No. 12-2153
In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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

Plaintiffs-Appellants,

v.

RUTH JOHNSON,
Defendant-Appellee,

and

REPUBLICAN PARTY OF MICHIGAN,
Third Party-Intervenor.

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

STATE DEFENDANT-APPELLEE'S RESPONSE TO PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING EN BANC

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Dated: June 13, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT AGAINST GRANTING REHEARING EN BANC

Michigan's sore-loser statute is not about success or failure, but about "switching sides halfway through the fight." (R. 28, District Court Amended Opinion and Order 9/10/2012, at 16, ID# 965.) The statute is not about being defeated, but about "ditching one political party for another." *Id.*

Twice on preliminary injunction and once on the merits, this Court has rejected Plaintiffs Libertarian Party of Michigan, Gary Johnson, and Denee Rockman-Moon's arguments that Mich. Comp. Laws § 168.695 does not apply to presidential candidates. (Order Denying Emergency Motion for Injunction, 9/12/2012; Order Denying Motion to Reconsider, 9/13/2012; Opinion and Judgment Affirming District Court Decision, 5/1/2013.) Plaintiffs' petition for rehearing *en banc* re-raises these arguments a fourth time, asserting "critical factual errors" and alleged misapplication of Supreme Court precedents. These are not grounds for rehearing *en banc*. Fed. R. App. P. 35(a) ("Alleged errors in the determination of state law or in the facts of the case . . . or errors in the application of correct precedent to the facts of the case, *are matters for panel rehearing but not for rehearing en banc*.") (emphasis

added.) These allegations also lack merit: despite their contentions, the very authorities Plaintiffs cite teach that sore-loser laws are constitutional even when applied to presidential candidates.

Plaintiffs' petition should be denied.

ARGUMENT

Plaintiffs contend that sore-loser laws have not been, and cannot be, applied to presidential candidates. To condone Michigan's extreme application, Plaintiffs claim, would produce disastrous results and upend the country's political system. (Appellants' Pet For Rehrg En Banc, 5/15/2013, at 9.) Yet controlling authorities say otherwise. Indeed, under Supreme Court precedent, application of Michigan's sore-loser law to presidential candidates is neither unconstitutional nor extreme. And while Michigan's law is subject to only moderate scrutiny, it survives any standard of review.

I. Michigan's sore-loser law is subject to only moderate scrutiny.

Michigan's sore-loser law is akin to the Minnesota statute the U.S. Supreme Court analyzed in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) and *Clingman v. Beaver*, 544 U.S. 581

(2005), under moderate scrutiny. In *Timmons*, the Court considered a statute banning candidates from appearing as nominees for more than one political party. 520 U.S. at 353-54. The *Timmons* Court specifically explained why the statute in that case was subject to only moderate scrutiny and distinguished the primary case on which Plaintiffs rely, *Tashijian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

While *Tashijian* "involved regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban [did] not. The ban, which applie[d] 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." *Timmons*, 520 U.S. at 353-354. Because the ban left parties both free to convince candidates to associate with them and free to endorse candidates not appearing on their ballot, the burden imposed by the statute was neither trivial nor severe and satisfied moderate scrutiny. *Id.* at 363.

Likewise, in *Clingman*, the Supreme Court analyzed Oklahoma's semi-closed primary system, aimed in part at preventing sore-loser candidacies, under a moderate scrutiny standard. *Clingman*, 544 U.S. at 593. The Court's standard of review was based on its conclusion that

the law did not severely burden the plaintiff's associational rights. *Id.* The Supreme Court's rationale for applying moderate scrutiny in *Timmons* and *Clingman* had nothing to do with whether the statutes applied to candidates for president.

Michigan's sore-loser law imposes the same type of modest burdens as the laws the Supreme Court considered in *Timmons* and *Clingman*. As in *Clingman*, Michigan's statute is facially non-discriminatory and does not restrict only the Libertarian Party and its would-be candidates. *Id.* at 590. And like the statute in *Timmons*, Michigan's law does not severely limit the Libertarian Party of Michigan's political choices. The Party could have nominated anyone it desired except for the few candidates who ran for a different political party in Michigan's February 2012 primary contest. *Timmons*, 520 U.S. at 363-64; Mich. Comp. Laws § 168.695. In sum, both *Timmons* and *Clingman* support this Court's adoption of the District Court's conclusion that moderate scrutiny applies.

Relying on *Tashijian v. Republican Party of Conn.*, 479 U.S. 208 (1986), Plaintiffs argue that Michigan's sore-loser statute is subject to strict scrutiny. But Michigan's statute and the Connecticut law

assessed in *Tashijian* are readily distinguishable. Connecticut's statute permitted independent voters, among other things, to participate in Republican primaries for federal and state offices. *Tashijian*, 479 U.S. at 210-11. Michigan's statute does not permit this type of interparty meddling and is not subject to the same searching review. *Timmons*, 520 U.S. at 358-59 (not all elections regulations are subject to strict scrutiny).

In sum, Michigan's law is subject to moderate scrutiny.

II. Michigan's interest in its sore-loser law is not only permissible but compelling.

Although the standard of review is moderate scrutiny, Michigan's sore-loser statute survives any level of scrutiny. The Supreme Court has held that states' interests in sore-loser laws, even applied to presidential candidates, can be "not only permissible, but compelling." *Storer v. Brown*, 415 U.S. 724, 736 (1974).

