No. 13-421

In The Supreme Court of the United States

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

Petitioners,

v.

RUTH JOHNSON, Secretary of State of Michigan,
in her official capacity;
REPUBLICAN PARTY OF MICHIGAN,

Respondents.

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

BRIEF FOR RESPONDENT REPUBLICAN PARTY OF MICHIGAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court review a constitutional challenge to Michigan's "sore loser" law where this Court has repeatedly upheld "sore loser" laws as serving several important state interests?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REASONS FOR DENYING THE PETITION

I. The Issues Presented Are Not Compelling, And Have No Effect Outside Of Michigan

"A petition for a writ of certiorari will be granted only for compelling reasons." *Supreme Court Rule 10*. In an attempt to meet this standard, the Petitioners indicate that this case represents a "question of exceptional importance." Petition at 4.

If this case truly rises to the level of "exceptional importance" as the Petitioners now apparently claim, how can Petitioners make such a claim given their own actions below – actions which the District Court characterized as "vexatious," "dilatory," and "reprehensible." According to the District Court in this case:

> "As the Court noted in its prior Order Granting Intervenor-Defendant the Republican Party of Michigan's Motion to Intervene (ECF No. 23), Plaintiffs' dilatory conduct in this action has put the Court and the Defendant Secretary of State in an unnecessarily haste-driven position. The Court put on the record at the September 6, 2012 hearing on this matter its findings regarding Defendant Ruth Johnson's claim that Plaintiffs' motion for an expedited hearing on the merits of this matter should have been denied on the basis of laches. Although the Court has decided, given the importance of the issue to reach the merits, Plaintiffs' failure to act with any sense of urgency in this matter until August 19, 2012 is reprehensible. Plaintiffs were well aware, as early as May 3, 2012, that

> Johnson would be denied general election ballot access in Michigan, but waited until June 25, 2012 to file their Complaint, further waited until July 18, 2012 to serve the Defendant, further waited until August 2, 2012 to file their non-emergency motion for summary judgment, and vexatiously waited until August 19, 2012 to apprise the Court that their motion was of an urgent nature. Any effort on Plaintiffs' part to stay this Court's decision pending appeal should be met with great skepticism. *See Nader v. Blackwell,* 230 F.3d 833, 834 (6th Cir. 2000) ("The plaintiffs could have pursued their cause more rigorously by filing suit at an earlier date. A state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent."). *See also* Affidavit of Christopher M. Thomas, August 31, 2012. (ECF No. 16, Ex. 2) (detailing the time challenges presented by Plaintiffs' delay in pursuing this matter)."

Libertarian Party of Michigan, et al. v. Johnson, et al., 905 F.Supp. 2d 751, 754 n.2 (E.D. Mich. 2012). Pet. App. at 12.

Actions speak louder than words.

Ignoring their own "dilatory conduct," "reprehensible" "failure to act," and "vexatious" actions in this case, the Petitioners assert that this case presents a question of "exceptional importance," articulated as follows: "Whether a minor party candidate for president can be excluded from the general election ballot

because he or she ran in a major party primary?" Petition at 4.

Petitioners concede that, pursuant to Michigan law, the answer to their own inquiry is an unequivocal "yes":

> "Plaintiffs do not dispute that facially, by its clear and unambiguous terms, the statute can be read to apply to a presidential candidate such as Gary Johnson."

Libertarian Party of Michigan, et al. v. Johnson, et al., 905 F.Supp. 2d 751, 756 (E.D. Mich. 2012). Pet. App. at 16.

Consequently, the actual issue presented in this case involves only whether Michigan's specific "sore loser" statute (Mich. Comp. Laws §168.695) applies to presidential candidates consistent with the Constitution. While the Petitioners cite "sore loser" laws from states such as Maryland, North Carolina, and Kentucky, the requirements of these state statutes are different from Michigan's "sore loser" statute, making such comparisons irrelevant. The outcome of this case has no effect outside of Michigan.

