UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM GELINEAU; GARY E. JOHNSON; And LIBERTARIAN PARTY OF MICHIGAN.	)	
Plaintiffs,	)	
v.	)	Case No. 12-cv-00976
	)	Judge Paul L. Malony
RUTH JOHNSON, Secretary of State of Michigan, in her official capacity.	)	
Defendant.	)	

Thomas S. Baker (P#55589)
Jason C. Miller (P#76236)
MILLER JOHNSON
Attorneys for Plaintiffs
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
Telephone: (616) 831-1700

*** EXPEDITED CONSIDERATION REQUESTED ***
*** ORAL ARGUMENT REQUESTED ***

BRIEF SUPPORTING MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

The Libertarian Party of Michigan (the "Libertarian Party") is a political party that is indisputably qualified under Michigan law to have its nominee for president appear on the November 2012 general election ballot. Ruth Johnson (the "Secretary"), in her capacity as Michigan Secretary of State, has removed the Libertarian nominee from the ballot and **will start printing ballots without a Libertarian candidate on them by the end of this week**.

By essentially stripping the Libertarian Party of its ballot access, the Secretary has violated the constitutional rights of the voters, the candidate, and the party involved. Even though the Libertarian Party has qualified for the ballot and is entitled to place its nominee on the general election ballot, the Secretary has barred Gary E. Johnson from the ballot and refused to include him on the list of candidates.

This situation came about when Governor Gary Johnson of New Mexico left the Republican Party and instead decided to seek the Libertarian nomination. The Secretary took the position that Governor Johnson was barred from doing so under Michigan's "sore loser law," Mich. Comp. Laws § ("MCL") 168.695, which potentially bans candidates from running as another party's nominee after losing an earlier primary. At its state convention, to protect the rights of its members and voters, the Libertarian Party nominated Gary E. Johnson of New Mexico as its candidate *in the event that* the Secretary barred Governor Johnson from the ballot.

The Secretary of State has barred Governor Johnson from the ballot and successfully litigated this point in the Eastern District of Michigan. But last week she has also barred Gary E. Johnson from the ballot. She has no basis for doing so because the sore loser law does not apply to Gary E. Johnson and Michigan law expressly provides that the political parties and the Secretary ***shall*** forward on the names selected by these parties.

> In each presidential election year, the state central committee of each political party shall, not more than 1 business day after the state convention or the national convention of that party, whichever is later, forward to the secretary of state the typewritten or printed names of the candidates of that party for the offices of president of the United States and vice-president of the United States certified to by the chairperson and secretary of the committees. A party is not required to certify nominations made at an official primary election. The secretary of state ***shall*** forward a copy of a list received under this section to the board of election

> commissioners of each county, in care of the county clerk at the county seat. [Mich. Comp. Laws § 168.686 (emphasis added)][1]

By refusing to place him on the November ballot, the Secretary has imposed a severe burden on the rights of Gary E. Johnson and the voters. The Secretary has done this without any justification and thus violated their constitutional rights.

The time to remedy this constitutional wrong is quickly slipping away. Plaintiffs have been informed that ballots will be printed at the end of this week and the Secretary has insisted that all election litigation must be resolved by that time. Last Saturday, the Michigan Republican and Michigan Democratic Parties finalized their nominees for Supreme Court and the state educational boards. The last pieces of this election are about to fall in place, but if the constitutional rights of Libertarian Party members like William Gelineau and its presidential candidate Gary E. Johnson are not protected immediately by a temporary restraining, order or preliminary injunction, they will be entirely and permanently deprived of these rights.

STATEMENT OF FACTS

The Libertarian Party is a qualified party within the meaning of MCL 168.560a. (Ex. 1, Gelineau Aff. at ¶ 4.) It nominates its parties by means of a convention, or caucus, and certifies its candidates to the Secretary under MCL 168.868. (*Id.*) By a letter dated May 3, 2012, the Secretary notified the Libertarian Party that if Governor Johnson became the Libertarian Party's candidate for president, he would be excluded from the ballot under Michigan's "sore loser law." (*Id.* at ¶ 5.) At its June 2, 2012 convention, the Libertarian Party nominated Governor Johnson. In light of the Secretary's threat to bar Governor Johnson from the November ballot, the Libertarian Party also named a contingent candidate, Gary E. Johnson.

[1] Although the statute directs the Secretary of State to forward the list to the counties, Plaintiffs will describe this as placing the candidate on the ballot for ease of discussion.

> In the letter of Christopher Thomas [from the Secretary's office] to William Hall dated May 3, 2012, Mr. Thomas indicated that you would refuse to place the name of Governor Johnson on the November ballot as the Libertarian Party nominee. On June 2, 2012, the delegates to the Libertarian Party of Michigan state convention also resolved, in the event you do so, to nominate as their stand-in Presidential candidate:
>
> Gary E. Johnson
> 2011 Parker Lane, Apt. 134
> Austin, Texas 79741

(*Id.* at Ex. A.) Despite repeated inquiries, the Libertarian Party did not receive a response from the Secretary's office as to whether Gary E. Johnson would be placed on the ballot based on the Secretary's position of excluding Governor Johnson until very recently. (*Id.* at ¶¶ 9-11.)

During this same time period, the Libertarian Party and Governor Johnson pursued a lawsuit against the Secretary to challenge Michigan's sore loser law. On September 6, Judge Borman upheld the sore loser law and the exclusion of Governor Johnson, issuing a written opinion on September 7. *Libertarian Party v. Johnson*, 2:12-cv-12782 (E.D. Mich. 2012) (opinion attached as Ex. 2). The Court also noted that noting that Michigan's sore loser law did not prevent the Libertarian Party "from nominating the candidate of its choice, but only prevented from nominating one of the handful of candidates who chose to run for a different political party in the primary race." (*Id.* at 25). This opinion seemed to assume that the Libertarian Party could nominate any candidate who had not just run in another party's primary. Gary E. Johnson is just such a candidate.

Gary E. Johnson is a Libertarian activist residing in Austin, Texas. (Ex. C, Johnson Dec. at ¶ 3.) He meets the legal requirements to run for president, agreed to be the Libertarian Party's nominee if the Secretary barred Governor Johnson, and seeks to be placed on the ballot. (*See Id.* at ¶¶ 3-7.) Now that this contingency has happened, Gary E. Johnson is the Libertarian Party's candidate.

Indeed, it was not unprecedented for a political party to offer a substitute candidate. As set forth in the attached declaration of ballot access expert Richard Winger, Michigan has on at least four occasions permitted a political party—other than the Libertarian Party—to replace a presidential or vice presidential candidate. (Ex. 4, Winger Dec. at ¶¶ 4-7) On three occasions, this replacement occurred in September. But in this case, even though the Secretary was notified in June of Gary E. Johnson's nomination, she barred him from the ballot.

On September 6, 2007, the Secretary's staff finally responded to William Gelineau, indicating that Gary E. Johnson would not be placed on the ballot. (Ex. 1, Gelineau Aff. at Ex. C) Now, no Libertarian Party candidate will be on the ballot. Ballots will soon be printed, and Libertarian Party members, candidates, and voters will be injured if deprived of the right to cast a vote for Gary E. Johnson. (*Id.* at ¶ 14)

William Gelineau is a voter who plans to vote for Gary E. Johnson. (*Id.* at ¶ 2.) He is also the Libertarian Party's candidate for Michigan's third congressional district and a candidate for at-large presidential elector (an Electoral College delegate). (*Id.* at ¶¶ 2-3) As a candidate, he plans to tell voters to vote not only for himself but for the entire Libertarian Party slate of candidates, which no longer includes a presidential candidate. (*Id.* at ¶ 2.) Unless the Secretary is enjoined from excluding Gary E. Johnson from the ballot, William Gelineau and others like him will be deprived of these rights.

LEGAL STANDARD

There are four factors courts typically consider prior to determining whether to grant any type of injunctive relief: (1) the likelihood that the party seeking the injunction will prevail on merits; (2) the party seeking the injunction will suffer irreparable harm if the injunction is not issued; (3) the threatened injury to the party seeking the injunction outweighs any injury the proposed injunction may cause the party opposing the injunction; and (4) the

injunction would serve, not harm, the public interest. *N.E. Ohio Coal. for the Homeless v. Blackwell,* 467 F.3d 999, 1009 (6th Cir. 2006). These four factors are "interrelated considerations that must be balanced together," not independent requirements. *N.E. Ohio Coal.*, 467 F.3d at 1009. The stronger the showing on one factor, the less of a showing required on another. *Id.* A sufficient degree of success is shown if "the plaintiff has raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Six Clinics Holding Corp. v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997).

A temporary restraining order may even be issued ex parte, as is "no doubt necessary in certain circumstances" to prevent irreparable harm. *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters & Auto Truck Drivers,* 415 U.S. 423, 439 (1974) (citation omitted). The Affidavit of William Gelineau sets out the facts supporting the irreparable harm that will be faced by voters and candidates like himself if Gary E. Johnson is kept off the ballot. (Ex. 1). Christopher Thomas, Michigan's Director of Elections, has stated in an affidavit that Michigan's ballots will be sent to the printer at the end of this week. *See Affidavits of Christopher Thomas, attached as Exhibits 1 and 2 to Docket Entry 16* in *Libertarian Party v. Johnson*, . 2:12-cv-12782 (E.D. Mich. 2012). Thus, the need for emergency and expedited action is apparent from the affidavits. Moreover, Counsel for Plaintiffs has conferred with the relevant attorneys in the Michigan Attorney General's office and provided copies of all papers in this case. The Court should act immediately.

ARGUMENT

I. Plaintiffs will succeed on the merits in demonstrating a violation of their constitutional rights.

A. Denying Gary E. Johnson access to the ballot violates the Plaintiffs' rights.

1. Courts apply a sliding scale of scrutiny to ballot access laws.

The Secretary has barred Gary E. Johnson from the 2012 ballot and deprived voters, such as William Gelineau, of the opportunity to vote for him. This implicates federal constitutional issues: "The impact of candidate eligibility requirements on voters implicates basic constitutional rights. . . . [I]t 'is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.'" *Anderson v. Celebrezze*, 460 U.S. 780, 786-87 (1983). As Justice Douglas explained, "[v]oting is clearly a fundamental right. But the right to vote would be empty if the State could arbitrarily deny the right to stand for election." *Lubin v. Panish*, 415 U.S. 709, 721–22 (1974) (Douglas, J. concurring) (internal citations omitted).

Thus, the Supreme Court has held that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock v. Carter,* 405 U.S. 134, 143 (1972); *see also Anderson v. Celebrezze,* 460 U.S. 780, 806 (1983) ("[O]ur primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused.").

The Supreme Court has set out a sliding-scale test for determining the constitutionality of restricting a candidate's access to the ballot. Courts consider the character and magnitude of the asserted injury to the protected rights and then identify and evaluate the

precise interests put forward by the state as justifications for the burden imposed by the rule. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992). The *Anderson/Burdick* test,[2] 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). The greater the burden imposed on voters, the stricter the scrutiny the law will face *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610, 1616 (2008); *see also Norman v. Reed*, 502 U.S. 279, 288–89 (1992) (severe restriction not justified by narrowly drawn state interest of compelling importance).

