

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

No. 1:12-CV-976

v

HON. PAUL L. MALONEY

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

Defendant.

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**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Table of Authorities

- Adair v. State Dept. of Ed.*,
470 Mich 105, 121 (2004)
- City Communications, Inc v City of Detroit*,
888 F2d 1081, 1089 (CA 6, 1989)
- Colvin v. Caruso*,
605 F.3d 282 (6th Cir. 2010)
- Eu v. San Francisco County Democratic Central Comm.*,
489 U.S. 214, 231, (1989)
- Gose v Monroe Auto Equip Co*,
409 Mich 147, 162-163; 294 NW2d 165 (1980)
- Gonzales v. Nat'l Bd of Med Exam'rs*,
225 F.3d 620, 625 (6th Cir. 2000)
- Libertarian Party of Michigan, et al. v. Ruth Johnson*,
2:12-cv-12782, - WL – (E.D. Mich. 9/7/2012).
- Leary v. Daeschner*,
228 F.3d 729, 736 (6th Cir. 2000)
- Merrill Lynch, Pierce, Fenner & Smith, Inc v Grall*,
836 F Supp 428, 432 (W.D. Mich. 1993)
- N.E. Ohio Coalition for the Homeless v. Blackwell*,
467 F.3d 999, 1009 (6th Cir. 2006)
- Neveux v Webcraft Technologies, Inc*,
921 F. Supp. 1568, 1570-71 (E.D. Mich. 1996)
- Rogers v Colonial Federal Savings & Loan Ass'n*,
405 Mich 607, 615; 275 NW2d 499 (1979)
- Timmons v. Twin Cities Area New Party*,
520 U.S. 351, 365 (1997)
- U.S.A. v. State of Michigan, et al.*,
No. 1:12-cv-00788, – WL – (Aug. 6, 2012, W.D. Mich).

INTRODUCTION

Plaintiffs William Gelineau, Gary E. Johnson, and the Libertarian Party of Michigan (LPM) file this action seeking the extraordinary relief of a temporary restraining order and preliminary injunction against the Secretary of State's enforcement of valid Michigan law.

In brief, Plaintiffs have no legal right to nominate a "stand in" or "contingent" candidate for president, as a back-up method in case their preferred candidate is statutorily ineligible to run. The absence of a legal right means that Plaintiffs cannot demonstrate legal harm, and without the imminent threat of irreparable legal harm, an injunction will not issue. Moreover, as the Sixth Circuit just held in a related case in which LPM is also a plaintiff, "the entry of injunctive relief at this late date, when the Secretary's intentions have long been clear, would cause substantial harm to the orderly processing of the election and would not serve the public interest." Attached Order, dated 9/12/2012.

Plaintiffs oscillate between asserting a legitimate interest in nominating Gary E. Johnson as a presidential candidate, and merely nominating an individual who happens to have the same name as the Gary Johnson the Secretary of State refused to certify for the ballot as a means of "political expression." The fact that the LPM desires to place on the ballot two separate candidates who, for reasons of coincidence or something else, have the same name, does not make these candidates interchangeable. Nor does the fact that Michigan law does not grant Plaintiffs unfettered access to the ballot with the candidates and the timing of their choosing

render its provisions unconstitutional. For these and the reasons stated more fully herein, the Secretary of State respectfully request that this Court deny Plaintiffs' unreasonable request.

ARGUMENT

I. In response to this Court's scheduling order request, the Secretary of State cannot halt the ballot printing process

This Court has instructed Defendant Secretary of State Ruth Johnson “to address whether she intends to refrain from sending general-election ballots to the printers while Plaintiffs’ request for injunctive relief is pending.” Scheduling Order dated September 12, 2012. Because the election is now underway, the Secretary of State does not intend to halt this process unless a court of competent jurisdiction orders her to do so. Michigan has a decentralized elections system which requires massive coordination with county and local election officials before ballots are printed at the local level or sent to overseas and military voters in a timely manner.

