

Case No. 12-2153

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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

*Appellants-Appellants,*

v.

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

*Defendant-Appellee,*

REPUBLICAN PARTY OF MICHIGAN,

*Intervenor Defendant-  
Appellee.*

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Appeal from the U.S. District Court For the Eastern District of Michigan  
Judge Paul D. Borman, presiding

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**INTERVENOR DEFENDANT-APPELLEE'S RESPONSE  
TO APPELLANTS' PETITION FOR REHEARING EN BANC**

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## **ARGUMENT**

### **I. Rehearing En Banc is Not Warranted Because the Issues Presented Do Not Rise to the Level of Exceptional Public Importance**

En banc review is an "extraordinary procedure" that is "not favored" and should not be ordered unless necessary "to maintain uniformity of the court's decisions" or to resolve a "precedent-setting error of exceptional public importance." Fed. R. App. P. 35; 6th Cir. I.O.P. 35(a). Alleged errors in the determination of state law are not appropriate grounds for en banc rehearing. 6th Cir. I.O.P. 35(a). Additionally, mere disagreement with the Panel's decision does not suffice to warrant en banc review. See *Mitts v. Bagley*, 626 F.3d 366, 370 (6th Cir. 2010). As opposed to panel rehearings, which are designed to allow the panel to correct errors of law or fact, en banc rehearings are reserved for the "truly exceptional cases" that affect the integrity and development of the circuit's case law. *Easley v. Ruess*, 532 F.3d 592, 594 (7th Cir. 2008); Fed. R. App. P. 35.

If this case truly rises to the level of "exceptional public importance" as the Appellants now apparently claim, how can Appellants make such a claim given the negligent treatment by the Appellants of their own case? According to the District Court in this case:

"As the Court noted in its prior Order Granting Intervenor–Defendant the Republican Party of Michigan's Motion to Intervene (ECF No. 23), Plaintiffs' dilatory conduct in this action has put the Court and the Defendant Secretary of State in an unnecessarily haste-driven

position. The Court put on the record at the September 6, 2012 hearing on this matter its findings regarding Defendant Ruth Johnson's claim that Plaintiffs' motion for an expedited hearing on the merits of this matter should have been denied on the basis of laches. Although the Court has decided, given the importance of the issue to reach the merits, Plaintiffs' failure to act with any sense of urgency in this matter until August 19, 2012 is reprehensible. Plaintiffs were well aware, as early as May 3, 2012, that Johnson would be denied general election ballot access in Michigan, but waited until June 25, 2012 to file their Complaint, further waited until July 18, 2012 to serve the Defendant, further waited until August 2, 2012 to file their non-emergency motion for summary judgment, and vexatiously waited until August 19, 2012 to apprise the Court that their motion was of an urgent nature. Any effort on Plaintiffs' part to stay this Court's decision pending appeal should be met with great skepticism. *See Nader v. Blackwell*, 230 F.3d 833, 834 (6th Cir. 2000) (“The plaintiffs could have pursued their cause more rigorously by filing suit at an earlier date. A state's interest in proceeding with an election increases as time passes, decisions are made, and money is spent.”). *See also* Affidavit of Christopher M. Thomas, August 31, 2012. (ECF No. 16, Ex. 2) (detailing the time challenges presented by Plaintiffs' delay in pursuing this matter). “*Libertarian Party of Michigan, et al. v Johnson et al.*, 905 F.Supp. 2d 751, \_\_\_\_ (ED. Mich. 2012).”

Actions speak louder than words.

Ignoring their own “dilatory conduct,” “reprehensible” “failure to act,” and “vexatious” actions in this case, the Appellants assert that this case presents a question of “exceptional importance,” articulated as follows: “Can a minor party candidate for president be excluded from the general election ballot because he ran in a major party primary?”

Appellants concede that, pursuant to Michigan law, the answer to their own inquiry is an unequivocal “yes”:

“Plaintiffs do not dispute that facially, by its clear and unambiguous terms, the statute can be read to apply to a presidential candidate such as Gary Johnson.” *Libertarian Party of Michigan, et al. v Johnson et al.*, 905 F.Supp. 2d 751, \_\_\_\_ (E.D. Mich. 2012).

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

In fact, in their own argument and again in their request for relief, Appellants acknowledge that the effect of this case is limited to Michigan law. To the end, Appellants request that the case be referred to the Michigan Supreme Court to determine whether the Secretary of State's interpretation of Michigan's sore loser law is correct "as a matter of Michigan law." Appellants further state that certification to the Michigan Supreme Court is authorized as this case involves "a question that Michigan law may resolve." Because the outcome of this case does not extend beyond Michigan's borders, it does not rise to the level of exceptional public importance necessary to warrant en banc rehearing.

This case also does not involve an alleged "precedent-setting" error of exceptional public importance as required by Sixth Circuit Rules because the

Panel's opinion did not even discuss the merits of the case. 6th Cir. I.O.P. 35(a). After reasoning that the case was not moot, the Panel simply affirmed the District Court's judgment after determining that "no jurisprudential purpose would be served by a panel opinion on the merits." Panel Op. at 5.

Accordingly, the present case does not rise to the level of exceptional public importance. The Appellants have cited no Sixth Circuit decision that is contrary to the present case. The Appellants cannot cite "precedent-setting error" because no Panel opinion was issued in this case. As illustrated by the District Court opinion, this case is nothing more than a straight-forward application of well-established legal principles.

## **II. Michigan's Sore Loser Statute is Constitutional as Applied to Presidential Elections**

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

not impose a substantial burden on either individual candidates or political parties. *See Timmons*, 520 U.S. at 359; *Clements v. Fashing*, 457 U.S. 957, 971-72 (1982).

