

“IF YOU AIN’T FIRST, YOU’RE LAST”: HOW STATE “SORE-LOSER” LAWS MAKE IT IMPOSSIBLE FOR TRUMP TO RUN A SUCCESSFUL THIRD-PARTY CAMPAIGN IF HE LOSES THE REPUBLICAN PRIMARY

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INTRODUCTION

In recent months, Donald Trump and his supporters have stoked rumors that he may run as a third-party candidate for president in 2024 if he fails to win the Republican nomination.¹ These rumors, sometimes bordering on outright threats,² have reinvigorated a discussion of sore-loser laws—restrictions that states place on candidates running in the general election after losing a primary election. This discussion has centered on two questions: 1) whether sore-loser laws apply to candidates for president, and, if so; 2) whether a Trump third-party campaign can win a majority of electoral college votes if sore-loser laws prevent him from accessing the ballot. This article explores the hypothetical scenario where Trump (or any other Presidential candidate) seeks to run in the general election after a losing bid for a major-party nomination.

Although nearly every state now has some kind of sore-loser restriction, their potential application to presidential candidates has not been extensively studied.³ The Authors have

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¹ See, e.g., Tom Porter, Trump Once Again Stirs Rumors That He Could Run as a Third-Party Candidate and Split the Republican Vote if Party Turns on Him, BUSINESS INSIDER (Dec. 30, 2022, 9:26 AM); <https://www.businessinsider.com/trump-stirs-rumors-he-could-run-as-third-party-candidate-2022-12> [<https://perma.cc/5QCG-AETV>]; Juan Williams, Opinion, Third Party Chatter Opens Door for Trump, THE HILL (Dec. 19, 2022, 9:30 AM); <https://thehill.com/opinion/3780233-juan-williams-third-party-chatter-opens-door-for-trump/> [<https://perma.cc/7QCT-L7EM>].

² See Mary Papenfuss, *Trump Appears to Float Third-Party Threat if GOP Won't Back Him*, YAHOO! NEWS (Dec. 31, 2022), <https://news.yahoo.com/trump-floats-third-party-threat-071227119.html> [<https://perma.cc/9AL4-ARF5>]. Of course, this is not the first time that Trump has threatened a third-party run. See, e.g., Nick Gass, *Trump Threatens GOP with Third-Party Run*, POLITICO (July 23, 2015, 7:29 AM), <https://www.politico.com/story/2015/07/donald-trump-gop-third-party-independent-candidate-120521> [<https://perma.cc/66QE-JWEC>].

³ Michael S. Kang & Barry C. Burden, *Sore Loser Laws in Presidential and Congressional Elections*, in ROUTLEDGE HANDBOOK OF PRIMARY ELECTIONS 456 (Robert G. Boatright ed., 2018).

determined that sore-loser laws in 28 states do indeed apply to presidential candidates and that if a candidate fails to win the Republican nomination, sore-loser laws will prevent access to the general election ballot in those states. This includes 20 states that Trump won in either 2016 or 2020 which total 225 electoral votes—more than 83% of the electoral votes needed for a majority.⁴ As a result, it would be nearly impossible for Trump to win the general election as a third-party candidate given the limited number of Republican-leaning or “tossup” states where his name would appear on the ballot, which together amount to an insufficient number of electoral votes for a general election victory. Accordingly, any third-party presidential campaign mounted by Trump or any other defeated Republican could only function as a spoiler campaign—splitting the vote that would otherwise coalesce behind the Republican nominee—thereby causing that nominee to lose the general election.⁵

I. CRITERIA APPLIED BY THE AUTHORS

For this article, the Authors analyzed the history of the application of sore-loser laws to federal candidates generally. Next, we examined the statutory language and jurisprudence involving sore-loser laws. The Authors were then able to determine whether each state possessed a sore-loser restriction and then classify the type of sore-loser restriction each state possessed. Finally, the Authors examined previous academic analyses concerning the application of sore-loser laws to presidential candidates. Of particular note, the authors examined the findings of Richard Winger⁶ and those of Drs. Michael S. Kang and Barry C. Burden.⁷

The Authors’ analysis and conclusions differ significantly from those of Winger, who relied primarily on previous lack of enforcement.⁸ Winger concluded that only two states—South Dakota and Texas—had sore-loser laws applicable to presidential candidates.⁹ His analysis focused solely on *direct* prohibitions of sore-loser candidacies and extrapolated from previous failures to enforce sore-loser prohibitions against presidential candidates.¹⁰ This analysis, while potentially helpful for historical, precedential, and public opinion purposes, fails to account for political and legal realities.

