

CASE NO. ____

In The Supreme Court of the United States

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

Petitioners,

v.

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

Respondent,

REPUBLICAN PARTY OF MICHIGAN,

Intervenor/Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit**

**PETITIONERS' APPLICATION FOR EMERGENCY RELIEF
SUBMITTED TO JUSTICE KAGAN**

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Application for Stay

Pursuant to Supreme Court Rules 21, 22 and 23, Petitioners apply for an emergency stay of the United States Court of Appeals for the Sixth Circuit's Order issued in the above-styled case (hereinafter "Sixth Circuit's Order") (Attachment 1) and an emergency preliminary injunction either placing Gary Johnson's name on Michigan's November 2012 presidential election ballot, or alternatively directing the Michigan Secretary of State not to print Michigan's November 2012 presidential election ballot without Gary Johnson's name until the merits of Petitioners' case in the Sixth Circuit can be addressed. Immediate relief is requested, as the Michigan Secretary of State has represented to the Sixth Circuit that she needs to begin printing presidential ballots on September 13, 2012.

The Sixth Circuit's Order refused to grant Petitioners an emergency injunction directing the Michigan Secretary of State to place Gary Johnson's name on Michigan's November 2012 ballot. See Sixth Circuit Order at 2. Petitioners had taken an immediate emergency appeal, see Record Entry No. 27,¹ to the Sixth Circuit from the United States District Court for the Eastern District of Michigan's denial of their motion for preliminary injunction seeking that same relief. See Attachment 2.

The Sixth Circuit's refusal to issue emergency relief spells the death knell of Petitioners' case, because without emergency relief Michigan has made clear that it intends to print its November 2012 presidential election

¹ All Record references are to the District Court's Docket Sheet unless otherwise indicated.

ballot immediately without Gary Johnson's name. The Sixth Circuit agreed to expedite the merits of Petitioners' appeal, providing that full briefing will not be completed until September 24, 2012. However, in the absence of an order either placing Johnson's name on the ballot or at least postponing printing of the ballot, it is certain that the Sixth Circuit's decision on the merits will come too late. As the description of the proceedings below shows, the relief being sought here is not now available from any other court. See Supreme Court Rule 23.3.

Reasons for Granting the Application

The Application should be granted in order to prevent the Respondent, the Michigan Secretary of State, a Republican, and the Republican Party of Michigan, Intervenor-Respondent, from succeeding in their orchestrated effort to remove Gary Johnson's name from Michigan's presidential ballot. Similar attempts have been made and are proceeding in other 'swing states', including Ohio and Pennsylvania. These frivolous, coordinated political efforts should not be tolerated in a free and open democratic society.

Parties and Proceedings Below

Petitioner, the Libertarian Party of Michigan ("LPM"), is a fully qualified political party in Michigan with full right of access to Michigan's ballots. LPM is a state affiliate of the national Libertarian Party ("LP" or "national party"). Petitioner, Gary Johnson ("Gary Johnson" or "Johnson"), is a former two-term governor of New Mexico and is the LP's candidate for

President. Respondent, Ruth Johnson ("the Secretary"), is the Secretary of State of Michigan and has overall responsibility for the conduct of elections in Michigan. Intervenor-Respondent, the Republican Party of Michigan ("the Michigan Republican Party"), is the local affiliate of the national Republican Party, which has nominated Mitt Romney for President in Michigan and across the United States.

Gary Johnson began this election cycle by running for the Republican nomination for President. He therefore participated in a handful of Republican presidential primaries. By the end of the 2011 calendar year, however, Johnson had decided to withdraw from the Republican race. He notified the Michigan Secretary of State of this fact on December 9, 2011. Remarkably, the Secretary concluded that Johnson had missed Michigan's 4:00 PM deadline by three minutes, *see* Record Entry No. 6, Ex. 3, ¶¶ 5 & 6 (Johnson Declaration), and therefore refused to remove his name from the primary ballot. *Id.* Johnson did not thereafter campaign in Michigan.

