UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM GELINEAU; GARY JOHNSON; and LIBERTARIAN PARTY OF MICHIGAN,

Plaintiffs,

v

RUTH JOHNSON, Secretary of State of Michigan, in her official capacity,

Defendant.

No. 1:12-CV-976

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BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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INTRODUCTION

> [T]he time element is now short and the ponderous [state] election machinery is already under way, printing the ballots. Absentee ballots have indeed already been sent out and some have been returned. The costs of reprinting all the ballots will be substantial and it may well be that no decision on the merits can be reached by the Court of Appeals in time to reprint the ballots excluding petitioners, should they lose on the merits. . . . I must deny the injunction, not because the cause lacks merit but because orderly election processes would likely be disrupted by so late an action. The time element has plagued many of these election cases; but *one in my position cannot give relief in a responsible way when the application is a[s] tardy as this one*.
>
> *Westermann v. Nelson*, 409 U.S. 1236, 1236 (1972) (Douglas, J., denying request for injunction) (emphasis added).

Justice Douglas' observations from 1972 apply equally to the facts of this 2012 dispute. Plaintiffs William Gelineau, Gary E. Johnson, and the Libertarian Party of Michigan (collectively, Plaintiffs) move for a temporary restraining order and a preliminary injunction: (1) ordering Michigan Secretary of State Ruth Johnson to include James P. Gray as the Libertarian Party's vice presidential candidate on the November 2012 general election ballot; or (2) mandating that the Secretary of State count straight ticket Libertarian votes as ballots cast for Gary E. Johnson and James P. Gray, whether or not these candidates appear on the ballot. (R. 20, Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction 9/27/2012, at 15.) One of many problems, as in *Westermann*, is that ballots have already been printed and sent to military and overseas voters and local jurisdictions have already commenced the process of printing more than 7,000,000 paper ballots for the November general election. That these events are taking place while Plaintiffs' lawsuit is pending is solely because Plaintiffs have failed to act in a timely fashion.

The Secretary of State respectfully requests that this Court deny Plaintiffs' request for injunctive relief for five fundamental reasons:

1. *First*, in accordance with decisions of this Court and the Federal District Court for the Eastern District of Michigan, ballots have already been sent to military and overseas voters without Gary E. Johnson and James P. Gray's names on them. Moreover, the printing of more than 7,000,000 of these same ballots for the general election has begun in jurisdictions statewide. Accordingly, Plaintiffs' claims are now moot.

2. *Second*, as both this Court and the Court of Appeals for the Sixth Circuit have already denied Plaintiffs' requests for injunctive relief to place Gary E. Johnson and James P. Gray on the ballot, Plaintiffs' request for identical relief is precluded by the law of the case doctrine.

3. *Third*, as this Court has already recognized, Plaintiffs have unreasonably delayed in raising their time-sensitive request to place Gary E. Johnson and James P. Gray on the ballot, triggering the equitable defense of laches.

4. *Fourth*, for the related reason that Plaintiffs could have but did not raise their claims in prior litigation in the Federal District Court for the Eastern District of Michigan, Plaintiffs' claims are barred by *res judicata*.

5. And *fifth*, Plaintiffs' alternative demand that straight ticket votes for the Libertarian Party be counted toward candidates whose names do not appear on the ballot is wholly unsupported by law and common sense and would itself present major constitutional issues.

ARGUMENT

I. Plaintiffs do not satisfy the factors necessary for this Court to grant injunctive relief.

A. Standard of Review

In deciding whether injunctive relief is warranted, four factors are considered: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of an injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002).

B. Analysis

1. Plaintiffs will not succeed on the merits because their claims are moot, barred by the law of the case, laches, and *res judicata*, and have no support in law or common sense.

a. Plaintiffs' claims are moot because ballots have already been sent to military and overseas voters and the printing of more than 7,000,000 paper ballots for the November election has already commenced statewide.

Federal courts lack jurisdiction to consider moot questions. *Calderon v. Moore*, 518 U.S. 149, 150 (1996). A claim is moot, and must therefore be dismissed, if "by virtue of an intervening event, a court . . . cannot grant 'any effectual relief whatever' in favor of the [plaintiff]." *Id*. (internal citations omitted).

Plaintiffs concede that overseas and military ballots have already been distributed, yet claim that time remains to modify the paper ballots to be used on Election Day. (R. 20, Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction 9/27/2012, at 15.) Plaintiffs are incorrect—all Michigan counties have been approved

to print the more than 7,000,000 ballots necessary for the November 6, 2012 election, and printing of these paper ballots has already commenced. (Thomas Aff., Ex. 1, at ¶[x].) Indeed, Plaintiffs' requested injunction cannot issue because ballots have already been printed and distributed and cannot now be modified to include Gary E. Johnson's or James P. Gray's names. Because no effectual relief can be granted to them, Plaintiffs' claims are moot and this Court lacks jurisdiction to adjudicate them. *Calderon*, 518 U.S. at 150.

