

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,

Case No. 2:08-cv-10149

v.

Hon. Nancy G. Edmonds

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

Defendant.

Thomas F. Wieder (P33228)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
2445 Newport Rd.
Ann Arbor, MI 48103
(734) 994-6647
wiedert@aol.com

Stephen F. Wasinger (P25963)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
Stephen F. Wasinger PLC
32121 Woodward Ave., Ste. 300
Royal Oak, MI 48073
(248) 554-6306
sfw@sfwlaw.com

Michael J. Steinberg (P 43085)
Kary L. Moss (P 49739)
American Civil Liberties
Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org
kmoss@aclumich.org

**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION**

Plaintiffs, by their counsel, move, pursuant to Rule 65, F.R.Civ.P., for a temporary restraining order and preliminary injunction prohibiting Defendant from releasing the voter preference information collected pursuant to MCL 168.615c until this Court has entered its decision on Plaintiffs' motion for summary judgment.

1. The bases for the motion are stated in the supporting brief.
2. Pursuant to Local Rule 7.1(a), Plaintiffs state that they sought concurrence in the relief sought in an email dated and in discussions with the Michigan Attorney General's office, but concurrence was denied.

WHEREFORE, Plaintiffs pray that this Court:

A. Enter a temporary restraining order and preliminary injunction prohibiting Defendant from releasing the voter preference information collected pursuant to MCL 168.615c until this Court has decided Plaintiffs' motion for summary judgment; and

B. Grant any other appropriate relief.

Respectfully submitted,

/s/ Thomas F. Wieder
Thomas F. Wieder (P33228)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
2445 Newport Rd.
Ann Arbor, MI 48103
(734) 994-6647
wiedert@aol.com

Michael J. Steinberg (P 43085)
Kary L. Moss (P 49739)
American Civil Liberties
Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org
kmoss@aclumich.org

/s/ Stephen F. Wasinger
Stephen F. Wasinger (P25963)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
Stephen F. Wasinger PLC
32121 Woodward Ave., Ste. 300
Royal Oak, MI 48073
(248) 554-6306
sfw@sfwlaw.com

Dated: February 13, 2008

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. Edmonds

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

Defendant.

Thomas F. Wieder (P33228)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
2445 Newport Rd.
Ann Arbor, MI 48103
(734) 994-6647
wiedert@aol.com

Stephen F. Wasinger (P25963)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
Stephen F. Wasinger PLC
32121 Woodward Ave., Ste. 300
Royal Oak, MI 48073
(248) 554-6306
sfw@sfwlaw.com

Michael J. Steinberg (P 43085)
Kary L. Moss (P 49739)
American Civil Liberties
Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org
kmoss@aclumich.org

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION SUMMARY JUDGMENT**

TABLE OF CONTENTS

CONCISE STATEMENT OF THE ISSUES iii
CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR THE RELIEF SOUGHT ... iv
INTRODUCTION 1
FACTUAL AND LEGAL BACKGROUND 1
STANDARD OF REVIEW 1
DISCUSSION 3
CONCLUSION AND RELIEF REQUESTED 4

TABLE OF AUTHORITIES

Cases

American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,
354 F.3d 438 (6th Cir. 2003)..... iv, 2

Bay County Democratic Party v. Land,
347 F.Supp.2d 404 (E.D.Mich. 2004)..... 2

Broadwell v. Municipality of San Juan,
312 F.Supp.2d 132 (D.P.R. 2004)..... 3

Hazardous Waste Treatment Council v. South Carolina,
945 F.2d 781 (4th Cir.1991)..... 2

In re DeLorean Motor Co.,
755 F.2d 1223 (6th Cir.1985)..... 2

Libertarian Party of Indiana v. Marion County Bd. of Voter Registration,
778 F.Supp. 1358 (S.D.Ind. 1991) 3

Libertarian Party of New Hampshire v. Gardner,
N.H. Superior Ct. Docket No. 07-E327 3