Thus, 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,* at 434. On the other hand, "important regulatory interests" will usually be enough to justify "reasonable, nondiscriminatory restrictions." *Id.* In this case, the burden on the Plaintiffs is severe and the scrutiny must be strict. Even though the Libertarian Party is qualified for the ballot in Michigan and complied with Michigan's election laws, Gary E. Johnson is completely excluded from the ballot and voters are completely denied the opportunity to vote for him. The Secretary's interests, conversely, are nonexistent: no legitimate interest justifies exclusion of a legally qualified candidate from a legally qualified political party.

2. The burden on Plaintiffs in being denied ballot access and a choice in the presidential election is severe, requiring strict scrutiny.

William Gelineau wants to vote for the presidential candidate of his choice. This candidate is excluded from the ballot, and no Libertarian Party candidate will appear. It is difficult to imagine an election regulation more severe than the complete denial of the

[2] Although the standard is set, the Supreme Court is divided as to whether it is properly called the *Anderson or Burdick* test. *See* Jason C. Miller, *The Unwise and Unconstitutional Hatch Act: Why State and Local Government Employees Should be Free to Run for Public Office*, 34 S. Ill. U. L.J. 313, 341 n. 203 (2010).

opportunity to vote for the candidate nominated by one's party. *See Burdick v. Takushi, supra* at 433 (The right to cast an effective vote "is of the most fundamental significance under our constitutional structure").

Furthermore, Courts are particularly hostile towards attempts at "regulation of political parties' internal affairs and core associational activities." *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986). In this case, the Secretary's primary objective is regulating the Libertarian Party's internal affairs. Michigan law provides that the parties pick their nominees and the Secretary acts on these names. Rather than doing her statutory duty, the Secretary barred both Governor Johnson and Gary E. Johnson. The Libertarian Party has the right to nominate its candidates for public office. Nominating candidates is exactly the type of internal political party affairs that the U.S. constitution (and Michigan law) leaves to the parties themselves. Having crossed the line to bar Gary E. Johnson solely because she doesn't like his name, the Secretary's actions are subject to strict scrutiny.

3. Michigan's interests are non-existent because state law permits the Libertarian Party to select its candidate, and it selected Gary E. Johnson.

Michigan's sore loser law, MCL 168.695, is not applicable to this case. Gary E. Johnson did not run in Michigan's republican presidential primary, and thus the state has no interest in applying a sore loser law to a candidate it does not apply to. Whatever interest the Secretary may have in punishing Governor Johnson for his defection from the GOP, there is no legitimate state interest in punishing Gary E. Johnson for another man's party defection.

Nor can the state assert any generic interest in orderly elections or following its general statutory scheme. Under Michigan law, the political party provides the Secretary the "names of the candidates for the offices of president of the United States and vice-president of the United States." MCL 168.686. After that point, the Secretary "***shall*** forward" on this list for

inclusion on the ballot. *Id.* Michigan's statutory scheme does not provide the Secretary with discretion to second guess a political party's nomination decision—even if that decision annoys the Secretary or seems "too cute." The decision on candidate nominations is left to the party, and the statute does not prohibit the party from nominating stand-in, contingent, alternative, or substitute candidates. *See id.* The Libertarian Party nominated Gary E. Johnson as its candidate in the event that the Secretary excluded Governor Johnson. The Secretary did exclude Governor Johnson, leaving Gary E. Johnson as the Libertarian Party's candidate. At this point, the Secretary has no particular interest in excluding Johnson.

The Secretary may also assert a generic interest in promptness or avoiding delay in barring Gary E. Johnson from the ballot.[3] But that does not apply here. The Libertarian Party selected Gary E. Johnson as its contingent candidate on June 2 and notified the Secretary on the next business day. (Ex. 1, Gelineau Aff. at ¶¶ 7-8.) The Secretary had already taken the position that Governor Johnson was barred from the ballot. (*Id.* at ¶ 5.) William Gelineau, on behalf of the Libertarian Party, repeatedly contacted the Secretary about the contingent nomination of Gary E. Johnson without response. (*Id.* at ¶¶ 8-12.) It was not until close of business last Friday that the Secretary of state responded. (*Id.* at ¶ 12.) Accordingly, any delay is the product of the Secretary's unwillingness to consider the issue earlier and does not provide a sufficient basis to exclude Gary E. Johnson.

Finally, the state simply has no interest in keeping libertarians off of the ballot. The Libertarian Party is qualified to appear on the ballot and has other candidates appearing on the ballot. (Ex. 1, Gelineau Aff at. ¶¶ 3-4.) Whatever burden is faced by including a minor

[3] In Governor Johnson's case in the Eastern District, the Secretary argued that the case was not brought or pursued expeditiously. Such arguments cannot be made here. The Secretary of State provided no response on the issue of Gary E. Johnson's eligibility until close of business on Friday, September 7, 2012. Plaintiffs filed this Complaint on September 11 and promptly moved for this TRO.

party on the ballot is already present. Thus, the Secretary lacks any precise justification for barring Gary E. Johnson from the ballot.

B. The Plaintiffs' speech rights are also violated.

The Secretary's actions have violated the Plaintiffs' constitutional rights in multiple ways. In the interest of expeditiously resolving this case, the Plaintiffs draw the Court's attention to two other issues.

First, Gary E. Johnson seeks to run for office and express himself and his opinions as a candidate for president. Running for office is a protected form of expression under the First Amendment. *See, e.g., Finkelstein v. Bergna*, 924 F.2d 1449, 1453 (9th Cir. 1991) ("Disciplinary action discouraging a candidate's bid for elective office represent[s] punishment by the state based on the content of a communicative act protected by the first amendment.") (internal quotation marks and brackets omitted); *Washington v. Finlay*, 664 F.2d 913, 927–28 (4th Cir. 1981) (recognizing "the First Amendment's protection of the freedom of association and of the rights to run for office, have one's name on the ballot, and present one's views to the electorate"); *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir. 1977) (holding that the "plaintiff's interest in running for Congress and thereby expressing his political views without interference from state officials . . . lies at the core of the values protected by the First Amendment."); *Minielly v. State*, 411 P.2d 69, 73 (Or. 1966) (en banc) ("Running for public office is one of the means of political expression which is protected by the First Amendment").

Second, these cases also show that the Libertarian Party's selection of a candidate named Gary E. Johnson in response to the exclusion of Governor Johnson is itself a means of political expression. The Secretary apparently objects to the content of this expression. When political parties have previously sought to swap or replace candidates in presidential elections, Michigan has permitted such requests. (*See* Ex. 4, Winger Dec. at ¶¶ 4-7.) But the Secretary has

rejected the naming of Gary E. Johnson as a substitute candidate based, apparently, on his name. Such a content-based restriction is subject to strict scrutiny and cannot survive a court challenge. *See United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000). At the very least, Plaintiffs have "raised questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation" and have thus established a reasonable probability of success on the merits. *Six Clinics Holding, supra*, at 402.

II. Plaintiffs will suffer irreparable harm if the ballots are printed and distributed without Gary E. Johnson's name on the ballot.

This is one of the clearest cases of irreparable harm that the Court can face. If the Secretary is permitted to print and distribute ballots without Gary E. Johnson's name on them, then he will be completely denied access to the ballot, William Gelineau will not be allowed to vote for him, and the Libertarian Party will have no candidate on the ballot for president. Moreover, money damages cannot replace the loss of ballot access, the ability to vote for a candidate of one's choice, or the possibility of being elected to the highest office in the land—or of at least sending delegates to the electoral college.

III. The injury caused by the deprivation of Plaintiffs' constitutional rights greatly outweighs any possible injury to the Secretary in having a ballot-qualified party on the ballot.

The injury to the Plaintiffs is strong and obvious. If Gary E. Johnson is kept off the ballot, they will be deprived of their constitutional rights and injured as set forth above. It is hard to imagine an injury that the Secretary would suffer. The Libertarian Party is indisputably qualified for Michigan's ballot for this election, and it has been on the ballot for years. Including a Libertarian Party candidate for president on the ballot does not harm the Secretary.

The only conceivable grounds the Secretary could assert is that excluding Gary E. Johnson is supported by the interests behind Michigan's sore loser law and that the Secretary

does not wish to deal with a contingent candidate. Neither of these interests are compelling, and neither outweigh the injury caused by depriving Plaintiffs of their rights. As set forth above, Michigan's sore loser law has no application to Gary E. Johnson. Furthermore, the burden faced by the Secretary in accepting the contingent candidate is minimal. She was informed months ago of the contingent candidate, and her office refused to address the issues or respond to the Plaintiffs. To the extent a special burden is imposed because of the close proximity to the election, this burden is caused only by the Secretary's stubborn refusal to deal with the issue earlier when approach by the Plaintiffs. (*See* Ex. 1, Gelineau Aff. at ¶¶ 8-12.)

IV. Permitting voters the opportunity to cast a ballot for Gary E. Johnson serves, rather than harms, the public interest.

Simply put, voters face no harm in being granted a choice to vote for Gary E. Johnson. No person who does not wish to vote for him will be required to do so. Those, such as William Gelineau, who want to vote for Gary E. Johnson will be allowed to. William Gelineau's choice to vote for Gary E. Johnson harms no one. In 2008, 23,716 voters case their ballot for the Libertarian Party nominee.[4] Those individuals—and all of Michigan's voters—should have the choice to vote for Gary E. Johnson in 2012.

CONCLUSION

For these reasons, the Plaintiffs respectfully request that the Court enter a temporary restraining order and/or preliminary injunction preventing the Secretary from excluding Gary E. Johnson from the ballot and instead ordering her to forward his name as the nominee, along with the Libertarian Party's nominee for Vice President, Jim Gray, to the counties and take all such other steps as necessary to place them on the November 2012 ballot.

[4] Election results available at: http://miboecfr.nictusa.com/election/results/08GEN/01000000.html

Respectfully submitted,

MILLER JOHNSON
Counsel for Plaintiff

Dated: September 12, 2012

/s/ *Thomas S. Baker*
Thomas S. Baker (P#55589)
Jason C. Miller (P#76236)
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 12, 2012 I served a true and correct copy of the foregoing motion and related briefs and exhibits, by email on the following:

Denise C. Barton
MI Dept of Atty Gen
Public Employment, Elections and Torts Division
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

I also certify that I served a true and correct copy of plaintiffs' complaint and demand for injunctive relief on the same by email on September 11, 2012.

MILLER JOHNSON
Counsel for Plaintiff

Dated: September 12, 2012

/s/ Jason C. Miller
Thomas S. Baker (P#55589)
Jason C. Miller (P#76236)
250 Monroe Avenue, N.W., Suite 800
PO Box 306
Grand Rapids, Michigan 49501-0306
Telephone: (616) 831-1700

EXHIBIT 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WILLIAM GELINEAU, GARY E. JOHNSON
and LIBERTARIAN PARTY OF MICHIGAN

Plaintiffs, No. _____

v.

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

Defendant.
_____/

AFFIDAVIT OF WILLIAM GELINEAU

I, William Gelineau, do depose and state under oath:

1. This Affidavit is submitted in support of plaintiffs' complaint and demand for injunctive relief and motion for temporary restraining order and preliminary injunction.

2. I reside in Lowell Township, Kent County, Michigan. I am the Political Director of the Libertarian Party of Michigan ("**LPM**"), am registered to vote in Michigan, am one of the LPM's candidates for at-large presidential elector, and want to support and vote for the LPM and Gary E. Johnson of Austin, Texas, in the general election on November 6, 2012.

