

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

WILLIAM GELINEAU; GARY E. JOHNSON;	)	
And LIBERTARIAN PARTY OF MICHIGAN.	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1:12-CV-976
	)	HON. PAUL L. MALONEY
RUTH JOHNSON, Secretary of State of	)	
Michigan, in her official capacity.	)	
	)	
	)	
Defendant.	)	

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**\*\*\* EXPEDITED CONSIDERATION REQUESTED \*\*\***  
**\*\*\* TELEPHONIC ORAL ARGUMENT REQUESTED \*\*\***

**REPLY BRIEF SUPPORTING MOTION FOR TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

Plaintiffs file this reply brief to address the issues of laches and res judicata. In support, Plaintiffs attach a Declaration from a nonpartisan City Clerk stating that:

- 1.) Ballots are not yet being printed;**
- 2.) If the Court issues an order by tomorrow morning (September 14), it will not create a problem for clerks to include Gary E. Johnson;**
- 3.) If the court waits until the scheduled September 18 hearing to issue an order, it will be feasible to add Gary E. Johnson, but will cost money.**

See Ex. A, Declaration of Michael Mizzi.

**I. Plaintiffs' claims are not barred by laches because issues related to Gary E. Johnson were not ripe for adjudication until the Defendant denied him a place on the ballot.**

*A. Plaintiffs' claim that Gary E. Johnson was unconstitutionally excluded from the ballot was not ripe until the Secretary unconstitutionally excluded him from the ballot.*

Defendant Ruth Johnson (the "Secretary") has raised the issue of laches and quotes at length from an opinion in another case faulting the Libertarian Party for not moving quickly enough to respond to the Secretary's May 3, 2012 letter indicating the Secretary would not place Governor Johnson on the ballot. But this May 3, 2012 letter did not address Gary E. Johnson. As set forth in the Gelineau Affidavit attached to Plaintiffs' motion, the Secretary outright refused to address the issue of whether Gary E. Johnson would be placed on the ballot until the end of the day on September 7, 2012. Indeed, because the Michigan Republican and Michigan Democratic Party did not solidify some of their nominees (e.g. state supreme court) until Saturday, the state-wide official candidate list was not published by the Secretary until Monday. Plaintiffs filed suit on Tuesday. This is hardly a delay sufficient to deprive Plaintiffs of their constitutional rights.

The Secretary's argument is that Gary E. Johnson should have filed suit months ago when the Libertarian Party challenged Michigan's sore loser law. But he could not have filed then because his claim was not yet ripe. "A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v United States*, 523 US 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-581 (1985)). "The ripeness doctrine has developed "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *In re Cassim*, 594 F.3d 432, 437 (6th Cir. 2010). "[O]ne cannot be guilty of

laches until his right ripens into one entitled to protection.” *Gasser Chair Co, Inc. v. Infanti Chair Mfg. Corp.*, 60 F3d 770, 777 (Fed. Cir. 1995).

Plaintiffs had no indication from the Secretary that Gary E. Johnson would be excluded until the very end of last week. Had Plaintiffs raised this issue earlier, the Secretary would have undoubtedly sought to dismiss the case for lack of subject matter on ripeness grounds. This claim was not ripe until the Secretary excluded this candidate from the ballot. Indeed, the Plaintiffs could not possibly have filed a lawsuit before the Secretary excluded Gary E. Johnson *because no statute prohibits naming a substitute or contingent candidate*. It is the Secretary that refused to respond to the Libertarian Party or address Gary E. Johnson sooner, and the Secretary bears the responsibility for this delay and any associated costs. But the Court does not need to assign blame or indulge counsel in pointing fingers because time still exists to add Gary E. Johnson to the ballot.

*B. It is still practical and possible to add Gary E. Johnson to the ballot.*

Attached to this brief as **Exhibit A is the Declaration of Michael Mizzi**. Mr. Mizzi is the nonpartisan City Clerk in Allen Park, Michigan. This succinct declaration makes clear that ballots are not yet printing, that the Court could order Gary E. Johnson added by tomorrow morning without creating any difficulty, and that ordering Gary E. Johnson be placed on the ballot by the morning of September 18 is also possible, just costlier. This declaration shows that the Secretary is wrong to claim Gary E. Johnson cannot be placed on the ballot, but re-enforces that if the Court is going to protect Plaintiffs’ constitutional rights, it should do so immediately to save costs and protect the public interest.

## **II. Res judicata does not bar Plaintiffs' claims because they were not ripe.**

As the Secretary sets forth, res judicata requires that “both actions involve the same parties or their privies” and “the matter in the second case was, or could have been, resolved in the first.” *Gose v Monroe Auto Equip Co*, 409 Mich 147, 162-163; 294 NW2d 165 (1980). The Secretary makes an absurd point that Gary E. Johnson and Governor Johnson are in privity “because their legal rights are inherently intertwined.” Br. at 8. Governor Johnson sued to place Governor Johnson’s name on the ballot. Gary E. Johnson is suing to place his own name on the ballot. These are legally separate issues and interests. But even if privity existed here, the issue of placing Gary E. Johnson on the ballot was not raised in the earlier case (and could not have been) because the Secretary did not exclude him until well after that case was filed.

“[R]es judicata does not apply to claims that were not ripe at the time of the first suit.” *Rawe v Liberty Mut Fire Ins. Co.*, 462 F.3d 521, 529-530 (6th Cir. 2006) (citing *Katt v Dykhouse*, 983 F.2d 690, 693-694 (6th Cir. 1992)). This includes claims based on conduct that occurs after the filing of the previous complaint. *Rawe*, 462 F.3d at 529 (“Simply put, [a plaintiff] could not have asserted a claim that [he or she] did not have at the time.”). As set forth above, the dispute between Gary E. Johnson and the Secretary, and the issues related to whether a substitute or contingent candidate like Gary E. Johnson could be placed on the ballot could not have even been raised in a lawsuit until this week. Thus, the prior adjudication as to Governor Johnson did not and could not have decided any issues related to Gary E. Johnson.

**CONCLUSION**

Plaintiffs are, of course, libertarians, and would like to save taxpayer money while still vindicating their rights. Therefore, Plaintiffs request that the Court either:

- Issue an order tomorrow morning ordering that Gary E. Johnson be placed on the ballot; or
- Issue an order tomorrow morning that ballots not be printed, which would avoid duplication of cost, until the Court hears this motion on September 18.

Respectfully submitted,

MILLER JOHNSON  
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Dated: September 13, 2012

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