

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

LIBERTARIAN PARTY OF MICHIGAN;
GARY JOHNSON; DENE ROCKMAN-MOON,

Plaintiffs-Appellants,

Case No. 12-2153

v.

**On Appeal from the United States
District Court for the Eastern District
of Michigan, No. 2:12-cv-12782**

RUTH JOHNSON,

Defendant-Appellee,

REPUBLICAN PARTY OF MICHIGAN,

Third Party-Intervenor.

**APPELLANTS' EMERGENCY MOTION
FOR INJUNCTION AND EXPEDITED APPEAL**

Appellants move the Court for an emergency injunction pending appeal pursuant to FRAP 8 directing appellee, Michigan Secretary of State Ruth Johnson ("Secretary"), to place the names of appellant Gary Johnson and James P. Gray on the Michigan ballot for the general election to be held on November 6, 2012 as the candidates of the Libertarian Party for President and Vice President of the United States, respectively. Appellants also move to expedite this appeal. They seek immediate relief because ballots must be finalized, printed and distributed to absentee voters in the immediate future.

By Opinion and Order issued on September 7, 2012 the district court denied plaintiff Gary Johnson access to the ballot, granted defendant's and intervenor-defendant's motions to dismiss, and denied plaintiffs' motion for summary judgment. ECF No. 25, Opinion and Order.¹

¹References in the form "ECF No. __, [description of document]" are to documents listed on the district court's CM/ECF docket sheet.

Plaintiffs filed a notice of appeal the same day. ECF No. 27, Notice of Appeal.

INTRODUCTION

In the district court, plaintiffs sought 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. ECF No. 6-7, Letter from Secretary to Gary Johnson dated Dec. 13, 2011. Plaintiffs asserted that barring Johnson from the general election ballot would severely injure plaintiffs' voting and associational rights under the First and Fourteenth Amendments, and that Michigan has no state interest in barring Johnson from the ballot which justifies the injuries to plaintiffs' rights.

Plaintiff-appellant Libertarian Party of Michigan ("LPM") is the Michigan affiliate of the national Libertarian Party. ECF No. 6-4, ¶ 3, Declaration of Denee Rockman-Moon executed on July 29, 2012 ("Rockman-Moon Decl."). Plaintiff-appellant Gary Johnson is a former two-term governor of New Mexico and is the Libertarian Party candidate for president. ECF No. 6-3, ¶ 1, Declaration of Gary Johnson executed on July 27, 2012 ("Johnson Decl."). Plaintiff-appellant Denee Rockman-Moon is the chair of the LPM and its candidate for presidential elector from Michigan's fifth congressional district, and wants to support and vote for the LPM and plaintiff-appellant Gary Johnson at the general election on November 6, 2012. ECF No. 6-4, ¶ 2, Rockman-Moon Decl. Defendant-appellee Ruth Johnson is the Secretary of State of Michigan and has overall responsibility for the conduct of elections and for the supervision and administration of the election laws of Michigan. MCL 168.31. Intervenor-defendant-appellee is the Republican Party of Michigan.

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. ECF No. 6-4, ¶ 3, Rockman-Moon Decl..

By letter to Gary Johnson's Michigan campaign coordinator dated November 21, 2011, the Secretary advised that Johnson would appear as a Republican candidate on Michigan's February 28, 2012 presidential primary ballot unless he withdrew pursuant to MCL 168.615a(1) by 4:00 p.m. on December 9, 2011. ECF No. 6-3, ¶ 5, Johnson Decl.. By letter to Gary Johnson dated December 13, 2011, the Michigan Department of State's Director of Elections advised that Gary Johnson 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. *Id.*, ¶ 6. Gary Johnson did appear as a Republican candidate on Michigan's February 28, 2012 presidential primary ballot, *Id.*, ¶ 7, although he did no campaigning and expended no funds in connection with the primary election. *Id.*

By letter to counsel for the LPM dated May 3, 2012, the director of the Michigan Department of State's Bureau of Elections advised that Gary Johnson would be barred by Michigan's "sore loser" law, MCL 168.695, from appearing on the ballot at the November 6, 2012 general election as a presidential candidate for the LPM. *Id.*, ¶ 8. Gary 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 3-6, 2012. *Id.*, ¶ 9; ECF No. 6-4, ¶ 4, Rockman-Moon Decl. His nomination was ratified by the LPM state convention on June 2, 2012 and forwarded to the Secretary pursuant to MCL 168.686. *Id.*, ¶ 5.

