UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

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

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

v.

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

Defendant.
_____/

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

Plaintiffs, by and through counsel, move the Court for summary judgment pursuant to Fed. R. Civ. P. 56 declaring that Michigan's "sore loser" law, MCL 168.695, is unconstitutional on its face and as applied to plaintiffs and ordering defendant to print plaintiff Gary Johnson's name on the ballots for the general election to be held on November 6, 2012 as the presidential candidate of the Libertarian Party. In support of the motion, plaintiffs refer the Court to the annexed brief and to the appendix filed herewith.

Statement Pursuant to the Court's Practice Guidelines

Pursuant to the Court's Practice Guidelines relating to motion practice, the plaintiffs state that this motion for summary judgment is being filed at this time because (1) no discovery should be necessary, as there can be no genuine dispute as to any of the relevant material facts and (2) this matter relates to the contents of the ballot for the general election to be held on November 6, 2012.

Statement Pursuant to E. D. Mich. LR 7.1(a)

Pursuant to E. D. Mich. LR 7.1(a), plaintiffs state that there was a conference between attorneys for the parties in which counsel for the movants explained the nature of the motion and its legal basis and requested but did not obtain concurrence in the relief sought.

Respectfully submitted,

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PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Statement of the Issues Presented

Pursuant to E. D. Mich. LR 7.1(d)(2), plaintiffs state that the issues presented by this motion are as follows:

Is Michigan's "sore loser" law, MCL 168.695, unconstitutional on its face?

Is the sore loser law unconstitutional as applied to plaintiffs?

Should defendant be ordered to place plaintiff Gary Johnson's name on the ballot as the presidential candidate of the Libertarian Party in the general election to be held on November 6, 2012?

Statement of Controlling Authority

Pursuant to E. D. Mich. LR 7.1(d)(2), plaintiffs state that the controlling authorities for the relief sought are *Anderson v. Celebrezze,* 460 U.S. 780 (1983) and *Libertarian Party of Ohio v. Blackwell,* 462 F. 3d 579 (6th Cir. 2006).

Statement of Material Facts

Pursuant to Fed. R. Civ. P. 56, plaintiffs assert that the following material facts cannot genuinely be disputed:

Plaintiff Libertarian Party of Michigan ("LPM") is the Michigan affiliate of the national Libertarian Party. Complaint, ¶ 6; Declaration of Denee Rockman-Moon executed on July 29, 2012 ("Rockman-Moon Decl."), Pl. Appendix, Ex. C, ¶ 3.

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 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.

Michigan's sore loser law, 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.

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:

> 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.

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

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

I. THE STANDARDS FOR ADJUDICATING RESTRICTIONS ON ACCESS TO THE BALLOT

While the administration of the election process is largely entrusted to the states, they may not infringe on basic constitutional protections. *Kusper v. Pontikes*, 414 U.S. 51, 57 (1974), citing

Dunn v. Blumstein, 405 U.S. 330 (1972). *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (holding unconstitutional Ohio's election laws making it virtually impossible for a minor party to access the presidential election ballot), the first case in which the Supreme Court addressed the constitutional status of state restrictions on the electoral process, considered the nature of the rights at stake. The Court noted that such restrictions

> place burdens on two different, although overlapping, kinds of rights -- the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.

Many electoral restrictions are, of course, justified by the state's legitimate regulatory interests. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

The Supreme Court has described the trial court's task in evaluating a constitutional challenge to a state-imposed restriction on access to the ballot as follows:

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged [restriction] is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (holding that Ohio's March filing deadline for presidential candidate petitions was unconstitutionally burdensome).[1]

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[1]The *Anderson* Court based its analysis on the First and Fourteenth Amendments generally and did not explicitly engage in a separate equal protection analysis. The Court stated, however, that it "rel[ied] ... on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment," *id*. at 786 n. 7, and indicated that those cases had been correctly decided. The earlier cases to which the Court referred employed

In *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) (upholding Hawaii's prohibition against write-in voting in the context of a regulatory framework providing easy access to the ballot) the Supreme Court endorsed the *Anderson* methodology and examined the circumstances in which different levels of scrutiny should be applied, stating:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends [citing *Anderson* at 788]. Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently. * * *
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> * * *
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> Under [*Anderson*'s "more flexible standard"], the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. ___, ___, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions [citing *Anderson* at 788] . . . .

The *Anderson* approach, as informed by *Burdick*, has been characterized as "a balancing test that ranges from strict scrutiny to a rational-basis analysis, depending upon the factual circumstances in each case." *Duke v. Clelland,* 5 F.3d 1399, 1405 (11th Cir. 1993), citing *Fulani v. Krivanek*, 973 F.2d 1539, 1543 (11th Cir. 1992). Actions of the states which affect access to the ballot are subject to a sliding scale, with more searching review applied to more burdensome regulations. *McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004). Voting regulations imposing "severe burdens" must be narrowly tailored to a compelling state interest, but "reasonable,

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traditional equal protection analysis but with varying levels of scrutiny. See *Williams v. Rhodes, supra*; *Jenness v. Fortson*, 403 U.S. 431 (1971); *Storer v. Brown, supra*; *American Party of Texas v. White*, 415 U.S. 767 (1974), *rehearing denied*, 417 U.S. 926 (1974); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979).

nondiscriminatory restrictions" will usually be justified by "important regulatory interests." *Id.*, citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The *Anderson-Burdick* balancing test is a judicial attempt to achieve an "equilibrium between the legitimate constitutional interests of the States in conducting fair and orderly elections and the First Amendment rights of voters and candidates." *Libertarian Party of Maine v. Diamond*, 992 F.2d 365, 370 (1st Cir. 1993).

II. THE APPLICABLE STANDARD OF REVIEW IS STRICT SCRUTINY

Plaintiffs assert that the application of Michigan's sore loser law, MCL 168.695, to candidates for President of the United States is subject to heightened scrutiny and is overly broad on its face and unduly burdensome in its application to plaintiffs. The law 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.

A. THE SORE LOSER LAW SEVERELY BURDENS FIRST AMENDMENT 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.'" *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,* 504 U.S. at 434.

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." In the case at bar, foreclosing plaintiffs LPM and 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*, *supra,* at 30; *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 Johnson from appearing on the general election ballot and by precluding their supporters from voting for them.

B. THE BURDENS ARE NOT JUSTIFIED BY 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 Michigan's sore loser law is not narrowly drawn, and its application to plaintiffs and to others who are similarly situated does not appear to serve any important state interest.

First Amendment considerations aside, the broad language of the sore loser law invites application to candidates for President of the United States as well as to candidates for local office. It might be 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 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 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.[2] Winger

[2]In 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).

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 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 American Independent 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 1982 (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 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 sore loser 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 to the general election ballot 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 must await the state's response to this motion for an identification of "precise interests" that Michigan might invoke to justify using its sore loser law to keep Gary Johnson off the ballot. *Anderson* at 789. What plaintiffs do know at this juncture is that the state's generalized interests in the orderly administration of its electoral system will not suffice. Further, 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. In fact, 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.* In fact, 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.

Conclusion

For the foregoing reasons, the Court should grant plaintiffs summary judgment declaring Michigan's sore loser law unconstitutional on its face and as applied to plaintiffs 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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Dated: August 1, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 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/Robert W. Roddis
Robert W. Roddis