The Secretary of State has already certified the contents of the general election ballot. Affidavit of Christopher Thomas, Exhibit 1, at ¶ 4. This being the case, the Secretary of State is now in the midst of a massive coordinated effort with 83 counties, 1,035 local jurisdictions, and 4,900 precincts to have ballots approved, printed, and distributed to overseas voters by September 22, 2012. Exhibit 1. September 22, 2012 is a federal deadline under the MOVE Act, 42 USC 1973ff-1(a)(8), and one with which the Secretary of State is currently under court order to strictly comply, lest she be held in contempt. *U.S.A. v. State of Michigan, et al.*, No. 1:12-cv-00788, – WL – (Aug. 6, 2012, W.D. Mich). The exact steps the elections process must take between now and then are detailed in the attached affidavit of Christopher Thomas, Director of the Bureau of Elections. *See* Exhibit 1.

At present, not only have the certified ballots already been distributed to local jurisdictions to be supplemented with local elections issues, but the Secretary of State has begun receiving proofs of these completed ballots from the local jurisdictions for her approval. Exhibit 1, at ¶ 8. Upon the Secretary of State's approval of these ballot proofs, the ballots will be sent back to the county level, where the printing of more than 7,000,000 ballots will commence on or about September 13, 2012. Exhibit 1, at ¶ 9. The Bureau of Elections has already informed local clerks that they may email ballots to registered overseas voters. Exhibit 1, at ¶ 12. In short, the elections machinery is in such motion that it cannot be disturbed. It is not the case that the Secretary of State can simply "insert" Gary E. Johnson's name on the ballot without suffering any prejudice. Were the Secretary of State to make even a minor change to the ballots, the entire process of sending the ballots to local jurisdictions, approving ballot proofs, sending the ballots back to the county level for printing, and final approval of the ballots would need to be restarted. At a bare minimum, the Director of the Bureau of Elections has stated that any changes made after September 13, 2012 or September 14, 2012 would be "prohibitively expensive or impossible."

Plaintiff LPM is well aware of the status of these deadlines, having lost a federal lawsuit after it mounted a delayed constitutional challenge in the United States District Court. That lawsuit was filed in the Eastern District. *Libertarian Party of Michigan, et al. v. Ruth Johnson*, 2:12-cv-12782, - WL – (E.D. Mich. 9/7/2012).

On September 10, 2012, LMP filed an appeal after Judge Paul Borman rejected Plaintiffs' challenge, which is now pending in the Sixth Circuit. Judge Borman's observations about the importance of timely raising election challenges in the courts can be aptly applied to the current situation:

Plaintiffs' dilatory conduct in this action has put the Court and the Defendant Secretary of State in an unnecessarily haste-driven position. The Court put on the record at the September 6, 2012 hearing on this matter its findings regarding Defendant Ruth Johnson's claim that Plaintiffs' motion for an expedited hearing on the merits of this matter should have been denied on the basis of laches. Although the Court has decided, given the importance of the issue to reach the merits, Plaintiffs' failure to act with any sense of urgency in this matter until August 19, 2012 is reprehensible. Plaintiffs were well aware, as early as May 3, 2012, that Johnson would be denied general election ballot access in Michigan, but waited until June 25, 2012 to file their Complaint, further waited until July 18, 2012 to serve the Defendant, further waited until August 2, 2012 to file their non-emergency motion for summary judgment, and vexatiously waited until August 19, 2012 to apprise the Court that their motion was of an urgent nature. Any effort on Plaintiffs' part to stay this Court's decision pending appeal should be met with great skepticism. See *Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000) ("The plaintiffs could have pursued their cause more rigorously by filing suit at an earlier date. A state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent."). See also Affidavit of Christopher M. Thomas, August 31, 2012. (ECF No. 16, Ex. 2) (detailing the time challenges presented by Plaintiffs' delay in pursuing this matter).