On September 7, 2012 the district court issued an Opinion and Order granting defendant's and intervenor-defendant's motions to dismiss and denying plaintiffs' motion for summary judgment. ECF No. 25, Opinion and Order. The court ruled that the burdens imposed on plaintiffs' rights by denying Gary Johnson access to the ballot were not severe and that they were justified by the state's interests in maintaining political stability. *Id.*

ARGUMENT

I. Plaintiffs are Substantially Likely to Succeed on the Merits

A. "Sore Loser" Statutes

Most states have "sore loser" laws. ECF No. 6-2, ¶¶ 3, 4, Decl. of Richard Winger executed on July 30, 2012 ("Winger Decl."). These laws vary in language and scope. Michigan's law, MCL 168.695, 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:

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.

Sore loser laws unquestionably apply to candidates for offices other than president. Until now, however, no federal or state court had ever used a sore loser law to keep a candidate for President of the United States from appearing on the general election ballot.² Nor, until now, has any state 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

²*National Committee of U.S. Taxpayers v. Garza*, 924 F. Supp. 71 (W.D. Texas 1996) used a sore loser law to bar Pat Buchanan from the Texas general election presidential ballot because he had run in the Republican primary. The controversy became moot, and the ruling was not appealed, because Buchanan did not seek the U.S. Taxpayers Party nomination.

major party presidential primary. ECF No. 6-2, ¶ 7, Winger Decl. This is hardly surprising 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) the “real” candidates in a presidential election are not the candidates for president themselves but the candidates for presidential elector, U.S. Const. Art. II, § 1, who are not candidates in primary elections and therefore cannot be “sore losers” in those elections; (3) parties choose their presidential candidates at nominating conventions, not at state primary elections; a candidate for president cannot win or lose a party’s nomination by winning or losing a state’s primary election; and (4) the application of state sore loser laws to presidential candidates would impose an unduly severe burden on the First and Fourteenth Amendment rights of the candidates, their parties and supporters across the nation.

B. Standards for Adjudicating Ballot Access Restrictions

The standards for adjudicating the constitutionality of state-imposed restrictions on access to the ballot were summarized by the Supreme Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (employing rational basis analysis in upholding a Minnesota “anti-fusion” statute, where plaintiffs wanted candidate to appear on ballot as nominee of multiple parties) (quoted by the district court, ECF No. 25, p. 10, Opinion and Order):

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the “character and magnitude” of the burden the State’s rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State’s concerns make the burden necessary. *Burdick* [*v. Takushi*, 504 U.S. 428, 434 (1992)], 112 S. Ct., at 2063-2064 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L.Ed.2d 547 (1983)). Regulations imposing severe burdens on plaintiffs’ rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State’s “important regulatory interests” will usually be enough to justify “reasonable, nondiscriminatory restrictions.” *Burdick, supra*, at 434, 112 S. Ct. at

2063 (quoting *Anderson, supra*, at 788, 103 S. Ct., at 1569-1570); *Norman* [*v. Reed*, 502 U.S. 279, 288-299 (1992)], 112 S. Ct., at 704-706 (requiring “corresponding interest sufficiently weighty to justify the limitation”). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer* [*v. Brown*, 415 U.S. 724, 730 (1974)], 94 S. Ct., at 1279 (“[N]o litmus-paper test . . . separat[es] those restrictions that are valid from those that are invidious The rule is not self-executing and is no substitute for the hard judgments that must be made”).

