

NO. 10-2175

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**LIBERTARIAN PARTY OF MICHIGAN;
GARY JOHNSON; DENEEN ROCKMAN-MOON,**

Plaintiffs-Appellants,

v.

RUTH JOHNSON,

Defendant-Appellee,

REPUBLICAN PARTY OF MICHIGAN,

Third-Party Intervenor.

**On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division**

APPELLANTS' BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 12-2153

Case Name: Libertarian Party v. Ruth Johnson

Name of counsel: Gary Sinawski

Pursuant to 6th Cir. R. 26.1, Libertarian Party of Michigan

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on September 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/Gary Sinawski

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, as this is a civil action arising under the Constitution of the United States, and pursuant to 28 U.S.C. § 1342(a)(3), as Plaintiffs-Appellants (“Plaintiffs”) seek to redress the deprivation by Defendant-Appellee (“Secretary”), acting under color of state law, of rights secured to Plaintiffs by the First and Fourteenth Amendments.

An Opinion and Order and a Judgment disposing of all claims with respect to all parties were entered in the District Court on September 7, 2012, granting the Secretary’s and the Republican Party’s motions to dismiss and denying Plaintiffs’ motion for summary judgment. Op. and Order, RE 25, Page ID # 922-946; Judg., RE 26, Page ID # 947; Mots. to Dismiss, RE 8 and 21, Page ID # 423-442 and 889-912; Mot. for Summ. Judg., RE 6, Page ID # 356-373.

Plaintiffs filed a notice of appeal the same day, September 7, 2012. Notice of App., RE 27, Page ID # 948-949. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The issues presented for review are whether Michigan’s sore loser law, Mich. Comp. Laws (“MCL”) 168.695, is unconstitutional on its face; whether the sore loser law is unconstitutional as applied to Plaintiff Gary Johnson and other candidates for president; and whether Plaintiffs’ claims are barred by laches.

STATEMENT OF THE CASE

This is a ballot access case arising from the Secretary's determination to exclude Libertarian Party presidential candidate Gary Johnson from Michigan's November 2012 general election ballot because he ran in Michigan's February 2012 Republican presidential primary.

Plaintiffs filed their complaint on June 25, 2012. RE 1, Page ID # 1-9. The Secretary moved to dismiss on July 31, 2012. RE 4, Page ID # 14-33. Plaintiffs moved for summary judgment on August 2, 2012. RE 6, Page ID # 356-373. The Republican Party moved to dismiss on September 4, 2012. RE 21, Page ID # 889-912. The District Court held a hearing on the motions on September 6, 2012. RE (Minute Entry) following RE 24.

The District Court issued an Opinion and Order and a Judgment on September 6, 2012 granting the Secretary's and Republican Party's motions to dismiss and denying the Plaintiffs' motion for summary judgment. RE 25, Page ID # 922-946. The Plaintiffs filed a notice of appeal the same day, September 7, 2012. RE 27, Page ID # 948-949. On September 10, 2012 the District Court issued an amended opinion and order deleting one sentence from its prior opinion and order. RE 28, 950-974.

On September 11, 2012 this Court denied Plaintiffs-Appellants' emergency motion for injunction and expedited appeal and, on September 12, 2012, denied

their motion to reconsider.

STATEMENT OF FACTS

This appeal is taken from an Opinion and Order and a Judgment of the District Court filed on September 7, 2012,¹ granting the Secretary's and the Republican Party's motions to dismiss and denying Plaintiffs' motion for summary judgment. Op. and Order, RE 25, Page ID # 922-946; Judg., RE 26, Page ID # 947; Mots. to Dism., RE 8 and RE 21, Page ID # 423-442 and 889-912; Mot. for Summ. Judg., RE 6, Page ID # 356-373. The Plaintiffs filed a notice of appeal the same day. Notice of App., RE 27, Page ID # 948-949.

In the District Court, plaintiffs sought declaratory and injunctive relief from the Secretary's determination that Gary Johnson is barred by Michigan's sore loser law from appearing on the ballot in the November 6, 2012 general election as the presidential candidate of the Libertarian Party because he appeared on the ballot in Michigan's Republican primary election on February 28, 2012. Letter dated May 3, 2012 to Gary Johnson, RE 6-8, Page ID # 391-394. Plaintiffs asserted that

¹On September 10, 2012 the District Court issued an Amended Opinion and Order, RE 28, Page ID # 950-974, which is identical to its original Opinion and Order except for the deletion of the following sentence and citation from page 17: "To avoid this unconstitutional predicament, the Supreme Court of Michigan ordered that Mr. [John] Anderson's name be removed from the primary ballot so that he could appear on the general election ballot as the candidate of a different party. *Michigan Republican State Central Committee v. Secretary of State*, 408 Mich. 931 (1980)."

barring Johnson from the general election ballot would severely injure Plaintiffs' voting and associational rights under the First and Fourteenth Amendments, and that Michigan has no state interest in barring Johnson from the ballot as the Libertarian presidential candidate which justifies the injuries to Plaintiffs' rights, particularly when the state admits that Johnson was free to separately petition to be listed as an independent candidate for president on the November ballot.

