

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM GELINEAU; GARY E. JOHNSON;)	
And LIBERTARIAN PARTY OF MICHIGAN.)	
)	
)	
Plaintiffs,)	
)	
v.)	Case No. 1:12-CV-976
)	HON. PAUL L. MALONEY
RUTH JOHNSON, Secretary of State of)	
Michigan, in her official capacity.)	
)	
)	
Defendant.)	

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**REPLY BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING
ORDER AND PRELIMINARY INJUNCTION RELATED TO VICE PRESIDENTIAL
CANDIDATE JAMES P. GRAY**

Introduction

Before this Court is the issue of whether to count votes cast straight ticket for the Libertarian Party of Michigan (the “Libertarian Party”) as votes for its vice presidential nominee Judge James P. Gray (“Judge Gray”) and his slate of Electoral College electors. Secretary of State Ruth Johnson (the “Secretary”) has raised practical, mechanical, and cost-related issues with altering the November 6, 2012 ballots. Due to these concerns, **Plaintiffs now focus exclusively on the issue of counting straight ticket votes.**

On November 6, 2012—and sooner for those voting by mail—Michigan voters will be presented with a check box that allows them to vote straight ticket for the Libertarian Party. Michigan law states that if votes are cast straight ticket, they are counted for that political party's candidates. Mich. Comp. Laws § (“MCL”) 168.804. And state law says that votes for a political party in a presidential / vice presidential election are actually counted for its slate of electors to the Electoral College. MCL 168.45. Judge Gray is the Libertarian Party's properly nominated candidate for the vice presidency. Under state law, a vote for the Libertarian Party should be counted as a vote for Judge Gray / Judge Gray's slate of Electoral College electors.

Refusing to count those votes clearly places a burden on the Plaintiffs' constitutional rights. And because state law does not even permit such conduct by the Secretary, she cannot possibly justify the burden under the *Anderson / Burdick* test. This issue is before the Court on a request for a TRO or preliminary injunction to ensure that Libertarian Party votes are properly counted. After the election, the Secretary may report difficulty in determining the exact number of straight ticket votes for the Libertarian Party—and specifically, the number of straight ticket votes that were not cast as a “split ticket” vote that voted for another party's president and vice presidential nominees—unless ordered to take action now.

At the very least, the Court should order the Secretary to ensure that straight ticket Libertarian Party votes are counted—even if counted separately—such that the data is retained and vote totals can be updated after the election upon order of this Court. For a minor party, the vote totals themselves, and not just winning the election, is extremely important and impacts campaign finance, ballot access, and the party's ability to influence public policy.

The Secretary raises a series of procedural arguments in an attempt to avoid a decision on the merits of her refusal to count straight ticket votes for Judge Gray. These

procedural arguments suffer from two key and fatal flaws. First, because vote counting occurs after the election, any delay in bringing this case related to the prejudice of ballot-printing deadlines is irrelevant and certainly doesn't prejudice the Secretary, who will already be required to count votes. Second, no court has yet decided the issues related to Judge Gray.

ARGUMENT

I. The Secretary's decision not to count votes is not supported by state law, and she cannot justify the burden she is placing on the Plaintiffs' constitutional rights.

The Secretary is making this issue seem more complicated than it is. It is undisputed that the Libertarian Party is a ballot-qualified political party entitled to nominate a candidate for the vice presidency. It is undisputed that the Libertarian Party complied with the procedural requirements of the law as it relates to Judge Gray. The Secretary has not claimed that Judge Gray himself is not a valid vice presidential candidate. Instead, she argues that "no eligible presidential candidate has selected James P. Gray as his running mate." Br. at 16. The statute that both sides rely on provides that the party nominates its vice presidential candidate; it does not add a requirement that an eligible presidential candidate select the vice president. *See* MCL 168.686.

The Secretary also invokes a creative reading of the statute: because the party nominates the candidates together ("President of the United States and vice-president of the United States"), one cannot be on the ballot without the other.¹ But this reading is not supported by other statutes that refer to the Secretary of State and Attorney General of Michigan being nominated and elected together. *See, e.g.*, MCL 168.72, 168.73, 168.76. But these are clearly different offices held by different persons.

¹ Of course, the Secretary does treat them as separate offices and line items on the official candidate listing: http://miboecfr.nictusa.com/election/candlist/12GEN/12GEN_CL.HTM

There is a common sense reason to bunch president and vice president on the ballot together, which is that voters are really casting a vote for a slate of electors who will attend the Electoral College if their candidate wins. *See, e.g.,* MCL 168.41 *et seq.* It is really one slate of electors that voters are picking, even if voting both president and vice president in one vote. *Id.* But voters can still cast their vote for Judge Gray’s slate of electors without a presidential candidate, as his electors have already been certified and submitted. Under Michigan law, a vote marked “under the party name of a political party” is ultimately counted as a vote for the slate of “electors chosen by that political party.” MCL 168.45. What voters do by voting straight ticket Libertarian Party is cast votes for Judge Gray’s Electoral College electors, and that vote should be counted. Counting these votes does not undermine the orderly election process.

