

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GREEN PARTY OF MICHIGAN,
LIBERTARIAN PARTY OF MICHIGAN,
REFORM PARTY OF MICHIGAN, METRO
TIMES, INC., and DAVID FORSMARK,
d/b/a WINNING STRATEGIES,

Plaintiffs,

v.

Case No. 2:08-cv-10149
Hon. Nancy G. Edmunds

MICHIGAN SECRETARY OF STATE
TERRI LYNN LAND, in her official capacity,

Defendant.

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their counsel, move for summary judgment, pursuant to Rule 56, F.R.Civ.P., declaring that MCL 168.615c is unconstitutional in violation of the First and Fourteenth Amendments to the United States Constitution.

1. The bases for the motion are stated in the supporting brief.

2. Pursuant to Local Rule 7.1(a), Plaintiffs sought concurrence in the relief sought in an email dated and in discussions with the Michigan Attorney General's office, but concurrence was denied by an email dated January 31, 2008.

WHEREFORE, Plaintiffs pray that this Court:

A. Declare unconstitutional the offending portions of the statute, MCL 168.615c, subsections (5), (6), (7), (8), (9), (10) and (11), and to enjoin the Secretary from carrying her responsibilities under subsections (5), (6).

B. Grant any other appropriate relief.

Respectfully submitted,

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Dated: February 12, 2008
KH104106

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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CONCISE STATEMENT OF THE ISSUES

1. Does M.C.L. § 168.615c violate the Equal Protection Clause of the Fourteenth Amendment because it requires the Michigan Secretary of State to provide to the chairpersons of the two major political parties a file containing the political party preference declarations of each person who voted in the Michigan Presidential Primary but bars distribution of the information to anyone else, including the Minor Political Parties, the Press and political consultants?
2. Does M.C.L. § 168.615c violate the First Amendment by selectively barring access to the party preference information provided to the two Major Parties and imposing criminal penalties on third parties, such as the press, who obtain access to the information?

**CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR THE RELIEF
SOUGHT**

1. Equal Protection

Anderson v. Celebrezze, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983)

Socialist Workers Party v. Rockefeller, 314 F.Supp. 984 (S.D.N.Y. 1970), *summarily
aff'd* 400 U.S. 806, 91 S.Ct. 65, 27L.Ed.2d 38 (1970)

2. First Amendment

S.H.A.R.K. v. Metro Parks Serving Summit County, 499 F.3d 553 (6th Cir. 2007)

INTRODUCTION

This case challenges M.C.L. § 168.615c (the “Statute”), which requires the Michigan Secretary of State (the “Secretary”) to provide to the chairpersons of the two major political parties a file containing the political party preference declarations of each of the nearly 1.5 million persons who voted in the January 15, 2008 Michigan Presidential Primary (the “Primary”). The statute authorizes the two major parties to make use of this information for virtually any purpose which “supports” the parties’ “political activities.”

The information provided to the two major parties is not provided to Plaintiffs Green Party of Michigan, Libertarian Party of Michigan, Reform Party of Michigan (hereinafter “Plaintiff Third Parties”) or other political parties. The information is exempted from Michigan’s Freedom of Information Act (FOIA). Use of the information by anyone other than the two major parties, including news organizations, is prohibited and punishable as a criminal misdemeanor.

This discriminatory scheme violates Plaintiffs’ rights under the Equal Protection Clause of the 14th Amendment and under 42 U.S.C. § 1983. It also violates the First Amendment right of Plaintiff Metro Times, Inc., publisher of the Metro Times newspaper, of access to certain information of public interest and to report on this information without fear of criminal prosecution.

STATEMENT OF FACTS

The Statute was enacted on August 30, 2007, 2007 PA 52 and establishes certain procedures regarding the Michigan Presidential Primary. (See Exhibit A). Only the Democratic and Republican parties in Michigan were eligible to participate in the Primary. Pursuant to statute, “minor” or “third parties” did not participate in this process.

Michigan voters do not record a party preference when they register to vote. M.C.L. § 168.495. Subsection (1) of the challenged Statute requires each voter to “indicate in writing, on

a form prescribed by the secretary of state, which participating political party ballot he or she wishes to vote when appearing to vote” in the Primary (the “Party Preference”). M.C.L. § 168.615c(1).

The Statute requires the Secretary to provide to the chairpersons of the two major political parties, but to no one else, a file containing all of the party preference declarations of the persons who voted in the Primary (the “Party Preference Information”). M.C.L. § 168.615c(6).

There is no question that the information that the Statute would provide to the major parties for their exclusive use is highly valuable and can provide a competitive advantage. In a state without official registration of voters by party, this information will be the single most reliable source of information regarding the party affiliation of a significant portion of Michigan’s voters. (See Declaration of David Forsmark, Exhibit B, ¶¶ 3-7).

Knowing the party affiliation of voters enables a political party, and its candidates, to make important decisions about the allocation of resources designed to persuade voters to support them. Such knowledge is useful also for planning get-out-the-vote efforts, volunteer recruitment and fundraising. *Id.* In the words of the Michigan Supreme Court, party affiliation is a valuable commodity, “a part of the market research” for political parties. *Grebner v. State of Michigan*, 480 Mich. 939, ---N.W.2d---, 2007 WL 4127638 *3 (Mich. Nov. 21, 2007).

