

NO. 12-2153

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

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

Plaintiffs-Appellants,

v.

RUTH JOHNSON,

Defendant-Appellee,

REPUBLICAN PARTY OF MICHIGAN,

Third-Party Intervenor.

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

APPELLANTS' REPLY BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 12-2153

Case Name: Libertarian Party v. Ruth Johnson

Name of counsel: Gary Sinawski

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

Name of Party

makes the following disclosure:

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

No

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

No

CERTIFICATE OF SERVICE

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

s/Gary Sinawski

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

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ARGUMENT

I. The Appellees have Unclean Hands

Neither the Secretary nor the Intervenor has engaged in this controversy with clean hands, a prerequisite for seeking equity in any court. Notwithstanding the pendency of this litigation the Secretary has *needlessly* prepared Michigan's ballots and then, incredibly, used ballot preparation as the basis for claiming that the controversy is moot. Secretary's Br. at 18-19. The Appellees have also persisted in falsely claiming that federal law, together with an order of another federal court, required the printing of overseas ballots containing candidates' names by September 22, 2012. *Id.*; Intervenor's Br. at 32-35.

The equitable doctrine of unclean hands precludes the Appellees from relying on laches, itself an equitable doctrine. *See, e.g., Bein v. Heath*, 47 U.S. 228, 245 (1848) ("The equitable powers of this court can never be exerted in behalf of *one who has acted fraudulently, or who by deceit or any unfair means has gained an advantage*. To aid a party in such a case would make this court the abetter of iniquity.") (Emphasis added).

II. This Case is not Moot

In *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974), the Supreme Court explained why cases like this one are not moot:

The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the

issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is ‘capable of repetition, yet evading review.’ [Citations omitted.] The ‘capable of repetition, yet evading review’ doctrine, in the context of election cases, is appropriate when there are ‘as applied’ challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

III. Michigan was not Required to Print Ballots with Candidates’ Names by September 22, 2012

Neither the Stipulated Order in *United States v. Michigan*, No. 12-788 (W.D. Mich., Aug. 6, 2012), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), nor the Military and Overseas Voter Empowerment Act (MOVE) require printing ballots with candidates’ names by September 22, 2012.¹

¹See Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*: 44 Ind. L. J. 113, 143 (2010):

UOCAVA has its origins in the Federal Voting Assistance Act of 1955, which was designed to allow members of the armed services and their families to vote absentee when stationed overseas, and the Overseas Citizens Voting Rights Act of 1975, which extended absentee voting to other citizens residing outside the United States. In 1986, Congress repealed these statutes and enacted UOCAVA in their place, out of a recognition that overseas voters still faced serious obstacles to voting absentee and having their votes counted. Broadly speaking, UOCAVA requires states to allow uniformed and overseas voters to use absentee voter procedures. UOCAVA also prescribes a process by which voters who request but do not receive their absentee ballots in time may cast a federal write-in ballot, and it includes a number of “recommended” steps that states can take to facilitate voting by uniformed and overseas voters. *This leaves many of the details to be worked out by individual states.*

See Appellants’ principal brief at 26-28. UOCAVA, after all, only requires that states allow overseas military personnel and their dependents to apply for absentee ballots for federal elections. It requires that states send, when requested, these absentee ballots for federal elections. It then affords overseas voters additional leeway in terms of time, procedure and format to cast their votes. *See Voting Integrity Project, Inc. v. Boner*, 199 F.3d 773, 777 (5th Cir. 2000)(“The Uniformed and Overseas Citizens Absentee Voting Act ... requires states to accept absentee ballots in federal elections from certain voters”). For example, a UOCAVA voter can vote for a party (which will be counted for all the party's candidates for federal office) and can simply write-in the names of his or her choices.

In 2009, Congress strengthened UOCAVA through the Military and Overseas Voter Empowerment (MOVE) Act. Finding that military and overseas voters still faced a “complicated and convoluted system,” the MOVE Act imposed more specific requirements on the states. Among these requirements are: (1) to allow the electronic transmission of registration materials, ballot requests, and blank ballots, (2) to give covered voters forty-five days to complete and return their absentee ballots, (3) to create a system for determining whether voters' ballots have been received, (4) to ensure the privacy of military and overseas voters, and (5) to prohibit states from rejecting registration or ballot requests for lack of notarization or other formalities. MOVE also gives a presidential designee (now the Secretary of Defense) various responsibilities, such as the establishment of procedures for delivery of ballots and an outreach program for voters covered by the Act.

(Emphasis added).

The important point is that these requirements only apply to federal elections. See Eric S. Fish, Note, *The Twenty-Sixth Amendment Enforcement Power*, 121 Yale L. J. 1168, 1218 (2012). This is important because it proves that states need not, under federal law, send ballots with state elective offices, or the names of candidates for those offices, to overseas voters. States may choose to do so, but federal law does not require it. Hence, Michigan's ballot, an example of which is included as Exhibit 2 to the Secretary's brief, is clearly not required by federal law. This ballot did not have to be printed by September 22.