Plaintiffs' failure to expeditiously press their case before the Eastern District of Michigan has directly caused Plaintiffs' late-in-time filing in the instant matter. On sole account of Plaintiffs' dilatory conduct, it is not only unreasonable to adjudicate Plaintiffs' claims (as discussed more fully below), but impracticable for the entire elections machinery to halt while this Court does so. For this reason,

absent a court order directing it otherwise, the Secretary of State cannot enjoin the ballot production process.

II. Plaintiffs have not met the considerations that support the extraordinary grant of a preliminary injunction

Four factors must be considered and balanced by the district court in making its determination as to whether a preliminary injunction is appropriate: (1) whether the movant has a “strong” likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether the threatened injury to the party seeking the injunction outweighs any injury the proposed injunction may cause the party opposing the motion; and (4) whether the public interest would be served by issuance of a preliminary injunction. *Colvin v. Caruso*, 605 F.3d 282 (6th Cir. 2010) (citing *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000)); *N.E. Ohio Coalition for the Homeless v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006).

Although the Court must balance these four factors, plaintiffs must always demonstrate irreparable injury in order for a preliminary injunction to issue. *Neveux v Webcraft Technologies, Inc*, 921 F. Supp. 1568, 1570-71 (E.D. Mich. 1996). Additionally, the extent to which a party must demonstrate a substantial likelihood of success generally varies inversely with the degree of harm the party will suffer absent an injunction." *Neveux*, 921 F. Supp. at 1570-71 (internal citation omitted). A preliminary injunction will not issue unless plaintiffs’ right to relief is clear. *Neveux*, 921 F. Supp. at 1571 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc v Grall*, 836 F Supp 428, 432 (W.D. Mich. 1993)).

Applying this well-established inquiry, Plaintiffs have not demonstrated entitlement to the extraordinary relief of preliminary injunction.

A. Because Plaintiffs' claim is barred by *res judicata* and laches, Plaintiffs cannot demonstrate likely success on the merits

"A finding that there is simply no likelihood of success on the merits is usually fatal to a request for preliminary injunction." *Gonzales v. Nat'l Bd of Med Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000). Here, Plaintiffs lack a strong likelihood of success on the merits because, having failed to raise their claim in related litigation in the Eastern District of Michigan and Sixth Circuit, *res judicata* stands as a jurisdictional bar to this Court's adjudication of their claim. Even if this Court concludes that no jurisdictional bar exists, the equitable doctrine of laches bars Plaintiffs' claim for failure to raise is in a more appropriate and timely manner.

1. *Res Judicata*

Res judicata is invoked to prevent endless litigation, vexation, and confusion for the litigants, and ineffective use of judicial resources. *City Communications, Inc v City of Detroit*, 888 F2d 1081, 1089 (CA 6, 1989) (citing *Rogers v Colonial Federal Savings & Loan Ass'n*, 405 Mich 607, 615; 275 NW2d 499 (1979)). Since 1980, Michigan has followed a broad application of *res judicata*. In Michigan, *res judicata* "bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was or could have been, resolved in the first." See, e.g., *Gose v Monroe Auto Equip Co*, 409 Mich 147, 162-163; 294 NW2d 165 (1980). Each of these elements is present here.

Plaintiffs LMP, Denee Rockman-Moon (chairperson of the LMP), and Gary Johnson filed suit in the Eastern District of Michigan on June 18, 2012, serving the Secretary of State on July 25, 2012, with a complaint seeking declaratory and injunctive relief after the Secretary of State refused to certify Gary Johnson as the Libertarian candidate for president based on MCL 168.695, which prevents individuals who had run in one party's primary from then running for another party in the general election. MCL 168.695. Plaintiffs sought to have the Eastern District of Michigan declare Michigan's "sore loser statute," MCL 168.695, facially unconstitutional and unconstitutional as applied to Gary Johnson. On September 6, 2012, Judge Borman ruled from the bench that laches barred Plaintiffs' claim and, in any event, that MCL 168.695 was constitutional, approving the Secretary of State's decision not to certify Gary Johnson's name for the general election ballot. *Libertarian Party of Michigan, et al. v. Ruth Johnson*, 2:12-cv-12782, - WL – (E.D. Mich. 9/7/2012). Accordingly, the prior action was decided on the merits.