Plaintiff Libertarian Party of Michigan ("LPM") is the Michigan affiliate of the national Libertarian Party. Declaration of Denee Rockman-Moon executed on July 29, 2012 ("Rockman-Moon Decl."), RE 6-4, ¶ 3, Page ID # 382-383. Plaintiff Gary Johnson is a former two-term governor of New Mexico and is the Libertarian Party candidate for president. Declaration of Gary Johnson executed on July 27, 2012 ("Johnson Decl."), RE 6-3, ¶ 1, Page ID # 380-381. Plaintiff Denee Rockman-Moon is the chair of the LPM and one of its candidates for presidential elector. Rockman-Moon Decl., RE 6-4, ¶ 2, Page ID # 382-383. Defendant Ruth Johnson is the Secretary of State of Michigan and has overall responsibility for the conduct of elections and for supervision and administration of Michigan's election laws. MCL 168.31. Intervenor-Defendant is the Republican Party of Michigan.

The LPM is a qualified political party under of MCL 168.560a, nominates its candidates by means of caucuses or conventions as provided in MCL 168.532 and 168.686a, and certifies its candidate for President of the United States as provided

in MCL 168.686. Rockman-Moon Decl., RE 6-4, ¶ 3, Page ID # 382-383.

On November 21, 2011, the Secretary advised that Johnson would appear as a Republican candidate on Michigan's February 28, 2012 presidential primary ballot unless he withdrew pursuant to MCL 168.615a(1) by 4:00 p.m. on December 9, 2011. Johnson Decl., RE 6-3, ¶ 5, Page ID # 380-381. On December 13, 2011, the Secretary advised that Johnson had missed the deadline by three minutes and that he would appear as a Republican candidate on the February 28, 2012 presidential primary ballot. *Id.*, ¶ 6. Gary Johnson did appear as a Republican candidate on Michigan's presidential primary ballot, *Id.*, ¶ 7, although he did no campaigning and expended no funds in connection with the primary election. *Id.*

On May 3, 2012, the Secretary advised that Johnson was barred by the sore loser law from appearing on the ballot at the November 6, 2012 general election. *Id.*, ¶ 8. Johnson was subsequently nominated by the national Libertarian Party as its 2012 candidate for president at the Libertarian national convention held in Las Vegas on May 3-6, 2012. *Id.*, ¶ 9. His nomination was ratified by the LPM state convention on June 2, 2012 and forwarded to the Secretary pursuant to MCL 168.686. Rockman-Moon Decl., RE 6-4, ¶ 5, Page ID # 382-383.

The District Court ruled that the burdens imposed on Plaintiffs' rights by denying Gary Johnson access to the ballot were not severe and that they were justified by the state's interests in maintaining political stability. Opinion and

Order, RE 25, Page ID # 922-946.

ARGUMENT

I. “Sore Loser” Statutes Cannot Properly be Applied to Candidates for President

A. Sore Loser Statutes have not been Successfully Applied to Presidential Candidates

Most states have “sore loser” laws. Declaration of Richard Winger executed on July 30, 2012 (“Winger Decl.”), RE 6-2, ¶ 3, 4, Page ID # 376-379. These laws vary in language and scope. Michigan’s law, MCL 168.695, prohibits a candidate who appeared on a party’s primary election ballot from appearing as the candidate of another party on the general election ballot:

No person whose name was printed or placed on the primary ballots or voting machines as a candidate for nomination on the primary ballots of 1 political party shall be eligible as a candidate of any other political party at the election following that primary.

Courts have not seriously questioned the applicability of sore loser laws to candidates for offices other than president. Until now, however, no federal or state court had ever used a sore loser law to keep a candidate for President of the United States from appearing on the general election ballot except for the court in *Nat. Comm. of U.S. Taxpayers v. Garza*, 924 F. Supp. 71 (W.D. Texas 1996), where a sore loser law was used to bar Pat Buchanan from the Texas general election because he had run in the Republican primary. However, that controversy became

moot, and the ruling was not appealed, because Buchanan did not seek the U.S. Taxpayers Party nomination.

Nor, until now, has any state ever successfully prohibited the presidential candidate of a minor party from appearing on its general election ballot on the grounds that the candidate had previously run in a major party presidential primary. Winger Decl. RE 6-2, ¶ 7, Page ID # 376-379. This should come as no surprise because, as the Supreme Court has pointed out, presidential elections are unique:

In the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries.

Anderson v. Celebrezze, 460 U.S. 780, 794-95 (1983).

Furthermore, the “real” candidates in a presidential election are not the candidates for president themselves but those for presidential elector, U.S. Const. Art. II, § 1, who are not candidates in primary elections and therefore cannot be “sore losers” in those elections. Moreover, parties choose their presidential candidates at nominating conventions, not at state primary elections, and a candidate for president cannot win or lose a party's nomination by winning or

losing a state's primary election. And the application of sore loser laws to presidential candidates would unduly burden the First and Fourteenth Amendment rights of the candidates, their parties and their supporters across the nation.

