Docket No. 12-35816

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SANDERS COUNTY REPUBLICAN CENTRAL COMMITTEE,

Appellees,

v.

TIMOTHY C. FOX, in his official capacity as Attorney General for the State of Montana; JONATHAN MOTL, in his official capacity as the Commissioner for Political Practices for the State of Montana,

Appellants.

On Appeal from the Final Order and Judgment
of the United States District Court for the
District of Montana
(Hon. Charles C. Lovell, Presiding)

District of Montana Case No. CV-12-00046-CCL

APPELLANTS' PETITION FOR REHEARING *EN BANC*

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I. STATEMENT PURSUANT TO RULE 35(b) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Appellants (State of Montana)[1] submit this case should be heard *en banc* because it involves questions of exceptional importance within the meaning of Rule 35(b)(2). Two opinions of the same panel have considered the matters presented here. This was a case of first impression at the time of the first panel opinion (Cause No. 12-35543), in light of *Renne v. Geary*, 50 U.S. 312 (1991). Shortly after the second panel opinion, the Supreme Court issued a decision directly bearing on the issues raised here in *Shelby County v. Holder*, ___ U.S. ___, 2013 U.S LEXIS 4917 (June 25, 2013).

The first panel decision declared the Montana statute at issue facially unconstitutional, and the second panel decision limited the scope of the first. All Ninth Circuit published opinions constitute binding authority, which must be followed unless and until overruled by a body competent to do so. *Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (en banc). This Court sitting *en banc* may overturn a panel opinion. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001). The panel decisions declaring a portion of Mont. Code Ann. § 13-35-231 should be reversed.

[1] Jonathan Motl has replaced the previous Commissioner of Political Practices and is, therefore, substituted as a party pursuant to Fed. R. App. P. 42(c)(2).

II. QUESTIONS OF EXCEPTIONAL IMPORTANCE

A. Whether the State of Montana has the power to regulate its elections, prescribe the structure of its judiciary, and prohibit political party endorsements in nonpartisan judicial elections based upon the U.S. Constitution, Article IV, Section 4.

B. Whether the State of Montana has the power to regulate its elections, prescribe the structure of its judiciary, and prohibit political party endorsements in nonpartisan judicial elections based upon the Tenth Amendment of the U.S. Constitution.

C. Whether Montana's compelling interest in maintaining its independent and impartial judiciary, as well as the due process rights guaranteed to persons appearing before jurists, should be balanced against speech rights in determining whether political party endorsements may be prohibited in nonpartisan judicial elections.

III. STATEMENT OF THE CASE

The State of Montana has elected supreme court justices and district court judges since it was admitted to the union in 1889. These elections have been nonpartisan since 1935. The 1972 Montana Constitution preserved this established system for nonpartisan judicial elections. Montana has long exercised its

sovereign powers to prohibit political party endorsements and expenditures in nonpartisan judicial elections.

Appellee Sanders County Republican Central Committee (SCRCC) filed this action on May 29, 2012, to challenge a portion of one Montana statute. SCRCC brought suit to enjoin the State of Montana from enforcing Mont. Code Ann. § 13-35-231, and thereby allow SCRCC to endorse judicial candidates in nonpartisan elections and make expenditures to publicize any such endorsement. The hearing on SRCC's motion for preliminary injunction occurred on June 11, 2012. The district court, in a reasoned decision, denied SCRCC's motion for preliminary injunctive relief in an order entered on June 26, 2012. SRCC promptly appealed. A three-judge panel of this Court reversed on September 17, 2012. *See* Ex. A.

On remand, the district court quickly vacated the trial setting, ruled additional dispositive motions were superfluous, and entered a permanent injunction against enforcement of the entire statute on September 19, 2012. The State of Montana timely appealed the permanent injunction, and the same three-judge panel affirmed in part and reversed in part on June 21, 2013. *See* Ex. B.

