

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,

No. 2:08-cv-10149

HON. NANCY G. EDMUNDS

Plaintiffs,

v

MICHIGAN SECRETARY OF STATE
TERRI LYNN LAND,

Defendant.

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**DEFENDANT TERRI LYNN LAND'S RESPONSE TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

CONCISE STATEMENT OF ISSUES PRESENTED

- I. **Whether MCL 168.615c violates the Equal Protection Clause of the Fourteenth Amendment where Plaintiffs are not similarly situated to the participating political parties in terms of the primary and the voter preference information, the burdens on Plaintiffs are minor, and there is no evidence of invidious discrimination against minor parties, the press, or private political consultants.**

- II. **Whether MCL 168.615(c) violates the First Amendment guarantees of freedom of speech and freedom of the press where the press and private citizens have no right of access to information not publicly available, where the burden on Plaintiffs' speech is minor and is justified by the State's legitimate regulatory interest in balancing the confidentiality of voter information with the participating political parties' need to know who voted and associated with their party in the 2008 Michigan primary, and where the statute is neither vague nor overbroad.**

- III. **Whether Plaintiffs' request for injunctive relief is barred by the doctrine of laches.**

- IV. **Whether, if MCL 168.615(c) is found unconstitutional, the nonseverability clause dictates that no one receives the voter preference information and/or the questions of whether, how, and to whom the information is made available, are questions of State law to be resolved by State courts.**

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Anderson v Celebrezze, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983)
Branzburg v Hayes, 408 US 665, 684; 92 S Ct 2646; 33 L Ed 2d 626 (1972)
Bullock v Carter, 405 US 134, 145; 92 S Ct 849; 31 L Ed 2d 92 (1972)
Grebner v Michigan, Michigan Supreme Court No 135274, at n 6; 2007 Mich LEXIS 2894 (November 21, 2007)
Houchins v KQED, Inc, 438 US 1, 9; 98 S Ct 2588; 57 L Ed 2d 5532 (1978)
Illinois Bd of Elections v Socialist Workers Party, 440 US 173, 185; 99 S Ct 983; 59 L Ed 2d 230 (1979)
Jenness v Fortson, 403 US 431, 442; 91 S Ct 1970; 29 L Ed 2d 554 (1971)
Munro v Socialist Workers Party, 479 US 189; 107 S Ct 533; 93 L Ed 2d 499 (1986)
Rosario v Rockefeller, 410 US 752, 761; 93 S Ct 1245; 36 L Ed 2d 1 (1973)
Smith v Daily Mail Pub Co, 443 US 97; 99 S Ct 2667; 61 L Ed 2d 399 (1979)
Storer v Brown, 415 US 724, 730; 94 S Ct 1274 39 L Ed 2d 714 (1974)
Timmons v Twin Cities Area New Party, 520 US 351, 367; 117 S Ct 1364; 137 L Ed 2d 589 (1997)

PA 52 of 2007

STATEMENT OF THE FACTS

In 2007, the Michigan Legislature enacted Public Act 52 of 2007, which amended Michigan Election Law by changing Michigan's presidential primary process from an open one to a semi-closed statewide primary. The bill, which took effect on September 5, 2007, requires that a political party receive at least 25% of the total vote cast in the State in order to participate in the primary.¹ The bill refers to a political party authorized to participate in the presidential primary under the law as a "participating political party."² Previously, a political party that received less than 5% of the total vote cast nationwide for the Office of President in the last presidential election could not participate in the statewide presidential primary election.

In order to vote at the presidential primary, electors appearing to vote at a presidential primary must indicate in writing, on a form prescribed by the Secretary of State, which participating political party ballot they wish to vote. Under 168.615c, the challenged provision of the bill, the Secretary of State must develop a procedure for city and township clerks to use in keeping a separate record at a presidential primary.³ The separate record contains the printed name, address, and qualified voter file number of each elector, as well as the participating political party ballot that the elector selected at the primary.⁴ In order to ensure compliance with State and national political party rules of each participating political party, PA 52 also requires the Secretary of State to provide these records to the chairperson of each participating political party.⁵

¹ PA 52 of 2007.

² PA 52 of 2007.

³ MCL 168.615c(3).

⁴ MCL 168.615c(3).

⁵ MCL 168.615c(5).

A participating political party may only use the information transmitted by the Secretary of State in the manner and for the purposes proscribed by the statute, namely, to support political party activities by that participating political party.⁶ A participating political party may not use the information for commercial purposes.⁷ Otherwise, this information that indicates which participating political party primary ballot an elector selected, is confidential and exempt from disclosure under the Freedom of Information Act and may not be disclosed to any person for any reason.⁸ Any person who uses the information for a purpose not authorized by the statute is subject to criminal penalties.⁹

PA 52, enacting § 1 provides, "If any portion of this amendatory act or the application of this amendatory act to any person or circumstances is found invalid by a court, it is the intent of the legislature that the provisions of this amendatory act are nonseverable and that the remainder of the amendatory act shall be invalid, inoperable, and without effect."¹⁰

⁶ MCL 168.615c(8).

⁷ MCL 168.615c(7).

⁸ MCL 168.615c(4).

⁹ MCL 168.615c(11).

¹⁰ PA 52 of 2007, enacting § 1.

