

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LIBERTARIAN PARTY OF MICHIGAN,
GARY JOHNSON, and DENEEN ROCKMAN-
MOON,

Plaintiffs,

v.

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

Defendants.

REPUBLICAN PARTY OF MICHIGAN,

*Defendant-
Intervenor*

Civil No. 2:12:-CV-12782-PDB

Judge Paul D. Borman

INTERVENOR REPUBLICAN PARTY OF MICHIGAN'S MOTION TO DISMISS

Intervenor Republican Party of Michigan hereby moves that this Court dismiss the Complaint in this case under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. A memorandum of law in support of this Motion, as well as a proposed order, are attached.

On August 30, 2012, the undersigned counsel spoke with the Secretary of State's attorney and obtained concurrence in this motion. On September 4, 2012, the undersigned counsel attempted to contact Plaintiffs' counsel, but was unable to reach Plaintiffs' counsel to seek concurrence in this motion. Accordingly, the Michigan Republican Party has complied with L.R. 7.1(a).

Respectfully submitted,

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INTERVENOR'S MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS AND IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Both the facts and the law of this case are essentially undisputed. Gary Johnson affirmatively requested to run for the Republican nomination for President of the United States in Michigan's presidential primary, and lost that election. He now seeks to run for President in the general election as the Libertarian Party's nominee. Michigan's sore-loser law flatly prohibits individuals who unsuccessfully run in one party's primary from appearing on the general election ballot as a candidate of a different party. Mich. Comp. L. § 168.695.

The sore-loser law is constitutional, both on its face and as applied to Mr. Johnson. It places minimal burdens on the associational rights of the Libertarian Party and its members. The Party is free to nominate whomever it wishes as its candidate for President, except for the few dozen individuals who unsuccessfully sought another party's nomination for office in a primary earlier this year. The statute likewise places minimal burdens on the constitutional rights of Mr. Johnson, who was free to choose the party whose nomination he would seek, and remains free to run as an independent candidate for President. He cannot reasonably complain about being deprived of the opportunity to seek the nomination of two different parties in the course of a single election cycle. Because Michigan's sore-loser law does not impose a substantial burden on fundamental rights, it is presumptively valid and subject only to the equivalent of rational-basis scrutiny.

The law protects a variety of important state interests by reinforcing the separate functions and roles of primary and general elections. It helps ensure that essentially intra-party disputes are resolved at the primary stage, so that the general election may be reserved for major clashes of differing worldviews and political philosophies. The statute also helps to protect

against excessive factionalism and party splintering. These interests are no less important in the context of a presidential election than other types of races.

Courts repeatedly have upheld the constitutionality of sore-loser laws. *See, e.g., S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 759 (4th Cir. 2010); *Hooker v. Thompson*, 21 F. App'x 342 (6th Cir. 2001); *Cooley v. Keisling*, 45 F. Supp. 2d 818, 823 (D. Or. 1999); *Nat'l Comm'n of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 74-75 (W.D. Tex. 1996); *see also Storer v. Brown*, 415 U.S. 724, 735 (1974). Indeed, the Supreme Court has recognized the state's strong interest in preventing sore-loser candidacies. *Clingman v. Beaver*, 544 U.S. 581, 596 (2005); *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Storer*, 415 U.S. at 735. Thus, this Court should uphold both Michigan's sore-loser law and the Secretary's decision to exclude Mr. Johnson from the ballot, deny the Plaintiffs' Motion for Summary Judgment, and dismiss the Complaint.

STATEMENT OF MATERIAL FACTS

The undisputed facts demonstrate that, after unsuccessfully running in Michigan's presidential primary as a Republican, Gary Johnson now seeks to run in the general election as the Michigan Libertarian Party's candidate for the Presidency. The Secretary of State properly has decided to exclude Mr. Johnson from the ballot under Michigan's sore-loser law, Mich. Comp. L. § 168.695.

A. Gary Johnson's Candidacy in Michigan's Republican Presidential Primary

Michigan law provides that, in mid-November of the year before a presidential election, the Secretary of State must identify each "individual[] generally advocated by the national news media to be [a] potential presidential candidate[]" for a major political party's nomination.

