UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTHA HAYES,
Plaintiff

Case no. 1:07-cv-1237

v.

HON. Robert J. Jonker

MICHIGAN DEMOCRATIC PARTY,

and

THE STATE OF MICHIGAN AND TERRI LYNN LAND,
solely in her official capacity as Secretary of State of Michigan
JOINTLY AND SEVERALLY,

Defendants

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PLAINTIFF'S BRIEF IN SUPPORT OF HER RULE 65 MOTION FOR A PRELIMINARY INJUNCTION

EXPEDITED CONSIDERATION REQUESTED[1]

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[1] See: § VII, *infra*.

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I. STATEMENT OF FACTS

At the 2004 Democratic National Convention, the delegates to the Convention voted to establish a commission to study the timing of the Democratic Party's Presidential delegate selection process. Subsequently, and as is discussed in more detail, *infra,* § III, B, 1, the Commission on Presidential Nomination and Scheduling was created. This Commission recommended the establishment of February 5, 2008 as the date before which only Iowa, New Hampshire, and one or two other states could engage in a Presidential primary or caucus.[1] This recommendation was adopted by the Rules and Bylaws Committee of the Democratic National Committee and resulted in the promulgation of the National Democratic Party's delegate selection timing rule allowing only the states of Iowa, New Hampshire, South Carolina and Nevada to hold a primary or caucus prior to February 5, 2008.[2]

On September 3, 2007 Governor Jennifer Granholm signed into law Michigan 2007 PA 52.[3] Among other things, this law established a January 15, 2008 date for a presidential primary to be utilized by both the Republican and Democratic parties for the purpose of selecting delegates to the respective parties' National Conventions. In a letter dated November 14, 2007,[4] the Chair of the Michigan Democratic Party, Mark Brewer, notified the Michigan Secretary of State that the Michigan Democratic Party (hereinafter

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[1] The Report issued by this Commission (hereinafter "Commission Report") is attached as Exhibit One to this Brief.

[2] The National Democratic Party's Delegate Selection Rules (hereinafter "DSR") are attached to Plaintiff's Complaint as Exhibit 1. See: DSR 11.A.

[3] This Act is attached as Exhibit 3 to Plaintiff's Complaint.

[4] A copy of this letter is attached as Exhibit 4 to Plaintiff's Complaint.

"MDP") would utilize the January 15th primary for the purpose of selecting delegates to the 2008 National Convention if two conditions obtained: first, that 2007 PA 52 (then in litigation) be upheld on appeal; and, second, that the Michigan Republican Party also use the January 15th Primary to select its delegates to its National Convention.[5] On November 21, 2007, in *Grebner, et al v Secretary of State,* the Michigan Supreme Court upheld the constitutionality of 2007 PA 52,[6] and the Michigan Republican Party has publicly declared that it will participate in the January 15th Primary.

Prior to the enactment of the January 15 primary law, The National Democratic Party required the MDP to submit its delegate selection plan for the National Convention for review and approval.[7] The MDP submitted a plan that called for the use of a statewide caucus, to be held on February 9, 2008, as the first step in its delegate selection process.[8] At the Democratic National Committee's Fall meeting, the Rules and Bylaws Committee stripped Michigan of all of its delegates to the 2008 National Convention as a result of the MDP's decision to scrap the February 9, 2008 Caucus and instead utilize the January 15th primary for the purpose of selecting its delegates.

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[5] A copy of this letter is attached as Exhibit 4 to Plaintiff's Complaint.

[6] *Grebner, et al. v. Secretary of State, ____ Mich ___, ____ NW2d _____(2007)*; last viewed on line on December 10, 2007 at: http://courtofappeals.mijud.net/documents/sct/public/orders/20071121_s135274_43_135274_2007-11-21_or.pdf. The present litigation raises different issues than found in the state court action, and Plaintiff was not a party to the state court action.

[7] See: DSR 1.A. & B.

[8] The MDP's Delegate Selection Rules are attached as Exhibit 2 to Plaintiff's Complaint.

II. THE FIRST AMENDMENT'S PROTECTION OF THE ASSOCIATIONAL INTERESTS OF POLITICAL PARTIES AND ITS MEMBERS

It is settled law that any state law imposing a burden on the operation of the rules promulgated by the National Democratic Party addressing the process of the selection of delegates to its 2008 National Convention is unconstitutional in the absence of a compelling state interest for the enactment of the conflicting state law.[9] *Democratic Party* v. *Wisconsin Ex Rel. La Follette,* 450 U.S. 107, 67 L. Ed. 2d 82, 101 S. Ct. 1010 (1981); *Cousins* v. *Wigoda,* 409 U.S. 1201, 34 L. Ed. 2d 15, 92 S. Ct. 2610 (1972).

At issue in *La Follette* was the constitutionality of a Wisconsin law that established a primary election, the results of which were to be used at a subsequent party run caucus for the purpose of selecting delegates. *La Follette, supra* at 109. The Wisconsin presidential primary election law allowed any qualified voter, including members of other political parties and independents, to vote in the Democratic primary without regard to party affiliation and without requiring a public declaration of party preference. *La Follette, supra* at 110-111. The Wisconsin law was in conflict with Democratic National Party rules in that, while the Wisconsin law established an open primary, National Democratic rules stated:

"Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded."

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[9] For the purposes of the arguments contained in this brief, it must be kept in mind that the Democratic National Party Rules also supersede any inconsistent state party rule or decision. Art. Two, Section 2 of *The Charter and The Bylaws of the Democratic Party of the United States* provides: "State Party rules or state laws relating to the election of delegates to the National Convention shall be observed unless in conflict with this Charter and other provisions adopted pursuant to authority of the Charter, including the Resolutions or other actions of the National Convention." See: Exhibit 2 to this Brief.

La Follette, supra at 109.