3. I am also the LPM's candidate for United States Congress in the Third Congressional District of Michigan, and am concerned that if there is no Libertarian presidential candidate on the ballot, that will adversely impact my Congressional race and my efforts to tell voters to vote not only for me, but also the entire LPM slate of candidates in Michigan.

4. The LPM is a qualified political party within the meaning of MCL 168.560a. It nominates its candidates by means of caucuses or conventions as provided in MCL 168.532 and 168.686a and certifies its candidate for president as provided in MCL 168.686.

5. By letter dated May 3, 2012, to counsel for the LPM, the Secretary of State advised that former Governor Gary Johnson of New Mexico ("**Governor Johnson**"), who was then seeking the Libertarian Party's nomination for president, would be precluded by Michigan's sore loser law from being listed on the November 6, 2012, general election ballot as the Libertarian Party candidate for president because he had been listed on the February 28, 2012, presidential primary ballot as a candidate for the Republican Party nomination.

6. Governor Johnson was nevertheless nominated by the national Libertarian Party as its 2012 candidate for president at the Libertarian national convention held in Las Vegas on May 5, 2012.

7. On June 2, 2012, Governor Johnson's nomination was ratified by the LPM state convention. At the same time, the convention, recognizing the Secretary of State's threat to exclude Governor Johnson from the ballot, and anticipating that the Secretary of State would ignore its nomination of Governor Johnson, nominated Gary E. Johnson of Austin, Texas, to serve as the LPM's presidential nominee.

8. Pursuant to MCL 168.686, on June 4, 2012, I personally delivered to Carol Pierce at the Bureau of Elections, in the Secretary of State's office in Lansing, Michigan ("**BOE**"), the certification of the LPM's nomination of Gary E. Johnson as its presidential candidate, a copy of which letter is attached to this Affidavit as **Exhibit A.**

9. I mentioned to Carol Pierce that we had nominated Gary E. Johnson as our presidential candidate, assuming that the Secretary of State would persist in her position that

Governor Johnson's nomination would be invalid. Carol Pierce made it clear that "others" would decide whether to place Gary E. Johnson on the ballot and contact me "in a couple of weeks" on what the BOE would recommend to the Board of Canvassers in that respect. Though not required by law, I showed her a copy of the Affidavit of Gary E. Johnson attached to this Affidavit as **Exhibit B**, and she requested a copy, which I gave her.

10. Over the next three weeks I had numerous conversations with personnel at the BOE regarding the LPM's candidates generally and our presidential candidate in particular. During those conversations, I was told that the "real" decision would be made by the Board of Canvassers. Not accepting that, I began to make telephone calls to Chris Thomas, BOE Director, which he did not return. He did finally call me when we filed suit to place Governor Johnson's name on the ballot, as we had indicated we would do in our certification letter of June 2, 2012, where we said we would "file a legal challenge" to the Secretary of State's decision. In that conversation, he still refused to say whether the BOE would place Gary E. Johnson on the ballot.

11. When I learned in the late afternoon of September 6, 2012, prior to 5 p.m., that a court had refused to place Governor Johnson's name on the ballot as the presidential nominee of the LPM, I emailed Chris Thomas, asking him once again, whether Gary E. Johnson would be placed on the ballot as the LPM's presidential nominee, but I received no response. I made a follow up call the next morning, September 7, 2012, and was told by Lydia, the administrative assistant to Chris Thomas, that he was unavailable but I would receive a call back from Melissa Malerman, their staff legal expert, that morning, but never did.

12. After speaking to Lydia, I promptly emailed Melissa Malerman, asking if Gary E. Johnson would be placed on the ballot as the LPM's presidential candidate. I received a computer system acknowledgement that she read my email at 2 p.m. At 4:40 p.m. on Friday,

September 7, 2012, I received the attached email from Melissa Malerman and letter from Chris Thomas attached to this Affidavit as **Exhibit C**, stating that the Secretary of State is refusing to place the LPM's presidential nominee, Gary E. Johnson, on the ballot.

13. In response to Malerman's message, on the morning of Monday, September 10, 2012, I emailed her, disputing the legality of their decision, and asking whether the BOE also plans to exclude the LPM's Vice Presidential nominee, James P. Gray, from the ballot. I have received no response.

14. The BOE has explained that ballots will soon be printed. If the general election ballots are printed and distributed without Gary E. Johnson's name on it, immediate and irreparable injury will result to LPM members, candidates, and voters.

15. I verify that the facts stated in this Affidavit are true, and that if sworn as a witness, I can testify with personal knowledge as to these facts.

[signature block follows on next page]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2012

William Gelineau

Subscribed and sworn to before me
this 11th day of September, 2012.

Traci M. Newhouse

Notary Public, Kent County, Michigan
My commission expires: _____
Acting in the County of Kent

Traci M. Newhouse
Notary Public - State of Michigan
County of Kent
My Commission Expires October 10, 2012
Acting in Kent County

EXHIBIT 1A

Libertarian Party of Michigan

Columbia Center II, 101 West Big Beaver Road, Suite 1400,
Troy, MI 48084 www.mi.lp.org Telephone 1-888-freenow

June 2, 2012

Bureau of Elections
430 West Allegan
Lansing, Michigan 48918

Re: Libertarian Party Presidential Nomination

Dear Sir or Madam:

This letter certifies that the Libertarian Party selected as its candidates for President and Vice President of the United States of America at its national convention in Las Vegas, Nevada, on Sunday, May 6, 2012, and the Libertarian Party of Michigan ratified those selections at its state convention in Livonia, Michigan, on Saturday, June 2, 2012:

For President: Gary Johnson
850 Camino Chamisa
Santa Fe, New Mexico 87501

Mr. Johnson is the former Governor of New Mexico

For Vice President: James P. Gray
2531 Crestview Drive
Newport Beach, California 92663

Place these candidates on the November 6, 2012, Michigan general election ballot.

In the letter of Christopher Thomas to William Hall dated May 3, 2012, Mr. Thomas indicated that you would refuse to place the name of Governor Johnson on the November ballot as the Libertarian Party nominee. On June 2, 2012, the delegates to the Libertarian Party of Michigan state convention also resolved, in the event you do so, to nominate as their stand-in Presidential candidate:

Gary E. Johnson
2001 Parker Lane, Apt. 134
Austin, Texas 78741

Mr. Gary E. Johnson is a long-time Libertarian activist and former national Secretary of the Libertarian National Committee. He has been nominated and agreed to serve as our stand-in candidate (together with Vice Presidential nominee James P. Gray) pending our legal challenge of your decision to exclude former Governor Gary Johnson of New Mexico from the ballot. In

the event that legal challenge is unsuccessful, Gary E. Johnson of Texas will serve as our nominee on the November ballot.

Attached to this letter is the slate of presidential electors for our candidates approved by the Libertarian Party of Michigan at its state convention.

Please contact Bill Gelineau at 616-723-2776 if you have any questions concerning this matter.

Very truly yours,

Denee Rockman-Moon
Chair, Libertarian Party of Michigan

Denee Rockman-Moon

Mary Buzuma
Secretary, Libertarian Party of Michigan

Mary Buzuma

BUREAU OF ELECTIONS
MI DEPT OF STATE
2012 JUN -4 AM 9:26

Congressional District	Presidential Electors – 2012
1st CD	Chad Stevens 422 Carrie St Sault Ste Marie MI 49783-2116
2nd CD	Mary Buzuma 714 S Beacon Blvd Apt 76 Grand Haven MI 49417-2167
3rd CD	Andrew S. Hall 11002 Stegman Forest Court, NE Rockford, MI 49341
4th CD	Robert Joyce 4320 Birchwood Trail Lake MI 48632
5th CD	Denee Rockman-Moon 729 Woodbine Fenton MI 48430
6th CD	William Bradley 746 Lee St South Haven MI 49090-1837
7th CD	Ronald Muszynski 2975 Fishville Rd Grass Lake MI 49240-9740
8th CD	Will Tyler White 2142-1/2 Hamilton Road Okemos, MI 48864
9th CD	Robert James Fulner 3059 Cumberland Rd Berkley MI 48072-1664
10th CD	Shyler Engel 11737 - 21 Mile Road Shelby Township, MI 48315
11th CD	Stephen A. Burgis 534 North Glenhurst Birmingham MI 48009
12th CD	Benjamin Bachrach 21835 Cherry Hill St Dearborn MI 48124-1149
13th CD	Christopher Sharer 8193 Donna St Westland MI 48185-1774
14th CD	Leonard Schwartz 13711 Victoria Oak Park, MI 48237
At Large	William Gelineau 2789 Kissing Rock Lowell, MI 49331
At Large	Scott Boman 4877 Balfour Road Detroit MI 48224-3403

EXHIBIT 1B

AFFIDAVIT

STATE OF TEXAS)
) ss.
COUNTY OF TRAVIS)

GARY E. JOHNSON, being first duly sworn, states:

1. I am 35 or more years old and under no disability. I am a natural-born citizen of the United States of America. For many years I have been an activist in the Libertarian Party and served in the past as its national Secretary. I currently reside at 2001 Parker Lane, Apt. 134, Austin, Texas 78741.

2. I understand that the Michigan Secretary of State has expressed her intention to refuse to list former New Mexico Governor Gary Johnson as the nominee of the Libertarian Party for President of the United States of America on the November 6, 2012, general election ballot for the State of Michigan. If she carries through on that intention, I have agreed to accept the nomination of the Libertarian Party of Michigan for President of the United States of America as a stand in candidate pending a legal challenge of such refusal by the Libertarian Party of Michigan. In the event that legal challenge is unsuccessful, I have agreed that I will serve as such nominee, and consent to the placing of my name as such nominee on the November 6, 2012, general election ballot for the State of Michigan.

Dated: JUNE 1, 2012.

Gary E Johnson
Gary E. Johnson

This Affidavit was signed, sworn to and acknowledged before me in Travis County, Texas, on June 1, 2012, by Gary E. Johnson.

MEGAN LIVINGSTON
Notary Public
STATE OF TEXAS
My Comm. Exp. 09-17-13

Notary Public, Travis County, Texas
My commission expires: 9-17-13
Acting in the County of Travis

EXHIBIT 1C

STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

September 7, 2012

Bill Gelineau, Political Director
Libertarian Party of Michigan
Via email: bgelineau@the-closingoffice.com

Dear Mr. Gelineau:

The Bureau of Elections acknowledges receipt of your email message sent September 6, 2012, inquiring about the status of the Libertarian Party of Michigan's (LPM) nominees for the office of President of the United States.

LPM nominated former New Mexico Governor Gary Johnson as its candidate for President. The Bureau advised the LPM of its intention to disqualify Governor Johnson from appearing on the November 6, 2012 general election ballot on the basis of Michigan's sore loser law, MCL 168.695d, on May 3, 2012. The LPM and Governor Johnson subsequently filed a legal challenge in which a decision was rendered yesterday by Judge Paul Borman, dismissing the plaintiff's complaint for declaratory and injunctive relief. *Libertarian Party of Michigan, et al. v Secretary of State*, Dkt. No. 2:12-cv-12782-PDB-MJH.

Perhaps in anticipation of this outcome, the LPM has purportedly nominated a "stand-in Presidential candidate," Gary E. Johnson. However, no provision of the Michigan Election Law authorizes a political party to nominate a contingent or stand-in candidate. Therefore, Gary E. Johnson's name will not appear on the November 6, 2012 general election ballot.