Both actions involved the same parties or their privities. Plaintiff LMP is a common party to both suits. Plaintiffs Gelineau and Gary E. Johnson are in privity with Plaintiffs LMP, Rockman-Moon, and Gary Johnson, because their legal rights are inherently intertwined. See, e.g., *Adair v. State Dept. of Ed.*, 470 Mich 105, 121 (2004) ("To be in privity is to be so identified in interest with another party that the first litigant represents the same legal right that the later litigant is trying to assert.").

Finally, the instant controversy could easily have been resolved in the Eastern District of Michigan, without need to file again, just days after the conclusion of district court litigation, in the Western District. Judge Borman was, and the Sixth Circuit now is, familiar with the facts of Plaintiff LMP's first lawsuit, which concerned, like its present suit in this Court, which of its political nominees could be constitutionally placed on, or barred from, the general election ballot. Adjudicating this issue in the Eastern District of Michigan where Plaintiff LMP had already filed suit would not only have been possible and expeditious, but would have concerned judicial resources. Plaintiffs' failure to raise their claim before a prior tribunal, when doing so would have been both appropriate and beneficial to all parties involved, bars their claim under *res judicata*.

2. Laches

For the same reasons that *res judicata* bars Plaintiffs' claim for failure to raise it in the Eastern District or the Sixth Circuit litigation currently pending, laches stands as an equitable bar to Plaintiffs' requested relief in this case. To the extent Plaintiffs claim that the Secretary of State is estopped from arguing laches in this case because she or her agents failed to immediately respond to Plaintiffs' requests for declaration regarding the appropriateness of nominating Gary E. Johnson as its contingent candidate, this argument misses the mark. It is not the fault of the Secretary of State that Plaintiffs are now bringing this action before the Court. In the first instance, Plaintiffs were free to nominate anyone of their choosing as the LMP's presidential candidate—it was Plaintiffs themselves, not the

Secretary of State, who chose to list Gary E. Johnson as an impermissible “stand in” candidate rather than the LMP’s first-choice representative. Likewise it was Plaintiff LMP and the “original” Gary Johnson whose fault it was that the LMP’s preferred candidate did not make a timely withdrawal from Michigan’s Republican primary race, rendering him ineligible for general election ballot placement under MCL 168.695 and creating the legal challenge Plaintiff LMP mounted in the Eastern District of Michigan, the results of which precipitated the current conflict. Even if this Court concludes that Plaintiffs could somehow not have raised their instant legal challenge before Judge Borman in that litigation, and thus *res judicata* does not apply, it is certainly the case that had Plaintiffs expeditiously pressed that case rather than engage in “reprehensible delays,” they would have been in this forum at an earlier date and neither this Court, nor the Secretary of State, would have been prejudiced by the inability of time to respond deliberately and comprehensively to Plaintiffs’ claim. Accordingly, even if this Court concludes that *res judicata* does not deprive it of jurisdiction to adjudicate Plaintiffs’ claims, laches can and should stand as an equitable bar to this case moving forward.

B. Even if this Court were to reach the merits of Plaintiffs’ claim, it is not likely to succeed because Plaintiffs have no legal right to nominate a “stand in” or “contingent” presidential candidate

Even if this Court reaches the merits of Plaintiffs’ claim, it is not likely to succeed on the merits because Plaintiffs lack any legal right to nominate a “stand in” or “contingent” presidential candidate in case their first candidate, who they knew was statutorily barred from appearing on the general election ballot, was rejected. Because they have no legal right to have such a candidate placed on the

ballot, the Secretary of State's refusal to certify his name causes no legal injury to Plaintiffs.