The Secretary of State certified the contents of Michigan's ballot on September 9, 2012. (Ex. 1, at ¶ 4.) The certified ballot does not list Gary E. Johnson as the Libertarian Party's candidate for president, nor does it include James P. Gray as his running mate. (Ex. 1, at ¶ 4; Sample MOVE Act Ballot, Ex. 2.) Immediately after certifying the ballot, the Secretary of State embarked on a massive, coordinated effort with Michigan's 83 counties, 1,035 local jurisdictions, and 4,900 precincts to have ballots approved, printed, and distributed to overseas voters by September 22, 2012—the deadline for ballots to be made available to military and absentee overseas voters under the federal MOVE Act, 42 U.S.C. §§ 1973ff-1(a)(8). In accordance with this deadline, more than 5,600 ballots have *already* been issued and transmitted to military and overseas voters, all without Gary E. Johnson or James P. Gray's names on them. (Ex. 1, at ¶ 12.) The ballots for every single Michigan county have been reviewed and approved by the Secretary of State, and by Monday, September 24, 2012, the Secretary of State had approved the last of these counties to print the more than 7,000,000 paper ballots necessary for the election. The printing of these ballots has commenced statewide. It is now impossible and cost-prohibitive to make further changes to the ballot. (Ex. 1, at ¶ 9.)

As in *Westermann*, Michigan's election machinery is at the point of no return. It cannot be that military and overseas voters choose from one set of candidates, while domestic, non-

military voters choose from another. Nor can it be that the general election does not take place on time because, as detailed below, Plaintiffs did not pursue their claim with diligence and at an earlier date. Because Plaintiffs' claims are moot, this Court should deny their request for injunctive relief.

b. Plaintiffs' claims are barred by the law of the case.

Even if ballots could somehow be modified after their printing and distribution, Plaintiffs' request for an injunction to place James P. Gray on the ballot is barred by the law of the case doctrine. "The law of the case doctrine generally discourages courts from reconsidering determinations that the court made in an earlier stage of the proceedings." *United States v. Graham*, 327 F.3d 460, 464 (6th Cir. 2003). The doctrine applies to any issue that has been decided on the merits, either explicitly or necessarily by implication. *Bowles v. Russell*, 432 F.3d 668, 676-77 (6th Cir. 2005). So long as a prior court's decision was based upon a rule of law, no rationale for the ruling is necessary for it to become the law of the case. *Id*. at 677.

The Libertarian Party of Michigan has pursued ballot access claims for its preferred Gary Johnson, its replacement Gary Johnson, and its vice presidential candidate James P. Gray in this Court, the Federal District Court for the Eastern District of Michigan, Court of Appeals for the Sixth Circuit, and the United States Supreme Court. (R. 1, Complaint 9/11/2012); (Complaint E.D. Mich. 6/252012, No. 2:12-cv-12782); (Plaintiff-Appellants' Motion Emergency Motion for Injunction Pending Appeal 9/18/2012, No. 12-2184); (Plaintiffs-Appellants' Emergency Motion for Injunction and Expedited Appeal 9/11/2012, No. 10-2175); (Petitioners' Application for Emergency Relief Submitted to Justice Kagan 9/13/2012, No. 12A260.)

Every court has denied Plaintiffs' requested injunctive relief. (R. 11, Western District of Michigan Opinion and Order Denying Motion for Injunctive Relief 9/17/2012); (Sixth Circuit

Order Denying Emergency Motion for Preliminary Injunction and Stay Pending Appeal, affirming Western District of Michigan's denial of injunctive relief), No. 12-2184, Sept. 19, 2012); (Sixth Circuit Order Denying Plaintiff-Appellants' Motion for Reconsideration, affirming Western District of Michigan's denial of injunctive relief, No. 12-2184, Sept. 21, 2012); *Libertarian Party of Michigan, et al. v. Ruth Johnson*, 2:12-cv-12782 (E.D. Mich. 9/7/2012) (Eastern District of Michigan decision denying Plaintiffs' request for injunctive relief); (Sixth Circuit Order Denying Motion for Emergency Injunction Pending Appeal, affirming Eastern District of Michigan's denial of injunctive relief, No. 12-2153, Sept. 12, 2012); (Sixth Circuit Order Denying Motion for Reconsideration, affirming Eastern District of Michigan's denial of injunctive relief, No. 12-2153, Sept. 13, 2012); (United States Supreme Court Order Denying Application for Stay and an Injunction, No. 12A260, Sept. 19, 2012.)

