

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

ROQUE “ROCKY” DE LA FUENTE;)	
ADANYS CLERCH,)	
)	
Plaintiffs,)	
v.)	Civil Action No.
)	2:16-cv-00755-WKW-GMB
JOHN H. MERRILL, Secretary of State for)	
the State of Alabama,)	
)	
Defendant,)	

SECRETARY MERRILL’S MOTION TO DISMISS (Doc. 7)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Secretary Merrill moves to dismiss the First Amended Complaint, doc. 7, for failure to state a claim upon which relief can be granted.

I. Background.

Roque “Rocky” De La Fuente “recently competed in the Democratic Presidential Primary in 40 states, 5 territories, and the District of Columbia.” Freedom, *available at* <https://www.rocky2016.com/>, *last visited* Sept. 17, 2016. Alabama is one of the States where De La Fuente competed in the Democratic primary. First Amended Complaint, doc. 7, at ¶ 6. He failed to secure his party’s nomination, *id.*, which instead went to Hillary Clinton. Nonetheless, De La Fuente is trying to get on ballots across the nation as a Presidential candidate in the upcoming General Election. In Alabama, De La Fuente sought to be an independent candidate for President on Alabama’s general election ballot. *Id.* at ¶ 7. Secretary of State Merrill declined to certify De La Fuente’s name for inclusion on that ballot on the basis of Alabama’s sore loser law, *id.* at ¶¶ 10, 12; *id.* at 1-2, which is included within Ala. Code § 17-9-3(b). De La Fuente,

along with a supporter, initiated this litigation seeking ballot access. Doc. 7, generally. This court denied Plaintiffs' motion for a preliminary injunction on grounds that Plaintiffs are not likely to succeed on the merits. Doc. 23 at 2-3.

II. Standard of Review.

"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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Court must "take the factual allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008). This rule "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

III. Plaintiffs' Claims Fail on the Merits.

Section § 17-9-3(b) of the Alabama Code governs whose names may be printed on the ballot. Within this section is the so-called sore loser provision. It provides: "The judge of probate may not print on the ballot the name of any independent candidate who was a candidate in the primary election of that year and the name of any nominee of a political party who was a candidate for the nomination of a different political party in the primary election of that year." Ala. Code § 17-9-3(b).

The sore loser provision "basically allows every candidate only one opportunity to run for an elected position in any given year." Opinion to Honorable Jim Bennett, Sec'y of State, dated May 28, 2014, A.G. No. 2014-061; *see also* Opinion to Honorable L. W. Noonan, Judge of Probate, dated Aug. 10, 1992, A.G. No. 92-00371 ("The purpose of this provision is to give each candidate one shot at running for an office in any given year."); Opinion to Honorable Billy Joe Camp, Sec'y of State, dated Aug. 12, 1992, A.G. No. 92-00382 (same).

Alabama's sore loser provision applies to Presidential candidates, and lawfully prohibits De La Fuente's name from being included in Alabama's 2016 General Election ballot.

A. Plaintiffs' Challenge to the Sore Loser Provision under the First Amendment and the Fourteenth Amendment Fails.

"Alabama's . . . 'sore loser' statute does not, by itself, unconstitutionally burden the right of an independent candidate to appear on the ballot. States obviously are empowered to regulate their election processes in order to prevent that critical aspect of democratic society from degenerating into chaos." *Campbell v. Bennett*, 212 F. Supp. 2d 1339, 1345 (M.D. Ala. 2002). Plaintiffs here argue that the sore loser provision is unconstitutional because a Presidential election is at issue.

Contrary to Plaintiffs' position, doc. 7 at ¶ 22, there is precedent before 2012 where a court allowed a State to apply its sore loser provision to a Presidential candidate. A district court allowed Texas to keep Pat Buchanan off the 1996 Presidential ballot as the U.S. Taxpayers Party's nominee when he had run in the Republican primary that year. *Nat'l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F.Supp. 71 (W.D. Tex. 1996). Then in 2012, another district court relied, *inter alia*, on the Texas case in allowing Michigan to keep Gary Johnson off of that year's Presidential ballot as the Libertarian Party nominee when he had run in the Republican primary. *Libertarian Party of Michigan v. Johnson*, 905 F.Supp.2d 751 (E.D. Mich. 2012). On appeal, the Sixth Circuit affirmed "for the reasons stated" by the district court. *Libertarian Party of Michigan v. Johnson*, 714 F.3d 929, 932 (6th Cir. 2013).

