

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTHA HAYES,

Plaintiff,

Case No. 07-1237

v

Hon. Robert J. Jonker

THE STATE OF MICHIGAN AND
TERRI LYNN LAND, solely in her official capacity
as secretary of State of Michigan, jointly and severally,

Defendants.

Earl Earland (P41917)
Attorney for Plaintiff

Denise C. Barton (P41535)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendants State of Michigan and
Terri Lynn Land
P.O. Box 30736
Lansing, Michigan 48909
(517) 373-6434

**STATE DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY INJUNCTION**

CONCISE STATEMENT OF ISSUES PRESENTED

- I. Whether this Court lacks jurisdiction to entertain Plaintiff's Complaint for declaratory and injunctive relief against the State Defendants because Plaintiff lacks standing to bring her claim against the State Defendants; the Eleventh Amendment also bars any claims against the State of Michigan.**

- II. Whether Plaintiff fails to state a claim upon which relief may be granted with respect to the substantive claim asserted against the State Defendants, and thus her suit must be dismissed as to these Defendants.**

- III. Whether Plaintiff's motion for a preliminary injunction should be denied where Plaintiff cannot establish the requisite elements for granting injunctive relief, particularly where Plaintiff has no likelihood of success on the merits of her claim.**

- IV. Whether Plaintiff's claim for injunctive relief is untimely and is barred by the doctrine of laches.**

TABLE OF CONTENTS

CONCISE STATEMENT OF ISSUES PRESENTED..... i

CONTROLLING OR MOST APPROPRIATE AUTHORITY iv

STATEMENT OF THE FACTS 1

 A. 2007 PA 52 1

 B. Relevant facts..... 3

ARGUMENT..... 6

I. This Court lacks jurisdiction to entertain Plaintiff’s Complaint for declaratory and injunctive relief against the State Defendants because Plaintiff lacks standing to bring her claim against the State Defendants; the Eleventh Amendment also bars claims against the State of Michigan. 6

 A. The elements of standing. 6

 B. Plaintiff’s alleged “injury” is not “fairly traceable” to the State Defendants nor will Plaintiff’s alleged "injury" be redressed by granting relief against the State Defendants..... 7

 C. Defendant State of Michigan is entitled to immunity under the Eleventh Amendment. 9

II. Plaintiff fails to state a claim upon which relief may be granted with respect to the substantive claim asserted against the State Defendants, and thus her suit must be dismissed as to these Defendants. 10

 A. Standard of review. 10

 B. Elements of a 42 USC § 1983 action. 11

 C. Plaintiff’s Complaint fails to state a claim upon which relief may be granted with respect to the State Defendants because 2007 PA 52 does not unconstitutionally burden Plaintiff’s First and Fourteenth Amendment associational rights. 11

 1. The claims presented here are nonjusticiable where they present nothing more than an intra-party dispute. 13

 2. The State Defendants first assert that there is no State or governmental action in this case for purposes of supporting Plaintiff’s Fourteenth Amendment claim. 15

 3. Case law supports this Court’s dismissal of Plaintiff’s claims against the State Defendants. 16

III. Plaintiff cannot establish the requisite elements for granting a preliminary injunction in this case.	19
A. Standards for granting injunctive relief.	20
B. No substantial likelihood of success on the merits.	20
C. No irreparable harm.	21
D. Substantial harm to others.	21
E. Public interest would not be served by an injunction.	22
IV. Plaintiff's request for injunctive relief is untimely and should be barred by the doctrine of laches.	22

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Cases

ACLU v Taft, 385 F3d 641 (CA 6, 2004)..... 19

Advocacy Org for Patients & Providers v Auto Club Ins Ass'n, 176 F3d 315 (CA 6, 1999)..... 10

Allen v Wright, 468 US 737; 104 S Ct 3315; 82 L Ed 2d 556 (1984) 6, 7

Anderson v Celebreeze, 460 US 780; 103 S Ct 1564; 75 L Ed 2d 547 (1983)..... 11

Bachur v Democratic National Party, 836 F2d 837 (CA 4, 1987)..... 13, 14

Baker v Carr, 369 US 186; 7 L Ed 2d 663; 82 S Ct 691 (1962) 12, 13

Bovee v Coopers & Lybrand CPA, 272 F3d 356 (CA 6, 2001)..... 10

Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund, 206 F3d 680 (CA 6, 2000) 23

Burdick v Takushi, 504 US 428; 112 S Ct 2059; 119 L Ed 2d 245 (1992)..... 11

California Democratic Party v Jones, 530 US 567; 120 S Ct 2402; 147 L Ed 2d 502 (2000) 12

Checker Motors Corp v Chrysler Corp, 405 F2d 319 (CA 2, 1969) 20

Cleveland Branch, NAACP v City of Parma, 263 F3d 513 (CA 6, 2001) 6

Clingman v Beaver, 544 US 581; 125 S Ct 2029; 161 L Ed 2d 920 (2005)..... 11

Cousins v Wigoda, 409 US 477; 95 S Ct 541; 42 L ed 2d 595 (1975) 13

DaimlerChrysler Corp v Cuno, 547 US ____; 126 S Ct 1854, 1867; 164 L Ed 2d 589 (2006)... 6, 7

Democratic Party of the United States v Wisconsin, 450 US 107; 101 S Ct 1010; 67 L Ed 2d 82 (1981)..... 19, 20, 22

Dubuc v Board of Law Examiners, 342 F3d 610 (CA 6 2003)..... 9

Duke v Smith, 784 F Supp 865, 870 (D Fla 1992) 15

Ellison v Garbarino, 48 F3d 192 (CA 6, 1995)..... 15

Elrod v Burns, 427 US 347; 96 S Ct 2673; 49 L Ed 2d 547 (1976) 12

Eu v San Francisco County Democratic Central Comm, 489 US 214; 109 S Ct 1013; 103 L Ed 2d 271 (1989)..... 12, 13

Federspiel v Ohio Republican Party State Central Committee, 1996 US App LEXIS 15422; 85 F3d 628 (CA 6 1996) 9, 13

Gonzales v Nat'l Bd of Med Exam'rs, 225 F3d 620 (CA 6, 2000)..... 20

Grebner v Secretary of State, Michigan Supreme Court Docket No. _____..... 22

Idaho v Coeur d'Alene Tribe of Idaho, 521 US 261; 117 S Ct 2028; 138 L.Ed.2d 438 (1997)..... 9