Mich. Comp. L. § 168.614a(1). The Secretary must send a letter to each individual, *see id.* § 168.614a(3), cautioning that he or she will be included as a candidate on the applicable party's presidential primary ballot, unless he or she submits an affidavit "specifically stating that '(candidate's name) is not a presidential candidate'" by "no later than 4 p.m. on the second Friday in December." *Id.* § 168.615a(1). If the individual fails to submit an affidavit of withdrawal by the statutory deadline, "the secretary of state shall cause the name of [that] presidential candidate . . . to be printed on the appropriate presidential primary ballot." *Id.*

Throughout most of 2011, Gary Johnson actively campaigned throughout the nation to become the Republican nominee for President of the United States. Compl. ¶ 10. In November 2011, his campaign repeatedly contacted Michigan Secretary of State Ruth Johnson's office to ensure that Secretary Johnson would recognize Mr. Johnson as a candidate for the Republican presidential nomination. One letter stated:

Governor Gary E. Johnson is fully committed to running a national campaign seeking the Republican nomination for the office of President of the United States of America. Governor Johnson has traveled through more than 35 states in his ongoing efforts to spread his message, while seeking the Republican nomination. Governor Gary E. Johnson respectfully requests to be placed on Michigan's primary election ballot.

Letter from Grant K. Huihui, Campaign Scheduler, Gary Johnson 2012, to Secretary of State Ruth Johnson (Nov. 8, 2011), *attached as* Plaintiffs' Mot. for Summary Judgment ("Pl. S.J. Mot."), Ex. 8, Dock. #6-8, at 9.¹

¹ See also Letter from John Cruz, Mich. Campaign Director, Gary Johnson 2012 to Secretary of State Ruth Johnson, at 1 (Nov. 9, 2011) ("[W]e are fully committed to running a nationwide campaign and wish it to be made known that while Governor Johnson has not gotten the media attention of other candidates, he has polled consistently on par with many who have gotten considerable attention."), *attached as* Plaintiffs' S.J. Mot., Ex. 8, Dock. #6-8, at 10; E-mail from John Cruz, Mich. Campaign Coordinator, Gary Johnson 2012 to SOS, Elections, *Question/Comment from Contact the Secretary of State (ContentID – 25634)* (Nov. 8, 2011) ("I am writing to make sure that GOP candidate and former New Mexico Governor Gary Johnson will be on the list [of Republican presidential nominees] send to the MiGOP district Chairs."), *attached as* Plaintiffs' S.J. Mot., Ex. 8, Dock. #6-8, at 5; E-mail from John Cruz to Melissa Malermann, *Re: FW: Question/Comment from Contact the Secretary of State (ContentID – 25634)* (Nov. 9, 2011) ("Our wishes are simply to let Secretary Johnson know that we feel that the

Less than two weeks later, Secretary of State Johnson mailed Mr. Johnson a letter, noting that he would be included as a candidate in Michigan's presidential primary for the Republican Party. *See* Compl. ¶ 12; *see also* Pl. S.J. Mot., Ex. 6, Dock. #6-6, at 1. The letter cautioned that, if he wished to withdraw from that race, he must submit an affidavit of withdrawal by 4:00 P.M. on December 9, 2011. *Id.* Mr. Johnson did not submit such an affidavit until after that deadline, and it therefore was legally ineffective. *Id.* ¶ 14; *see also* Pl. S.J. Mot., Ex. 7, Dock. #6-7, at 1.² Consequently, Mr. Johnson appeared as a candidate for the Republican presidential nomination in Michigan's February 2012 primary, *id.* ¶ 15, and lost that election.

**B. Gary Johnson's Attempted Candidacy for
President as a Member of the Libertarian Party**

The Libertarian Party of Michigan ("Party") is a qualified political party, *see* Mich. Comp. L. § 168.560a, but not a major party, *see id.* § 168.16, under Michigan law. As such, it nominates its candidates for President and Vice President of the United States by holding conventions or caucuses and certifying the results to the Secretary of State, *see* Mich. Comp. L. § 168.532, 168.686. Declaration of Denee Rockman-Moon, Dock. #8-4, ¶ 3 (Aug. 16, 2012).

In May 2012, following Gary Johnson's unbroken string of losses across the nation in Republican presidential primary elections, the national Libertarian Party nominated him as its candidate for President at its convention in Las Vegas. *See* Declaration of Gary Johnson, Dock. #8-3, ¶ 7, at 2 (Aug. 16, 2012). The Michigan Libertarian Party then attempted to certify Mr. Johnson as its candidate for President in Michigan's general election. *Id.* ¶ 10. Secretary Johnson, however, informed the Party that Mr. Johnson was ineligible to run for President as a

campaign meets all requirements for inclusion" on the Republican presidential preference ballot in Michigan.), *attached as* Plaintiffs' S.J. Mot., Ex. 8, Dock. #6-8, at 6.