States are not legally bound to permit sore-loser candidates in 2024 solely because they did so previously, especially if those decisions were made decades ago by state officials who are no longer in office, in contravention of state law, due to a low-profile “sore-loser” candidate, or before a substantive change in state law. For these reasons, a state’s past failure to enforce sore-loser restrictions against presidential candidates is not a reliable guide to future enforcement. Moreover, while a state may lack an express sore-loser provision, it may have other election

⁴ The prospects for a Trump write-in candidacy are beyond the scope of this article.

⁵ “A spoiler effect occurs when a single party or a candidate entering an election changes the outcome to favor a different candidate.” Handbook of Social Choice and Voting 379 (Jac C. Heckelman & Nicholas R. Miller eds., 2015), available at <https://www.e-elgar.com/shop/usd/handbook-of-social-choice-and-voting-9781788974035.html>.

⁶ See *Sore Loser Laws for Presidential Candidates*, 2016, BALLOTPEDIA, https://ballotpedia.org/Sore_loser_laws_for_presidential_candidates,_2016 [https://perma.cc/XB3U-GRYE].

⁷ See generally Kang & Burden, *supra* note 3.

⁸ See *Sore Loser Laws for Presidential Candidates*, 2016, *supra* note 6.

⁹ Kang & Burden, *supra* note 3, at 463.

¹⁰ *Id.* at 463–64.

regulations that make it functionally impossible for candidates who lose a party primary to run in the general election as a third-party or independent candidate. For these reasons, the Authors look not only to express sore-loser restrictions, but also disaffiliation requirements, cross-filing prohibitions, and candidate filing deadlines. Though these provisions may differ substantively from sore-loser laws, they can have the same effect by prohibiting candidates who compete in and lose a party primary from running as an independent candidate.

Kang and Burden's analysis, which was published in the Routledge Handbook of Primary Elections in 2018, is more closely aligned with our findings, although there are several differences.¹¹ Kang and Burden applied a broad interpretation of the kinds of laws that function as sore-loser prohibitions and focused on statutory language and judicial interpretation, rather than solely on enforcement history (or lack thereof). As a result, Kang and Burden determined that the majority of states have sore-loser laws currently in effect that could prevent a presidential candidate who fails to gain a party nomination after a primary election to subsequently run as a third-party or independent candidate in the general election. However, Kang and Burden's analysis is nearly five years old and does not address the political ramifications that such sore-loser laws would have on a potential Trump independent candidacy in 2024, nor does it account for the recent trend away from caucuses and towards presidential preference primaries.¹² The Authors provide this article as an update to, and expansion of their research, focusing on the political realities of the electoral college in 2024.

II. APPLICATION OF SORE-LOSER LAWS TO FEDERAL CANDIDATES

Article 1, Section 4 of the United States Constitution (the Elections Clause) reserves to states the authority to control the time, place, and manner of federal elections.¹³ The Elections Clause vests each state with power to regulate the structure of the ballot and requirements for candidates to appear thereon, even when such regulations "may, in practice, favor the traditional two-party system."¹⁴

The constitutionality of sore-loser laws was affirmed by the U.S. Supreme Court in *Storer v. Brown*.¹⁵ The Court identified a swath of important state interests that justified the provisions, including protecting the integrity of political processes from frivolous candidacies, thinning the herd of candidates, reserving the general election for "major struggles" rather than "continuing intraparty feuds," preventing "independent candidacies prompted by short-range political goals, pique, or personal quarrel," and preventing "splintered parties and unrestrained political factionalism [that] may do significant damage to the fabric of government."¹⁶

¹¹ *Id.*

¹² Several states that previously used caucuses to allocate delegates to the national presidential nominating conventions have within the last five years moved to a presidential primary system, and the generally applicable restriction applies to presidential primaries unless amended. See Matt Vasilogambros, *Even Before Iowa, Caucuses Were on Their Way Out*, STATELINE (Feb. 10, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/02/10/even-before-iowa-caucuses-were-on-their-way-out> ("Ten states that hosted caucuses in 2016—Alaska, Colorado, Hawaii, Idaho, Kansas, Maine, Minnesota, Nebraska, Utah and Washington—switched to primaries for [the 2020] presidential cycle.").

¹³ U.S. Const. art. I, § 4.

¹⁴ *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366–67 (1997).

