Governor Gary Johnson and write to you on his behalf. As you are aware, the Governor last Saturday became the nominee of the Libertarian Party for the office of President of the United States.

In one location, your website states that no third party candidate this cycle will qualify for federal general election public funding, because during the 2008 cycle, no third party candidate received 5% of the vote in the general election. Notwithstanding this statement, it is our position that Governor Johnson IS entitled to public funding, for the reasons I will now outline.

26 U.S.C. §9004 (a)(2)(A) provides that, "[t]he eligible candidates of a minor party in a presidential election shall be entitled to payments under section 9006 equal in the aggregate to an amount which bears the same ratio to the amount allowed under paragraph (1) for a major party as the number of popular votes received by the candidate for President of the minor party, as such candidate, in the preceding presidential election bears to the average number of popular votes received by the candidates for President of the major parties in the preceding presidential election."

There is nothing in this subsection that imposes a 5% threshold; the next subsection is where that floor is imposed in order to receive funding. Likewise, the language of the next subsection, (a)(2)(B) refers to instances where the candidate was also a candidate for President in the preceding presidential election—thus additionally differentiating subsection (A) from subsection (B). Governor Johnson is an "eligible candidate" within the ambit of subsection (A) as that term is defined in §9002(4) and §9003(a) and (c). With regard to the term "candidate" in §9002(2), as opposed to "eligible candidate" in §9002(4), we believe that term is applicable only to §9004 (a)(2)(B) and not relevant to (a)(2)(A). For the same reason, we aver that the definition §9002 (7) of "minor party" is only relevant to §9004 (a)(2)(B) and not relevant to (a)(2)(A).

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Para 1 of 2

Anthony Herman, Esq.
8 May 2012
Page two

In summation, we submit that the draftsmen of §9004(a)(2) intended the five percent threshold to apply to subsection (B) and not subsection (A) and accordingly made this clear by the use of different language in the two provisions. Put differently, it would render subsection (A) utterly meaningless to apply the 5% threshold to its grant of funds, because subsection (B) governs all situations when the candidate received 5% or more in the preceding election. Ergo, subsection (A) *only* has meaning in circumstances when the minor party candidate received *less* than 5%; no other reading of subsection (A) allows it to have any applicability. Statutes must be read so as to give them effect, and interpretations that have the effect of vitiating the effect of a statute are improper. *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *Stewart v. Smith*, 673 F.2d. 485, 492 (D.C. Cir. 1982).

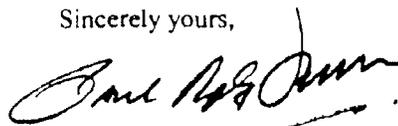
Accordingly, and based on the plain meaning of §9004(a)(2), Governor Johnson is entitled to funding at this time.

In 2008, the Democrat nominee received 69,498,215 votes; the Republican nominee received 59,498,240; the Libertarian nominee received 523,713 votes. The average of the two major party votes is 64,498,228. The Libertarian nominee thus received 523,713/64,498,228, or .81% of the average vote of the major party candidates.

This cycle, the major party candidates will each receive \$92,241,400.00. Based on this, Governor Johnson's position is that he is entitled to receive .81% of that number, which is \$747,115.34. The Governor, by this letter, hereby requests this amount be disbursed to his campaign forthwith for the reasons set forth above.

Please be so kind as to contact the undersigned immediately to discuss this request.

Sincerely yours,


PAUL ROLF JENSEN

3
2

EXHIBIT 2

June 11, 2012

Caroline C. Hunter, Chairman
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Dear Madam Chairman:

As presidential and vice-presidential candidate seeking to become eligible to receive Presidential general election funds, I certify and agree to the following provisions as prescribed at 11 CFR §9003.1 and 11 CFR §9003.2.

- I. In accordance with 11 CFR §9003.1(a)(2) and 11 CFR §9003.2(b), I certify that we are seeking the nominees of the Libertarian Party for election to the Office of President and Vice-President, respectively, and have qualified to appear on the ballots for the general election in ten or more States, and hereby request pursuant to 11 CFR §9003.1(a)(2) that you extend the deadline for our submission of this request to the date you receive this letter.
- II. In accordance with 11 CFR §9003.1(b)(1), I acknowledge that I have the burden of proving that disbursements made by me, and any of my authorized committee(s) or agents are qualified campaign expenses as defined at 11 CFR §9003.5.
- III. Pursuant to 11 CFR §9003.1(b)(2), I and my authorized committee(s) will comply with the documentation requirements set forth in 11 CFR §9003.5.
- IV. Upon the request of the Commission, I and my authorized committee(s) will supply an explanation of the connection between any disbursement made by me or my authorized committee(s) and the campaign as prescribed by 11 CFR §9003.1(b)(3).
- V. In accordance with 11 CFR §9003.1(b)(4), I and my authorized committee(s) agree to keep and furnish to the Commission all documentation relating to receipts and disbursements including any books, records (including bank records for all accounts) all documentation required by law, including those required to be maintained under 11 CFR 9003.5 and other information that the Commission may request.