Sincerely,

Christopher M. Thomas
Director of Elections

---------- Forwarded message ----------
From: **Malerman, Melissa** <malermanm@michigan.gov>
Date: Fri, Sep 7, 2012 at 4:40 PM
Subject: RE: Libertarian Party Presidential Candidate
To: Bill Gelineau <bgelineau@the-closingoffice.com>
Cc: "Thomas, Christopher M" <ChristopherT@michigan.gov>

Please see the attached, sent on behalf of Chris Thomas.

We acknowledge receipt of the write-in declarations of intent filed in our office earlier today by Gary Johnson and James Gray.

Sincerely,

EXHIBIT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

v.

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

Defendant,

REPUBLICAN PARTY OF MICHIGAN,

Intervenor/Defendant.
_____/

Case No. 12-cv-12782

Paul D. Borman
United States District Judge

AMENDED[1] OPINION AND ORDER
(1) GRANTING DEFENDANT RUTH JOHNSON'S MOTION TO DISMISS (ECF NO. 4);
(2) GRANTING INTERVENOR-DEFENDANT REPUBLICAN PARTY OF MICHIGAN'S MOTION TO DISMISS (ECF NO. 21); AND
(3) DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (ECF NO. 6)

This matter is before the Court on Defendant Ruth Johnson's Motion to Dismiss (ECF No.

[1] The only amendment to the Court's September 7, 2012 Opinion and Order is the striking of one sentence and a citation appearing on page 17 of the Court's Opinion: "To avoid . . . (1980)." The Court did not in any way rely on this language or citation in reaching its decision on the merits. Indeed the Court noted, also at page 17 of its Opinion, that Mr. Anderson's name did appear on the primary ballot as a candidate for the Republican Party but, as explained in the Bureau of Elections Director's May 3, 2012 letter to Plaintiff Gary Johnson, also cited by the Court at page 17 of its Opinion, Anderson's efforts to also appear as a candidate on the general election ballot as the Anderson Coalition's candidate were not challenged at that time by the Bureau of Elections because Michigan did not then have in place a statutory procedure for qualifying an independent candidate. That procedure is in place today and Plaintiff Gary Johnson could have availed himself of this procedure, thus distinguishing the instant case from the situation faced by John Anderson in 1980.

4); Intervenor-Defendant Republican Party of Michigan's Motion to Dismiss (ECF No. 21); and Plaintiffs' Motion for Summary Judgment (ECF No. 6).

A hearing was held on Thursday, September 6, 2012, at which Plaintiffs, Defendant Ruth Johnson and Intervenor-Defendant Republican Party of Michigan appeared and were heard. For the reasons that follow, the Court (1) GRANTS Defendant Ruth Johnson's Motion to Dismiss, (2) GRANTS Intervenor-Defendant's Motion to Dismiss, (3) DENIES Plaintiffs' Motion for Summary Judgment and (4) DISMISSES Plaintiffs' Complaint with prejudice.[2]

INTRODUCTION

Plaintiff Gary E. Johnson ("Gary Johnson") ran for the Republican nomination for President of the United States in Michigan's February, 2012 presidential primary and lost. Gary Johnson now seeks to have his name placed on the ballot in Michigan as a candidate for President of the United States in the November 6, 2012 general election as the Libertarian Party nominee. Michigan statute

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[2] 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).

MCL 168.695, known as the "sore loser statute," provides that an individual who has placed his or her name on the primary ballot as a candidate for nomination of one political party is not eligible to run as a candidate for any other political party at the general election immediately following that primary. Pursuant to the sore loser statute, the Defendant Secretary of State has excluded Gary Johnson's name from the ballot for the upcoming November 6, 2012 general election as the Libertarian Party candidate for President of the United States. Plaintiffs Gary Johnson, the Libertarian Party of Michigan ("LPM") and Denee Rockman-Moon ("Rockman-Moon"), the Chairperson of the LPM, filed this action claiming that application of the statute to Gary Johnson violates their First and Fourteenth Amendment rights under the United States Constitution. Plaintiffs seek injunctive and declaratory relief invalidating Michigan's sore loser statute, both facially and as applied to Gary Johnson, that would require the placement of Gary Johnson's name as the Libertarian Party Candidate for President of the United States on the ballot in the upcoming November, 2012 general election.

I. BACKGROUND

The facts in this matter are undisputed. Plaintiff Gary Johnson resides in Santa Fe, New Mexico and served as governor of New Mexico from 1995-2003. (ECF No. 6, Pls.' Mot. Summ. Judg. Ex. B, July 27, 2012 Affidavit of Gary Johnson ¶ 1.) Throughout much of 2011, Gary Johnson sought the Republican Party nomination for President of the United States. (*Id.* ¶ 3.)

In November, 2011, Gary Johnson's then-Republican campaign contacted the Michigan Secretary of State on several occasions to ensure that Gary Johnson would be recognized as a candidate for the Republican presidential nomination. In a November 8, 2011 Letter from Gary Johnson's campaign scheduler, Grant K. Huihui, to Secretary of State Ruth Johnson, Mr. Huihui

stated that: "Governor Gary E. Johnson is fully committed to running a national campaign seeking the Republican nomination for the office of President of the United States of America. Governor Johnson has traveled through more than 35 states in his ongoing efforts to spread his message, while seeking the Republican nomination. Governor Gary E. Johnson respectfully requests to be placed on Michigan's primary election ballot." (ECF No. 6-8, p. 9, Pls.' Mot. Summ. Judg. Ex. F, November 8, 2011 Letter to Ruth Johnson.)

On November 21, 2011, Defendant Secretary of State Ruth Johnson, pursuant to MCL § 168.614a(3), sent Gary Johnson a letter informing him that his name would be included on Michigan's Presidential Primary ballot as a candidate for the Republican party unless he filed an affidavit, no later than 4:00 p.m. (E.S.T.) on Friday, December 9, 2011, specifically stating that he was not a presidential candidate of the Republican party. (ECF No. 6-8, p. 11, Pls.' Mot. Summ. Judg. Ex. F, November 21, 2011 Letter to Gary Johnson.)

Gary Johnson subsequently attempted to withdraw from the Michigan presidential primary but his request, received by email at 4:03 p.m. on December 9, 2011, after the 4:00 p.m. statutory deadline set forth in MCL § 168.615a(1) had passed, was ineffective. (ECF No. 6-8, p. 1-2, Pls.' Mot. Summ. Judg. Ex. G, May 3, 2012 Letter to William W. Hall.) Because Gary Johnson did not timely submit an affidavit seeking to have his name removed from the ballot in compliance with the deadlines set forth in MCL § 168.615a(1), his name appeared on the ballot as a candidate for the Republican presidential nomination in Michigan's February, 2012 primary election. Gary Johnson never challenged, or took any legal action to reverse the Secretary of State's decision refusing his untimely request to remove his name from the Michigan primary ballot as a Republican party presidential candidate. Gary Johnson did not win the Republican party nomination.

At its Las Vegas convention held on May 3-6, 2012, the national Libertarian Party, a qualified political party under Michigan law, MCL § 168.560a, but not a major party, MCL § 168.16, nominated Gary Johnson as its candidate for President. (ECF No. 6-3, Gary Johnson Aff. ¶ 9.) Gary Johnson's nomination was subsequently ratified by the Defendant LPM and forwarded to the Michigan Secretary State for certification and inclusion of Gary Johnson's name on the November 6, 2012 general election ballot as the Libertarian Party candidate for president. *Id.* ¶ 10.

The Michigan Secretary of State disqualified Gary Johnson from appearing on the November 6, 2012 general election ballot as a presidential candidate for the Libertarian Party based upon the Michigan "sore loser" law, which prohibits a candidate who appears on the primary ballot for one political party from appearing as a candidate for any other political party at the election following that primary:

> Ineligibility of candidate at subsequent election.
>
> 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.

MCL § 168.695.

Plaintiffs claim that the Defendant Secretary of State wrongfully refused to place Gary Johnson's name on the Michigan ballot for the November 6, 2012 general election as the Libertarian Party candidate for president because, *inter alia*, Michigan's sore loser statute does not apply to presidential candidates. 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. Plaintiffs argue, however, that the statute should not be applied to presidential candidates because the "real candidates" in a presidential election are the candidates for presidential elector, not the presidential

candidate. Plaintiffs also argue that application of the sore loser statute to Johnson's Libertarian Party candidacy for President of the United States violates their First and Fourteenth Amendment rights.

II. STANDARD OF REVIEW

A. Federal Rule of Civil Procedure 12(b)(6) - Motion to Dismiss

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a case where the complaint fails to state a claim upon which relief can be granted. When reviewing a motion to dismiss under Rule 12(b)(6), a court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirectTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007). But the court "need not accept as true legal conclusions or unwarranted factual inferences." *Id.* (quoting *Gregory v. Shelby County*, 220 F.3d 433, 446 (6th Cir. 2000)). "[L]egal conclusions masquerading as factual allegations will not suffice." *Eidson v. State of Term. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . . ." *Id.* at 555 (internal citations omitted). Dismissal is appropriate if the plaintiff has failed to offer sufficient factual allegations that make the asserted claim plausible on its face. *Id.* at 570. The Supreme Court clarified the concept of "plausibilty" in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009):

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007)]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

> inference that the defendant is liable for the misconduct alleged. *Id.* at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

Id. at 1948-50. A plaintiff's factual allegations, while "assumed to be true, must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *LULAC v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Twombly*, 127 S.Ct. at 1965). Thus, "[t]o state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *Bredesen*, 500 F.3d at 527 (citing *Twombly*, 127 S.Ct. at 1969).

In ruling on a motion to dismiss, the Court may consider the complaint as well as (1) documents that are referenced in the plaintiff's complaint or that are central to plaintiff's claims (2) matters of which a court may take judicial notice (3) documents that are a matter of public record and (4) letters that constitute decisions of a government agency. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 2499, 2509 (2007). *See also Greenberg v. Life Ins. Co. Of Virginia*, 177 F.3d 507, 514 (6th Cir. 1999) (finding that documents attached to a motion to dismiss that are referred to in the complaint and central to the claim are deemed to form a part of the pleadings). Where the claims rely on the existence of a written agreement, and plaintiff fails to attach the written instrument, "the defendant may introduce the pertinent exhibit," which is then considered part of the pleadings. *QQC, Inc. v. Hewlett-Packard Co.*, 258 F. Supp. 2d 718, 721 (E.D. Mich. 2003). "Otherwise, a plaintiff with a legally deficient claims could survive a motion to dismiss simply by failing to attach a dispositive document." *Weiner v. Klais & Co., Inc.*, 108 F.3d 86, 89 (6th Cir. 1997).

B. Federal Rule of Civil Procedure 56 - Motion for Summary Judgment

Pursuant to Federal Rule of Civil Procedure 56, a party against whom a claim, counterclaim, or cross-claim is asserted may "at any time, move with or without supporting affidavits, for a summary judgment in the party's favor as to all or any part thereof." Fed. R. Civ. P. 56(b). Summary judgment is appropriate where the moving party demonstrates that there is no genuine issue of material fact as to the existence of an essential element of the nonmoving party's case on which the nonmoving party would bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "Of course, [the moving party] always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323; *See also Gutierrez v. Lynch*, 826 F.2d 1534, 1536 (6th Cir. 1987).