In re DeLorean Motors Co, 755 F2d 1223, 1229 (CA 6, 1985)..... 19

Jackson v Metropolitan Edison Co, 419 US 345; 42 L Ed 2d 477; 95 S Ct 449 (1974) 14

Jones v City of Monroe, 341 F3d 474 (CA 6, 2003)..... 19

Kay v Austin, 621 F2d 809 (CA 6, 1980) 22

Lexmark Int'l Inc v Static Control Components Inc, 387 F3d 522 (CA 6, 2004) 19

Lucking v Schram, 117 F2d 160 (CA 6, 1941) 22

Marshall v Meadows, 105 F3d 904 (CA 4, 1997) 8

Mason County Med. Ass'n v Knebel, 563 F2d 256, 261 (CA 6, 1977)..... 20

Miller v Brown, 465 F Supp 2d 584 (ED Va 2006)..... 16, 17, 18, 19

NAACP v City of Mansfield, 866 F2d 162 (CA 6, 1989)..... 19

O'Brien v Brown, 409 US 1; 92 S Ct 2718; 34 L Ed 2d 1 (1972)..... 12

O'Lone v Estate of Shabazz, 482 US 342; 107 S Ct 2400; 96 L Ed 2d 282 (1986)..... 20

Republican State Central Committee v Ripon Society, Inc, 409 US 1222; 93 S Ct 1475 (1972). 13

Scheid v Fanny Farmer Candy Shops, Inc, 859 F2d 434 (CA 6, 1988) 10

<i>Seminole Tribe of Florida v Florida</i> , 517 US 44; 109 S Ct 1114; 134 L.Ed.2d 252 (1996)	9
<i>Simon v E Ky Welfare Rights Org</i> , 426 US 26; 96 S Ct 1917; 48 L Ed 2d 450 (1976).....	7
<i>Tashjian v Republican Party of Conn</i> , 479 US 208; 107 S Ct 544; 93 L Ed 2d 514 (1986).....	12
<i>Timmons v Twin Cities Area New Party</i> , 520 US 351, 358-359; 117 S Ct 1364 (1997).....	11
<i>Wagner v Metro. Nashville Airport</i> , 772 F2d 227 (CA 6, 1985).....	10
<i>Tahfs v Proctor</i> , 316 F3d 584, 590 (CA 6, 2003).....	10
<i>West v Atkins</i> , 487 US 42; 108 S Ct 2250; 101 L Ed 2d 40 (1988)	15
<i>Whitmore v Arkansas</i> , 495 US 149; 110 S Ct 1717; 109 L Ed 2d 135 (1990)	6
<i>Will v Dept of State Police</i> , 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989)	9
<i>Wolotsky v Huhn</i> , 960 F2d 1331 (CA 6, 1992).....	15

Statutes

2007 PA 52	1, 2, 21
MCL 168.1	1, 2

STATEMENT OF THE FACTS

This case concerns the recent enactment of 2007 PA 52, which amended the Michigan Election Law, MCL 168.1 *et seq.*, and most notably moved the holding of Michigan's presidential primary for the 2008 election year to January 15, 2008, for that election only. (See 2007 PA 52, § 613a, attached as Exhibit 1). The changing of the primary date generated media coverage, both local and nationwide, and resulted in threats of sanctions from both the National Democratic Party and the National Republican Party for violating national party rules.

A. 2007 PA 52

Section 613a of the Act provides, in part (Exhibit 1, § 613a):

(1) 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.

(2) 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. At 4 p.m. on November 15, 2007, the secretary of state shall determine, based upon the information provided by the participating political parties under this subsection, whether the participating political parties in this state will be using a method other than the results of the January 15, 2008 presidential primary to select delegates to their respective national conventions to nominate a candidate for president of the United States in 2008. If the secretary of state determines that all participating political parties are using a method other than the results of the January 15, 2008 presidential primary, the secretary of state shall cancel the presidential primary that would otherwise be held on January 15, 2008, and any ballots for that presidential primary shall be destroyed. . . .

* * *

(5) Nothing in this section or sections 614a to 616a shall be interpreted to diminish or impair the state and federal constitutional rights of a participating political party or give this state, its political subdivisions and agencies, or its courts jurisdiction or authority over the application or interpretation by a participating political party of the party's state or national rules, regulations, policies, and procedures. Each participating political party shall be the sole and exclusive arbiter of the application and interpretation of its state and national rules, regulations, policies, and procedures.

The Act further provides that “[n]ot later than 4 p.m. on the eighteenth Tuesday before the presidential primary, the state chairperson of each participating political party shall file with the secretary of state a list of individuals whom they consider to be potential presidential candidates for nomination by that participating political party in the next presidential election year.” (Exhibit 1, § 614a). “After receipt of the list of candidates from the state chairperson of each participating political party . . . the secretary of state shall notify each potential presidential candidate on the lists of the provisions of this act relating to the presidential primary.” (Exhibit 1, § 614a). However, under the Act, “[a] presidential candidate notified by the secretary of state under section 614a may file an affidavit with the secretary of state indicating that he or she does not wish to have his or her name printed on a presidential primary ballot and the secretary of state shall not cause that presidential candidate's name to be printed on a ballot for the presidential primary.” (Exhibit 1, § 615a(1)).

The Act also again established a closed or at least semi-closed primary system. Thus, under the Act in order to vote at a presidential primary an elector must indicate in writing, on a form to be created by the Secretary of State, which “participating political party” ballot he or she wishes to vote when appearing to vote at a presidential primary. (Exhibit 1, § 615c(1)).¹

Additionally, the Act also requires local city and township clerks to keep a separate record of who votes at a presidential primary election that contains the printed name, address, and qualified voter file number of each elector, and the participating political party ballot selected by that elector at the presidential primary. (Exhibit 1, § 615c(3)). The local clerks must

¹ “[P]articipating political party’ means a political party authorized to participate in a presidential primary under section 613a.” (Exhibit 1, § 19(a)). Under § 613a, “[a] political party that received less than 20% of the total vote cast in this state for the office of president in the last presidential election shall not participate in the presidential primary.” (Exhibit 1, § 613a(3)). At this point in time, only the Michigan Democratic Party and the Michigan Republican Party are qualified to participate in the presidential primary process.

then submit this information to Defendant Secretary of State. (Exhibit 1, § 615c(6)). Thereafter the Secretary of State, "shall provide to the chairperson of each participating political party a file of the records for each participating political party," as kept and submitted by the local clerks. (Exhibit 1, § 615c(6)). The Act's stated purpose for the allowance of this disclosure of the otherwise confidential information is "[t]o ensure compliance with the state and national political party rules of each participating political party and this section" (Exhibit 1, § 615c(5)). The Act then authorizes the participating political parties to use this information for limited purposes (Exhibit 1, § 615c).