On May 3, 2012, the Director of the Michigan Department of State's Bureau of Elections advised the Johnson campaign that Johnson would be barred by Michigan's "sore loser" law, MCL 168.695, from appearing on the November 2012 election. *Id.* at ¶ 8. Notwithstanding this threat, Johnson was subsequently nominated by the national Libertarian Party as its 2012 candidate for president at the Libertarian national convention held in Las Vegas on May 6, 2012. *Id.* at ¶ 9. His nomination was ratified by the LPM

state convention on June 2, 2012 and timely forwarded to the Secretary pursuant to Michigan law. Record Entry No. 6, Ex. 4 at ¶ 5 (Rockman-Moon Declaration).

Petitioners filed suit against the Secretary seeking an immediate preliminary injunction "prohibiting the Secretary from refusing to place Johnson's name on the general election ballot" and "prohibiting the Secretary from applying the sore loser law to candidates for president" three weeks later on June 25, 2012. See Record Entry No. 1. They filed a dispositive motion seeking preliminary and permanent relief placing "Gary Johnson on the ballots for the November 6, 2012 elections" on August 2, 2012. See Record Entry No. 6. Because the District Court set a hearing on this Motion for March 13, 2013, Petitioners moved to expedite the proceedings on August 19, 2012. See Record Entry No. 9.

The Secretary opposed Petitioners' motion to expedite. See Record Entry No. 12. A hearing was not held on the motion to expedite until August 30, 2012. See Record Entry No. 15. Meanwhile, a hearing on Petitioners' dispositive motion for preliminary and permanent relief was not held until September 6, 2012. See Record Entry (Minute Entry) following No. 24. The District Court denied preliminary and permanent relief the following day, on September 7, 2012. See Record Entry No. 25.

Because it made a factual error concerning whether John Anderson had been allowed to withdraw from Michigan's ballot in 1980,² the District Court *sua sponte* amended its September 7, 2012 Opinion and Order on September 10, 2012. See Record Entry No. 28 (Attachment 2), at 1 n.1 (explaining the correction).

Petitioners filed a notice of appeal on September 7, 2012. See Record Entry No. 27. On September 11, 2012, Petitioners moved the Sixth Circuit for an emergency injunction placing Johnson's name on the ballot. Petitioners at the same time asked that the proceedings be expedited. On September 12, 2012, after receiving the Secretary's response incorrectly claiming that ballots had to be immediately printed under federal law and because of another federal court's order, the Sixth Circuit denied Petitioners' request for emergency relief. See Attachment 1. Petitioners moved for reconsideration that same day, pointing out that the Sixth Circuit had mistakenly concluded that Petitioners did not first seek emergency relief in the District Court and that the Secretary had deliberately misrepresented both federal law and the federal court order she relied upon. The Sixth Circuit, however, declined to alter its order on September 13, 2012. See Attachment 3.

² Anderson, like Johnson here, had not been allowed to withdraw. The District Court incorrectly asserted in its September 7, 2012 Opinion and Order that he had been allowed to withdraw by the Michigan Supreme Court.

Argument

I. Petitioners are Likely to Succeed on the Merits.

The Secretary argues that Johnson is barred from running as a Libertarian for President by Michigan's "sore loser" law, Mich. Comp. Laws 168.695, which states:

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

Until the Secretary announced in May of 2012 that this sore loser law applied to Johnson, Michigan had never successfully used it against presidential candidates.³ Indeed, following John Anderson's experience in Michigan in 1980, discussed below, Michigan had never (until now) attempted to apply this law to presidential candidates.

Notwithstanding a proliferation of sore loser laws across the country, the vast majority of states concede that they have no application to presidential elections. This is hardly surprising. This Court stated in *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983), that states have less of an interest in regulating presidential elections:⁴

³ Michigan now is one of only five states to take this extreme position. Before Michigan changed its interpretation of its sore loser law for this election, "only four states [would] apply their sore loser provisions to elections for presidential electors –Mississippi, Ohio, South Dakota, and Texas." Michael S. Kang, *Sore Loser and Democratic Contestation*, 99 GEO. L. J. 1013, 1044 n. 124 (2011).

⁴ Further, the "real" candidates in a presidential election are not the candidates for president themselves, but are the candidates for presidential electors. *See* U.S. Const. Art. II, § 1.

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

Consequently, this Court in *Anderson* refused to force John Anderson to comply with Ohio's March filing deadline.

