

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

JILL STEIN, et al.,
Plaintiffs-Appellees,

Appeal No. 16-2690

-against-

THOMAS, et al.,
Defendants,

-and-

SCHEUTTE,
Intervenor-Defendant,

-and-

MICHIGAN REPUBLICAN PARTY,
Intervenor-Appellant,

**PLAINTIFFS' RESPONSE TO MICHIGAN REPUBLICAN PARTY'S
EMERGENCY PETITION FOR INITIAL HEARING EN BANC**

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PRELIMINARY STATEMENT

Plaintiffs oppose Intervenor-Appellant Michigan Republican Party's application for initial en banc review of the district court's temporary restraining order because appellate review is not appropriate at this time for the reasons set forth in the responses filed earlier today in opposition to the Republican Party and State Attorney General's emergency motions for a stay. *See* Dkt. Nos. 14, 18.

Plaintiffs also note that Intervenor's application for initial en banc review is prohibited by the Sixth Circuit Internal Operating Procedure 35(a).

IMMEDIATE EN BANC REVIEW IS INCONSISTENT WITH SIXTH CIRCUIT RULES

The Sixth Circuit has set forth extraordinarily high standards necessary to obtain en banc review in I.O.P. 35(a):

Extraordinary Nature of Petition for Rehearing En Banc. A petition for rehearing en banc is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional public importance or an opinion that directly conflicts with Supreme Court or Sixth Circuit precedent. Alleged errors in the determination of state law or in the facts of the case (including sufficient evidence), 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.

The Michigan Republican Party asserts that en banc review is necessary because this case is one of "exceptional importance." Rep. En Banc Br. at 6. But the Michigan Republican Party fails to cite the full rule, which requires a "precedent-

setting error of exceptional public importance.” 6th Cir. I.O.P. 35(a). The rule also expressly says that resolving “errors in the determination of *state law*” or “errors in the *application* of correct precedent to the facts of the case” are not matters for rehearing en banc. *Id.* (emphases added). Yet, that is exactly what the Republican Party asks Court to do en banc.

All parties agree that *Burdick v. Takushi*, 504 U.S. 428 (1992), is controlling precedent in this case. The dispute is over the specific *application* of *Burdick* to the facts in this case. Indeed, the Michigan Republican Party expressly states that the problem with the district court’s decision is a “misapplication” of *Burdick*. Rep. En Banc Br. at 9. As expressly set out in the Sixth Circuit rules, determining if the correct precedent was misapplied is not the function of en banc review.

Moreover, the Michigan Republican Party complains about the district court’s interpretation of Michigan state law. Rep. En Banc Br. at 8. Review of a district court’s determination of state law is also expressly a prohibited reason for en banc review under Sixth Circuit procedure.

Finally, the district court’s decision is likely not “precedent-setting” as it is only a temporary restraining order and likely not the district court’s last word. The district court has appropriately invited the parties to return to the court should further clarity or adjudication be required in light of developments in state court

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2016, I submitted the foregoing document to the Court's ECF system for service and filing, and the document was thereby served upon counsel of record through that system.

/s/ Jessica Clarke

Jessica Clarke

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/s/ Jessica Clarke

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