The Act was given immediate effect by the Legislature, and thus became effective September 4, 2007. Notably, the Act was supported by Governor Granholm, a democrat, and the leaders of both the MDP and the Michigan Republican Party. (Exhibit 2, Granholm, press release, 9/4/07). In fact, the MDP had been publicly supporting the idea of moving Michigan's primary ahead since the spring of 2007. (Exhibit 2, MDP press releases, 3/1/07, 8/31/07). As passed, the Act includes a "nonseverability" clause, which provides that "[i]f any portion of [the Act] or the application of [the Act] to any person or circumstances is found invalid by a court, it is the intent of the legislature that the provisions of this [Act] are nonseverable and that the remainder of the [Act] shall be invalid, inoperable, and without effect." (Exhibit 1, Enacting section 1).

B. Relevant facts.

Pursuant to 2007 PA 52, the Michigan Democratic Party (MDP) filed a list of potential presidential candidates, which included: Senator Joe Biden, Senator Hillary Clinton, Senator Chris Dodd, John Edwards, Mike Gravel, Congressman Dennis Kucinich, Senator Barack Obama, and New Mexico Governor Bill Richardson. However, Biden, Edwards, Obama, and Richardson later filed timely affidavits withdrawing their names from the list of candidates, thus

leaving only Clinton, Dodd, Gravel, and Kucinich as candidates for the MDP nomination.² According to Plaintiff's Complaint, these candidates withdrew their names because they and the other major candidates for the Democratic Party had previously signed a pledge pursuant to national party rules that they would neither campaign nor participate in any State that scheduled a presidential primary election or caucus before February 5, 2008, except for the States of Iowa, Nevada, New Hampshire, and South Carolina. (Complaint, ¶ 36).

On November 14, 2007, in compliance with § 613a of the Act, the MDP notified the Secretary of State that the party intended to participate in the January 15, 2008, primary and use the results of the primary for the purpose of selecting delegates to the National Convention. (See Brewer Letter, attached to Plaintiff's Complaint as Exhibit 3). In other words, the MDP did not opt out of the presidential primary as it had the right or choice to do under the Act.

According to the Complaint, the Democratic National Committee, in response to the MDP's decision to participate in the January 15, 2008, primary, elected to strip Michigan of all or some of its delegates to the National Convention. (Complaint, ¶¶ 32-34). Thus, the net result of all of these actions is that only a few of the major democratic candidates will appear on the democratic primary ballot here in Michigan, and all of the candidates were precluded from campaigning here in Michigan in connection with the presidential primary.

Feeling aggrieved by the MDP's actions, Plaintiff filed the instant lawsuit on December 10, 2007, 23 business days (excluding the holidays) before the scheduled January 15, 2008, primary, against the MDP, the State of Michigan, and Secretary of State Terri Lynn Land.³

² See http://www.michigan.gov/documents/sos/Presidential_Primary_Candidates_2_211928_7.pdf.

³ A state court action was filed against 2007 PA 52, challenging the constitutionality of some of its provisions under state constitutional and statutory law on October 24, 2007, in *Grebner v Secretary of State*, Ingham County Circuit Court Case No. 07-1507. The Michigan Supreme Court ultimately affirmed the Act's constitutionality under state law, and plans for the primary have proceeded at an expedited pace since that Court's November 21, 2007, decision. The issues

Plaintiff contends that “at least 44% of Michigan’s Democrats have been effectively disenfranchised by the current state of the Presidential Primary process in Michigan. Further, according to the Plaintiff’s complaint, none of the Democratic primary voter base (including Plaintiff) can engage in candidate initiated or sponsored campaign activities, as such as prohibited [by national party rules].” (Complaint, ¶ 40). Plaintiff asserts that “[t]he decision to hold a primary on January 15, 2008, violates [national party rules] in that any primary held without the participation of the withdraw candidates would violate the Rule’s requirement that delegates shall be allocated in a fashion that fairly reflects the expressed presidential preference or uncommitted status of the primary voters.” (Complaint, ¶ 41).

The State Defendants assert for the reasons stated below that this Complaint must be dismissed as to them, and that any request for declaratory or injunctive relief must be denied as well.

litigated in the state court action were different from the issues raised here by Plaintiff, although Plaintiff’s issues could have been presented to the state courts as well.

ARGUMENT

I. This Court lacks jurisdiction to entertain Plaintiff's Complaint for declaratory and injunctive relief against the State Defendants because Plaintiff lacks standing to bring her claim against the State Defendants; the Eleventh Amendment also bars claims against the State of Michigan.

A. The elements of standing.

Jurisdiction, including standing, is "assessed under the facts existing when the complaint is filed."⁴ "[A] plaintiff must demonstrate standing for each claim [she] seeks to press."⁵ "[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted."⁶ In order to meet the standing requirements derived from Article III, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and, (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."⁷ The litigant must clearly and specifically set forth facts sufficient to satisfy all of these standing requirements.⁸

⁴ *Cleveland Branch, NAACP v City of Parma*, 263 F3d 513, 524 (CA 6, 2001)(quoting *Lujan v Defenders of Wildlife*, 504 US 555, 570 n4; 112 S Ct 2130; 119 L Ed 2d 351 (1992)).

⁵ *DaimlerChrysler Corp v Cuno*, 547 US 332; 126 S Ct 1854, 1867; 164 L Ed 2d 589 (2006); accord *Lac Vieux Desert Band of Lake Superior Chippewa Indians v Mich Gaming Control Bd*, 172 F3d 397, 407 (CA 6, 1999) (requiring proof of standing for each individual claim).

⁶ *Allen v Wright*, 468 US 737, 752; 104 S Ct 3315; 82 L Ed 2d 556 (1984) (emphasis added); *ACLU v NSA*, 493 F3d 644, 652 (CA 6, 2007).

⁷ *Cleveland Branch*, 263 F3d at 523-24 (quoting *Friends of the Earth, Inc v Laidlaw Envtl Servs*, 528 US 167, 180-81; 120 S Ct 693; 145 L Ed 2d 610 (2000)).

⁸ *Whitmore v Arkansas*, 495 US 149, 155; 110 S Ct 1717; 109 L Ed 2d 135 (1990).

