

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN**

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

Plaintiffs,

No. 2:12-cv-12782-PDB-MJH

v.

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

Defendant.

_____ /

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
AND BRIEF IN OPPOSITION

Plaintiffs, by and through counsel, oppose Defendant's Motion to Dismiss. Plaintiffs rely on Plaintiffs' Brief in Opposition to Motion to Dismiss and the Exhibits thereto, all of which are filed contemporaneously herewith.

Respectfully submitted,

s/Gary Sinawski

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Dated: August 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2012 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to ECF participants, and I hereby certify that I sent the paper via U.S. Mail to non-ECF participants.

s/Gary Sinawski
Gary Sinawski

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PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Introduction

Plaintiffs seek declaratory and injunctive relief from the Secretary of State's determination that Gary Johnson is barred by Michigan's "sore loser" law, MCL 168.695, from appearing on the ballot in the November 6, 2012 general election as the presidential candidate of the Libertarian Party because he appeared on the ballot in Michigan's Republican primary election on February 28, 2012. Barring Johnson from the general election ballot would severely injure plaintiffs' voting and associational rights under the First and Fourteenth Amendments, and Michigan has no state interest in barring Johnson from the ballot which justifies the injuries to plaintiffs' rights.

Almost all of the states have "sore loser" laws similar to Mich. Comp. Laws ("MCL") 168.695, which prohibits a candidate who appeared on a party's primary election ballot from appearing as the candidate of another party on the general election ballot. Declaration of Richard Winger executed on July 30, 2012 ("Winger Decl."), Pl. Appendix, Ex. A, ¶¶ 3, 4.

MCL 168.695 provides:

168.695 Ineligibility of candidate at subsequent election.

Sec. 695. 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.

However, while sore loser laws unquestionably apply to candidates for offices other than president, no federal or state court has ever used a sore loser law to keep a candidate for President of the United States from appearing on the general election ballot. As explained more fully below, this is primarily because (1) “. . . 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,” *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983); (2) parties choose their presidential candidates at nominating conventions, not at state primary elections; (3) a candidate for president cannot lose a party’s nomination by losing a state’s primary election; (4) the true candidates in a presidential election are not the candidates for president themselves but the candidates for presidential elector, *U.S. Const. Art. II, § I*, who are not even candidates in primary elections and therefore cannot possibly be “sore losers” in those elections; and (5) the application of a sore loser law to a presidential candidate would impose an unconstitutionally severe burden on the First and Fourteenth Amendment rights of the candidate and his or her supporters.

Statement of Facts¹

The relevant facts, which plaintiffs contend cannot reasonably be disputed, are as follows:

Plaintiff Libertarian Party of Michigan (“LPM”) is the Michigan affiliate of the national

¹This Statement of Facts draws from the Statement of Material Facts contained in plaintiffs’ Brief in Support of Motion for Summary Judgment (Dkt. # 6), pp. 2-5.

Libertarian Party. Complaint, ¶ 6; Declaration of Denee Rockman-Moon executed on July 29, 2012 (“Rockman-Moon Decl.”), Pl. Appendix, Ex. C, ¶ 3.²

Plaintiff Gary Johnson resides in Santa Fe, New Mexico and is a former two-term governor of that state. Complaint, ¶ 7; Declaration of Gary Johnson executed on July 27, 2012, (“Gary Johnson Decl.”), Pl. Appendix, Ex. B, ¶ 1.

Plaintiff Denee Rockman-Moon resides in Fenton, Michigan, is the chair of the LPM, is a registered Michigan voter, is the LPM’s candidate for presidential elector from Michigan’s fifth congressional district, and wants to support and vote for plaintiffs LPM and Johnson at the general election on November 6, 2012. Complaint, ¶¶ 1, 8; Rockman-Moon Decl., Pl. Appendix, Ex. C, ¶ 2.

Defendant Ruth Johnson (“Secretary”), the Secretary of State of Michigan, has overall responsibility for the conduct of elections and for the supervision and administration of the election laws of Michigan. MCL 168.31.