C. The District Court Erroneously Used a Rational Basis Standard of Review

The district court determined that Michigan’s sore loser law does not impose a severe burden on plaintiffs’ rights and therefore does not warrant strict scrutiny, relying on *Timmons, supra*, and *Clingman v. Beaver*, 544 U.S. 581 (2005) (employing rational basis analysis in upholding Oklahoma’s “semi-closed” primary system, where plaintiffs wanted all voters to be able to participate in party’s primary election), and distinguishing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (applying strict scrutiny in striking down Connecticut’s closed primary statute, where plaintiffs wanted voters registered as independents to be able to participate in Republican primaries).

The district court’s analysis is grounded in its observation that “[t]he Supreme Court has held that laws having the same effect as the Michigan sore-loser law, i.e. precluding a particular candidate from placing his or her name on the ballot under certain circumstances, do not place severe burdens on voters’ or candidates’ associational rights and therefore need only be reasonable and nondiscriminatory restrictions that serve a State’s important regulatory interests.” This observation, however, overlooks the fact that neither *Timmons* nor *Clingman* involved a candidacy for President of the United States. In *Anderson v. Celebrezze*, 460 U.S. 780, 794-95 (1983) (employing strict scrutiny to invalidate Ohio laws which made it virtually impossible for an independent candidate for president to access the ballot), the Supreme Court pointed out that presidential elections are unique:

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.

For these reasons, courts have been extremely careful when called upon to apply local sore loser laws to presidential candidates. They have been so careful, in fact, that no court in the country has ever sustained the application of a state sore loser law to a presidential candidate except the U.S. District Court for the Western District of Texas in *National Committee of U.S. Taxpayers v. Garza*, *supra*, which is distinguished above at n. 2. It remains the case that until now, no state had 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. ECF No. 6-2, ¶ 7, Winger Decl.

The district court also made light of plaintiffs' observation that the "real" candidates in a presidential election are not the candidates for president themselves but the candidates for presidential elector, U.S. Const. Art. II, § 1, who are not candidates in primary elections and therefore cannot be "sore losers" in those elections. Voters at the November general election do not elect a president. Rather, they choose candidates for presidential elector. Presidential candidates appear on the November ballot as markers for competing slates of presidential electors. In recognition of these facts, MCL 168.45 expressly 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:

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.

Although the candidates for president are perhaps the real parties in interest, the candidates who will be elected (or not) at the November general election are candidates for presidential elector.

The district court asserts that the sore loser law does not “impose severe burdens on Gary Johnson, who is only barred from the general election as a candidate for a party other than the Republican party.” ECF No. 25, p. 12, Opinion and Order. The court repeatedly, and erroneously, states that Johnson is free to run as an independent. To the contrary, the July 19, 2012 deadline for collecting and filing the 30,000 valid petition signatures necessary to access the ballot as an independent has passed. MCL 168.590 - 168.590h, 168.544f. Even if Johnson could still mount an independent candidacy, the independent candidate route to Michigan’s general election ballot would 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 this Court’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 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 it to nominate candidates at March primary election placed unconstitutional burdens on First Amendment rights of party, its candidates and voters). Like *Tashjian*, and unlike *Timmons* and *Clingman*, this case involves a state’s regulation of a political party’s internal affairs (the Libertarian Party’s

nomination process) and core associational activities (Gary Johnson's right to appear on the ballot, as the Libertarian Party's presidential candidate, and his and the Party's supporters' right to vote for him as such). Like *Tashjian*, this case calls for strict scrutiny of the state law whose application to Johnson's candidacy impairs these core associational rights.

The decision of the court below is expressive of a tension in the law between protecting the major parties from internal dissension, on the one hand, and protecting the associational rights of minor parties and candidates and voters of all stripes, on the other. In distinguishing *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981) (holding Kentucky's sore loser law inapplicable to presidential candidate by its terms), the court below observes that

[t]he Michigan sore loser statute does not seek to regulate associational conduct simply based on winning or losing the battle but rather based upon switching sides halfway through the fight. It does not depend for its application solely upon the candidates (sic) prior defeat, but rather depends upon his or her decision to ditch one political party for another.