¹⁵ 415 U.S. 724 (1974).

¹⁶ *Storer*, 415 U.S. at 732–35.

Although the Supreme Court has never evaluated the applicability of sore-loser laws to presidential candidates, other federal courts have. The U.S. Court of Appeals for the Third Circuit upheld Pennsylvania's sore-loser laws after determining that they were less restrictive than the blanket ban upheld in *Storer*.¹⁷ In 1996, a third party sued the Texas Secretary of State after he determined that the state's sore-loser law prohibited Pat Buchanan from appearing on the general election ballot as that party's presidential nominee due to his participation in the Republican primary.¹⁸ The court sided with the state, applying the *Anderson-Burdick* test to find that the burden the law imposed on plaintiffs was "slight" and easily outweighed by the state's countervailing interest "in preventing factionalism, intra-party feuding, and voter confusion."¹⁹ The U.S. District Court for the Eastern District of Michigan came to a similar conclusion in a case involving the application of Michigan's sore-loser statute to Libertarian candidate Gary Johnson, holding that the law was "a reasonable, nondiscriminatory restriction justified by Michigan's important regulatory interests of preventing extended intra-party feuding, factionalism, and voter confusion."²⁰ Significantly, the Eastern District of Michigan also expressly rejected the argument that the State's sore-loser law was inapplicable to presidential candidates, explaining that "[n]otwithstanding the involvement of the electoral college in the process, the individual whose name appears on the ballot . . . is the only 'candidate,'" not the presidential electors pledged to that candidate.²¹

Precisely how these laws would be enforced in the Presidential context remains a likely source of controversy. In 2015, when Trump previously teased the possibility of a third-party run, journalists sought comment from state election officials concerning the applicability of their sore-loser laws, and the responses presented a mixed bag. The North Carolina State Board of Elections general counsel, for example, conceded that the state had a sore-loser provision that applied to presidential primaries but added that "[w]e can't judge how this specific statute would apply" because it was "cryptic."²² By contrast, the Tennessee Secretary of State confirmed that "[i]f a candidate doesn't win the primary, they cannot appear on the ballot during the general election for another party or as an independent," despite the fact that Tennessee had twice previously failed to enforce this standard.²³ Similarly, as discussed *infra* Section IV, the Ohio Secretary of State firmly pronounced that Ohio law would prevent Trump from running as an independent or third-party candidate in that state after failing to win the Republican Nomination.

¹⁷ *De La Fuente v. Cortes*, 751 Fed. Appx. 269, 273–74 (3d Cir. 2018).

¹⁸ *Nat'l Comm. of the U.S. Taxpayers Party v. Garza*, 924 F. Supp. 71, 72 (W.D. Tex. 1996).

¹⁹ *Id.* at 75.

²⁰ *Libertarian Party of Mich. v. Johnson*, 905 F. Supp. 2d 751, 766 (E.D. Mich. 2012).

²¹ *Id.* at 761. Note however that the Michigan law at issue in this case only prevented primary participants from running "as a candidate of any other political party" in the subsequent general election, and not from competing as independents. Mich. Con. Law § 168.695.

²² *Could Trump Run as a 'Sore Loser' in the Carolinas?*, WFAE (Aug. 27, 2015, 4:13 PM), <https://www.wfae.org/politics/2015-08-27/could-trump-run-as-a-sore-loser-in-the-carolinas> [<https://perma.cc/9CMT-R3AK>].

²³ Mary Troyan, *Tennessee 'Sore Loser' Law Would Block Donald Trump*, TENNESSEAN (Feb. 18, 2016, 12:00 PM), <https://www.tennessean.com/story/news/politics/2016/02/18/tennessee-sore-loser-law-would-block-donald-trump/80459620/> [<https://perma.cc/KQ6Q-3ZX3>].

III. APPLICATION OF SORE-LOSER RESTRICTIONS TO PRESIDENTIAL CANDIDATES

Sore-loser provisions take many forms, including not merely express sore-loser laws but also cross-filing prohibitions, disaffiliation requirements, and filing deadlines that make it effectively impossible for a candidate to file as an independent candidate or nominee of another party for the general election if they lose a presidential primary. These restrictions are sore-loser laws because the result is identical—a loser of a primary is prevented from running for the same office in the general election under the banner of a different party or no party. Like Kang and Burden before us, the Authors contend that a broad reading of broadly written provisions makes sense because such statutes vest election officials with substantial discretion over enforcement. A candidate considering a sore-loser run must treat these laws as applicable out of an abundance of caution or risk losing ballot access.