Thus, courts have been extremely careful when called upon to apply sore loser laws to presidential candidates. It remains the case that until now, no state had ever successfully barred the presidential candidate of or minor party from its general election ballot because the candidate had previously run in a major party presidential primary. Winger Decl., RE 6-2, ¶ 7, Page ID # 376-379.

B. If Allowed to Stand, the District Court's Decision would have a Far-Reaching, Negative Impact

If approved by this Court, Michigan's approach to regulating the general election ballot by means of the sore loser law could do untoward damage to the interstate cooperation envisioned by the Framers as well as to practices recognized today in the several states. The Supreme Court has found that several provisions in the Constitution prohibit a state from "projecting" its laws onto activities in other states. Perhaps the best known of these limitations is found in the Dormant Commerce Clause, which has been routinely interpreted to prohibit states from attempting to give their laws "extra-territorial" application. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 516 (1935), to use the best-known example, the Court ruled that New York could not apply its otherwise valid minimum-price measure

for milk “against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce” Justice Cardozo explained that “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state ... [and] New York is equally without power to prohibit the introduction within her territory of milk ... acquired in Vermont” *Id.* at 521.

The Court applied this principle in *Healy v. Beer Institute*, 491 U.S. 324, 326 (1989), to invalidate a “price affirmation” statute requiring liquor distributors to “affirm” that the prices charged to wholesalers inside the state are no higher than those charged in neighboring states. The Court explained that the “established view [is] that a state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause.” *Id.* at 332 (citing *Baldwin*). The Court in *Healy*, 491 U.S. at 335, stated:

The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also *by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.*

(Emphasis added).

The Fourteenth Amendment’s Due Process Clause also supplies limitations. States cannot simply reach out to regulate activities beyond their borders.

Regulated entities must have “minimum contacts” with a State in order to be taxed,

see, e.g., Quill Corp. v. North Dakota, 504 U.S. 298 (1992), or called into court.

See, e.g., Goodyear Dunlop Tires Operations v. Brown, 131 S. Ct. 2846 (2011). A state cannot regulate or punish activity beyond its borders (through punitive damages, for example) where that conduct is otherwise “lawful where it occurred.”

See, e.g., State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003).

The teaching behind these cases is that a state’s regulations cannot be considered in a constitutional vacuum. The practical effects of a state’s laws on the nation as a whole must also be considered. This is certainly the case with presidential elections, which are governed in the first instance by Article II of the Constitution and the Twelfth Amendment. Under both Article II and the Twelfth Amendment, a state’s electors are required to vote for at least one candidate for President and Vice President who “shall not be an inhabitant of the same state with themselves.” U.S. Const., Amend. XII. *See also* U.S. Const., Art. II, § 1, cl. 3 (stating that local electors shall vote for two candidates “of whom one at least shall not be an Inhabitant of the same state with themselves”). The Framers therefore were keenly aware that the states’ selections of presidential electors interconnected and thereby required some measure of interstate cooperation.

As previously noted, the Supreme Court made clear in *Anderson v. Celebrezze, supra*, that presidential selection is constitutionally unique. Thus, notwithstanding the general validity of ballot access restrictions, like sore loser

laws, when applied to presidential contests these restrictions must give way.

Numerous courts have refused to apply states' sore loser laws to presidential candidates, either because they are seen as attempts at projecting states' laws outside their borders or because they are otherwise viewed as interfering with national policies and politics. The common theme among these cases is that states are simply not allowed to interfere with the will of the national electorate by tying candidates to parties. Whether a state is telling candidates that 'because you ran in another state's party primary you cannot run here,' *see, e.g., In re Nader*, 858 A.2d 1167 (Pa. 2008), or 'because you lost in this state under one banner you cannot run here under another,' *see, e.g., Anderson v. Mills, supra*, the Constitution is violated. States simply are not constitutionally authorized to project their ballot limitations onto decisions made by national political parties and their affiliates in other states.

Using the terms of the tying arrangement addressed in *Healy v. Beer Institute*, states are not authorized to require that presidential candidates "affirm" that they are running under a single political party banner throughout the United States. Just as Michigan cannot require that sellers relinquish economic opportunities by "affirming" that their prices are as low as those in other states, *see Healy*, Michigan cannot demand that presidential candidates forego political opportunities in other states by running for president in Michigan. Simply put, presidential candidates have the constitutional right to participate in, and lose, the

primaries and conventions of the various political parties across the United States.

In re Nader, supra, provides a recent example. There, Pennsylvania officials were called on to apply their sore loser law to Ralph Nader and his running mate, Peter Camejo, even though neither had ever run in a Pennsylvania primary. Disregarding this fact, the lower court ruled that Pennsylvania's sore loser law applied because of Nader's and Camejo's party activities in other states. *Id.* at 1178. Nader and Camejo, the lower court reasoned, were not truly independent. The Pennsylvania Supreme Court disagreed, finding that this interpretation violated the First Amendment:

the Commonwealth ... has not offered any reason, let alone one that is "compelling," to justify its interest in prohibiting candidates who have been nominated by the Reform Party in other states from running as independents in this Commonwealth. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Similarly, the Pennsylvania high court concluded that Pennsylvania's sore loser law could not be used against Nader's running mate, Camejo, who was registered with a party in another state:

The Commonwealth has not intervened, thus failing to supply any reason, compelling or otherwise, to justify its interest in prohibiting candidates who are members of a party in another state from running as independents in this Commonwealth.