ECF No. 25, p. 15, Opinion and Order. The court's extensive reliance on *South Carolina Green Party v. South Carolina State Election Commission*, 612 F.3d 752 (4th Cir. 2010) (upholding South Carolina's sore loser law in a non-presidential race) rests on the Fourth Circuit's observation that

the Supreme Court . . . explained in *Clingman v. Beaver* [*supra*] that sore loser statutes prevent a candidate who has lost a party primary or nomination from effecting a 'splinter' of a major political party, by joining a minor party while retaining the support of the major party's voters, thereby undermining the major party in the general election.

Id. at 756; ECF No. 25, p. 19, Opinion and Order. Ultimately, the district court concluded that the burdens imposed on the instant plaintiffs by Michigan's sore loser law are not severe and are justified by the state's interest in preventing "divisive and internecine intraparty fights after a political party has decided its nominee," *Id.* at 20, quoting *Garza*, 924 F. Supp. at 74; protecting political stability, *Id.*; preventing "last minute political party maneuvering," ECF No. 25, p. 21,

Opinion and Order; and preventing “extended intraparty feuding, factionalism and voter confusion,” *Id.* at 21-22. Since Johnson, by defendant’s own admission, could have gained access to the general election ballot as an independent candidate if he had obtained the 30,000 valid petition signatures necessary to do so, one might question the importance of these putative state interests. How can it be that they somehow apply to Johnson as a Libertarian candidate but would not apply to Johnson as an independent candidate?

In 1980, John 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. ECF No. 6-2, ¶ 3, 4, Winger Decl. 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.*

Anderson was listed on Michigan’s 1980 general election ballot as the presidential candidate of the Anderson Coalition Party. The district court provides the following, *erroneous*, accounting of Anderson’s candidacy in Michigan in an effort to show that the Michigan sore loser law indeed applies to presidential candidates such as Johnson:

At the time of Anderson’s candidacy, however, Michigan had not yet enacted a provision that permitted an independent candidate to obtain access to the general election ballot. *See* ECF No. 6-8, p. 3, Pls.’ Mot. Summ. Judg. Ex. G, May 3, 2012 Letter to William W. Hall. Because Mr. Anderson’s name appeared on the Michigan primary ballot as a candidate for the Republican party, he was technically precluded by application of Michigan’s sore loser law from running at all in the general election. To avoid this unconstitutional predicament, the Supreme Court of Michigan ordered that Mr. Anderson’s name be removed from the primary ballot so that he could appear on the general election ballot as the candidate of a different party. *Michigan Republican State Central Committee v. Secretary of State*, 408 Mich. 931 (1980). Plaintiff Gary Johnson

does not face this same dilemma as Michigan law now permits him to run as an independent candidate, notwithstanding that he appeared on the primary presidential ballot as a candidate for the Republican party. MCL § 168.590 to 168.590h.

First, although in 1980 Michigan did not have a statutory provision permitting an independent candidate to obtain access to the general election ballot, a judicially-approved, non-statutory ballot access method existed. This was the method used by Eugene McCarthy in 1976 to gain access to the Michigan ballot as an independent candidate for president by collecting enough petition signatures to demonstrate public support and filing them with the secretary of state. The method was reviewed and approved by the court in *McCarthy v. Austin*, 423 F. Supp. 990 (W.D. Mich. 1976). There is no reason Anderson could not have used this method for obtaining access to the 1980 ballot if he had chosen to run as an independent candidate in Michigan rather than as a minor party candidate. Second, and most important, the Supreme Court of Michigan did not “order[] that Mr. Anderson’s name be removed from the primary ballot so that he could appear on the general election ballot as the candidate of a different party.” Rather, the Supreme Court of Michigan, by a vote of 4-3, *declined* to remove Anderson from the May 20, 1980 Republican primary ballot, and Anderson received 48,947 votes in the Republican primary. Chief Justice Coleman wrote separately to say that he would have granted the relief sought by removing Anderson from the primary ballot. *Michigan Republican State Central Committee v. Secretary of State*, 408 Mich. 931 (1980). In sum, Anderson *did* appear on the 1980 Michigan Republican presidential primary ballot *and* on the general election ballot as a minor party candidate, notwithstanding the sore loser law’s prohibition.³

