

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 individual capacity,

Defendant.

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**CORRECTED**  
**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION**  
**FOR SUMMARY JUDGMENT (Dkt. 4)**

**This brief corrects a typographical error on page 3.**

**As filed the brief stated: "Defendant offer evidence of any prejudice...."**

**Corrected, it states: "Defendant offers no evidence of any prejudice...."**

Nothing in Defendant's Response (Dkt. 11) contradicts the Plaintiff Third Parties' position that it is a denial of equal protection for the two major political parties to receive a state-generated resource of great value for general election campaigns, while all other parties are denied access to and use of that resource.

Plaintiffs have never suggested that states may not have different nominating procedures for major or minor parties, even to the extent of excluding minor parties from state-run primaries. Defendant's assertion of this state regulatory authority, and the case law which supports it, is both unremarkable and irrelevant to the issues of this case.

In his Declaration, Plaintiff Forsmark states that party preference information is a valuable tool which provides a competitive advantage to a political party which possesses it over a party which does not. The Michigan Supreme Court has described such information as "a part of the market research" for political parties. *Grebner v. State of Michigan*, 480 Mich. 939, --- N.W.2d---, 2007 WL 4127638 (Nov. 21, 2007).

The political parties of Michigan do not compete with each other in the respective parties' nomination processes and have little interest in how the other parties nominate. When it comes to general election competition, however, the major and minor parties compete directly for votes, and they have the same interest in having resources which assist them in competing. All of the political parties are similarly situated with regard to their need for and potential use of valuable party preference information for the general election, notwithstanding differences in their state-mandated nominating procedures.

Defendant's denial of discrimination against the Plaintiff Third Parties is confused, inaccurate and misleading. It is an undeniable fact that, when the Legislature adopted the statute in 2007, it used a definition of eligibility to obtain the party preference information — having received 20% of the 2004 general election votes for President — that would include only the two major parties. It is equally undeniable that the Legislature is composed solely of the members of

the two major parties. The United States Supreme Court has warned about the problems such a situation creates:

In, addition, because the interests of minor parties...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.

*Anderson v. Celebrezze*, 460 U.S. 780, 793, n. 16 (1983); accord *Clingman v. Beaver*, 554 U.S. 581, 603 (2005) (O'Connor, J., concurring) (noting that "the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit" and "those in power may be using electoral rules to erect barriers to electoral competition").

Defendant's Response, p. 6, says "nothing in the statute prevented a minor party from attaining that 25% [sic] vote in the 2008 Primary." However, the 20% vote threshold was fixed by 2004 presidential election results. No minor party could do anything "in the 2008 Primary" to qualify to receive the voter information generated by the 2008 primary.

Defendant does not so much apply the *Anderson* test for evaluating state election regulation as disregard it. Rather than considering "the character and magnitude" of the burden imposed by the statute on the Plaintiff Third Parties, as *Anderson* requires, Defendant simply assumes away any burden on the Plaintiff Third Parties when they are denied this valuable information, while their competitors have it. Defendant does not offer any counter-declaration to Plaintiff Forsmark's or dispute the Michigan Supreme Court's characterization of the value of the information. Accordingly, for the purpose of summary judgment, there is no dispute that the party preference information has high value to third parties. Fed.R.Civ.P. 56(e).

Defendant also fails to address the second part of the *Anderson* test: the requirement to "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." Defendant cites numerous cases upholding state election regulations, but none of them remotely resembles the facts of this case. Defendant does not even suggest that providing party preference information two months after the primary serves any purpose of preventing corruption, insuring orderly and fair elections, avoiding voter confusion,

etc. In fact, Defendant gives no explanation, whatsoever, as to how providing this information to the two major parties serves the state's legitimate interests in conducting elections.

Defendant's Response, p. 7, states that the statute is designed to "ensure the purity and integrity of Michigan's" primary, but gives no hint as to how the statute serves that purpose. It also says, without any factual support, that the statutory scheme satisfies voter concerns about who gets their information and serves the interest of the parties in knowing who is voting and "that the primary actually occurred." (*Id.*, p. 8.) It also cites, without elaboration, compliance with party rules.

The *Anderson* formulation requires a court to "consider the extent to which those interests make it necessary to burden the plaintiff's rights." Defendant offers absolutely no support for the notion that denying the party preference information to other parties is necessary to ensure the purity of elections, to satisfy voter concerns, to assure the major parties that the primary took place or to comply with party rules.

Defendant attempts to dismiss the authorities on which Plaintiffs rely on the ground that the voter information in those cases was publicly available. Minor parties in those cases could obtain through public sources most or all of the information they sought, albeit at a greater cost than the price at which major parties could obtain it or only with significantly greater expenditure of time and effort. Here, by contrast, the information that the Plaintiffs seek is not available to them at any price. Although the Defendant is correct that this is a distinction, it is a distinction that strongly supports the Plaintiffs. The burden here is obviously much greater than in any of the cited cases.

Defendant is incorrect when it suggests that the *Anderson* analysis is the proper analysis for deciding Plaintiff *Metro Times'* claim as opposed to test set forth in *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553, 559-560 (6th Cir. 2007). (*See* Plaintiffs' Summary Judgment Brief [Dkt. 4], pp. 16-17).

Even assuming, *arguendo*, that Defendant is correct, and *Anderson* applies, Defendant's argument fails. The statute makes the information regarding who voted in the primary available to the major parties and their agents so that they can conduct political activity. Democrats receive the list of Republican voters and Republicans receive the list of Democrats. None of this is necessary to accomplish the stated purposes of the statute. The interests of the *Metro Times* and the Plaintiff Third Parties in having access to this information are no less than the interests of the Democratic and Republican parties in having access to who voted in the other party's primary. This arbitrary and discriminatory scheme of information access is not constitutional.

Defendant's claim of laches lacks merit. To prevail on that affirmative defense, Defendant must prove both unreasonable delay on the part of Plaintiffs and resulting prejudice to Defendant. *See Costello v. United States*, 365 U.S. 265, 282 (1961), cited by *U.S. v. Mandycz*, 447 F.3d 951, 964-65 (6th Cir.2006).

Defendant demonstrates neither. As set forth more fully in Reply Brief in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, there was no unreasonable delay. More importantly, Defendant offers no evidence of any prejudice, much less demonstrates the type of prejudice which would equitably outweigh violation of Plaintiffs' important constitutional rights.

The issues of severability raised by Defendant do not affect the constitutional claims raised in this action, and Plaintiffs do not believe that any action on them by this Court is necessary. Plaintiffs would only comment that they reject Defendant's contention that they selectively sought to have some portions of the enabling act be preserved, while challenging others. None of the Plaintiffs had any stake in the preservation of any part of the statute; nor did the conduct of the primary itself violate their rights. When it became clear that the primary would go forward, they challenged the only provisions of the statute that violated their rights, those pertaining to the distribution of the party preference information.

**CONCLUSION**

The Court should grant Plaintiffs' motion for summary judgment.

Respectfully submitted,

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Dated: March 14, 2008  
KH104566

### Certificate Of Service

I hereby certify that on February 21, 2008, I electronically filed the foregoing pleading with the Clerk of the Court for the Eastern District of Michigan using the 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:

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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

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