In 1979, the Wisconsin Democratic Party submitted its delegate selection rules to the Compliance Review Commission of the Democratic National Party for review and approval. *La Follette, supra* at 112. Because Wisconsin State Party rules had incorporated the provision of Wisconsin law providing for an open primary, its delegate selection plan was rejected by the Compliance Review Commission, and the State Party was informed by the Democratic National Party that Wisconsin delegates who were bound to vote according to the results of the open Wisconsin primary would not be seated. *La Follette, supra* at 113. Subsequent to this notification, the Wisconsin Attorney General filed an action in state court against both the National and the State parties seeking a declaration that the Wisconsin state law delegate selection system was constitutional and that the National Party could not lawfully refuse to seat the Wisconsin delegation at the Convention. *Id.*

In its response filed in the state court action, the State Party agreed with the Attorney General and filed a cross claim against the National Party asking for the same relief sought by the Wisconsin Attorney General. *Id.* The National Party, in turn, argued in the state court litigation that under the First and Fourteenth Amendments it could not be judicially compelled to seat delegates if those delegates were selected in a process that violated its own rules. *Id.* The Wisconsin Supreme Court agreed with the position advanced by the Attorney General and the Wisconsin Democratic Party, but the United States Supreme Court reversed.

The Supreme Court began its analysis in *La Follette* by noting that the closed primary rule arose out of efforts to reform the delegate selection process that began

following the 1968 National Convention, when the convention delegates voted to direct the DNC to engage in a review of its nomination process. *La Follette, supra* at 115. Three separate Commissions, the McGovern/Fraser Commission, *La Follette, supra* at 115, the Mikulski Commission, *La Follette, supra* at 117 and the Winograd Commission, *La Follette, supra* at 118, were appointed in connection with the Democratic Party's review of its Presidential Nomination process.

The McGovern/Frasier Commission concluded:

". . . that a major problem faced by the Party was that rank-and-file Party members had been underrepresented at its Convention, and that the Party should 'find methods which would guarantee every American who claims a stake in the Democratic Party the opportunity to make his judgment felt in the presidential nominating process.'"

La Follette, supra at 116.

The Mikulski Commission, in turn, proposed "binding rules directing state parties to restrict participation in the delegate selection process to Democratic voters", *La Follette, supra* at 117, and the Winograd Commission "recommended that 'participation in the delegate selection process in primaries or caucuses . . . be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded.'" *La Follette, supra* at 119. It made this recommendation, in part, after a study of voting behavior in the Wisconsin open primary system. *La Follette, supra* at 118. The closed primary rule was subsequently implemented by the National Democratic Party, along with a rule that prohibited any exemption that would allow the seating at the National Convention of delegates selected in any but a closed primary system. *La Follette, supra* at 119.

In its review of the Constitutionality of the Wisconsin law, the Supreme Court framed the issue before it as follows:

"The question in this case is not whether Wisconsin may conduct an open primary election if it chooses to do so, or whether the National Party may require Wisconsin to limit its primary election to publicly declared Democrats. Rather, the question is whether, once Wisconsin has opened its Democratic Presidential preference primary to voters who do not publicly declare their party affiliation, it may then bind the National Party to honor the binding primary results, even though those results were reached in a manner contrary to National Party rules."

La Follette, supra at 120.

In answering this question in the negative and reversing the Wisconsin Supreme Court, the Supreme Court stated that this issue had been resolved in *Cousins* v. *Wigoda, supra*:

"In Cousins the Court reviewed the decision of an Illinois court holding that state law exclusively governed the seating of a state delegation at the 1972 Democratic National Convention, and enjoining the National Party from refusing to seat delegates selected in a manner in accord with state law although contrary to National Party rules. Certiorari was granted "to decide the important question . . . whether the [appellate] [court] was correct in according primacy to state law over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention." Id., at 483. The Court reversed the state judgment, holding that "Illinois' interest in protecting the integrity of its electoral process cannot be deemed compelling in the context of the selection of delegates to the National Party Convention." Id., at 491. That disposition controls here."

La Follette, supra at 121.

The *La Follette* Court then explained its holding in *Cousins:*

"The Cousins Court relied upon the principle that "[the] National Democratic Party and its adherents enjoy a constitutionally protected right of political association." [Citation omitted] This First Amendment freedom to gather in association for the purpose of advancing shared beliefs is protected also by the Fourteenth Amendment from infringement by any State. Kusper v. Pontikes, 414 U.S. 51, 57; Williams v. Rhodes, 383 U.S. 23, 30-31. See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460. And the freedom to associate for the "common advancement of political beliefs," Kusper v. Pontikes, supra, at 56, necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only. "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." Sweezy v. New Hampshire, 354 U.S. 234, 250; see NAACP v. Button, 371 U.S. 415, 431."

La Follette, supra at 121.

As to the case before it, the *La Follette* Court found that the ". . . members of the National Party, speaking through their rules, chose to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention", *La Follette, supra* at 122, and that Wisconsin had failed to advance any interest sufficiently compelling as to justify ". . . its substantial intrusion into the associational freedom of members of the National Party." *La Follette, supra* at 126.

The Sixth Circuit has twice addressed the associational rights protected in the *Cousins* and *La Follette* decisions. *Ferency* v. *Austin,* 666 F.2d 1023 (6th Cir. 1981) and *Heitmanis* v *Austin*, 899 F.2d 521 (6th Cir. 1990). In *Ferency*, the Appellant brought an action seeking a declaration that the defendants in that action, the Michigan Secretary of State, the Michigan Director of the Elections Division, and the State Board of Canvassers, were obligated to enforce a Michigan statute that required the MDP to use a primary for the purpose of selecting delegates to its national convention. *Ferency, supra* at 1024. Additionally, because the MDP had notified the Secretary of State that it would (contrary to state law) be using a caucus for the purpose of selecting its delegates, Ferency also sought a ruling that the use of the caucus for that purpose was unconstitutional. *Id.* The Sixth Circuit rejected this challenge on the basis of *Cousins* and *La Follette*:

"We conclude that, in the light of the decisions of the Supreme Court in Cousins v. Wigoda, 419 U.S. 477, 95 S. Ct. 541, 42 L. Ed. 2d 595 (1975) and in LaFollette, supra, the Michigan statute could not be enforced so as to control the method of selection of Michigan delegates to the Democratic National Convention."

Ferency, supra at 1025.