While the application of sore-loser laws to congressional candidates is clear,²⁴ the question of whether they apply to presidential candidates is more complicated due to several factors.²⁵ First, unlike other elections, in presidential primaries the party nominee is chosen at the national, rather than the state or district level.²⁶ Presidential primaries decide only the allocation of a state's respective party delegates in this broader national process, but are not individually decisive.²⁷ Hence, the eventual party nominee could win the national nomination without winning every single state primary election or caucus.²⁸ This mismatch, paired with the fact that every sore-loser law is limited to a given state, complicates the application. For this reason, it makes little sense to bar a presidential candidate, who happens to have lost a particular state's primary election but nonetheless won the national party's nomination, from appearing on the general election ballot in that state as the party nominee.²⁹ Accordingly, the states that possess sore-loser restrictions applicable to presidential candidates normally mention nomination or failure to achieve nomination, rather than success or failure in a particular state's primary election.

Second, most states have general sore-loser restrictions for elective offices, but do not specify whether they apply to presidential candidates. These states often regulate presidential elections and presidential candidates under a separate code section. The result is that fewer sore-loser restrictions apply to presidential elections than to state or other federal elections. In those states, the Authors conducted a separate analysis of text and the overall statutory scheme to determine whether there was an applicable "sore loser" consequence of the state law.

A third complicating factor is that some presidential candidates who lost party primary elections have historically been permitted to run as independent or third-party candidates in the

²⁴ See, e.g., Kang & Burden, *supra* note 3, at 457–60.

²⁵ See *Kennedy v. Pablos*, 2017 U.S. Dist. LEXIS 76214, at *10 (W.D. Tex. May 18, 2017) (noting that "the Supreme Court has not evaluated the constitutionality [of] sore loser statutes as applied to presidential candidates").

²⁶ Kang & Burden, *supra* note 3, at 460–61.

²⁷ *Id.*

²⁸ See Matthew Bloch, Wilson Andrews, & Josh Keller, *Detailed Maps of Where Trump, Cruz, Clinton and Sanders Have Won*, N.Y. TIMES (last updated October 4, 2016), <https://www.nytimes.com/elections/2016/national-results-map> [<https://perma.cc/F9U7-SUU4>] (2016 nominees both lost multiple state primaries to other candidates).

²⁹ See *Anderson v. Mills*, 664 F.2d 600, 605 (6th Cir. 1981) (declining to apply Kentucky's sore-loser law to an independent presidential candidate because doing so "would seem to require that in future presidential elections, not only an independent candidate, but a nominee of one of the two major parties might not be permitted to appear on the general election ballot").

general election, irrespective of potentially applicable sore-loser prohibitions. While some commentators believe that precedent should prevail over statutory language and judicial interpretation,³⁰ the Authors contend that precedent is not controlling because: (1) A state is not legally bound by its previous applications of its sore-loser restrictions, or lack thereof; (2) New administrators have their own interpretations of state regulations that do not necessarily comport with those of their predecessors;³¹ and, importantly (3) The major-party candidates may be more motivated to challenge a potential Trump sore-loser candidacy in 2024 than those of previous candidates.

Fourth, any analysis of the application of sore loser laws to presidential candidates must contend with various election calendars and withdrawal deadlines in each state. There is a possibility that a struggling candidate, faced with a series of defeats in early primary states, will withdraw from the presidential contest before suffering any additional losses and refile as an independent candidate. But in general, candidates cannot just withdraw from a primary hours before voters head to the polls; several states set remarkably early withdrawal deadlines, including Missouri (77 days before the primary³²) and Michigan (second Friday in December of year preceding election³³). A candidate who fails to properly withdraw by this deadline runs the risk of being on the printed primary ballot against their will, as happened to Gary Johnson in Michigan in 2012 when he missed the deadline by three minutes.³⁴

The presidential primary calendar is increasingly frontloaded in presidential election years which mitigates against the possibility that a losing candidate could somehow evade sore-loser laws by quitting while he's not too far behind. Texas, the largest Republican-leaning state with 40 electoral votes, requires that its presidential primary take place on the first Tuesday in March, or March 5, 2024, and the names of candidates included on the primary ballot must be certified by the ninth day following the regular filing deadline, which is December 20, 2023.³⁵ For 2024 primaries, approximately 18 states have 2023 deadlines, and 21 other states have deadlines before March 15, 2024. This calendar makes it unlikely that a candidate would drop out before seeing how they perform on Super Tuesday in early March, at which point it is likely too late for them to withdraw from future contests.