In fact, in their own argument and again in their request for relief before the Sixth Circuit, the Petitioners acknowledge that the effect of this case is limited to Michigan law. To this end, Petitioners requested that the case be referred to the Michigan Supreme Court to determine whether the Secretary of State's interpretation of Michigan's "sore loser" law is correct "as a matter of Michigan law." Resp. App. at

23. Petitioners further stated that certification to the Michigan Supreme Court is authorized as this case involves "a question that Michigan law may resolve." Resp. App. at 23. Because the outcome of this case does not extend beyond Michigan's borders, it does not rise to the level of a "compelling" case necessary to warrant a writ of certiorari. As illustrated by the decisions of the Sixth Circuit and the District Court below (*see* Petitioners' Appendix), this case is nothing more than a straight-forward application of well-established legal principles to a Michigan statute.

II. Michigan's "Sore Loser" Statute Is Constitutional As Applied To Presidential Elections

In order to protect the integrity of the political process from frivolous or fraudulent candidates and avoiding party splintering, excessive factionalism, and voter confusion, Michigan has adopted the following "sore loser" law:

> "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."

Mich. Comp. Laws §168.695.

Because Petitioner Gary Johnson's name was printed on Michigan's February, 2012 primary ballot of the Republican Party for President, Respondent Michigan Secretary of State could not and did not permit

Petitioner Gary Johnson's name on the Michigan ballot for the November 6, 2012 general election as the Libertarian Party candidate for President. Pet. App. at 16. The District Court and the Sixth Circuit upheld the constitutionality of Michigan's "sore loser" law in this case. *See* Petitioners' Appendix.

The Supreme Court has upheld the constitutionality of "sore loser" laws as "not only permissible, but compelling." *Storer v. Brown*, 415 U.S. 724, 736 (1974). When determining whether a state election law violates constitutional rights, the court must weigh the magnitude of the burden against the interests justifying the burden. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 351 (1997). "Sore loser" laws serve several important state interests, including protecting the integrity of the political process from frivolous or fraudulent candidates and avoiding party splintering, excessive factionalism, and voter confusion. *Storer,* 415 U.S. at 732; *Timmons,* 520 U.S. at 351, 367. Additionally, "sore loser" laws do not impose a substantial burden on either individual candidates or political parties. *See Timmons,* 520 U.S. at 359; *Clements v. Fashing,* 457 U.S. 957, 971-72 (1982).

Petitioners attempt to argue that Michigan's "sore loser" law violates the Constitution as applied to presidential elections. However, none of their arguments in support of this contention have merit.

First, Petitioners cite to several inapposite cases from other jurisdictions where courts declined to

apply or expressed concern about applying different "sore loser" laws to presidential elections. However, each case is specific to that state's "sore loser" law, and is distinguishable from the facts of this case. No court has held that "sore loser" statutes could *never* apply to presidential elections.

Petitioners first cite to *Anderson v. Morris,* 636 F.2d 55, 56 (4th Cir. 1980), which held only that Maryland's filing deadline for presidential candidates was unconstitutional. Petition at 6-7. The court noted that Maryland had a "sore loser" law that contained certain exceptions for presidential candidates. *Id.* at 58. The court simply mentioned in a footnote that it believed it would be "improbable" that a "sore loser" law could apply "in all circumstances to presidential races," because a state would have to allow a candidate who received his party's nomination to appear on its general election ballot, even if he did not run, or lost, that state's primary election. *Id.* at 58 & n.8. However, the court did not address whether a state is required to allow a person who unsuccessfully ran in the presidential primary to run in the general election as the candidate of a different party.

Petitioners also cite to *Anderson v. Babb,* 632 F.2d 300 (4th Cir. 1980), in which the court found that North Carolina's "sore loser" statute did not apply to a presidential candidate under distinguishable circumstances. Petition at 7. North Carolina's statute prohibited a person who "*participates* in the North Carolina presidential preference primary" from running as a candidate of a different party in the general

election. *Id.* at 308 (emphasis added). The court found that North Carolina's law only applied to candidates who actually ran in the state's Republican primary, and that Anderson's belated withdrawal was effective under North Carolina law. Therefore, the "sore loser" law did not apply to him. Unlike North Carolina's statute, which focuses on the vague standard of whether a candidate "participate[d]" in a primary, Michigan's statute focuses on whether a candidate's name appeared on the primary ballot as a candidate for nomination. Thus, the court's reasoning in *Babb* does not apply to this case.