Similarly, in *Heitmanis, supra,* the Sixth Circuit found unconstitutional a portion of Michigan election law that conflicted with Michigan Republican Party rules concerning the selection of delegates to the Republican county conventions[10], finding that the election law provision constituted a substantial burden on the associational rights of the Michigan Republican Party, and that Michigan failed to demonstrate either a compelling state interest or that its law establishing automatic delegate eligibility for two categories of individuals for the purpose of the State Party's county conventions was narrowly tailored to serve that interest. *Heitmanis, supra* at 529.

III. MICHIGAN 2007 PA 52 VIOLATES BOTH THE NATIONAL DEMOCRATIC PARTY'S AND PLAINTIFF'S ASSOCIATIONAL RIGHTS

A. PLAINTIFF'S STANDING

In *Gable* v *Patton*, 143 F. 3d 940 (6th Cir. 1998) Robert Gable, a candidate in the 1995 Kentucky gubernatorial primary filed suit challenging several provisions of that state's election and campaign finance laws. *Gable, supra* at 943. After prevailing on only one of his numerous claims, Gable filed an appeal and Kentucky and the other state defendants took a cross-appeal from the District Court rulings in the litigation.

In its Opinion the Sixth Circuit, *sua sponte*, raised the issue of Gable's standing. The state Defendants argued that Gable lacked standing for the reason that "the associational rights that he identifies are not his personally but are only those of the Republican Party." *Gable, supra* at 945-946. Those Defendants also argued that Gable could not assert the rights of an unincorporated association (the state Republican Party) without pleading his claim as a class action. *Gable, supra* at 946.

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[10] State law granted automatic delegate status to party nominees and legislators at the state and county convention levels, *Heitmanis, supra* at 522, while the state Republican Party rules explicitly banned automatic delegate status. *Heitmanis, supra* at 523.

Gable offered two arguments in opposition, asserting he had standing both for the reason that he was a party member participating in the selection of the party's gubernatorial candidate, and that he himself was a candidate in the Republican Party primary. *Id.* Responding to these arguments, the Sixth Circuit found standing:

"We conclude that Plaintiff's argument is correct, at least with regard to his status as a party member. The Supreme Court has repeatedly stated that "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents." Sweezy v. New Hampshire, 354 U.S. 234, 250, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957); accord Tashjian v. Republican Party of Conn., 479 U.S. 208, 215, 93 L. Ed. 2d 514, 107 S. Ct. 544 (1986); Democratic Party of U.S. v. Wisconsin ex rel. LaFollette, 450 U.S. 107, 122, 67 L. Ed. 2d 82, 101 S. Ct. 1010 (1981); see also Julia E. Guttman, Primary Elections and the Collective Right of Freedom of Association, 94 Yale L.J. 117,117 n.3 (1984) ("In the past, when a political party has brought suit, it has alleged an infringement of the rights of its members. Thus, when a political party can sue, any party member could also sue.")."

Id.

In this instance, Plaintiff is a member of both the State and National Democratic parties and thus has standing to assert the rights and advance the arguments found in both her complaint and this brief.[11]

B. 2007 PA 52 VIOLATES BOTH NATIONAL AND STATE PARTY RULES ON DELEGATE SELECTION

1. 2007 PA 52 TIMING

The 2004 Democratic National Convention (hereinafter "DNC") passed a resolution creating the Commission on Presidential Nomination and Scheduling.[12] The Commission was tasked with the responsibility of studying the timing of Democratic presidential primaries and caucuses and developing appropriate recommendations for the

[11] Hayes Affidavit, ¶ 3, attached as Exhibit 3 to this brief. As stated in her Affidavit, in addition to her membership status, Plaintiff also would have participated in campaign activities and would have voted in the February 9, 2006 Democratic Caucus.

[12] The Commission Report is attached as Exhibit One to this Brief.

timing of the 2008 Presidential nomination cycle. *Commission Report,* p. 9. Former Secretary of Transportation Alexis M. Herman and Congressman David Price were appointed as co-chairs of the Commission (hereinafter the "Herman/Price Commission").

The Herman/Price Commission began work in March of 2005. *Id.* It held four public hearings on this matter, *Commission Report,* pp.29-37, received significant input from various state parties, individuals and organizations having extensive knowledge of the presidential primary process, and conducted an extensive review of the timing of the delegate selection process for the 1972 through 2000 election cycles. *Commission Report,* pp. 20-25.

In its report, the Herman/Price Commission recommended:

"Preserving the first-in-the-nation status of Iowa and New Hampshire but adding other states in the pre-window period.

"Adding 1 or 2 new first-tier caucuses between Iowa and New Hampshire, and 1 or 2 new primaries between New Hampshire and the opening of the window for all other states on February 5, 2008."

Commission Report, p. 9.

Of particular concern to the Herman/Price Commission was the developing trend of "front-loading"[13] the delegate selection process:

"The continued front-loading of the nominating process has been steady and inexorable. Not only has the process started ever earlier; it has also concluded ever earlier; as increasing percentages of delegates are effectively selected earlier in the process. As noted above, the Hunt Commission found that in 1972, 17% of the delegates had been allocated (bound to a presidential candidate) by mid-April, while in 1976 the comparable percentage was 33% and in 1980, 44%. In 1984, by the end of the first week after the window opened, 40.3% of the delegates had been allocated and by mid-April, 57.4% had been allocated. In 1992, by the end of the second Tuesday of the window (March 10), 40% of the delegates had been allocated and almost exactly half had been allocated by the end of March. In 1996, by the second Tuesday of the window (March 12), 54% of the

[13] The Commission defined the term "front-loading" as: ". . . the early bunching of contests at the beginning of the formal window period." *Commission Report,* p. 18, fn 3.

pledged delegates had been allocated. In 2000, by the second Tuesday (March 14) 66.67%, two-thirds, of the delegates had been allocated. In 2004, with the regular window opening earlier, by the second Tuesday in March (March 9), 71.4 % of the delegates had been allocated. Commission members and presenters from virtually all sides of the calendar issue expressed serious concerns about the front-loading trend. In this regard, representatives of Michigan and other states were joined by party leaders from Iowa and New Hampshire. Most of the presenters echoed these concerns. Dr. Mann and Dr. Walters both emphasized that broader participation in the process was limited by front-loading. Mr. Gans, the League of Women Voters and others made the same point. Front-loading, as William Mayer and Andrew Busch argue, "greatly accelerates the voters' decision process and thus makes the whole system less deliberative, less rational, less flexible, and more chaotic.... Voters are forced to reach a final decision about their party's next presidential nominee in a remarkably short period of time.... Equally important, front-loading makes it all but impossible for the voters to reconsider their initial judgment if new information becomes available."