The LPM is a qualified political party within the meaning of MCL 168.560a, nominates its candidates by means of caucuses or /conventions as provided in MCL 168.532 and 168.686a, and certifies its candidate for President of the United States as provided in MCL 168.686. Complaint, ¶ 6; Rockman-Moon Decl., Pl. Appendix, Ex. C, ¶ 3.

By letter dated November 21, 2011 to Johnson’s Michigan campaign coordinator, the Secretary advised that Johnson would appear as a Republican candidate on Michigan’s February 28, 2012 presidential primary ballot unless he withdrew by filing an affidavit pursuant to MCL

²Plaintiffs’ Appendix (“Pl. Appendix”) is a series of exhibits filed as attachments to this brief. The Appendix/exhibits/attachments are identical to those filed with plaintiffs’ Brief in Support of Motion for Summary Judgment (Dkt. # 6).

168.615a(1) by 4:00 p.m. on December 9, 2011. Complaint, ¶ 12; Gary Johnson Decl., Pl. Appendix, Ex. B, ¶ 5.

By letter dated December 13, 2011 to Johnson from the Michigan Department of State's Director of Elections, Johnson was advised that he had missed the deadline for withdrawing by three minutes and that he would appear as a Republican candidate on the February 28, 2012 presidential primary ballot. Complaint, ¶ 14; Gary Johnson Decl., Pl. Appendix, Ex. B, ¶ 6.

Johnson did appear as a Republican candidate on Michigan's February 28, 2012 presidential primary ballot. Complaint, ¶ 15; Gary Johnson Decl., Pl. Appendix, Ex. B, ¶ 7.

Johnson did no campaigning and expended no funds in connection with Michigan's February 28, 2012 presidential primary election. *Id.*

By letter dated May 3, 2012 to counsel for the LPM from the director of the Michigan Department of State's Bureau of Elections, Johnson was advised that he would be barred by Michigan's "sore loser" law, MCL 168.695, from appearing on the ballot for the November 6, 2012 general election as a presidential candidate for the LPM. Complaint, ¶ 16; Gary Johnson Decl., Pl. Appendix, Ex. B, ¶ 8.

Johnson was nominated by the national Libertarian Party as its 2012 candidate for president at the Libertarian national convention held in Las Vegas on May 3 - 6, 2012. Complaint, ¶ 7; Rockman-Moon Decl., Pl. Appendix, Ex. C, ¶ 4; Gary Johnson Decl., Pl. Appendix, Ex. B, ¶ 9.

Thereafter, Johnson's nomination was ratified by the LPM state convention and forwarded to the Secretary pursuant to MCL 168.686. Complaint, ¶ 21; Rockman-Moon Decl., Pl. Appendix, Ex. C, ¶ 5.

In 1980, John Anderson was listed on the November general election ballot in Michigan as the presidential candidate of the Anderson Coalition Party, even though he had been listed on the Michigan Republican presidential primary ballot that year. Complaint, ¶ 18; Declaration of Richard Winger executed on July 30, 2012 (“Winger Decl.”), Pl. Appendix, Ex. A, ¶¶ 3, 4.

In 1980, Anderson appeared on the Republican presidential primary ballots of the District of Columbia and 20 states, including Michigan, and appeared on the November general election ballots of all 50 states and the District of Columbia as an independent or minor party candidate for president. *Id.*

Other presidential candidates who ran in major party presidential primaries and also appeared on the November ballot as the nominees of new or minor parties are Theodore Roosevelt in 1912, Robert M. La Follette in 1924 and David Duke in 1988. *Id.*

MCL 168.45 provides that a vote for a party’s presidential candidate is not considered as a direct vote for that candidate but as a vote for the party’s candidates for presidential elector.

Notwithstanding the sore loser law, Johnson could have gained access to Michigan’s November presidential ballot as an “independent” candidate without party affiliation by submitting 30,000 valid petition signatures by July 19, 2012. MCL 168.590 - 168.590h, 168.544f; Pl. Appendix, Ex. G, p. 18.