² Courts have enforced deadlines in the election-law context, even where a person misses them by only a few minutes. *See, e.g., Falke v. State*, 717 P.2d 369, 373 (Alaska 1986) ("[T]he legal principle is well established, both in Alaska and in other jurisdictions, that election law filing deadlines are to be strictly enforced.").

Libertarian Party candidate in Michigan's 2012 general election under the state's "sore-loser" law, Mich. Comp. L. § 168.695. *See* Letter from Christopher M. Thomas, Director, Michigan Dep't of State Bureau of Elections, to William W. Hall, at 1 (May 3, 2012), *attached as* Pl. S.J. Mot., Ex. Dock. #6-8 (Aug. 2, 2012).

The sore-loser law provides, "No person whose name was printed or placed on the primary ballots or voting machines as a candidate for nomination on the primary ballot of 1 political party shall be eligible as a candidate of any other political party at the election following that primary." Mich. Comp. L. § 168.695. Having run in the Republican Party's presidential primary, Mr. Johnson may not now seek the presidency as the Libertarian Party's candidate. *Id.* The Libertarian Party; Denée Rockman-Moon, the Party's chair; and Mr. Johnson now seek an injunction and declaratory judgment invalidating the sore-loser statute, § 168.695, both facially and as applied to Mr. Johnson. Compl. ¶¶ 2-3.

ARGUMENT

Michigan's sore-loser law, Mich. Comp. L. § 168.695, does not violate or substantially burden the First or Fourteenth Amendment rights of the Libertarian Party, its members, or Mr. Johnson. Part I begins by confirming that the sore-loser law applies to presidential candidates such as Mr. Johnson. Part II demonstrates that § 168.695 is constitutional, both facially and as applied to Mr. Johnson.

I. MICHIGAN'S SORE-LOSER LAW APPLIES TO PRESIDENTIAL CANDIDATES

Secretary Johnson acted appropriately in excluding Mr. Johnson from the ballot as the Libertarian Party's candidate for President because Michigan's sore-loser statute applies to presidential elections. Plaintiffs acknowledge that "the broad language of the sore-loser law

invites application to candidates for President of the United States.” Pl. S.J. Mot. at 10. They then go on, however, to argue that the law does not, in fact, apply to presidential elections.

Plaintiffs point out that neither a presidential primary nor a general election actually results in a candidate for president being elected to any office. Rather, each candidate in the presidential primary who receives at least a certain percentage of the popular vote is entitled to have a corresponding percentage of the delegates to the national convention vote for him in the first round of balloting. Mich. Comp. L. §§ 168.562b(1), 168.619(1). Likewise, a vote for a presidential candidate in the general election is treated as a vote for the slate of presidential electors (*i.e.*, nominees for the electoral college) chosen by that candidate’s political party, Mich. Comp. L. § 168.45, who are required to cast their electoral votes for their party’s presidential candidate, *id.* § 168.47.

None of these factors affect the applicability of the sore-loser statute to Mr. Johnson, however. The law provides, “[1] No person whose name was printed or placed on the primary ballots or voting machines [2] as a candidate for nomination on the primary ballots of 1 political party [3] shall be eligible as a candidate of any other political party at the election following that primary.” *Id.* § 168.695. Each element of this statute is met here.

First, Mr. Johnson’s name was “placed on [a] primary ballot” this year. *Id.* Michigan law requires that a “statewide presidential primary election” be held “in each presidential election year,” *id.* § 168.613a(1), and “conducted under the provisions of [Michigan law] that govern the conduct of general primary elections.” *id.* § 168.613a(3). It is undisputed that Mr. Johnson’s name appeared on the ballot in Michigan’s 2012 Republican presidential primary.

Second, Mr. Johnson appeared “as a candidate for nomination” on the Republican Party’s presidential primary ballot. Michigan law expressly provides, “[T]he secretary of state shall

cause the name of a *presidential candidate* notified by the secretary of state . . . to be printed on the appropriate presidential primary ballot for that political party.” *Id.* § 168.615a(1). Indeed, the law repeatedly refers to the individuals whose name appears on a presidential primary ballot as “candidates.” *Id.* The fact that a vote for Mr. Johnson would have contributed to the election of delegates to vote for his nomination as the Republican candidate for President at the Republican National Convention, *id.* §§ 168.562b(1), 168.619(1), does not change the underlying fact that he participated in the Republican presidential primary election as a candidate for the Republican Party’s nomination for President.

