No. 13-421

In The Supreme Court of the United States

LIBERTARIAN PARTY OF MICHIGAN, et al.,

Petitioners,

v.

RUTH JOHNSON, Michigan Secretary of State, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICI CURIAE* LISA DISCH, J. DAVID GILLESPIE, DOUGLAS J. AMY, JOHN C. BERG, WILLIAM P. KREML, SCOT SCHRAUFNAGEL AND JOHN B. ANDERSON IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici are distinguished professors of political science and history who specialize in the study of American political history, and, in-particular are experts on the two-party system and the impact of Sore Loser laws on third party and independent candidates. These *Amici* are:

1. Professor Lisa Disch, Professor of Political Science and Women's Studies, Associate Chair, Political Science, University of Michigan. Professor Disch is a political theorist who specializes in democratic theory, and has studied the relationship of political parties to democratic freedom. Among other things, she is the author of *The Tyranny of the Two-Party System* (Columbia 2002), a study of the history and contemporary relevance of electoral fusion which is another electoral device, widely used by third political parties in the second half of the 19th century, whose prohibition at the turn of the 20th century contributed to the decline of third political parties and helped to precipitate the sharp decline in political participation that followed the adoption of ballot access laws and other electoral restrictions.

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[1] *Amici* support Petitioner. This brief was not authored, in whole or in part, by counsel for either party. Costs for printing and filing of this brief were paid for by the Coalition for Free and Open Elections, which is a wholly non-affiliated organization to any party to this case. *Amici* sought and obtained consent by all parties to file this brief more than ten days prior to its filing, in accordance with Rule 37, subparagraph 2(a).

2. Professor J. David Gillespie, Ph.D., Charles A. Dana Professor of Political Science, emeritus, Presbyterian College. Professor Gillespie currently teaches *Political Parties* and *Seminar on Third Parties* at the College of Charleston. Gillespie has written many conference papers and published articles on third parties and he is the author of two books on the topic, both published by the University of South Carolina Press: *Politics at the Periphery: Third Parties in Two-Party America* (1993) and *Challengers to Duopoly: Why Third Parties Matter in American Two-Party Politics* (2012). He has given statements, testimony, and depositions in state and federal cases involving ballot access, discriminatory public funding provisions, and Sore Loser laws.

3. Professor Douglas J. Amy, Professor of Politics, Mount Holyoke College. Professor Amy has spent over 25 years studying and writing about election systems and party systems. Surveys have repeatedly shown that American voters desire more choices at the polls and want to see more third party and independent candidates on their ballots. Professor Amy teaches that the United States needs to take a critical look at our elections rules to ensure that candidates are not unfairly excluded from election contests. Overturning this application of Michigan's Sore Loser law is an important step toward opening up the election system and giving more power to voters.

4. Professor John C. Berg, Professor of Government, Director of Graduate Studies in Political Science, Director of Environmental Studies, Suffolk

University, and President, New England Political Science Association. Professor Berg is a prolific writer on election laws and the political and social impact of the two-party system and the recipient of the Charles A. McCoy Career Achievement Award from the New Political Science (NPS) Section of the American Political Science Association (APSA).

5. Professor William P. Kreml, J.D., Ph.D., Distinguished Professor Emeritus University of South Carolina. Professor Kreml has a B.A. and a J.D. from Northwestern University and a Ph.D. in political science from Indiana University. He has published nine single-authored, non-edited books on various aspects of American government, constitutional law, and political theory. Professor Kreml was a college professor for 46 years.

6. Professor Scot Schraufnagel, Associate Professor & Director of Graduate Studies, Department of Political Science, Northern Illinois University. His research and teaching specialties are the U.S. Congress, political parties, elections, and state government, with an emphasis on promoting a civil, representative, and effective legislative process in the United States. Professor Schraufnagel recently published two books, one titled *Third Party Blues: The Truth and Consequences of Two-Party Dominance* with Routledge Press and a second titled *Historical Dictionary of the U.S. Congress* with Roman-Littlefield Press.