Not only is the Party Preference Information not provided to the Plaintiff Third Parties or other political parties, the Statute punishes as a criminal misdemeanor the use of the Party Preference Information by anyone other than the two major parties. M.C.L. § 168.615c(11).

Subsection (4) exempts the Party Preference Information from Michigan’s Freedom of Information Act, and provides that it “shall not be disclosed to any person for any reason.” M.C.L. § 168.615c(4). The subsection provides, however, that this guarantee of confidentiality applies “except as otherwise provided in this section.” *Id.*

The exception to Subsection (4) is Subsection (5), which requires the Secretary to provide the Party Preference Information to the chairperson of each of the Primary's "participating political part[ies]." (M.C.L. § 168.615c(5)). The Party Preference Information must be provided by the Secretary to the chairpersons of the "participating political part[ies] within 71 days of" the Primary. The 71st day following the Primary is March 26, 2008.

The only political parties qualifying as a "participating political party" for purposes of the Primary are the Democratic and Republican parties.

Subsection (8) grants the two major parties the virtually unfettered right to use the party preference information for almost any purpose a political party might have. (M.C.L. § 168.615c(8)) Specifically, it allows them to use this information "to support political party activities by that participating political party, including, but not limited to, support for or opposition to candidates and ballot proposals. A participating political party may release the information transmitted to the participating political party under subsection (6) to another person, organization, or vendor for the purpose of supporting political party activities by that participating political party, including, but not limited to, support for or opposition to candidates or ballot proposals." *Id.*

The Statute permits the major political parties to use the party preference information for the full range of political activities, including such things as mailing unsolicited campaign material; door-to-door canvassing; telephone polling; so-called "robocalling" – in which recorded calls are placed by computers; fundraising solicitations; and get-out-the-vote efforts. M.C.L. § 168.615c denies to the Plaintiff Third Parties access to and use of party preference information which they could otherwise use in furthering their political party activity, including such things as identifying potential supporters and opponents, targeting the distribution of information about the Third Parties, and focusing campaign and get-out-the-vote activities. (Exhibit B).

The Metro Times has published a number of articles about the structure and rules governing the Primary and the use of Party Preference Information. It intends to publish

additional articles regarding the conduct of the Primary and participation in the Primary. It is legitimately concerned that M.C.L. § 168.615c will subject it and/or its reporters and editors to criminal penalties for engaging in legitimate First Amendment activities, creating a chilling effect on those activities. (See Heron Declaration, Exhibit F).

Plaintiff Forsmark's services as a political consultant include providing information regarding the likely party preferences of voters,¹ which may be used by his clients to target and refine their campaigns and other political efforts. The stated party preferences of nearly 1.5 million Michigan voters are an extremely valuable resource which Plaintiff Forsmark could use in the provision of consulting services to his clients. (Exhibit B).

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only when there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to the party's case and on which that party bears the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In evaluating a

¹ See <http://miboecfr.nictusa.com/election/results/08PPR/COUNTYVT.html> (1,491,261 voters participated in the Michigan primary).

motion for summary judgment, the evidence must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The non-moving party may not rest upon its mere allegations, however, but rather “must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). The mere existence of a scintilla of evidence in support of the non-moving party's position will not suffice. Rather, there must be evidence on which the jury could reasonably find for the non-moving party. *Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

ARGUMENT

I. M.C.L. § 168.615c VIOLATES THE FOURTEENTH AMENDMENT BY REQUIRING THE SECRETARY OF STATE TO PROVIDE TO THE CHAIRPERSON OF THE TWO POLITICAL PARTIES A FILE CONTAINING THE POLITICAL PARTY PREFERENCE DECLARATIONS OF ALL PEOPLE WHO VOTED IN THE MICHIGAN PRESIDENTIAL PRIMARY, BUT BARS DISTRIBUTION OF THE INFORMATION TO ANYONE ELSE, INCLUDING MINOR POLITICAL PARTIES, THE PRESS AND POLITICAL CONSULTANTS.

In a somewhat different factual context from this case, the United States Supreme Court has set forth the process by which a court should consider a challenge to a state's election law:

It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.

Anderson v. Celebreeze, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983).

Under this test, the level of scrutiny varies on a sliding scale with the extent of the asserted injury. When, at the low end of that scale, the law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State's important regulatory interests are generally sufficient to justify’ the restrictions.” *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 788, 788-89 n.9). But

when the law places heavy or discriminatory burdens on the rights of political parties, candidates or voters, “the regulation must be ‘narrowly drawn to advance a state interest of compelling importance.’” *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

The *Anderson* court also noted the particular concerns that arise when the First Amendment associational rights of minor political parties are at issue:

In, addition, because the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny.

Id., p. 793, fn. 16.

A. The Character and Magnitude of the Burdens

Michigan’s data disclosure scheme burdens “two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968).