Third, Mr. Johnson is now attempting to serve as a candidate of a different party, the Libertarian Party of Michigan, at the general election following that presidential primary. Michigan law provides that a vote for a “candidate of [a] political party for president and vice-president” is not a “direct vote” for those individuals, but rather counts as “a vote for the entire list or set of presidential electors chosen by that political party.” Mich. Comp. L. § 168.45. This statute is clear, however, that despite the involvement of the electoral college in the presidential electoral process, the individual running for President is still considered the “candidate.” *Id.*; *see also* Mich. Comp. L. § 168.47 (discussing “candidates for president and vice-president appearing on the Michigan ballot”); *id.* § 168.558(1) (exempting a “candidate nominated for the office of president of the United States or vice president of the United States” from filing an affidavit of identity). Thus, the sore-loser law squarely applies to Mr. Johnson.

Neither of the two cases upon which Plaintiffs rely alters this result. First, the sore-loser law at issue in *Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980), *cited by* Pl. S.J. Mot. at 10, was dramatically different than Michigan’s. It prohibited a person who “participates in the North Carolina presidential preference primary” from later running in the general election as the

candidate of a different party. *Id.* at 308. The Fourth Circuit noted that this was a “cryptic” standard which “begs for judicial construction or legislative clarification.” *Id.* at 302, 307.

The candidate in *Babb* had accepted the Secretary of State’s invitation to participate in the Republican party’s presidential preference primary. *Id.* at 303. Two months later, he publically announced that he was “withdraw[ing] his name as a candidate for the Republican presidential nomination” and running (depending on the state) either independently or as a third party candidate. *Id.* He submitted a letter to that effect to the North Carolina Secretary of State. *Id.* Critically, state law did not contain a deadline for withdrawing from the presidential primary election. The ballots for that election already had been printed, however, and he wound up receiving approximately 5% of the vote. *Id.* at 304.

Acknowledging that the issue was a close call and fraught with constitutional considerations, the Fourth Circuit affirmed the district court’s conclusion that, “because [the candidate] had ‘revoked’ his nomination as a Republican presidential candidate prior to the date of the North Carolina primary election,” the sore-loser law did not prevent him from running in the general election as the candidate of a different party. *Id.* at 305. Michigan’s sore-loser law, in contrast, shares none of these ambiguities. Rather than employing the vague and subjective standard of whether a candidate “participate[d]” in a primary, Michigan’s statute focuses exclusively on the objectively verifiable fact of whether a candidate’s “name was printed or placed on the primary ballot . . . as a candidate for nomination.” Mich. Comp. L. § 168.695.

Plaintiffs’ other case, *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981), *cited by* Pl. S.J. Mot. at 11, is equally inapposite. The Kentucky sore-loser provision at issue in that case, by its plain language, applied only to candidates “who have been defeated for the nomination for any office in a ‘primary election.’” *Id.* at 605. The Sixth Circuit held that the law did not apply to

candidates in a presidential primary. “Since a candidate cannot lose his party’s nomination for president by losing a state’s primary election,” the court held, “it would appear that the ‘sore-loser’ statute is inapplicable, and does not address itself to presidential candidates.” *Id.* The court continued, “[T]he Kentucky legislature, in its wisdom, has seen fit to limit the ‘sore-loser’ statute to those offices where a nomination is gained or lost through the primary process, not through a national convention.” *Id.* Again, Michigan’s law is written in far broader terms, and is triggered by the mere fact that a person’s name appears on a primary ballot as a candidate for nomination, without regard to whether the person may win or lose a particular office solely as a result of that race. Mich. Comp. L. § 168.695. Thus, Michigan’s sore-loser law squarely bars Mr. Johnson from appearing on the 2012 general election ballot as the Libertarian Party’s candidate for President.

II. MICHIGAN’S SORE-LOSER STATUTE IS SUBJECT ONLY TO RATIONAL-BASIS SCRUTINY AND DOES NOT VIOLATE THE CONSTITUTION

Plaintiffs’ constitutional challenge to Michigan’s sore-loser law is completely meritless. The Supreme Court has recognized that virtually every aspect of a state’s election code, including those governing the “eligibility of candidates . . . inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the State’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.” *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). Michigan’s sore-loser statute, Mich. Comp. L. § 168.695, is one of the State’s innumerable “reasonable, nondiscriminatory restrictions” that is subject only to rational-basis scrutiny and is constitutionally permissible.