The National Democratic Party incorporated the two Recommendations quoted above into a new rule on the timing of the delegate selection process:

"A. No meetings, caucuses, conventions or primaries which constitute the first determining stage in the presidential nomination process (the date of the primary in primary states, and the date of the first tier caucus in caucus states) may be held prior to the first Tuesday in February or after the second Tuesday in June in the calendar year of the national convention. Provided, however, that the Iowa precinct caucuses may be held no earlier than 22 days before the first Tuesday in February; that the Nevada first-tier caucuses may be held no earlier than 17 days before the first Tuesday in February; that the New Hampshire primary may be held no earlier than 14 days before the first Tuesday in February; and that the South Carolina primary may be held no earlier than 7 days before the first Tuesday in February. In no instance may a state which scheduled delegate selection procedures on or between the first Tuesday in February and the second Tuesday in June 1984 move out of compliance with the provisions of this rule.

Delegate Selection Rule 11.A.[14]

§ 613a(1) of Michigan 2007 PA 52[15] establishes the following date for the 2008 Democratic Presidential Primary:

"Except as otherwise provided in subsection (2), a presidential primary shall be conducted under this act on January 15, 2008, and on the fourth Tuesday in February in each following presidential election year."

§ 613a(2) of Michigan 2007 PA 52 states:

[14] The DSR are attached to Plaintiff's Complaint as Exhibit 1.

[15] This Act is attached as Exhibit 3 to Plaintiff's Complaint.

"Not later than 4 p.m. on November 14, 2007, the chairperson of each participating political party shall notify the secretary of state if his or her political party will be using a method other than the results of the January 15, 2008 presidential primary to select delegates to his or her respective national convention to nominate a candidate for president of the United States in 2008."

On November 14, 2007, the Chairman of the MDP notified the Michigan Secretary of State in writing that the MDP would both participate in the January 15th Presidential Primary and use the results of that Primary for the purpose of selecting Delegates to the National Convention if two conditions were met: first, that 2007 PA 52 be upheld on appeal; and, second, that the Michigan Republican Party also use the January 15th Primary to select its delegates to its National Convention.[16] On November 21, 2007, in *Grebner, et al v Secretary of State,* the Michigan Supreme Court upheld the constitutionality of 2007 PA 52.[17] Further, the Michigan Republican Party has publicly declared that it will use the January 15th primary for the purpose of selecting its delegates. Thus, as things currently stand, the MDP is participating in the January 15, 2008 primary, and is obligated by operation of state law to use the primary results for the purpose of selecting delegates to the National Convention.[18]

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[16] A copy of this letter is attached as Exhibit 4 to Plaintiff's Complaint.

[17] *Grebner, et al. v. Secretary of State,* ____ *Mich* ___, ____ *NW2d* _____*(2007)*; last viewed on line on December 10, 2007 at: http://courtofappeals.mijud.net/documents/sct/public/orders/20071121_s135274_43_135274_2007-11-21_or.pdf.

[18] The MDP's Revised Non-DNC approved Delegate Selection Plan, section 1.B.1., states it will use the results of the January 15th primary for the purpose of selecting its delegates: "Michigan will use a proportional representation system based on the results of a state-run presidential primary on January 15, 2008 for apportioning delegates to the 2008 Democratic National Convention." The revised plan is attached as Exhibit 4 to this brief.

This is clearly impermissible in light of *La Follette* and *Cousins,* as the Michigan January 15th primary law conflicts with the Democratic National Party rules on the timing of the delegate selection process in two separate ways. First, under DSR 11.A., only the states of Iowa, New Hampshire, South Carolina and Nevada are allowed to hold an event constituting the first determining stage in the presidential delegate selection process prior to February 5, 2008. Second, under National Party Rules, the state Democratic Party was required to submit its delegate selection plan to the National Party. It did so, and the National Party approved the MDP's proposed plan setting up the specific date of February 9, 2008 as the date the MDP was to run a caucus as the first step in its delegate selection process.[19]

Similar to the situation in *La Follette*, in which the Supreme Court was reviewing a Democratic National Party Rule that had come into existence after review by three separate commissions, this Court has before it the findings of the Herman/Price Commission Report, a Report that contains a careful analysis of the associational interests implicated and affected by the timing of the Democratic National Party's Presidential delegate selection process. Of particular concern to the Commission was the goal of broader democratic voter participation in the delegate selection process:

"The front-loading of states at the beginning of the calendar has also limited broader participation in the process. The trend toward bunching up on the first day of the window, or in the first month, does not enhance the role of any state or group of states.

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[19] The Michigan Democratic Party's DNC approved Delegate Selection Plan is attached as Exhibit 2 to Plaintiff's Complaint. Section 1.B.1. of this plan states: "Michigan will use a proportional representation system based on the results of a state party-run presidential primary, traditionally called a caucus in Michigan, for apportioning delegates to the 2008 Democratic National Convention. References in this Plan to "state party-run presidential primary" or "caucus" shall be a reference to the same process for selecting delegates."

To be effective and to receive attention from candidates and the press, states must spread out the dates of their contests and restore a more deliberate pacing to the process."

Commission Report, p. 9.

As the Commission observed, front-loading also impacts campaign activities:

"The front-loading of states soon after the first-in-the-nation contests in Iowa and New Hampshire reduces the amount of time for presidential candidates to continue to make their case and for voters to assess the candidates."

Commission Report, p. 35.

In *La Follette,* the Supreme Court was clear that a Court, in a case such as the present one addressing the associational interests of a political party and its members, is to defer to the party's determination of both the asserted interests of a political party and its adherents and the manner it chooses to promote and achieve those interests:

"The State argues that its law places only a minor burden on the National Party. The National Party argues that the burden is substantial, because it prevents the Party from "[screening] out those whose affiliation is . . . slight, tenuous, or fleeting," and that such screening is essential to build a more effective and responsible Party. But it is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational. It may be the case, of course, that the public avowal of party affiliation required by Rule 2A provides no more assurance of party loyalty than does Wisconsin's requirement that a person vote in no more than one party's primary. But the stringency, and wisdom, of membership requirements is for the association and its members to decide -- not the courts -- so long as those requirements are otherwise constitutionally permissible. 26 Cf. Ripon Society, Inc. v. National Republican Party, 173 U. S. App. D. C. 350, 368, 525 F.2d 567, 585 (en banc) ("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the protection of the Constitution . . .") (emphasis of the court), cert. denied, 424 U.S. 933"

La Follette, supra at 123.