The same proved true for John Anderson in the context of sore loser laws. Michigan and three other states, Kentucky, North Carolina, and Maryland, attempted to apply their sore loser laws to his campaign. Anderson, after all, had begun his quest for President as a Republican, and ran in several Republican primaries. He only converted to an independent in April of 1980, long after the bulk of the primary season was complete. Still, no state succeeded in applying a sore loser law against Anderson.

In Michigan, Anderson (like Johnson here) attempted to withdraw from the Republican primary, but (again like Johnson here) was refused by the Secretary of State. State court litigation followed, with the Michigan Supreme Court, *see Michigan Republican State Central Committee v. Secretary of State*, 408 Mich. 931 (1980), ultimately rejecting Anderson's attempt to withdraw. Anderson therefore ran in Michigan's Republican

These electors are not candidates in primary elections and therefore cannot be "sore losers" within the meaning of local laws.

primary, but in the end was still allowed to run for President in Michigan's subsequent general election.⁵

Kentucky likewise attempted to apply its sore loser law to John Anderson, but lost in the Sixth Circuit. See *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981). The Sixth Circuit rejected application of Kentucky's law to Anderson, who had run in Kentucky's Republican primary, because

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

Id. at 605 (citation omitted).

Moreover, the Sixth Circuit stated that it had "grave doubts" about whether Kentucky's sore loser law could ever be used to limit the participation of presidential candidates. *Id.* at 606.

In Maryland, state officials eventually conceded that Maryland's sore loser law could not be applied to Anderson even though he had run in, and lost, Maryland's Republican primary. See *Anderson v. Morris*, 636 F.2d 55

⁵ Anderson was listed on Michigan's 1980 general election ballot as the presidential candidate of the Anderson Coalition Party. The District Court below, in an effort to distinguish Anderson's experience, erroneously summarized Anderson's campaign in Michigan. See Attachment 2 at 1 n.1. Contrary to the District Court's distinctions, Anderson ran under a party label in the general presidential election, Michigan did have a procedure--though not a formal statute--for candidates to run for President as independents, and the Michigan Supreme Court did not order that Anderson's name be removed from the Republican primary in order to protect Anderson's right to run in the general election. In regard to the procedure that Anderson could have used to run as an independent, but did not, Eugene McCarthy in 1976 gained access to the Michigan ballot as an independent candidate for President by collecting approximately 6,500 signatures to demonstrate public support. See *McCarthy v. Austen*, 423 F. Supp. 990 (W.D. Mich. 1976).

(4th Cir. 1980). Questioning whether a sore loser statute could ever be applied to a presidential candidate, the Fourth Circuit in *Morris*, 636 F.2d at 58 n.8, noted:

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

(Emphasis added).

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

More recently, the Pennsylvania Supreme Court in 2004 rejected elections officials' efforts to apply the state's sore loser law to the campaign of Ralph Nader. *See In re Nader*, 858 A.2d 1167 (Pa. 2004). Pennsylvania officials asserted that because Nader was running as a Reform Party

candidate elsewhere he could not run as an independent in Pennsylvania *Id.* at 1178. The Pennsylvania Supreme Court disagreed, finding that this application violated the First Amendment: "the Commonwealth . . . has not offered any reason, let alone one that is 'compelling,' to justify its interest in prohibiting candidates who have been nominated by the Reform Party in other states from running as independents in this Commonwealth." *Id.*

No appellate court in the country has ruled to the contrary. With presidential elections, the Framers were keenly aware that the States' selections of electors were interconnected. They recognized that States might attempt to establish obstacles to other States' candidates. They therefore wrote into both Article II of the Constitution and the Twelfth Amendment the requirement that a State's electors must vote for at least one candidate for President and Vice President who "shall not be an inhabitant of the same state with themselves." U.S. Const., Amend. XII. *See also* U.S. Const., Art. II, § 1, cl. 3 (stating that local electors shall vote for two candidates "of whom one at least shall not be an Inhabitant of the same state with themselves").

If it were any other way, serious candidates for President would have been excluded from ballots long ago. John Anderson would have been removed from at least four states' ballots. Teddy Roosevelt in 1912, who started out as a Republican, would not have been allowed to run as a Bull Moose. Robert La Follette in 1924, who began as a Republican, would have been precluded from running for President as a Progressive. This cannot be

the law of the United States. Michigan's application of its sore loser law to Gary Johnson is patently unconstitutional.