This court is familiar with the applicable legal framework from presiding in *Stein v. Bennett*, Case No. 2:12-CV-42-WKW (M.D. Ala.):

First Amendment challenges to state election laws are governed by *Anderson v. Celebrezze*, 460 U.S. 780 (1983). Under *Anderson*, a reviewing court must first "consider the character and magnitude of the asserted injury to

the rights protected by the First and Fourteenth Amendment.” 460 U.S. at 789. Then the court must “identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.” *Id.* Finally, the court must “determine the legitimacy and strength of each of those interests,” while also considering “the extent to which those interests make it necessary to burden the Plaintiff’s rights.” *Id.*

Further, if the state election scheme imposes “severe burdens” on the plaintiffs’ constitutional rights, it may survive only if it is “narrowly tailored and advance[s] a compelling state interest.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). But when a state’s election law imposes only “reasonable, nondiscriminatory restrictions” upon a plaintiff’s First and Fourteenth Amendment rights, “a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.” *Id.* (quotations omitted). In short, the level of the scrutiny to which election laws are subject varies with the burden they impose on constitutionally protected rights—“Lesser burdens trigger less exacting review.” *Id.*

Stein v. Ala. Sec’y of State, 774 F.3d 689, 694 (11th Cir. 2014) (quoting district court opinion in Appendix).

The Texas district court determined that applying the sore loser provision to Pat Buchanan did not place a great burden on the plaintiffs there. *Garza*, 924 F.Supp. at 74. The court recognized that Buchanan could have been the Taxpayer’s candidate on the general election ballot if not for the fact that he had already run as a Republican that year, and that he could be the Taxpayers’ candidate in the future. *Id.* at 74.

One of the cases the Texas court relied on was *Swamp v. Kennedy*, 950 F.3d 383 (7th Cir. 1991), which approved Wisconsin’s ban on fusion candidates, (“which prohibits a candidate from being nominated by more than one party for the same office in the same election,” *id.* at 384). *Garza*, 924 F. Supp. at 74. About a year later, in *Timmons*, the Supreme Court also upheld such a ban, 520 U.S. 351, 353-54 (2007), and, in the course of doing so, said that the burdens on the plaintiff’s rights “—though not trivial—are not severe,” *id.* at 363.

Similarly, the Michigan court found that the sore loser statute at issue in that case “imposes restrictions that are ‘not trivial’ but ‘not severe.’” *Libertarian Party of Michigan v. Johnson*, 905 F. Supp. 2d 751, 760 (E.D. Mich. 2012) (internal citation omitted). In reaching that conclusion, the court considered *Timmons* as well as *Clingman v. Beaver*, 544 U.S. 581 (2005), which dealt with a semi-closed primary law. *Johnson*, 905 F. Supp. 2d at 759-60.¹

The Supreme Court’s decision in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), is also instructive on the burden to the Plaintiffs. In that case, the State of Washington required minor party candidates to participate in a blanket primary election and secure at least 1% of the vote in order to be included on the general election ballot. 479 U.S. at 190, 192. The Majority

¹ The court did note more than once that Gary Johnson was not prohibited by Michigan’s sore loser statute from running as an independent candidate, *e.g.*, *Johnson*, 905 F. Supp. 2d at 760, 766, and included footnotes indicating that the Michigan statute would survive strict scrutiny because it is tailored to prevent party switching, *id.* at 760 n. 4, 766 n. 8. It is not at all clear that the court thought strict scrutiny would be triggered if the Michigan statute prohibited Johnson from running as an independent. In fact, the court started its analysis on the burden issue by noting that “The Supreme Court has held that laws having the same effect as the Michigan sore-loser law, *i.e.*, *precluding a particular candidate from placing his or her name on the ballot under certain circumstances*, do not place severe burdens on voters’ or candidates’ associational rights” *Id.* at 759 (emphasis added). It then went into its discussion of *Timmons* and *Clingman*. *Id.* at 759-60.