IV. A REVIEW OF SORE-LOSER LAWS APPLICABLE TO PRESIDENTIAL CANDIDATES

States that possess applicable sore-loser restrictions generally fall into one of five categories.³⁶

³⁰ See, e.g., *Sore Loser Laws for Presidential Candidates*, 2016, *supra* note 6.

³¹ See, e.g., *De La Fuente v. Merrill*, 214 F. Supp. 3d 1241, 1245 (M.D. Ala. 2016) (Alabama Secretary of State explaining that Lyndon LaRouche was allowed on the ballot as a sore-loser candidate in 1992 because it was “a long time ago and [under] a different secretary of state”).

³² Mo. Rev. Stat. § 115.359(1).

³³ Mich. Con. L. Serv. § 168.615a(2).

³⁴ *Libertarian Party of Mich. v. Johnson*, 905 F. Supp. 2d 751, 755 (E.D. Mich. 2012).

³⁵ Tex. Elec. Code § 41.007(c); Tex. Sec’y of State, *Important Election Dates 2022-2024*, <https://www.sos.state.tx.us/elections/voter/important-election-dates.shtml#2023> [<https://perma.cc/2UHA-U7D6>].

³⁶ Other states do not have applicable sore-loser restrictions, and so were not analyzed. This category includes eighteen states: California, Connecticut, Delaware, Florida, Hawaii, Indiana, Iowa, Kentucky, Maryland, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Vermont, Virginia, Washington, and Wyoming.

First, there are states that possess express sore-loser laws that apply to presidential candidates.³⁷ In these states, a candidate who fails to gain their party's nomination is expressly prohibited from running as the nominee of another party or as an independent in the general election, and such restrictions apply to presidential candidates.

Second, there are states that have cross-filing prohibitions.³⁸ In these states, state law prohibits candidates for filing for more than one party or switching to independent during the same election cycle. Cross-filing restrictions function as sore-loser laws because they effectively prohibit candidates who fail to gain a party nomination from running in the general election.

Third, some states have disaffiliation requirements.³⁹ In these states, to seek office as a party candidate, or as an independent, a person cannot have associated with another political party (including running for office as a partisan candidate) for a prescribed period preceding the submission of their nomination papers. Disaffiliation requirements effectively make it impossible to run in the general election under a different party affiliation if a candidate failed to attain their party's nomination in the primary.

Fourth, some states have established deadlines that make it impossible to file as a third-party or independent candidate after the primary election.⁴⁰ The filing deadlines in these states effectively work as restrictions on sore-loser candidates for president.

Finally, four states possess one of the aforementioned varieties of sore-loser restriction, but it is unclear whether the restriction applies to presidential candidates.⁴¹ This uncertainty can be due to any one of the complicating factors discussed in Section III *supra*.

One example of a state with an express sore-loser law is South Carolina. The law states that "a person who was defeated as a candidate for nomination to an office in a party primary or party convention" must not appear on the general election ballot unless the original nominee dies or otherwise ceases to be the party's nominee.⁴² South Carolina's sore-loser law clearly prevents defeated candidates from participating in the general election as independents. In South Carolina, the regulation of presidential primaries is separately codified, but the statutory sore-loser

³⁷ This category includes six states: Arkansas (Ark. Code Ann. § 7-7-204(a)), Colorado (Colo. Rev. Stat. § 1-4-105), Nebraska (Neb. Rev. Stat. § 32-605), Oregon (Or. Rev. Stat. § 249.048), South Carolina (S.C. Code Ann. §§ 7-11-10(A); 7-11-10(B)), and Texas (Tex. Elec. Code Ann. § 192.032(h)).