ARGUMENT

A state has broad power to regulate the time, place, and manner of elections.¹¹ States also have a major role to play in structuring and monitoring the election process, including the primaries.¹² Therefore, States regain the power to regulate their own elections.¹³ Both constitutional law and common sense compel the conclusion that the government must play an active role in structuring elections, and must substantially regulate elections if they are to be fair and honest, and if order, rather than chaos, is to accompany the democratic process.¹⁴

To subject every voting regulation to strict scrutiny by requiring that the regulation be narrowly tailored to advance a compelling state interest, would "tie the hands of States seeking to assure that elections are operated equitably and efficiently."¹⁵ Thus, the Supreme Court has adopted a more flexible standard.¹⁶ In assessing the constitutionality of a state election law, courts first examine whether the law burdens rights protected by the First and Fourteenth Amendments.¹⁷ It must then identify and evaluate the precise interests asserted by the State as justifications for the burden imposed, and consider the extent to which those interests make it necessary to burden plaintiff's rights.¹⁸ If a challenged law substantially burdens constitutional

¹¹ *Clingman v Beaver*, 544 US 581; 125 S Ct 2029; 161 L Ed 2d 920 (2005) (internal citations omitted) (quoting Const art I, § 4, cl 1).

¹² *Burdick v Takushi*, 504 US 428, 433; 112 S Ct 2059; 119 L Ed 2d 245 (1992).

¹³ *Burdick*, 504 US at 433 (citing *Sugarman v Dougall*, 413 US 634, 647; 93 S Ct 2842; 37 L Ed 2d 853 (1973)).

¹⁴ *Burdick*, 504 US at 433 (citing *Storer v Brown*, 415 US 724, 730; 94 S Ct 1274 39 L Ed 2d 714 (1974)).

¹⁵ *Burdick*, 504 US at 433.

¹⁶ *Burdick*, 504 US at 433.

¹⁷ *Eu v San Francisco Democratic Central Committee*, 489 US 214, 222; 109 S Ct 1013; 103 L Ed 2d 271 (1989) (citing *Tashjian v Republican Party of Connecticut*, 479 US 208, 217; 107 S Ct (1986) and *Anderson v Celebreeze*, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983)).

¹⁸ *Anderson*, 460 US at 789.

rights, the State must show that it advances a compelling state interest,¹⁹ and must be narrowly tailored to serve that interest.²⁰ If the burden is minor, however, and a state election law provision imposes only reasonable, nondiscriminatory restrictions on the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.²¹

I. The statute does not violate the Equal Protection Clause because Plaintiffs are not similarly situated to the participating political parties in terms of their need for and use of voter preference information, the burdens on Plaintiff are minor, and there is no evidence of invidious discrimination against minor parties, the press, or private political consultants.

The Equal Protection Clause does not necessarily forbid separate procedures for minor parties and major parties.²² Indeed, the United States Supreme Court has recognized that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other." In *American Party of Texas v White*, for example, the Court recognized that a state is not guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot." The Court, too, has upheld the constitutionality of statutes requiring candidates not nominated by major parties to obtain given numbers of signatures on petitions before being placed on the ballot.²³ The Court has also held that a state may condition access to

¹⁹ See, e.g., *Tashjian*, 479 US at 217, 222.

²⁰ See, e.g., *Illinois Bd of Elections v Socialist Workers Party*, 440 US 173, 185; 99 S Ct 983; 59 L Ed 2d 230 (1979); *Dunn v Blumstein*, 405 US 330, 343; 92 S Ct 995; 31 L Ed 2d 274 (1972).

²¹ *Burdick*, 504 US at 434 (citing *Anderson*, 460 US at 788).

²² See *American Party of Texas v White*, 415 US 676, 782; 94 S Ct 1296; 39 L Ed 2d 944 (1974) (Equal Protection Clause not violated by requirement that minor parties had to proceed by convention whereas major parties were permitted to choose their candidates by primary election).

²³ See, e.g., *Jenness v Fortson*, 403 US 431, 442; 91 S Ct 1970; 29 L Ed 2d 554 (1971); *American Party*, 415 US at 782 n 14.

the general election ballot by a minor party or independent candidate upon a showing of a modicum of support among potential voters for the office.

The Court has wisely stated that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . ." ²⁴ As the Court has recognized, statutes create many classifications that do not deny equal protection. ²⁵ It is only invidious discrimination that offends the Constitution. ²⁶

A. The statute does not treat Plaintiffs differently than similarly situated individuals.

Here, section 615c creates a classification: political parties that have met the qualifications necessary for participation in the Michigan primary and thus, have access to voter preference information collected and compiled as a result of the primary as a separate category from all others who did not qualify as participating political parties and therefore do not have access to the voter preference information. But that classification does not deny Plaintiffs equal protection under the law. Minor parties are subject to the same criterion as are major parties, and the statute is applied evenhandedly to all parties. For purposes of equal protection analysis, there is no evidence that any party participated in the primary without meeting the criterion, nor that any minor party Plaintiff has been treated any differently than any other party that did not meet the eligibility requirements of PA 52. Minor parties who did not meet the requirements, members of the press, and private political consultants simply are not similarly situated to the participating political parties that have met the statutory requirements. Plaintiffs' relationship to

²⁴ *American Party*, 415 US at 782 (citing *Williams v Rhodes*, 393 US 23, 31; 89 S Ct 5; 21 L Ed 2d (1968)).

²⁵ *American Party*, 415 US at 781-782 (citing *Ferguson v Skrupa*, 372 US 726, 732 (1963) (footnote omitted)).

²⁶ *American Party*, 415 US at 781 (citing *Ferguson*, 372 US at 732).

the primary and the voter preference information collected through the primary is different than those of participating political parties.

B. There is no invidious discrimination in creating separate procedures for participating political parties and nonparticipating political parties.