A burden that falls unequally on new or small political parties or independent candidates impinges, by its very nature, on associational choices protected by the First Amendment. It discriminates against those candidates -- and of particular importance -- against those voters whose political preferences lie outside the existing political parties.

Anderson, 460 U.S. at 793-94. The scheme also burdens the fundamental “right of citizens to create and develop new political parties,” *Norman*, 502 U.S. at 288.

The burdens imposed by the Statute are patently discriminatory and deny the Plaintiff Third Parties an equal opportunity to win the votes of the electorate. The scheme gives valuable data to the Democratic and Republican parties and prevents anyone else from obtaining or using

it. Although clothed in party-neutral language, the scheme is obviously intended to aid the Democratic and Republican parties who controlled the legislature that enacted it. The threshold for obtaining the data is high – so high, in fact, that no parties other than the Democratic and Republican parties have met it since 1912. *See* <http://uselectionatlas.org>. And the legislature that enacted the scheme in 2007 obviously knew at the time that the Democratic and Republican parties would be the only ones able to meet the threshold in 2008. The net effect of the scheme is thus that the Democratic and Republican parties have an intractable tactical campaigning advantage and all other parties have an intractable tactical disadvantage. (See Declaration of David Forsmark, Exhibit B).

The burdens here are also quite heavy. There can be no dispute that the data are valuable – that’s why the Democratic and Republican parties want the information. In a state like Michigan, with no party registration, this information is the single-most reliable source of party affiliation data for a great number of Michigan voters. There is no practical way for the plaintiffs to recreate it by other means. *Id.*

The burdens here are at least as heavy and discriminatory as those at issue in three cases that struck down laws very similar to Michigan’s data disclosure scheme: *Socialist Workers’ Party v. Rockefeller*, 314 F. Supp. 984 (S.D.N.Y.) (three-judge district court), *aff’d* 400 U.S. 806 (1970) (mem.), *Libertarian Party of Indiana v. Marion County Board of Voter Registration*, 778 F. Supp. 1458 (S.D. Ind. 1991), and *Libertarian Party of New Hampshire v. Gardner*, N.H. Superior Ct. Docket No. 07-E327 (Nov. 26, 2007) (copy attached as Exhibit C). *See also Schulz v. Williams*, 44 F.3d 48, 60 n.11 (2d Cir. 1994) (casting doubt on a similar provision). The key difference between those cases and this one is that there is no practical alternative for the plaintiffs here to obtain reliable data about the voters’ party preferences.

In *Socialist Workers' Party*, for example, the statute at issue required that lists of registered voters be provided free of charge to any party that had received at least 50,000 votes for governor in the last preceding gubernatorial election, a definition which included only the Democratic and Republican parties. 314 F. Supp. at 995. Other parties could purchase the lists at the cost of production. *Id.* In striking down the law, the court concluded that “[t]he State has shown no compelling state interest nor even a justifiable purpose for granting what, in effect, is a significant subsidy only to those parties which have least need therefor.” *Id.* Here, by contrast, Michigan’s data disclosure scheme is not merely a subsidy to the Democratic and Republican parties. It’s an exclusive benefit that is unattainable by other means.

Subsequent to the decision in *Socialist Workers Party*, the New York Legislature re-enacted the challenged statute “in all material, unlawful respects.” *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994). The statute was again challenged, with the same result. The latter challenge also included a challenge to the constitutionality of a companion statute that required “enrollment lists indicating the party enrollment of registered voters be sent to the chairmen of the state committee of each political party and to the county chairmen of each party, normally in April of each year.” *Schulz*, 44 F.3d at 60, fn. 11. The lists were not provided to minor parties. Although the Court of Appeals did not find it necessary to directly decide the issue, it noted that “we see no reason why the patent constitutional infirmity of section 5-602 [voter registration lists] would not apply to section 5-604 [party enrollment lists]...” *Id.*

The party preference declaration information at issue in this case is essentially the same as the party enrollment lists discussed in *Schulz*, and the reasoning of the Court of Appeals is sound. While voter registration lists and party affiliation lists may serve different specific purposes, each of them is a valuable tool in the competitive world of politics. The state may not

constitutionally provide this resource to select political parties and deny it to others.

In *Libertarian Party of Indiana*, the challenged statute required officials to provide computerized lists of registered voters free of charge to the two major political parties. 778 F. Supp. at 1459. Other parties were only allowed to inspect and copy the lists by hand. *Id.* Although the court declined to characterize the severity of the burden imposed by the statute because the statute failed even low-level scrutiny, *see id.* at 1463, the court observed that minor parties “would have to expend significant amounts of labor and money to have the list in a usable form.” *Id.* In this case, by contrast, no amount of money or labor would enable the plaintiffs to recreate the party preference data.

In *Libertarian Party of New Hampshire*, the challenged statute made the state’s centralized voter registration database available for purchase only by the two major parties. *See* Exhibit C at 2. Other parties could obtain similar data by purchasing data from each of New Hampshire’s 224 towns and 13 cities, but the centralized database contained some unique data not available elsewhere. *Id.* at 4-5. The court ultimately concluded that the challenged scheme imposed a severe burden that put minor political parties at a “distinct disadvantage,” and it therefore applied strict scrutiny. *Id.* at 6.