A fact is "material" for purposes of a motion for summary judgment where proof of that fact "would have [the] effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984) (quoting Black's Law Dictionary 881 (6th ed. 1979)) (citations omitted). A dispute over a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Conversely, where a reasonable jury could not find for the nonmoving party, there is no genuine issue of material fact for trial. *Feliciano v. City of Cleveland*, 988 F.2d 649, 654 (6th Cir. 1993). In making this evaluation, the court must examine the evidence and draw all reasonable inferences in favor of the non-moving party. *Bender v. Southland Corp.*, 749 F.2d 1205, 1210-11 (6th Cir. 1984). "'The

central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Binay v. Bettendorf*, 601 F.3d 640, 646 (6th Cir. 2010) (quoting *In re Calumet Farm, Inc.*, 398 F.3d 555, 558 (6th Cir. 2005)).

If this burden is met by the moving party, the non-moving party's failure to make a showing that is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," will mandate the entry of summary judgment. *Celotex*, 477 U.S. at 322-23. The non-moving party may not rest upon the mere allegations or denials of his pleadings, but the response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts which demonstrate that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The rule requires the non-moving party to introduce "evidence of evidentiary quality" demonstrating the existence of a material fact. *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 145 (6th Cir. 1997); *see Anderson*, 477 U.S. at 252 (holding that the non-moving party must produce more than a scintilla of evidence to survive summary judgment).

III. ANALYSIS

A. The Impact of the Michigan Sore Loser Statute on Associational Rights and the Necessary Level of Judicial Scrutiny

"The impact of candidate eligibility requirements on voters implicates basic constitutional rights. . . . [I]t 'is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.'" *Anderson v. Celebrezze*, 460 U.S.

780, 786-87 (1983) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)).[3] It is likewise beyond debate, however, "that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election - and campaign - related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The "character and magnitude of the burden" of an election law regulation on constitutional rights determines the level of scrutiny with which a court reviews the law:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "'character and magnitude'" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. *Burdick [v. Takushi,* 504 U.S. 428, 434 (1992)], 112 S. Ct., at 2063-2064 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S. Ct. 1564, 1570, 75 L.Ed.2d 547 (1983)). Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'" *Burdick, supra*, at 434, 112 S. Ct., at 2063 (*quoting Anderson, supra*, at 788, 103 S. Ct., at 1569-1570); *Norman [v. Reed,* 502 U.S. 279, 288-289 (1992)], 112 S. Ct., at 704-706 (requiring "corresponding interest sufficiently weighty to justify the limitation"). No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms. *Storer [v. Brown,* 415 U.S. 724, 730 (1974)], 94 S. Ct., at 1279 ("[N]o litmus-paper test ... separat[es] those restrictions that are valid from those that are invidious.... The rule is not self-executing and is no substitute for the hard judgments that must be made").

Timmons, 520 U.S. at 358-59.

The Supreme Court has held that laws having the same effect as the Michigan sore-loser law,

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[3] As the Supreme Court did in *Anderson*, this Court bases its ruling directly on the First and Fourteenth Amendments and does not engage in a distinct equal protection analysis. *Anderson*, 460 U.S. at 786 n. 7. However, as the Supreme Court did in *Anderson*, this Court employs the analysis relied on in multiple Supreme Court election cases, and several lower federal court cases since, "applying the "fundamental rights" strand of equal protection analysis, [] identif[ying] the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and [] consider[ing] the degree to which the State's restrictions further legitimate state interests." *Id.*

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. For example, in *Timmons*, the Court examined the burdens imposed by Minnesota's law prohibiting "fusion" candidacies, in which the same candidate places his or her name on the ballot as a nominee for more than one political party. Holding that the Court of Appeals had improperly applied a strict scrutiny analysis to the antifusion law, the Court explained:

> Minnesota's laws do not restrict the ability of the New Party and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the party's access to the ballot. They are silent on parties' internal structure, governance, and policymaking. Instead, these provisions reduce the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party. They also limit, slightly, the party's ability to send a message to the voters and to its preferred candidates. We conclude that the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights-though not trivial-are not severe.
>
> The Court of Appeals determined that Minnesota's fusion ban imposed "severe" burdens on the New Party's associational rights, and so it required the State to show that the ban was narrowly tailored to serve compelling state interests. We disagree; given the burdens imposed, the bar is not so high. Instead, the State's asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the party's rights. Nor do we require elaborate, empirical verification of the weightiness of the State's asserted justifications.

Timmons, 520 U.S. at 363-64 (internal citations and quotation marks omitted).

Distinguishing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986), where the Supreme Court engaged in a compelling interest analysis to strike down a closed primary statute that sought "regulation of political parties' internal affairs and core associational activities," the Court in *Timmons* concluded that the Minnesota fusion ban "which applies to major and minor parties alike, simply preclude[d] one party's candidate from appearing on the ballot, as that party's

candidate, if already nominated by another party," and did not impose a severe enough associational burden to warrant strict scrutiny. 520 U.S. at 360. More recently, in *Clingman v. Beaver*, 544 U.S. 581 (2005), the Supreme Court examined the constitutional burdens imposed by Oklahoma's semiclosed primary law, which required voters to switch registration from their existing political party before participating in another party's primary. 544 U.S. at 595. The Supreme Court held that the Oklahoma restriction, which served in part to prevent "sore loser" candidacies, did not severely burden voter associational rights. *Id.* at 593. The Supreme Court recognized, in *Clingman*, that preventing sore-loser candidacies serves an important state interest in preventing "party splintering and excessive factionalism," as well as "the organized switching of blocs of voters from one party to another." *Id.* at 593-94.

The Michigan sore loser statute "neither regulate[s] the [Libertarian] Party's internal decisionmaking process, nor compel[s] it to associate with voters of any political persuasion . . . ." *Clingman*, 544 U.S. at 590. Nor does the statute impose severe burdens on Gary Johnson, who is only barred from the general election as a candidate for a party other than the Republican party. He is free to run as an independent and he was free to make a timely choice to withdraw from the Michigan primary as a candidate of the Republican party so that he could run in the general election as a candidate of the Libertarian party. Nor is it claimed that the statute operates in a discriminatory fashion. The Michigan sore loser statute imposes restrictions that are "not trivial" but "not severe." *Id.* at 589. This court concludes, as the Sixth Circuit did in *Morrison v. Colley*, 467 F.3d 503, 508 (6th Cir. 2006), that the state statute here does not impose a severe burden on the First and Fourteenth Amendment rights of the Plaintiffs or the voters. Thus, the Court reviews the alleged imposition on Plaintiffs' associational rights to determine whether Michigan's interests in applying

the law are "sufficiently weighty to justify the limitation imposed." *Timmons*, 520 U.S. at 364.[4]

B. Michigan's Sore Loser Statute Applies to Presidential Candidates

Plaintiffs do not attack the constitutionality of Michigan's sore loser statute generally but only as applied to presidential candidates, and in particular to Gary Johnson. Plaintiffs assert that the sore loser statute simply has no application to presidential candidates, like Gary Johnson, because "the real candidates in a presidential election are the candidates for presidential elector," and not the candidate himself. (ECF No. 22, Pls.' Reply, at 2.) Plaintiffs assert that this proposition is entirely self-evident, solely based upon the involvement of the electoral college process in a presidential election. The Court disagrees.

First, Michigan law neither makes nor supports such a distinction. It is true that Michigan law provides that a vote for a party's presidential candidate is not a "direct vote" for those individuals but rather constitutes "a vote for the entire list or set of electors chosen by that political party." MCL § 168.45. But nothing in this statute, or elsewhere in Michigan's election laws, suggests that the electors are the candidates. Notwithstanding the involvement of the electoral college in the process, the individual whose name appears on the ballot, whether it be Gary Johnson, Barack Obama or Mitt Romney, is the only "candidate." *See* MCL § 168.47 (referring to the

[4] The Michigan sore loser statute does not implicate the type of burdens found to be severe and justifying strict scrutiny review in *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006). In *Blackwell*, the Sixth Circuit applied strict scrutiny, finding that the right burdened, the ability of a political party to appear on the general election ballot, was critical. In the instant case, the right of a political party to appear on the Michigan ballot is not at issue. As discussed, *infra*, however, even were this Court to apply a standard of strict scrutiny to the Michigan sore loser law, which targets the switching of political parties in advance of a general election and applies equally to all candidates, the Court would find that the statute is narrowly enough tailored to meet important state interests in attracting major political parties to participate in Michigan's presidential primary and in preventing party splintering, factionalism and voter confusion.

electors's obligation to cast votes for the "candidates for president and vice president appearing on the Michigan ballot of the political party which nominated the elector"); MCL § 168.558(1) (exempting a "candidate nominated for the office of president of the United States or vice president of the United States" from filing an affidavit of identity).[5] There is no suggestion that anyone's name but that of the candidate appears on the ballot and Plaintiffs distort this reality with their suggestion that the "real candidates" are the electors.

The Supreme Court recognized as much in *Storer*, *supra*, when it rejected, in a footnote, a challenge to the standing of the presidential and vice presidential candidates in that case, Hall and Tyner, to bring an action challenging the California election laws:

> In California, presidential electors must meet candidacy requirements and file their nomination papers with the required signatures. ss 6803, 6830. The State claims, therefore, that the electors, not Hall and Tyner, are the only persons with standing to raise the validity of the signature requirements. But it is Hall's and Tyner's names that go on the California ballot for consideration of the voters. s 6804. Without the necessary signatures this will not occur. It is apparent, contrary to the State's suggestion, that Hall and Tyner have ample standing to challenge the signature requirement.

Storer, 415 U.S. at 738 n. 9. Similarly, in *Anderson*, *supra*, the Supreme Court noted that Anderson's name had been entered in the Ohio Republican primary as a candidate for president before Anderson made the decision to run as an independent. 460 U.S. at 784 n. 2. The Court observed that the parties had agreed that Anderson, who in fact had "competed unsuccessfully in nine Republican primaries," had withdrawn his name from the Ohio primary in a timely fashion so that Ohio's sore loser statute, "which disqualifies a candidate who ran unsuccessfully in a party

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[5] This statutory section also supports Defendants' argument that when the Michigan legislature sought to exclude presidential candidates from a particular Michigan election law, it was fully capable of doing so. It has not done so in the case of the sore loser statute.

primary from running as an independent in the general election," did not apply to him. *Id.*

Also, in *Storer*, while the Supreme Court was not called upon to decide the constitutionality of California's one-year disaffiliation statute as applied to Hall and Tyner, the presidential and vice presidential candidates, the Court noted without comment that each candidate in fact had satisfied the disaffiliation condition. 415 U.S. at 738. *See also Anderson*, 460 U.S. at 804 n. 32 (noting without comment that "Hall and Tyner, the Presidential and Vice-Presidential candidates, apparently complied with the one-year disaffiliation provision.") By all measures, the California one-year disaffiliation statute more broadly disqualifies potential candidates than does the Michigan sore loser statute. Yet there is no hint in the Supreme Court's observations in *Anderson* and *Storer* that a sore loser statute would be, as Plaintiffs argue, logically inapplicable to presidential candidates. Surely if such a fact were as self-evident as Plaintiffs suggest, it would have at least merited comment by the Supreme Court in these contexts. It did not.