In adjudicating a constitutional challenge to a state election law, a court must consider:

(i) “the character and magnitude of the asserted injury” to the plaintiff’s constitutional rights, (ii) “the precise interests put forward by the State as justifications for the burden imposed by its rule,” and (iii) “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789; *accord Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). Weighing these three factors here, Michigan’s sore-loser law easily must be upheld, both on its face, and as applied to presidential elections.

A. The Character and Magnitude of the Constitutional Injury Allegedly Caused by the Sore-Loser Law is Minimal

As the Supreme Court has recognized, “not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates.” *Anderson*, 460 U.S. at 788. Despite Plaintiffs’ claim that the sore-loser law “severely” burdens their constitutional rights, Pl. S.J. Mot. at 9, the law places only minimal restrictions on the fundamental rights of the Party, its voters, and Johnson.

First, the statute does not prohibit either the Party from nominating virtually whoever it wants as its candidate for President, or Mr. Johnson from running as an independent candidate for President. The Party’s argument that the sore-loser law “foreclos[es]” the Party “from the ballot” and limits “its ability to appear on the general election ballot,” Pl. S.J. Mot. at 9 (quotation marks omitted), is simply false. The statute’s only effect is to prevent the Party from nominating as its candidate any of the few dozen people who ran for a different party’s nomination in a primary election earlier this election cycle. Mich. Comp. L. § 168.695. This is a minimal constraint on the scope of the Party’s discretion to select its standard-bearer. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (holding that a law barring a candidate from running as the nominee of two different parties in the same election did not

substantially burden the associational rights of a political party or its members, because the law “reduced the universe of potential candidates who may appear on the ballot as the Party’s nominee” by only a “few individuals”); *cf. Bullock v. Carter*, 405 U.S. 134, 135-36, 143-44 (1972) (invalidating filing fees which were “patently exclusionary” and barred “[m]any potential office seekers”).

In *Nat’l Comm’n of the U.S. Taxpayers Party v. Garza*, a failed First Amendment challenge to application of a sore-loser law in a presidential race, the court explained:

The “sore-loser” statute does not prohibit the Plaintiffs from selecting a Presidential nominee and placing his or her name on the ballot. . . . Rather, the provision bars Plaintiffs from selecting as their nominee an individual who has already run in a party primary and lost, namely Pat Buchanan. This is not to say that Pat Buchanan could not have been the U.S. Taxpayers Presidential nominee. Had Mr. Buchanan aligned himself with the Plaintiffs earlier and never run in the Republican Primary, there would be no obstacle to the Plaintiffs placing his name on the ballot this November. Furthermore, there is nothing to prevent the U.S. Taxpayers Party from running Mr. Buchanan in the next Presidential election. Although the “sore-loser” statute impacts the Plaintiffs’ fundamental rights as voters, the magnitude of the injury is not great.

924 F. Supp. 71, 74 (W.D. Tex. 1996). The same reasoning applies with equal force to Gary Johnson and the Michigan Libertarian Party.

Second, the Supreme Court repeatedly has held that statutory requirements concerning the eligibility of individual candidates do not impose substantial burdens on the associational rights of political parties or voters. *See, e.g., Clements v. Fashing*, 457 U.S. 957, 971-72 (1982) (upholding statute barring a Justice of the Peace with more than one year left in his term from running for the state legislature). “[L]imiting the choice of candidates to those who have complied with state election law requirements is the prototypical example of a regulation that, while it affects the right to vote, is eminently reasonable.” *Burdick*, 504 U.S. at 440, n.10 (upholding constitutionality of ban on write-in voting); *see also Bullock*, 405 U.S. at 143

(holding that a law which “creates barriers to candidate access,” thereby “tending to limit the field of candidates from which voters might choose does not of itself compel close scrutiny”).

Elsewhere, the Court elaborated:

It does not follow, though, that a party is absolutely entitled to have its nominee appear on the ballot as that party’s candidate. A particular candidate might be ineligible for office, unwilling to serve, or, as here, another party’s candidate. That a particular individual may not appear on the ballot as a particular party’s candidate does not severely burden that party’s association rights.