For all of these reasons, strict scrutiny is the appropriate standard in this case.

B. State Interests and Narrow Tailoring

The list distribution scheme contained in the Statute is so arbitrary and unjustified that it would be unconstitutional under any standard.

The Supreme Court held in *Storer v. Brown*, 415 U.S. 724, 736 (1974), that a state has a “compelling” interest in “the stability of its political system.” The Court held more recently that

this interest does not extend so far as to permit a state to protect existing parties from competition with independent or third-party candidates. *Anderson*, 460 U.S. at 801-02. Indeed, “[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms.” *Id.* at 802 (quoting *Williams*, 393 U.S. at 32). There is thus a critical difference between a legitimate stability interest in avoiding “splintered parties and unrestrained factionalism,” *Storer*, 415 U.S. at 736, and an illegitimate stability interest “in protecting the two major political parties,” *Anderson*, 460 U.S. at 802. Michigan’s data disclosure scheme serves the latter and not the former.

The state’s interests in this particular discriminatory scheme are minimal, if any can be discerned at all. Moreover, the interests which the scheme purports to serve are undermined or wholly contradicted by portions of the statute itself.

The text of the Statute suggests that its principal purpose is “[t]o ensure compliance with the state and national political party rules of each participating political party.” M.C.L. § § 168.615c(5). The genesis of the Statute is reasonably well-explained in “S.B. 624: Second Analysis,” the Michigan State Senate Fiscal Agency Bill Analysis (attached as Exhibit D) of the legislation which created M.C.L. § 168.615c. As the background section of the Analysis explains for a number of decades Michigan had no presidential primary. (Exhibit D, pp. 5-6). Since 1972, when use of a presidential primary was first resumed, the presidential delegate selection process has been changed almost every election cycle.

A chief concern motivating these regular changes has been the issue of an “open” or “closed” primary. In an open primary, which Michigan uses for all other elected offices, any voter may participate in the primary election for either one of the major parties, and this choice is made secretly in the voting booth. Under a closed primary system, a voter must either be

registered as a member of a party, or otherwise publicly declare an affiliation with the party, to vote in its primary. Concerns have arisen in the past regarding “crossover voting” in open primaries, where voters who are affiliated with or identify with one party vote in the other party’s primary, skewing the results.

Because of concern about such crossover voting, the national Democratic Party has for some time maintained rules which require its delegate selection process to be limited to persons who publicly declare their Democratic Party preference. The present version of those rules provides as follows:

2. PARTICIPATION

A. Participation in the delegate selection process shall be open to all voters who wish to participate as Democrats.

1. Democratic voters shall be those persons who publicly declare their Party preference and have that preference publicly recorded.

“Delegate Selection Rules for the 2008 Democratic National Convention,” p. 3, (portions attached as Exhibit E).

Republican Party rules do not prohibit use of an open primary for the selection of national convention delegates.

It is not clear, given the exemption of the Party Preference Information from Michigan’s FOIA, as well as the restrictions on the use of the information, that the Statute complies with the Democratic Party requirement that the preference be “publicly recorded.”

It is doubtful that assuring compliance by just one state political party with its national party rules would justify a scheme as obviously discriminatory as this one. Even if such a goal were a legitimate state interest, the effort is completely vitiated by another portion of Senate Bill 624, which created M.C.L. § 168.615c. That provision, part of M.C.L. § 168.613a, moved the date for the 2008 Michigan presidential primary from the fourth Tuesday in February to January

15, 2008. In so doing, it put both of Michigan's major political parties in violation of the delegate selection rules of their national parties.

The Democratic National Committee's rules – "Rule 11. Timing of the Delegate Selection Process" - prohibit the scheduling of any delegate selection activity prior to February 5, 2008, except for four designated states, not including Michigan. ("Delegate Selection Rules for the 2008 Democratic National Convention," p. 12, portions attached as Exhibit E.) As a result, the Democratic National Committee has determined that no delegates chosen as a result of the Primary will be seated at the 2008 Democratic National Convention. A similar violation of Republican National Committee rules has resulted in a decision that Michigan Republicans will be deprived of half of their convention delegates.

The Statute ventures far beyond satisfying any rule-compliance purpose. The Statute does not limit what each major party chairperson receives to a list of the voters declaring for that chairperson's party. Instead, the Statute provides that each chairperson receives the Party Preference declarations of all voters in the Primary, including those declaring for the other major party. *See* M.C.L. § 168.615c, subsections (3) and (6). Nothing in either party's rules requires this.

There is nothing in either party's rules requiring that voter preference declarations be kept secret and withheld from other individuals and organizations which may have an interest in that information, as the Statute provides.

Nothing in the rules of either party requires the state to authorize the major parties to use this information for any purpose desired, as long as it supports "political party activities" by the parties.

The Secretary may argue that keeping this information from other political parties, the public, the news media and others is an attempt to protect voters' privacy regarding their party affiliations. M.C.L. § 168.615c(1) does direct the Secretary to prescribe procedures "to protect

or safeguard the confidentiality” of the voters’ choices. Unfortunately, the balance of the Statute shows little concern with voters’ privacy.