In addition, former Congressman John B. Anderson joins this brief as an *Amici*. After 20 years in the U.S. House of Representatives, Congressman Anderson sought the Republican presidential nomination in 1980. On April 24, he withdrew from that contest, and declared as an independent presidential candidate. He attained ballot status in all 50 states and the District of Columbia for the November 1980 election, even though his name had been on the Republican presidential primary ballot in 20 states and the District of Columbia, and he had been a write-in candidate in the Pennsylvania Republican primary.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici submit this brief to draw the Court's attention to how lower courts, including the court below, misread and misapply *Storer v. Brown*,[2] and to encourage the Court to take this opportunity to clarify the proper scope and application of that case.

In 1974, the U.S. Supreme Court issued its opinion in *Storer v. Brown*. *Storer* upheld a California law prohibiting a candidate for political office from appearing on the general election ballot as an independent if that individual had been a registered member of a qualified political party the preceding

[2] 415 U.S. 724, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (U.S. 1974).

year. Although the decision did not directly address candidates who switch from one party to another, this decision was one of the chief bases for upholding the Michigan Secretary of State's exclusion of Governor Gary Johnson from the Michigan general election ballot.[3]

The U.S. Supreme Court now has the opportunity to clarify and limit its holding in *Storer* to its facts. The so-called "Sore Loser" laws, which punish candidates for office who switch party affiliations, are empirically damaging to free elections (according to emerging scholarship), chill First Amendment rights to free association, and inhibit free-market principles of voter choice, competition and the marketplace of ideas. The potential abuse of *Storer* is ripe because Americans have a historically high interest in independent and alternative party political candidates.[4] *Storer* holds the danger that it may be used by a political ruling class to quash competition from dissenting political voices, as the Michigan Secretary of State did when she forced an unwilling Governor Gary Johnson to be a Republican-affiliated primary

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[3] Governor Gary Johnson changed his voter registration from "Republican" to "Libertarian" on December 28, 2011. By then he was already on the Michigan Republican presidential primary ballot. The primary was being held on February 28, 2012. He tried to withdraw but the Secretary of State ruled that his withdrawal arrived two minutes too late for Johnson to be removed from the Republican presidential primary ballot.

[4] Jeffrey M. Jones, "In U.S., Perceived Need for Third Party Reaches New High", *Gallup,* http://www.gallup.com/poll/165392/perceived-need-third-party-reaches-new-high.aspx (October 11, 2013).

candidate in order to disqualify the Libertarian Party from appearing on the general election ballot.

In accepting the *Libertarian Party of Michigan v. Johnson* case for review, the Supreme Court can provide guidance as to the intended scope and reach of *Storer* and square it with the more recent decision *United States Term Limits v. Thornton*,[5] in which the Court held that state laws adding qualifications to candidates above those qualifications listed in Article One of the U.S. Constitution must be struck. *Storer* implies – as does the Sixth Circuit's reliance on this case in *Libertarian Party of Michigan v. Johnson* – that states laws that impose an additional requirement on a candidate for Federal office of "not previously different party affiliated" would pass Constitutional muster. Not so, according to *United States Term Limits*. *Amici* submit that the holdings in *United States Term Limits* are sounder and should not face disruption by *Storer*, and its misplaced application by the Sixth Circuit in *Johnson*.

[5] 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (U.S. 1995).

ARGUMENT

I. Sore Loser Laws Harm the Natural Free Market Competition Necessary for a Robust Democratic Process.

Recent political science, economic and legal scholarship show that Sore Loser laws harm the natural free market system necessary for robust democratic elections, particularly when applied to Federal office.[6]

After empirical and legal study, *Sore Loser Laws and Democratic Contestation* concludes that

> Sore loser laws not only allow the parties to deny attractive candidates and choices access to the general election, but just as importantly, they also give critical leverage to entrenched party leaders and voters who can enforce party orthodoxy on dissenters in what should otherwise be competitive, active democratic contestation within the major parties. . . . Interparty competition is meaningful only if parties are capable of competitive responsiveness that brings them closer to the median voter's ultimate preferences.[7]

Sore Loser Laws point to several recent Senatorial races. Senator Lisa Murkowski, defeated in the 2010 Republican primary for U.S. Senate by Joe

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[6] *See* Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L.J. 1013 (April 2011).