Further, as demonstrated in *La Follette*, Michigan's January 15 primary law can stand only if the state can demonstrate to this Court a narrowly tailored compelling interest for the burden it has placed upon the associational rights of both the National Democratic Party and its members, such as Plaintiff Hayes. *La Follette, supra* at 124-126. This will be an exceptionally difficult burden for the state to carry given the fact that, after the 2004 Convention, the Democratic National Party engaged in a thorough review of the timing of the delegate selection process, and devised a nationwide delegate selection schedule for, among other reasons, to combat the "front-loading" of the delegate selection process and the concomitant harm brought by that tendency to both the voters and the candidates.

2. MICHIGAN 2007 PA 52 AND DELEGATE SELECTION METHOD

Rule 1 of the DSR required the MDP to submit for approval by the by the DNC Rules and Bylaws Committee its state level delegate selection plan. DRS Rules 1.A. and 1.B. contain 29 items that Michigan's delegate selection plan was to address, including a requirement that the State Party indicate whether it would be utilizing a primary, a caucus, or a convention for the purpose of selecting its delegates. *DSR 1.A.2.*

As noted above, the plan submitted by the MDP, and approved by the National Party's Rules and Bylaws Committee, established a state wide caucus on February 9, 2008 as the first step in the delegate selection process in Michigan. Michigan's primary law - which creates a primary on January 15, 2008 as the first step in the Democratic delegate selection process - clearly conflicts with the procedure proposed by the MDP and approved by the Democratic National Party, the February 9th caucus. Under the holding of *La Follette* and *Cousins*, the state primary law's delegate selection

mechanism, which requires the use of the results of the January 15th primary election for the purpose of delegate selection as a condition of participating in the January 15th , is a significant infringement into and burden upon the associational rights of both the Democratic National Party and the Democratic voters (such as Plaintiff) of this state.

3. MICHIGAN 2007 PA 52 PUBLIC DECLARATION OF PARTY PREFERENCE

One of the delegate selection rules of the Democratic National Party allows only publicly professed Democrats to participate in its delegate selection process. *DSR 2.A.* Subsection 1. of this rule requires a public declaration of the voter's allegiance to the Democratic Party, and further requires that this allegiance be publicly recorded.

"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."[20]

In contrast to the Democratic National Party's requirements of a publicly expressed preference for the Democratic Party that is publicly recorded, the Michigan primary statute contains provisions designed to keep a voter's party preference essentially secret, and the statute enforces its secrecy provisions through the teeth of criminal sanctions.

§ 615c(1) of Michigan 2007 PA 52 states:

"In order to vote at a presidential primary, an elector shall indicate in writing, on a form prescribed by the secretary of state, which participating political party ballot he or she

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[20] The wording of subsection 1. of this rule is virtually identical to the Rule at issue in *La Follette*. *La Follette, supra* at 109. The Rule at issue in *La Follette* stated, in pertinent part: "Participation in the delegate selection process in primaries or caucuses shall be restricted to Democratic voters only who publicly declare their party preference and have that preference publicly recorded."

wishes to vote when appearing to vote at a presidential primary. In fulfilling the requirements of this subsection, the secretary of state shall prescribe procedures intended to protect or safeguard the confidentiality of the participating political party ballot selected by an elector consistent with this section."

Subsection (4) of this section provides that the form utilized for recording the party preference of an individual voter is confidential:

"Except as otherwise provided in this section, the information acquired or in the possession of a public body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246, and shall not be disclosed to any person for any reason."

Under subsection (5) of the Act[21], a voter's preference may only be disclosed to the chairperson of the political parties participating in the primary, while under subsection (7) the political parties are prohibited from releasing voter preference information "to any other person, organization, or vendor." Subsection (11)[22] makes it a misdemeanor, punishable by 93 days in jail and a $ 1,000.00 fine, to violate the non-disclosure provisions of the Act.

The Supreme Court has recognized that a political party is free to choose the type of voter who may participate in its Presidential delegate selection process, and is free to exclude those it does not wish to participate:

"Consistent with this tradition, the Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs," Tashjian, 479 U.S. at 214-215, which "necessarily presupposes the freedom to identify

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[21] Subsection (5) reads: "To ensure compliance with the state and national political party rules of each participating political party and this section, the records described in subsection (3) shall be provided to the chairperson of each participating political party as set forth in subsection (6)."

[22] (11) Any person who uses the information indicating which participating political party primary ballot an elector selected at a presidential primary for a purpose not authorized in this section is guilty of a misdemeanor punishable by a fine of $1,000.00 for each voter record that is improperly used or imprisonment for not more than 93 days, or both.

the people who constitute the association, and to limit the association to those people only," La Follette, 450 U.S. at 122. That is to say, a corollary of the right to associate is 530 U.S. 567, 572; 120 S. Ct. 2402, 2407; 147 L. Ed. 2d 502, 2000 U.S. LEXIS 4303 the right not to associate. "'Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.'" 450 U.S. at 122, [575] n. 22 (quoting L. Tribe, American Constitutional Law 791 (1978)). See also Roberts v. United States Jaycees, 468 U.S. 609, 623, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984)."

California Democratic Party v. *Jones*, 530 U.S. 567, 574, 147 L. Ed. 2d 502, 120 S. Ct. 2402 (2002).

In this instance the National Democratic Party has chosen to allow only those voters who are comfortable with making a public declaration that is publicly recorded to participate in its Presidential delegate selection process. To the extent the requirement of "public preference publicly recorded" weeds out of the Democratic delegate selection process those voters uncomfortable with such a requirement as a condition for participation in the selection of the Democratic Presidential Nominee, the requirement is constitutionally protected, as the right to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only . . . ." *La Follette, supra* at 122. The Supreme Court has recognized that the First Amendment provides profound respect for, and protection of, a political party and its adherent's associational rights, and that the First Amendment protects a political party and its adherents from any situation in which the state, through regulation, distorts the party's candidate selection process without a compelling reason to do so:

"On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions -- thus impairing the party's essential functions -- and that political parties may accordingly protect themselves 'from intrusion by those with adverse political principles.'"