Plaintiff claims that 615c is "patently discriminatory" and denies minor party Plaintiffs "an equal opportunity to win the votes of the electorate. (Pls' Motion for SJ, p 6.) But the criterion for that classification is neutral—a political party must have received at least 25% of the total vote cast in the State in order to participate in the primary. The fact that only major parties qualified for the 2008 primary does not make the statute unconstitutional. Nothing in the statute prevented a minor party from attaining that 25% vote in the 2008 primary, or from attaining that percentage and thus participating in the next primary. Therefore, Plaintiffs' blanket allegation that the statute "prevents anyone else [but the major parties] from obtaining or using" the information (Pls' Motion for SJ, p 6) is not accurate.

Plaintiffs' bold accusations that "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" or that the statute "is obviously intended to aid the Democratic and Republican parties who controlled the legislature that enacted it" (Pls' Motion for SJ, pp 6-7) are both overreaching and alarming. The United States Supreme Court has recognized as constitutional similar eligibility requirements, even where they have created hurdles for minor parties.²⁷

The bottom line is that the statute is neutral both on its face and in its application. PA 52's eligibility requirements take into account all parties, major and minor. Section 615c was adopted not to disadvantage the minor parties, the press, or private political consultants but to

²⁷ *American Party*, 415 US at 782; *Jenness*, 403 US at 442.

improve the quality of the primary by ensuring the participating political parties that the primary occurred and informing them as to who voted and associated them. Plaintiffs' minor parties in Michigan, did not meet the eligibility requirements for the 2008 primary, and thus, are not accorded the same rights as the participating parties.

C. Under the applicable *Anderson* balancing test, MCL 168.615c is not an unconstitutional infringement of Plaintiffs' First Amendment free speech and freedom of the press rights because it imposes, at most, a minor burden on Plaintiffs that is justified by the State's legitimate regulatory interest in balancing voter confidentiality with the participating political parties' need to know who is voting and associating with their party.

As nonparticipating political parties in Michigan's 2008 primary, which was held January 15, 2008, Plaintiffs have no statutory rights to the voter preference information collected from that primary. They also do not have a First Amendment right to participate fully in the primary or to gain access to the information generated by the primary where they have not met the legitimate, neutral eligibility requirements. As discussed more fully in Argument II below, it is also well-established that the press does not have "a substantial right of special access to information not available to the public generally."²⁸ Nor do private political consultants have a right to information that is not generally available to the public.

i. Any burden on Plaintiffs is minor and indirect.

Even if the statute implicates the First Amendment, under the applicable *Anderson* standard, MCL 168.615c's burden is minor, indirect, and remote. The fact that Plaintiffs do not have access to voter preference information is a consequence of a reasonable law designed to ensure the purity and integrity of Michigan's primary. Section 615c does not unfairly or unnecessarily burden Plaintiffs as minor parties by denying—or even significantly lessening—any nonparticipating parties' opportunities to promote their candidates or place their candidates

²⁸ *Branzburg v Hayes*, 408 US 665, 684; 92 S Ct 2646; 33 L Ed 2d 626 (1972).

on the ballot. Neither does it exclude them from participating in the primary in the future, thus cementing the *status quo*. It also does not interfere with minor party Plaintiffs' freedom to associate, to express their views to voters, or to continue to garner political support in the hopes of attaining participating political party status in the next primary. In any event, associational rights are necessarily subject to qualification.²⁹

Section 615c appropriately balances voters concerns over who gets their information with the interest of the participating political parties in knowing who is voting and associating with that party. By providing the voter preference information to the participating political parties, the State satisfies those parties that the primary actually occurred. The State accomplishes this important task by providing to the head of each participating political party a record of each elector, the elector's address and qualified voter file number, and the participating political party ballot selected by that elector at the primary. As articulated in the statute, this ensures compliance with State and national political party rules of each participating party.³⁰

Significantly, although minor parties do not have access to the 2008 primary voter preference information, they do have access to a list of voters who voted in the primary. The party preference information at issue here is arguably less valuable to nonparticipating political parties than the general voter lists generated from voter registration forms to which Plaintiffs have access, since voter preference information lists are generally populated by voters who already have demonstrated affiliation with a major party.

In any event, the burden here on Plaintiffs as minor parties is surely less than the burden imposed on a new or small political party or an independent candidate that is kept from having access to the ballot—and thus, from having access to a platform from which to espouse its

²⁹ *Storer*, 415 US at 730.

³⁰ MCL 168.615c(5).

view—because it cannot meet the requirements of a State's classification scheme. Yet, the Supreme Court has routinely upheld many such schemes as constitutional,³¹ and has clearly articulated that statutory schemes "need not remove all of the many hurdles third parties face in the American political arena today."³²

In *Timmons v Twin Cities Area New Party*, for example, the Supreme Court declined to apply strict scrutiny to the anti-fusion at issue, holding that any burden imposed was minimal because it did "not restrict the ability of the [party] and its members to endorse, support, or vote for anyone they like," and did not "exclude [] a particular group of citizens, or a political party, from participation in the election process."³³ Courts of Appeals have held similarly. In the context of ballot procedure, for example, the Seventh Circuit has recognized that "different treatment of minority parties that does not exclude them from the ballot, prevent them from attaining major party status if they achieve widespread support, or prevent any voter from voting for the candidate of his choice, and that is reasonably determined to be necessary to further an important state interest does not result in a denial of equal protection."³⁴

As to the burden on the press, it is minor where the press has no general right to the nonpublic information at issue. Likewise, the burden on a private political consultant is minor where that consultant has no particular First Amendment right to information that is not available to the public. Nor have Plaintiffs demonstrated that the statute denies the media the opportunity

³¹ See, e.g., *Illinois State Bd of Election*, 440 US at 173; *Storer*, 415 US at 730; *American Party*, 415 US at 767; *Jenness*, 403 US at 431.