Finally, Petitioners cite to *Anderson v. Mills,* 664 F.2d 600, 605 (6th Cir. 1981), where the court rejected the application of Kentucky's specific "sore loser" law to a presidential candidate. Petition at 7-9. However, Kentucky's statute explicitly applied only to "candidates *who have been defeated* for the nomination for any office in a primary election." *Id.* at 605 (emphasis added). The court correctly reasoned that Kentucky's law did not apply to candidates in a presidential primary because "a candidate cannot lose his party's nomination for president by losing a state's primary election." *Id.* Michigan's "sore loser" law is distinguishable as it is triggered whenever a person's name is printed on a primary ballot as a candidate for nomination. Therefore, unlike the law at issue in *Mills*, Michigan's law squarely prohibits a candidate appearing in the Republican presidential primary from appearing on the general election ballot as a Libertarian candidate.

All of the Petitioners' cited cases are distinguishable from the facts of this case and are thus insufficient to overcome the binding Supreme Court precedent upholding "sore loser" laws as constitutional. *See, e.g., Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997); *Storer v. Brown,* 415 U.S. 724, 733 (1974).

Second, Petitioners cite to *Anderson v. Celebrezze,* 460 U.S. 780 (1983), in which the Supreme Court held that Ohio's filing deadline for independent presidential candidates was unconstitutional. Petition at 9. Petitioners highlight language in the opinion in which the Court notes that states have a diminished interest in regulating presidential elections as opposed to state elections. *Id.* at 794-95. However, the Court made these statements in the context of evaluating the constitutionality of a state's regulation of filing deadlines, which does not involve the same interests protected by a "sore loser" law. Furthermore, even if the state's interests are somewhat diminished in the context of a presidential election, the state interests here are more than sufficient to justify the minimal burden placed on Gary Johnson and the Libertarian Party as recognized by the District Court in this case. Pet. App. at 32-41.

Third, Petitioners incorrectly contend that the District Court's decision relied on two "critical factual errors." Petition at 15.

Petitioners assert that the District Court provided an inaccurate account of John Anderson's 1980

appearance on the general election ballot as a minor party candidate after losing in the Michigan Republican primary. Petition at 16. The District Court distinguished Anderson's candidacy on the ground that "at the time of Anderson's candidacy, Michigan had not yet enacted a provision that permitted an independent candidate to gain access to the general election," and Anderson was therefore precluded from running at all in the general election. Pet. App. at 32. Petitioners assert that even though there was in fact no statutory mechanism for independent candidates to access the ballot, Anderson could have run as an independent under the same method used by Eugene McCarthy in 1976. Petition at 17. Such a minor distinction, however, has no bearing on the outcome of this case. John Anderson was never permitted to appear on the general election ballot through an order of a court. One anomalous non-application of Michigan's "sore loser" law over thirty years ago has no bearing on the constitutionality of the law in this case.

Petitioners also argue that the District Court erred in stating that the "sore loser" law did not impose severe burdens on Johnson because he was free to run as an independent. Petitioners indicate that the filing deadline to run as an independent had expired on July 19, 2012, three weeks before the District Court rendered its decision. Petition at 15. However, Secretary Johnson's office notified the Libertarian Party that the "sore loser" law barred Gary Johnson from appearing in the general election as the

Libertarian Party's candidate on May 3, 2012, two and a half months before the filing deadline. Petitioners did not do anything in response for nearly two months until they filed their Complaint on June 25, 2012. Petitioners then waited three more weeks until they decided to serve Secretary Johnson on July 18, 2012, one day before the filing deadline. Thus, it was Petitioners' own dilatory conduct, described as "reprehensible" and "vexatious[ ]" by the District Court, Amended Opinion and Order at 2 n.2 (Sept. 10, 2012), that delayed the decision until after the filing deadline had expired. Pet. App. at 12.

Finally, Petitioners argue that the District Court's decision would have "disastrous implications" on "interstate comity." Petition at 9. Petitioners attempt to analogize to dormant commerce clause cases to argue that by applying its "sore loser" law to presidential elections, Michigan is attempting to regulate activities outside of its borders. Simply put, a state does not regulate activities outside its borders by maintaining control over which names are printed on its ballots. As noted, the Supreme Court has repeatedly upheld "sore loser" laws as serving several important state interests, including protecting the integrity of the political process from frivolous or fraudulent candidates and avoiding party splintering, excessive factionalism, and voter confusion. *Storer,* 415 U.S. at 732; *Timmons,* 520 U.S. at 351, 367. Accordingly, the well-reasoned analysis set forth by the lower courts in this case (*see* Petitioners' Appendix) demonstrates

that Michigan's "sore loser" statute is constitutional as applied to presidential elections.