In any event, drawing a constitutional line between switching parties on the one hand and switching to independent status on the other would not serve Alabama’s interests in its sore loser provision. It is easier for De La Fuente to run as an independent candidate for President in Alabama than it would have been for him to get a new political party qualified for ballot access. Compare Ala. Code § 17-6-22 with Ala. Code § 17-14-31. Libertarian candidate Gary Johnson and Green Party candidate Jill Stein are running in Alabama as independent candidates this year. Certification of Presidential and Vice Presidential Candidates, *available at* <http://www.alabamavotes.gov/ElectionInfo/ElectionInfo2016.aspx?a=voters>, *last visited* Oct. 3, 2016 (showing Johnson and Stein as independent); 2016 Libertarian Party Candidates, *available at* <http://www.lp.org/2016-libertarian-party-candidates>, *last visited* Sept. 22, 2016 (“Two-term Governors Gary Johnson and William Weld were nominated to be the Libertarian Party’s presidential and vice presidential candidates on May 29, 2016”); Johnson Weld 2016, *available at* <https://www.johnsonweld.com/>, *last visited* Sept. 22, 2016 (listing Libertarian affiliation at the bottom); Why Jill is running for President with the Green Party, *available at* <http://www.jill2016.com/>, *last visited* Sept. 22, 2016.

reasoned that voters are not “denied freedom of association because they must channel their expressive activity into a campaign at the primary as opposed to the general election.” *Id.* at 199. Access to that primary ballot meant the “magnitude of [the statute’s] effect on constitutional rights is slight when compared to the restrictions [the Court] upheld in *Jenness* and *American Party*.”² *Id.* While Washington’s law is very different from Alabama’s sore loser provision, the Supreme Court’s observation is nonetheless telling.

More telling is what the Supreme Court has said, or not said, about sore loser statutes in Presidential races. Both the Michigan and Texas courts relied on *Storer v. Brown*, 415 U.S. 724 (1974), and on *Anderson. Garza*, 924 F.Supp. at 74; *Johnson*, 905 F. Supp. 2d at 763. The *Storer* Court had upheld California’s disaffiliation statute (which required independent candidates to be disaffiliated with political parties) as applied to Congressional candidates. *Storer*, 415 U.S. at 728. That disaffiliation statute is rather like a sore loser provision, only broader in that it applies to all persons affiliated with political parties, not just candidates. *Cf. id.* at 762 (“By all measures, the California one-year disaffiliation statute more broadly disqualified potential candidates than does the Michigan sore loser statute.”). The *Storer* Court did not blink at the fact that California’s disaffiliation requirement applied to Presidential candidates. 415 U.S. at 738.³ Then, as noted in *Garza*, the Supreme Court in *Anderson* “noted that the restriction [stricken there] was neither a ‘sore loser’ nor a disaffiliation statute, indicating that those sorts of ballot access restrictions were constitutional.” *Garza*, 924 F. Supp. at 74

² *Jenness v. Fortson*, 403 U.S. 431 (1971), and *American Party of Texas v. White*, 415 U.S. 767 (1974).

³ The Supreme Court recognized that the disaffiliation requirement applied to the Presidential candidate in that case, Hall, and had been satisfied before moving on to the provision Hall challenged. *Storer*, 415 U.S. at 738 (“Beyond the one-year party disaffiliation condition and the rule against voting in the primary, both of which Hall apparently satisfied, it was necessary for an independent candidate to . . .”).

(citing *Anderson*, 460 U.S. at 804). As the Michigan court put it, “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.” *Johnson*, 905 F. Supp. 2d at 763. More than that, “its oblique discussion of the issue suggests that the distinction would not have been one of constitutional significance.” *Id.*⁴

The Texas court acknowledged that “the State’s interest in protecting political stability is not as strong when a national election is at issue,” but held that “[t]he State’s interest in preventing factionalism, intra-party feuding, and voter confusion outweighs the minimal burden the statute places on the Plaintiffs’ rights.” *Garza*, 924 F.Supp. at 75; *see also Johnson*, 905 F. Supp. 2d at 764-65 (listing interests); *id.* at 766 (Michigan’s sore loser law is “justified by Michigan’s important regulatory interests of preventing extended intra party feuding, factionalism, and voter confusion”) (footnote omitted). Secretary Merrill asserts these same interests here.

The dangers the State is guarding against are amply demonstrated by the Presidential election this year. There was speculation about whether Donald Trump could launch an independent bid for the Presidency if he did not secure the Republican nomination. Robert Eno, *Eno: Trump Independent Run All But Impossible, Ineligible in at Least 17 States*, *Conservative Review* (Mar. 30, 2016), *available at* <https://www.conservativereview.com/commentary/2016/03/trump-independent-bid-all-but-impossible>, *last visited* September 30, 2016. Trump did secure the nomination, and several other

⁴ At this point, the Michigan court disagreed with a footnote by the Fourth Circuit that found less significance in *Storer*. *Johnson*, 905 F. Supp. 2d at 763 (“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 remark, in the Supreme Court opinion, is not without significance.”); *see also Anderson v. Babb*, 632 F.2d 300, 305 n. 2 (4th Cir. 1980).

popular candidates did not. Under Plaintiffs' analysis, those candidates could easily have secured access to Alabama's ballot again this Fall.