[7] *Id*. at 1014-15

Miller, was allowed by Alaska law to continue her campaign in the general election. She won. Similarly, then-Senator Joe Lieberman, defeated in the 2006 Democratic Connecticut primary, was allowed by Connecticut law to appear on the November ballot as an independent. And he won. Both of these Senators had the reputation of reaching across the aisle with their colleagues. When Sore Loser candidates are allowed to compete for Federal office, there are more moderates in Congress who represent their constituency more accurately, *Sore Loser Laws* concludes.

Empirical study by Michael S. Kang and his colleagues, discussed in *Sore Loser Laws*, concludes that states without Sore Loser laws had congressional delegations that were less polarized than states that have Sore Loser laws. If all states were without Sore Loser laws, it is somewhat likely that the behavior of members of Congress would be more moderate, because they could know that even if they lost their own party's primary, they might still be re-elected as independent candidates in the general election.

Further, times of great political growth in the United States are marked with political party switching. U.S. presidents who changed party affiliation include Martin Van Buren, Millard Fillmore, Abraham Lincoln, and Theodore Roosevelt. Noted British Prime Ministers who changed party affiliation include Winston Churchill and Benjamin Disraeli. To date, 452 U.S. elected officials have changed their

party affiliation, or switched from a party to independent status.[8]

At the 1854 congressional election, 41 incumbent members of the U.S. House (out of 234 seats) were re-elected under a different party than the party they had run with two years earlier. The Republican Party had been formed on July 6, 1854, in response to Congress having passed the Kansas-Nebraska Act on May 22, 1854. The Republican Party held a plurality in the U.S. House that convened in 1855. A large percentage of the Republican plurality had been elected as Whigs in the preceding election. There were also members who had been elected as Whigs for the 1853 session of Congress, but who elected for the 1855 Congress as nominees of the American ("Know-Nothing") Party; and there were a few members who had been elected as Free Soil members for the 1853 Congress but who were elected as Republicans for the 1855 Congress. Few would argue that the political upheaval related to party-switching that gave rise to the Republican Party, the Civil War, President Lincoln

[8] For an exhaustive list of party-switchers in Federal office and notable party-switchers in other offices, *see* Wikipedia, *Party Switching in the United States*, http://en.wikipedia.org/wiki/Party_switching_in_the_United_States (October 31, 2013) and CNN, *Party-Switchers, Past and Present*, http://edition.cnn.com/2001/ALLPOLITICS/05/23/switchers.list/ (May 23, 2001). For a more in-depth history of U.S. Senators who have switched parties during service, *see Senators Who Changed Parties During Senate Service (Since 1890)*, U.S. Senate, http://www.senate.gov/artandhistory/history/common/briefing/senators_changed_parties.htm (October 31, 2013).

and *The Emancipation Proclamation* was not an important part of America's democratic history. Yet none of this would have been possible if today's Sore Loser laws were applied to Federal elections back then.

Moreover, the rest of the free democratic world allows for party switching. In the exhaustive catalogue of the laws of all countries that hold free elections (except the United States and Switzerland, due to the complexity of their local laws), *Establishing the Rules of the Game: Election Laws in Democracies*,[9] not a single nation is listed that prevents someone from being a candidate on the grounds that he or she had recently changed parties, or on the grounds that he or she had tried and failed to get the nomination of one party and then carried on the campaign under another party label. All other free democracies in the world recognize such Sore Loser laws as abhorrent to an efficient, fluid and competitive election process, reflective of a diverse electorate.