1. **MCL 168.686 does not permit the nomination of “stand in” or “contingent” candidates for president**

Plaintiffs have absolutely no right to nominate a “stand in” or “contingent” candidate for president, and so it is not surprising that Plaintiffs cite no statutorily authority to this effect. The only statute Plaintiffs can accuse the Secretary of State of violating in this case is MCL 168.686, a procedural statute which requires political parties to submit the names of their candidates for President and Vice President to the Secretary of State, and the Secretary of State to then place the name of each candidate on the ballot:

Sec. 686. Within 24 hours after the conclusion of the state convention before a general election, the state central committee of each political party shall canvass the proceedings of the convention and determine the nominees of the convention. Not more than 1 business day after the state convention, the chairperson and secretary of the state central committee shall forward to the secretary of state, a typewritten or printed list of the names and residence, including the street address if known, of all candidates nominated at the state convention. In each presidential election year, the state central committee of each political party shall, not more than 1 business day after the state convention or the national convention of that party, whichever is later, forward to the secretary of state the typewritten or printed names of the candidates of that party for the offices of president of the United States and vice-president of the United States certified to by the chairperson and secretary of the committees. A party is not required to certify nominations made at an official primary election. The secretary of state shall forward a copy of a list received under this section to the board of election commissioners of each county, in care of the county clerk at the county seat. MCL 168.686.

Plaintiffs point out that nothing in this statute prevents them from nominating a secondary presidential candidate in the event their first is rejected, yet it is clearly not the case that actions not specifically precluded by statute are automatically permissible. To the contrary, neither MCL 168.686 nor any other provision of Michigan election law provides for nomination of a “stand in” or “contingent” candidate.¹ MCL 168.686 provides that the “names” of the candidates for the “offices” of president and vice president must be provided in timely fashion; “names” is merely plural because it is referring to “offices,” yet there is clearly only one office of the presidency and one office of the vice presidency, and thus one candidate can be named for each.

Moreover, whether derived from MCL 168.686 or merely common sense, the Secretary of State’s authority to prohibit a political party from simultaneously nominating more than one candidate for president of the United States is a slight burden on Plaintiffs’ first and fourteenth amendment rights subject to, at most, rational basis review. Like the statute Plaintiff is currently challenging in the Sixth Circuit, MCL 168.686 is facially non-discriminatory. As Judge Borman found in that case, the statute “imposes restrictions that are ‘not trivial’ but ‘not severe.’” R. 25, Final Order, 2:12-cv-12782, - WL – (E.D. Mich. 9/7/2012), at 12.

¹ Nor has Michigan, contrary to Plaintiffs’ assertion, ever sanctioned the appointment of such a candidate. The circumstances Plaintiffs cite all involve a candidate resigning or being rendered otherwise incapable of serving as the candidate for a particular party, as opposed to here, where Plaintiffs’ elected to “nominate” Gary E. Johnson as a preemptory strike against the possibility that the Secretary of State would prohibit Plaintiffs’ preferred candidate, coincidentally also

C. Because Plaintiffs have no legal right at issue, they would suffer no irreparable injury were this Court to deny their motion for injunctive relief

It is axiomatic that because Plaintiffs have no legal right to placement of a “stand in” or “contingent” presidential candidate on the ballot, i.e., the nomination of a secondary candidate in case the first is rejected, they will suffer no harm—much less irreparable harm—if this Court denies the extraordinary relief of their requested injunction. Indeed, the exact constitutional rights Plaintiffs contend have been deprived are somewhat unclear—Plaintiffs asserting, as they do, that they both honestly support and want Gary E. Johnson to be elected to the “highest office in the land,” on the one hand, but also have a right to respond to the Secretary of State’s application of Michigan’s sore loser law to bar Gary Johnson from the ballot by placing another candidate, who coincidentally has the same name, on the ballot instead. Either way, Plaintiffs’ interests are illegitimate.