Timmons, 520 U.S. at 359; *see also Anderson*, 460 U.S. at 792, n.12 (holding that voters’ rights are not substantially burdened where, although they may be precluded “from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy [applicable] requirements”).³

Indeed, the burden the sore-loser law imposes on Mr. Johnson’s supporters is even less than is typically the case under eligibility laws, because he remained free to attempt to run as an independent candidate. *Cf. Timmons*, 520 U.S. at 363 (holding that a law prohibiting a candidate from running as the nominee of two different parties in the same election did not substantially burden voters’ rights, because “Party members may campaign for, endorse, and vote for their preferred candidate even if he is listed on the ballot as another party’s candidate”).

Finally, the sore-loser law does not impose a substantial burden on constitutional rights because it does not “operate as a mechanism to exclude certain *classes* of candidates from the electoral process.” *Clements*, 457 U.S. at 964 (1982) (emphasis added); *see also Anderson*, 460 U.S. at 792-93 (assessing whether an election law “places a particular burden on an identifiable

³ *See also S.C. Green Party v. S.C. State Elec. Comm’n*, 612 F.3d 752, 759 (4th Cir. 2010) (holding that a sore-loser law did not substantially burden fundamental rights because it “did not affect the [minor party’s] right to nominate its own candidate, but only affected the [minor party’s] right to nominate” a candidate who was disqualified under the statute).

segment” of the electorate or “limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status”); *see, e.g., Bullock*, 405 U.S. at 144 (invalidating candidate filing fees because their impact “would fall more heavily on the less affluent segment of the community”). In this case, there is no reason to believe that individuals who lose primary elections constitute a coherent or identifiable social group that the State might be attempting to systematically marginalize or exclude from the political process. To the contrary, as Governor Mitt Romney’s successful bid for the Republican presidential nomination demonstrates, a candidate who loses a primary election one year might very well prevail in the following election cycle.

For these reasons, Michigan’s sore-loser law does not impose a substantial burden on the associational rights of the Party, its members, or Mr. Johnson.

B. The Sore-Loser Law Furthers Important State Interests

Michigan’s sore-loser statute helps promote several important state interests. *First*, and most importantly, it helps protect the function and integrity of primary and general elections. A primary “is not merely an exercise or warm-up for the general election but an integral part of the entire election process.” *Storer v. Brown*, 415 U.S. 724, 735 (1974). As the Court has recognized,

The State’s general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified.

Id. at 735.

As the Tennessee Supreme Court further explained:

If a candidate who ran unsuccessfully in a party primary for one office, and then runs in the general election for the same office under a different party name, or for a different office for which a primary was already held, the public may lose faith in the primary process and the party system. Allowing a defeated primary candidate to change political affiliation or to renounce all political affiliations and enter a race in which his former party has already chosen a candidate undermines the integrity of the primary process. For the primary election system to be an effective method of choosing candidates, the results of those elections must have some meaning.

Crowe v. Ferguson, 814 S.W.2d 721, 724 (Tenn. 1991); *see also Garza*, 924 F. Supp. at 74-75 (“The ‘sore-loser’ statute prohibits, and thus avoids, divisive and internecine intraparty fights after a political party had decided its nominee.”).

Mr. Johnson competed in the Republican presidential primary and lost. The State of Michigan is justified in preventing him from carrying his candidacy over to the Libertarian Party and re-waging the same essentially intraparty feuds from the primary election in the context of the general election. It constitutionally may reinforce the meaning and consequences of the primary by barring Mr. Johnson from switching parties and continuing his quixotic crusade for the presidency.

Second, sore-loser laws help protect the “stability” of our party-based political system by “temper[ing] the destabilizing effects of party-splintering and excessive factionalism.” *Timmons*, 520 U.S. at 367; *accord Clingman v. Beaver*, 544 U.S. 581, 596 (2005); *S.C. Green Party*, 612 F.3d at 759; *Cooley v. Keisling*, 45 F. Supp. 2d 818, 823 (D. Or. 1999) (holding that sore-loser law legitimately prevents “intra-party feuding”). Indeed, the Supreme Court has specifically recognized that, to protect these interests, the State may prevent a major-party primary candidate “who senses defeat” from “launch[ing] a ‘sore-loser’ candidacy by defecting to the LPO [Libertarian Party] . . . taking with him loyal [major-party] voters, and thus undermining the

[major party] in the general election.” *Clingman*, 544 U.S. at 596; *see also Burdick*, 504 U.S. at 439 (recognizing the state’s important interest in “averting divisive sore-loser candidacies”).