CONCLUSION

For these reasons, Respondent Michigan Republican Party respectfully requests that this Court DENY Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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NO. 12-2153

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants,

v.

RUTH JOHNSON,

Defendant-Appellee,

REPUBLICAN PARTY OF MICHIGAN,

Third-Party Intervenor.

On Appeal from the United States District Court
For the Eastern District of Michigan
Southern Division

APPELLANTS' PETITION FOR REHEARING WITH PETITION FOR REHEARING EN BANC

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constitution

Statutes

Miscellaneous

INTRODUCTION

This case presents a question of exceptional importance: *Can a minor party candidate for president be excluded from the general election ballot because he ran in a major party primary?*

The issue was settled in litigation arising from the John Anderson campaign for president in 1980, in a manner favorable to the Plaintiffs-Appellants ("Plaintiffs") and similarly-situated parties. *See* Point I, *infra.* It has been unsettled by the district court and Sixth Circuit Panel opinions in this case.

The answer to the question turns on the application of state "sore loser" laws to presidential candidates. Most states have such laws, which vary in

their language and scope. Declaration of Richard Winger executed on July 30, 2012 ("Winger Decl."), RE 6-2, ¶ 3, 4, Page ID # 376-379. The statute involved here, MCL 168.695, prohibits a candidate who appeared on a party's primary election ballot from appearing as another party's candidate on the general election ballot:

> 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 in the election following that primary.

The Panel affirmed the district court's determination that Libertarian Party presidential candidate Gary Johnson was properly excluded from Michigan's November 2012 general election ballot on account of this statute because he ran in Michigan's February 2012 Republican presidential primary.[1] The Panel's opinion, entered on May 1, 2013, explains that the appeal is not moot because the underlying controversy is "capable of repetition, yet evading review." Panel Op. at 2-5. It then "affirm[s] the district court's judgment for the reasons stated in its September 10, 2012

[1] Gary Johnson appeared on the 2012 general election ballot in 48 states and the District of Columbia. He ran in the Republican primaries in eight states (Florida, Georgia, Michigan, Missouri, Mississippi, New Hampshire, South Carolina and Tennessee). He was excluded from the general election ballot only in Michigan, because of the state's sore loser law, and Oklahoma, for other reasons.

opinion." *Id.* at 5. The district court upheld the constitutionality of Michigan's sore loser law on its face and as applied to Gary Johnson. Copies of the Panel's and district court's opinions are appended hereto.

ARGUMENT

I. Minor Party Candidates have not Previously been Excluded from the General Election Ballot because They Ran in Major Party Primaries

In 1980, John Anderson appeared on the Republican presidential primary ballots of the District of Columbia and 20 states, including Michigan, and also 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. Winger Decl., RE 6-2, ¶ 3-4, Page ID # 376-379. 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).[2] Notwithstanding these sore loser challenges, Anderson was not excluded from any state's ballot. *Id.*

In Maryland, Anderson ran in, and lost, the Republican primary. *See Anderson v. Morris,* 636 F.2d

[2] 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.

55 (4th Cir. 1980). Questioning whether a sore loser statute could ever be applied to a presidential candidate, the Fourth Circuit 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.*

Id. at 58 n.8 (Emphasis added).

In North Carolina, Anderson withdrew 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 the state's Republican primary, that 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 other conclusion, after all, would cause serious constitutional difficulties.

This Court applied similar logic in *Anderson v. Mills,* 664 F.2d 600, 605 (6th Cir. 1981) 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.

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 11 of the 26 presidential elections held since the advent of presidential primaries in 1912, at least one candidate has appeared on the general election ballot after running in a major party presidential primary (1912, 1924, 1932, 1952, 1968, 1980, 1984, 1988, 1992, 2008, 2012). These candidates included Theodore Roosevelt, in 1912, and Robert M. La Follette, in 1924, neither of whom was excluded as being a sore loser. No state excluded any such candidate from its general election ballot on account of a sore loser law. Indeed, before Anderson's campaign, no state even attempted to apply its sore loser law to presidential candidates.