John Anderson's experience during the 1980 presidential election generated similar results. Anderson was challenged by Democrats using sore loser laws in at

least four states. See Fred H. Perkins, Note, *Better Late Than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines*, 11 Hofstra L. Rev. 691, 720 n. 197 (1983).² Anderson, like Johnson here, had at one time been a candidate in Republican primaries for president. He began withdrawing from Republican primaries in April of 1980, however, in order to run as an independent. Notwithstanding several sore loser challenges, Anderson was not excluded from any state's ballot. *Id.*

In Maryland, for example, state officials eventually conceded that Maryland's sore loser law could not be applied to Anderson even though he had run in, and lost, Maryland's Republican primary. See *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980). Questioning whether a sore loser statute could ever be applied to a presidential candidate, the Fourth Circuit in *Morris*, 636 F.2d at 58 n.8, noted:

it is improbable that such a statute could be adopted by reason of the very nature of the American political process for the selection by the major parties of their presidential candidates. Because candidates are selected by convention and the convention occurs after all state primary elections have been concluded, *a state must make provision for a candidate nominated by national convention to appear on its general election ballot even if the candidate did not appear on the primary ballot in that state, or, having appeared, was defeated in the state primary.*

(Emphasis added).

²Anderson ran in nearly two dozen state primaries in 1980. All but three states at that time had sore loser laws. Still, only four states even attempted to apply their sore loser laws to Anderson.

A similar result was achieved in North Carolina, where Anderson had withdrawn from the state's Republican primary on the eve of the election. *See Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980). The district court there concluded that North Carolina's sore loser law only applied to candidates who actually ran in the state's Republican primary, that Anderson's belated withdrawal was effective under North Carolina law, and that North Carolina's sore loser law therefore could not be applied to him. *Id.* at 304-05. The Fourth Circuit readily agreed. Any other conclusion, after all, would cause serious constitutional difficulties.

This Court applied similar logic in *Anderson v. Mills*, *supra* at 605, where Kentucky's sore loser law was also invoked against Anderson. The Court rejected application of Kentucky's law to Anderson, who had run in Kentucky's Republican primary, because

[t]he 'sore loser' section of the Kentucky legislation applies only to candidates: '... who have been defeated for the nomination for any office in a primary election.' Since a candidate cannot lose his party's nomination for president by losing a state's primary election, it would appear that the 'sore loser' statute is inapplicable, and does not address itself to presidential candidates.

Moreover, this Court stated that it had "grave doubts" about whether Kentucky's sore loser law could ever be used to limit the participation of presidential candidates. *Id.* at 606. Kentucky officials, after all, conceded that the law "would not apply to the nominee of the Democratic or Republican parties [I]f either of these parties' candidates lost in the Kentucky presidential primary, but

subsequently were nominated by his party, his name would appear on the ballot in Kentucky.” *Id.* Interpreting or re-writing the law to preserve this facet while excluding minor candidates, like Anderson, as sore losers, caused the Court concern: “It would seem to require that in future presidential elections, not only an independent candidate, but a nominee of one of the two major parties might not be permitted to appear on the general election ballot. *The constitutionality of such an interpretation is subject to grave doubts.*” *Id.* (Emphasis added).

The District Court also concluded that this Court’s decision in *Mills* is not controlling for the reason that Michigan, unlike Kentucky, does not apply sore loser status to primary losers who eventually represent the same political party in the general election. Thus, a primary loser like John McCain was still able to run as the Republican candidate in Michigan. The presidential selection process is preserved; *Mills* is satisfied.

But this is not exactly true either. For under Michigan law, a candidate who lost a major party presidential primary in Michigan would, under Michigan’s present interpretation, be precluded from running as the candidate of any other party, including the other major party. Thus, important candidates who started out running as Republicans – like Roosevelt in 1912 and La Follette in 1924, for example – would then be precluded from being nominated by new political parties – like Roosevelt’s Bull Moose Party and La Follette’s Progressive Party.

Roosevelt ran runner-up in 1912. Were Michigan's law in place, the second most popular candidate in America would not have been allowed on its ballot.

Of course, Michigan is one of only a handful of states that takes this extreme position. Before Michigan changed its interpretation of its sore loser law for this election, "only four states [would] apply their sore loser provisions to elections for presidential electors –Mississippi, Ohio, South Dakota, and Texas." Michael S. Kang, *Sore Loser and Democratic Contestation*, 99 Geo. L.J. 1013, 1044 n. 124 (2011). But think of the potential for electoral chaos if more states followed Michigan's lead. The "practical effect" would be to jeopardize the entire national selection process. Major candidates, like John Anderson and Theodore Roosevelt, would be frozen into the first parties they tested; they would not be allowed to change their minds for fear of being excluded from multiple ballots. Not only could they expect to lose ballot access in Michigan, but they would lose ballot access in numerous other states. This application would change the presidential election landscape dramatically. There would be no more Teddy Roosevelts, Robert La Follettes or John Andersons.