Plaintiffs have already brought their request for injunctive relief to place Gary E. Johnson and James P. Gray on the ballot—this Court denied that request and the Sixth Circuit twice affirmed. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012; Sixth Circuit Order Denying Emergency Motion for Preliminary Injunction and Stay Pending Appeal, No. 12-2184, Sept. 19, 2012; Sixth Circuit Order Denying Plaintiff-Appellants' Motion for Reconsideration, No. 12-2184, Sept. 21, 2012.) Plaintiffs' second request to have James P. Gray placed on the ballot is nothing more than an attempt to have this Court reconsider its prior decision and those of the appellate court, and their demand that straight ticket Libertarian Party votes be counted as ballots cast for Gary E. Johnson and James P. Gray is nothing more than an attempt to circumvent the consequences of this and the appellate court's binding rulings. The law of the case has been decided on these issues, and it must not be revisited.

Plaintiffs sought "a declaration that the Secretary must place Gary E. Johnson and James P. Gray on the ballot as the Libertarian Party's candidate for president and vice president; . . . [and] preliminary and permanent injunctions requiring the Secretary to place Gary E. Johnson and James P. Gray on the ballot as the Libertarian Party's candidate for president and vice president" for the first time on September 11, 2012. (R. 1, Complaint 9/11/2012, at 8.) This Court denied that request for relief on the merits.[1] (R. 9, Opinion and Order 9/18/2012, at 2.) Following this Court's decision, Plaintiffs extensively briefed the same issues before the Sixth Circuit. As they do here, Plaintiffs placed special emphasis on their position that James Gray should appear on the ballot without a companion presidential candidate. Indeed, Plaintiffs affirmed before the Sixth Circuit that they had raised the issue "in their complaint, in their trial briefing, and before this Court . . . ." (Reply to Defendant's Response in Opposition to Plaintiffs' Motion for Injunction Pending Appeal and to Expedite 12-2184, Sept. 19, 2012, at 2.) Like this Court, the Sixth Circuit rejected Plaintiffs' argument and declined to issue the requested injunctive relief. (Sixth Circuit Order Denying Motion for Emergency Injunction Pending Appeal, 12-2184, Sept. 19, 2012, at 2-3) (acknowledging that Plaintiffs' "seek to compel the Michigan Secretary of State to include Gary E. Johnson and James Gray on Michigan's ballots for the November 6, 2012, election" before denying Plaintiffs' motion and

[1] This Court specifically held:

> "[A] finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Nat'l Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000). This is no exception. Even assuming that the other three factors—irreparable injury, substantial harm to others, and the public interest—favor injunctive relief, the fact that Plaintiffs' claims are barred is dispositive here."

In a footnote, this Court concluded that its assumption was a generous one, because "[a]s the Sixth Circuit recently noted, the public has a strong interest in the orderly processing of elections." (R. 11, Western District of Michigan Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 10).

affirming this Court's denial of injunctive relief). Plaintiffs then moved for rehearing, again fully briefing—indeed, strictly relying upon—the issue of whether James Gray could appear on the ballot. (Motion for Reconsideration of Sixth Circuit Order 9/20/2012.) On consideration of Plaintiffs' motion, the Sixth Circuit affirmed its prior ruling. (Sixth Circuit Order Denying Plaintiff-Appellants' Motion for Reconsideration, No. 12-2184, Sept. 21, 2012.)

These prior decisions make the law of this case clear. Neither Gary E. Johnson nor James P. Gray can appear on Michigan's November general election ballot and, by implication, straight ticket votes cast for the Libertarian Party will not be counted as votes for these candidates. This is the law of the case which should not be disturbed, and is a compelling basis on which to deny Plaintiffs' renewed request for injunctive relief.

c. Plaintiffs' claims are barred by laches.

Even if the law of the case doctrine did not bar subsequent adjudication of Plaintiffs' requests for injunctive relief, this Court should not hesitate to apply its prior reasoning to Plaintiffs' identical request to find that Plaintiffs' claims are, at a minimum, barred by laches. As this Court has recognized, laches reflects the principle that "equity aids the vigilant, not those who slumber on their rights." *Lucking v. Schram*, 117 F.2d 160 (6th Cir. 1941). Laches bars a plaintiff's action if: (1) the plaintiff delayed unreasonably in asserting his rights; and (2) the defendant is prejudiced by this delay. *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F.3d 680, 684 (6th Cir. 2000).

