

No. 12-2184

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

WILLIAM GELINEAU,
GARY E. JOHNSON

and

LIBERTARIAN PARTY OF MICHIGAN,
Plaintiffs-Appellants

v.

RUTH JOHNSON, Secretary of State
of Michigan, in her official capacity,
Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Michigan
Case No. 1:12-cv-0976
Hon. Paul L. Maloney

*** EXPEDITED CONSIDERATION REQUESTED ***

**REPLY BRIEF SUPPORTING EMERGENCY MOTION
FOR INJUNCTION PENDING APPEAL**

Jason C. Miller (P#76236)
MILLER JOHNSON
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
Telephone: (616) 831-1700
millerj@millerjohnson.com

ARGUMENT

I. The Secretary does not even address the exclusion of vice presidential nominee James Gray.

Michigan Secretary of State Ruth Johnson (the “Secretary”) offers no explanation or argument as to why Libertarian Party of Michigan (the “Libertarian Party”) vice presidential nominee James Gray cannot be on the ballot¹. Plaintiffs have raised this issue in their complaint, in their trial briefing, and before this Court without the Secretary advancing any interest in keeping James Gray off the ballot. The Secretary simply has no response.

The Secretary does not dispute that the Libertarian Party is qualified to be on the ballot, but insists that Governor Johnson was barred by the sore loser law and that Gary E. Johnson is not allowed as a substitute candidate. James Gray is not a sore loser—he did not defect from the Republican Party. James Gray was not nominated as a substitute or contingent candidate. He was the only person named as the Libertarian nominee for vice president. (*See* Ex. 3 to Motion, Gelineau Aff. at A.) The statute and arguments advanced by the Secretary are clear—under Mich. Comp. Laws § 168.686, the Libertarian Party gets to pick a vice presidential nominee and the Secretary must put him on the ballot. Once again, the Secretary has advanced no state interest for denying the constitutional rights of Plaintiffs and other Michigan voters in having the opportunity to vote for James Gray.

¹ James Gray is presently on the ballot in 47 states as the vice presidential candidate for the Libertarian Party.

The Secretary's laches arguments are completely inapplicable to James Gray. That the Secretary intended to exclude Governor Johnson does not mean that she would exclude James Gray. It was not until well into September that the Secretary indicated she would bar James Gray.² Laches requires a finding of both 1.) unreasonable delay and 2.) prejudice caused by the delay. *Brown-Graves Co. v. Central States*, 206 F.3d 680, 684 (6th Cir. 2000). Because there was no statutory authority or regulation allowing the Secretary to remove James Gray from the ballot, the Libertarian Party had no reason to file suit related to James Gray until she acted. Indeed, it is perfectly reasonable for a ballot-qualified political party to assume that the Secretary of State will follow the law and place its nominee on the ballot. Thus, without an unreasonable delay, there can be no laches claim. The Secretary is required to put James Gray on the ballot, and the laches argument created by her own delay does not save her.

II. Laches does not bar Gary E. Johnson from the ballot, either.

Again, laches requires both delay *and* prejudice. *Id.* Because the Secretary has no justification for keeping James Gray off the ballot, she will be required to reprint ballots to include James Gray. The additional burden of including Gary E. Johnson's name on the ballot with James Gray—while already reprinting—is not sufficient prejudice to apply laches to Gary E. Johnson. This is

² The Secretary's official candidate list was released on September 10, 2012.

so even if Gary E. Johnson had engaged in unreasonable delay. And Gary E. Johnson did not engage in unreasonable delay.