Plaintiffs reliance on *Anderson v. Mills*, 664 F.2d 600 (6th Cir. 1981), to support its assertion that sore loser statutes cannot be applied to presidential candidates is misplaced. The Kentucky sore loser statute being challenged in *Mills*, provided that: "No candidate who has been defeated for the nomination for any office in a primary election shall have his name placed on voting machines in the succeeding general election as a candidate for the same office of the nomination to which he was a candidate in the primary election." 664 F.2d at 605. The Sixth Circuit observed that: "Since a candidate cannot lose his party's nomination for president by losing a state's primary election, it would appear that the "sore loser" statute is inapplicable, and does not address itself to presidential candidates." *Id.*

Significantly, the Michigan statute is drafted differently than the Kentucky statute in that it

does not expressly require that the candidate suffer defeat in the primary race. The Michigan sore loser statute bars a candidate whose name appears on the primary ballot for one political party from running in the general election as the nominee of a different political party. It does not bar the candidate from running as an independent candidate in the subsequent general election. The Michigan sore loser statute does not seek to regulate associational conduct simply based on winning or losing the battle but rather based upon switching sides halfway through the fight. It does not depend for its application solely upon the candidates prior defeat, but rather depends upon his or her decision to ditch one political party for another.

In *Mills*, the Sixth Circuit declined to apply the Kentucky sore loser statute to a presidential candidate because doing so would logically have led to the conclusion that "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." 664 F.2d at 605. The Sixth Circuit observed that: "The constitutionality of such an interpretation is subject to grave doubts." *Id.*[6] This constitutional infirmity simply is not presented by application of the Michigan statute to presidential candidates.

Plaintiffs also contend that the story behind the candidacy of John Anderson in the 1980 presidential campaign supports their assertion that the Michigan sore loser statute does not apply to a presidential candidate. 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

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[6] As indeed it would have as this is a common occurrence. For example, when John McCain appeared on the Michigan presidential primary ballot in the 2008 election, he received fewer votes than Mitt Romney, and yet McCain appeared on the general election ballot as the Republican party candidate for president. As discussed *supra*, such a result would not obtain under the Michigan sore loser statute which depends not upon the mere fact that one lost, but that one also then sought to switch political parties.

ballot. *See* ECF No. 6-8, p. 3, Pls.' Mot. Summ. Judg. Ex. G, May 3, 2012 Letter to William W. Hall. Because Mr. Anderson's name appeared on the Michigan primary ballot as a candidate for the Republican party, he was technically precluded by application of Michigan's sore loser law from running at all in the general election. ~~To avoid this unconstitutional predicament, the Supreme Court of Michigan ordered that Mr. Anderson's name be removed from the primary ballot so that he could appear on the general election ballot as the candidate of a different party. *Michigan Republican State Central Committee v. Secretary of State*, 408 Mich. 931 (1980).~~ Plaintiff Gary Johnson does not face this same dilemma as Michigan law now permits him to run as an independent candidate, notwithstanding that he appeared on the primary presidential ballot as a candidate for the Republican party. MCL § 168.590 to 168.590h.

C. The Michigan Sore Loser Statute is not Unconstitutional Either Facially or as Applied to Gary Johnson

The Supreme Court's decision in *Storer*, *supra*, goes a long way toward confirming the constitutionality of the Michigan sore loser statute as applied in this case to Gary Johnson. *Storer* upheld a California statute prohibiting independent candidates from appearing on a ballot on behalf of one party if they were registered with a different political party within one year of the election. The Supreme Court found such a requirement "expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot." 415 U.S. at 733. While admittedly Storer, who was challenging the disaffiliation statute, was not a presidential candidate, Hall and Tyner were. Although the Supreme Court was not called upon to decide the applicability of the California disaffiliation statute to Hall and Tyner, who were challenging a separate California signature requirement, the Court noted, as discusssed *supra*, that both Hall and Tyner had complied with the disaffiliation statute and thus, it was presumed to be a non-issue. 415 U.S. at 738. As

discussed *supra*, the Supreme Court in both *Storer* and *Anderson* had opportunities to decry the notion of applying a disaffiliation statute to a presidential candidate, yet on neither occasion did it do so. Indeed, as discussed *supra*, its oblique discussion of the issue suggests that the distinction would not have been one of constitutional significance. Thus, the Court finds that the Supreme Court's opinion in *Storer* offers significant support for a finding that the less-restrictive Michigan sore loser statute passes constitutional muster.[7]

In *South Carolina Green Party v. South Carolina State Election Commission*, 612 F.3d 752 (4th Cir. 2010), the Fourth Circuit upheld the constitutionality of the South Carolina sore loser statute in a non-presidential race, first finding the burden on the Green Party's associational rights to be non-severe and refusing to engage in strict scrutiny review:

> Because Platt was "disqualified" from appearing on the ballot by operation of the

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[7] In this regard, this Court is not wholly persuaded by the Fourth Circuit's observation in *Anderson v. Babb*, 632 F.2d 300, 305 n. 2 (4th Cir. 1980) that *Storer* does not foreclose the instant constitutional controversy. The Fourth Circuit in *Babb* "agree[d] that the "disaffiliation" provision upheld in *Storer* was, in general terms, more restrictive than the "sore loser" provision before the district court in [that] action," but concluded that this did not foreclose a constitutional challenge to the less-restrictive North Carolina sore loser statute. The Fourth Circuit reasoned that it was "not entirely clear whether the Supreme Court's statements with respect to California's direct party primary for congressional office would apply with equal force to North Carolina's presidential preference primary." *Id.* The Fourth Circuit observed that the Supreme Court in *Storer* "fail[ed] to make any reference whatsoever to a presidential preference primary" in the context of the disaffiliation statute. *Id.* The Fourth Circuit, however, did not comment on the language from *Storer* discussed *supra*, in which the Court noted that both Hall and Tyner, in their presidential race, had complied with the disaffiliation statute. This Court finds that this remark, in the Supreme Court opinion, is not without significance.

Babb is otherwise distinguished from the instant case by the fact that the statute there, which was "subject to a wide variety of interpretations," precluded a person who "participated" in the presidential primary for one party from being placed on the ballot in the general election as the candidate of a different party. 632 F.3d at 307. The court specifically avoided the issue of the statute's constitutionality by concluding that in fact Anderson had not "participated" in the primary and therefore could appear as requested on the general election ballot. *Id.* at 308.

> sore-loser statute, the Green Party could have nominated a substitute candidate. *See* S.C.Code § 7-11-50. Additionally, because Platt's loss did not affect the Green Party's right to nominate its own candidate, but only affected the Green Party's right to nominate Platt as its preferred candidate, we conclude that the burden imposed by the sore-loser statute in this case is no greater than the modest burden imposed by the fusion ban at issue in *Timmons*. *See Timmons*, 520 U.S. at 359, 117 S.Ct. 1364. Therefore, we hold that the impact of the sore-loser statute imposed only a modest burden on the Green Party's association rights, and we will not engage in strict scrutiny of those asserted rights.

612 F.3d at 759. In *Green Party*, Eugene Platt sought to be a fusion candidate and to run for three different political parties in the primary election, including the Democratic party. *Id.* at 754. Platt lost the Democratic primary and was precluded, under South Carolina's sore loser statute, from appearing on the ballot for the general election as the candidate for the Green Party. *Id.* In upholding the constitutionality of the sore loser provision as applied to Platt, the court recognized the legitimate state interests at issue:

> Decisions in previous cases have recognized the various state interests furthered by sore-loser statutes. In *Storer v. Brown*, 415 U.S. 724, 735, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974), the Supreme Court addressed a California sore-loser provision, and emphasized the importance of sore-loser statutes in discouraging intra-party feuding and in reserving "major struggles" for general election ballots. *See also Backus v. Spears*, 677 F.2d 397, 399-400 (4th Cir. 1982). The Supreme Court later explained, in *Clingman v. Beaver*, 544 U.S. 581, 596, 125 S.Ct. 2029, 161 L.Ed.2d 920 (2005), that sore-loser statutes prevent a candidate who has lost a party primary or nomination from effecting a "splinter" of a major political party, by joining a minor party while retaining the support of the major party's voters, thereby undermining the major party in the general election.

612 F.2d at 756. Relying principally on the justifications observed as valid by the Supreme Court in *Timmons*, *supra*, 520 U.S. at 364, the Fourth Circuit concluded:

> We conclude that South Carolina's sore-loser statute advances several state regulatory interests that are important. As we previously have recognized, South Carolina's sore-loser statute advances the state's interest in minimizing excessive factionalism and party splintering. The sore-loser statute also operates to reduce the possibility of voter confusion that could occur when a candidate's name appears on the ballot after losing a primary race. Likewise, the sore-loser statute furthers the

> state's interest in ensuring orderly, fair, and efficient procedures for the election of public officials.

612 F.3d at 759 (internal citations omitted).

In *National Committee of U.S. Taxpayers v. Garza*, 924 F. Supp. 71 (W.D. Texas 1996), the district court faced precisely the issue confronted by this Court today, examining the constitutionality of the Texas sore loser statute as applied to a presidential candidate. *Garza* involved Pat Buchanan's run for president as a candidate for the U.S. Taxpayers Party. Like Gary Johnson, Buchanan had run for president in the Republican primary and lost. *Id.* at 72-73. The Texas sore loser statute made "a person who was a candidate for nomination in a primary ineligible for a place on the ballot for the succeeding general election as the nominee of a political party other than the party holding the primary in which the person was a candidate." *Id.* at 72. Plaintiffs were therefore informed that Buchanan, who ran as a Republican in the primary, was not eligible for nomination as the candidate for the U.S. Taxpayers Party in the general election. *Id.* at 73. Plaintiffs challenged the constitutionality of the Texas sore loser provision as applied to their efforts to place Buchanan on the November ballot as a candidate for the U.S. Taxpayers party.

Comparing the severity of the restrictions imposed by the Texas sore loser statute to the limitations imposed by the disaffiliation statute found constitutionally valid by the Supreme Court in *Storer*, the court in *Garza* found the Texas sore loser statute to be justified by the state's legitimate interest in guarding against "divisive and internecine intraparty fights after a political party has decided its nominee." 924 F. Supp. at 74. Recognizing that a State's interest in protecting political stability may not be "as strong" in the context of a national election, the court nonetheless found the interests sufficient to justify the restriction:

> The Court finds that the Defendants' stated reasons for the "sore loser" statute are

> valid, legitimate justifications for the restriction. There is no question that the present situation presents an example of intraparty feuding. Pat Buchanan is now, and at all relevant times has been, a Republican. It is well known that he would like to be in the place of the likely Republican nominee for President, Bob Dole, and that he has sought, in a spirited contest, the Republican Party's Presidential nomination in 1996. The "sore loser" statute is designed to address this very type of intra-party conflict.
>
> Although the State's interest in protecting political stability is not as strong when a national election is at issue, the Defendants' justifications for the restriction are valid. The State's interest in preventing factionalism, intra-party feuding, and voter confusion outweighs the minimal burden the statute places on the Plaintiffs' rights. The Court finds that the Texas "sore loser" statute is a reasonable, nondiscriminatory restriction that protects the integrity and reliability of the electoral process itself and does not overly burden Plaintiffs' fundamental rights as voters.