Page 3 of 5

- VI. As provided at 11 CFR §9003.1(b)(4), I and my authorized committee(s) agree to keep and furnish to the Commission all documentation relating to disbursements and receipts including any books, records (including bank records for all accounts), all documentation required by this section (including those required to be maintained under 11 CFR §9003.5), and other information that the Commission may request. If I or my authorized committee(s) maintains or uses computerized information containing any of the categories of data listed in 11 CFR §9003.6(a), the committee will provide computerized magnetic media, such as magnetic tapes or magnetic diskettes, containing the computerized information at the times specified in 11 CFR §9007.1(b)(1) that meet the requirements of 11 CFR §9003.6(b). Upon request, documentation explaining the computer system's software capabilities shall be provided and such personnel as are necessary to explain the operation of the computer system's software and the computerized information prepared or maintained by the committee(s) shall be made available.
- VII. As prescribed at 11 CFR §9003.1(b)(5), I and my authorized committee(s) will obtain and furnish to the Commission upon request all documentation relating to funds received and disbursements made on my behalf by other political committees and organizations associated with me.
- VIII. I and my authorized committee(s) shall permit an audit and examination pursuant to 11 CFR §9007 of all receipts and disbursements, including those made by me, all authorized committee(s) and any agent or person authorized to make expenditures on my behalf or on behalf of my authorized committee(s). I and my authorized committee(s) shall also provide any material required in connection with an audit, investigation, or examination. I and my authorized committee(s) shall facilitate the audit by making available in one central location, office space, records and such personnel as are necessary to conduct the audit and examination, and shall pay any amounts required to be repaid under 11 CFR part 9007.
- IX. Pursuant to 11 CFR §9003.1(b)(7), the person listed below is entitled to receive payments from the fund on my behalf, which will be deposited into the listed depository, which I have designated as the campaign depository. Any change in the information required by this paragraph shall not be effective until submitted to the Commission in a letter signed by me or the Treasurer of my authorized principal campaign committee.

Name of Person: Chet Goodwin
Mailing Address: 280 South 400 West Suite 220
Salt Lake City, Utah 84101

Designated
Depository: Zions Bank

Address: 455 East South Temple
South Lake City, Utah 84111

Name of Account: Gary Johnson 2012

ATTACHMENT 1
PAGE 4 OF 5

- X. I agree that I and my authorized committee(s) shall comply with the applicable requirements of 2 USC §431, et seq.; 2 USC §9001, et seq.; and the Commission's Regulations at 11 CFR parts 100-400, and 9001-9012.
- XI. I agree that I and my authorized committee(s) shall pay any civil penalties included in a conciliation agreement or otherwise imposed under 2 USC §437g against me, or either of us, my authorized committee(s), or any agent thereof.
- XII. Pursuant to 11 CFR §9003.1(b)(10), any television commercial prepared or distributed by me or my authorized committee(s) will be prepared in a manner which ensures that the commercial contains or is accompanied by closed captioning of the oral content of the commercial to be broadcast in line 21 of the vertical blanking interval, or is capable of being viewed by deaf and hearing impaired individuals via any comparable successor technology to line 21 of the vertical blanking interval.

I further certify, under penalty of perjury of the laws of the United States, that neither I, nor my authorized committee(s) has incurred, nor will it incur, qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under 11 CFR 9004.1. I also so certify that no contributions to defray qualified campaign expenses will be accepted by me or my authorized committee(s), except to the extent, if any, that the qualified campaign expenses incurred exceed the aggregate payments received by me from the Fund under 11 CFR 9004.2.

I further certify under penalty of perjury of the laws of the United States that I will not knowingly make expenditures from my personal funds or from the personal funds of any immediate family, in connection with my campaign for the office of President and/or Vice President, in excess of \$50,000.00 in the aggregate.

Signed: Gary E. Johnson
Gary E. Johnson,
Libertarian Party nominee for
President of the United States

Signed: James P. Gray
James P. Gray,
Libertarian Party nominee for
Vice-President of the United States

ATTACHMENT 1
PAGE 5 OF 5

EXHIBIT 3

Federal Election Commission
999 B Street, NW
Washington, DC 20463

Dear Commissioners:

Pursuant to 26 U.S.C § 9003 and 11 C.F.R. § 9003.1, this Letter Agreement certifies that as the nominees of the Libertarian Party for President and Vice President, we and our authorized committees (collectively "we" or "us") agree to comply with the following provisions set forth in 11 C.F.R. § 9003.1(b):