B. Plaintiff's alleged "injury" is not "fairly traceable" to the State Defendants nor will Plaintiff's alleged "injury" be redressed by granting relief against the State Defendants.

"(1) injury in fact, (2) causation, and (3) redressability."⁹ "Causation" is "a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant."¹⁰ "[F]ederal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction."¹¹ "In other words, . . . a federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."¹²

Even a cursory review of Plaintiff's Complaint reveals that her primary allegations are directed at the MDP, and not the State Defendants. Plaintiff essentially asserts that the decision to participate or at least not opt out of the January 15, 2008, primary will disenfranchise or is disenfranchising her of her First and Fourteenth Amendment associational rights. The State Defendants do not dispute that the Legislature passed, and the Governor signed, 2007 PA 52 into law. However, the Act clearly and specifically authorized the MDP to opt out of the 2008 presidential primary. (Exhibit 1, § 613a(2)). The MDP, as did the Michigan Republican Party, chose not to exercise this option, and instead confirmed their intent to participate in the primary process. Accepting as true Plaintiff's allegation that moving the primary date to January 15 violated national party rules, the MDP voluntarily chose to violate those rules, and the National Democratic Committee chose to enforce its rules and sanctions against the MDP, and thus

⁹ *Steel Co*, 523 US at 102-03 (citations and footnotes omitted); *ACLU v NSA*, 493 F3d 644, 666 (CA 6, 2007).

¹⁰ *Steel Co*, 523 US at 102-103 (citing *Simon v E Ky Welfare Rights Org*, 426 US 26, 41-42; 96 S Ct 1917; 48 L Ed 2d 450 (1976)).

¹¹ *Simon*, 426 US at 41 (citations and footnotes omitted).

¹² *Simon*, 426 US at 41-42.

caused the alleged “injury” to Plaintiff – not the State Defendants. (See Plaintiff’s Complaint at ¶¶ 32-34).

For example, in *Marshall v Meadows*, the United States Court of Appeals for the Fourth Circuit affirmed a district court's dismissal based on a lack of standing where the Virginia Republican Party voluntarily chose to participate in an open primary as allowed for by Virginia law.¹³ There, an incumbent Republican senator opted to hold a primary for purposes of securing his nomination as provided for by Virginia law. Virginia law also provided for open primaries, thus the effect of the senator's choice was the holding of an open primary for purposes of securing his nomination. Before the holding of the primary, a Republican delegate representing Virginia's 13th House of Delegates District, and the former Chairman of the Virginia Republican Party, filed suit against members of the Virginia Board of Elections. The plaintiffs' suit, brought pursuant to § 1983, alleged that the defendants' actions in enforcing Virginia's Open Primary Law violated their First Amendment rights to free speech and freedom of association.¹⁴

The defendant local election officials argued that the plaintiffs lacked standing to bring their action, and the district court agreed. On appeal, the Fourth Circuit observed¹⁵:

We need not decide whether the plaintiffs satisfied the injury component of the standing analysis because it is unquestionably clear that the plaintiffs failed to satisfy . . . causation In order to establish causation, the plaintiffs must prove that their injury "fairly can be traced to the challenged action." Here, the challenged action is the Open Primary Law. However, it is not the Open Primary Law that is the cause of the plaintiffs' alleged injury. Rather, it is the decision of the Virginia Republican Party to conduct an "open" primary that is causing this alleged injury, as there is: (1) nothing unconstitutional about a political party's choice of an "open" primary; and (2) simply no indication that the Virginia Republican Party would have a "closed" primary in the absence of the Open Primary Law or change to a "closed" primary if we declared the Open Primary Law unconstitutional. In other words, if a political party's choice of an "open" primary is a lawful and voluntary one, the decision of the party is the cause of the

¹³ *Marshall v Meadows*, 105 F3d 904 (CA 4, 1997).

¹⁴ *Marshall*, 105 F3d at 904-905.

¹⁵ *Marshall*, 105 F3d at 906-907 (internal citations omitted).

alleged "forced" association, not the state law requiring the "open" primary. Because the alleged injury is caused by a voluntary choice made by the Virginia Republican Party and not the Open Primary Law, the plaintiffs have not established causation. The Virginia Republican Party has made its choice to conduct a party primary in the manner it desires and there is no reason for us to interfere with that voluntary decision.

The same analysis can and should be applied here to dismiss Plaintiff's claim against the State Defendants because Plaintiff has not alleged an injury fairly traceable to the State Defendants for purposes of conferring Article III standing upon Plaintiff.¹⁶ The MDP voluntarily opted to participate in the January 15, 2008, primary, and the Democratic National Committee chose to implement sanctions against the MDP for doing so. Act 52 is not the source of Plaintiff's "injury" in this case. Moreover, Plaintiff's alleged "injury" will not be redressed by granting any relief against the State Defendants. Plaintiff still could not vote or campaign for Edwards in conjunction with a primary. Furthermore, the State Defendants do not control how the MDP will determine delegate selection. This is an issue for the political parties to determine.¹⁷ Accordingly, this Court should dismiss the claim against the State Defendants under FR Civ P 12(b)(1) and (6).

C. Defendant State of Michigan is entitled to immunity under the Eleventh Amendment.

Plaintiff's claim against the State of Michigan should be dismissed under Eleventh Amendment immunity. The Eleventh Amendment bars suits in federal court against the State and its agencies unless this jurisdictional immunity from suit is expressly waived by either the

¹⁶ See also *Federspiel v Ohio Republican Party State Central Committee*, 1996 US App LEXIS 15422; 85 F3d 628 (CA 6 1996) (unpublished) (observing that state statute that conferred a choice upon a private party was not the cause of the plaintiff's alleged injury).

¹⁷ See *Tashjian v Republican Party of Connecticut*, 479 US 208; 215 n 6; 107 S Ct 544; 93 L Ed 2d 514 (1986).

State or Congress, regardless of the nature of the relief sought.¹⁸ Neither congress nor the State has waived this jurisdictional immunity with respect to claims brought under 42 USC 1983.¹⁹ Since this statutory procedural vehicle does not waive Eleventh Amendment immunity, jurisdiction is barred in this case with respect to the State of Michigan. Dismissal as to Defendant State of Michigan is warranted under FR Civ P 12(b)(2).

II. Plaintiff fails to state a claim upon which relief may be granted with respect to the substantive claim asserted against the State Defendants, and thus her suit must be dismissed as to these Defendants.