³⁸ This category includes twenty states: Alabama (Ala. Code §§ 17-9-3(b); 17-9-3(a)(2)), Arizona (Ariz. Rev. Stat. Ann. §§ 16-312(F)(1); 16-311(A)), Georgia (Ga. Code Ann. § 21-2-137), Illinois (10 Ill. Comp. Stat. 5/7-43), Louisiana (La. Stat. Ann. § 18:1254(C)), Maine (Me. Stat. tit. 21-A, § 351(2)), Michigan (Mich. Comp. Laws Serv. § 168.695), Minnesota (Minn. Stat. § 204B.04(2)), Missouri (Mo. Rev. Stat. §§ 115.351; 115.359(1)), Nevada (Nev. Rev. Stat. Ann. § 293.200(7)), New Hampshire (RSA 655:43(IV)), North Carolina (N.C. Gen. Stat. § 163-122(b)), Ohio (Ohio Rev. Code Ann. §§ 3513.04; 3513.257), Pennsylvania (25 Pa. Cons. Stat. §§ 2911(e)(5); 2911(e)(6)), Rhode Island (R.I. Gen. Laws §§ 17-14-2.1; 17-14-1.1), South Dakota (S.D. Codified Laws § 12-7-5), Tennessee (Tenn. Code Ann. § 2-5-101(f)(3)-(4)), Utah (Utah Code Ann. § 20A-9-501(2)), West Virginia (W. Va. Code § 3-5-23(g)), and Wisconsin (Wis. Stat. § 8.15(7)).

³⁹ Only Montana (Mont. Code Ann. § 13-10-507(1)) falls into this category. Ohio, as discussed *infra* note 46, and Pennsylvania have both cross-filing prohibitions and disaffiliation requirements, so they could be included in either category. 25 Pa. Con. Stat. § 2911(e)(5)-(6).

⁴⁰ Only Kansas (Kan. Stat. Ann. § 25-305(b)) falls into this category.

⁴¹ This category includes: Alaska, Idaho, Massachusetts, and Mississippi.

⁴² S.C. Code Ann. § 7-11-10(A). South Carolina also has a cross-filing prohibition which prohibits candidates from filing "more than one statement of intention of candidacy for a single office for the same election." S.C. Code Ann. § 7-11-10(B).

language is broadly written to apply to *all* primary elections where a candidate was defeated and then tries to run as a third-party or independent candidate. Therefore, this sore-loser law applies to presidential candidates. Likewise, the sore-loser law in Texas, a state with 40 electoral votes that no conservative candidate can afford to lose, is unambiguous: It mandates that “[a] candidate in a presidential primary election is ineligible to be an independent candidate for president . . . in the succeeding general election.”⁴³

Ohio has enacted both cross-filing prohibitions and disaffiliation requirements which include presidential candidates. Individuals who seek a party’s nomination in a primary election and “who [are] a first choice for president of candidates” for election as delegates to the national party conventions are barred from becoming a candidate via nominating petition or write-in.⁴⁴ This effectively makes it impossible for sore-loser candidates to run in the general election as a third-party or independent candidate after losing a party primary, and the law explicitly applies to presidential candidates. Ohio’s sore-loser law has been upheld at least twice by the Ohio Supreme Court, including in 2014 when the court rejected an effort by a Democratic judicial candidate, who, after losing the primary, attempted to file as a candidate for an entirely separate judicial seat.⁴⁵ Interestingly, Ohio also has a disaffiliation law, requiring anyone running as an independent presidential candidate to file a statement of candidacy and nominating petition certifying that they have not affiliated with a political party.⁴⁶

It would be difficult for Trump to prove he is not affiliated with a political party after participating in Republican debates and primaries in 2023-24. Ohio’s disaffiliation law was upheld in 2006 by the U.S. Court of Appeals for the Sixth Circuit, which ruled that an individual who had filed as a candidate in a Republican primary for county and state party committees could not also run as an independent due to the disaffiliation requirement.⁴⁷

In response to Trump’s repeated suggestions in 2015 that he might run as an independent or third-party candidate if he was “not treated fairly” by Republicans,⁴⁸ then-Ohio Secretary of State Jon Husted affirmed this interpretation of the Ohio’s sore-loser laws announcing that:

Since Donald Trump has filed a declaration of candidacy . . . as a Republican, has filed with Federal Election Commission as a Republican candidate and voluntarily took part in the Republican presidential debates, the first of which was held in Ohio, there is no way for Mr. Trump to disaffiliate from the Republican Party ‘in good faith’ during this election cycle.⁴⁹

⁴³ Tex. Elec. Code Ann. § 192.032(h).

⁴⁴ Ohio Rev. Code Ann. § 3513.04.

⁴⁵ See Jack Torry, *Ohio Laws Would Hamper a Trump Bid to Run as Independent*, COLUMBUS DISPATCH (Mar. 12, 2016, 11:01 PM), <https://www.dispatch.com/story/news/local/2016/03/13/ohio-laws-would-hamper-trump/23564637007/> [<https://perma.cc/5327-GW3G>].