³On September 10, 2012 the district court issued an Amended Opinion and Order, ECF No. 28, with the following explanation:

“The only amendment to the Court’s September 7, 2012 Opinion and Order is the striking of one sentence and a citation appearing on page 17 of the Court’s Opinion: “To avoid . . . (1980).” The Court did not in any way rely on this language or citation in reaching its decision on

D. If Allowed to Stand, the District Court’s Decision would have a Far-Reaching, Negative Impact

If approved by this Court, Michigan’s approach to regulating the general election ballot by means of the sore loser law has the potential to do untoward damage to the interstate cooperation envisioned by the Framers as well as recognized practices employed today in the several states. The Supreme Court has found that several provisions in the Constitution prohibit a state from “projecting” its laws onto activities that occur in other states. Perhaps the best known of these limitations is found in the Dormant Commerce Clause, which has been routinely interpreted to prohibit states from attempting to give their laws “extra-territorial” application. In *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 516 (1935), to use the best-known example, the Court ruled that New York could not apply its otherwise valid minimum-price measure for milk “against a dealer who has acquired title to the milk as the result of a transaction in interstate commerce” Justice Cardozo explained that “New York has no power to project its legislation into Vermont by regulating the price to be paid in that state . . . [and] New York is equally without power to prohibit the introduction within her territory of milk . . . acquired in Vermont” *Id.* at 521.

The Court more recently applied this principle in *Healy v. Beer Institute*, 491 U.S. 324, 326 (1989), to invalidate a “price affirmation” statute requiring that liquor distributors “affirm”

the merits. Indeed the Court noted, also at page 17 of its Opinion, that Mr. Anderson’s name did appear on the primary ballot as a candidate for the Republican Party but, as explained in the Bureau of Elections Director’s May 3, 2012 letter to Plaintiff Gary Johnson, also cited by the Court at page 17 of its Opinion, Anderson’s efforts to also appear as a candidate on the general election ballot as the Anderson Coalition’s candidate were not challenged at that time by the Bureau of Elections because Michigan did not then have in place a statutory procedure for qualifying an independent candidate. That procedure is in place today and Plaintiff Gary Johnson could have availed himself of this procedure, thus distinguishing the instant case from the situation faced by John Anderson in 1980.” *Id.* at n.1.

that the prices charged to wholesalers inside the state are no higher than those charged in neighboring states. The Court explained that the “established view [is] that a state law that has the ‘practical effect’ of regulating commerce occurring wholly outside that State’s borders is invalid under the Commerce Clause.” *Id.* at 332 (citing *Baldwin v. G.A.F. Seelig*). The Court in *Healy*, 491 U.S. at 335, stated:

The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also *by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.*

(Emphasis added).

The Fourteenth Amendment’s Due Process Clause also supplies limitations. States cannot simply reach out to regulate activities beyond their borders. Regulated entities must have “minimum contacts” with a State in order to be taxed, *see, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), or called into court. *See, e.g., Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846 (2011). A state cannot regulate or punish activity beyond its borders (through punitive damages, for example) where that conduct is otherwise “lawful where it occurred.” *See, e.g., State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 421 (2003).

The teaching behind these cases is that a state’s regulations cannot be considered in a constitutional vacuum. The practical effects of a state’s laws on the nation as a whole must also be considered. This is certainly the case with presidential elections, which are governed in the first instance by Article II of the Constitution and the Twelfth Amendment. Under both Article II and the Twelfth Amendment, a state’s electors are required to 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”). The Framers therefore were keenly aware that the states’ selections of electors for the United States President were interconnected and thereby required some measure of interstate cooperation.

As previously noted, the Supreme Court made clear in *Anderson v. Celebrezze, supra*, that presidential selection is constitutionally unique. Thus, notwithstanding the general validity of ballot access restrictions, like sore loser laws, when applied to presidential contests these restrictions must give way.