M.C.L. § 168.615c(8) authorizes the major parties to release the information to “another person, organization or vendor for the purpose of supporting political party activities by that participating political party...” This could put the information into numerous hands, with little ability to actually protect the privacy of voters’ choices.

States have offered other justifications in similar cases, and those justifications should likewise fail if the state offers them here.

In *Socialist Workers’ Party*, for example, the State of New York had argued that restricting free access to voter lists to the Democratic and Republican parties was justified by the state’s interest in limiting public expense. 314 F. Supp. at 995-96. Giving free access to everyone, the state argued, would be a huge financial burden for the state. *Id.* The court wasted no time in rejecting that justification, however, noting that the plaintiff political parties weren’t suggesting that the state should give the list to anyone who ask. *Id.* Rather, the parties were only asking the court to mandate equal treatment for all ballot-qualified parties. *Id.* The same is true here. The plaintiffs are asking only for equal treatment, and, although the cost to the state is probably minimal, there is no reason that the state has to provide the information free of charge.

In *Libertarian Party of Indiana*, the court concluded that giving valuable data to some parties but not others could not be justified by an asserted desire to weed out fraudulent voters or to avoid financial and administrative burdens. 778 F. Supp. at 1464. The court rightly observed that any desire to use the political parties to weed out fraudulently registered voters suggests that more political parties, not fewer, should have access to the data. *Id.* The court also found that the financial and administrative burdens asserted by the State of Indiana were too speculative and unproven to outweigh the burden on the plaintiffs. Here, the financial and administrative

burdens on the state are likely to be very small because of the ease with which computerized databases can be copied and distributed.

Finally, in *Libertarian Party of New Hampshire*, the court held that New Hampshire's data disclosure scheme couldn't be justified by the state's interest in voter education or voter privacy. *See* Exhibit C at p. 6. The court rightly noted that voter privacy is not furthered by a law requiring disclosure of the supposedly private data to the largest political parties in the state. *Id.* The court also concluded that the restrictions on disclosure to minor parties were not necessary to achieve the state's legitimate interest in voter education. *Id.* The same is true here. Michigan's data disclosure scheme isn't justified by any interest in voter privacy or voter education.

Under these circumstances, Michigan's data distribution scheme cannot pass constitutional muster.

II. M.C.L. § 168.615c VIOLATES THE FIRST AMENDMENT BY SELECTIVELY BARRING ACCESS TO THE PARTY PREFERENCE INFORMATION PROVIDED TO THE MAJOR PARTIES AND IMPOSING CRIMINAL PENALTIES ON THIRD PARTIES SUCH AS THE PRESS WHO OBTAIN ACCESS TO THE INFORMATION.

The Statute violates the First Amendment rights of Plaintiff Metro Times, because it prevents the newspaper from reporting on matters of public concern, although there is no compelling state interest in doing so.

As noted briefly above, the structure of the state's presidential primaries has been significantly driven by a concern about "crossover" voting; that is, voters who identify with one party voting in the other party's primary, often with the intent to do mischief. This issue was raised in dramatic fashion when Alabama Governor George Wallace won the 1972 Michigan

Democratic primary. It was widely believed that Wallace's victory was significantly aided by large numbers of normally Republican voters voting in the Democratic Party.

As a result of the 1972 Michigan experience and other occurrences around the country, the national Democratic Party adopted the rules cited above, limiting the Democratic delegate selection process to persons willing to publicly declare their party affiliation.

Does the statute eliminate crossover voting? Does it curtail organized efforts by activists in one party to affect the other party's primary? Was there significant crossover voting in the January 15, 2008 Primary, either spontaneous or organized? Are any accusations that organized crossover voting took place valid? These questions are of significant public interest and are subjects which Plaintiff Metro Times desires to, and has the right to, report upon. See Exhibit F (Declaration of Kim Heron).

Because the Statute prohibits any use of the party preference information other than by the two major parties, it is virtually impossible for the Metro Times to reliably answer any of the questions posed above without the threat of criminal sanctions. Access to the party preference information would enable the Metro Times to examine these issues and report on them with some reliability. Party preference information could be compared to publicly available names of elected officials, party officials, known party activists, campaign contributors and others to reveal any organized crossover effort.

Even if the Metro Times did not initiate its own study of the information, its ability to report on the subject is impermissibly restricted. If officials of one party, using the party preference information available to it, claim that elected or party officials of the other party voted in the first party's primary, there is no way for the Metro Times to verify or contradict this claim without using the party preference information. In fact, it would arguably be a violation of the statute for the Metro Times to even report the allegation, because doing so would entail "use" of the party preference information.