La Follette, supra at 122.

In *California Democratic Party*, the Supreme Court found that a California law requiring the Democratic Party to utilize a blanket primary system[23], when the party's rules required the use of a closed primary, heavily burdened the party's associational freedoms. *California Democratic Party, supra* at 582. Because the state could not advance any narrowly tailored compelling interest for the burden, Justice Scalia, in a 7-2 Opinion, found the law unconstitutional. *California Democratic Party, supra* at 582-87.

IV. THE IMPACT OF 2007 P4 52 ON PLAINTIFF'S OTHER PROTECTED ASSOCIATIONAL AND FREE SPEECH INTERESTS

A. INTRODUCTION

The prior section of this Brief argued, on the basis of *La Follette* and cases applying the decisional rationale of *La Follette*, cases that also addressed the interplay of state election law and the associational interests of voters and political parties, that Michigan 2007 PA 52 impermissibly conflicts with Democratic National Party Rules concerning the timing of the first step in the delegate selection process, the method utilized for that first step (caucus vs. primary), and the associational requirement that those participating in the first step of the delegate selection process be required to state a public preference for voting as a Democrat.

This section of the brief addresses First Amendment concerns neither raised nor addressed in La *Follette*, *Cousins*, *Ferency* or *Hermanaitis*: the effect on Plaintiff's protected associational interests in being exposed to, and being able to participate in,

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[23] As described in the Opinion, California's "blanket" primary system resulted in a system in which any person who was entitled to vote, including persons who were not registered members of any party, could vote for any candidate of any party for a given office.

campaign activity, and Plaintiff's First Amendment right to cast an effective vote in the first step of the delegate selection process. This section of the brief argues that the combination of the state primary law and the state Democratic Party's decision to utilize the state created January 15th primary as the first step in its delegate selection process, has impermissibly burdened Plaintiff's protected associational and free speech rights, in the two areas identified.

B. CAMPAIGN ACTIVITIES AND A VOTER'S ASSOCIATIONAL AND FREE SPEECH RIGHTS[24]

The Supreme Court has on numerous occasions recognized that state interference in the election process implicates a voter's First Amendment associational rights as they pertain to campaign activities. See, e.g., *Anderson* v. *Celebrezze*, 460 U.S. 780, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983); *Illinois Elections Board* v. *Socialist Worker's Party,* 440 U.S. 173, 59 L. Ed. 2d 230, 99 S. Ct. 983 (1979). Campaign activities by a voter, in turn are also protected by the First Amendment's Free Speech clause.[25]

The importance of the existence of campaign opportunity is rooted firmly in the concept of the Marketplace of Ideas, a concept at the core of First Amendment jurisprudence. But the protection of campaign activity is not limited to the sphere of the candidate for public office; rather, such protection extends to the individual voter, as the Supreme Court has recognized that for purposes of the First Amendment there is no clear

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[24] The standard of review for the asserted constitutional injury to Plaintiff's Associational rights is as found in *Clingman* v. *Oklahoma,* 544 U.S. 581, 592, 161 L. Ed. 2d 920, 125 S. Ct. 2029 (2005). If this Court finds the associational burden to be substantial, as Plaintiff argues, then this Court must apply the strict scrutiny analysis. *Id.* It must be noted that the Sixth Circuit has interpreted *Clingman* as standing for the proposition that strict scrutiny is warranted if a heavy or severe burden is found. *Morrison* v. *Colley,* 467 F. 3d 503, 506 (6th Cir. 2006).

[25] See, e.g., *Buckley* v. *Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976).

distinction between candidates and voters.[26] For example, in *Anderson*, the Court observed:

"Nevertheless, as we have recognized, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." Bullock v. Carter, 405 U.S. 134, 143 (1972)."

Anderson, supra at 786.

Interestingly (and surely because of the symbiotic relationship between the interests of the candidate and the voter) the *Anderson* Court initially focused its analysis of the issues before it in that case on the effect on the voter, despite the fact that it was the candidate prosecuting the litigation:

"We began our inquiry by noting that our primary concern is not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson's candidacy and the views he espoused."

Anderson, supra at 806.

The availability of campaign activity impacts a voter in two broad ways. First, the Court has recognized that campaign activities are designed to educate a voter concerning the issues.[27] It would necessarily follow from this that a voter, and in particular a Michigan Democratic voter interested in participating in the delegate selection process, has a First Amendment right to be exposed to such educational activities as they relate to issues important to Michigan's Democratic voters. Traditionally, educationally oriented campaign activities have included public events and

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[26] This approach is conceptually identical to *La Follette.* As noted in the section of this Brief addressing Plaintiff's standing, the Supreme Court has recognized the congruence of the interests of a political party and its adherents.

[27] *Anderson, supra* at 798.

rallies at which a primary candidate makes an appearance, the use of handbills, circulars, direct mail and other print media, sent either directly to a potential voter or made available in publications of general circulation, and, in the last few election cycles, the use of the internet to reach voters. That these educational campaign activities in the course of a primary election receive the same First Amendment protection available in a general election is beyond dispute: "Free discussion about candidates for public office is no less critical before a primary than before a general election." *Eu* v. *San Francisco County Democratic Central Committee*, 489 U.S. 214, 223, 103 L. Ed. 2d 271, 109 S. Ct. 1013, 1020 (1989).

Second, the Court has recognized, broadly, that not only voting, but other political activities[28] engaged in by a voter that constitute party building activities, [29] receive First Amendment protection[30]. The Sixth Circuit has recognized that such activities include organizing and developing a campaign apparatus in Michigan, recruiting supporters, and volunteer work for an individual primary candidate. See, e.g., *Libertarian Party* v. *Blackwell*, 462 F. 3d 579, 586 (6th Cir. 2006).