Ultimately, the Secretary’s arguments boil down to this: because she excluded Judge Gray, she doesn’t need to count votes for him. But she has no valid underlying reason for excluding Judge Gray. She does not have a state law to rely on that can justify the burden placed on Plaintiffs’ constitutional rights. And simply counting votes will not disrupt the orderly process of the election.

II. Counting straight ticket votes is an appropriate remedy that will not confuse voters and serves the public interest

The Secretary argues that straight ticket votes cannot be counted because Libertarian Party voters will be confused when they do not see Judge Gray’s name on the ballot. While the Secretary’s sudden concern for the Libertarian voters she disenfranchised is heartwarming, her concern lacks merit. As the Secretary knows, nobody will be forced to vote straight ticket. If a voter casts a “split ticket” vote—voting straight ticket Libertarian but checking the box of another ticket, such as Romney / Ryan, then no straight ticket vote would be counted for any Libertarian in that race. **This motion addresses only those people who will**

vote straight ticket Libertarian Party without attempting to cast a vote for a different presidential or vice presidential ticket. Unless their vote is counted for Judge Gray, their vote will not be counted at all. Nothing in the Secretary's response indicates otherwise. And nothing the Secretary has submitted shows that these individuals will be confused if their straight-ticket Libertarian Party vote is counted as a vote for the Libertarian Party's nominee. The confusion at issue involves something that happens after the vote is cast—it's not confusion about the form of the ballot itself.

Moreover, any confusion is a product of Johnson's unlawful conduct. Libertarian Party voters are likely to be informed and motivated voters—a straight ticket Libertarian vote is an intentional, as opposed to default, choice. To the extent the Court is concerned about voter confusion, the Court should order the Secretary to separately count all straight ticket Libertarian Party votes. After the election, the Court could then conduct an evidentiary hearing or trial on the merits and the parties could present voter testimony on confusion. A pre-election order is necessary, though, because without such an order, the Secretary may not count these straight ticket votes separately and could come back before the Court arguing that the data was not preserved and could not be obtained except at a high cost. Counting votes is in the public interest and, at the very least, retaining the data to allow votes to be counted is in the public interest.

III. What prejudice does the Secretary face in counting votes?

Laches requires both unreasonable delay and prejudice caused by the delay. *Brown-Graves Co. v. Central States*, 206 F.3d 680, 684 (6th Cir. 2000). The Secretary's argument on laches is heavy on argument about Plaintiffs' unreasonable delay and fixates on the printing of ballots. Even accepting the Secretary's point that lawsuits related to exclusion of a candidate should be brought before the Secretary excludes the candidate from the ballot due to

time constraints on printing (and thus when the claim is not ripe), those same time constraints do not apply to counting votes. The Secretary has not yet started counting votes and certainly will have time to comply with an order from this Court on counting straight ticket votes. Any delay in presenting the straight ticket issue is not unreasonable in relationship to when the counting will begin.²

The Secretary has not identified how she will be prejudiced by counting votes or at least conducting a preliminary vote tally using the straight ticket votes and preserving this data for a trial on the merits. The Secretary has not alleged that counting straight ticket votes will impose an extra cost or burden on the government or disenfranchise overseas soldiers. Counting votes after the election will not delay the election. The Secretary cannot identify any prejudice in counting votes, and the Court should not indulge a laches argument on vote counting merely because ballots are already printed.

IV. The Secretary's other procedural arguments are meritless.

The Secretary's procedural arguments are meritless when viewed within the context of the relief the Plaintiffs' request—counting straight ticket votes as votes for Judge Gray. The issue of whether to count votes is not moot, was not decided by this or any other court, and is not frivolous.

A. This case is not moot because the Court can order votes counted.

The Secretary argues that this case is moot because the Court “cannot grant any effectual relief whatever.” Br. at 3 (citing *Calderon v. Moore*, 518 U.S. 149, 150 (1996)). It is absurd to argue that an election case is moot before the election even happens. The Secretary's

² On this particular issue, Plaintiffs cannot say the Secretary created her own mess like the murderer who killed his parents and asks for mercy because he is an orphan. The Secretary is not really an “orphan” here because counting votes simply does not prejudice her.

arguments have to do with how ballots are printed and ballots that have already been distributed. But Plaintiffs ask the Court to require the Secretary to *count* votes cast on those very ballots. So long as there is still time to *count* and/or *report* votes, the Court obviously has authority to grant effectual relief.

Counting votes matters, even if Judge Gray doesn't win. If the Johnson-Gray ticket wins 5% of the vote nationally, it will entitle the 2016 Libertarian Party candidate to millions of dollars.³ Polls have put Johnson-Gray at 6%, 5.3%, and 4.3% nationally.⁴ The polls indicate that the race will be close enough that this Court's decision will have an impact. Moreover, the affidavits submitted in connection with this motion state that the number of votes received by the Libertarian Party (as reported by the Secretary) impacts the ability of Plaintiffs to influence public policy. The more votes Libertarians receive, the more they matter and their issues need to be paid attention to. Furthermore, although the Secretary points out that *other* candidates can also count towards ballot access requirements, she does not dispute that Judge Gray's election showing can impact the Libertarian Party's future ballot access if his vote totals are high enough. Finally, for a voter like Plaintiff William Gelineau, the issue of counting his vote and vindicating his voting rights is simply not moot—he cares whether or not his vote is counted, and this Court has authority to grant relief to him.