II. *Storer* Should Be Squared With *United States Term Limits*.

In 1995, this Court held that states cannot add to the qualifications listed in Article One of the U.S. Constitution for candidates for Congress. Specifically, *United States Term Limits* struck down the Arkansas law that did not permit incumbent

[9] Louis Massicotte, Andre Blais, and Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies,* Univ. of Toronto Press, ISBN 0-8020-8564-4 (2004).

members of Congress to be listed on ballots if they had already served three terms in the U.S. House, or two terms in the U.S. Senate. The Arkansas law let anyone be a write-in candidate, whether they had served many terms already; it only restricted listing candidates on the ballot. The decision determined that the qualifications listed in Article One (age, citizenship, residency) are exclusive.

If states cannot keep congressional candidates off the ballot because of their past political behavior of winning previous elections to Congress, states also cannot keep congressional candidates off the ballot for any type of past political behavior (*i.e.,* having registered into one party and then changing their registration during the election year or the last portion of the odd year preceding the election year). *Storer,* if applied to Congressional (or Presidential) elections, is in conflict with *U.S. Term Limits.* Placing the requirement on candidates that they not be otherwise previously party-affiliated is a substantive qualification (as opposed to a procedural barrier to ballot access),[10] and therefore cannot stand under *U.S. Term Limits* or Article One.

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[10] *United States Term Limits* makes a distinction between permissible procedural barriers to ballot access (such as a certain level of support amongst the electorate, as shown by prior elections or petition signatures, which is not personal to the candidate's behavior, but rather an objective measure of voter support. A candidate having been elected to Congress previously, and a candidate having changed party membership in the past year before filing, are both types of behavior that is personal to

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III. *The Federalist, No. 10* Does Not Suggest that Laws Blocking Party-switchers or Sore Losers are Necessary for Good Government.

The *Storer* decision relies on *The Federalist, No. 10*'s arguments about the evils of factionalism to determine that the states have an interest in dissuading party infighting. Perhaps this is so. James Madison did write that factionalism is harmful to society. But he also wrote that outlawing factionalism would do more harm than factionalism itself does.

Perhaps the most famous line in any of the Federalist Papers is,

> Liberty is to faction what air is to fire, an ailment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.[11]

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the individual candidate. It does not follow logically that petition requirements, or filing fees, to get on the ballot, are elements of personal behavior on the part of the candidate or office-holder. A candidate need not circulate ballot access petitions personally; supporters can do that. Supporters can also raise the funds for the candidate's filing fee. Therefore, ballot access petitions and filing fees are not "qualifications" in conflict with Article One, but term limits and political affiliation are "qualifications".

[11] James Madison, *The Federalist, No. 10* (Nov. 22, 1787).

Madison goes on to explain that the surest way to guard against the excess of factionalism is to ***encourage a multiplicity of factions, rather than having just two factions***. This argument was in favor of uniting the 13 states into one true nation, rather than just a confederation. Madison presumed that a large country would have more factions than a single state, and that the multiplicity of factions would be better than just two factions.

To the extent that *The Federalist, No. 10* was meant to support the holding in *Storer,* the Court should have struck down the California law instead of upholding it. At the very least, that should be the result with respect to Federal elections, because, as Madison argues, multiple political parties instead of just two was one of the very purposes behind uniting the states beyond a mere confederacy. And Madison's predictions are now empirically supported by a long history and study of practices between the states.[12] For that reason, the Court should revisit its holding in *Storer*, clarify its scope, and limit it to its facts. *Storer* should not now be enshrined as expanded precedence in favor of Sore Loser laws in Federal elections.

[12] *See, e.g.,* Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 Geo. L.J. 1013 (April 2011).

CONCLUSION

For these reasons, *Amici* respectfully urge this Court to hear *Libertarian Party of Michigan v. Johnson* to clarify its jurisprudence concerning Sore Loser laws, not only for Presidential candidates, but for Congressional and other Federal partisan offices.

Respectfully submitted,

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