VI. ARGUMENT

In 1889, Montana adopted a Constitution providing that supreme court justices and district court judges must be attorneys admitted to practice in Montana

and must be elected. By statute, since 1935, political parties have been prohibited from endorsing nonpartisan judicial candidates, and prohibited from making expenditures or contributions in nonpartisan judicial elections. The current Montana Constitution, adopted in 1972, reaffirmed that judges shall be elected and empowered the Montana Supreme Court to regulate conduct of judges and attorneys.

The Montana Constitution reflects both the considered judgment of the Montana Legislature, delegates to the 1971-1972 Constitutional Convention, and the citizens of Montana who approved it. *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991). As the Supreme Court ruled on June 25, 2013, "the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." *Shelby County v. Holder*, ___ U.S. ___, 2013 U.S LEXIS 4917 at *22 (2013) (quoting *Gregory v. Ashcroft*). The *Shelby County* decision invalidated a portion of the Voting Rights Act based, in part, on state authority "to determine the conditions under which the right of sufferage may be exercised," and state power "to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Id.* at *23, *44-45 (citations omitted).

Montana's system of nonpartisan judicial elections reflects a deeply-ingrained and repeatedly-confirmed sovereign decision. SCRCC's attack

on the statute clearly involves questions of exceptional importance, because it is an assault on Montana's sovereign authority to determine how to maintain the impartiality and nonpartisan nature of its judiciary.

A. SCRCC's Challenge to Montana's Prohibition on Political Parties From Endorsing Nonpartisan Candidates in Judicial Elections Is a Direct Attack on Montana's Sovereign Right to Structure Its Judiciary.

The Montana Constitution requires election of supreme court justices and district court judges. Mont. Const. Art. VII, § 8. Montana law provides that elections for judicial offices are nonpartisan. *See* Mont. Code Ann. § 13-14-111. SCRCC did not challenge this statute. SCRCC only challenged the endorsement and expenditure provisions of Mont. Code Ann. § 13-35-231, which reads:

> **Unlawful for political party to endorse judicial candidate.** A political party may not endorse, contribute to, or make an expenditure to support or oppose a judicial candidate.

These two statutes, in various forms, have been on the books for nearly eight decades. Political parties have been prohibited from endorsing candidates for seats on the supreme court and district court for the last 78 years.

Aside from the statutory prohibition on endorsements, any partisan endorsement in judicial elections also runs afoul of the Montana Code of Judicial Conduct (Judicial Code), particularly Rules 4.1(A)(7) and 4.1(B). The Judicial

Code was adopted by the Montana Supreme Court on December 12, 2008,[2] and became effective January 1, 2009.[3] SCRCC did not challenge the Judicial Code.

"The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and *nonpartisanship*." *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (emphasis added). *See also Hurles v. Ryan*, 650 F.3d 1301, 1309 (9th Cir. 2011) (quoting *Mistretta*); *Wersal v. Sexton*, 674 F.3d 1010, 1022-23 (8th Cir. 2012) (same). The reputation of the judiciary also rests upon the perception of impartiality, and "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings v. Continental Casualty*, 393 U.S. 145, 150 (1968). Partisan political positions, on the other hand, clearly involve office holders who are expected to represent their individual constituents, rather than independently strive for impartial justice for the benefit of all. *Reichert v. State*, 278 P.3d 455, 476-77 (Mont. 2012). The continued recognition of *nonpartisanship* as the basis of judicial legitimacy obviously supports Montana's restriction of

[2] The Order adopting the Judicial Code is accessible on the internet at http://supremecourtdocket.mt.gov/view/AF%2008-0203%20Other%20--%20Order?id={7F2426C5-4E87-4C48-AE15-3E8E997CF8FC}

[3] The Montana Supreme Court has authority to make rules governing judicial conduct and members of the bar seeking judicial office. Mont. Const. Art. VII, §§ 2, 11. In order to be eligible for the office of supreme court justice or district judge, a citizen must be an attorney licensed in Montana for a specified period. Mont. Const. Art. VII, § 9.

partisan endorsements (and related expenditures) in judicial elections. Montana's sovereign choice in this regard, particularly in light of the *Shelby County* decision rooted in federalism, should not be invalidated.