Minor candidates, of course, would be particularly hard hit by such a development, since participation in any minor party's selection process would mean that a candidate could not run under any other minor party's label in any other state. It is very common today for minor candidates for president to run

under different party labels in different states. Ralph Nader, who was an independent in some states but also the candidate of various minor parties in others, would have been shut out of the 2004 election under Michigan's approach.

II. The Standards for Adjudicating Ballot Access Restrictions

In *Anderson v. Celebrezze*, *supra*, and *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (upholding Hawaii's prohibition against write-in voting in context of regulatory framework providing easy access to the ballot) the Supreme Court developed a methodology for appraising the constitutionality of restrictions on access to the ballot. The standards developed in those cases were summarized in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (employing rational basis analysis in upholding a Minnesota "anti-fusion" statute, where plaintiffs wanted candidate to appear on ballot as nominee of multiple parties) (quoted by the District Court, Op. and Order, RE 25 at 931, Page ID # 922-946):

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "character and magnitude" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Burdick* [*v. Takushi*, 504 U.S. 428, 434 (1992)], 112 S. Ct., at 2063-2064 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L.Ed.2d 547 (1983)). Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions." *Burdick*, *supra*, at 434, 112 S. Ct. at 2063 (quoting *Anderson*, *supra*, at 788, 103 S. Ct., at 1569-1570); *Norman* [*v. Reed*, 502 U.S. 279, 288-299 (1992)], 112 S. Ct., at 704-706 (requiring "corresponding interest

sufficiently weighty to justify the limitation”). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer v. Brown*, 415 U.S. 724, 730 (1974)], 94 S. Ct., at 1279 (“[N]o litmus-paper test . . . separat[es] those restrictions that are valid from those that are invidious The rule is not self-executing and is no substitute for the hard judgments that must be made”).

III. The Injuries to Plaintiffs’ Rights are Severe

The District Court asserts that the sore loser law does not “impose severe burdens on Gary Johnson, who is only barred from the general election as a candidate for a party other than the Republican party.” *Id.* at 933. The court repeatedly, and erroneously, states that Johnson is free to run as an independent. To the contrary, the deadline for collecting and filing the 30,000 valid petition signatures necessary to access the ballot as an independent expired on July 19, 2012, MCL 168.590-168.590h, 168.544f, nearly three weeks before the District Court rendered its decision.

Even if Johnson could still mount an independent candidacy, it would not make the impact of the sore loser law any less severe. The Supreme Court has pointed out that “the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other.” *Storer v. Brown*, *supra* at 745. In this Court’s words, “[a] candidate’s appearance without party affiliation is not a substitute for appearing under a party name, and it does not lessen the burden imposed by ... restrictions on minor parties.” *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586-87 (6th Cir.

2006). Like *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), this case involves a state's regulation of a political party's internal affairs (the Libertarian Party's nomination process) and core associational activities (Gary Johnson's right to appear on the ballot, as the Libertarian Party's presidential candidate, and his and the Party's supporters' right to vote for him as such). Like *Tashjian*, therefore, this case calls for strict scrutiny of the state law whose application to Johnson's candidacy impairs these core associational rights.

IV. The State Interests Proffered do not Justify the Injuries

The District Court concluded that the burdens imposed on the instant plaintiffs by Michigan's sore loser law are not severe and are justified by the state's interest in preventing "divisive and internecine intraparty fights after a political party has decided its nominee," Op. and Order, RE 25 at 941, Page ID # 922-946 (quoting *Garza*, 924 F. Supp. at 74); protecting political stability, *Id.*; preventing "last minute political party maneuvering," *Id.* at 17; and preventing "extended intraparty feuding, factionalism and voter confusion," *Id.* Since Johnson, by defendant's own admission, could have gained access to the November ballot as an independent if he had obtained the necessary 30,000 valid petition signatures, one might question the importance of these putative state interests. How can it be that they somehow apply to Johnson as a Libertarian Party candidate but would apparently not apply to Johnson as an independent candidate?

If an injunction does not issue, Gary Johnson will be excluded from Michigan's presidential election scheduled for November 6, 2012. The Supreme Court's stay in *Bush v. Gore*, 531 U.S. 1046 (2000), illustrates how important presidential elections are. Just as the improper counting of votes can cause a presidential candidate irreparable harm, barring a candidate from the ballot is an injury beyond repair. Even conceding that Johnson will not win the presidential election, he will suffer irreparable harm in other ways. Federal matching funds are at stake. Voters' rights are at stake. Those who wish to vote for Johnson will be forever denied that right. Current polls show that Johnson enjoys the support of over 4% of the electorate. He has significant support in Michigan and throughout the nation. Given Michigan's millions of registered voters, Johnson's exclusion has the potential to disenfranchise several hundred thousand of them.