924 F. Supp. at 74-75.

The court in *Garza* further observed that:

> The "sore loser" statute does not prohibit the Plaintiffs from selecting a Presidential nominee and placing his or her name on the ballot. It does not discriminate against independent candidates, nor does it create burdensome ballot access requirements for third parties. Rather, the provision bars Plaintiffs from selecting as their nominee an individual who has already run in a party primary and lost, namely Pat Buchanan. This is not to say that Pat Buchanan could not have been the U.S. Taxpayers Presidential nominee. Had Mr. Buchanan aligned himself with the Plaintiffs earlier and never run in the Republican Primary, there would be no obstacle to the Plaintiffs placing his name on the ballot this November. Furthermore, there is nothing to prevent the U.S. Taxpayers Party from running Mr. Buchanan in the next Presidential election. Although the "sore loser" statute impacts the Plaintiffs' fundamental rights as voters, the magnitude of the injury is not great.

924 F. Supp. at 74.

This Court similarly concludes that the Michigan sore loser statute, which is directed expressly at preventing last minute political party maneuvering, is a reasonable, nondiscriminatory restriction justified by Michigan's important regulatory interests of preventing extended intra party

feuding, factionalism and voter confusion.[8] When viewed, as it must be, in light of the totality of Michigan's election laws, *see Williams v. Rhodes*, 393 U.S. 23, 34 (1968), its constitutionality is clear. Plaintiff Gary Johnson is not prevented from running for the party of his choice, as long as he has not previously in the same election cycle run as a candidate for a different party. Importantly, Gary Johnson is free to place his name on the ballot in the November 6, 2012 general election as an independent candidate, thus he is not facing complete exclusion from the political race. Nor is Defendant LPM prevented from nominating the candidate of its choice, but only prevented from nominating one of the handful of candidates who chose to run for a different political party in the primary race. Gary Johnson's interest in being able to present himself as the candidate of two different political parties in the same election cycle does not outweigh the State's legitimate and important interests in protecting the integrity of the election process. The Supreme Court noted in *Storer* the important interests served by the more restrictive disaffiliation statute at issue there:

> The general election ballot is reserved for major struggles; it is not a forum for continuing intra party feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

415 U.S. at 735. Plaintiffs have not convinced the Court that the State's interests in protecting against excessive factionalism and party splintering, and ensuring that intra party disputes are largely resolved at the primary stage, reserving the general election stage for the discussion of grander

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[8] While the Court believes that ample Supreme Court precedent, particularly *Timmons* and *Clingman*, discussed *supra*, supports the conclusion that this type of restriction does not impose a severe enough burden to warrant strict scrutiny review, the Court concludes that the Michigan sore loser statute, drafted as it is to prevent only the switching of political parties, would meet that more exacting standard, as it is a narrowly-tailored restriction advancing important state interests.

political ideas, are, as a matter of constitutional principle, less important in the context of a presidential election than in other political contests. Indeed, given that the major political parties have a choice whether or not to participate in the Michigan presidential primary process, the State has an even greater interest in ensuring that the process is even-handed and that the rules are fairly applied, thereby attracting the national political parties, who have a choice, to participate in the process. These candidates can be confident that Michigan's sore loser statute will "temper[] the destabilizing effects" of party splintering that is known to accompany the last minute party-switching tactics of a sore loser. *Clingman*, 544 U.S. at 596.

IV. CONCLUSION

The Supreme Court has held that "not every electoral law that burdens associational rights is subject to strict scrutiny," *Clingman*, 544 U.S. at 591, and that "strict scrutiny is appropriate only if the burden is severe." *Id.* at 592. *Clingman* quoted, with approval, from *Timmons*, 520 U.S. at 358, "that states may, and inevitably must, enact reasonable regulations of parties, elections and ballots to reduce election - and campaign - related disorder." Long before *Clingman*, in *Storer*, *supra*, the Supreme Court recognized that "as 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." 415 U.S. at 730.

Like the Minnesota laws approved by the Supreme Court in *Timmons*, Michigan's law does not directly limit the Libertarian Party's access to the ballot. Instead the Michigan law reduces "the universe of potential candidates who may appear on the ballot as the party's nominee only by ruling out those few individuals who . . . have already agreed to be another party's candidate . . . ." *Timmons*, 520 U.S. at 363. Not a "trivial," but not a "severe," burden on associational rights,

"justified by "correspondingly weighty," valid state interests in ballot integrity and political stability." *Id.* at 363, 369.

The Supreme Court noted in *Anderson v. Celebrezze*, *supra*:

> Although a disaffiliation provision may preclude . . . voters from supporting a particular ineligible candidate, they remain free to support and promote other candidates who satisfy the State's disaffiliation requirements.

460 U.S. at 792 n. 12. So too here!

Michigan's sore loser statute provides that: "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." Plaintiff Gary Johnson's name was placed on the primary ballot this year as a candidate for nomination as the Republican candidate for president. Mr. Johnson now seeks to appear in the November 6, 2012 as a presidential candidate for another political party, the Libertarian Party. He is precluded from doing so by Michigan's sore loser statute, a reasonable nondiscriminatory restriction that serves Michigan's "sufficiently weighty" regulatory interests.

Accordingly, the Court GRANTS Defendant Ruth Johnson's Motion to Dismiss, GRANTS Intervenor-Defendant the Republican Party of Michigan's Motion to Dismiss, DENIES Plaintiffs' Motion for Summary Judgment and DISMISSES the Complaint with prejudice.

IT IS SO ORDERED.

S/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: September 10, 2012

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on September 10, 2012.

S/Denise Goodine
Case Manager

EXHIBIT 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WILLIAM GELINEAU, GARY E. JOHNSON and LIBERTARIAN PARTY OF MICHIGAN

Plaintiffs, No. _____

v.

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

Defendant.
_____/

DECLARATION OF GARY E. JOHNSON

Pursuant to 28 U.S.C. § 1746, Gary E. Johnson declares:

1. This Declaration is submitted in support of plaintiffs' complaint and demand for injunctive relief and motion for temporary restraining order and preliminary injunction.

2. I am 35 or more years old and under no disability. I am a natural-born citizen of the United States of America. For many years I have been an activist in the Libertarian Party and served in the past as its national Secretary. I currently reside at 2001 Parker Lane, Apt. 134, Austin, Texas 78741.

3. On May 3, 2012, I was advised that the Michigan Secretary of State had expressed her intention to refuse to list former New Mexico Governor Gary Johnson ("**Governor Johnson**") as the nominee of the Libertarian Party of Michigan ("**LPM**") for President of the United States of America on the November 6, 2012, general election ballot for the State of Michigan, for the reason that his nomination by the LPM would violate Michigan's "Sore Loser Law".

4. On that date I agreed that if the Michigan Secretary of State carried through on her threat, I would accept the nomination of the Libertarian Party of Michigan for President of the United States of America, pending a legal challenge of her refusal to place Governor Johnson on the ballot as the presidential candidate of the Libertarian Party of Michigan.

5. I also agreed that in the event that legal challenge was unsuccessful, I would serve as the LPM's presidential nominee on the November 6, 2012, general election ballot for the State of Michigan.

6. I was then nominated by the Libertarian Party of Michigan at its state convention on June 2, 2012, and my nomination was forwarded to the Secretary of State pursuant to Michigan law on June 4, 2012.

7. As Michigan is refusing to list Governor Johnson as the LPM's presidential nominee, I desire to be listed on that ballot as the nominee of the Libertarian Party of Michigan, together with James P. Gray of California, as my vice presidential nominee.

[signature block follows on next page]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2012

Gary Edward Johnson

Gary E. Johnson

EXHIBIT 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

WILLIAM GELINEAU, GARY E. JOHNSON
and LIBERTARIAN PARTY OF MICHIGAN

Plaintiffs, No. _____

v.

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

Defendant.
_____/

DECLARATION OF RICHARD WINGER

Pursuant to 28 U.S.C. § 1746, Richard Winger declares:

1. This Declaration is submitted in support of plaintiffs' complaint for injunctive relief and expedited hearing.

2. I am above the age of 18 and a resident of San Francisco, California.

3. I am the editor of Ballot Access News, a 27-year-old print publication that covers changes in the ballot access laws that affect minor political parties and independent candidates. I have been accepted as an expert witness concerning ballot access for minor parties, and independent candidates, in ten states. My *c.v.* is attached to this Declaration as **Exhibit A**.

4. In 2000, the Michigan Secretary of State let the U.S. Taxpayers Party replace its vice presidential nominee with a new vice presidential nominee. On October 1, 1999, the party's national convention chose Joseph Sobran for vice-president. Sobran resigned as the nominee on March 31, 2000. On September 2, 2000, the national committee of the party replaced him with Dr.

J. Curtis Frazier. Michigan printed Frazier's name on the ballot, even though the original certification by the party had listed Sobran.

5. Michigan, like all states, also let the Democratic Party choose and certify a new vice presidential nominee in 1972, after the original certification to the Michigan Secretary of State. Thomas Eagleton was nominated as the Democratic vice presidential nominee by the Democratic National Convention in July, 1972. Yet 18 days later, in August, 1972, he was replaced by Sargent Shriver. A book about that was published this year. It is "The Eighteen-Day Running Mate: McGovern, Eagleton, and a Campaign Crisis" by Joshua M. Glasser.

6. Also, in 1980, Michigan let the Anderson Coalition Party choose a new vice presidential nominee in early September. The party's original vice presidential nominee was Milton Eisenhower, but he resigned and was replaced with Patrick Lucey, after the original certification to the Secretary of State.

7. And, in 1996, the Michigan Secretary of State let the Reform Party choose a new vice presidential nominee, also in September. The Reform Party, a ballot-qualified party in Michigan, had certified the names of Ross Perot for President and Carl Owenby for Vice-President, to the Michigan Secretary of State, shortly after Perot won the party's presidential nomination on August 17, 1996. But on September 11, the Reform Party replaced Owenby (who had been considered a stand-in) with Pat Choate, and Michigan printed Choate's name on the November ballot.

[signature block follows on next page]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2012

Richard Winger

Richard Winger

EXHIBIT 4A

Richard Winger Curriculae Vitae
3201 Baker Street
San Francisco, California 94123
Updated June 17, 2012

EDUCATION

BA, Political Science, University of California, Berkeley, 1966
Graduate study, Political Science, UCLA, 1966-67

EMPLOYMENT

Ballot Access News, Editor 1985-Present
Editor of newsletter covering legal, legislative and political developments of interest to minor parties and independent candidates. Researcher of ballot access laws of all 50 states from years 1888-present; well versed in how ballot access laws of each state work historically and how they compare to each other. Responsible for reading all statutes, regulations, legal opinions, and state attorney general opinions on rights of political parties and the publications of minor parties.

On the Editorial Board of *Election Law Journal*, published by Mary Ann Liebert, Inc., Larchmont, N.Y., since 2001.

PUBLICATIONS

Wrote a chapter or two in each of these books:

America Votes! A Guide to Modern Election Law and Voting Rights, 2nd edition, 2012, published by the American Bar Association's Section of State and Local Government Law, editor Benjamin E. Griffith.

Others, Vol. 2, Third Parties During The Populist Period, by Darcy G. Richardson (2007: iUniverse, Inc., New York). Wrote the book's Appendix, "Early Ballot Access Laws for New and Minor Parties."

Democracy's Moment
edited by Ronald Hayduk and Kevin Mattson (2002: Rowman & Littlefield, Lanham, Md.)

The Encyclopedia of Third Parties in America
edited by Immanuel Ness and James Ciment (2000: M.E. Sharpe, Inc., Armonk, N.Y.)

Multiparty Politics in America
edited by Paul S. Herrnson (1997: Rowman & Littlefield, Lanham, Md.)