II. Sore Loser Laws are not Applicable to Candidates for President

Courts have not seriously questioned the applicability of sore loser laws to candidates for offices other than the presidency. However, with a single exception, no court has ever before used a sore loser law to bar a presidential candidate from the general election ballot.[3]

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[3] The sole exception is *Nat. Comm. of U.S. Taxpayers v. Garza,* 924 F. Supp. 71 (W.D. Texas 1996), in which the court ruled that Pat Buchanan could not be listed on the Texas general election ballot as the candidate of the U.S. Taxpayers Party because he had run in the Republican primary. However,

(Continued on following page)

Nor has any state ever before succeeded in barring a minor party presidential candidate from its general election ballot on the grounds that the candidate had previously run in a major party presidential primary. Winger Decl. RE 6-2, ¶ 7, Page ID # 376-379.

The district court did not take into account, or even mention, the Supreme Court's famous admonition that presidential contests are unique and are subject to fewer state-imposed restrictions than elections for other offices:

> 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

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the controversy became moot, and the ruling was not appealed, because Buchanan ultimately did not seek the U.S. Taxpayers Party nomination.

> determined by voters beyond the State's boundaries.

Anderson v. Celebrezze, 460 U.S. 780, 794-95 (1983).

Understandably, courts have been extremely careful when called upon to apply sore loser laws to presidential candidates. It remains the case that until now, no state had ever successfully barred a minor party presidential candidate from the general election ballot because the candidate had previously run in a major party primary. Winger Decl., RE 6-2, ¶ 7, Page ID # 376-379.

III. The District Court's Decision Rests on Critical Factual Errors

John Anderson was listed on Michigan's 1980 general election ballot as the presidential candidate of the Anderson Coalition Party. The district court provides an inaccurate 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 Gary 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. 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.

Op. and Order, RE 28, Page ID # 965-966.

To the contrary: Although in 1980 Michigan did not have a *statutory* method for independent candidates to access the general election ballot, there existed a judicially-approved, *non-statutory* method. It was used by Eugene McCarthy in 1976 to access the Michigan ballot as an independent candidate by collecting enough petition signatures to demonstrate public support and filing them with the secretary of state. The method was approved by the court in *McCarthy v. Austin,* 423 F. Supp. 990 (W.D. Mich. 1976) (ordering McCarthy placed on the November ballot as an independent candidate). Anderson, too, could have used this method for obtaining access to the 1980 Michigan ballot if he had chosen to run as an *independent candidate* rather than as a minor party candidate. The upshot is that Anderson appeared on the 1980 Michigan Republican presidential primary ballot *and* on the general election ballot, as a *minor party candidate,* notwithstanding the sore loser law.

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 ballot as a candidate for a party other than the Republican party." *Id.* at 961. The court repeatedly, and *erroneously,* states that Johnson was free to run as an independent. To the contrary, the deadline for collecting and filing the 30,000 valid petition signatures necessary to access the ballot as an independent expired on July 19, 2012, nearly three weeks before the district court rendered its decision. MCL 168.590-168.590h, 168.544f.

Even if Johnson could still have mounted an independent candidacy, it would not have mitigated the 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,* 415 U.S. 724, 745 (1974). 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). Like *Tashjian v. Republican Party of Conn.,* 479 U.S. 208 (1986), 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,* therefore, this case calls for strict scrutiny of the state law whose application to Johnson's candidacy impairs these core associational rights. The district court erred in applying a rational basis standard of review.

IV. The District Court's Decision Rests on Faulty Premises

The district court observes 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.

Op. and Order, RE 28, Page ID # 959-960 (emphasis added). This observation is benign as far as it goes, but it begs important questions like *who the particular candidate is*[4] and *what the specific circumstances*

[4] The district court rejected plaintiffs' argument that the "real" candidates in a presidential election are those 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. But voters at the November general election do not elect a president; they choose candidates for presidential elector.