Finally, a sore-loser law “furthers the state’s interest in ensuring orderly, fair, and efficient procedures for the election of public officials.” *S.C. Green Party*, 612 F.3d at 759; *Garza*, 924 F. Supp at, 74. Thus, the statute is supported by numerous important state interests. *See also Council of Alt. Political Parties v. Hooks*, 179 F.3d 64, 80 (3d Cir. 1999) (“New Jersey’s interest in preventing ‘sore-losers’ rises to the level of a legitimate and important State interest.”)

C. The Sore-Loser Statute is a Permissible Restriction on Plaintiffs’ Rights

Numerous courts have held that the important interests furthered by a sore-loser statute more than warrant the minimal interference they impose on political parties’, voters’ and candidates’ constitutional rights. *See, e.g., Storer*, 415 U.S. at 735; *S.C. Green Party*, 612 F.3d at 759 (4th Cir.) (“South Carolina had important regulatory interests that justified the modest burden imposed by its nondiscriminatory application of the sore-loser statute, and . . . the sore-loser statute did not impermissibly infringe on the Green Party’s association rights.”) (citation omitted); *Hooker v. Thompson*, 21 F. App’x 342 (6th Cir. 2001) (holding that Tennessee’s sore-loser law is constitutional because it is “rationally related to the state’s legitimate interest in conducting orderly elections”); *Cooley v. Keisling*, 45 F. Supp. 2d 818, 823 (D. Or. 1999) (“Oregon’s ‘sore-loser’ statute is a reasonable regulation of the state’s election scheme.”); *Garza*, 924 F. Supp. at 74-75 (“[T]he “Defendants’ stated reasons for the ‘sore-loser’ statute are valid, legitimate justifications for the restriction.”). Given both the minimal burden a sore-loser law places on Plaintiffs’ constitutional rights, as well as the important interests the law furthers, this Court should reach the same conclusion regarding § 169.695.

Plaintiffs argue that the State's interest in enforcing the sore-loser law cannot be especially important, , because Mr. Johnson was free to attempt to gather signatures in order to run as an independent candidate. Pl. S.J. Mot. at 13-14. Because the sore-loser law is not subject to strict scrutiny, however, the legislature is free to address the problem of sore-loser candidacies in piecemeal fashion, one step at a time. Furthermore, the legislature reasonably could have chosen to keep the independent-candidate route open to sore-loser candidates in an attempt to minimize or alleviate any possible constitutional burdens. Finally, the Supreme Court has recognized that allowing a person to run as an independent is substantially less of a threat to the stability of the political system, because an independent candidate is "free from ties and obligations to party organizations, and support for them is not so total a commitment of political allegiance because it does not require renunciation of major party affiliation." *Anderson*, 460 U.S. at 791 n.12, *quoting* *Developments in the Law—Elections*, 88 Harv. L. Rev. 1111, 1143 n.130 (1975). Thus, the legislature reasonably may have decided, as a compromise, to bar sore-loser candidates from splintering off into competing parties that would substantially disrupt the outcomes of the primary elections, while allowing them to continue pursuing their candidacies as individuals. This Court should neither second-guess those decisions, nor use them as a basis for invalidating Michigan's reasonable, nondiscriminatory sore-loser statute.

CONCLUSION

For these reasons, Intervenor-Defendants respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment and grant Intervenor-Defendants' Motion to Dismiss.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

LIBERTARIAN PARTY OF MICHIGAN,)	
GARY JOHNSON, and DENEEN ROCKMAN-)	
MOON,)	Civil No. 2:12:-CV-12782-PDB
)	
<i>Plaintiffs,</i>)	Judge Paul D. Borman
)	
v.)	
)	
RUTH JOHNSON, Secretary of State of)	
Michigan, in her official capacity,)	
)	
<i>Defendants.</i>)	
)	
REPUBLICAN PARTY OF MICHIGAN,)	
)	
<i>Defendant-</i>)	
<i>Intervenor</i>)	
_____)	

CERTIFICATE OF SERVICE (e-file)

I hereby certify that on September 4, 2012, I electronically filed the Intervenor Republican Party of Michigan's Motion to Dismiss and Intervenor's Memorandum in Support of Plaintiffs' Motion to Dismiss and In Opposition to Defendants' Motion for Summary Judgment with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

By: /s/ Eric E. Doster

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