Sore loser laws exist in almost all of the states. Winger Decl., Pl. Appendix, Ex. A, ¶ 3.

No state, including Michigan, has ever successfully prohibited the presidential candidate of a new or minor party from appearing on its general election ballot on the grounds that the candidate had previously run in a major party presidential primary. Winger Decl., Pl. Appendix, Ex. A, ¶ 7.

Argument

I. STANDARDS OF REVIEW

Plaintiffs accept the statement of the applicable standards of review set forth in Defendants’ Brief in Support of Motion to Dismiss (Dkt. # 4),³ pp. 6-7. The standards for adjudicating restrictions on access to the ballot are described at greater length in Plaintiffs’ Brief in Support of Motion for Summary Judgment (Dkt. # 6), pp. 5-8.

II. MICHIGAN’S SORE LOSER LAW IS SUBJECT TO STRICT SCRUTINY

The sore loser law is overly broad on its face and unduly burdensome to plaintiffs and is therefore subject to strict scrutiny.

A. THE SORE LOSER LAW SEVERELY BURDENS PLAINTIFFS’ RIGHTS

The Sixth Circuit has noted that “[t]he first step under the *Anderson/Burdick* framework is to determine whether the burden imposed on plaintiffs’ First Amendment rights is ‘severe.’”⁴ *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 586-87 (6th Cir. 2006) (holding that combined effect of requiring minor party to file qualifying petitions 120 days before March primary election and requiring party to nominate candidates at March primary election placed unconstitutional burdens on First Amendment rights of party and its candidates and voters). If the burden imposed by the restriction on plaintiffs’ rights is severe, the restriction “must be narrowly drawn to advance a state interest of compelling importance.” *Burdick v. Takushi*, *supra* n. 4, 504 U.S. at 434.

³References in the form “Dkt. # ___” are to documents listed on the CM/ECF docket sheet.

⁴The Sixth Circuit was referring to the methodology for determining the constitutionality of restrictions on access to the ballot developed in *Anderson v. Celebrezzi*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992), both of which are discussed in plaintiffs’ Brief in Support of Motion for Summary Judgment (Dkt. # 6), pp. 6-8.

According to *Libertarian Party of Ohio v. Blackwell*, *supra*, and other leading ballot access decisions, “[t]he key factor in determining the level of scrutiny to apply is the importance of the associational rights burdened.” *Libertarian Party of Ohio* at 587. In the case at bar, foreclosing plaintiffs LPM and Gary Johnson from the ballot will decimate plaintiffs’ “right . . . to associate for the advancement of political beliefs, and the[ir] right . . . to cast their votes effectively.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see also California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) (“Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”), *Burdick v. Takushi*, *supra* at 433 (The right to cast an effective vote “is of the most fundamental significance under our constitutional structure”).

As with the Ohio laws at issue in *Libertarian Party of Ohio*, the application of Michigan’s sore loser law to plaintiffs “do[es] not merely affect the rights of the [LPM] to associate with nonmembers or select a certain candidate to be its standard-bearer” but also “limit[s] a far more important function of a political party – its ability to appear on the general election ballot.” *Id.* at 588. The court observed that “[t]here are few greater burdens that can be placed on a political party than being denied access to the ballot.” *Id.* at 593.

Few rights accorded U.S. citizens are more important than these. The Secretary’s application of the sore loser law to plaintiffs unquestionably imposes severe burdens on fundamentally important associational and voting rights by precluding the LPM and Gary Johnson from appearing on the general election ballot and by precluding their supporters from voting for them.

B. THE BURDENS ARE NOT JUSTIFIED BY ANY STATE INTERESTS

In view of the severity of the burden on fundamentally important First Amendment rights, the appropriate standard of constitutional review here is strict scrutiny. To survive a strict scrutiny analysis, Michigan's sore loser law and its application to plaintiffs by the Secretary must be "narrowly drawn to advance a state interest of compelling importance." *Burdick, supra* at 434.