A. Standard of review.

A motion under FR Civ P 12(b)(6) seeks dismissal for a plaintiff's failure to state a claim upon which relief can be granted. "The court must construe the complaint in the light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff can prove a set of facts in support of its claims that would entitle it to relief."²⁰ To survive a motion to dismiss under Rule 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory."²¹

¹⁸ *Pennhurst State School and Hospital v Halderman*, 465 US 89, 100, 119, 120; 104 S Ct 900; 79 L.Ed.2d 67 (1984); *Will v Dept. of State Police*, 491 US 89; 109 S Ct 2304; 105 L.Ed.2d 45 (1989); *Seminole Tribe of Florida v Florida*, 517 US 44; 109 S Ct 1114; 134 L.Ed.2d 252 (1996); *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261; 117 S Ct 2028; 138 L.Ed.2d 438 (1997); *Dubuc v Board of Law Examiners*, 342 F3d 610, 615, 615 (CA 6 2003).

¹⁹ *Will v Dept of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989).

²⁰ *Bovee v Coopers & Lybrand CPA*, 272 F3d 356, 360 (CA 6, 2001).

²¹ *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 176 F3d 315, 319 (CA 6, 1999) (quoting *Scheid v Fanny Farmer Candy Shops, Inc*, 859 F2d 434, 436 (CA 6, 1988)).

B. Elements of a 42 USC § 1983 action.

A § 1983 claim must satisfy these elements: (1) the deprivation of a right secured by the Constitution or laws of the United States; (2) the deprivation was caused by a person acting under color of state law; and (3) a causal connection between the two.²²

C. Plaintiff's Complaint fails to state a claim upon which relief may be granted with respect to the State Defendants because 2007 PA 52 does not unconstitutionally burden Plaintiff's First and Fourteenth Amendment associational rights.

Plaintiff asserts that 2007 PA 52 unconstitutionally infringes upon her First and Fourteenth Amendment associational rights. In *Burdick v Takushi*, the US Supreme Court advised that "a [] flexible standard applies" when reviewing the constitutionality of state election statutes²³:

A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

The Court continued that under that standard the "rigorousness" of the inquiry into the validity of a state election law will depend upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights²⁴:

[A]s we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.*

²² *Wagner v Metro. Nashville Airport*, 772 F2d 227, 229 (CA 6, 1985); *Tahfs v Proctor*, 316 F3d 584, 590 (CA 6, 2003).

²³ *Burdick v Takushi*, 504 US 428, 434; 112 S Ct 2059; 119 L Ed 2d 245 (1992), quoting *Anderson v Celebrezze*, 460 US 780, 789; 103 S Ct 1564; 75 L Ed 2d 547 (1983).

²⁴ *Burdick*, 504 US at 434 (internal citations omitted; emphasis added).

This restatement of the applicable standard was applied by the Supreme Court in *Timmons v Twin Cities Area New Party*, in which the Court upheld against a First Amendment challenge a Minnesota statute that prohibited candidates from appearing on the ballot as the candidate of more than one party.²⁵ In 2005, the Court again applied *Burdick's* flexible standard in *Clingman v Beaver*, a First Amendment challenge to an Oklahoma primary election statute.²⁶ Thus, under United States Supreme Court precedent, the level of review to be employed by a court analyzing a constitutional challenge to an election law hinges on the level of the burden imposed by the regulation on an elector's First and Fourteenth Amendment rights. A "severe" burden will require "strict scrutiny" review and the demonstration of a compelling state interest, while a lesser burden requires a lesser review.

The State Defendants do not dispute that the US Supreme Court has settled the notion that "the First Amendment protects 'the freedom to join together in furtherance of common political beliefs.'"²⁷ The Court has confirmed that its "cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"²⁸ The right of political parties to freely associate is unquestionably entitled to First Amendment protection.²⁹

²⁵ *Timmons v Twin Cities Area New Party*, 520 US 351, 353-354, 358-359; 117 S Ct 1364; 117 S Ct 1364 (1997).

²⁶ *Clingman v Beaver*, 544 US 581 at 591-592, and 602-603; 125 S Ct 2029; 161 L Ed 2d 920 (2005) (Justice O'Connor, concurring in part, concurring in judgment).

²⁷ *California Democratic Party v Jones*, 530 US 567, 574; 120 S Ct 2402; 147 L Ed 2d 502 (2000) (quoting *Tashjian v Republican Party of Conn*, 479 US at 214-15 (1986)).

²⁸ *Jones*, 530 US at 575 (alteration in original) (quoting *Eu v San Francisco County Democratic Central Comm*, 489 US 214, 224; 109 S Ct 1013; 103 L Ed 2d 271 (1989)).

²⁹ *Elrod v Burns*, 427 US 347, 357; 96 S Ct 2673; 49 L Ed 2d 547 (1976).

1. The claims presented here are nonjusticiable where they present nothing more than an intra-party dispute.

Justiciability is a subspecies of the political question doctrine, in which courts refuse to interfere in issues committed by the constitution to the Legislative or Executive Branch of government.³⁰ Justiciability concerns also arise from "the lack of judicially discoverable and manageable standards for resolving" the issue or "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."³¹

The US Supreme Court in *O'Brien v Brown* cautioned against judicial intervention in internal political party disputes³²:

No case is cited to us in which any federal court has undertaken to interject itself into the deliberative processes of a national political convention; no holding of this Court up to now gives support for judicial intervention in the circumstances presented here, involving as they do relationships of great delicacy that are essentially political in nature. Judicial intervention in this area traditionally has been approached with great caution and restraint. It has been understood since our national political parties first came into being as voluntary associations of individuals that the convention itself is the proper forum for determining intra-party disputes as to which delegates shall be seated. Thus, these cases involve claims of the power of the federal judiciary to review actions heretofore thought to lie in the control of political parties. Highly important questions are presented concerning justiciability. . . . Vital rights of association guaranteed by the Constitution are also involved.

Other courts have similarly counseled or refused to pass on such issues.³³ The fact that a political party risks and often realizes internal friction does not justify intrusion by a court or state; "presumably a party will be motivated by self-interest and not engage in acts or speech that

³⁰ *Baker v Carr*, 369 US 186, 217; 7 L Ed 2d 663; 82 S Ct 691 (1962).

³¹ *Baker*, 369 US at 217.

³² *O'Brien v Brown*, 409 US 1, 4; 92 S Ct 2718; 34 L Ed 2d 1 (1972) (citations omitted).