What UOCAVA likewise clearly does not require is a completed *federal* ballot, comparable in every respect to the *federal* ballot that will be used on election day. See *Somers v. South Carolina Election Commission*, 2012 WL 1754094 (D.S.C., May 16, 2012) (distinguishing the ballots that must be sent overseas from election-day ballots). By its terms, UOCAVA simply requires that states send out and accept back write-in absentee ballots. MOVE, enacted in 2010, did not change this. Indeed, MOVE was a response to cases like *United States v. Cunningham*, 2009 WL 3350028 (E.D. Va. 2009), which noted a temporal flaw in UOCAVA; that is, UOCAVA did not include a deadline for sending out absentee ballots. MOVE corrected this by requiring that absentee ballots sent overseas be sent 45 days before the election. Its literal terms require nothing more. It does not require that service personnel receive the exact same ballot that will be viewed by

domestic voters on election day.

Cunningham, relied upon by the Intervenor, involved a situation where Virginia *failed* to timely send absentee ballots overseas. Virginia argued, in its defense, that its error was harmless because overseas voters could simply use the federally-prepared write-in absentee ballots, FWABs, available on military bases. It was this that the Court rejected: "the Court rejects Defendants' argument that the Federal write-in ballot is the exclusive remedy available *when States fail to send absentee ballots timely*." (Emphasis added). Had Virginia timely delivered official, state-prepared absentee ballots, it would not have had a problem under UOCAVA.²

This is made clear by the fact that UOCAVA and MOVE provide an express exception when the state suffers a delay in generating ballots due to a "legal contest." *See* 42 U.S.C. § 1973ff-1(g)(2)(8). Consequently, states engaged in litigation over ballot access are free under UOCAVA and MOVE not only to delay

²This is proved true by the Consent Decree Virginia and the federal government eventually entered to close the litigation. The Decree only required that Virginia do its best to mail out absentee ballots including candidates' names 45 days before the election. When it cannot, the consent decree authorizes the use of FWABs. *See United States v. Cunningham*, No. 3:08CV709, at 4 (E.D. Va., Dec. 14, 2010) ("If, during the time period covered by this Consent Decree, it becomes apparent that [they] ... will be unable to transmit regular absentee ballots to UOCAVA voters by the 45th day before a general election as required by the MOVE Act, the Defendants shall ensure that each UOCAVA voter ... shall be sent a FWAB").

delivering absentee ballots overseas, but also to use “special write-in absentee ballots” (SWABs) when necessary. These SWABs, which are state creations, are distinct from the default alternative write-in ballots (FWABs) provided by the federal government under UOCAVA. See <http://www.fvap.gov/resources/media/fwab.pdf> (providing FWAB ballot that can be downloaded.)³

The common use of SWABs to satisfy UOCAVA and MOVE proves the Intervenor’s charge – that Michigan was fulfilling a federal statutory duty by preparing its ballots early – is not supported by the weight of the authorities. In Pennsylvania, for example, SWABs are used when absentee ballots with federal candidates’ names have yet to be printed. See *Pileggi v. Aichele*, 843 F. Supp.2d 584, 587 (E.D. Pa. 2012) (describing Pennsylvania’s procedure for sending overseas ballots and stating “[n]o later than forty-five days before the day of the primary, the county board is to commence delivering official absentee ballots or

³ Only one court, in *United States v. Georgia*, 2012 WL 4336257 (N.D. Ga., July 5, 2012), held that SWABs likely do not satisfy UOCAVA and issued a preliminary injunction against their use. The court did note that UOCAVA’s literal language does not require ballots with candidates’ names. It also addressed a unique situation in that it was concerned that military personnel would have little time to vote, as Georgia proposed holding a run-off only 21 days after the election and sent out SWABs for the run-off only 24 days before the election. It remains the case that UOCAVA apparently does not require a finalized ballot; that SWABs are commonly used (as explained below, Pennsylvania and Connecticut are now using them); and that states have the right to correct their ballots. Most important, where a state suffers a delay in preparing ballots on account of a legal contest, the state can use SWABs. See 42 U.S.C. § 1973ff-1(g)(2)(8).

special write-in absentee ballots when official absentee ballots have not yet been printed.”).

The Pennsylvania Department of State explains on its official web page that this is true for both overseas civilians and members of the military:

Overseas civilian voters who are outside the United States on Election Day might receive a special write-in absentee ballot. Elections officials use write-in ballots when they are required by law to provide absentee ballots, but official absentee ballots have not yet been printed. The special write-in ballot includes all of the offices and questions that will appear on the official ballots for the election district, but not the names of the candidates for the office.

<http://www.votespa.com/portal/server.pt?open=514&objID=1192209&mode=2>

Members of the military who are outside the United States on Election Day might receive a special write-in absentee ballot. Elections officials use write-in ballots when they are required by law to provide absentee ballots, but official absentee ballots have not yet been printed. The special write-in ballot includes all of the offices and questions that will appear on the official ballots for the election district, but not the names of the candidates for the office.