Ben Carson, Ted Cruz, John Kasich, and Marco Rubio all achieved significant support in the Alabama's Republican primary this year. Letter from Terry Lathan, Chairman, Ala. Republican Party, to Hon. John H. Merrill, Ala. Sec'y of State (Mar. 11, 2016) at 8 (table showing Ben Carson received 88,094 votes, Ted Cruz received 181,479 votes, John Kasich received 38,119 votes, and Marco Rubio received 160,606 votes, all in Alabama's Republican Presidential Preference Primary Election), *available at* <http://www.alabamavotes.gov/downloads/election/2016/primary/primaryResultsCertified-Republican-2016-03-11.pdf>, *last visited* Oct. 3, 2016. Given that independent Presidential candidates face an extremely low bar for demonstrating sufficient support to achieve ballot access in Alabama, each of them would have likely succeeded if he tried. For these candidates, only 5,000 valid signatures are needed and the deadline is in August. Ala. Code § 17-14-31. By contrast, political parties seeking ballot access and independent candidates seeking access for any other race must provide more signatures and do so by an earlier date. Ala. Code § 17-6-22 (a political party can petition for ballot access by collecting the valid signatures of 3% of the number of qualified electors who voted in the last gubernatorial race and filing the same by the date of the primary election); Ala. Code § 17-9-3 (same requirements for independent candidates).

Alabama may well provide for such easy access to the Presidential ballot as an independent candidate because of its lesser interests in the national election. To go further and require it to also allow sore losers to access the ballot raises the potential of a much more crowded Presidential ballot, promoting factionalism, intra-party feuding, and voter confusion.

Relatedly, Secretary Merrill adopts the interest recognized by the Michigan court in “attracting the national political parties” to participate in Alabama’s primary elections by promoting the candidates’ confidence that Alabama “will temper[] the destabilizing effects of party splintering that is known to accompany the last minute party-switching tactics of a sore loser.”⁵ *Johnson*, 905 F. Supp. 2d at 767 (internal quotation marks and citation omitted; alteration by the court). He also asserts interests in promoting fair and honest elections, “rather than chaos,” *Storer*, 415 U.S. at 730, and “maintaining the integrity of various routes to the ballot,” *Garza*, 924 F. Supp. at 73 (listing State interests the Supreme Court has upheld).

It is true, of course, that winning Alabama’s Presidential Preference Primary Election does not guarantee one a spot on the general election ballot the way that winning any of the other public offices in a primary would. But the primary election is undisputedly part of the process for selecting the national candidates for President. One who chooses to pursue that path is not entitled to thereafter pursue a different path in the same election cycle. Prohibiting such activity does not unconstitutionally burden the rights of the candidate or his supporters.

B. Alabama’s Sore Loser Provision is Not an Additional Qualification for Office.

Plaintiffs contend that Alabama’s sore loser provision amounts to an additional qualification for the office of President in violation of the Qualifications Clause, U.S. Const. Art. II, § 1. In the context of members of Congress, the Supreme Court has explained that the States do not have the authority to add qualifications beyond those set forth in the Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995). The Court recognized a difference between ballot access requirements, which do not violate the Qualifications Clause, and the imposition of term limits, at issue there, which had “the avowed purpose and obvious effect of

⁵ See n. 1, *supra*.

evading the requirements of the Qualifications Clause by handicapping a class of candidates” *Id.* at 831.

In *Storer v. Brown*, 415 U.S. 724 (1974), the Supreme Court said a Qualifications Clause challenge to California’s disaffiliation requirement was “wholly without merit.” *Id.* at 746 n. 16. In *Term Limits*, the Court suggested the supporters of the term limit requirement offered a “narrow understanding of qualifications” based on *Storer*, 514 U.S. at 829, but very clearly left for another day whether that understanding was correct, *id.* The *Term Limits* Court did not overrule what the *Storer* Court had said, and instead turned to the fact that the challenged term limits provision was designed to circumvent the Qualifications Clause. *Id.* at 829-30.

Plaintiffs criticize Secretary Merrill’s reliance on *Storer* which, they say “long predates *United States Term Limits*,” doc. 22 at 16, and they rely on *Benesch v. Miller*, 446 P.2d 400 (Alaska 1968). *Benesch* did hold that a sore loser provision was an unconstitutional qualification, but it did so about six years before *Storer*. Additionally, *Benesch* was decided by the Supreme Court of Alaska, not by the Supreme Court of the United States as *Storer* was.