- (1) We have the burden of proving that disbursements made by us or our agents are qualified campaign expenses as defined in 11 C.F.R. § 9002.11.
- (2) We will comply with the documentation requirements set forth at 11 C.F.R. § 9003.5.
- (3) We will provide an explanation, in addition to complying with the documentation requirements, of the connection between any disbursements made by us and the campaign if requested by the Commission.
- (4) We will keep and furnish to the Commission all documentation relating to receipts and disbursements including any books, records (including bank records for all accounts), all documentation required by this subchapter (including those required to be maintained under 11 C.F.R. § 9003.5), and other information that the Commission may request. If we maintain or use computerized information containing any of the categories of data listed in 11 C.F.R. § 9003.6(a), the committee will provide magnetic or optical media containing the computerized information that meets the requirements of 11 C.F.R. § 9003.6(b) at the times specified in 11 C.F.R. § 9007.1(b)(1). Upon request, documentation explaining the computer system's software capabilities will be provided, and such personnel as are necessary to explain the operation of the computer system's software and the computerized information prepared or maintained by the committee will also be made available.
- (5) We will obtain and furnish to the Commission upon request all documentation relating to funds received and disbursements made on our behalf by other political committees and organizations associated with us.
- (6) We will permit an audit and examination pursuant to 11 C.F.R. part 9007 of all receipts and disbursements including those made by us and any agent or person authorized to make expenditures on our behalf. We will facilitate the audit by making available in one central location, office space, records and such personnel as are

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INDEXED 3

necessary to conduct the audit and examination, and will pay any amounts required under 11 C.F.R. part 9007.

(7) Pursuant to 11 C.F.R. part 103 and 11 C.F.R. § 9005.2 the person listed below is entitled to receive payments from the Fund on our behalf.

Name
Mailing Address
City, State, ZIP

Such funds will be deposited into the listed depository:

Bank Name
Bank Address
City, State, Zip

The account name is:

(8) We will comply with the applicable requirements of 2 U.S.C. 431 et seq., 26 U.S.C. 9001 et seq., and the Commission's regulations at 11 C.F.R. parts 100-300, and 9001-9012.

(9) We will pay any civil penalties included in a conciliation agreement or otherwise imposed under 2 U.S.C. § 437g.

(10) We agree that any television commercial prepared or distributed by us will contain closed captioning of the oral content of the commercial to be broadcast in line 21 of the vertical blanking interval, or be capable of being viewed by deaf and hearing impaired individuals via any comparable successor technology to line 21 of the vertical blanking interval.

Additionally, pursuant to 26 U.S.C. § 9003 and 11 C.F.R. § 9003.2, and under penalty of perjury, we certify:

(1) That we have not incurred and will not incur qualified campaign expenses in excess of the aggregate payments to which the eligible candidates of a major party are entitled under 11 C.F.R. § 9004.1.

(2) That no contributions to defray qualified campaign expenses have been or will be accepted by us except to the extent that the qualified campaign expenses incurred exceed the aggregate payments we received from the Fund under 11 C.F.R. § 9004.2.

(3) That the Presidential and Vice Presidential nominees will not knowingly make expenditures from our personal funds or the personal funds of our immediate family, in connection with our campaign for the office of President and Vice President of the United States in excess of \$50,000 in the aggregate.

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JUN-27-2012 WED 11:11 AM RTNIELSON COMPANY

FAX NO. 8013558335

P. 03/03

Jun 27 12 08:59a Gray

9498502603

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Jun 27 12 07:08a Kate Prusack

505-955-0144

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Signed:

<u><i>Kate Prusack</i></u>	<u>6/27/12</u>
Candidate for President	Date

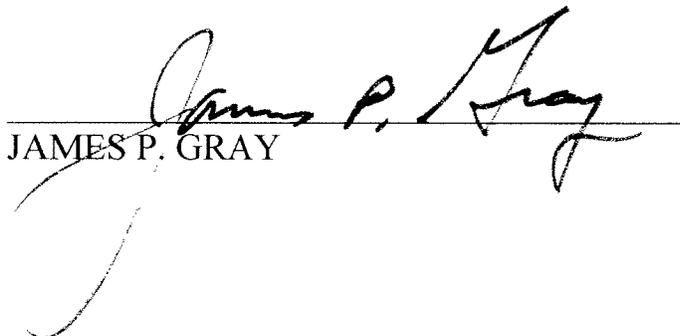
<u><i>James P. Gray</i></u>	<u>6-27-12</u>
Candidate for Vice President	Date

ATTACHED 2
 JUN 28 11 30 AM '12

VERIFICATION

I, James P. Gray, declare as follows:

1. I am a party to this action and the nominee of the Libertarian Party for election to the office Vice President of the United States.
2. I either have personal knowledge of the truth allegations of the complaint or am informed of the truth of the allegations and believe them to be true.
3. On that basis, I verify under penalty of perjury of the laws of the United States of America that the factual statements in this Complaint are true and correct. Executed at Costa Mesa, California on September 26, 2012



JAMES P. GRAY