The Metro Times' First Amendment claim is based on its right to access to information, not the right to expression, and therefore must be analyzed under the right to access framework. As explained in the recent Sixth Circuit decision, *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559-60 (6th Cir. 2007):

Although access cases are rooted in First Amendment principles, they have developed along distinctly different lines than have freedom of expression cases. See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 9-10, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) (setting forth general principles regarding access to information under the First Amendment); *Pell v. Procunier*, 417 U.S. 817, 834-35, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) (same); *Branzburg v. Hayes*, 408 U.S. 665, 684, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972) (same). See also *D'Amario v. Providence Civic Ctr. Auth.*, 639 F.Supp. 1538, 1543 n. 4 (D.R.I.1986), *aff'd without opinion*, 815 F.2d 692 (1st Cir.1987) (recognizing that access cases require a different analytical approach than do expression cases). "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg*, 408 U.S. at 684, 92 S.Ct. 2646. Further, "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control." *Houchins*, 438 U.S. at 15, 98 S.Ct. 2588. **Importantly, however, "[t]here is an undoubted right to gather news 'from any source by means within the law...'"** *Id.* at 11, 98 S.Ct. 2588 (quoting *Branzburg*, 408 U.S. at 681-82, 92 S.Ct. 2646). (Emphasis added).

The *S.H.A.R.K.* court proceeded from this line of cases to set forth an approach to analyzing access to information cases:

Although the Supreme Court has established general principles with respect to access claims, what is missing from these cases is a clearly defined framework in which to analyze these claims. We find *D'Amario*, 639 F.Supp. 1538, instructive. In *D'Amario*, the plaintiff-photographer challenged the defendant's no-photography rule. The *D'Amario* court synthesized the Supreme Court case law into the following test:

The rule which emerges from this caselaw is reasonably clear. Although the press cannot command access wherever, whenever, and however it pleases, neither can government arbitrarily shroud genuinely newsworthy events in secrecy. **Members of the press**, to their own behoof and as representatives of the public, **have some (limited) claim to access when government attempts selectively to delimit the audience** (or when government cooperates in enforcing such restrictions). In such circumstances, the state's rulemaking power is not absolute: if the first amendment is to retain a reasonable degree of vitality, **the limitations upon access must serve a legitimate governmental purpose, must be rationally related to the accomplishment of that purpose, and must outweigh the systemic benefits inherent in unrestricted** (or lesser-restricted) access. *Id.* at

1543 (footnote omitted).

S.H.A.R.K., 499 F.3d at 560 (emphasis added).

Recognizing that there is no absolute right of access for news-gatherers, *S.H.A.R.K.* defined the extent of access guaranteed by the First Amendment. It noted that the test set forth in *D'Amario, supra*, “recognizes that the government cannot use the fact that it has made a rule as an absolute shield against access.” *Id.* In this case, that would mean that M.C.L. § 168.615c’s prohibition on access to party preference information would not be determinative of whether the Metro Times and other media have a right to access the information.

Under the first *S.H.A.R.K.* test, it is clear that the statute “selectively delimits the audience” for the party preference information. Only the two major parties are given access to the information. All other individuals and entities are completely denied access.

The second step is determining whether the state has any legitimate interest in allowing access to the major parties and denying it to all others. Because the Statute selectively delimits the audience for the information, these governmental interests are subject to heightened scrutiny.

The first stated governmental interest – compliance with national party rules – does not justify the access restrictions, even using a rational basis test, let alone the required heightened scrutiny test. Allowing access to this information by the news media and others does not in any way conflict with fostering compliance with national party rules. In fact, open access to party affiliation information and compliance with national Democratic Party rules go together. In the states which use political party voter registration, which is a majority, the records of party preference are available to anyone and clearly satisfy party rules.

The second claim of governmental interest – protection of voter privacy – is simply untenable. Although Republican Party rules do not require a declaration of party preference, the Statute requires Republican primary voters to make such a declaration. This information is then provided to both major parties, compounding the invasion of the voter’s privacy.

The two parties are permitted to use the information in any way that supports “party political activity” and to release the information to others, including commercial vendors, as long as the release supports such activity. This broad use and loose control of the information seriously threaten voter privacy.

If the state were interested in enabling compliance with national party rules, while protecting voter privacy, the statute would be far different. Each party could receive a list of its primary voters only and would be prohibited from any use of the list other than complying with national party rules.

The Statute tramples on First Amendment rights in other ways, as well. In prohibiting any use of party preference information other than to support “political party activities,” the statute impermissibly criminalizes legitimate First Amendment activity. A story published by the Metro Times which used information from the party preference declarations would subject the newspaper, and/or its reporter, to up to a \$1,000 fine and up to 93 days in jail, or both, for each individual voter preference record used for the story. Since the statute punishes “use” of the information, and is not limited to actual publication of individual voters’ names and their preferences, the Metro Times could be liable for a story which used the information, even if no voter privacy were compromised. A few examples should demonstrate how offensive to First Amendment rights the Statute is.

Assume that the Michigan Republican Party issues a press release stating that it has examined its copy of the Party Preference Information and has determined that 100 known Democrats – elected officials, party officials, major contributors, etc. – voted in the Republican primary. It provides a list of the names of those individuals. It does this to advance its political party activities by seeking to embarrass the Democrats. Could the Metro Times safely report this allegation? Could it report the names of the individuals? The language of the statute suggests that the answer is “no.”