³³ See *Republican State Central Committee v Ripon Society, Inc*, 409 US 1222; 93 S Ct 1475 (1972); *Cousins v Wigoda*, 409 US 477, 483 n4; 95 S Ct 541; 42 L ed 2d 595 (1975); *Democratic Party of the United States*, 450 US at 124; *Wymbs v Republican State Executive Committee*, 719 F2d 1072 (CA 11, 1983); *Bachur v Democratic National Party*, 836 F2d 837 (CA 4, 1987). Cf. *Heitmanis v Secretary of State*, 899 F2d 521 (CA 6, 1990).

run counter to its political success."³⁴ "While it may not be politically expedient to alienate an important part of the party, that is within each party's prerogative."³⁵

In this case, the MDP simply disagrees with the DNC's rules authorizing the ability of a few States to hold early primaries or caucuses, and denying that ability to other States, like Michigan. Plaintiff concedes that the MDP publicly reaffirmed that it would continue to defy the DNC and participate in the January 15, 2008 primary. Plaintiff's Complaint at ¶ 34. Thus, to make a political statement and essentially force a showdown with the DNC, the MDP supported 2007 PA 52, stated that it would comply with the Act, and opted to hold a democratic primary on January 15, 2008, knowing all the while that doing so would violate DNC rules and subject the MDP to party sanctions. The MDP could have opted out of the primary and held a caucus as it has done in the past to avoid violating DNC rules with respect to open primaries, thereby avoiding sanctions and this lawsuit. The MDP chose not to do so as a matter of party politics. Plaintiff is a disgruntled member of the MDP, who disagrees with the actions taken by the MDP since the party's choices have resulted in her preferred candidate opting out of the primary. These facts clearly demonstrate that at the heart of this lawsuit is an intra-party dispute between Plaintiff, the MDP, and the DNC. The State's passage of 2007 PA 52 is only remotely or tangentially involved in the dispute.

Under these specific factual circumstances, this Court should conclude that Plaintiff's claims are nonjusticiable because they present this Court with the type of nonjudicial policy determinations over which it has no discretion to decide, and thus her Complaint should be dismissed under FR Civ P 12(b)(6).

³⁴ *Eu v San Francisco County Democratic Cent Comm*, 489 US 214, 228; 109 S Ct 1013; 103 L Ed 2d 271 (1989).

³⁵ *Federspiel v Ohio Republican Party State Cent Comm*, 867 F Supp 617, 623 (D Ohio 1994).

2. The State Defendants first assert that there is no State or governmental action in this case for purposes of supporting Plaintiff's Fourteenth Amendment claim.

Again, before this Court may assume jurisdiction over Plaintiffs' Fourteenth Amendment claims, there must be state or governmental action – private conduct, however wrongful it may be, cannot be challenged under the Fourteenth Amendment.³⁶

The fact that the State passed 2007 PA 52, and is preparing to hold a primary election pursuant to the MDP's and the Michigan Republican Party's choices, does not automatically lead to a conclusion that there is state action in this case for purposes of establishing a § 1983 claim, because there is no causal connection between the State's actions and Plaintiff's alleged injury. The Act's provision that the 2008 primary be held on January 15, 2008, and the State's intent to conduct the primary on January 15, 2008, pursuant to the Act and the political parties' requests, do not and will not deprive Plaintiff of any constitutional rights. The deprivation, if indeed there is or was one, arose as a result of (1) the MDP's choice to participate in the primary contrary to national party rules, (2) the DNC's decision to enforce those rules against the MDP, which (3) resulted in Plaintiff's preferred candidate's choice not to participate in the Michigan primary.³⁷

The State Defendants further submit that the instant facts do not support a finding of state action based on the actions of the MDP. The Sixth Circuit recognizes three tests for determining whether a particular defendant was acting under color of state law: (1) acting under the compulsion of the state; (2) public function; and (3) the nexus approach.³⁸ Under the compulsion test, a plaintiff must show the state significantly encouraged or somehow coerced the private party, either overtly or covertly, to take a particular action so that the choice is really that

³⁶ *Jackson v Metropolitan Edison Co*, 419 US 345; 42 L Ed 2d 477; 95 S Ct 449 (1974).

³⁷ See, e.g., *Duke v Smith*, 784 F Supp 865, 870 (D Fla 1992) (finding no state action for purposes of § 1983 action on behalf of state officials).

³⁸ See *Wolotsky v Huhn*, 960 F2d 1331, 1335 (CA 6, 1992).

of the state.³⁹ The public function test "requires that the private entity exercise powers which are typically reserved to the state"⁴⁰ Finally, the nexus test requires the plaintiff to show a sufficiently close relationship between the private individual and the state to be a participant or interdependent with the state.⁴¹ "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."⁴²

None of these tests apply in this case. First, the MDP was in no way compelled or coerced into participating in the January 15 primary by the State. Second, the choice or decision to participate in the primary process is reserved to the political parties. Finally, the MDP does not have a sufficiently close relationship with the State to be considered a participant or interdependent with the State.

3. Case law supports this Court's dismissal of Plaintiff's claims against the State Defendants.

The question here is whether 2007 PA 52, which moved the presidential primary date ahead to January 15, 2008, for purposes of the 2008 primary only, but still allowed the political parties to back out, unconstitutionally burdens Plaintiff's rights.

The Court of Appeals for the Fourth Circuit addressed an analogous question in *Miller v Brown*.⁴³ There, a Republican incumbent senator designated a primary as the method of nomination for his seat consistent with the Virginia law. Previously, the Republican Party had amended its policies to allow local committees to choose to hold closed primaries. The senator's

³⁹ See *Ellison v Garbarino*, 48 F3d 192, 195 (CA 6, 1995) (citing *Wolotsky*, 960 F2d at 1335).

⁴⁰ *Ellison*, 48 F3d at 195 (quoting *Wolotsky*).

⁴¹ *Ellison*, 48 F3d at 195.

⁴² *West v Atkins*, 487 US 42, 52 n10; 108 S Ct 2250; 101 L Ed 2d 40 (1988) (internal quotations omitted).