Laches can and should be applied in the context of time-sensitive election claims. Indeed, it is particularly well established in this Circuit that plaintiffs bear the burden to expeditiously press election cases in a way that underscores the seriousness of their purported injury and prevents prejudice to the defendant. *Kay v. Austin*, 621 F.2d 809, 813 (1980) (holding

that the plaintiff's eleven day delay in filing his elections-based suit disentitled him to equitable relief); *McNeilly v. Terri Lynn Land*, No. 1:10-cv-612 (W. Mich., filed July 22, 2010) (denying relief to a plaintiff who failed to pursue his November elections claim until June 28, 2010 because "[w]hether based on laches, as argued by Defendant, or merely the fair and efficient administration of justice, the Court finds no basis in the facts or the law to accommodate what is essentially Plaintiff's 'self-made election emergency.'"). As this Court has already recognized, Plaintiffs in this case have done neither. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012.)

In its Order denying Plaintiffs' first request for injunctive relief to place Gary E. Johnson and James P. Gray on the ballot, this Court went into great detail regarding Plaintiffs' deplorable delay in bringing their claims. This Court held that the Libertarian Party of Michigan was without excuse for suing the Secretary of State in the Eastern District of Michigan over her decision to exclude its preferred Gary Johnson from the ballot, yet neglecting to raise in the same proceeding the question of whether its replacement Gary Johnson (and, by necessary implication, his running mate James P. Gray) could appear instead. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 6.) This Court held similarly with regard to Plaintiffs William Gelineau and Gary E. Johnson, concluding that they too should have intervened in the Eastern District litigation to ask the same question. (R. 11, Opinion and Order Denying Motion for Injunctive Relief, 9/17/2012, at 7.) This Court further concluded that Plaintiffs' dilatory conduct in failing to file suit earlier caused prejudice to the Secretary that was "abundantly clear." (R. 11, Opinion and Order Denying Motion for Injunctive Relief, 9/17/2012, at 7.)

The conclusion that laches bars Plaintiffs' request for injunctive relief to place James P. Gray on the November ballot has already been decided. It makes no difference that this Court

dedicated its reasoning to Plaintiffs' unreasonable delay in raising their claims regarding Gary E. Johnson, because this Court summarily held that Plaintiffs should have raised *all of their claims*, including those about James P. Gray, before the Eastern District of Michigan. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 11) (denying injunctive relief.) Yet even if this Court has not expressly decided it, it is plain that if laches barred Plaintiffs' request for injunctive relief to place Gary E. Johnson's name on Michigan's general election ballot, so too does it bar Plaintiffs' request to place James P. Gray's name thereon, or to have straight ticket Libertarian Party votes count for either or both candidates.

In their attempt to deflect the bar of laches the first time they sought injunctive relief before this Court, Plaintiffs strenuously argued that they could not have raised the issue of whether their replacement Gary Johnson could appear on the ballot in lieu of their preferred Gary Johnson any earlier because that claim was contingent on the Eastern District judge's decision on the constitutionality of Michigan's sore loser law and was not ripe until the Eastern District judge reached his decision. This Court found Plaintiffs' argument "utterly unconvincing." (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 6-7.)

If Plaintiffs' arguments regarding their inability to intervene in the Eastern District to ask the Gary Johnson question were unconvincing, any arguments they raise in opposition to bringing their current questions before the Eastern District should be easily rejected. Both Gary Johnsons selected James P. Gray as their purported running mate. Plaintiffs' interest in having James P. Gray on the ballot was not contingent on the Eastern District judge's decision, because it existed always and equally, regardless of which Gary Johnson's candidacy hung in the balance.

In their present attempt to avoid the bar of latches, Plaintiffs argue that they received no explicit indication from the Secretary of State regarding whether James P. Gray could appear on

the ballot in November, and so their claims regarding his candidacy were not ripe to raise in the Eastern District. (R. 20, Plaintiffs' Brief in Support of Motion for Temporary Restraining Order and Preliminary Injunction 9/27/2012, at 3) (citing Gelineau Aff., Plaintiffs' Ex. 1, at ¶¶ 7-11.) Yet when Plaintiffs raised this same argument regarding their replacement Gary Johnson, this Court found that Plaintiffs' uncertainty only *reinforced* their unreasonableness in not bringing suit sooner. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 9 (rejecting Plaintiffs' argument that their delay in filing suit was the Secretary of State's fault because she "did not inform them of her stance on Gary E. Johnson until September 7" and holding instead that Plaintiffs' unorthodox attempt to nominate a contingent presidential candidate, "[c]ombined with the Secretary's failure to respond to these inquiries . . . would have induced a reasonable party to file suit well before [Plaintiffs did]).) Plaintiffs' desire to have James P. Gray run alone as a vice presidential candidate is at least as unorthodox as their request to run a contingent presidential candidate—indeed, in all of Plaintiffs' briefs so far, they have only identified one circumstance, in a different state, in which this has happened. Combined with their apparent uncertainty as to the Secretary's stance on whether James P. Gray could run on the ballot, the oddity of Plaintiffs' proposition should have compelled them to file suit sooner. One of Plaintiffs better arguments, then, becomes not a mitigating factor in favor of granting Plaintiffs relief, but an aggravating circumstance making the case for laches more compelling.