II. Petitioners will Suffer Irreparable Injury.

If the injunction does not issue, Gary Johnson will be excluded from Michigan's presidential election scheduled for November 6, 2012. This Court on several occasions has granted emergency relief to presidential candidates in order to insure that they remain on the ballot. It has done so precisely because of the irreparable harm caused the candidates. *See, e.g., McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (ordering Eugene McCarthy onto Texas's ballot in 1976); *Williams v. Rhodes*, 393 U.S. 23 (1968) (ordering George Wallace onto Ohio's ballot in 1968).

III. Respondents will Suffer No Significant Harm.

The Secretary will have ample time to print ballots before the election. As a qualified political party, the Libertarian Party has an assigned line on the ballot that will be populated by candidates for various offices. The space reserved for President and Vice President will either be empty or contain the names of Johnson and his running mate, depending on the outcome of this application. Neither possibility should present the Secretary with insurmountable problems.

The Secretary, in an effort to convince the courts below that time is rushed, misrepresented that it is bound by federal law and federal court order to print ballots for overseas voters by September 22, 2012. Neither is

true. According to the Secretary, the District Court's order in *United States v. Michigan*, No. 12-788 (W.D. Mich., Aug. 6, 2012), places it under an obligation to print ballots by September 22, 2012. As Petitioners pointed out to the Sixth Circuit in their Motion for Reconsideration, however, the Stipulated Order says no such thing. The federal MOVE Act, 42 U.S.C. § 1973ff-1(a)(7), meanwhile, does not require printed ballots; it provides that States must supply blank absentee ballots to overseas voters 45 days before the general election. *See* 42 U.S.C. § 1973ff-1(a)(7) (“Each State shall—... in addition to any other method of transmitting *blank absentee ballots* in the State, establish procedures for transmitting by mail and electronically *blank absentee ballots*”) (emphasis added). Thus, there is no rush to print the names of candidates on ballots by September 22, 2012.⁶

The Secretary also asserted below that Petitioners have been dilatory in pursuing this action, and that somehow this has prejudiced her defense; a sentiment apparently shared by the District Court. See Attachment 2 at 2 n.2. However, as the chronology described above shows, the District Court's assessment of their dedication is not correct. Petitioners have been timely and deliberate in pursuing this action. Much of the "delay," if there has been

⁶ MOVE also provides for a hardship exemption for state officials: “If the chief State election official determines that the State is unable to meet the requirement [to transmit ballots not later than 45 days before the election] with respect to an election for Federal office due to an undue hardship ..., the chief State election official shall request that the Presidential designee grant a waiver to the State of the application of such subsection.” *Id.* § 1973ff-1(g)(1).

any, is attributable to the Secretary, the Intervenors, and scheduling delays in the District Court.

A comparison with similar cases in the Sixth Circuit proves the point. For example, in *Schrader v. Blackwell*, 241 F.3d 783, 786 (6th Cir. 2001), where a Libertarian Party candidate for Congress sought to have his party-identifier included with his name on Ohio's November 1998 ballot, suit was not filed until August 19, 1998. The plaintiff thereafter filed an amended complaint on September 1, 1998 and had preliminary relief awarded by the District Court, directing the Secretary of State to "place the designation 'Libertarian' after Schrader's name on the ballot," *id.*, on September 28, 1998. *Id.* The Secretary complied and Schrader ran as a Libertarian in the November 1998 election. No mention was made about laches, unreasonable delay, or the state's pressing need to immediately print its ballots.

In *Bogaert v. Land*, 543 F.3d 862 (6th Cir. 2008), to use another example, where the Michigan Secretary of State refused to include a recall election on the November 2008 ballot, suit was filed on July 18, 2008. A hearing on the plaintiff's motion for preliminary injunction was held on July 31, 2008, and the injunction requiring that the recall be included on the ballot was granted on August 27, 2008. *Id.* at 863. Again, nothing was said about unreasonable delay.

And in *Lawrence v. Blackwell*, 430 F.3d 368, 370 (6th Cir. 2005), where the plaintiff sought to be included on Ohio's November 2004 ballot, suit was

filed on June 14, 2004, a hearing was held on his motion for preliminary injunction on August 4, 2004, and his motion was denied on August 18, 2004. Although the plaintiff lost on the merits in this Court, not a word was mentioned about any unreasonable delay.