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,
389 F.3d 973 (10th Cir. 2004)..... iv, 2

Schulz v. Williams,
44 F.3d 48 (2d Cir. 1994)..... 3

Socialist Workers Party v. Rockefeller,
314 F.Supp. 984 (S.D.N.Y. 1970), *summarily aff'd* 400 U.S. 806 (1970) 3

United States v. Miami University,
294 F.3d 797 (6th Cir.2002)..... 2

Statutes

MCL 168.615(c)(6) 1

MCL 168.615c 1

Rules

Rule 65, F.R.Civ.P. iv, 1

CONCISE STATEMENT OF THE ISSUES

1. Should this Court enter a temporary restraining order and preliminary injunction prohibiting the Secretary of State from releasing the voter preference information collected pursuant to MCL 168.615c until the Court has decided Plaintiffs' motion for summary judgment where such relief is necessary to preserve the status quo, protect this Court's power to render a meaningful decision, and prevent the constitutional violation which is the subject of Plaintiffs' motion for summary judgment?

CONTROLLING OR MOST APPROPRIATE AUTHORITY FOR THE RELIEF SOUGHT

Rule 65, F.R.Civ.P.

O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft,
389 F.3d 973 (10th Cir. 2004)

American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,
354 F.3d 438 (6th Cir. 2003)

INTRODUCTION

Plaintiffs have challenged MCL 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.

MCL 168.615(c)(6) provides in pertinent part:

Within 71 days after the presidential primary, the secretary of state shall provide to the chairperson of each participating political party a file of the records for each participating political party described under subsection (3).

Plaintiffs fear that the Secretary of State may release the voter preference information prior to the Court’s decision on Plaintiffs’ motion for summary judgment.

Plaintiffs have asked the Secretary of State to refrain from doing so, but the Secretary of State has refused.

Therefore, a temporary restraining order and preliminary injunction is necessary to preserve the status quo, protect this Court’s power to render a meaningful decision, and prevent the constitutional violation which is the subject of Plaintiffs’ motion for summary judgment.

FACTUAL AND LEGAL BACKGROUND

The factual and legal bases establishing Plaintiffs’ likelihood of success on the merits are stated in Plaintiffs’ motion for summary judgment.

STANDARD OF REVIEW

The issuance of a temporary restraining order and preliminary injunction is governed by Rule 65, F.R.Civ.P.

When exercising its discretion with respect to a motion for preliminary injunction, a district court must give consideration to four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury

without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction. *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 354 F.3d 438, 445 (6th Cir. 2003).

In this circuit, “the four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met.” *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir.1985); *United States v. Miami University*, 294 F.3d 797, 816 (6th Cir.2002).

When there are First Amendment and right to vote issues, as there are here, the last three preliminary factors usually follow the court’s determination on likelihood of success on the merits. *McCreary County*, 354 F.3d at 462; *Bay County Democratic Party v. Land*, 347 F.Supp.2d 404, 435-36 (E.D.Mich. 2004) (Lawson, J.).

Here, these factors should be considered in the context of the specific T.R.O. and injunction which Plaintiffs seek: an injunction preserving the status quo only until the Court can determine the merits of Plaintiffs’ summary judgment motion. As the Court observed in *Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 977-978 (10th Cir. 2004):

The underlying purpose of the preliminary injunction is to “preserve the relative positions of the parties until a trial on the merits can be held.” *Camenisch*, 451 U.S. at 395, 101 S.Ct. 1830; see also 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2947, at 123 (2d ed.1995) [hereinafter “Wright & Miller”] (noting that **the purpose of the preliminary injunction is to assure that the non-movant does not take unilateral action which would prevent the court from providing effective relief to the movant should the movant prevail on the merits**). Although the prevention of harm to the movant is certainly a purpose of the preliminary injunction, it is not the paramount purpose. See Wright & Miller § 2947, at 123 (noting that although the prevention of harm to the movant is an important factor to be considered in deciding whether to grant a preliminary injunction, the primary purpose for such an order is “the need to prevent the judicial process from being rendered futile by defendant’s action or refusal to act”). [Emphasis added.]