So too with Plaintiffs' request that straight-ticket votes for the Libertarian Party of Michigan should still be counted as votes for precluded candidates whose names have not appeared on the ballot. If Plaintiffs should have been comprehensive in raising contingent arguments before the Eastern District such as whether their replacement Gary Johnson could appear on the ballot in case their preferred Gary Johnson could not, R. 11, Opinion and Order

Denying Motion for Injunctive Relief 9/17/2012, at 9, so too should they be held accountable for neglecting to ask the more natural question of what fate would befall either Gary Johnson's running mate in the event the presidential candidate with whom he was supposed to run was excluded from the ballot.

In sum, Plaintiffs' request for injunctive relief to place Gary E. Johnson and James P. Gray on the November ballot has been heard and rejected by this Court and the Sixth Circuit. Under the law of the case doctrine, Plaintiffs should not be able to re-litigate this issue or request this Court to undermine its consequences by ruling that straight ticket votes for the Libertarian Party will nonetheless count toward these candidates. Yet even if this Court does not apply the law of the case, it can and should again hold, once again, that laches bars Plaintiffs' claims.

d. Plaintiffs' claims are barred by *res judicata*.

Res judicata presents another, related basis on which to deny Plaintiffs' request for emergency injunctive relief. Plaintiffs have sought injunctive relief to place their desired candidates on the ballot in four separate courts. (R. 1, Complaint 9/11/2012); (R. 1, Complaint E.D. Mich. 6/252012, No. 2:12-cv-12782); (Plaintiff-Appellants' Motion Emergency Motion for Injunction Pending Appeal 9/18/2012, No. 12-2184); (Plaintiffs-Appellants' Emergency Motion for Injunction and Expedited Appeal 9/11/2012, No. 10-2175); (Petitioners' Application for Emergency Relief Submitted to Justice Kagan 9/13/2012, No. 12A260.) They have been denied their requested relief seven times. (R. 11, Western District of Michigan Opinion and Order Denying Motion for Injunctive Relief 9/17/2012); (Sixth Circuit Order Denying Emergency Motion for Preliminary Injunction and Stay Pending Appeal, affirming Western District of Michigan's denial of injunctive relief), No. 12-2184, Sept. 19, 2012); (Sixth Circuit Order Denying Plaintiff-Appellants' Motion for Reconsideration, affirming Western District of

Michigan's denial of injunctive relief, No. 12-2184, Sept. 21, 2012); *Libertarian Party of Michigan, et al. v. Ruth Johnson*, 2:12-cv-12782 (E.D. Mich. 9/7/2012) (Eastern District of Michigan decision denying Plaintiffs' request for injunctive relief); (Sixth Circuit Order Denying Motion for Emergency Injunction Pending Appeal, affirming Eastern District of Michigan's denial of injunctive relief, No. 12-2153, Sept. 12, 2012); (Sixth Circuit Order Denying Motion for Reconsideration, affirming Eastern District of Michigan's denial of injunctive relief, No. 12-2153, Sept. 13, 2012); (United States Supreme Court Order Denying Application for Stay and an Injunction, No. 12A260, Sept. 19, 2012.)

As this Court has already recognized, Plaintiffs could have brought their current claims in litigation already ongoing in the Eastern District of Michigan, yet chose not to. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 6-7.) *Res judicata* is invoked to put a stop to exactly this kind of "endless litigation, vexation, and confusion for the litigants, ineffective use of judicial resources," and "multiple lawsuits." *City Communications, Inc v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989) (citing *Rogers v. Colonial Federal Savings & Loan Ass'n*, 405 Mich. 607, 615 (1979)); *Hutcherson v. Lauderdale County, Tennessee*, 326 F.3d 747 (6th Cir. 2003).

Federal courts generally look to state law to inform their decisions on whether *res judicata* or other substantive doctrines apply. Since 1980, Michigan has followed a broad application of *res judicata*. In Michigan, *res judicata* "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was or could have been, resolved in the first." *See, e.g., Gose v. Monroe Auto Equip Co.*, 409 Mich. 147, 162-163 (1980). Each of these elements is present here, strongly supporting the application of *res judicata*.

i. The prior action was decided on the merits.