Assume further that the Michigan Democratic Party denies the allegations and provides to the Metro Times copies of the party declaration records of some or all of the 100 individuals,

showing that they, in fact, voted in the Democratic primary. Could the Metro Times safely report this information? Could it reproduce copies of the records? Again, the answer appears to be “no.”

Or, consider this example. The Metro Times receives, from an anonymous source, copies of party preference documents showing that known officials of one party voted in the other party’s primary. Could it report the information contained in the documents? In this example, as well, the answer appears to be “no.”

May the State of Michigan constitutionally punish the Metro Times for publishing this truthful information about this matter of public significance? In a series of cases applicable to the instant one, the United States Supreme Court has clearly held that it cannot.

For example, in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979), the Supreme Court stated that precedent “suggest[ed] strongly that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.” At issue in *Daily Mail* was a West Virginia statute making it a crime for a newspaper to publish, without written approval of the juvenile court, the name of any youth charged as a juvenile offender. The Supreme Court held that the statute violated the First and Fourteenth Amendments in prohibiting truthful publication of an alleged juvenile delinquent’s name, lawfully obtained by newspapers by monitoring the police band radio frequency and by interviewing eyewitnesses.

The Supreme Court rejected the state’s justification for its criminal statute:

The sole interest advanced by the State to justify its criminal statute is to protect the anonymity of the juvenile offender. It is asserted that confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense. ...The magnitude of the State’s interest in this statute is not sufficient to justify application of a criminal penalty to respondents.

Id., at 104.

In this case, the purported state interest in punishing any use of Party Preference Information, except by the major political parties, is to protect an interest of a lower order than the privacy interest of a juvenile defendant. In many states, publicly recorded party registration is a prerequisite to voting in a primary. In others, delegate selection includes caucuses at which voters must not only publicly declare their party, but also their individual candidate choice. Moreover, the State of Michigan has voluntarily moved from a system of total protection of voter privacy – open primaries – to one in which the major parties may “release the information...to another person, organization or vendor for the purpose of supporting political party activities...” The “magnitude of the State’s interest” in protecting voter privacy seems quite limited, indeed.

The Supreme Court extended and elaborated upon its holding in *Daily Mail* with its decision in *The Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed. 443 (1989). That case concerned the constitutionality of a Florida statute which made it a misdemeanor to “print, publish, or broadcast or cause or allow to be printed, published or broadcast in any instrument of mass communication ... the name of the victim of any sexual offense...” *Id.*, at 526. The name of the victim had been included in an incident report posted in the police department’s pressroom. The newspaper included the victim’s name in one of its reports. The victim received a civil judgment against the newspaper, but the Supreme Court vacated the judgment on First Amendment grounds.

The Supreme Court reiterated its *Daily Mail* formulation that a newspaper may not be punished for publishing information of public significance that it lawfully obtained. *Florida Star*, 491 U.S. at 526. The Supreme Court noted that the police department had violated the statute by handling the victim’s name in such a manner that it “allowed” publication of the name, but the newspaper had done nothing unlawful, as there was nothing in the statute proscribing **receipt** of such information.

What is the result of applying these principles to this case and the examples discussed above? Under what circumstances would party preference information be considered “lawfully obtained” by the Metro Times or others? In the first example, the Republican Party released the

information for the purpose of embarrassing the Democratic Party, and the Democratic Party used it to counter the Republican criticism. Both of these releases would appear to be authorized by the statute's language permitting any use to support the "political party activities" of the major parties. The blanket prohibition on use of the information by any other person would unconstitutionally restrict the Metro Times' First Amendment right to report this information.

In the second example - anonymous delivery of the information - it is unclear if the dissemination of the information was authorized by the statute. However, under the reasoning in *Florida Star*, however, the newspaper would have done nothing unlawful in receiving the information and could not constitutionally be punished for reporting it.

The Statute is, thus, overly broad as drafted, because it includes within its reach conduct that is protected by the free speech clauses of the federal and state constitutions. Courts will strike down statutes that are so broad in their application that they penalize protected speech.

It is not necessary that an actual prosecution under the statute has taken place for a court to consider a claim that a statute is overly broad. As the United States Supreme Court held in *NAACP v. Button*, 371 U.S.415, 432, 83 S. Ct. 328, 338-339, 9 L. Ed. 2d 405 (1963):

Furthermore, the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible application of the statute in other factual contexts besides that at bar. *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093; *Winters v. New York*, *supra*, 333 U.S. at 518-520, 68 S.Ct. at 671-672. *Cf. Staub v. City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302. It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. *Cf. Marcus v. Search Warrant*, 367 U.S. 717, 733, 81 S.Ct. 1708, 1717, 6 L.Ed.2d 1127. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. *Cf. Smith v. California*, *supra*, 361 U.S. at 151-154, 80 S.Ct. at 217-219; *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460. Because First Amendment freedoms need breathing space

to survive, government may regulate in the area only with narrow specificity. *Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213.

In this case, this court must look to the clear reach of the Statute even though there is no specific conduct before it. It clearly reaches potential First Amendment activity by the Metro Times, would have a chilling effect on its exercise, and does not regulate in the area with the “narrow specificity” required in the Supreme Court’s formulation. (See Exhibit F, ¶6).