³² *Timmons v Twin Cities Area New Party*, 520 US 351, 367; 117 S Ct 1364; 137 L Ed 2d 589 (1997).

³³ *Timmons*, 520 US at 363-364.

³⁴ *The Board of Election Commissioners of Chicago v The Libertarian Party of Illinois*, 591 F2d 22 (CA 7, 1979).

to discuss political candidates, or the issue of crossover voting, or significantly limits the work of private political consultants.

ii. Any minor burden is justified by the State's legitimate regulatory interest in limiting access to voter preference information.

The State's legitimate regulatory interest in limiting access to and use of voter preference information collected in the primary is sufficient to justify MCL 168.615c's reasonable, nondiscriminatory restrictions. The Supreme Court has recognized as "important" and sufficient to justify reasonable, nondiscriminatory restrictions, the following regulatory interests:

1) "preserv[ing political] parties as viable and identifiable interest groups,"³⁵ "2) enhanc[ing] parties' electioneering and party-building efforts"³⁶ and "3) guard[ing] against party raiding and 'score loser' candidacies by spurned primary contenders."³⁷ Specifically, the Court has held that since encouraging citizens to vote is an important state interest, a State is entitled to protect parties' ability to plan their primaries for a stable group of voters.³⁸ As the Supreme Court held in *Tashjian*, a State may enact laws "to prevent the disruption of the political parties from without."³⁹

On numerous occasions, the Supreme Court has held to be constitutional regulations that ensure orderly elections, even where those regulations do not erase every hurdle faced by a minor party. For example, the Court has held that a state may impose restrictions that promote

³⁵ *Clingman v Beaver*, 544 US 581, 593-594; 125 S Ct 2029; 161 L Ed 2d 920 (2005) (citing *Nader v Schaffer*, 417 F Supp 837, 845 (D Conn, 1976), aff'd 420 US 989; 97 S Ct 516 50 L Ed 2d 602 (1976)).

³⁶ *Clingman*, 544 US at 593-594 (citing *Nader*, 417 F Supp at 845).

³⁷ *Clingman*, 544 US at 593-595 (citing *Storer*, 415 US 7 at 730).

³⁸ *Clingman*, 544 US at 596 (citing *California Democratic Party v Jones*, 530 US 567, 587; 120 S Ct 2402; 147 L Ed 2d 502 (2000) and transcript of oral argument).

³⁹ *Eu*, 489 US at 227 (citing *Tashjian*, 479 US at 224).

the integrity of primary elections.⁴⁰ It has also held that a State may regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption,⁴¹ and that preventing election fraud and preserving the "purity of the ballot box" are legitimate State interests.⁴² In *American Party of Texas v White*, the Court rejected an Equal Protection challenge and held to be constitutional a scheme that limited primary elections to major parties polling at least 200,000 votes in the gubernatorial election and that limited minor parties to nomination by convention.⁴³ Likewise, in *Rosario v Rockefeller*, the Court held constitutional a requirement for waiting periods before voters may change party registration and participate in another party's primary.⁴⁴ In *Bullock v Carter*, too, the Court found constitutional reasonable filing fees as a condition of placement on the ballot.⁴⁵ Similarly, the Court in *Jenness v Fortson* upheld a law limiting ballot access via primary election to political parties meeting a threshold of 20% of the total vote for Governor or President in the previous election, justifying this preliminary showing of a significant modicum of support because of the State's interest in avoiding confusion and deception.⁴⁶ Similarly, in *Munro v Socialist Workers Party*, the Court held that the State of Washington's interest in avoiding deception and confusion justified its requirement that a minor party candidate poll at least 1% in the primary to qualify for the ballot even though major parties receiving at least 5% of the vote were not subject to the same

⁴⁰ *American Party*, 415 US at 779-780.

⁴¹ *Eu*, 489 US at 229 (citing *Buckley v Valeo*, 424 US 26, 27; 96 S Ct 612; 46 L Ed 2d 659 (1976)).

⁴² *Bay County Democratic Party v Land*, 347 F Supp 404, 437 (WD Mich, 2004) (citing *Dunn v Blumstein*, 405 US 330, 345; 92 S Ct 995; 31 L Ed 2d 274 (1972)).

⁴³ *American Party*, 415 US at 779-780.

⁴⁴ *Rosario v Rockefeller*, 410 US 752, 761; 93 S Ct 1245; 36 L Ed 2d 1 (1973).

⁴⁵ *Bullock v Carter*, 405 US 134, 145; 92 S Ct 849; 31 L Ed 2d 92 (1972).

⁴⁶ *Jenness*, 403 US at 442.

requirement.⁴⁷ The *Munro* Court noted that, as in *Jenness*, "candidates and members of small or newly formed political organizations are wholly free to associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish. States are not burdened with constitutional imperative to reduce voter apathy or to 'handicap' an unpopular candidate to increase the likelihood that the candidate will gain access to the general election ballot."⁴⁸

In these cases, the First Amendment burden was "the indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections."⁴⁹ As the Supreme Court has recognized, and as the Michigan Supreme Court recognized when it decided *Grebner*, States have a "strong interest" in the stability of their political systems.⁵⁰ Surely, a nonparticipating party's lack of access to specific voter preference information is a less severe burden than being denied ballot access – especially when voter registration lists are generally available.