V. The District Court Erred in Conducting a Rational Basis Analysis

The District Court determined that Michigan's sore loser law does not impose a severe burden on plaintiffs' rights and therefore does not warrant strict scrutiny, relying on *Timmons, supra*, and *Clingman v. Beaver*, 544 U.S. 581 (2005) (employing rational basis analysis in upholding Oklahoma's "semi-closed" primary system, where plaintiffs wanted all voters to be able to participate in party's primary election), and distinguishing *Tashjian v. Republican Party of Conn., supra* (applying strict scrutiny in striking down Connecticut's closed primary statute,

where plaintiffs wanted voters registered as independents to be able to participate in Republican primaries).

The District Court's analysis stems from its observation that:

The Supreme Court has held that laws having the same effect as the Michigan sore-loser law, i.e. precluding a particular candidate from placing his or her name on the ballot under certain circumstances, do not place severe burdens on voters' or candidates' associational rights and therefore need only be reasonable and nondiscriminatory restrictions that serve a State's important regulatory interests.

This observation, however, overlooks the fact that neither *Timmons* nor *Clingman* involved a candidacy for President of the United States. As the Supreme Court noted in *Anderson, supra* at 794-95, presidential elections are unique in their cross-border impact; states have a diminished interest in regulating them as well as a diminished right to do so.

The District Court also discounted plaintiffs' observation that the "real" candidates in a presidential election are the candidates for presidential elector, U.S. Const. Art. II, § 1, who are not candidates in primary elections and therefore cannot be "sore losers" in those elections. But voters at the November general election do not elect a president; they choose candidates for presidential elector. Presidential candidates appear on the November ballot as markers for competing slates of presidential electors. In recognition of this reality, MCL 168.45 expressly provides that a vote for a party's presidential candidate is not considered as a direct vote for that candidate but as a vote for the party's candidates for presidential elector:

Marking a cross (X) or a check mark (✓) in the circle under the party name of a political party, at the general November election in a presidential year, shall not be considered and taken as a direct vote for the candidates of that political party for president and vice-president or either of them, but, as to the presidential vote, as a vote for the entire list or set of presidential electors chosen by that political party and certified to the secretary of state pursuant to this chapter.

Although the candidates for president are perhaps the real parties in interest, the candidates who will be elected (or not) at the November general election are the candidates for presidential elector.

The decision of the lower court is expressive of a tension in the law between protecting the major parties from internal dissension, on the one hand, and protecting the associational rights of minor parties, independent and minor party candidates, and voters, of all stripes, on the other. In distinguishing *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981) (holding Kentucky's sore loser law inapplicable to presidential candidate by its terms), the lower court observes that

[t]he Michigan sore loser statute does not seek to regulate associational conduct simply based on winning or losing the battle but rather based upon *switching sides halfway through the fight*. It does not depend for its application solely upon the candidates (sic) prior defeat, but rather depends upon his or her decision to *ditch one political party for another*.

(Emphasis added.) Op. and Order, RE 25 at 937, Page ID # 922-946. This sentiment goes hand in hand with the court's extensive reliance on *South Carolina Green Party v. South Carolina State Election Commission*, 612 F.3d 752 (4th Cir. 2010) (upholding South Carolina's sore loser law in a non-presidential race) and its

reliance on the Fourth Circuit's observation that

the Supreme Court ... explained in *Clingman v. Beaver* [*supra*] that sore loser statutes prevent a candidate who has lost a party primary or nomination from effecting a 'splinter' of a major political party, by joining a minor party while retaining the support of the major party's voters, thereby undermining the major party in the general election.

Id. at 756; Op. and Order, RE 25, Page ID # 922-946.

In 1980, John Anderson appeared on the Republican presidential primary ballots of the District of Columbia and 20 states, including Michigan, and appeared on the November general election ballots of all 50 states and the District of Columbia as an independent or minor party candidate for president. Winger Decl., RE 6-2, ¶ 3-4, Page ID # 376-379. Other presidential candidates who ran in major party presidential primaries and also appeared on the November ballot as the nominees of new or minor parties are Theodore Roosevelt in 1912, Robert M. La Follette in 1924 and David Duke in 1988. *Id.* No state excluded any of these candidates from its general election ballot on account of a sore loser law. *Id.*

Anderson was listed on Michigan's 1980 general election ballot as the presidential candidate of the Anderson Coalition Party. The District Court provides the following, *erroneous*, accounting of Anderson's candidacy in Michigan in an effort to show that the Michigan sore loser law indeed applies to presidential candidates such as Johnson:

At the time of Anderson's candidacy, however, Michigan had not yet enacted a provision that permitted an independent candidate to obtain access to the

general election ballot. *See* ECF No. 6-8, p. 3, Pls.' Mot. Summ. Judg. Ex. G, May 3, 2012 Letter to William W. Hall. Because Mr. Anderson's name appeared on the Michigan primary ballot as a candidate for the Republican party, he was technically precluded by application of Michigan's sore loser law from running at all in the general election. Plaintiff Gary Johnson does not face this same dilemma as Michigan law now permits him to run as an independent candidate, notwithstanding that he appeared on the primary presidential ballot as a candidate for the Republican party. MCL § 168.590 to 168.590h.