B. The Constitution Allows the Sovereign State of Montana to Prohibit Political Party Endorsements in Nonpartisan Judicial Elections.

"States retain broad autonomy in structuring their governments and pursuing legislative objectives." *Shelby County, supra*, at *22. The Supreme Court has often recognized the fundamental principle that "the States possess concurrent sovereignty with that of the federal Government, subject only to the limitation of the Supremacy Clause." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). "Just as the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections, each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Gregory, supra*, at 461-62 (citations and internal quotation marks omitted). This power of the States also rests upon Art. IV, § 4. *Id.* at 463. *See also, Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (recognizing "a State's constitutional responsibility for the establishment and operation of its own government").

The Tenth Amendment reserves to the States powers not delegated to the United States by the Constitution, and Art. IV, § 4 of the Constitution specifically provides that "[t]he Congress shall guarantee to every State in this Union a Republican Form of Government." The Supreme Court has clearly recognized the sovereign rights of States to regulate elections and prescribe qualifications of judges. *Gregory*, 501 U.S. at 460-63. *See also Geary v. Renne*, 94 F.2d 280, 287-88 (9th Cir. 1990) (Rymer, J., dissenting). The first panel decision briefly considered the impact of the Tenth Amendment, but did not address the *Gregory* decision or the republican form of government clause in Art. IV, § 4.

In *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (*en banc*), similar issues were addressed by this Court in a much broader dispute over nonpartisan elections in general. The Supreme Court subsequently reversed and vacated the judgment on other grounds. *Renne v. Geary*, 501 U.S. 312, 321-22 (1991). Over the last two decades, however, a substantial number of cases have addressed deference to state sovereignty and judicial elections. This body of jurisprudence offers guidance, and supports application of the persuasive rationale set forth in Judge Rymer's dissent in *Geary*.[4]

First, there is no longer any dispute that the State of Montana has a compelling state interest in a fair and impartial judiciary. *See Siefert v. Alexander*,

[4] *Geary*, 911 F.2d at 295-305.

608 F.3d 974, 979-80 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011) ("beyond doubt that states have a compelling interest in developing, and indeed are required by the Fourteenth Amendment to develop . . . independent and faithful jurists"). Justice Kennedy has emphasized:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.

Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring). *See also Caperton v. A.T. Massey Coal*, 556 U.S. 868 (2009) (partisan contributions and expenditures in nonpartisan judicial elections may deprive litigants of due process). The first panel opinion recognized this compelling state interest. Ex. A, majority decision, at 7.

Montana's interest in preserving a fair and impartial judiciary supports nonpartisan judicial campaigns. A recent district court ruled:

> We reject the suggestion that judicial candidates ought to enjoy greater freedom to engage in partisan politics than sitting judges. An asymmetrical electoral process for judges is unworkable. Fundamental fairness requires a level playing field among judicial contenders. Candidates for judicial office must abide by the same rules imposed upon the judges they hope to become.

Wolfson v. Brammer, 822 F. Supp. 2d 925, 932 (D. Ariz. 2011) (rejecting First Amendment challenge to the Arizona Code of Judicial Conduct's prohibition

on the "political activities" of judicial candidates). The "State's decision to select its judges by popular election does not eliminate the State's compelling interest in preserving the real and perceived integrity of an unbiased judiciary." *Id.* at 930. Montana has chosen to preserve its interest in an unbiased judiciary by precluding partisan activities in nonpartisan judicial elections.