First, the prior action in which Plaintiffs could have brought their instant request for injunctive relief was decided on the merits. On September 6, 2012, the Federal District Court for the Eastern District of Michigan ruled from the bench that the case for laches barring the plaintiffs' claims was compelling and, in any event, that the Secretary of State's decision not to certify the Libertarian Party of Michigan's preferred Gary Johnson's name for the general election ballot easily passed constitutional muster. (E.D. Mich. Minute Entry: Motion Hearing Held on Defendant Secretary of State's Motion to Dismiss, GRANTED, Sept. 6, 2012.) The District Court issued a written opinion to the same effect the following day. *Libertarian Party of Michigan, et al. v. Ruth Johnson*, 2:12-cv-12782 (E.D. Mich. 9/7/2012).

ii. Both actions involved the same parties or their privies.

Second, both actions involved the same parties or their privies. There is no dispute that the Libertarian Party of Michigan is a party to both suits. Although Plaintiffs William Gelineau and Gary E. Johnson were not plaintiffs in the Eastern District litigation, they had privity of interest with those that were. Michigan law has defined privity as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." *Sloan v. City of Madison Heights*, 425 Mich. 288, 295 (1986).

Here, Plaintiffs William Gelineau and Gary E. Johnson had an "identification of interest" with the Eastern District plaintiffs in having James P. Gray appear on the November ballot as the Libertarian Party's vice presidential candidate. *Sloan*, 425 Mich. at 295. As discussed above, both Gary Johnsons selected James P. Gray as their running mate. It was in the interest of the

Libertarian Party of Michigan, its purported presidential candidates, and the parties' supporters to have their chosen vice presidential candidate's name on the ballot.

iii. The instant action could have been brought in the prior litigation.

Finally, as this Court has already concluded, Plaintiffs' instant claims could easily have been brought and resolved in the Eastern District of Michigan without the need for the "endless litigation" and "multiple lawsuits" Plaintiffs have chosen instead to pursue. Put another way, there is no justifiable reason why Plaintiffs needed to switch forums to have related election issues decided by different judges and courts. Just as Plaintiffs could and should have raised in the Eastern District of Michigan the more attenuated issue of whether their contingent Gary Johnson could run instead of their preferred Gary Johnson, so too should Plaintiffs have raised the more obvious question of what impact the Eastern District of Michigan's decision on Gary Johnson's ballot standing would have on his running mate.

All criteria for *res judicata* being met, this Court should hold that this doctrine, if not also mootness, the law of the case, laches, and the arguments that follow, bar Plaintiffs' instant request for injunctive relief.

e. Plaintiffs will not succeed on their constitutional claims because Michigan law contemplates a unitary presidential/vice presidential ticket, and there is no basis for counting straight ticket votes in favor of candidates whose name do not appear on the ballot.

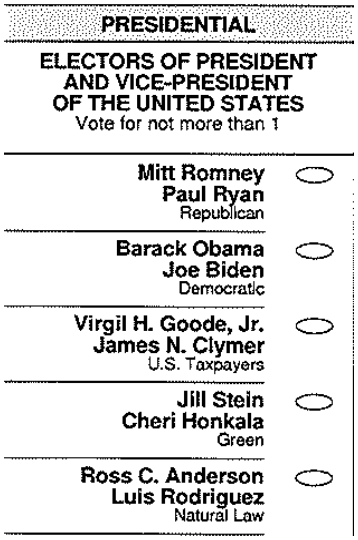
i. Michigan voters choose a president and his running mate as one, rather than voting separately for each office.

Even if this Court reaches Plaintiffs' constitutional claim that James Gray should appear on the ballot even absent a Libertarian Party presidential candidate, Plaintiffs are unable to

demonstrate the substantial likelihood of success on the merits necessary to warrant the extraordinary relief of a temporary restraining order or a preliminary injunction.

Indeed, there is no support, in law or common sense, for a vice presidential candidate to run on the ballot without a presidential companion. M.C.L. 168.686, which Plaintiffs cite in *support* of their claim, contemplates that political parties nominate presidential and vice presidential candidates together:

> In each presidential election year, the state central committee of each political party shall, not more than 1 business day after the state convention or the national convention of that party, whichever is later, forward to the secretary of state *the typewritten or printed names of the candidates of that party for the offices of president of the United States and vice-president of the United States* certified to by the chairperson and secretary of the committees. M.C.L. 168.695.