An example of a legislative enactment held to be overly broad because it prohibited and punished protected speech is the ordinance considered in *Houston v. Hill*, 482 U.S. 451, 107 S Ct 1277, 94 L Ed 2d 137 (1987). Defendant Hill was arrested for “willfully ... interrupt[ing] a city policeman ... by verbal challenge during an investigation” in violation of a municipal ordinance making it unlawful for any person “to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty.” Hill had shouted at police in an attempt to divert them while they spoke with his friend. After he was acquitted, Hill brought suit to invalidate the ordinance. The Supreme Court invalidated the ordinance, because it applied not only to fighting words, which the ordinance was entitled to regulate, but also to protected speech. The Court stated:

Criminal statutes must be scrutinized with particular care, ...those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. *Id.*, at 458 (citations omitted)

The ...ordinance ...is not limited to fighting words nor even to obscene or opprobrious language, but prohibits speech that “in any manner ... interrupt[s]” an officer. The Constitution does not allow such speech to be made a crime. *Id.*, at 462. (citations omitted)

Houston’s ordinance criminalizes a substantial amount of constitutionally protected speech, and accords the police unconstitutional discretion in enforcement. ...Far from providing the “breathing space” that “First Amendment freedoms need ... to survive,” ...the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid.

Id., at 466-467 (citations omitted).

M.C.L. § 168.615c is equally infirm. One could imagine restrictions on the use of party preference information that might survive judicial scrutiny, such as a prohibition on the use of the information for commercial solicitations unrelated to political matters. The Statute’s prohibition and punishment of basic First Amendment activity, however, dooms it. The Statute “criminalizes a substantial amount of protected speech” and is “susceptible to regular application to protected expression.” As did the court in *Houston v. Hill*, this Court should find that the statute is facially invalid.

This Court should also find that the Statute is void for vagueness. Where First Amendment rights are implicated, the principles for such a determination were stated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed. 222 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute ‘abut(s) upon sensitive areas of basic First Amendment freedoms,’ it ‘operates to inhibit the exercise of (those) freedoms.’ Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone’ ... than if the boundaries of the forbidden areas were clearly marked.’

FN5. Where First Amendment interests are affected, a precise statute ‘evinced a legislative judgment that certain specific conduct be ... proscribed,’ *Edwards v. South Carolina*, 372 U.S. 229, 236, 83 S.Ct. 680, 684, 9 L.Ed.2d 697 (1963), assures us that the legislature has focused on the First Amendment interests and determined that other governmental policies compel regulation.

Applying this vagueness test, the critical defect in M.C.L. § 168.615c is the absence of any definition of the phrase “support political party activities,” which is what the major parties may do with the party preference information provided to them. Since the parties, themselves, could be subject to criminal penalties for straying beyond the boundaries of this phrase, the

statute may be vague as to them, but the instant Plaintiffs are not in a position to assert that claim.

The same vagueness affects the Metro Times and other news media. In one of the examples cited above, it was presumed that the release of names by one party of officials of the other party engaging in “crossover” voting would be allowed as part of “political party activities,” making its release authorized under the statute. While the Metro Times would argue that publishing this information would be protected in any case, uncertainty about the legality of the information release itself could have an inhibiting effect on its reporting. The uncertain threat of a criminal prosecution under the statute, even assuming eventual vindication in a federal court, has a chilling effect on the exercise of First Amendment rights.

CONCLUSION AND RELIEF REQUESTED

The provisions M.C.L. § 168.615c which grant virtually unfettered use of voter party preference information to the two major political parties, while making any use by others a criminal offense, cannot withstand even a minimal level of judicial scrutiny, let alone the higher level required of such an enactment.

It is the blatantly discriminatory nature of the statute which dooms it. Under Michigan’s prior system of “open” primaries, the party preference of voters was kept secret from everyone, and no person or entity could claim a right to this information. That system would seem to be invulnerable to constitutional challenge. The new statute, selectively distributing this information and selectively allowing its use, without a justifying state interest in so doing, violates the First and Fourteenth Amendment rights of the Plaintiffs.

Plaintiffs do not ask this Court to order that they be given the same information that would be given to the major political parties. That would be asking the Court to rewrite the statute, which it would, understandably, not be inclined to do. It is also not necessary. None of the party preference information has yet been provided to the two major political parties, so distribution to others is not required as a remedial measure.

Rather, Plaintiffs ask this Court to declare unconstitutional the offending portions of the statute, M.C.L. § 168.615c, subsections (5), (6), (7), (8), (9), (10) and (11), and to enjoin the Secretary from carrying her responsibilities under subsections (5), (6).

The relief sought by the Plaintiffs may have the result of making the party preference information available to everyone, not just to the major parties and the Plaintiffs. The enabling legislation enacting M.C.L. § 168.615c contains a nonseverability clause. If this Court grants the relief sought, that portion of the statute exempting party preference information from Michigan's FOIA will also fail, and the party preference information will become public record. The Michigan Legislature, if it values voter privacy in this regard, is free to re-enact the FOIA exemption, untethered to the unconstitutional provisions of the Statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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