⁴⁶ Ohio Rev. Code Ann. §§ 2501.01(I); 3513.257.

⁴⁷ *Morrison v. Colley*, 467 F.3d 503, 508 (6th Cir. 2006) (examining a candidate’s voter registration and partisan declaration on file with the Federal Election Commission).

⁴⁸ Jeremy Diamond, *Donald Trump: ‘I Keep Whining and Whining Until I Win,’* CNN (Aug. 11, 2015, 3:35 PM), <https://www.cnn.com/2015/08/11/politics/donald-trump-refutes-third-party-run-report/index.html> [<https://perma.cc/2RKG-WKX8>].

⁴⁹ Jeremy Pelzer, *Donald Trump Can’t Run as an Independent in Ohio, Secretary of State’s Office Says*, CLEVELAND.COM (Dec. 14, 2015, 4:39 PM), https://www.cleveland.com/open/2015/12/donald_trump_cant_run_as_indep.html [<https://perma.cc/2JK6->

Ohio's statutes paired with the recent pronouncements by state elections officers confirming those statutory restrictions leaves little doubt as to what effect Ohio's laws would have on a potential sore-loser presidential candidate in 2024.

The law in North Carolina, another must-win state for a conservative candidate with 16 electoral votes, specifically renders a person ineligible for ballot access "as an unaffiliated candidate for the same office" if their name has "appeared on the ballot in a primary election preliminary to the general election," thereby preventing candidates from getting two bites at the apple.⁵⁰

Montana, exemplifying the third category of disaffiliation requirements, stipulates that any "person seeking office as an independent candidate may not be associated with a political party for 1 year prior to the submission of the person's nomination petition."⁵¹ The statute explains that "associated with" means "having run for office in Montana as a partisan candidate."⁵² Although presidential primary elections are governed by a separate subchapter, the disaffiliation requirement appears in the subchapter governing all nominations "other than by primary election" — *i.e.*, distinguishing these nominations by the method of selection, but not the office for which the candidate is competing. Hence, in the absence of any enumerated carveout, the general disaffiliation requirement applies to independent presidential candidates too.

Kansas provides an example of a state that lacks an express sore-loser law, but whose filing deadlines effectively preclude a sore-loser candidacy. Kansas law requires independent nomination petitions "of candidates for national . . . office" to be filed with the Secretary of State "no later than 12:00 noon on the Monday preceding the date fixed for the holding of primary elections."⁵³ In other words, a candidate must decide whether they will compete as an independent *before* partisan primaries are held, preventing them from losing a primary and then changing their strategy.

V. THE AUTHORS' FINDINGS

Ultimately, 28 states have sore-loser laws of some type that will likely apply to presidential candidates who participate in the Republican primary. These states include many likely Republican⁵⁴ or tossup⁵⁵ states that together total 221 of the 538 total electoral votes (or 41% of the total, or 82% of the total needed for an electoral college majority). The chart below summarizes our findings by state:

AQC4]; *see also* Paul Singer, *A Trump Independent Run Got Harder Thursday Night*, USA Today (Aug. 7, 2015, 3:37 PM), <https://www.usatoday.com/story/news/politics/elections/2015/08/07/trump-independent-bid-ohio-debate/31283537/> [<https://perma.cc/YKQ2-XEHM>].

⁵⁰ N.C. Gen. Stat. § 163-122(b).

⁵¹ Mont. Code Ann. § 13-10-507(1).

⁵² *Id.* § 13-10-507(2).

⁵³ Kan. Stat. Ann. § 25-305(b).

⁵⁴ The Authors consider "Republican" or "GOP" states to be ones where the Republican presidential candidate prevailed by more than five percentage points in two of the last three general elections.

⁵⁵ The Authors consider "Tossup" states to be those where the winning presidential candidate prevailed by less than five percentage points in two of the last three general elections.