It is clear that the sore loser law is not narrowly drawn, and that its application to plaintiffs and others who are similarly situated serves no important state interest. Its broad language invites application to candidates for President of the United States as well as to candidates for other offices. It is within Michigan's discretion to prohibit a candidate for local office who has run in one party's primary election from appearing on the general election ballot as the candidate of another party. Indeed, almost all states have such sore loser laws. Winger Decl., Pl Appendix, Ex. A, ¶ 3. However, it is not within the state's discretion to apply a sore loser law to a candidate for president. This is principally because, as the Supreme Court stated in *Anderson v. Celebrezze, supra* at 794-95:

. . . in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. * * * Thus in a Presidential election a State's enforcement of more stringent ballot access requirements . . . 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. * * *

These considerations explain why no state, including Michigan, has ever successfully prohibited the presidential candidate of a new or minor party from appearing on its general election ballot on the grounds that the candidate had previously run in a major party presidential

primary.⁵ Winger Decl., Pl. Appendix, Ex. A, ¶ 7. No presidential candidate obtains a party's nomination by winning a presidential primary, because presidential primaries do not nominate presidential candidates. Rather, they either elect delegates to national party nominating conventions or merely function as "beauty contests" that have no binding effect. *Id.*, ¶ 5.

Parties do not choose their presidential candidates at state primary elections but at national nominating conventions. This fact provided the basis for the Sixth Circuit's ruling in *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981), that Kentucky's sore loser law did not apply to presidential candidates. The Kentucky law, like Michigan's, was worded broadly enough to apply to presidential candidates, as it barred from the general election ballot any candidate "who has been defeated for the nomination for any office in a primary election." *Id.* at 605. Nevertheless, the court recognized that "[s]ince 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.*

Furthermore, under Article II of the Constitution, voters at the November general election do not elect a president. Rather, they choose candidates for presidential elector. *U.S. Const. art. II, § 1*. Presidential candidates appear on the November ballot as markers for competing slates of presidential electors. Thus, MCL 168.45 provides that a vote for a party's presidential candidate is not considered as a direct vote for that candidate but as a vote for the party's candidates for

⁵In 1996, Texas informed the U.S. Taxpayers Party that Pat Buchanan could not appear on the Texas general election ballot as its presidential nominee because he had run in the Republican presidential primary. However, Buchanan did not seek the U.S. Taxpayers Party nomination in 1996, and the party nominated Howard Phillips for president. Winger Decl., ¶ 7. In 1980, the Fourth Circuit unanimously upheld a decision of the district court requiring that John Anderson be listed on the November ballot in North Carolina as the candidate of the John Anderson Party of North Carolina, after the state had refused to do so on the grounds that he had run in its Republican presidential primary. *Id.*; *Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980).

presidential elector:

168.45 Cross or check mark as vote for presidential electors.

Sec. 45. Marking a cross (X) or a check mark (✓) in the circle under the party name of a political party, at the general November election in a presidential year, shall not be considered and taken as a direct vote for the candidates of that political party for president and vice-president or either of them, but, as to the presidential vote, as a vote for the entire list or set of presidential electors chosen by that political party and certified to the secretary of state pursuant to this chapter.

Michigan has long acknowledged that the true candidates in a presidential election are the presidential elector candidates, not the presidential candidates themselves:

In 1960, Michigan general election ballots carried candidates nominated by the Independent American Party, for unpledged presidential electors and for other federal and state offices. Voters were permitted to vote for the Independent American Party presidential electors, even though the party had no presidential and vice-presidential candidates printed on the ballot. Instead, the Michigan November 1960 ballot printed a blank space in the Independent American Party column for President, and yet voters were permitted to vote “for” the “blank space.” The official Michigan returns show the unpledged elector slate received 539 votes in the state. If Michigan thought of the presidential candidates as the true candidates, it would not have allowed voters to cast valid votes in the presidential election for a party that had no presidential candidate.