The Secretary and the trial court both make the same mistake in fixating on the relationship between Gary E. Johnson's ballot access and the case in the Eastern District of Michigan. Gary E. Johnson's claim ripened when the Secretary excluded him from the ballot on September 7. It was not the proceedings in the Eastern District of Michigan that gave rise to his case; it was the Secretary's unlawful decision to exclude him from the ballot. Thus, Gary E. Johnson cannot possibly be punished for having failed to intervene in a case before his claim was ripe. And if claims related to Gary E. Johnson and James Gray were not ripe, laches cannot apply. *See, e.g., Texas v United States*, 523 US 296, 300 (1998); *Gasser Chair Co, Inc. v. Infanti Chair Mfg. Corp.*, 60 F3d 770, 777 (Fed. Cir. 1995).

III. *Res judicata* does not apply because these claims were unripe.

This issue is very simple because “res 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). “Simply put, [a plaintiff] could not have asserted a claim that [he or she] did not have at the time.” *Id.* at 529. The Secretary did not exclude Gary E. Johnson from the ballot until September 7, 2012. This issue was not ripe to raise in the earlier lawsuit in the Eastern District of Michigan lawsuit. Moreover, there was simply *no dispute* about whether James

Gray could be placed on the ballot for vice president until the Secretary, without reason or justification, excluded Gray in September. Since the issue was not ripe until this suit was filed, a prior decision cannot possibly be res judicata.

III. The Secretary's practical arguments are unpersuasive.

Without justification, the Secretary has kept Gary E. Johnson and James Gray off the ballot. Indeed, her experienced and competent attorneys could not even come up with a single argument for excluding James Gray to present to this Court. To counter the obvious lack of justification, the Secretary is relying on an argument that it is just too late. By waiting until the last possible minute to exclude James Gray and Gary E. Johnson, the Secretary believes she has insulated herself from review by the Court and achieved a *fait accompli*. But this is not the case for three simple reasons:

- Although the Secretary claims that federal law requires ballots go out immediately, she can request a “legal contest” waiver under 42 U.S.C. § 1973ff-1(g)(2)(B)(ii);
- Although the Secretary claims that allowing back-up or substitute candidates is simply not possible, her predecessors have allowed such candidates on at least four prior occasions. (Ex. 5 to Motion, Winger Dec. at ¶¶ 4-7); and
- Although the Secretary argues that it is simply too late for the Court to correct the constitutional wrong because ballots have been printed, on October 25, 1990, just days before the 1990 general election, the Supreme Court ordered Cook County to reprint its ballots, requiring that 3,000,000 ballots be thrown away. *See Norman v. Reed*, 502 U.S. 279, 287 (1992) (discussing Oct. 25, 1990 order).

As long as there is time to reprint the ballots, there is still time to correct this constitutional wrong. And there is still time to print or reprint ballots

in Michigan. The Secretary should have taken steps earlier to prevent this additional expense, but her mismanagement is not grounds to take away Plaintiffs' constitutional rights or to deprive Michigan's voters, at home and abroad, of a Libertarian choice for president and vice president.

Conclusion

For these reasons, Plaintiff-Appellants respectfully request that the court issue:

- 1.) An injunction ordering Defendant-Appellee to place Gary E. Johnson and James Gray on the November ballot; or
- 2.) An injunction pending appeal and expeditiously decide the appeal.

MILLER JOHNSON
Counsel for Plaintiffs-Appellants

Dated: September 19, 2012

/s/ Jason C. Miller
Jason C. Miller (P#76236)
MILLER JOHNSON
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
Telephone: (616) 831-1700

CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2012 I electronically served a true and correct copy of the foregoing on the following:

Denise C. Barton
State of Michigan Department of Attorney General
P.O. Box 30736
Lansing, MI 48909-8236
517-373-6434
Fax: 517-373-6434
Email: bartond@michigan.gov

Nicole Grimm
State of Michigan Department of Attorney General
525 West Ottawa
Lansing, MI 48909
517-373-6434
Fax: 517-373-2454
Email: grimmn@michigan.gov

MILLER JOHNSON
Counsel for Plaintiff

Dated: September 19, 2012

/s/ Jason C. Miller
Jason C. Miller (P#76236)
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
Telephone: (616) 831-1700