No. 13-421

In The
Supreme Court of the United States

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

Petitioners,

v.

RUTH JOHNSON, Secretary of State of Michigan,
in her official capacity;
REPUBLICAN PARTY OF MICHIGAN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT REPUBLICAN PARTY OF MICHIGAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court review a constitutional challenge to Michigan's "sore loser" law where this Court has repeatedly upheld "sore loser" laws as serving several important state interests?

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REASONS FOR DENYING THE PETITION

I. The Issues Presented Are Not Compelling, And Have No Effect Outside Of Michigan

"A petition for a writ of certiorari will be granted only for compelling reasons." *Supreme Court Rule 10.* In an attempt to meet this standard, the Petitioners indicate that this case represents a "question of exceptional importance." Petition at 4.

If this case truly rises to the level of "exceptional importance" as the Petitioners now apparently claim, how can Petitioners make such a claim given their own actions below – actions which the District Court characterized as "vexatious," "dilatory," and "reprehensible." 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, 754 n.2 (E.D. Mich. 2012). Pet. App. at 12.

Actions speak louder than words.

Ignoring their own "dilatory conduct," "reprehensible" "failure to act," and "vexatious" actions in this case, the Petitioners assert that this case presents a question of "exceptional importance," articulated as follows: "Whether a minor party candidate for president can be excluded from the general election ballot

because he or she ran in a major party primary?" Petition at 4.

Petitioners 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, 756 (E.D. Mich. 2012). Pet. App. at 16.

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 Petitioners 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 before the Sixth Circuit, the Petitioners acknowledge that the effect of this case is limited to Michigan law. To this end, Petitioners requested 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." Resp. App. at

23. Petitioners further stated that certification to the Michigan Supreme Court is authorized as this case involves "a question that Michigan law may resolve." Resp. App. at 23. Because the outcome of this case does not extend beyond Michigan's borders, it does not rise to the level of a "compelling" case necessary to warrant a writ of certiorari. As illustrated by the decisions of the Sixth Circuit and the District Court below (*see* Petitioners' Appendix), this case is nothing more than a straight-forward application of well-established legal principles to a Michigan statute.

II. Michigan's "Sore Loser" Statute Is Constitutional As Applied To Presidential Elections

In order to protect the integrity of the political process from frivolous or fraudulent candidates and avoiding party splintering, excessive factionalism, and voter confusion, Michigan has adopted the following "sore loser" law:

> "No person whose name was printed or placed on the primary ballots or voting machines as a candidate for nomination on the primary ballots of 1 political party shall be eligible as a candidate of any other political party at the election following that primary."

Mich. Comp. Laws §168.695.

Because Petitioner Gary Johnson's name was printed on Michigan's February, 2012 primary ballot of the Republican Party for President, Respondent Michigan Secretary of State could not and did not permit

Petitioner Gary Johnson's name on the Michigan ballot for the November 6, 2012 general election as the Libertarian Party candidate for President. Pet. App. at 16. The District Court and the Sixth Circuit upheld the constitutionality of Michigan's "sore loser" law in this case. *See* Petitioners' Appendix.

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).

Petitioners 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, Petitioners 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.

Petitioners 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. Petition at 6-7. 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.

Petitioners 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. Petition at 7. 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, Petitioners cite to *Anderson v. Mills,* 664 F.2d 600, 605 (6th Cir. 1981), where the court rejected the application of Kentucky's specific "sore loser" law to a presidential candidate. Petition at 7-9. 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). The 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 the Petitioners' 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, Petitioners cite to *Anderson v. Celebrezze,* 460 U.S. 780 (1983), in which the Supreme Court held that Ohio's filing deadline for independent presidential candidates was unconstitutional. Petition at 9. Petitioners 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 as recognized by the District Court in this case. Pet. App. at 32-41.

Third, Petitioners incorrectly contend that the District Court's decision relied on two "critical factual errors." Petition at 15.

Petitioners 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 the Michigan Republican primary. Petition at 16. 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. Pet. App. at 32. Petitioners 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. Petition at 17. 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 a 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.

Petitioners 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. Petitioners 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. Petition at 15. 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. Petitioners did not do anything in response for nearly two months until they filed their Complaint on June 25, 2012. Petitioners 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 Petitioners' 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. Pet. App. at 12.

Finally, Petitioners argue that the District Court's decision would have "disastrous implications" on "interstate comity." Petition at 9. Petitioners 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. Accordingly, the well-reasoned analysis set forth by the lower courts in this case (*see* Petitioners' Appendix) demonstrates

that Michigan's "sore loser" statute is constitutional as applied to presidential elections.

CONCLUSION

For these reasons, Respondent Michigan Republican Party respectfully requests that this Court DENY Petitioners' Petition for Writ of Certiorari.

Respectfully submitted,

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