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

**First**, Appellants cite to several inapposite cases from other jurisdictions where courts declined to apply or expressed concern about applying different sore loser laws to presidential elections. However, each case is specific to that state's sore loser law, and is distinguishable from the facts of this case. No court has held that sore loser statutes could *never* apply to presidential elections.

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



required to allow a person who unsuccessfully ran in the presidential primary to run in the general election as the candidate of a different party.

Appellants also cite to *Anderson v. Babb*, 632 F.2d 300 (4th Cir. 1980), in which the court found that North Carolina's sore loser statute did not apply to a presidential candidate under distinguishable circumstances. North Carolina's statute prohibited a person who "*participates* in the North Carolina presidential preference primary" from running as a candidate of a different party in the general election. *Id.* at 308 (emphasis added). The court found that North Carolina's law only applied to candidates who actually ran in the state's Republican primary, and that Anderson's belated withdrawal was effective under North Carolina law. Therefore, the sore loser law did not apply to him. Unlike North Carolina's statute, which focuses on the vague standard of whether a candidate "participate[d]" in a primary, Michigan's statute focuses on whether a candidate's name appeared on the primary ballot as a candidate for nomination. Thus, the court's reasoning in *Babb* does not apply to this case.

Finally, Appellants cite to *Anderson v. Mills*, 664 F.2d 600, 605 (6th Cir. 1981), where this Court rejected application of Kentucky's specific sore loser law to a presidential candidate. However, Kentucky's statute explicitly applied only to "*candidates who have been defeated* for the nomination for any office in a primary election." *Id.* at 605 (emphasis added). This Court correctly reasoned that

Kentucky's law did not apply to candidates in a presidential primary because "a candidate cannot lose his party's nomination for president by losing a state's primary election." *Id.* Michigan's sore loser law is distinguishable as it is triggered whenever a person's name is printed on a primary ballot as a candidate for nomination. Therefore, unlike the law at issue in *Mills*, Michigan's law squarely prohibits a candidate appearing in the Republican presidential primary from appearing on the general election ballot as a Libertarian candidate.

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

**Second**, Appellants cite to *Anderson v. Celebrezze*, 460 U.S. 780 (1983), in which the Supreme Court held only that Ohio's filing deadline for independent presidential candidates was unconstitutional. Appellants highlight language in the opinion in which the Court notes that states have a diminished interest in regulating presidential elections as opposed to state elections. *Id.* at 794-95. However, the Court made these statements in the context of evaluating the constitutionality of a state's regulation of filing deadlines, which does not involve the same interests protected by a sore loser law. Furthermore, even if the State's interests are somewhat diminished in the context of a presidential election, the state interests

here are more than sufficient to justify the minimal burden placed on Gary Johnson and the Libertarian Party.

*Third*, Appellants incorrectly contend that the District Court's decision relied on two "critical factual errors."

Appellants first assert that the District Court provided an inaccurate account of John Anderson's 1980 appearance on the general election ballot as a minor party candidate after losing in Michigan Republican primary. The District Court distinguished Anderson's candidacy on the ground that "at the time of Anderson's candidacy, Michigan had not yet enacted a provision that permitted an independent candidate to gain access to the general election," and Anderson was therefore precluded from running at all in the general election. Appellants assert that even though there was in fact no statutory mechanism for independent candidates to access the ballot, Anderson could have run as an independent under the same method used by Eugene McCarthy in 1976. Such a minor distinction, however, has no bearing on the outcome of this case. John Anderson was never permitted to appear on the general election ballot through an order of this Court. One anomalous non-application of Michigan's sore loser law over thirty years ago has no bearing on the constitutionality of the law in this case.

Appellants also argue that the District Court erred in stating that the sore loser law did not impose severe burdens on Johnson because he was free to run as

an independent. Appellants indicate that the filing deadline to run as an independent had expired on July 19, 2012, three weeks before the District Court rendered its decision. However, Secretary Johnson's office notified the Libertarian Party that the sore loser law barred Gary Johnson from appearing in the general election as the Libertarian Party's candidate on May 3, 2012, two and a half months before the filing deadline. Appellants did not do anything in response for nearly two months until they filed their complaint on June 25, 2012. Appellants then waited three more weeks until they decided to serve Secretary Johnson on July 18, 2012, one day before the filing deadline. Thus, it was Appellants' own dilatory conduct, described as "reprehensible" and "vexatious[]" by the District Court, Amended Opinion and Order at 2 n. 2 (Sept. 10, 2012), that delayed the decision until after the filing deadline had expired.

*Finally*, Appellants argue that the District Court's decision would have "disastrous implications" on "interstate cooperation." Appellants attempt to analogize to dormant commerce clause cases to argue that by applying its sore loser law to presidential elections, Michigan is attempting to regulate activities outside of its borders. Simply put, a state does not regulate activities outside its borders by maintaining control over which names are printed on its ballots. As noted, the Supreme Court has repeatedly upheld sore loser laws as serving several important state interests, including protecting the integrity of the political process

from frivolous or fraudulent candidates and avoiding party splintering, excessive factionalism, and voter confusion. *Storer*, 415 U.S. at 732; *Timmons*, 520 U.S. at 351, 367.

### **CONCLUSION**

For these reasons, Intervenor Defendant-Appellee Michigan Republican Party respectfully requests that this Court DENY Appellants' Petition for Rehearing En Banc.

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The brief contains 2,835 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 6<sup>th</sup> Cir. R. 32(b)(1).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 12, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF System, which will provide electronic copies to counsel of record.

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