⁴³ *Miller v Brown*, 503 F3d 360 (CA 4, 2007).

local Republican committee informed local election officials that it intended to hold a primary, but that it would be a closed primary, consistent with party rules, but contrary to Virginia's law that provided for open primaries. The local election officials indicated that they would have to comply with state law and hold an open primary. The Republican committee brought suit against the local election officials seeking a declaration that the open primary law violated the Committee's First and Fourteenth Amendment associational rights.⁴⁴

The district court held that the open primary law was not facially unconstitutional because Virginia law permitted other methods of nomination under which a political party could restrict participation in its nominating process to voters who share its political beliefs.⁴⁵ Regarding the as-applied challenge, however, the court determined that the statute severely burdened the committee's associational rights because the senator's selection of a primary as the method of nomination forced the committee to use a nomination process that prevented it from excluding voters with whom it did not wish to associate.⁴⁶ The court thus concluded that the statute was unconstitutional as applied to the committee.⁴⁷

The Fourth Circuit affirmed the district court on appeal, noting first that⁴⁸:

Here, we need not decide whether Virginia's open primary statute, viewed in isolation, impermissibly burdens a political party's right to associate with those who share its beliefs. That is because it is clear that [the statute] when properly viewed in the context of other methods of nomination permitted by Virginia law-- does not facially burden political parties' associational rights.

As explained above, Virginia allows political parties to nominate candidates not only by state-run primary but also by other methods controlled and funded by the party. And, by merely choosing any of these other options, a party is free to limit its candidate selection process to voters who share its political views. Thus, the "forced association" that the Supreme Court has condemned . . . simply is not

⁴⁴ *Miller*, 503 F3d at 362-363.

⁴⁵ See *Miller v Brown*, 465 F Supp 2d 584, 592-93 (ED Va 2006).

⁴⁶ *Miller*, 465 F Supp 2d at 594.

⁴⁷ *Miller*, 465 F Supp 2d at 595.

⁴⁸ *Miller*, 503 F3d at 367-368 (citations omitted).

present here. Indeed, neither of the two Supreme Court decisions holding primary laws unconstitutional involved a statute that represented only one of several options for candidate nomination. We agree with the district court that it is constitutionally significant that the primary laws in those cases were "both mandatory and exclusive."

The Committee argued, however, that because Virginia allows political parties to select their candidates by primary, a party has a constitutional right to restrict participation in the primary to persons of its choosing. The Fourth Circuit observed in response that "a party has no constitutional right even to select its nominees by primary," and that⁴⁹:

[W]hile the Committee argues that a primary has certain advantages over other forms of nomination--such as reduced cost to the party and broader exposure of party candidates to the public--there is no constitutional requirement that Virginia hold a primary at all. And, again, a party is free to select from various methods of nomination in which it can exclude voters who do not share its views--including a closed primary conducted and funded by the party. It is only when the party chooses to hold a primary operated and funded by the state that it must allow all voters to participate.

The Court thus concluded that "because Virginia makes available to political parties multiple options for restricting their candidate selection process to individuals of their choosing, the refusal by the state to fund and operate a closed primary does not burden parties' right of association."⁵⁰ The Court affirmed the holding of the district court that the statute was facially constitutional.

In this case, 2007 PA 52 left it up to the participating political parties to decide whether to utilize the primary process for 2008, and thus the expedited date. (Exhibit 1, § 613a). The MDP could have stuck by its apparent original decision to hold a caucus on February 9, 2008, as referenced by Plaintiff. (Complaint, ¶ 6). The Act did not compel or force the MDP to participate in the primary. Thus, like the statute in *Miller, supra*, 2007 PA 52 is not facially unconstitutional.

⁴⁹ *Miller*, 503 F3d at 368.

⁵⁰ *Miller*, 503 F3d at 368.

The *Miller* Court did, however, conclude that the Virginia statute was unconstitutional as applied to the Republican committee in that case. The Court essentially concluded that because the incumbent senator chose to have a primary, the committee had no choice but to hold an open primary as provided for by Virginia law but contrary to the committee's policy. This was the type of "forced association" the causes injury under the First Amendment.⁵¹ These facts, and thus the Court's conclusion, are of course distinguishable from the present case.

Here, no person or entity compelled the MDP to participate in the 2008 primary. Rather, the MDP voluntarily chose not to opt out of the primary. Moreover, as discussed above, the Chairman of the MDP supported 2007 PA 52 and its advancement of the primary date, despite the fact that moving the date violated national party rules, and exposed the MDP to sanctions by the Democratic National Committee. Under these facts, there simply is no credible argument to be made that the MDP was forced or compelled to do anything in this case. The MDP supported the passage of Act 52 and its January 15, 2008, date, and it opted to hold the primary. These facts are clearly distinguishable from those in *Miller, supra*, and other primary cases.⁵² Plaintiff thus fails to state a claim upon which relief may be granted with respect to the State Defendants. Dismissal is warranted under FR Civ P 12(b)(6).

III. Plaintiff cannot establish the requisite elements for granting a preliminary injunction in this case.

The State Defendants submit that any request for injunctive relief should be denied because it is untimely and substantially lacks merit.

⁵¹ *Miller*, 503 F3d at 368-370.

⁵² See *Democratic Party of the United States v Wisconsin*, 450 US 107; 101 S Ct 1010; 67 L Ed 2d 82 (1981); *Tashjian*, 479 US 208; *Jones*, 530 US 567.

A. Standards for granting injunctive relief.

Determining whether a preliminary injunction shall issue is a question residing solely within the court's discretion.⁵³ In exercising such discretion, the Sixth Circuit Court of Appeals has instructed that district courts evaluating requests for preliminary injunctive relief must consider four interrelated criteria⁵⁴:

- 1) Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
- 2) Whether the plaintiff has shown irreparable injury;
- 3) Whether the issuance of a preliminary injunction would cause substantial harm to others; [and]
- 4) Whether the public interest would be served by issuing a preliminary injunction.

These criteria serve as factors to be balanced, rather than rigid requirements that must be satisfied in every case.⁵⁵ The first factor – the likelihood of success on the underlying merits – is the most critical.⁵⁶ A district court need not make specific findings on each of the four factors if fewer factors are dispositive of the issue.⁵⁷ Thus "a finding that there is simply no likelihood of success on the merits is usually fatal."⁵⁸ A party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances.⁵⁹

B. No substantial likelihood of success on the merits.

⁵³ *Lexmark Int'l Inc v Static Control Components Inc*, 387 F3d 522, 532 (CA 6, 2004); *ACLU v Taft*, 385 F3d 641, 645 (CA 6, 2004).

⁵⁴ *NAACP v City of Mansfield*, 866 F2d 162, 166 (CA 6, 1989); see also *Edward Rose & Sons*, 384 F3d at 261; *Jones v City of Monroe*, 341 F3d 474, 476 (CA 6, 2003).

⁵⁵ *Jones*, 341 F3d at 476; *In re DeLorean Motors Co*, 755 F2d 1223, 1229 (CA 6, 1985).