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

Of course, this is not to say that plaintiffs have a blank check to unreasonably delay their actions. Delay can be inexcusable. But that is not what has happened here. Petitioners did not unreasonably delay this case. This action was filed on June 25, 2012, two months before suit was filed in *Schrader*, one month before suit was filed in *Bogaert*, and just eleven days later than suit was filed in *Lawrence*. Petitioners on July 31, 2012, while they were preparing their motion for dispositive relief, were then served with a motion to dismiss by the Secretary that included over 300 pages worth of exhibits. While attempting to prepare a response to this motion, Petitioners learned that on August 6, 2012, the Court had set their hearing on their dispositive motion for March 13, 2013.

On August 16, 2012, Petitioners responded to the motion to dismiss (and its 300 pages of exhibits), and three days later, on August 19, 2012, moved to expedite the proceedings. If there was unreasonable delay beyond

this point, it was caused by the Secretary, who opposed the motion to expedite on August 22, 2012. See Record Entry No. 12. Rather than agree to a timely briefing schedule, the Secretary's opposition delayed the proceedings. The Court then did not hold a telephonic hearing on the motion to expedite until August 30, 2012, and did not set a full hearing on the dispositive motion until September 6, 2012.

IV. The Public will Benefit.

No harm will come to the public. There is plenty of time to print ballots. This is reflected in this Court's own past ballot access orders. In *McCarthy v. Briscoe*, 429 U.S. 1317 (1976), where Eugene McCarthy sought ballot access as an independent presidential candidate in Texas. McCarthy filed suit on July 30 in order to win a place on the November ballot. The Supreme Court ordered his name onto the ballot on September 27. In its subsequent explanation, issued on September 30, the Supreme Court noted that it appeared Texas did not need to actually print the ballots until October 13. These two weeks provided the state “ample time” to prepare for the election. 429 U.S. at 1323 n.4.

In *Norman v. Reed*, 502 U.S. 279 (1992), which invalidated an Illinois election law, the candidates filed suit on August 6 in an effort to win space on the November 6 ballot. Following a full round of litigation in Illinois's state courts, which culminated with the candidates' exclusion from the ballot,

Justice Stevens on October 25, just two weeks before the election, ordered the candidates onto Illinois's ballots.

In *Williams v. Rhodes*, 393 U.S. 23 (1968), George Wallace sued on July 29 to gain access to Ohio's November presidential ballot. *See* 290 F. Supp. 983, 986 (D. Ohio 1968). Wallace's name was placed on Ohio's ballot by order of Justice Stewart on September 10. *See* 89 S. Ct. 1 (1968) (Preliminary Order) (Stewart, J.). The case was ultimately argued before the Supreme Court on October 7 and decided in Wallace's favor on October 15-- suggesting that the Supreme Court saw no problem with changing the ballots at that late date.

In *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), primary and special elections in Illinois were scheduled for April 19 and June 7, respectively. The District Court there issued its injunction against the Illinois State Board of Elections placing candidates' names on ballots on March 14, just over one month before the primary.

And in the Sixth Circuit, candidates have been placed on federal ballots by court order as late as September 28. *See Schrader v. Blackwell*, 241 F.3d 783, 786 (6th Cir. 2001) (ordering that the Secretary of State "place the designation 'Libertarian' after Schrader's name on the ballot" on September 28, 1998).

All these cases indicate that states do not need a grand amount of time beforehand to print ballots. In *McCarthy*, the Court noted that the ballots

were not needed (for a November election) until October 13. In *Norman*—which involved Illinois’s ballot access laws—Justice Stevens did not issue his order until October 25, just two weeks before the election.

In light of this precedent, the Secretary cannot credibly argue that voters in Michigan would somehow be prejudiced by a court order issued in the month of September. She cannot credibly claim that ballots must be printed now, as opposed to next week. Indeed, in the absence of a more compelling argument, it would seem that a Court order could be issued as late as October.

Conclusion

For the foregoing reasons, Petitioners' Application for Emergency Relief should be **GRANTED**.

Respectfully submitted,

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s/Mark R. Brown

Mark R. Brown