Applying this case law precedent, any minor burden on Plaintiffs is justified by the legitimate regulatory scheme of section 615c. Due to the need for some confidentiality of voter preference information, particularly with regard to the impact on voter turnout in the primary, the statute appropriately limits distribution of this information to the noncommercial political

⁴⁷ *Munro v Socialist Workers Party*, 479 US 189; 107 S Ct 533; 93 L Ed 2d 499 (1986); see also *Miller v Lorain County Bd of Elections*, 141 F3d 252 (CA 6, 1998) (upholding a law limiting the availability of primary elections for congressional nominations to major political parties); *Schrader v Blackwell*, 241 F3d 783 (CA 6, 2001) (upholding the requirement that a party poll at least 5% of votes for Governor before its candidate receives party designation on the ballot).

⁴⁸ *Munro*, 479 US at 198.

⁴⁹ *Eu*, 489 US at 232 (discussing the holdings of *American Party, Rosario*, and *Bullock*).

⁵⁰ *Grebner v Michigan*, Michigan Supreme Court No 135274, at n 6; 2007 Mich LEXIS 2894 (November 21, 2007) (quoting *Timmons*, 520 US at 367).

activities of the participating political parties.⁵¹ Defendant applies this scheme evenhandedly to all parties who participate or seek to participate in the primary.

Plaintiffs cite a line of cases in support of their assertion that providing voter preference information to only the major political parties here is unconstitutional. (Pls' Br in Support of Motion for Preliminary Injunction, p 3.) The instant case is readily distinguishable from those cases because here the information sought is not available to the public. Thus, the only cited case that is binding on this Court, the Supreme Court's summary affirmance of the holding in *Socialist Workers Party v Rockefeller*, has no application to the instant factual scenario. In *Rockefeller*, the list of registered voters at issue was available for public inspection at each main or branch office of the board of elections. Additionally, surplus copies could be sold to anyone requesting them.⁵² In that context, the court characterized the lists as a "significant subsidy."⁵³ In contrast here, although the information sought under section 615(c)(3) is not publicly available. Plaintiffs and the participating political parties can get access to a publicly available list of voters who voted in the primary on equal terms. Therefore, the voter preference information is not the type of "significant subsidy" that was at issue in *Rockefeller*.⁵⁴

Additionally, unlike the situation in *Rockefeller*, where there was no justifiable reason for adding

⁵¹ The importance of voter confidentiality is well-documented in Michigan's election history. In 1988 newly passed Public Act 275 provided that for the purpose of voting in the presidential preference primary, a voter would have to declare a political party preference on their registration record at least 30 days before the primary. Responding to public concern over privacy concerns, the Legislature in 1994 repealed that portion and paid local clerks to expunge this information. In 1995, the Legislature enacted Public Act 87, which eliminated the provision of law requiring the declaration of party preference in order to be eligible to vote in the presidential preference primary. PA 52 assures Michigan voters that if they declare the party ballot they want, the information will not be made available to the general public and will be made available to participating political party only with certain restrictions.

⁵² *Socialist Workers Party v Rockefeller*, 314 F Supp 984, 995 (SD NY 1984), summarily aff'd 400 US 806 (1970).

⁵³ *Rockefeller*, 314 F Supp at 997.

⁵⁴ *Rockefeller*, 314 F Supp at 995.

an arbitrary requirement on parties that had already placed their candidates on the ballot, the State of Michigan has a justifiable purpose in limiting the information to participating political parties.

Similarly, in *Libertarian Party of Indiana v Marion County Board of Voter Registration*, the voter registration lists at issue were available for public perusal, yet were only distributed to the two major political parties.⁵⁵ Here, the voter preference information is not publicly available, and there is a legitimate interest in limiting dissemination of the information.

In short, the burden on Plaintiffs' First Amendment rights is at most minor and indirect, Defendant's legitimate regulatory interests justify that slight burden, and the statute does not invidiously discriminate between minor and major parties.

II. MCL 168.615(c) does not violate the First Amendment guarantees of freedom of speech and freedom of the press where the press and private citizens have no right of access to information not publicly available, where the burden on Plaintiffs' speech is minor and is justified by the State's legitimate regulatory interest in balancing the confidentiality of voter information with the participating political parties' need to know who voted and associated with their party in the 2008 Michigan primary, and where the statute is not vague or overbroad.

A. The press has no right of access to information that is not publicly available.

Plaintiffs argue that the media should have special access to voter preference information that is not publicly available. Although the press enjoys some necessary First Amendment protections,⁵⁶ these protections are "neither absolute nor as far-ranging as freedom of speech itself."⁵⁷ "[T]he right to speak and publish does not carry with it the unrestrained right to gather information,"⁵⁸ nor is there a "First Amendment guarantee of a right of access to all sources of

⁵⁵ *Libertarian Party of Indiana v Marion County Bd of Voter Registration*, 778 F Supp 1458, 1459 (D Ind 1991).

⁵⁶ *Branzburg*, 408 US at 681.

⁵⁷ *D'Amaro, III v the Providence Civil Ctr Auth*, 639 F Supp 1538 (D RI, 1986).