PRESIDENTIAL

ELECTORS OF PRESIDENT AND VICE-PRESIDENT OF THE UNITED STATES
Vote for not more than 1

Mitt Romney
Paul Ryan
Republican

Barack Obama
Joe Biden
Democratic

Virgil H. Goode, Jr.
James N. Clymer
U.S. Taxpayers

Jill Stein
Cheri Honkala
Green

Ross C. Anderson
Luis Rodriguez
Natural Law

In the same way, candidates for president and vice president are elected together, not separately. This much is clear from Michigan's already-printed ballots, which require voters to "[v]ote for not more than 1" combination of presidential nominee and vice presidential running mate. (*See* Ex. 2, a portion of which is pictured on right.) While Plaintiffs claim that presidential and vice presidential candidates are running for "separate offices," there is simply no way to vote for a vice president independent of his presidential companion. Put another way, the *only way* a voter can vote for the vice president of his choice is for him to vote for the presidential candidate who has chosen him as his running mate. Because no eligible presidential candidate has selected James P. Gray as his running mate, the pair of them will not appear on the ballot—Plaintiffs have offered no authority to the contrary.

ii. Plaintiffs would create, rather than alleviate, constitutional dilemmas by counting straight ticket votes toward candidates not listed on the general election ballot.

Perhaps anticipating that this Court will reject its request to place James P. Gray on the general election ballot, Plaintiffs dedicate a significant portion of their brief to the argument that even if their replacement Gary Johnson and his vice presidential candidate do *not* appear on the ballot, straight ticket Libertarian Party votes should still be counted toward their candidacy. Such a proposition is not only fraught with constitutional difficulties, but is wholly without legal or logical support. Moreover, federal courts—from those in the Eastern and Western Districts of Michigan all the way to the Supreme Court—have decided that the Libertarian Party of Michigan will not have candidates for president and vice president on the ballot in this election cycle. Plaintiffs' request that straight ticket votes would somehow be counted toward these candidates anyway is nothing more than an attempt to undermine these decisions and should be rejected as both inappropriate and frivolous.

The Secretary of State has a compelling interest in the orderly processing of the election, which includes the fulfillment of simple guarantees such as votes being counted for the person for whom they are cast. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (states have a compelling interest in preserving the integrity of the elections process) (citing *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1981)). Logically, a "straight ticket" vote for the candidates of one political party is just that—a vote for the party's candidates on the ballot. It is not a vote for a political party's "almost candidates," or those who might have appeared on the ballot had they brought suit in a more timely fashion. Counting straight ticket votes as votes for candidates whose names do not appear on the ballot undermines voters' legitimate expectations when they elect to vote a "straight ticket" and undermines federal courts' decisions that the Libertarian Party of Michigan cannot run their replacement Gary Johnson and James P. Gray as

presidential and vice presidential candidates. *See Timmons*, 520 U.S. at 364 (affirming that states have a compelling interest in preventing voter confusion).

Plaintiffs' appeal to this Court that straight ticket votes must be counted toward precluded candidates of the Libertarian Party in order to facilitate its future ballot access is misguided. MCL 168.685(6) provides that a political party's ballot access depends upon the proportion of votes received in the general election in favor of its "principal candidate," yet the statute defines "principal candidate" *not* as the party's vice presidential or presidential nominee, but as its "candidate who receives the greatest number of votes of all candidates of that political party for that election." MCL 168.685(6). Because the Libertarian Party of Michigan has other candidates on the general election ballot, it may use those candidates' success to guarantee its ballot access in the next election. A political party is also always guaranteed ballot access upon a showing of requisite support through the circulation of petitions. Mich. Compl. Laws 168.685(6).

In sum, for all of the reasons aforementioned, Plaintiffs will not succeed on the merits of their claims.

2. Plaintiffs will not be irreparably harmed absent an injunction because they have no legal right to have Gary E. Johnson on the ballot.

Plaintiffs are also unable to make showings on the three remaining factors federal courts typically consider in granting injunctive relief. It is axiomatic, for example, that because Plaintiffs have no authority to support the placement of a vice presidential candidate on the general election ballot without a presidential counterpart, and because they certainly cannot demonstrate entitlement to have straight tickets votes count toward candidates whose name are not listed on the ballot, they will suffer no harm—much less irreparable harm—if this Court

denies the extraordinary relief of their requested stay or injunction. Accordingly, this factor weighs heavily against this Court granting Plaintiffs relief. *See Neveux v. Webcraft Techologies, Inc*, 921 F. Supp. 1568, 1570-71 (E.D. Mich. 1996) (holding that although the court must balance four factors, plaintiffs must always demonstrate irreparable injury in order for a preliminary injunction to issue).

3. The issuance of an injunction will substantially injure the Secretary of State, the State of Michigan, and Michigan voters.