Although in 1980 Michigan did not have a *statutory* method for independent candidates to access the general election ballot, there existed a judicially-approved, non-statutory method. It was used by Eugene McCarthy in 1976 to access the Michigan ballot as an independent candidate by collecting enough petition signatures to demonstrate public support and filing them with the secretary of state. The method was approved by the court in *McCarthy v. Austin*, 423 F. Supp. 990 (W.D. Mich. 1976) (ordering McCarthy placed on the November ballot as an independent candidate). Anderson, too, could have used this method for obtaining access to the 1980 Michigan ballot if he had chosen to run as an independent rather than as a minor party candidate. The upshot is that Anderson appeared on the 1980 Michigan Republican presidential primary ballot *and* on the general election ballot, as a minor party candidate, notwithstanding the sore loser law.

VI. Plaintiffs are not Barred by Laches

The Secretary still has time to print and distribute ballots. As a qualified political, the Libertarian Party is assigned a line on the ballot that will be populated

by candidates for various offices. The space reserved for president and vice president will either be empty or contain the names of Johnson and his running mate. Neither result would present the Secretary with insurmountable difficulties.

Plaintiff Johnson's nomination by the national Libertarian Party was ratified by the LPM on June 2, 2012 and timely forwarded to the Secretary pursuant to Michigan law. Rockman-Moon Decl., RE 6-4, ¶ 5, Page ID # 382-383. Plaintiffs filed suit against the Secretary seeking an immediate preliminary injunction "prohibiting the Secretary from refusing to place Johnson's name on the general election ballot" and "prohibiting the Secretary from applying the sore loser law to candidates for president" three weeks later on June 25, 2012. Complaint, RE 1, Page ID # 1-9. They filed a dispositive motion seeking preliminary and permanent relief placing "Gary Johnson on the ballots for the November 6, 2012 election" on August 2, 2012. Mot. for Summ. Judg., RE 6, Page ID # 356-373. Because the court set a motion hearing for March 13, 2013, Plaintiffs moved to expedite the proceedings on August 19, 2012. Mot. to Expedite, RE 9, Page ID # 491-497.

The Secretary opposed Plaintiffs' motion to expedite. RE 12, Page ID # 511-552. A hearing was not held on the motion to expedite until August 30, 2012. RE (Minute Entry) following RE 14. A hearing on Plaintiffs' dispositive motion was not held until September 6, 2012. RE (Minute Entry) following RE 24. The District Court denied preliminary and permanent relief the following day, on

September 7, 2012, and Plaintiffs appealed the same day. Op. and Order, RE 25, Page ID # 922-946; Notice of App., RE 27, Page ID # 948-949. Because it made a factual error concerning whether John Anderson had been allowed to withdraw from Michigan's ballot in 1980,³ the District Court *sua sponte* amended its September 7, 2012 Opinion and Order on September 10, 2012. Am. Op. and Order, RE 28, Page ID # 950-974.

The next day, on September 11, 2012, Plaintiffs moved this Court for an emergency injunction placing Gary Johnson's name on the ballot and asked that the proceedings be expedited. On September 12, 2012, after receiving the Secretary's response incorrectly claiming that ballots had to be immediately printed pursuant to federal law and another federal court's order, this Court denied Plaintiffs' request for emergency relief. Plaintiffs moved for reconsideration that same day, pointing out that this Court had mistakenly concluded that Plaintiffs did not initially seek emergency relief in the District Court and that the Secretary had deliberately misrepresented both federal law and the federal court order she relied upon. On September 13, 2012 this Court declined to alter its order of September 12, 2012.

The Secretary, in an effort to convince the District Court and this Court that time is of the essence, misrepresented that she is bound by federal law and by a

³Anderson, like Johnson here, had not been allowed to withdraw. The District Court incorrectly asserted in its September 7, 2012 Opinion and Order that he had been allowed to withdraw by the Michigan Supreme Court.

federal court order in *United States v. Michigan*, No. 12-788 (W.D. Mich., Aug. 6, 2012) to print ballots for overseas voters by September 22, 2012. Neither representation is true. The Stipulated Order in that case says no such thing. The federal Military and Overseas Voter Empowerment (“MOVE”) Act, 42 U.S.C. § 1973ff-1(a)(7), does not even require printed ballots; it provides that states must supply blank absentee ballots to overseas voters 45 days before the general election (“Each state shall ___... in addition to any other method of transmitting *blank absentee ballots* in the State, establish procedures for transmitting by mail and electronically *blank absentee ballots*”) (emphasis added).⁴ See also 42 U.S.C. § 1973ff-2(c), the federal Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”).⁵ Thus, there is no rush to print the names of candidates on ballots

⁴MOVE also provides for a hardship exemption for state officials: “If the chief State election official determines that the State is unable to meet the requirement [to transmit ballots not later than 45 days before the election] with respect to an election for Federal office due to an undue hardship ..., the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection.” *Id.* Sec. 1973ff-1(g)(1).

