

CASE NO. 12A260

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' REPLY
SUBMITTED TO JUSTICE KAGAN**

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Argument

I. Petitioners Moved For Emergency Relief Below in the District Court.

The Secretary and Intervenors assert that relief should be unavailable here because, they allege, Petitioners did not seek emergency relief in the District Court. But they know this is false. As Petitioners explained in their Application, they did seek emergency relief in the District Court before seeking that same emergency relief in the Sixth Circuit. The Sixth Circuit's initial Order denying equitable relief overlooked this fact, and Petitioners consequently in their motion for reconsideration corrected this misunderstanding.

As Petitioners pointed out to the Sixth Circuit, they moved in their Complaint for preliminary as well as permanent relief from the District Court and reiterated this demand in their dispositive motion. The lack of a separate motion for preliminary injunction may have caused the misunderstanding in the Sixth Circuit. Once the District Court denied emergency relief and dismissed the action, it would have been futile and "impracticable" to ask again for the same relief. *See, e.g., Chemical Weapons Working Group v. Department of the Army*, 101 F.3d 1360, 1362 (10th Cir. 1996) ("When the district court's order demonstrates commitment to a particular resolution, application for a stay from that same district court may be futile and hence impracticable.") (Citations omitted).

II. Litigation Is Pending In The Western District of Michigan But Does Not Involve Governor Johnson.

Counsel for Petitioners has been apprised that litigation is proceeding in the Western District of Michigan (*Gelineau v. Johnson*, No. 12-976 (W.D. Mich., Sept. 13, 2012)) on behalf of a different candidate named Gary E. Johnson. He is from Texas and is not related to Governor Gary Johnson (from New Mexico), who was nominated nationally by the Libertarian Party and who has a direct stake in the litigation before this Court.

The litigation filed in the Western District came after the United States District Court for the Eastern District of Michigan dismissed Governor Johnson's suit and denied him emergency relief. It was precipitated by the Secretary's decision, dated September 7, 2012—the same day that Petitioners' case was dismissed in the Eastern District—informing Gary E. Johnson (from Texas) that he would not be allowed to run as the Libertarian Party candidate for President either.

The Secretary's action proves beyond a shadow of a doubt that the present controversy is not about enforcing Michigan's sore loser law, or any other law for that matter. It is about keeping "Gary Johnson" off the ballot. After all, Gary E. Johnson (from Texas) is not a sore loser, nor is there any law in Michigan to justify the Secretary's refusal to allow him ballot access.

Aware of Republican shenanigans against Governor Johnson in other States¹ as well as the unfolding drama in Michigan, the Libertarian Party of Michigan on June 2, 2012 nominated, alternatively, both Governor Johnson and Gary E. Johnson (from Texas) for President. Both names were timely submitted to the Secretary, with the instruction that if Governor Johnson proved ineligible, Gary E. Johnson (from Texas) was to be the Libertarian Party of Michigan candidate. This path is perfectly acceptable under Michigan law, which allows replacements on presidential tickets (a not uncommon occurrence in Michigan and across the country).

The Secretary, however, studiously avoided rejecting Gary E. Johnson's alternative nomination until the very day that Governor Johnson was denied relief, September 7, 2012. Following these simultaneous developments, Governor Johnson took his appeal to the Sixth Circuit, while Gary E. Johnson pursued an original action in District Court.

The two cases are distinct. Governor Johnson cannot win relief in *Gelineau*, just as Gary E. Johnson cannot win relief here.

III. Federal Law Does Not Require That Candidates' Names Be Printed on Overseas Ballots.

Federal law, specifically the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), does not require candidates' names on

¹ Ohio Republicans, for example, filed an administrative complaint against Governor Johnson on August 31, 2012 arguing that Ohio's "sore loser" law prohibited his candidacy. Knowing their charge was frivolous under Ohio law, which only precludes party candidates from running as independents, they quickly withdrew their challenge the next day. In Pennsylvania, state courts are still considering Republicans' challenges to the signatures supporting Governor Johnson's ballot line.

ballots. Rather, UOVACA requires only that ballots sent overseas allow voters to designate a candidate for each office on the ballot by *writing in* the name of the candidate or by *writing in* the name of a political party, in which case the ballot shall be counted for the candidate of that political party. See 42 U.S.C. § 1973ff-2(c)(1). In the case of the offices of president and vice president, a vote for a named candidate or a vote by *writing in* the name of the political party is to be counted as a vote for the electors supporting the candidate involved. See 42 U.S.C. § 1973ff-2(c)(2).

The Military and Overseas Voter Empowerment Act (MOVE), which was passed in 2009, made changes to UOCAVA, but did not change its write-in requirement. The principal change found with MOVE is that states must now send "write-in absentee ballots," 42 U.S.C. § 1973ff-2(c), to overseas voters forty-five days before each federal election, and then provide a method to track these returned "write-in absentee ballots." By its terms, MOVE authorizes the use of blank, "write-in absentee ballots." Michigan is not required to print ballots with candidates' names by September 22, 2012 in order to comply with UOVACA, MOVE, federal court order, or anything else.

Consequently, to the extent Michigan is now printing ballots, and attempting to moot this case (as conceded by the Secretary in her Response), it is acting voluntarily and assuming the risk of having to make needed corrections.

Further, testimony in the original action filed on behalf of Gary E. Johnson establishes that even if a federal September 22 deadline for printed ballots with candidates' names existed--which it clearly is not--Michigan can comply by beginning the printing process as late as September 18, 2012. See *Gelineau v. Johnson*, No. 12-976 (W.D. Mich., Sept. 13, 2012) (Declaration of Michael Mizzi, City Clerk of Allen Park, Wayne County, Michigan) (copy attached). To the extent the Secretary claims the contrary in her Response, her untested statement lacks credibility.

Conclusion

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

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this document and attachment were electronically delivered by e-mail to: Denise C. Barton, Michigan Department of Attorney General, PO Box 30736, Lansing, MI 48909-8236, bartond@michigan.gov (Counsel for the Secretary), and Eric D. Doster, 313 S. Washington Square, Lansing, MI 48933, edoster@fosterswift.com (Counsel for the Michigan Republican Party), this 14th day of September, 2012.

s/Mark R. Brown

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