Conversely, the issuance of an injunction at this late date would substantially injure the Secretary of State, the State of Michigan, and Michigan voters. (Sixth Circuit Order Denying Emergency Injunctive Relief, No. 12–2153, Sept. 12, 2012, at 2.) Plaintiffs should have raised their claims regarding James P. Gray and straight ticket voting in the Libertarian Party of Michigan's related litigation in the Eastern District. When this Court previously held that laches barred Plaintiffs' request for the same injunctive relief Plaintiffs now seek again, the deadline for distributing ballots to military and overseas voters had not yet passed. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 5.) Still this Court concluded that "[t]he prejudice to the Secretary . . . [was] abundantly clear." (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 5.) In fact, this Court regarded the prejudice as plain *even if* Plaintiffs could prevail on the merits of their claims. (R. 11, Opinion and Order Denying Motion for Injunctive Relief 9/17/2012, at 6.)

The passage of time from this Court's order has only increased the injury that would result from this Court granting Plaintiffs' request for injunctive relief. The September 22, 2012 federal deadline for sending ballots to military and overseas voters has passed and more than 5,600 ballots have been already been printed and distributed to military and oversees voters in

compliance with the federal MOVE Act. (Ex. 1, at ¶ 12.) The printing of more than 7,000,000 domestic ballots has commenced and further changes to the ballot contents would be impossible and cost prohibitive. (Ex. 1, at ¶ 19.) In short, the prejudice of an injunction to the Secretary of State, and indeed to the entire elections process, all of its participants and the citizens of Michigan, is both inherent and impossible to understate.

4. The public interest lies in an orderly and on-time election in which only properly nominated candidates appear as nominees and absentee votes count.

In the ordinary case involving a request for injunctive relief, the parties discuss the first three factors and then perhaps make compulsory reference to the public interest being substantially aligned with the interest of one of the parties. But in an election case, the public interest is of paramount importance. As federal courts have continued to recognize in denying Plaintiffs' late-brought ballot access claims, the public has a compelling interest in the Secretary of State ensuring an orderly and timely election. *Libertarian Party of Michigan, et al. v. Ruth Johnson,* 2:12-cv-12782 (E.D. Mich. 9/7/2012) ("The plaintiffs could have pursued their cause more rigorously by filing suit at an earlier date. A state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent.") (citing *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000); (Sixth Circuit Order Denying Motion for Emergency Injunction Pending Appeal, affirming Eastern District of Michigan's denial of injunctive relief, No. 12-2153, Sept. 12, 2012) ("[T]he entry of injunctive relief at this late date, when the Secretary's intentions have long been clear, would cause substantial harm to the orderly processing of the election and would not serve the public interest."); (R. 11, Western District of Michigan Opinion and Order Denying Motion for Injunctive Relief 9/17/2012) (rejecting Plaintiffs' first request for injunctive relief to place Gary E. Johnson and James P. Gray on the

general election ballot because, *inter alia*, "[t]he Secretary—and by extension the people of Michigan—have a strong interest in managing the election process in an orderly manner.").

Michigan service members and those living overseas deserve to cast their ballots and have them counted. That is why federal law requires states to transmit such ballots overseas nearly two months before the election, and why Michigan has already complied with this mandate. (Ex. 1, at ¶ 12.) Crucially, Michigan voters have a clear interest in knowing that a straight ticket vote for the Libertarian Party is a vote for those qualified candidates they see listed on the ballot, not for persons about whom they may well know absolutely nothing. To protect all of these important interests, this Court should deny Plaintiffs' requested relief.

CONCLUSION AND RELIEF REQUESTED

Plaintiffs are not entitled to the extraordinary relief of a temporary restraining order or preliminary injunction. Plaintiffs will not succeed on the merits of their claims because their claims are moot, barred by the law of the case, barred by laches, precluded by *res judicata*, and lack underlying constitutional merit. As this Court has recognized, Plaintiffs' dilatory conduct throughout this litigation makes the prejudice of an injunction to the Secretary of State—and by extension the people of Michigan—abundantly clear. In sum, as in *Westermann*, this Court "cannot give relief in a responsible way when the application is a[s] tardy as this one." *Westermann*, 409 U.S. at 1236 (Douglas, J., denying request for injunction). For the reasons more fully explained herein, the Secretary of State respectfully requests that this Court deny Plaintiffs' requested relief.

In addition, the Secretary of State respectfully requests—in light of Plaintiffs' repeated filings of claims without demonstrable legal merit, that this Court would enjoin Plaintiffs from bringing any further lawsuits regarding the constitutionality of the Secretary of State's decision

to exclude Gary Johnson, Gary E. Johnson, or James P. Gray from the November general election ballot without prior approval by this Court. *See Pittman v. Michigan Corrections Organization*, No. 03-cv-71741 DT (E.D. Mich. 2005).

Respectfully submitted,

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Dated: October 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

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