⁵UOCAVA does *not* require candidates’ names on ballots. It requires only that ballots sent overseas allow voters to designate a candidate for each office on the ballot by *writing in* the name of the candidate or by *writing in* the name of a political party, in which case the ballot is counted for that party’s candidate. 42 U.S.C. 1973ff-2(c)(1). In the case of president and vice president, a vote for a named candidate or a vote by *writing in* the name of the political party counts as a vote for the electors supporting the candidate involved. 42 U.S.C. 1973ff-2(c)(2).

The MOVE Act, which was passed in 2009, made changes to UOCAVA but did not change its write-in requirement. The principal change is that states must now send “write-in absentee ballots, 42 U.S.C. 1973ff-2(c), to overseas voters 45

by September 22, 2012. Michigan is not required to print ballots with candidates' names by September 22, 2012 in order to comply with any law or court order.

The Secretary also asserted below that Plaintiffs have been dilatory in pursuing this action, and that somehow this has prejudiced her defense, a sentiment apparently shared by the District Court. However, as the chronology described above shows, the District Court's assessment of Plaintiffs' dedication is not correct. They have been timely and deliberate in pursuing this action. Much of the "delay," if there has been any, is attributable to the Secretary, the Intervenor, and scheduling delays in the District Court.

A comparison with similar Sixth Circuit cases affecting the contents of the general election ballot proves the point. For example, in *Schrader v. Blackwell*, 241 F.3d 783, 786 (6th Cir. 2001), suit was not filed until August 19, 1998. The plaintiff filed an amended complaint on September 1, 1998 and had preliminary relief awarded by the District Court on September 28, 1998. *Id.* The Secretary complied and Schrader ran as a Libertarian in the November 1998 election. No mention was made about laches, unreasonable delay, or the state's pressing need to immediately print its ballots.

In *Bogaert v. Land*, 543 F.3d 862 (6th Cir. 2008), to use another example,

days before each federal election and then provide a method to track the returned "write-in absentee ballots." By its terms, MOVE authorizes the use of blank "write-in absentee ballots."

suit was filed on July 18, 2008. A hearing on the plaintiff's motion for preliminary injunction was held on July 31, 2008, and the injunction requiring that the recall election rejected by the Secretary of State be included on the ballot was granted on August 27, 2008. *Id.* at 863. Again, nothing was said about unreasonable delay.

And in *Lawrence v. Blackwell*, 430 F.3d 368, 370 (6th Cir. 2005), suit was filed on June 14, 2004, a hearing was held on plaintiff's motion for preliminary injunction on August 4, 2004, and his motion was denied on August 18, 2004. Although plaintiff lost on the merits, there was no mention about any delay.

The truth is that ballot access challenges commonly come to court in the months (and sometimes weeks) leading up to the election. This is because facts are rarely final long beforehand. Only when state officials deny ballot access is a federal claim ripe for relief.

Of course, unreasonable delay can be inexcusable. But that is not what happened here. This action was filed two months before suit was filed in *Schrader*, one month before suit was filed in *Bogaert*, and just eleven days later than suit was filed in *Lawrence*. Plaintiffs on July 31, 2012, while they were preparing their motion for dispositive relief, were served with a motion to dismiss by the Secretary that included over 300 pages of exhibits. While attempting to prepare a response to this motion, Plaintiffs learned that on August 6, 2012 the District Court had set the hearing on their dispositive motion for March 13, 2013.

On August 16, 2012 Plaintiffs responded to the motion to dismiss, and three days later, on August 19, 2012, moved to expedite the proceedings. If there was unreasonable delay beyond this point, it was caused by the Secretary, who opposed the motion to expedite on August 22, 2012. Rather than agree to a timely briefing schedule, the Secretary's opposition delayed the proceedings. The District Court did not hold a telephone hearing on the motion to expedite until August 30, 2012 and did not set a full hearing on the dispositive motion until September 6, 2012.

CONCLUSION

For the foregoing reasons, the Court should issue an order declaring that Michigan's sore loser law is unconstitutional facially and as applied to Plaintiff Gary Johnson and other candidates for president, and directing the Secretary to name Gary Johnson and James P. Gray as the Libertarian Party candidates for President and Vice President of the United States on the November 6, 2012 ballots.

Respectfully submitted,

s/Gary Sinawski

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CERTIFICATE OF SERVICE (e-file)

I hereby certify that on September 10, 2012 I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

s/Gary Sinawski

Gary Sinawski

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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RE 8	Plaintiffs' Response to Defendant's Motion to Dismiss	423-442
RE 9	Plaintiffs' Motion to Expedite	491-497
RE 12	Defendant's Response to Plaintiffs' Motion to Expedite	511-521
RE 14	Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion to Expedite	544-546
RE 16	Defendant's Response to Plaintiffs' Motion for Summary Judgment	550-575
RE 20	Intervenor Defendant's Motion to Intervene	878-888
RE 21	Intervenor Defendant's Motion to Dismiss	889-912
RE 22	Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Summary Judgment	913-916
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