State	Presidential Sore-Loser Restriction	GOP, Dem, ⁵⁶ or Tossup	2024 Electoral Votes
Alabama	CFP/DEADL	GOP	9
Alaska	Unclear	GOP	3
Arizona	CFP/DIS	Tossup	11
Arkansas	SLL	GOP	6
California	N/A	Dem	54
Colorado	SLL	Dem	10
Connecticut	N/A	Dem	7
Delaware	N/A	Dem	3
Florida	N/A	Tossup	30
Georgia	CFP	GOP	16
Hawaii	N/A	Dem	4
Idaho	Unclear SLL	GOP	4
Illinois	CFP	Dem	19
Indiana	N/A	GOP	11
Iowa	N/A	GOP	6
Kansas	DEADL	GOP	6
Kentucky	N/A	GOP	8
Louisiana	CFP	GOP	8
Maine	CFP	Dem	4
Maryland	N/A	Dem	10
Massachusetts	Unclear CFP	Dem	11
Michigan	CFP	Tossup	15
Minnesota	CFP	Dem	10
Mississippi	Unclear	GOP	6
Missouri	CFP	GOP	10
Montana	DIS	GOP	4
Nebraska	SLL	GOP	5
Nevada	CFP	Tossup	6
New Hampshire	CFP	Dem	4
New Jersey	N/A	Dem	14
New Mexico	N/A	Dem	5

⁵⁶ The Authors consider “Democratic” or “Dem” states to be those where the Democratic presidential candidate prevailed by more than five percentage points in two of the last three general elections.

New York	N/A	Dem	28
North Carolina	CFP	Tossup	16
North Dakota	N/A	GOP	3
Ohio	CFP/DEADL	GOP	17
Oklahoma	N/A	GOP	7
Oregon	SLL	Dem	8
Pennsylvania	CFP/DIS	Tossup	19
Rhode Island	CFP/DIS	Dem	4
South Carolina	SLL/CFP	GOP	9
South Dakota	CFP	GOP	3
Tennessee	CFP	GOP	11
Texas	SLL	GOP	40
Utah	CFP	GOP	6
Vermont	N/A	Dem	3
Virginia	N/A	Dem	13
Washington	N/A	Dem	12
West Virginia	CFP	GOP	4
Wisconsin	CFP	Tossup	10
Wyoming	N/A	GOP	3

Table Key:

N/A = No sore-loser restriction applicable to presidential candidates.

SLL = Express Sore-Loser law.

CFP = Cross Filing Prohibition.

DIS = Disaffiliation requirement.

DEADL = Deadlines effectively make it impossible to file for the general election after losing a party primary.

Unclear = State has a sore-loser restriction, but it is unclear whether it is applicable to presidential candidates.

Due to the sheer number of likely Republican or tossup states that have sore-loser provisions applicable to presidential candidates, a candidate who fails to win the Republican nomination for President will find it practically impossible to win the general election if he or she decides to run as an independent or third-party candidate. Such a candidate would be denied ballot access in 28 states totaling 290 electoral votes if sore-loser laws are applied as written. Given that there are only 538 total electoral votes and 270 are required to win, a candidate for whom 290 electoral votes—more than half (54%) of the total—are rendered moot by the application of sore-loser laws

will find it impossible to win the presidency, even if that candidate obtains ballot access in every remaining state where otherwise eligible and prevails in those states.

The situation is even more difficult for a conservative candidate given that 11 of the 18 states that lack sore-loser laws lean Democrat. Trump defeated Hillary Clinton in the 2016 presidential election by 304 to 227, a margin of 77 electoral votes.⁵⁷ The last successful Republican candidate for President to prevail by a margin that could sustain the loss of 73 electoral votes at risk in Texas, North Carolina and Ohio (just to select three must-win states for a GOP nominee) combined was George H.W. Bush in 1988 when he won 426 electoral votes.⁵⁸ Assuming that Trump obtains ballot access as an independent or third-party candidate in every state in which sore-loser laws *do not* apply to presidential candidates or those where the application is unclear, and he prevails over the Republican nominee in each of those states that he won in 2016 or 2020, Trump would accumulate only 81 electoral votes—189 shy of an electoral vote majority.

As a result of the foregoing, if any defeated Republican primary candidate attempts to run as a third-party or independent candidate after competing in party primaries in 2024, that candidate simply could not win a majority of the electoral college.

CONCLUSION

In a significant number of states, sore-loser laws apply to candidates for president. In 2024, if Trump tries and fails to win the Republican nomination, he will be prevented from accessing the general election ballot in a majority of states including ones crucial to a conservative candidate. As a result, it would be effectively impossible for him to win the general election as a third-party or independent candidate if he does not win the Republican nomination.

⁵⁷ 2016 Electoral College Results, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/2016> [<https://perma.cc/YQ9R-5BV3>].

⁵⁸ 1988 Electoral College Results, NAT'L ARCHIVES, <https://www.archives.gov/electoral-college/1988> [<https://perma.cc/9S3Y-Y3RV>].