In *Storer*, the Supreme Court upheld a California law requiring candidates to disaffiliate from any political party for at least one year before the primary election immediately preceding the election in which they sought to run as an independent candidate. *Id*. at 726, 736. The

Court reasoned that promoting party unity and reducing factionalism, among other things, were compelling state interests that outweighed "the interests of the candidate and his supporters in making a late rather than an early decision to seek independent ballot status." *Id.* at 736. It also noted without comment that the presidential- and vice-presidential-candidate plaintiffs had satisfied the provision. *Id.* at 738; *see also Anderson v. Celebrezze*, 460 U.S. 780, 804 n. 32 (1983) (observing without comment that the presidential- and vice-presidential-candidates in *Storer* satisfied the disaffiliation provision).

In *Clingman*, the Supreme Court reiterated the compelling nature of similar state interests in sore-loser laws, even when applied to presidential candidates. *Clingman*, 544 U.S. at 594-596. The Court held that states have legitimate interests in aiding party-building efforts, on the one hand, and preventing party raiding, on the other. *Id.* It held that Oklahoma's semi-closed primary system prevented, among other things, "a Democratic primary contender who senses defeat [from] launch[ing] a 'sore loser' candidacy by defecting to the [Libertarian Party of Oklahoma] primary, taking with him loyal Democratic voters, and thus undermining the Democratic Party in the general election."

Id. at 596 (citing *Storer*, 415 U.S. at 735). Indeed, the Supreme Court pointedly affirmed that that law was valid because "Oklahoma has an interest in 'temper[ing] the destabilizing effects' of *precisely this sort* of 'party splintering and excessive factionalism.'" *Id*. at 596–97 (citing *Timmons*, 520 U.S. at 367) (emphasis added).

As these cases demonstrate, the Supreme Court does not share Plaintiffs' perspective that applying state sore-loser laws to presidential candidates is unconstitutional or extreme. To the contrary, the Court has held that such laws are subject to moderate scrutiny and are constitutional in light of states' compelling interests.

III. The panel's decision is not contrary to *Anderson v. Mills* and is not undermined by John Anderson's 1980 candidacy.

Anderson v. Mills, 644 F.2d 600 (6th Cir. 1981), is not inconsistent with this precedent. In that case, the challenged statute provided that "[n]o 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." *Id*. at 605. This Court opined (but did not decide) that the constitutionality of

the statute as applied to presidential candidates was doubtful because losing in a party's primary did not preclude a candidate from otherwise becoming that party's nominee for president.[1]

Michigan's statute is far different. Unlike the statute in *Mills*, Mich. Comp. Laws § 168.695 is not about success or failure, but about "switching sides halfway through the fight." (R. 28, District Court Amended Opinion and Order 9/10/2012, at 16, ID# 965.) It does not proscribe candidacy based on a prior defeat, but reflects a balance between Michigan's interests in promoting party unity and reducing factionalism and "the interests of the candidate and his supporters in making a late rather than an early decision to seek independent ballot status." *Storer*, 415 U.S. at 736. As the Supreme Court has held, statutes furthering these compelling state interests, even when applied to presidential candidates, are constitutional.

Neither should John Anderson's 1980 presidential candidacy persuade this Court to grant *en banc* review. Michigan's election law

[1] As the district court appropriately observed, John McCain's 2008 presidential candidacy—he lost Michigan's Republican primary race but went on to be the Republican presidential nominee—is an example of why the Kentucky statute did not extend to presidential candidates. (R. 28, District Court Amended Opinion and Order 9/10/2012, at 16 n. 6, ID # 965.)

was constitutionally deficient at that time, despite an isolated judicial acceptance of an independent candidate's non-statutory attempt to obtain ballot status. *See McCarthy v. Austin*, 423 F. Supp. 990, 998, 1000 (W. D. Mich. 1996) (concluding that Michigan's laws were constitutionally deficient albeit independent candidates could appear on the ballot through showing of community support). Applying Michigan's sore-loser statute to Anderson in 1980 would have presented constitutional infirmities not present here because, unlike Gary Johnson, John Anderson lacked a statutory method to obtain independent candidate status.[2]

[2] This Court should reject Plaintiffs' argument that Gary Johnson was prevented from appearing on the ballot as an independent because of the lateness of the District Court's decision. To the contrary, Plaintiffs' case would have been resolved in ample time to appear on the ballot if not for Plaintiffs' own "dilatory" and "vexatious" conduct during litigation. (R. 28, District Court Amended Opinion and Order 9/10/2012, at 2 n. 2, ID# 951.)

CONCLUSION AND RELIEF REQUESTED

This Court's decision is without error and compelled by the very authorities on which Plaintiffs rely. Accordingly, the Secretary of State respectfully requests that this Court deny Plaintiffs' petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains no more than 14,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). There are a total of 1,573 words.

2. 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) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Century Schoolbook.

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CERTIFICATE OF SERVICE

I certify that on June 13, 2013, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Defendant-Appellee, per Sixth Circuit Rule 28(c), 30(b), hereby designates the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	ID #
Amended Opinion and Order	09/10/2012	28	950