The New Populist Reader
edited by Karl Trautman (1997: Praeger, Westport, Ct.)

Additional articles published in these periodicals:
University of Arkansas Little Rock Law Review
Wall Street Journal
American Review of Politics

The Long Term View
University of Mass. Law Review
California Journal
Election Law Journal (two articles)
Cleveland State Law Review
Chronicles Magazine
Price Costco Connection
Fordham Urban Law Journal

Also, I have written "Election Law Decisions" in each issue of the newsletter of the American Political Science Association's Section on Representation and Electoral Systems, which appears twice a year, starting with the 2005 issues.

NATIONAL INTERVIEWS on Minor Parties, Independents, Ballots and Ballot Access

NBC	*National Public Radio*
ABC	*Pacifica Radio*
CNN	*MSNBC*

CASES: TESTIMONY or AFFIDAVITS (political party or candidate prevailing, or case pending)

Alaska: Libertarian Party v Coghill, state superior court, 3rd dist., 3AN-92-08181, 1992 Court issued injunction enjoining enforcement of petition deadline for minor parties

Arizona (3 cases)**:** Campbell v Hull, 73 F Supp 2d 1081 (1999); Az. Libt. Party v Hull, superior ct., Maricopa Co. 96-13996, 1996. Nader v Brewer, 531 F 3d 1028 (9th cir., 2008)

Arkansas (3 cases): Citizens to Establish a Reform Party v Priest, 970 F Supp 690 (E.D. Ark. 1996); Green Party of Ark. v Priest, 159 F.Supp.2d (E.D. Ark. 2001); Green Party of Ark. v Daniels, U.S. District Court, 448 F.Supp 2d 1056 (E.D.Ark. 2006).

California: California Democratic Party v Jones, 530 US 567 (2000); California Justice Committee v Bowen, 2:12-cv-3956, U.S. District Court, central district (2012).

Colorado: Ptak v Meyer, 94-N-2250, U.S. Dist. Ct., 1994. Court ordered Secretary of State to place Libertarian legislative candidate on ballot.

Florida (2 cases): Libt. Party of Fla. v Mortham, 4:96cv258-RH, U.S. Dist. Ct., N.D., 1996. Court ordered Secretary of State to place Libertarian vice-presidential candidate on ballot. Reform Party v Black, 885 So.2d 303 (Fla. 2004).

Georgia: Bergland v Harris, 767 F 2d 1551 (11th cir., 1985). U.S. Court of Appeals remanded case back to U.S. District Court. Before U.S. District Court acted, legislature substantially eased law, so case became moot.

Hawaii: Libt. Party of Hi. v Waihee, cv 86-439, U.S. Dist. Ct., 1986. Court ordered Lieutenant Governor to extend petition deadline for new parties.

Illinois: (2 cases): Nader v Ill. State Bd. of Elections, 00-cv-4401, U.S. Dist. Ct., N.D., 2000. Court ordered State Board of Elections to place candidate on ballot. Lee v Ill. State Bd. of Elections, 463 F.3d 763 (7th cir. 2006).

Iowa: Oviatt v Baxter, 4:92-10513, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put Grassroots Party candidate for Congress on ballot.

Kansas: Merritt v Graves, 87-4264-R, U.S. Dist. Ct., 1988. State did not defend three election laws and signed consent decree on independent petition deadline, requirement that independent petitions not be circulated outside of circulator's home precinct, and requirement that voters could only register in qualified parties. This case should not be confused with another by the same name decided in December, 1988.

Kentucky: Libt. Pty. of Ky. v Ehrler, 776 F Supp 1200 (E.D. 1991)
Maryland (2 cases): Dixon v Md. State Adm. Bd. of Elec. Laws, 878 F 2d 776 (1989, 4th cir.); Green Party v Bd. of Elections, 832 A 2d 214 (Md. 2003).
Montana: Kelly v Johnson, U.S. Dist. Ct. 08-25 (2012).
Nevada (2 cases): Libt Pty. of Nev. v Swackhamer, 638 F Supp 565 (1986); Fulani v Lau, cv-N-92-535, U.S. Dist. Ct., 1992. Court ordered Secretary of State to put various minor parties on ballot.
New Jersey (2 cases): Council of Alternative Political Parties v Hooks, 999 F Supp 607 (1998); Council of Alternative Political Parties v State Div. of Elections, 781 A 2d 1041 (N.J.Super. A.D. 2001).
New York (3 cases): Molinari v Powers, 82 F Supp 57 (E.D.N.Y. 2000); Schulz w Williams, 44 F 3d 48 (2nd cir., 1994); Green Party of N.Y. v N.Y. State Bd. of Elections, 389 F.3d 411 (2nd cir., 2004).
North Carolina: Obie v N.C. Bd. of Elections, 762 F Supp 119 (E.D. 1991); DeLaney v Bartlett, 370 F.Supp.2d 373 (M.D. 2004).
Ohio: Libertarian Party of Ohio v Blackwell, 462 F.3d 579 (6th cir. 2006).
Oklahoma: Atherton v Ward, 22 F Supp 2d 1265 (W.D. Ok. 1998).
Pennsylvania: Patriot Party of Pa. v Mitchell, 826 F Supp 926 (E.D. 1993).
South Dakota: Nader v Hazeltine, 110 F Supp 2d 1201 (2000).
Tennessee: Libt Party v Thompson, U.S. Dist. Ct., 793 F Supp 1064 (M.D. 2010); Green Party of Tennessee v Hargett, U.S. Dist. Ct., middle dist., 3:11-cv-692.
Texas: Pilcher v Rains, 853 F 2d 334 (5th cir., 1988).
Virginia: Libt. Pty of Va. v Quinn, 3:01-cv-468, U.S. Dist. Ct., E.D. (2001). Court ordered State Board of Elections to print "Libertarian" party label on ballot next to name of Libertarian candidates.
Washington: Washington State Democratic Central Committee v Washington State Grange, pending in U.S. Supreme Court, 11-1263.
West Virginia (3 cases): State ex rel Browne v Hechler, 476 SE 2d 559 (Supreme Court 1996); Nader v Hechler, 112 F.Supp.2d 575 (S.D.W.V., 2000); McClure v Manchin, 301 F Supp 2d 564 (2003).

CASES: TESTIMONY or AFFIDAVITS (political party or candidate not prevailing)
Alabama: Swanson v Bennett, 490 F.3d 894 (11th cit. 2007).
Arizona: (2 cases) Indp. Amer. Party v Hull, civ 96-1240, U.S. Dist. Ct., 1996; Browne v Bayless, 46 P 3d 416 (2002).
Arkansas (2 cases): Langguth v McKuen, LR-C-92-466, U.S. Dist. Ct., E.D., 1992; Christian Populist Party v Sec. of State, 650 F Supp 1205 (E.D. 1987).
California: Socialist Workers Party v Eu, 591 F 2d 1252 (9th cir., 1978).
Florida (2 cases): Fulani v Smith, 92-4629, Leon Co. Circuit Court, 1992; Libertarian Party of Fla. v State of Fla., 710 F 2d 790 (11th cir., 1983).
Georgia (2 cases): Libertarian Party of Ga. v Cleland, 1:94-cv-1503-CC, U.S. Dist. Ct., N.D. (1994); Esco v Secretary of State, E-53493, Fulton Co. Superior Court, 1998.
Idaho: Nader v Cenarrusa, cv 00-503, U.S. Dist. Ct., 2000.
Illinois: Libt Party v Rednour, 108 F 3d 768 (7th cir., 1997).
Kansas: Hagelin for President Committee v Graves, 804 F Supp 1377 (1992).
Maine (2 cases): Maine Green Party v Diamond, 95-318, U.S. Dist. Ct., 1995; Maine

Green Party v Secretary of State, 96-cv-261, U.S. Dist. Ct., 1996.
Maryland (2 cases): Ahmad v Raynor, R-88-869, U.S. Dist. Ct., 1988; Creager v State Adm. Bd. of Election Laws, AW-96-2612, U.S. Dist. Ct., 1996.
Missouri: Manifold v Blunt, 863 F 2d 1368 (8th cir. 1988).
New Hampshire: Werme v Gov. of N.H., 84 F 3d 479 (1st cir., 1996).
North Carolina: Nader v Bartlett, 00-2040, 4th cir., 2000.
Ohio: Schrader v Blackwell, 241 F 2d 783 (6th cir., 2001).
Oklahoma (3 cases): Rainbow Coalition v Okla. State Elec. Bd., 844 F 2d 740 (1988); Nader v Ward, 00-1340, U.S. Dist. Ct., 1996; Clingman v Beaver, __US__(May 2005).
Oregon: Libt Party v Roberts, 737 P 2d 137 (Ore. Ct. of Appeals, 1987).
Texas (2 cases): Texas Indp. Party v Kirk, 84 F 3d 178 (5th cir., 1996); Nat. Comm. of U.S. Taxpayers Party v Garza, 924 F Supp 71 (W.D. 1996).
Virginia: Wood v Meadows, 207 F 3d 708 (4th cir., 2000).
West Virginia: Fishbeck v Hechler, 85 F 3d 162 (4th cir., 1996).
Wyoming: Spiegel v State of Wyoming, 96-cv-1028, U.S. Dist. Ct., 1996.

QUALIFIED EXPERT WITNESS

Fishbeck v Hechler, 85 F 3d 162 (4th cir. 1996, West Virginia case)
Council of Alternative Political Parties v Hooks, 999 F Supp 607 (1998, N.J.)
Citizens to Establish Reform Party v Priest, 970 F Supp 690 (E.D. Ark, 1996)
Atherton v Ward, 22 F Supp 2d 1265 (W.D.Ok. 1998)
Calif. Democratic Party v Jones, 530 US 567 (2000)
Swanson v Bennett, not reported, U.S. Dist. Ct., m.d.Ala. (02-T-644-N)
Beaver v Clingman, 363 F 3d 1048 (10th cir., 2004, Okla. case)
Green Pty v N.Y. Bd. Elec., 267 F Supp 2d 342 (EDNY 2003), 389 F.3d 411 (2nd 2004)
Lawrence v Blackwell, 430 F.3d 368 (6th cir. 2005)

In all cases in which I was presented as an expert, the opposition accepted that designation, except in the Green Party of New York case. The U.S. District Court ruled that I qualify as an expert. See headnote #1 at page 342, and footnote nine on page 350. The 2nd circuit agreed, 389 F.3d 411 (2004), at 421.

SPEAKING ENGAGEMENTS: Colleges and Scholarly Meetings

Panel of New York City Bar Association, 1994. Ballot access.
Amer. Political Science Assn., nat. conventions of August 1995 and August 1996. Papers.
Capital University School, law school class, Columbus, Ohio, 1996. Guest lecturer.
Cal. State U., course in political science, Hayward, 1993 and 1996. Guest lecturer.
San Francisco City College, course in political science, 1996 and 1997. Guest lecturer.
Providence College, R.I., Oct. 1997, seminar on ballot access.
Harvard U., JFK School of Gov't, Oct. 18, 1995, guest lecturer, ballot access.
Voting Integrity Project national conference, Apr. 1, 2000, speaker on ballot access.
Center for Voting & Democracy nat. conference, Nov. 30, 2003, speaker on ballot access.
Robert Dole Institute of Politics, U. of Kansas, one of 5 panel members, Oct. 25, 2007.