As Plaintiffs of course are aware, Gary E. Johnson, who to the Secretary of State’s knowledge will not appear on even one state’s general election ballot, has no chance of being elected the next president of the United States. Because Michigan has only 16 votes in the electoral college, this will be true irrespective of the outcome of the instant litigation. Likewise, it is not the deprivation of a constitutional right to deny a political party, such as LMP, the exact candidate of their choice, nor does it inflict constitutional harm to prevent Gary E. Johnson from appearing on the ballot when he was not nominated properly.

named Gary Johnson, from appearing on the ballot because he failed to meet the applicable statutory requirements.

Just after discussing the importance of Gary E. Johnson's right to ballot access and the LMP's right to support him as a presidential candidate, Plaintiffs argue that even if they nominated Gary E. Johnson as a secondary candidate because he shared a name with a candidate they thought might not make it on to the ballot, this is a legitimate and constitutionally protected tactic. R. 4, Plaintiffs' Mot. for TRO and IJ, 9/12/2012, at 11 ("[T]he Libertarian Party's selection of a candidate named Gary E. Johnson in response to the exclusion of Governor Johnson is itself a means of political expression.") Needless to say, it is difficult to believe that Plaintiffs have a valid and legitimate interest in participation in the political process, ballot access, the unfettered right to the candidate of their choosing, etc., when they also assert an interest in "getting back" at the Secretary of State for following Michigan law in barring the "original" Gary Johnson from the ballot. To the extent this latter interest in the one on which Plaintiffs hang their hat, it is clear that Michigan has not only an important, but a compelling, interest in prevent such tactics in order to promote the integrity of the elections process, prevent voter confusion, and prevent fraud. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231, (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365 (1997) (concluding that states have compelling interests in preventing electoral distortions and ballot manipulations, avoiding voter confusion, and preserving the integrity of the elections process).

D. An injunction would harm the Secretary of State, the State of Michigan, the elections process, and Michigan voters

While the denial of an injunction would inflict no harm on Plaintiffs, who have not suffered any cognizable legal injury, the *issuance* of a preliminary injunction would harm the Secretary of State, the State of Michigan, the elections process, and Michigan voters. Not only does Michigan have a compelling interest in preventing the very type of voter confusion (and, conversely, promoting integrity in the elections process) Plaintiffs would undermine in the name of political expression, but by the time this Court has expedited hearing of this case, we will be but four days away from the absolutely immutable federal deadline for submitting all ballots to overseas voters. Ballots will have already been printed, and ballots *will have already been emailed to overseas voters*. See Exhibit 1. It cannot be that these ballots will appear without Gary E. Johnson's name, and the ballots for the November voters will read something different, for this being the case would undermine the integrity—and, what is more, the *actual results*—of the November election.

E. The public interest will not be served by the injunction.

For these same reasons, the public interest would not be served by this Court issuing a preliminary injunction. Michigan citizens have an interest in the upholding of Michigan law—both the law that prevented Gary Johnson from switching political parties on the eve of a general election, and the law that now prevents Plaintiffs from undermining this result by “swapping” their rejected candidate for another with the same name. Moreover, as the Sixth Circuit stated

in an order issued today, denying Plaintiff LMP's motion for immediate consideration:

Further, the entry of injunctive relief at this late date, when the Secretary's intentions have long been clear, would cause substantial harm to the orderly processing of the election and would not serve the public interest. Attached Order, dated 9/12/2012.

In short, Plaintiffs are not likely to succeed on the merits, and the balance of harms weighs against injunctive relief. Accordingly, preliminary injunction should not issue.

Respectfully submitted,

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Dated: September 12, 2012

CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

s/Nicole A. Grimm
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