Numerous courts have refused to apply states’ sore loser laws to presidential candidates, either because they are seen as attempts at projecting states’ laws outside their borders or because they are otherwise viewed as interfering with national policies and politics. The common theme among these cases is that states are simply not allowed to interfere with the will of the national electorate by tying candidates to parties. Whether a state is telling candidates that ‘because you ran in another state’s party primary you cannot run here,’ *see, e.g., In re Nader*, 858 A.2d 1167 (Pa. 2008), or ‘because you lost in this state under one banner you cannot run here under another,’ *see, e.g., Anderson v. Mills, supra*, the Constitution is violated. States simply are not constitutionally authorized to project their ballot limitations onto decisions made by national political parties and their affiliates in other states.

Using the terms of the tying arrangement addressed in *Healy v. Beer Institute*, states are not authorized to require that presidential candidates “affirm” that they are running under a single political party banner throughout the United States. Just as Michigan cannot require that sellers relinquish economic opportunities by “affirming” that their prices are as low as those in other states, *see Healy*, Michigan cannot demand that presidential candidates forego political

opportunities in other states by running for president in Michigan. Simply put, presidential candidates have the constitutional right to participate in, and lose, the primaries and conventions of the various political parties across the United States.

In re Nader, supra, provides a recent example. There, Pennsylvania officials were called on to apply their sore loser law to Ralph Nader and his running mate, Peter Camejo, even though neither had ever run in a Pennsylvania primary. Disregarding this fact, the lower court ruled that Pennsylvania's sore loser law applied because of Nader's and Camejo's party activities in other states. *Id.* at 1178. Nader and Camejo, the lower court reasoned, were not truly independent. The Pennsylvania Supreme Court disagreed, finding that this interpretation 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. "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Similarly, the Pennsylvania high court concluded that Pennsylvania's sore loser law could not be used against Nader's running mate, Camejo, who was registered with a party in another state:

The Commonwealth has not intervened, thus failing to supply any reason, compelling or otherwise , to justify its interest in prohibiting candidates who are members of a party in another state from running as independents in this Commonwealth.

John Anderson's experience during the 1980 presidential election generated similar results. Anderson was challenged by Democrats using sore loser laws in at least four states. *See* Fred H. Perkins, Note, *Better Late Than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines*, 11 Hofstra L. Rev. 691, 720 n. 197 (1983) (stating that

four states attempted to apply their sore loser laws to Anderson).⁴ Anderson, like Johnson here, had at one time been a candidate in Republican primaries for president. He began withdrawing from contention in Republican primaries across the United States in April of 1980, however, in order to run as an independent. Notwithstanding several sore loser challenges, Anderson was not excluded from any state's ballot.

In Maryland, for example, 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 (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).

A similar result was achieved in North Carolina, where Anderson had withdrawn from the state's Republican primary on the eve of the election. *See Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980). The district court there 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. *Id.* at 304-05. The Fourth Circuit readily agreed. Any

⁴Anderson ran in nearly two dozen state primaries in 1980. All but three states at that time had sore loser laws. Still, only four states even attempted to apply their sore loser laws to Anderson/

other conclusion, after all, would cause serious constitutional difficulties.

This Court applied similar logic in *Anderson v. Mills, supra*, where Kentucky's sore loser law was also invoked against Anderson. The Court 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.

Moreover, this Court 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. Kentucky officials, after all, conceded that the law "would not apply to the nominee of the Democratic or Republican parties [I]f either of these parties' candidates lost in the Kentucky presidential primary, but subsequently were nominated by his party, his name would appear on the ballot in Kentucky." *Id.* Interpreting or re-writing the law to preserve this facet while excluding minor candidates, like Anderson, as sore losers, caused the Court concern: "It would seem to require that in future presidential elections, not only an independent candidate, but a nominee of one of the two major parties might not be permitted to appear on the general election ballot. *The constitutionality of such an interpretation is subject to grave doubts.*" *Id.* (Emphasis added).

In the present case, the district court found that Johnson, unlike Anderson, ran in the Michigan Republican primary and can therefore be comfortably excluded notwithstanding the Anderson precedents described above. Factually, the district court is incorrect. As previously explained, John Anderson did, in fact, run in the Michigan primary, receiving 8% of the vote.