Also, in 1892, 1972, 1980, and 1988, Michigan November ballots carried the names of presidential or vice-presidential candidates who were under age 35. The ages of these candidates were publicized by the campaigns of the parties that ran these under-age candidates. The candidates were James B. Cranfill in 1892 (vice-presidential candidate of the Prohibition Party, age 33), Linda Jenness in 1972 (presidential candidate of the Socialist Workers Party, age 33), Andrew Pulley in 1972 (vice-presidential candidate of the Socialist Workers Party, age 19), Andrew Pulley in 1980 (presidential candidate of the Socialist Workers Party, age 27), and Larry Holmes in 1988 (presidential candidate of the Workers World Party, age 34). All of these parties proclaimed to the nation that their nominees were under the age of 35. Michigan presumably printed the names of these candidates on the ballot because Michigan election officials understood that the true candidates in November were the presidential elector candidates, and the presidential elector candidates were legally qualified. The fact that the presidential candidates themselves did not meet the constitutional qualifications to hold the office of President did not keep their names off the Michigan ballot.

Winger Decl., Pl. Appendix, Ex. A, ¶ 6 and Ex. H (copy of 1960 Michigan November ballot).

The sore loser law by its terms does not apply to candidates for presidential elector because they are not “sore losers.” They cannot be “sore losers” because they are not candidates

in presidential primary elections such as Michigan's February 28, 2012 Republican primary.

In *Libertarian Party of Ohio* at 587 the Sixth Circuit pointed out that:

[i]n determining the magnitude of the burden imposed by a state's election laws, the Supreme Court has looked to the associational rights at issue, including whether alternative means are available to exercise those rights; the effect of the regulations on the voters, the parties and the candidates; evidence of the real impact the restriction has on the process; and the interests of the state relative to the scope of the election.

The foregoing discussion has addressed the associational rights at issue here and the effect of the sore loser law on the various plaintiffs and on the electoral process. Questions might remain as to whether alternative means are available for plaintiffs to exercise their associational rights and whether relegating them to such alternative means is justified by important state interests.

As for the availability of alternatives it is true, notwithstanding the sore loser law, that plaintiff Gary Johnson could have gained access to Michigan's November presidential ballot as an "independent" candidate without party affiliation by obtaining 30,000 valid petition signatures by July 19, 2012. MCL 168.590 - 168.590h, 168.544f. Defendant conceded this point. Pl. Appendix, Ex. G, p. 18. However, the existence of the independent candidate route to Michigan's general election ballot does not mitigate the negative impact of the sore loser law. The Supreme Court has pointed out that "the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Storer v. Brown*, *supra* at 745. In the Sixth Circuit's words, "[a] candidate's appearance without party affiliation is not a substitute for appearing under a party name, and it does not lessen the burden imposed by . . . restrictions on minor parties." *Libertarian Party of Ohio* at 592.

The sore loser law prohibits an individual from running as a party's candidate in the general election after losing another party's primary election. The law does not prohibit an

individual from running as an *independent* candidate in the general election after losing a party's primary election. As previously noted, plaintiff Johnson could have secured access to the general election ballot as an independent candidate after losing the Republican presidential primary election, by obtaining petition signatures under MCL 168.590 - 168.590h and 168.544f. *See* Pl. Appendix, Ex. G, p. 18. One might wonder what state interest could possibly be served by permitting Johnson access to the general election ballot as an independent candidate but denying him access as the Libertarian Party candidate.

Another alternative would be for plaintiff Johnson to run as a write-in candidate by filing a declaration of intent as provided in MCL 168.737a. However, the Supreme Court has determined that write-in voting is an inadequate means for voters, candidates and parties to exercise their associational rights. *See, e.g., Anderson* at 799 (“we have previously noted that a [write-in] opportunity is not an adequate substitute for having the candidate’s name appear on the printed ballot;” *Lubin v. Panish*, 415 U.S. 709, 719, n. 5 (1974) (“[t]he realities of the electoral process . . . strongly suggest that ‘access’ via write-in votes falls far short of access in terms of having the name of the candidate on the ballot”).