See also *Hazardous Waste Treatment Council v. South Carolina*, 945 F.2d 781, 788 (4th Cir.1991) (“The rationale behind a grant of a preliminary injunction has been explained as

preserving the status quo so that a court can render a meaningful decision after a trial on the merits’.”); *Broadwell v. Municipality of San Juan*, 312 F.Supp.2d 132, 135 (D.P.R. 2004).

DISCUSSION

Plaintiff’s brief demonstrates that Plaintiffs have a strong likelihood of success on the merits. Other Courts, which have considered statutes similar to MCL 168.615c, have found that attempts to limit information to the major political parties are unconstitutional. *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); *Schulz v. Williams*, 44 F.3d 48 (2d Cir. 1994); *Libertarian Party of Indiana v. Marion County Bd. of Voter Registration*, 778 F.Supp. 1358 (S.D.Ind. 1991); *Libertarian Party of New Hampshire v. Gardner*, N.H. Superior Ct. Docket No. 07-E327.

Releasing the information would not only harm Plaintiffs but it would also create difficult questions about how to remedy an unconstitutional distribution to the major parties. As Plaintiffs explained in their summary judgment brief, MCL 168.615c contains a nonseverability clause. If the information is released prior to this Court’s decision on the merits, it is unclear how to remedy the harm. Could the Court order the major parties to return the information? Could the Court order the Secretary of State to release the information to anyone who requests it? Is there some other intermediate relief? Each of these questions can be either avoided, or decided in an orderly fashion, if an injunction issues preserving the status quo.

Given the short window created by the Statute for the release of the party preference information, there is a substantial risk that the Secretary of State could release the information before a decision on Plaintiffs’ summary judgment motion, thus effectively destroying this Court’s ability to render a meaningful decision on the merits.

The Secretary of State would not be harmed by an injunction for the short period of time necessary to allow this Court to decide Plaintiffs’ summary judgment motion.

The public interest favors an injunction so that the Court can decide Plaintiffs’ motion on the merits.

CONCLUSION AND RELIEF REQUESTED

The Court should enter a temporary restraining order and preliminary injunction preserving the status quo and prohibiting the Secretary of State from releasing the Voter Preference Information until the Court can decide Plaintiffs' motion for summary judgment.

Respectfully submitted,

/s/ Thomas F. Wieder

Thomas F. Wieder (P33228)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
2445 Newport Rd.
Ann Arbor, MI 48103
(734) 994-6647
wiedert@aol.com

Michael J. Steinberg (P 43085)
Kary L. Moss (P 49739)
American Civil Liberties
Union Fund of Michigan
60 West Hancock Street
Detroit, MI 48201
(313) 578-6814
msteinberg@aclumich.org
kmoss@aclumich.org

/s/ Stephen F. Wasinger

Stephen F. Wasinger (P25963)
Cooperating Attorney, American Civil
Liberties
Union Fund of Michigan
Stephen F. Wasinger PLC
32121 Woodward Ave., Ste. 300
Royal Oak, MI 48073
(248) 554-6306
sfw@sfwlaw.com

Dated: February 13, 2008
KH103738

Certificate Of Service

I hereby certify that on February 13, 2008, I electronically filed the foregoing pleading with the Clerk of the Court for the Eastern District of Michigan using ECF system which will send notification of such filing to the following registered participants of the ECF system as listed on the Court's Notice of Electronic Filing:

Denise Barton bartond@mich.gov

and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants:

None

/s/ Stephen Wasinger

STEPHEN WASINGER

300 Balmoral Centre

32121 Woodward Avenue

Royal Oak, MI 48073

Tel: (248) 554-6306

Fax: (248) 479-0391

sfw@sfwlaw.com