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[28] "In our first review of Ohio's electoral scheme, *Williams* v. *Rhodes*, 393 U.S. 23, 30-31 (1968), this Court explained the interwoven strands of "liberty" affected by ballot access restrictions: "In the present situation the state laws place burdens on 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." *Anderson, supra* at 787.

[29] "Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party, supra* at 573.

[30] ". . . [A]n election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens." *Anderson, supra* at 787.

As a result of the January 15th primary law, all of the Democratic Presidential contenders are, by operation of DNC rule, prohibited from campaigning in Michigan in connection with the January 15th primary upon pain of the automatic loss of delegates to the National Convention:

"A presidential candidate who campaigns in a state where the state party is in violation of the timing provisions of these rules, or where a primary or caucus is set by a state's government on a date that violates the timing provisions of these rules, may not receive pledged delegates or delegate votes from that state. 'Campaigning' for purposes of this section includes, but is not limited to, purchasing print, internet, or electronic advertising that reaches a significant percentage of the voters in the aforementioned state; hiring campaign workers; opening an office; making public appearances; holding news conferences; coordinating volunteer activities; sending mail, other than fundraising requests that are also sent to potential donors in other states; using paid or volunteer phoners or automated calls to contact voters; sending emails or establishing a website specific to that state; holding events to which Democratic voters are invited; attending events sponsored by state or local Democratic organizations; or paying for campaign materials to be used in such a state. The Rules and Bylaws Committee will determine whether candidate activities are covered by this section."

DSR Rule 20.C.1.b.

The list of prohibited campaign activities is broad, and implicates both the educational campaign activity[31] as well as campaign activity addressing an individual's decision to associate with a particular primary candidate through volunteer efforts.[32] This automatic

[31] "[An] election campaign is a means of disseminating ideas as well as attaining political office. . . ." *Illinois Elections Board,* v. *Socialist Workers Party,* 440 U.S. 173, 186, 59 L. Ed. 2d 230, 99 S. Ct. 983 (1979).

[32] The Supreme Court has also found protection for these types of political activities in the 14th Amendment:

"Writing for a unanimous Court in *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958), Justice Harlan stated that it "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Anderson, supra* at 786-87.

ban on campaign activity by Democratic primary contenders is in effect in Michigan as a direct result of the operation of Michigan 2007 PA 52, establishing, as it does, a January 15, 2008 primary date in violation of the timing provision of DSR 11.A., and requiring, as it does, that the results of that primary be utilized for the purpose of delegate selection.

C. THE LOSS OF DELEGATES AND THE RIGHTS TO CAST AN EFFECTIVE VOTE[33]

On Saturday, December 1, 2007 the Rules and Bylaws Committee of the National Democratic Party voted to bar Michigan from seating any delegates to the 2008 National Convention. This sanction was imposed as a result of the MDP's decision to participate in the state sponsored January 15, 2008 primary. As a result, Michigan's Democratic primary voters have been denied the singular significance of casting a vote in the Democratic primary: the right to participate effectively in the selection of the Democratic Party's Presidential nomination process. In *Libertarian Party, supra* at 585, the Sixth Circuit observed that the "... right to cast an effective vote "is of the most fundamental significance under our constitutional structure."[34] (Quoting *Burdick* v. *Takushi,* 504 U.S.

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[33] Plaintiff asserts that the *Clingman* standard of review also applies to this section of her brief. Again, Plaintiff asserts the existence of a substantial burden in that any vote cast in the January 15th Democratic primary is an ultimately meaningless act. Again, it must be noted that the Sixth Circuit has interpreted *Clingman* as standing for the proposition that strict scrutiny is warranted if a heavy or severe burden is found. *Morrison* v. *Colley,* 467 F. 3d 503, 506 (6th Cir. 2006).

[34] See also: *Williams* v. *Rhodes,* 393 U.S. 23, 30, 21 L. Ed. 2d 24, 89 S. Ct. 5 (1968):

"In the present situation the state laws place burdens on 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."

428, 433, 119 L. Ed. 2d 245, 112 S. Ct. 2059, (1992)); See also: *Kusper* v. *Pontikes*, 414 U.S. 51, 58, 38 L. Ed. 2d 260, 94 S. Ct. 303 (1973): "Under our political system, a basic function of a political party is to select the candidates for public office to be offered to the voters at general elections. A prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process."

The effect of the loss on Michigan Democratic voters of the right to select delegates for the purpose of the party's presidential nomination through a vote is not limited just to Michigan's Democratic voters, but rather it also has national repercussions as the significance of a vote made in connection with any stage of the process of selecting a president, including any individual state's presidential delegate selection process, is not confined to the voter or even the state in which the vote occurs. Rather, any corruption or diminution in value of the vote in any state's presidential delegate selection process is of national significance and reverberates beyond Michigan's borders. As the *Anderson* Court noted, the inability of Anderson's supporters to vote for him had the effect of diluting ". . . the potential value of votes cast for him on other states."[35] The following quote from *Anderson, supra* at 795, states the Supreme Court's analysis of the nationwide ripple emanating from Ohio's unconstitutional ballot access restrictions, and applies equally to the present case:

"Furthermore, in the context of a Presidential election, state-imposed restrictions implicate a uniquely important national interest. For the President and the Vice President of the United States are the only elected officials who represent all the voters in

[35] "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."

Reynolds v. *Sims,* 377 U.S. 533, 555, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964).

the Nation. Moreover, the impact of the votes cast in each State is affected by the votes cast for the various candidates in other States. Thus in a Presidential election a State's enforcement of more stringent ballot access requirements, including filing deadlines, has an impact beyond its own borders. Similarly, the State has a less important interest in regulating Presidential elections than statewide or local elections, because the outcome of the former will be largely determined by voters beyond the State's boundaries. This Court, striking down a state statute unduly restricting the choices made by a major party's Presidential nominating convention, observed that such conventions serve "the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." Cousins v. Wigoda, 419 U.S. 477, 490 (1975). The Ohio filing deadline challenged in this case does more than burden the associational rights of independent voters and candidates. It places a significant state-imposed restriction on a nationwide electoral process."

V. THE MICHIGAN DEMOCRATIC PARTY IS ENGAGED IN STATE ACTION

In *Heitmanis*, the Sixth Circuit utilized the two-part state action test found in *Lugar* v. *Edmondson Oil,* 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982):

"First, the deprivation must be caused by exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor."