Plaintiffs assert that neither Michigan nor any other state has a cognizable interest in preventing a candidate for president who ran in a party primary from running in the general election as the candidate of another party. Michigan appeared to recognize this in 1980, when John Anderson was listed on the November general election ballot in Michigan as the presidential candidate of the Anderson Coalition Party even though he had been listed on the Michigan Republican presidential primary ballot that year. Winger Decl., Pl. Appendix, Ex. A, ¶¶ 3, 4.

Defendant mistakenly claims that Anderson's situation was "materially distinguishable" from Gary Johnson's in that Anderson was given access to the November ballot as an *independent* candidate because states were constitutionally required to permit access by independent candidates but Michigan law did not do so. Defendant's brief at p. 16. To the contrary, Anderson, like Gary Johnson, was not an *independent* candidate but the candidate of a minor party (the Anderson Coalition Party). If the secretary of state had denied Anderson access to the ballot as the candidate of a political party, he could have gained access to the ballot as an independent candidate by following the procedure that was successfully used by Eugene McCarthy to gain access as an independent in 1976. *See McCarthy v. Austin*, 423 F. Supp. 990 (W.D. Mich. 1976).

Like Gary Johnson, Anderson had run in the Republican primary. Notwithstanding Michigan's sore loser law, Anderson was named on the general election ballot as the presidential candidate of a political party other than the Republican Party (the Anderson Coalition Party). Like Anderson, Gary Johnson also ran in the Republican primary and, notwithstanding the sore loser law, should also be named on the ballot as the presidential candidate of a political party other than the Republican Party (the Libertarian Party).

Anderson appeared on the Republican presidential primary ballots of the District of Columbia and 20 states, including Michigan, and appeared on the November general election ballots of all 50 states and the District of Columbia as an independent or minor party candidate for president. *Id.* Other presidential candidates who ran in major party presidential primaries and also appeared on the November ballot as the nominees of new or minor parties are Theodore Roosevelt in 1912, Robert M. La Follette in 1924 and David Duke in 1988. *Id.* No state excluded any of these candidates from its general election ballot on the grounds that he was

barred by a sore loser law. *Id.* Indeed, no state, including Michigan, has ever before successfully prohibited the presidential candidate of a new or minor party from appearing on its general election ballot on the grounds that the candidate had previously run in a major party presidential primary. Winger Decl., ¶ 7.

III. DEFENDANT'S BRIEF MISCHARACTERIZES THE PRINCIPAL AUTHORITIES ON WHICH IT RELIES

Defendant principally relies on several cases, discussed below, in which courts determined that various ballot access restrictions were not severely burdensome and were justified by various state interests that include promoting party unity and political stability; reducing party splintering and factionalism; and preventing party raiding and intraparty feuding. Defendant's brief at pp. 8-12. However, defendant overlooks the severity of the burdens imposed by Michigan's sore loser law on presidential candidates and their supporters and does not reveal which of these state interests justify those severe burden or how they do so. The constitutional burdens imposed, the state interests at play, and the circumstances presented in the cases cited by defendant differ sharply from those in the present case.

A. TIMMONS DOES NOT SUPPORT INTERMEDIATE SCRUTINY IN THIS CASE

If the Secretary of State prevails, Gary Johnson will not be on the general election ballot. The candidate in *Timmons v. Twin City Areas New Party*, 520 U.S. 351 (1997), discussed in defendant's brief at p. 8, *was* on the ballot as one political party's candidate for state representative. The issue before the Court was the constitutionality of Minnesota's antifusion laws, which operated to prohibit the candidate from also appearing on the same ballot as the candidate of another party (plaintiff-respondent New Party). The Court determined that the prohibition against fusion was constitutional in that it did not severely burden the New Party's

rights, observing that New 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.” In contrast, if Michigan’s sore loser law is applied to Gary Johnson, Libertarian Party members will not be able to “campaign for, endorse and vote for” him because he will not appear on the ballot at all. The burden in the present case (not appearing on the ballot at all) is far greater than the burden in *Timmons* (appearing on the ballot, but with another party’s label), and the sore loser law which produces that greater burden requires a correspondingly greater measure of scrutiny.