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are. It is insufficient to venture the opinion, as the district court does, that Michigan's sore loser law imposes less severe burdens than the one-year party "disaffiliation" law in *Storer v. Brown, supra,* and therefore passes constitutional muster. *Id.* at 15, 20. Plaintiff Storer, who challenged the disaffiliation requirement, was not a presidential candidate; plaintiff Gus Hall, who challenged an unrelated signature requirement, was. In light of the Supreme Court's favorable treatment of the disaffiliation requirement as applied to a non-presidential candidate, the district court seems to say, Michigan's sore loser law somehow does not impose a severe burden on plaintiffs' rights and therefore does not warrant strict scrutiny.

Nor do the authorities in which the district court grounds this thinking support its rational basis analysis of the sore loser law as applied to Gary Johnson. *Timmons v. Twin Cities Area New Party,* 520

Presidential candidates appear on the November ballot as markers for competing slates of presidential electors. Thus, 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. 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 the candidates for presidential elector. Moreover, parties choose their presidential candidates at nominating conventions, not at state primary elections, and a candidate for president cannot win or lose a party's nomination by winning or losing a state's primary election.

U.S. 351 (1997), used rational basis analysis in upholding the application of a Minnesota "anti-fusion" statute to prohibit a candidate for *local* office from appearing on the ballot as the nominee of multiple parties. *Clingman v. Beaver,* 544 U.S. 581 (2005) also employed rational basis analysis in upholding Oklahoma's "semi-closed" primary system, where the plaintiffs wanted all voters to be eligible to participate in a party's primary election for *local* office.

The district court glosses over the fact that neither *Timmons* nor *Clingman* involved a candidacy for President of the United States. As the Supreme Court explained in *Anderson, supra* at 794-95, presidential elections are uniquely national in their scope; states have a diminished interest in regulating them and a diminished right to do so.

V. The District Court's Decision has Disastrous Implications

If approved by this Court, Michigan's approach to regulating the general election ballot by means of the sore loser law could do untoward damage to the interstate cooperation envisioned by the Framers as well as to practices recognized 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 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 "extraterritorial" 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.

In *Healy v. Beer Institute,* 491 U.S. 324, 326 (1989), 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*). The Court 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.*

Id. at 335 (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 Auto. Ins. 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 presidential electors 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, these rstrictions [sic] must give way when applied to presidential contests.

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. *See* Point I, *infra.* 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. It also 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.

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, supra,* at 720 n.197 (1983).[5] Anderson, like Gary Johnson here, had at one time been a candidate in Republican primaries for president. He began withdrawing from Republican primaries 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. *Id.*

Furthermore, under Michigan law, a candidate who lost a major party presidential primary in Michigan 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 Roosevelt in 1912 and 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

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[5] Anderson 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.

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 Theodore 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. They could be expected to lose ballot access not only in Michigan, but in numerous other states. The presidential election landscape would be altered dramatically. There would be no more Teddy Roosevelts, Robert La Follettes or John Andersons.

Minor candidates 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, an independent in some states and the candidate of various minor parties in others, would have been shut out of the 2004 election under Michigan's approach.

VI. In the Alternative, the Case can be Referred to the Michigan Supreme Court

In the alternative, this Court could certify to the Michigan Supreme Court the question of whether the Defendant-Secretary of State's novel interpretation of Michigan's longstanding sore loser law – the same law that Michigan refused to apply to John Anderson – is correct as a matter of Michigan law. Certification is authorized by Michigan Court Rule 7.305(B)(1), which provides:

> When a federal court, state appellate court, or tribal court considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may on its own initiative or that of an interested party certify the question to the Michigan Supreme Court.

CONCLUSION

The district court's decision is expressive of a tension in the law between protecting the major parties from dissension, on the one hand, and, on the other hand, protecting the associational rights of minor parties, independent and minor party candidates, and voters of all stripes. As explained, the court relied on certain errors of fact and mistakes of law in subordinating these associational rights to the state's paternalistic interests in "preventing last minute political party maneuvering" and "protecting against excessive factionalism and party splintering." Op. and Order, RE 28 Page ID # 970-971. The district

court's decision is misguided, and the Panel's opinion should be reconsidered. In the alternative, the case should be referred to the Michigan Supreme Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE (e-file)

I hereby certify that on May 15, 2013 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