⁵⁸ *Branzburg*, 408 US at 684 (internal citation omitted).

information within the government control."⁵⁹ The press is not free to publish with impunity everything and anything it desires to publish"⁶⁰ nor does the First Amendment "invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."⁶¹ The publisher of a newspaper "has no special privilege to invade the rights and liberties of others."⁶² Thus, the press is regularly excluded from grand jury proceedings, judicial proceedings, meetings of official bodies gathered in executive session, meetings of private organizations, and access to crimes or disasters when the general public is excluded.⁶³

The access Plaintiffs seek is exactly the type of special access the United States Supreme Court has refused to recognize as a First Amendment right.⁶⁴ In *Branzburg v Hayes*, the Court held, "[i]t 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."⁶⁵ In *Pell v Procunier*, too, the court held that while the First and Fourteenth Amendments bar government from interfering with the press, "it is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists

⁵⁹ *Houchins v KQED, Inc*, 438 US 1, 9; 98 S Ct 2588; 57 L Ed 2d 5532 (1978) (special privilege of access by the press has been rejected by this Court, and is not a right essential to guarantee the freedom to communicate or publish).

⁶⁰ *Branzburg*, 408 US at 683.

⁶¹ *Branzburg*, 408 US at 682-683.

⁶² *Branzburg*, 408 US at 683 (citing *Associated Press v NLRB*, 301 US 103, 132-133 (1937)).

⁶³ *Branzburg*, 408 US at 684-685.

⁶⁴ See, e.g., *Houchins*, 438 US at 12.

⁶⁵ *Branzburg*, 408 US at 684.

sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision of this Court."⁶⁶

Where the public is permitted access, the government must articulate a legitimate basis for prohibiting media access.⁶⁷ In those situations where the public has had access to information but the media has been denied access, the Court has determined whether the government has a legitimate basis for its actions by applying a balancing test, balancing the media's right to gather information with the governmental concerns of that situation, such as safety, right to a fair trial, etc.⁶⁸ Here, however, where the information is not publicly available, the press has no right to the information and there is no need to engage in balancing. The same is true for a private political consultant. In any event, under the *Anderson* test, the burden on the press or private political consultants is slight and the State has articulated a legitimate regulatory reason for limiting the press's access to this information.

Plaintiffs suggest that this Court should depart from the well-established and flexible *Anderson* sliding scale and, instead, adopt the balancing test articulated in *D'Amario* and adopted by the 6th Circuit in *S.H.A.R.K. v Metro Parks*.⁶⁹ The Supreme Court adopted the flexible *Anderson* test in recognition that to subject every election regulation to strict scrutiny would "tie the hands of States seeking to assure that elections are operated equitably and efficiently."⁷⁰

⁶⁶ *Pell v Procunier*, 417 US 817, 834; 94 S Ct 2800; 41 L Ed 2d 495 (1974) (holding that newsmen have no constitutional right of access to prisons or their inmates beyond that afforded to the general public).

⁶⁷ See, e.g., *American Broadcasting Companies v Cuomo*, 570 F2d 1080, 1083 (CA 2, 1977); *D'Amario*, 639 F Supp at 1542.

⁶⁸ See, e.g., *Press Enterprise Co v Superior Court*, 478 US 1; 106 S Ct 2735; 92 L Ed 2d 1 (1986); *Globe Newspaper Co v Superior Court*, 464 US 501, 508; 104 S Ct 819; 78 L Ed 2d 629 (1984).

⁶⁹ *S.H.A.R.K. v Metro Parks Serving Summit County*, No 5:04CV2329, 2006 US Dist LEXIS 40027 (June 16, 2006).

⁷⁰ *Burdick*, 504 US at 433.

Defendant asserts that the *D'Amario* test, should be limited to cases outside the election area, as neither the United States Supreme Court nor the Sixth Circuit have held that such a balancing test ought to replace the applicable *Anderson* sliding scale that has been consistently applied to First and Fourteenth Amendment questions regarding election law.

But even if this Court were to apply the *D'Amario* test to the instant election case, the State's limitation of access meets that test. As an initial matter, section 615c does not "selectively delimit" the audience because it does not seek to suppress minority parties, unpopular ideas, or manipulate public debate. The primary is open to *any* party that meet's PA 52's reasonable requirements. The government's stated reason for the rule is to balance the confidentiality of the ballot (and thus, protection of participation in the primary) with the political parties' need to know who is voting and affiliating with them. Therefore, under the *D'Amario* test, this Court should uphold the restriction on access if it is reasonably related to the government's interest. Section 615c is rationally related to the accomplishment of the State's purpose because the information is released to the participating political parties, who need verify the election procedures and know who is voting and associating with them. The limitation on access outweighs the systemic benefits inherent in unrestricted or lesser-restricted access.⁷¹

B. The burden on the speech of minor parties is slight and is justified by the State's legitimate regulatory interest.

As set forth in Argument I, section 615c places at most a slight burden on minor party Plaintiffs. It does not restrict speech that is at the core of the electoral process or of First Amendment freedoms. It does not deny—or even significantly lesson—any nonparticipating parties 'opportunities to promote their candidates or place their candidates on the ballot. It also does not impinge on Plaintiffs' or their members' freedom to associate to express their views to

⁷¹ *S.H.A.R.K.*, 499 F3d 553, 560 (CA 6, 2007).

voters, or the voters' ability to express preferences. Where, as here, the burden is slight, Defendant need not establish a compelling interest. Rather, Defendant need only establish a legitimate interest in giving participating political parties access to and structured use of this information. As argued above, the State has a legitimate interest in concerns over who gets the information with the interest of the participating political parties knowing who is voting and associating with that party. Section 615c appropriately balances these competing interests.

C. The statute is not vague or overbroad.

Plaintiffs claim MCL 168.615c is overbroad because it reaches and restricts conduct that is protected by the free speech clauses of the United States and Michigan constitutions. (R 1, Complaint, § 50.) They also claim the statute is vague because it does not provide adequate notice to new organizations and others as to prohibited conduct. (R 1, Complaint, § 51.)