Second, the Supreme Court has recently recognized that political speech may appropriately be limited in situations where restriction on political activity allows governmental entities to perform their functions. In *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876 (2010), the Supreme Court specifically recognized political speech can be narrowly banned when a particular governmental function cannot operate effectively absent the ban. In *Citizens United*, the Court specifically recognized that a narrow ban on political speech is appropriate when a particular governmental function cannot operate effectively absent the ban:

> The Court has upheld a narrow class of speech restrictions that operate to the disadvantage of certain persons, but these rulings were based on an interest in allowing governmental entities to perform their functions. See, e.g., *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S. Ct. 3159, 92 L. Ed.2d 549 (1986) (protecting the "function of public school education"); *Jones v. North Carolina Prisoners' Labor Union, Inc*., 433 U.S. 119, 129, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977) (furthering "the legitimate penological objectives of the corrections system" (internal quotation marks omitted)); *Parker v. Levy*, 417 U.S. 733, 759, 94 S. Ct. 2547, 41 L. Ed.2d 439 (1974) (ensuring "the capacity of the Government to discharge its [military] responsibilities" (internal quotation marks

> omitted)); *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 557, 93 S. Ct. 2880, 37 L. Ed.2d 796 (1973) ("[F]ederal service should depend upon meritorious performance rather than political service").

Citizens United, 130 S. Ct. at 899. Indeed, Judge Rymer cited *Letter Carriers* in her *Geary* dissent to point out that "danger to proper government functioning" justified restriction on political party endorsements in nonpartisan elections. *See Geary*, 911 F.2d at 302-03. Montana's interest in an unbiased judiciary certainly is not less important than the interests recognized in *Citizen's United*.

Third, it is also clear that the issues presented here are at the core of federalism. The citizens of Montana determined at the inception of statehood in 1889 that supreme court justices and district court judges would be elected, and retained this method of selecting jurists when they adopted the 1972 Montana Constitution. These elections have been nonpartisan since 1935, which was recognized during debate over judicial selection alternatives in the 1971-72 constitutional convention. The *Shelby County* case should be extended to nonpartisan judicial elections based upon respect for Montana sovereignty.

As Judge Rymer recognized in her *Geary v. Renne* dissent, the political party endorsement ban in nonpartisan judicial elections "may render [the restriction] drawn as precisely as it can be." *Geary, supra*, at 301. An endorsement ban on political parties in nonpartisan elections does not prevent individuals or groups from making endorsements, nor does it prevent political

parties from speaking out on issues. *Id.* at 300. The prohibition on partisan endorsements in nonpartisan elections does not impose a burden on political parties that is out of proportion to strength of the State's interest in nonpartisan elections, which is particularly true where the State's compelling interest is an independent and unbiased judiciary. *Id.* at 300 n.21-22. There is no impermissible burden on associational rights. Because Montana's interest in nonpartisan judicial elections is a choice about its structure of government, rather than only an interest in preventing corruption, allowing individuals and special interest groups to speak when political parties cannot endorse candidates does not render the prohibition underinclusive because the distinction is based on partisanship itself and not specific issues related to the justice system. *Id.* at 302, n.32.

The Supreme Court decision in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989) does not compel a contrary result. The *Eu* case considered a prohibition on political party endorsements in partisan primary elections. *Eu*, 489 U.S. at 217, 220. There is a dramatic qualitative distinction between a statute regulating partisan speech by a political party in a partisan nonjudicial election (at issue in *Eu*) and a statute regulating partisan speech by a political party in a nonpartisan judicial election (at issue here). Judge Rymer explained that "*Eu* involved different issues and a different interest . . . . In *Eu* we found that regulation of internal political party affairs burdens the right of political

parties to govern themselves as they see fit, because a partisan primary is by definition theirs." *Geary*, *supra* at 298-99. *Eu* does not support the proposition that a political party always has an unfettered right to speak, and does not support the right to inject partisanship into judicial elections where Montana has clearly exercised its sovereign choice to exclude partisanship.

C. The Due Process Rights of Parties Should be Balanced Against the Right of Free Speech and Allow Prohibition of Political Party Endorsements in Nonpartisan Judicial Elections.

In addition to Montana's sovereign right to establish its own government and system of nonpartisan judicial elections, the statute at issue should be enforceable because of due process concerns. In the context of judicial elections, free speech rights must be balanced against the constitutional right to due process of parties to court proceedings. The State's compelling state interest in preserving a fair and impartial judiciary includes guarding against the appearance of impropriety. While the constitutional tension between these countervailing rights cannot be denied, Mont. Code Ann. §13-35-231 provides a reasonable means of balancing these rights. SCRCC's free speech rights must be balanced against the constitutionally protected due process rights of parties before the courts.