⁵⁶ *Mason County Med. Ass'n v Knebel*, 563 F2d 256, 261 (CA 6, 1977).

⁵⁷ *DeLorean Motor Co*, 755 F2d at 1229.

⁵⁸ *Gonzales v Nat'l Bd of Med Exam'rs*, 225 F3d 620, 625 (CA 6, 2000).

⁵⁹ See *Checker Motors Corp v Chrysler Corp*, 405 F2d 319 (CA 2, 1969); *O'Lone v Estate of Shabazz*, 482 US 342; 107 S Ct 2400; 96 L Ed 2d 282 (1986).

As discussed above and incorporated herein, Plaintiff's Complaint fails to state a claim upon which relief may be granted against the State Defendants. Accordingly, Plaintiff cannot establish a substantial likelihood of success on the merits for purposes of supporting any request for injunctive relief, and this failure should be considered dispositive of her request.

C. No irreparable harm.

Plaintiff's asserted injuries – that she cannot vote for her preferred candidate, John Edwards, at the primary and cannot campaign for Edwards in conjunction with the primary – will not be remedied by an injunction.

D. Substantial harm to others.

At this point in time, granting an injunction would cause substantial harm to persons other than the Plaintiff. The holding of a presidential primary is a significant undertaking by the State Defendants and the local city and township clerks. As set forth in the attached affidavit from Director of Elections Christopher Thomas, after the Michigan Supreme Court held on November 21, 2007, that 2007 PA 52 was constitutional under state law, and that the primary could go forward, county and local elections officials were instructed to immediately proceed with primary preparations. (Exhibit 3, affidavit of Christopher M. Thomas). Preparations are thus in full swing in anticipation of the primaries, which includes the development of forms and protocols necessary to implement 2007 PA 52. Ballots have been designed and are in the process of being printed, if most have not already been completed. Absentee voter ballots were mailed to the thousands of Michigan voters residing overseas. All of these events, and others, must continue to occur in a timely fashion in order to ensure a well-run and successful presidential primary. Enjoining these activities and others would again threaten the State's and local elections officials' ability to hold an effective and fair primary. Thus, this factor weighs in favor of denying Plaintiff's request for an injunction.

E. Public interest would not be served by an injunction.

Michigan's electors have substantial interests and rights in being offered the opportunity to participate in the scheduled upcoming presidential primaries in order to select party choices for the office of President of the United States. Moreover, they have an interest in participating in a primary that is well-organized and well-run, which cannot be accomplished by the State Defendants and local clerks on a moment's notice. Plaintiff's Complaint does not set forth any arguments or claims supporting enjoining of the holding of the presidential primaries as required under 2007 PA 52. Rather, the interests of the public will be best served by allowing preparation for and the primaries to proceed as scheduled. Thus, this factor weighs in favor of denying Plaintiff's request for an injunction.

IV. Plaintiff's request for injunctive relief is untimely and should be barred by the doctrine of laches.

In Plaintiff's motion for preliminary injunction, Plaintiff contends that issuance of a preliminary injunction "halting the January 15th primary" will also cause harm to "to those who wished to participate in the Republican Primary." (Plaintiff's Motion For A Preliminary Injunction And Other Relief, p 29.) This relief is different, and much broader in scope, from the relief sought in Plaintiff's Complaint filed with this Court on December 10th, which sought a preliminary injunction "enjoining the State of Michigan and the Michigan Secretary of State from conducting the January 15, 2008 Presidential Primary *so far as it relates to the Democratic Presidential Primary*". (Complaint, (emphasis added)). Plaintiff's attempt to enjoin either all or a part of the January 15th primary is untimely.

The election is underway and absentee ballot voting has commenced. Plaintiff has known since at least November 14, 2007, that the MDP chose not to conduct a caucus and instead opted to hold a primary. One week later, on November 21, 2007, the Michigan Supreme

Court upheld the constitutionality of 2007 PA 52.⁶⁰ Plaintiff could have filed her lawsuit in November, instead of waiting until the eve of the election. The relief that Plaintiff now seeks, which is to enjoin the entire statewide primary, should be barred by laches.

The defense of laches is rooted in the principle that equity aids the vigilant, not those who slumber on their rights.⁶¹ 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.⁶² In this case, Plaintiff's unreasonable delay in initiating this lawsuit, or at least in seeking injunctive relief, will prejudice the State Defendants.

After the state litigation challenging the state primary statute ended, local election officials were notified to proceed with the process of preparing for a statewide election. (Exhibit 4, Affidavit of Christopher Thomas, ¶ 5). This process included the printing and distributing of absent voter ballot applications, designing the layout of ballots for each precinct, printing proof ballots and distributing them to candidates for review, programming optical scan tabulators, preparing charts of predetermined results and ballot test decks needed for the performance of accuracy tests, printing ballots, and issuing ballots to absent voter ballot applicants. (Exhibit 4, Affidavit of Christopher Thomas, ¶5) Thus, at this point, considerable amounts of time and money have been invested by the State and local elections officials to prepare for the primary. This Court should decline Plaintiff's invitation to enjoin the statewide primary based on laches.⁶³

⁶⁰ *Grebner v Secretary of State*, Michigan Supreme Court No. 135274.

⁶¹ *Lucking v Schram*, 117 F2d 160 (CA 6, 1941).

⁶² *Brown-Graves Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 206 F3d 680, 684 (CA 6, 2000).

⁶³ See *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).

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth above, the State Defendants respectfully request that this Court grant their Motion to Dismiss Plaintiff's Complaint for failure to state a claim upon which relief may be granted as to these Defendants, and deny Plaintiff's Motion for Preliminary Injunction.

Respectfully submitted,

Michael A. Cox
Attorney General

s/Denise C. Barton (P41535)
s/Heather S. Meingast (P55439)
Attorneys for Defendants State of Michigan and
Terri Lynn Land
P.O. Box 30736
Lansing, MI 48909
(517) 373-6434
Email: bartond@michigan.gov
(P41535)

Dated: December 28, 2007

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2007, 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: Defendants' Motion to Dismiss, and I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants: Earl E. Erland, 161 Ottawa NW, Ste. 300-A, Grand Rapids, MI 49503.

s/Denise C. Barton (P41535)
s/Heather S. Meingast (P55439)
Attorneys for Defendants State of Michigan and
Terri Lynn Land
P.O. Box 30736
Lansing, MI 48909-8236
(517) 373-6434
Email: bartond@michigan.gov
(P41535)