Under *Grayned v City of Rockford*, the standard for vagueness is whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited."⁷² The statute must also "provide explicit standards for those who apply them."⁷³ MCL 168.615c does both. A person of ordinary intelligence can read the plain language of the statute and know, for example, that the following would subject them to criminal penalties: purchasing the information, or using it for other than political activity by the participating political party who provided the information.⁷⁴

The standard for overbreadth is well-established. "Only a statute that is *substantially overbroad* may be invalidated on its face."⁷⁵ Moreover, the Supreme Court has indicated that the

⁷² *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972).

⁷³ *Grayned*, 408 US at 108.

⁷⁴ MCL 615(c)(8).

⁷⁵ *New York v Ferber*, 458 US 747, 769; 102 S Ct 3348; 73 L Ed 2d 113 (1982); *Broadrick v Oklahoma*, 413 US 601; 93 S Ct 2908; 37 L Ed 2d 830 (1973).

overbreadth doctrine is "strong medicine that should be employed with hesitation and only as "last resort."⁷⁶ Here, section 615c does not prohibit access to a substantial amount of constitutionally protected speech. As previously argued, the press does not have a general First Amendment right of access to information that is not publicly available, nor does it have a well-established right to publish information *unlawfully* obtained. Neither does a private citizen have a First Amendment right to access to voter preference information that serves a particular purpose for the participating political parties. The First Amendment burden on minor parties is only slight and indirect. Moreover, section 615c is a neutral statute and there is no indication that its intention is to chill the speech of the press or minor parties.

Section 615c also does not criminalize any constitutionally protected speech, let alone a "substantial" amount of constitutionally protected speech and therefore is not facially invalid for overbreadth. Plaintiffs cite *Smith v Daily Mail* for the proposition that the statute is overly broad as drafted (Pls' Motion for SJ, pp 20-22) because it subjects to criminal sanctions any person who uses the information for a purpose not authorized by the statute. But *Daily Mail* held that if the information obtained by the press is obtained *lawfully*, "the state may not punish its publication exception when necessary to further an interest more substantial than is present here [protecting the anonymity of a juvenile offender]."⁷⁷ Similarly, in other key cases involving the conflict between truthful reporting and state-protected privacy interest, the information was lawfully obtained.⁷⁸ In *Cox Broadcasting*, for example, the name of the rape victim, which the press

⁷⁶ *Ferber*, 458 US at 769.

⁷⁷ *Smith v Daily Mail Pub Co*, 443 US 97; 99 S Ct 2667; 61 L Ed 2d 399 (1979).

⁷⁸ See, e.g., *Cox Broadcasting Corp v Cohn*, 420 US 469; 95 S Ct 1029; 43 L Ed 2d 328 (1975); *Oklahoma Publishing Co v Oklahoma County Dist Ct*, 430 US 308; 97 S Ct 1045; 51 L Ed 2d 355 (1977); *The Florida Star v B J F*, 491 US 525, 536; 109 S Ct 2603; 105 L Ed 2d 443 (1989).

published, was obtained from courthouse records that were open to public inspection.⁷⁹ Thus, *Daily Mail* "only protects the publication of information which a newspaper has 'lawfully obtain[ed]," and therefore as the Supreme Court has recognized, "the government retains ample means of safeguarding significant interests upon which publication may impinge."⁸⁰ Sixth Circuit case law has echoed this principle.⁸¹ Privacy interests fade once the information already appears on the public record because making public records generally available to the media but punishing the media's publication of those same records, leads to self-censorship and suppression.⁸² Additionally, the Supreme Court has repeatedly recognized "the sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights" and appropriately relied on "limited principles that sweep no more broadly than the appropriate context of the instant case."⁸³

Here, the information is not publicly available and therefore the confidentiality interest of the Michigan voters has not faded. In contrast to *Daily Mail*, the voter preference information from the primary can only be lawfully by the participating political parties and those to whom the participating political parties give the information for certain political activity purposes. Given the public nature of State law, both the press and private political consultants are well aware of the limitations and sanctions imposed by the statute; therefore, the statute's criminal penalties are unlikely to lead to self-censorship or suppression. In any event, the State can demonstrate that its punitive action was necessary to further the State interest in balancing voter confidentiality—and thus protecting the vitality of the primary—with the political parties' need

⁷⁹ *Cox Broadcasting*, 420 US at 492.

⁸⁰ *The Florida Star*, 491 US at 534 (quoting *Daily Mail*, 443 US at 103).

⁸¹ *S.H.A.R.K.*, 499 F3d at 560.

⁸² *The Florida Star*, 491 US at 530.

⁸³ *The Florida Star*, 491 US at 533.

to know who was voting and associating with them.⁸⁴ In effecting this interest, section 615c avoids public documentation or other public exposure of sensitive voter preference information. Accordingly, the ordinance is not substantially overbroad.