"[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them." *Bridges v. California*, 314 U.S. 252, 260 (1941). "The authors of the Bill of Rights did not

undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 561 (1976). Accordingly, the due process rights of litigants should be given at least equal weight when balancing these competing rights. *In re Independent Publishing*, 240 F. 849, 862 (9th Cir. 1917); *Siefert*, 608 F.3d at 983. Without a fair trial before an independent tribunal, no other constitutional right can be vindicated. "It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton*, 129 S. Ct. at 2259 (internal citations omitted). *See also Hurles v. Ryan*, 650 F.3d 1301, 1310-11 (9th Cir. 2011).

A balancing test should be applied in the event the statute is not deemed a valid exercise of Montana's sovereign power. A similar type of balancing test has been adopted by the Seventh Circuit in evaluating post-*Citizens United* First Amendment challenges brought to "political activity" prohibitions contained in state codes of judicial conduct. In these cases the courts have balanced a judge or judicial candidate's right to speak, against the state's interest in preserving an effectively functioning judiciary, and have concluded the prohibitions on "political activity" are constitutional. *See Wolfson*, 822 F. Supp.2d at 930; *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872

(2011); *Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2871 (2011).

In *Republican Party of Minn. v. White*, the Supreme Court applied strict scrutiny and held unconstitutional the Minnesota Code of Judicial Conduct's "announce clause," which prohibited candidates for judicial election from announcing their views on disputed legal issues. *White*, 536 U.S. at 788. Although the Court concluded that the "announce clause" was unconstitutional, Justice Kennedy, in his concurrence, specified that *White* did not present the question of "whether a State may restrict the speech of judges because they are judges," and suggested "a general speech restriction on sitting judges . . . in order to promote the efficient administration of justice" might be appropriate. *Id*. at 796 (Kennedy, J., concurring) (internal citations omitted). As noted in the first panel opinion dissent, "Political endorsements, much more than judges' discussion of issues lead to political indebtedness, which in turn has a corrosive impact on the public's perception of the judicial system." Ex. A, dissenting opinion, at 3.

Moreover, when *Citizens United* rejected the governmental interest in preventing corruption or appearance of corruption regarding corporate independent expenditures, it recognized that in representative politics the legislative and executive branches are meant to be responsive to political agendas of partisan supporters. *Citizens United*, 130 S. Ct. at 910. Judge Rymer also recognized this

concern in her *Geary* dissent. *Geary*, 911 F.2d at 303-04. The Montana Supreme Court has recognized an independent judiciary exists for a separate purpose than the legislative and executive branches. *Reichert*, 278 P.3d at 476-77. Other elected officials represent their constituents and voters, including fealty to political party platforms. Judicial officers, quite unlike other elected officials, independently serve *all* the people and are bound to follow the law.

The effective functioning of the judiciary in Montana will be adversely impacted by political parties endorsing nonpartisan judicial candidates. Judicial elections properly fall within this narrow category wherein the political speech of political parties may be restricted. The federalism concerns expressed by the Supreme Court in *Shelby County* a few days ago supports this result, and this result is also consistent with the narrow restrictions on speech recognized as valid by the Supreme Court in *Citizen's United.*

VIII. CONCLUSION

For the foregoing reasons, this Court should rehear this case *en banc* because the appeal involves questions of exceptional importance to the State of Montana.

Respectfully submitted this 5th day of July, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing document with the clerk of the court for the United States Court of Appeals for the Ninth Circuit by using cm/ecf system.

Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

Dated: July 5, 2013

/s/ Michael G. Black
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CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached Appellant's Petition for Rehearing *en banc* is: (check applicable option)

✓ Proportionately spaced, has a typeface of 14 points or more, and contains 3,627 words.

or

___ Monospaced, has 10.5 or fewer characters per inch and contains ____ words or ____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

___ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

/s/ Michael G. Black
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