When this precise issue came up in the Pat Buchanan case, the Texas court held that the sore loser provision was a ballot access requirement, not an additional qualification for office. *Garza*, 924 F. Supp. at 75. The court noted that “. . . *Term Limits* stands for the proposition that the states cannot create impermissible qualifications for office and then dress them up in ‘ballot access clothing,’” *Garza*, 924 F. Supp. at 75 (*quoting Term Limits*, 514 U.S. at 829). The court reasoned that “. . . Texas is not denying an otherwise-qualified candidate the opportunity to run for President, but rather allowing each candidate only one bite at the apple. The statute is not an absolute bar on an entire class of persons,” as was the requirement in *Term Limits* for

incumbents, “nor does it create additional qualifications for federal office,” since Buchanan had already been given a chance to be on the ballot. *Garza*, 924 F. Supp. at 75.

Similarly here, Alabama’s sore loser provision is not an additional qualification in violation of the Constitution. It is a ballot access requirement that limits De La Fuente to “only one bite at the apple.” *Garza*, 924 F. Supp. at 75. Whether by design or error, the bite he elected to take was as a Democrat.

C. This Court Cannot Resolve Plaintiffs’ Challenge to Secretary Merrill’s Interpretation of the State’s Sore Loser Provision.

In paragraph 24 of the First Amended Complaint, Plaintiffs argue that Secretary Merrill is in error in applying the sore loser statute to a Presidential candidate, essentially because they would parse the State law such that De La Fuente is not a candidate at all. Doc. 7 at ¶ 24.

Alabama’s sore loser provision applies to Presidential candidates. But, even assuming *arguendo* that Plaintiffs were right and Alabama’s sore loser law did not apply to De La Fuente, this court lacks jurisdiction to order State officials, like the Alabama Secretary of State, to follow State law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (“A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.”). And, of course, any interpretation by this court that Alabama’s sore loser law does not apply to Presidential candidates would not be authoritative. *McMahan v. Toto*, 311 F.3d 1077, 1079 (11th Cir. 2002) (“Recent events in this case illustrate that ‘when we write to a state law issue, we write in faint and disappearing ink.’”) (quoting *Sultenfuss v. Snow*, 35 F.3d 1494, 1504 (11th Cir. 1994) (*en*

banc) (Carnes, J. dissenting)). If Plaintiffs want to litigate whether Alabama's sore loser law applies to Presidential candidates, they belong in State court.

Secretary Merrill recognizes that a federal court in Pennsylvania abstained under the *Pullman* doctrine when De La Fuente raised a question of how the sore loser provision there should be read. *De La Fuente v. Cortes*, Case No. 1:16-cv-1696, doc. 15 (M.D. Pa. Sept. 14, 2016). Here, this court should hold, for the reasons stated above, that assuming the sore loser law applies to Presidential candidates, it is not unconstitutional. If, however, the court believes it necessary to finally determine whether Alabama's sore loser law applies to Presidential candidates in order to resolve the constitutional claims before it, the best course of action would be for this court to certify the question to the Alabama Supreme Court pursuant to Rule 18 of the Alabama Rules of Appellate Procedure. "A State's highest court is unquestionably 'the ultimate exposito[r] of state law.'" *Riley v. Kennedy*, 553 U.S. 406, 425 (2008) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

IV. Conclusion.

For the foregoing reasons, the First Amended Complaint should be dismissed for failure to state a claim.

Respectfully submitted,

LUTHER STRANGE
(ASB-0036-G42L)
Attorney General

BY:

s/ Misty S. Fairbanks Messick
Winfield J. Sinclair
(ASB-1750-S81W)
Misty S. Fairbanks Messick
(ASB-1813-T71F)
Assistant Attorneys General

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
334.242.7300 Office
334.353.8440 Fax
wsinclair@ago.sate.al.us
mmessick@ago.state.al.us

Counsel for Secretary Merrill

CERTIFICATE OF SERVICE

I certify that on the 3rd day of October, 2016, I electronically filed the foregoing document using the Court's CM/ECF system which will send notification of such filing to the following counsel for Plaintiffs:

David I. Schoen
David I. Schoen, Attorney at Law
2800 Zelda Road, Suite 100-6
Montgomery, Alabama 36106
334.395.6611 Phone
917.591.7586 Fax
DSchoen593@aol.com

s/Misty S. Fairbanks Messick
Counsel for Secretary Merrill