The Michigan Supreme Court, contrary to the district court's finding, refused to remove Anderson from the primary ballot.

The district court also concluded that this Court's decision in *Mills* is not controlling for the reason that Michigan, unlike Kentucky, does not apply sore loser status to primary losers who eventually represent the same political party in the general election. Thus, a primary loser like John McCain was still able to run as the Republican candidate in Michigan. The presidential selection process is preserved; *Mills* is satisfied.

But this is not exactly true either. For under Michigan law, were a candidate to lose in a major party presidential primary in Michigan, that candidate would, under Michigan's present interpretation, be precluded from running as the candidate of any other party, including the other major party. Thus, important candidates who started out running as Republicans – like Teddy Roosevelt in 1912 and Robert La Follette in 1924, for example – would then be precluded from being nominated by new political parties – like Roosevelt's Bull Moose Party and La Follette's Progressive Party. Roosevelt ran runner-up in 1912. Were Michigan's law in place, the second most popular candidate in America would not have been allowed on its ballot.

Of course, Michigan is one of only a handful of states that takes 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). But think of the potential for electoral chaos if more states followed Michigan's lead. The “practical effect” would be to jeopardize the entire national selection process. Major candidates, like John Anderson and Teddy Roosevelt, would be frozen into the first parties they tested; they would not be allowed to change their minds for fear of

being excluded from multiple ballots. Not only could they expect to lose ballot access in Michigan, but they would lose ballot access in numerous other states. This application would change the presidential election landscape dramatically. There would be no more Teddy Roosevelts, Robert La Follettes or John Andersons.

Minor candidates, of course, would be particularly hard hit by such a development, since participation in any minor party's selection process would mean that a candidate could not run under any other minor party's label in any other state. It is very common today for minor candidates for president to run under different party labels in different states. Ralph Nader, who was an independent in some states but also the candidate of several different minor parties in others, would have been shut out of the 2004 election under Michigan's approach.

II. Plaintiffs will Suffer Irreparable Injury.

If an injunction does not issue, Gary Johnson will be excluded from Michigan's presidential election scheduled for November 6, 2012.⁵ The supreme Court's stay in *Bush v. Gore*, 531 U.S. 1046 (2000), illustrates how important presidential elections are. Just as the improper counting of votes can cause a presidential candidate irreparable harm, barring a candidate from the ballot is an injury beyond repair. Even conceding that Johnson will not win the presidential election, he will suffer irreparable harm in other ways. Federal matching funds are at stake. Voters' rights are at stake. Voters who wish to vote for Johnson will be forever denied that right. Current polls show that Johnson enjoys the support of 4.3% of the electorate. He has significant support in Michigan and throughout the nation. Given Michigan's millions of

⁵It is unclear when ballots must be printed. Military and overseas absent voter ballots are scheduled by federal law to be distributed on September 22, 2012. 42 U.S.C. 1973ff-1(a)(8). The Secretary claims that changes in the ballots would be "prohibitively expensive or impossible" after September 13 or 14, 2012. ECF No. 16-3, para. 9, Affidavit of Christopher Thompson dated August 31, 2012.

registered voters, Johnson's exclusion has the potential to disenfranchise several hundred thousand of them.

III. Defendants will Suffer No Significant Harm.

The Secretary has ample time to print ballots before the September 22, 2012 date for distributing certain absent voter ballots. 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.

IV. The Public will Benefit from an Injunction.

It is common in these times to lament the apathy of America's voters. Part of the problem must lie in the dearth of choices offered to them. Third party candidacies like Johnson's offer more choices and increase voter interest by enlarging the marketplace of ideas.

CONCLUSION

For the foregoing reasons, the Court should expedite this appeal and enjoin the Secretary from issuing any ballots for the November 6, 2012 election which do not name Gary Johnson and James P. Gray as the Libertarian Party candidates for President and Vice President of the United States.

Respectfully submitted,

s/Gary Sinawski

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CERTIFICATE OF SERVICE (e-file)

I hereby certify that on September 10, 2012 I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will provide electronic copies to counsel of record.

s/Gary Sinawski
Gary Sinawski