

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.

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**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING ORDER
AND PRELIMINARY INJUNCTION (Dkt. 5)**

Defendant's response to Plaintiffs' Motion demonstrates that Plaintiffs are entitled to the relief that they seek. On each of the elements that this Court is required to consider, Plaintiffs arguments are clearly more persuasive.

The relief which Plaintiffs seek is reasonable and quite limited. They are asking this Court to enjoin the Defendant from distributing the voter party preference information only until the hearing before this Court on Plaintiffs' Motion for Summary Judgment. That hearing is scheduled for March 26, 2008, just 34 days from now. The Defendant is not required by the subject statute to release the information until that date. Full compliance with the statute by the Defendant will not be affected by the granting of this relief.

If this Court decides this matter on the merits on March 26, the request for any further injunctive relief will become moot. If no such decision is reached on that date, the Court can decide on further injunctive relief at that time, based on the parties' full briefing and presentation of the issues in conjunction with the Motion for Summary Judgment.

The purpose of preliminary injunctive relief is to preserve the status quo until a court has the opportunity to decide a case on the merits. Plaintiffs have raised substantial questions about the constitutionality of the subject statute. Since the relief they seek will not delay the implementation of the statute in any way, no harm will result to any party possibly benefited by it. Under these circumstances, injunctive relief is required.

1. Plaintiffs are Likely to Succeed on the Merits

Plaintiffs rely primarily on their Brief in Support of Motion for Summary Judgment for their arguments on the merits of this case, but supplement it with these comments on Defendant's Response.

Defendant bases its analysis on the false assumption that the statute is not discriminatory. The statute provides a valuable political resource only to each "participating political party," and defines such a party based on the 2004 election results. At the time that the statute was enacted, the Legislature, composed entirely of Democrats and Republicans, knew that only the

Democratic and Republican parties are covered by the definition. The statute might as well have said that the information would be provided only to the Democratic and Republican parties.

Defendant offers only conclusory statements that the statute imposes no substantial burden on the Third Party Plaintiffs. The Michigan Supreme Court recognized the value of this information in *Grebner v. State of Michigan*, 480 Mich. 939, ---N.W.2d---, 2007 WL 4127638 (Mich. Nov. 21, 2007) and the statutory language assumes its usefulness in supporting “political party activity.” In the competitive world of politics, giving this valuable resource to their major political party competitors, while denying it to them, imposes a substantial burden on the Third Party Plaintiffs.

Defendant cites, with little no discussion, cases upholding certain election statutes in others states, but none addresses the factual and legal issues here. Defendant fails to distinguish the authorities cited by Plaintiffs which specifically deal with the discriminatory provision of voter information.

Defendant claims that the statute is designed “to ensure the purity and integrity of Michigan’s primary” (Defendants Brief, p. 11), but gives no explanation as to how the statute serves this purpose.

Defendant cites no state or national political party rule that requires the state political parties to receive the voter preference information, that requires other parties to be denied access to it, or requires that the state parties be given permission to use such information for any purpose which supports “political party activity,” as the statute provides.

Defendant identifies no state regulatory interest that is served by this scheme of discriminatorily providing valuable information to two of the state’s political parties. There is no indication of how the provision of this information serves the state’s interest in the orderly, fair and impartial conduct of elections.

2. Plaintiffs Will Suffer Irreparable Harm if the Relief is Denied.

Defendant claims that the Plaintiffs will suffer no irreparable harm if their major party

competitors receive this valuable information and they subsequently prevail in this case. This argument is based on the claim that the major parties could be compelled to return or destroy the information, or widespread access to the information is eventually granted.

It is questionable that the relief of requiring the information to be returned or destroyed by the major political parties can be achieved by this Court. Those parties are not before the Court. Moreover, the statute authorizes them to release the information to others, such as vendors, local party organizations, party candidates, etc. Such distribution could take place before this Court acts, and it is doubtful that full retrieval of the information could be assured.

The alternative relief suggested, granting widespread access to the information, directly undermines the statute's stated intent to protect voter privacy. Contrary to Defendant's assertion (Defendant's Brief, p. 16), Plaintiffs do not seek "widespread access to the information." They seek to prohibit discriminatory access to the information by the two major parties. They have no objection, whatsoever, to the information remaining completely confidential.

3. No Others Will Suffer Harm if the Relief is Granted.

Defendant demonstrates no harm that will occur to others if the relief is granted. It claims that the two major parties will be denied information that "would allow them to verify the primary took place and was conducted properly." (Defendant's Brief, p. 17.) This is nonsensical. There is no question that the primary took place, and the party preferences of individual voters shed no light on the propriety of its conduct. Defendant also asserts some unexplained reliance by the public on the suspect provisions of the statute which will somehow be damaged by insuring that the voter preference information is not distributed before the deadline imposed by the statute. This assertion of harm is also meritless.

4. The Public Interest Will be Served by Granting the Relief.

The public interest will be served by giving this Court an opportunity to resolve the constitutionality of this never-before-used statute before it is implemented, rather than imposing remedial measures after the fact.

5. The Relief Sought is Not Barred by the Doctrine of Laches.

The doctrine of laches does not apply to the relief sought by the Plaintiffs, as there was no unreasonable delay in seeking it, nor is there any prejudice to the Defendant in the timing of the request.

Contrary to the assertions of the Defendant, the Plaintiffs only became aware of the suspect provisions of the statute shortly before the Complaint was filed. Those provisions were inserted late in the legislative process and received little or no public attention. In addition, the Third Party Plaintiffs are membership organizations with decision-making processes which must be complied with before initiation of litigation can be authorized. The Complaint was filed barely four months after the statute was enacted and before the Primary took place. This does not constitute unreasonable delay.

The Defendant demonstrates no prejudice that has resulted from the timing of Plaintiffs' Motion. Defendant claims that it cannot meet its statutory duties if it delays until the deadline to collect and compile the voter preference information. No such delay is being sought. The Defendant is free to collect and assemble the information; only distribution before the statutory deadline is sought to be enjoined. Defendant also complains that, had Plaintiffs acted sooner, Defendant might have been spared the expense of undertaking its statutory duties. This would make sense only if it is assumed that a decision on the merits of the case could have been

obtained before the Defendant began the process of collecting and assembling the information. Otherwise, the Defendant would still have been required to prepare for compliance with the statute, even if distribution was temporarily enjoined.

CONCLUSION

Defendant's objections to the relief sought in the Motion are not valid, and the relief should be granted.

Respectfully submitted,

/s/ Thomas F. Wieder

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Dated: February 21, 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:

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

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