B. *SOUTH CAROLINA GREEN PARTY HAS NOTHING TO DO WITH PRESIDENTIAL CANDIDACIES*

Defendant’s reliance on *South Carolina Green Party v. South Carolina State Election Commission*, 612 F.3d 752 (4th Cir. 2010), discussed in defendant’s brief at p. 9, entirely misses the point of this litigation. The candidate to whom the state’s sore loser law was applied in *South Carolina Green Party* was running for the state legislature, not for President of the United States. The instant plaintiffs do not contest the application of sore loser laws to candidates for offices other than president. As previously noted, and for the reasons previously discussed in this brief, plaintiffs urge that sore loser laws may not constitutionally be applied to candidates for president. *Cf. Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980), in which the Fourth Circuit unanimously upheld a district court decision requiring that John Anderson be named on the November 1980 North Carolina ballot after the state had refused to do so on the grounds that Anderson had participated in its Republican presidential preference primary. While the *Anderson v. Babb* court grounded its decision in statutory construction of the state’s sore loser law, it questioned whether the law would pass constitutional muster. *Id.* at 305, 308.

C. *STORER DID NOT “UPHOLD THE CONSTITUTIONALITY OF A CALIFORNIA SORE LOSER LAW”*

In *Storer v. Brown*, 415 U.S. 724 (1974), the Supreme Court considered the constitutionality of California’s petitioning requirements for independent presidential candidates and a California “disaffiliation” law barring from the ballot any independent candidate who had been affiliated with a political party within the year preceding the primary election.⁶ The Court did not “uphold the constitutionality of a California sore loser law,” defendant’s brief at p. 11, and no sore loser law was before the Court. Plaintiff Gary Johnson is not an independent candidate like the one in *Storer v. Brown*, and the issue in the present case is the constitutionality of a sore loser law, not of petitioning requirements or disaffiliation laws applicable to independent candidates. The Court stated:

We conclude that § 6830(d) is not unconstitutional, and Storer and Frommhagen were properly barred from the ballot as a result of its application. [Footnote and citation omitted.] Having reached this result, there is no need to examine the constitutionality of the other provisions of the Elections Code as they operate singly or in combination as applied to these candidates.

D. *CLINGMAN IS ALSO INAPPOSITE*

In *Clingman v. Beaver*, 544 U.S. 581 (2005), the Supreme Court did not “sanction[] the use of sore loser laws to further the interests of minimizing ‘party splintering and excessive

⁶The disaffiliation law, § 6830(d) (Supp. 1974) of the California Elections Code, provided:

Each candidate or group of candidates shall file a nomination paper which shall contain:

* * *

(d) a statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.

factionalism.” Defendants’s brief at p. 12. The Court upheld Oklahoma’s “semiclosed” primary system, which permitted a political party to invite only its own registrants and independent registrants to vote in its primary elections, in the face of a challenge by the Libertarian Party of Oklahoma and individual voters who wanted to open the Libertarian primary to all registered voters and argued that the semiclosed primary system unduly burdened their First Amendment right to freedom of political association. The state interests which the majority opinion said justified the burden on the plaintiff-respondents’ rights were: insuring that the results of a primary election accurately reflect the voting of the party members, *id.* at 594; aiding parties’ electioneering and party-building efforts, *id.* at 595; and preventing “party raiding,” which the majority characterized as “the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party’s primary election,” *id.* at 596, citing *Anderson*. 460 U.S. at 788-89, n. 9. None of these state interests are served by the application of Michigan’s sore loser law to the instant plaintiffs.

Conclusion

For the foregoing reasons, the Court should deny the defendant’s motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and order defendant to place Gary Johnson on the ballots for the November 6, 2012 election as the presidential candidate of the Libertarian Party.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: August 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2012 I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to ECF participants, and I hereby certify that I sent the paper via U.S. Mail to non-ECF participants.

s/Gary Sinawski
Gary Sinawski