<http://www.votespa.com/portal/server.pt?open=514&objID=1174126&mode=2>

In Pennsylvania, pending litigation by Republicans against Gary Johnson’s candidacy this election cycle has delayed ballot preparation, *see*

<http://www.ballot-access.org/page/4/>, and it is therefore a reasonable

assumption that Pennsylvania will be using these special write-in ballots, which clearly comply with federal law, this year.

Pennsylvania is not alone in authorizing SWABs. Missouri, North Dakota

and Delaware also authorize them. *See* Mo. Rev. Code 115.292.5 (providing that military personnel can request "special write-in ballots" and that "[t]he special write-in absentee ballot provided for in this section shall be used instead of the federal write-in absentee ballot in general, special, and primary elections for federal office as authorized in Title 42, U.S.C. Section 1973ff-2(e), as amended.");

<http://www.nd.gov/eforms/Doc/sfn.19022.pdf>; N.D. Code 16.1-07-08.1

(providing that military personnel may use "special write-in absentee ballots");

Del. Code, ch. 55, § 5520 (providing that military personnel may use "special write-in absentee ballots"). And Georgia has announced plans to use SWABs for

military personnel during the upcoming 2012 election. *See* [http://www.sos.ga.](http://www.sos.ga.gov/elections/elections/voter_information/SWAB2012_1106.pdf)

[gov/elections/elections/voter_information/SWAB2012_1106.pdf](http://www.sos.ga.gov/elections/elections/voter_information/SWAB2012_1106.pdf) (providing

copy of the SWAB) and [http://www.sos.ga.gov/elections/elections/voter_](http://www.sos.ga.gov/elections/elections/voter_information/SWAB2012_1106.pdf)

[information/SWAB2012_1106.pdf](http://www.sos.ga.gov/elections/elections/voter_information/SWAB2012_1106.pdf) (explaining that special write-in absentee

ballots will be used for military voters if a run-off is needed in December 2012).

Connecticut, to use another example, has mailed out its overseas absentee ballots, all of which are SWABs because the state's highest court has not yet determined which party will be listed first on the ballot. Accompanying the SWABs are lists of offices to be voted on and a list of candidates for each office.

Voters will write in their choices on the blank ballots. *See* <http://www.ballot-access.org/2012/09/25/all-connecticut-overseas-absentee-voters-will-cast-all->

votes-as-write-in-votes/.

In sum, neither federal law nor federal court order required that Michigan finalize its ballots on or before September 22, 2012. Michigan's frenzied effort to finalize its ballot before this case could be heard was a voluntary choice, one that is inexorably tied to its politically-charged desire to keep Gary Johnson's name off the ballot.

Evidence of Michigan's questionable motivation can also be found in its brazen claim that it is now "impossible" to change or correct its ballot. One wonders how this assertion can be squared with Michigan's own law, which *requires* corrections:

If the name of any candidate regularly certified to the board of election commissioners is omitted from the ballots, or if it is found that a mistake has been made in the printing of the name of any candidate on the ballot, the board of election commissioners *shall have the ballots reprinted with the candidate's name on the ballots.*

MCL § 168.712 (emphasis added).

The reality is that Michigan needlessly hurried to print its ballots in an effort to prevent this Court from reaching the merits. It claims that changes are now "impossible" because it does not want this Court to reach the merits. It knows that its action is unprecedented and cannot withstand reasoned scrutiny.

IV. Appellees have Misrepresented *Storer v. Brown*

The Secretary mischaracterizes *Storer v. Brown*, *supra*, one of the Supreme Court's seminal ballot access cases, and relies heavily on her mischaracterizations.

See Secretary's Brief at 26-27 ("In *Storer*, the Supreme Court upheld the constitutionality of a California sore loser law"); see also Intervenor's Brief at 13 ("...the sore loser law is constitutional, even as applied in the context of a presidential election," citing *Storer*).

In *Storer*, the Court considered two ballot access cases, each of which raised important questions about California's election laws. In one case appellants Storer and Frommhagen, independent candidates for congress, had been denied access to the ballot because they were not in compliance with the state's *disaffiliation statute*, which required candidates for public office to have been unaffiliated with any qualified political party for at least one year prior to the preceding primary election. The other case involved appellants Hall and Tyner, independent candidates for president and vice president, respectively, who had been denied access for failure to meet the state's *signature requirement*. The Court upheld the disaffiliation statute but remanded the Hall-Tyner case for additional findings on whether the petition signature requirement was unduly burdensome.

No sore loser law was at issue in either case, notwithstanding the Secretary's representations to the contrary. The only issues presented for decision were the constitutionality of the disaffiliation statute and the constitutionality of the signature requirement.

IV. Requesting a Stay in the District Court would have been Futile

In further compliance with Fed. R. App. P. 8(a)(1)(C), Appellants note that requesting a stay of the District Court's decision refusing to grant them a preliminary injunction would have been futile and, perhaps, ludicrous. Obtaining such a stay, even if it had been possible, would have accomplished nothing. Gary Johnson would still have been absent from the ballot unless the District Court ordered that he be named thereon, which is precisely what the court refused to do.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE (e-file)

I hereby certify that on September 26, 2012 I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

s/Gary Sinawski

Gary Sinawski