III. Plaintiffs' requests for injunctive relief are barred by the doctrine of laches.

Plaintiff's attempt to enjoin the Secretary of State's enforcement of section 615c is untimely and is thus barred by the doctrine of laches. The defense of laches is rooted in the principle that equity aids the vigilant, not those who slumber on their rights.⁸⁵ An action may be barred by the equitable defense of laches if: (1) the plaintiff delayed unreasonably in asserting her rights and (2) the defendant is prejudiced by this delay.⁸⁶ Federal courts have recognized the importance of bringing a timely action in elections cases.⁸⁷

Plaintiffs have known about the requirements and deadline of section 615c since September 5, 2007, when PA 52 was passed. Neither the requirements for or limitations on the release of voter preference information nor the March 26, 2008 deadline have changed since the Act's passage. Plaintiffs have also known since November 21, 2008, when the Michigan Supreme Court decided *Grebner v State*, that the Act was not an unconstitutional appropriation for a private purpose.⁸⁸ Moreover, as Plaintiffs are fully aware based on the plain language of section 615c, the March 26, 2008 deadline is the *last* day on which the voter preference

⁸⁴ See *Daily Mail*, 443 US at 97 (citing *Landmark Communications, Inc v Virginia*, 435 US 829 (1978)).

⁸⁵ *Lucking v Schram*, 117 F2d 160 (CA 6, 1941).

⁸⁶ *Brown-Graves Co v Central States, Southeast and Southwest Areas Pension Fund*, 206 F3d 680, 684 (CA 6, 2000).

⁸⁷ See, e.g., *Kay v Austin*, 621 F2d 809 (CA 6, 1980) (plaintiff who sought to be named on a presidential primary ballot was barred from obtaining injunctive relief because he delayed bringing suit until twenty-five days after he knew the choice of candidates had been made).

⁸⁸ *Grebner*, MSC No 135274.

information may be provided; however, but once the information is compiled, the Secretary of State may furnish that information on *any* day prior to that deadline.

Clearly, Plaintiffs could have sought injunctive relief and/or filed their lawsuit in September, October, or even in November, instead of waiting until the eve of the deadline set for the Secretary of State to provide voter preference information to the participating political parties. At a minimum, Plaintiffs could have sought injunctive relief pending the outcome of *Grebner*. By waiting for the primary, they treated PA 52 as if 615c were severable, an action clearly contrary to the plain language of the nonseverability clause. Yet, they slumbered on their rights. The relief that Plaintiffs now seek, which is to enjoin the Secretary of State from complying with the March 26, 2008 deadline, should be barred by laches.

IV. At this juncture, a determination that MCL 168.615c is unconstitutional would raise difficult questions that are State law questions to be resolved by State courts.

In light of the fact that Plaintiffs—with full knowledge of PA 52's nonseverability clause—unreasonably delayed this lawsuit until after the primary was held, a decision by this Court that PA 52 of 2007 is unconstitutional would raise troubling and difficult questions, not the least of which is who has access to the voter preference information. PA 52 contains a nonseverability clause providing that "[i]f any portion of this amendatory act or the application of this amendatory act to any person or circumstances is found invalid by a court, it is the intent of the legislature that the provisions of this amendatory act are nonseverable and that the remainder of the amendatory, and without effect."⁸⁹ The plain language of the nonseverability clause directs that any prospective action be invalid, inoperable, and without effect. Should this Court determine that section 615c is unconstitutional, any issues arising from that ruling are State issues that should be settled by State courts. This Court should exercise its discretion to

⁸⁹ PA 52 of 2007, enacting § 1.

abstain from ruling on these State issues. If this Court declares section 615c unconstitutional and is inclined to rule on whether, how, and to whom the voter preference information should be made available, Defendant requests that this Court certify the question to the Michigan Supreme Court under LR 83.40.⁹⁰

A. If this Court concludes that 615c is unconstitutional, Defendant does not plan on releasing the voter preference information to anyone.

Plaintiffs suggest that if section 615c is found unconstitutional, its FOIA provision is no longer of any effect and therefore the voter preference information is a matter of public record. Plaintiffs are correct that the FOIA provision would be of no effect. But the *entire* Act would be invalid, inoperable, and of no effect, rendering the primary of no effect—to the extent it is possible where a primary that has already occurred—and rendering the resultant voter preference information of no effect and therefore not obtainable. Plaintiffs cannot pick and choose the parts of PA 52 they want, keeping the primary and the compilation of the lists intact, while, in effect, "severing" only the FOIA provision. The Legislature through its inclusion of the nonseverability clause made clear that PA 52 was a package deal. Although the primary cannot be undone at this late juncture, any prospective actions, including the compiled voter preference information, are of no effect under the plain language of the statute. Therefore, if section 615c is declared unconstitutional and PA 52 is of no effect, the plain language of PA 52 dictates that no one gets the information.

This result is supported by important policy considerations. Michigan voters participated in the primary with the understanding that their party preference information would not be made available to the general public and that its disclosure to the participating political parties would be limited in accordance with section 615c. This Court should not render a decision that

⁹⁰ ED Mich LR 83.40.

"changes the rules" for Michigan voters. Not only would this trigger the voters' confidence in Michigan's election system.

Accordingly, in light of the nonseverability clause, but it also in light of PA 52 and this Court's entering of a TRO enjoining the Secretary of State from fully complying with section 615c by distributing the lists to the participating political parties until at least March 26, 2008, if this Court concludes that section 615c is unconstitutional, Defendant Secretary of State will not release the voter preference lists to any person or entity absent a court order.

CONCLUSION AND RELIEF SOUGHT

MCL 168.615c is at best a minor burden on Plaintiffs, and that minor burden is justified by the State's legitimate regulatory interests. Defendant Terri Lynn Land, Michigan Secretary of State, respectfully requests that this Court deny Plaintiffs' Motion for Summary Judgment, render judgment in favor of Defendant pursuant to MCR 2.116(I)(2), dismiss this case with prejudice, and award any other relief it deems appropriate and just.

Respectfully submitted,

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Dated: March 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the following:
Defendant's Response to Plaintiff's Motion for Summary Judgment.

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