B. Res judicata does not apply.

The Secretary argues that *res judicata* from the Eastern District of Michigan decision finding that Governor Gary Johnson was a sore loser bars the issue of whether straight ticket votes for Judge Gray should be counted. As the Secretary sets forth, *res judicata* requires

³ Although the statute at issue, 26 U.S.C. § 9004(a)(3), addresses the presidential ticket, Plaintiffs have reason to believe that votes for Judge Gray and his slate of electors would be counted towards this total.

⁴ Poll: Gary Johnson rakes in six percent of the vote. <http://dailycaller.com/2012/09/21/poll-gary-johnson-rakes-in-six-percent-of-the-vote/> (The Daily Caller, Sept 21, 2012).

that “both actions involve the same parties or their privies” and “the matter in the second case was, or could have been, resolved in the first.” *Gose v Monroe Auto Equip Co*, 409 Mich 147, 162-63; 294 NW2d 165 (1980).

This case involves different parties and different legal issues than the Eastern District case. The Secretary cites no cases finding privity between the different types of Plaintiffs here because such privity would have to be based only on their shared political affiliation. Moreover, even if privity existed, the issue of whether to count straight ticket votes for Judge Gray was not and could not have been raised in the earlier case. That case was dismissed before the Secretary ever decided to exclude Judge Gray or gave any indication that she would not count straight ticket Libertarian Party votes. This issue was not ripe.

“[R]es judicata does not apply to claims that were not ripe at the time of the first suit.” *Rawe v Liberty Mut Fire Ins. Co.*, 462 F.3d 521, 529-30 (6th Cir. 2006) (citing *Katt v Dykhouse*, 983 F.2d 690, 693-694 (6th Cir. 1992)). This includes claims based on conduct that occurs after the filing of the previous complaint. *Rawe*, 462 F.3d at 529 (“Simply put, [a plaintiff] could not have asserted a claim that [he or she] did not have at the time.”).

The nomination of Judge Gray did not involve an “unorthodox” maneuver.⁵ Judge Gray’s candidacy was not contingent on the Secretary accepting Governor Johnson, Gary E. Johnson, or anybody else. He was the only vice presidential nominee of a party entitled to have a vice presidential candidate. No state law stood in his way or created any uncertainty. Moreover, there was no determination by the Secretary that the Libertarian Party would not have

⁵ If the Court is concerned about the orthodoxy of such a maneuver, it should grant a temporary order counting ballots and take telephonic testimony from ballot access expert Richard Winger at an evidentiary hearing. Mr. Winger could testify about Michigan placing ineligible presidential candidates on the ballot, permitting “unpledged electors” that ran as a party and not under any candidates name, and numerous instances where a presidential and vice presidential candidates did not run as a single ticket on state ballots.

any presidential candidate to even generate uncertainty about a vice presidential candidate. Judge Gray was nominated in compliance with all state laws, and a theoretical dispute—a complaint that the Secretary *would in the future* exclude Judge Gray notwithstanding his full compliance with state law—would have been tossed out of federal court as unripe, premature, and premised exclusively on the belief that the Secretary would act in a partisan and unlawful manner in the future.

C. There is no “law of the case” regarding Judge Gray or straight ticket voting to apply.

The Secretary suggests that Plaintiffs are trying to circumvent rulings on Judge Gray, although the Secretary apparently cannot find language to quote from any ruling that denies the legitimacy of Judge Gray as a vice presidential candidate or says that straight ticket votes should not be counted for him. Plaintiffs did present the issue of Judge Gray’s candidacy, but until this point the Secretary refused to brief it and no court has addressed Judge Gray. There is no law of the case to apply.

D. Plaintiffs should not be enjoined against future litigation.

Finally, the Secretary seeks the extreme and shocking measure of banning a political party from filing future lawsuits. Such an extreme remedy would violate the Plaintiffs’ constitutional rights. Moreover, the Secretary’s purported basis—that Plaintiffs’ claims lack any legal merit—is undermined by the fact that the Secretary felt the issues were so complicated as to seek leave from the Court to file excess pages. The issues presented in this motion and this case are important and meritorious, and the Secretary should not be permitted to bar candidates from a rival political party from the ballot, refuse to count their votes, and shut them out from the Court all at the same time.

CONCLUSION

For these reasons, the Plaintiffs respectfully request that the Court enter a temporary restraining order and/or preliminary injunction:

- Ordering that straight ticket votes cast for the Libertarian Party be counted as votes for James P. Gray for vice president or Gary E. Johnson for president / James P. Gray for vice president; and/or
- Ordering that the Secretary record and preserve the number of straight ticket vote for the Libertarian Party pending further disposition by the Court.

Respectfully submitted,

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