As noted *supra*, in § II of this Brief , the Sixth Circuit in *Heitmanis* was addressing the constitutionality of a state law granting automatic delegate status to party nominees and legislators at the state and county convention levels in direct contravention of Republican State Party rules. Finding state action, the Sixth Circuit wrote:

"We conclude that the action was fairly attributable to the State of Michigan because the State enforced the Election Law. As stated above, National Party Rule 32(a) is a very general rule which allows state laws such as Michigan's to operate. The Michigan state legislature -- not the National Party -- set up the elaborate scheme of automatic delegates for county and state conventions."

Heitmanis, supra at 527.

So, too, in this case. The Michigan legislature created the January 15th primary law and imposed the condition that the results of the primary election be used as the first step in the MDP's delegate selection process.

In addition, the Sixth Circuit, in *Banchy* v. *The Republican Party of Hamilton County,* 898 F. 2d 1192, 1196 (6th Cir. 1990), acknowledged that the Supreme Court's *White Primary* cases[36] stand for the proposition that conducting an election is a governmental function and constitutes state action no matter who actually conducts the election.

VI. A PRELIMINARY INJUNCTION IS APPROPRIATE

A request for a preliminary injunction is governed by Federal Rule of Civil Procedure 65. It is "an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972, 138 L. Ed. 2d 162, 117 S. Ct. 1865, (1997). In deciding a Rule 65 motion, this Court is to consider four factors:

(1) whether Plaintiff has a reasonable likelihood of success on the merits;

(2) whether Plaintiff likely will suffer irreparable harm if the alleged conduct continues;

(3) the balance of hardships on the parties;

(4) the impact of the injunction on the public interest.

Project Vote v. *Blackwell,* 455 F. Supp 2d 694, 700 (6th Cir. 2006).

In addressing a Rule 65 motion, a Court is to balance the four factors:

" 'It is important to recognize that the four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied. These

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[36] *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953), and *Smith* v. *Allright*, 321 U.S. 649, 88 L. Ed. 987, 64 S. Ct. 757 (1944).

factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements.' In re Eagle-Picher Industries, Inc., 963 F.2d 855, 859 (6th Cir. 1992). Thus, 'the degree of likelihood of success required may depend on the strength of the other factors.' In re De Lorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985). 'In general, the likelihood of success that need be shown (for a preliminary injunction) will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.' Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982)"

In her brief, Plaintiff has identifies three ways in which Michigan 2007 PA 52 impacts both her associational rights as well as the associational rights of the Democratic Party as it relates to the timing, method and voter participation in the delegate selection process. Plaintiff submits, on the basis of *La Follette, Cousins, Heitmanis and Ferency*, she has made a clear showing that Michigan's January 15th primary law imposed a heavy, substantial and/or severe burden on the associational rights identified in this brief. Should the Defendants fail to advance a compelling state interest for the burden placed upon these rights, then Plaintiff will have clearly demonstrated that she is likely to prevail on the merits as to those arguments.

Plaintiff has also argued the existence of burdens on her right to engage in campaign activities and the right to cast an effective vote. Like *La Follette,* a case in which the Wisconsin delegates were not being seated as a reaction to the constitutionally offensive Wisconsin statute at issue in that case, the burdens on the rights identified by Plaintiff in §IV of this Brief, *supra*, flow out of the Michigan Legislature's decision to enact 2007 PA 52. Again, absent a demonstration of a compelling state interest for the heavy burden placed upon those rights, Plaintiff will have clearly demonstrated that she is likely to prevail on the merits as to those arguments.

Plaintiff will also suffer irreparable injury should the January 15th Primary proceed. As argued in this brief, the January 15th vote, on the Democratic ballot, is

meaningless as the National Democratic Party has already voted to refuse to seat any delegates selected on the basis of the results of the January 15th Primary. Further, campaigning in Michigan by candidates on the Democratic Ballot is prohibited. Finally, the mere existence of the January 15th Primary law, which requires that its results be used for the purposes of delegate selection, violates Plaintiff's associational rights as to the timing and method of delegate selection as well as that provision of the National Democratic Party rules which require those who vote in connection with the delegate selection process make a public declaration, publically recorded, of their party preference.

Plaintiff concedes that, if this Court issues a preliminary injunction halting the January 15th primary, harm will be caused to those who wished to participate in the Republican Primary.[37] This, alone, however, is not reason for refusing Plaintiff's request for a preliminary injunction. Plaintiff has demonstrated the Constitutional infirmity of 2007 PA 52, and it was the Michigan Legislature's decision to include a non-severability clause[38] in the legislation. If, as Plaintiff argues, 2007 PA 52 is Constitutionally infirm, substantial harm would flow by not acting upon that conclusion for, indeed, the public interest (the fourth prong of the test) is always served by proper judicial understanding of the Constitutionality-or lack thereof- of a given statute.

[37] If Plaintiff is correct as to any or all of the Constitutional issues raised, then there will be no harm to Democratic primary voters.

[38] "Enacting section 1. 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."

VII. REQUEST FOR EXPEDITED CONSIDERATION

Plaintiff requests expedited consideration of her Motion for a Preliminary Injunction under W.D. Mich. LCivR 7.1(e) as this litigation involves the Presidential Primary scheduled for January 15, 2008.

VIII. RELIEF REQUESTED

Plaintiff requests that this Court enter a preliminary injunction:

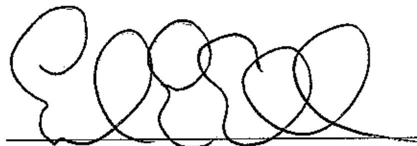
A. Enjoining the Michigan Secretary of State from conducting the January 15, 2008 Presidential Primary; or

B. Enjoining the Michigan Secretary of State from conducting the Democratic portion of the January 15, 2008 Presidential Primary; or

C. Enjoining the Michigan Democratic Party from using, in any manner or fashion, the results of the January 15, 2008 Michigan Presidential Primary for the purpose of selecting delegates from Michigan to the 2008 Democratic National Convention.

Plaintiff reserves the right to request such other and further relief to which she is entitled.

Dated: December 26, 2007



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