

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MARTHA HAYES,

Plaintiff,

Case No. 1:07-cv-1237

v.

MICHIGAN DEMOCRATIC PARTY,

Hon. Robert J. Jonker

and

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

Defendants.

Earl E. Erland (P41917)
Attorney for Plaintiff
161 Ottawa NW, Ste. 300-A
Grand Rapids, MI 49503
(616) 459-6168
eerland@twoheylaw.com

Andrew Nickelhoff (P37990)
Sachs Waldman, P.C.
Attorney for Defendant Michigan Democratic
Party
1000 Farmer St.
Detroit, MI 48226
(313) 496-9429
anickelhoff@sachswaldman.com

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

MOTION OF MICHIGAN DEMOCRATIC PARTY TO DISMISS

ORAL ARGUMENT REQUESTED

Defendant Michigan Democratic Party (“MDP”), by its attorneys, moves for dismissal of the Complaint for Declaratory and Injunctive Relief as to MDP, pursuant to F.R.C.P. Rule 12(b)(1) and (6), for the reasons stated in the appended Brief In Support.

WHEREFORE, MDP respectfully requests that the court dismiss the Complaint For Declaratory and Injunctive Relief as to MDP.

Respectfully Submitted,

SACHS WALDMAN, P.C.

s/ Andrew Nickelhoff

Andrew Nickelhoff (P37990)

Attorneys for Michigan Democratic Party

1000 Farmer Street

Detroit, MI 48226

(313) 496-9429

e-mail: anickelhoff@sachswaldman.com

Dated: December 28, 2007

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P.O. Box 30736
Lansing, Michigan 48909
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**BRIEF OF MICHIGAN DEMOCRATIC PARTY IN SUPPORT OF MOTION TO
DISMISS AND OPPOSING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

ORAL ARGUMENT REQUESTED

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INTRODUCTION

With the court's permission, defendant Michigan Democratic Party ("MDP") files this consolidated brief in support of its Motion to Dismiss, and opposing plaintiff's Motion for a Preliminary Injunction.

The gist of plaintiff's Complaint is that MDP violated her purported constitutional right to vote for and participate in campaign events sponsored by her favored contender for the Democratic Party's Presidential nomination. MDP is alleged to have accomplished this by electing to take advantage of a state law allowing it to use Michigan's January 15, 2008 Michigan Presidential primary election as a basis for allocating delegates to the Democratic National Convention, at which the Presidential nominee is chosen. In deference to the National Democratic Party's rules, which conflict with MDP's delegate selection rules, plaintiff's candidate withdrew from the Michigan primary election. Plaintiff seeks to lay this voluntary decision by her candidate at MDP's doorstep. On that tenuous basis she asks the court either to halt the January 15, 2008 Presidential Primary election or disable MDP's delegate selection plan.

The Complaint should be dismissed as to MDP under F.R.C.P. Rule 12(b)(6), because it does not assert a cognizable claim for relief. Plaintiff's allegations are not sufficient to state a claim under 42 U.S.C. § 1983, for several reasons. First, plaintiff does not make the required showing that MDP's purely internal, voluntary decision on a method for allocating its delegates to the National Convention amounted to state action. Second, plaintiff fails to identify any constitutional rights that allegedly were violated. She has no constitutional entitlement to participate in MDP's delegate selection process, or to take part in a candidate's sponsored campaign activities when the candidate decides not to conduct them. Finally, even if such constitutional rights existed, plaintiff fails to

make allegations showing that MDP caused a violation of those rights.

The case also suffers from serious jurisdictional defects and should be dismissed under F.R.C.P. Rule 12(b)(1). First, plaintiff Hayes lacks standing to bring the claim. Plaintiff fails to meet the fundamental requirements of standing, as to injury and as to redressability. The relief she seeks is for the court to enjoin the January 15th Presidential Primary. Even if the requested relief were granted, and it should not be, plaintiff will only have succeeded in preventing others from voting for the candidates who have opted for placement on the Primary ballot. Such a result would accomplish little more than indulging plaintiff's pique. Second, serious questions of justiciability should compel the court to dismiss for lack of a case or controversy.

Apart from all of the above, a preliminary injunction should not be granted. Plaintiff's request that a federal court enjoin a state-conducted primary election is unprecedented. There is no authority under F.R.C.P. Rule 65 for such extraordinary intervention by a federal court. Further, plaintiff's claim against MDP and her request for an injunction should be rejected based on laches. Plaintiff has asked the court to enjoin a primary election at the eleventh hour. The foreseeable effect of granting the requested injunction will be to disrupt a state-wide election that already is well under way, with no discernable benefit to anyone. Plaintiff Hayes should have moved far more quickly if she wanted the court to intervene in Michigan's primary election. Apart from all of that, Hayes fails to satisfy the equitable requirements for a preliminary injunction.

I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM.

A. The Applicable Standard Under F.R.C.P. Rule 12(b)(6).

The court must determine whether the Complaint sets forth sufficient allegations to establish a claim for relief. The court should accept plaintiff's allegations as true and construe them in the

light most favorable to plaintiff. *Hughlett v. Romer-Sensky*, 497 F.3d 557, 561 (6th Cir. 2006). The complaint should be dismissed only where it appears beyond doubt that plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *Conley v Gibson*, 355 U.S. 41, 44-46 (1957). “[W]hile liberal, this standard of review does require more than the bare assertion of legal conclusions.” *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109-1110 (6th Cir. 1995). “Bare bones” conclusory allegations are not sufficient, and the Complaint must state a cognizable claim for relief under the Constitution. *Coker v. Summit County Sheriff's Dep't*, 90 Fed. Appx. 782, 787 (6th Cir. 2003). To survive a motion to dismiss, the "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988) (internal quotation marks and citations omitted).

B. The Complaint Should Be Dismissed As To MDP Because State Action Is Not Alleged Or Shown.

Plaintiff has failed to allege facts sufficient to show the required element of state action on the part of MDP. To bring a claim against MDP under 42 U.S.C. § 1983, plaintiff must show that MDP was “acting under color of law.” *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-157 (1978). The Complaint includes a conclusory allegation that MDP was a state actor “[b]ecause of its decision to utilize this primary for the purpose of selecting delegates to the National Convention” (Compl. ¶ 66) However, the specific facts alleged, even if taken as true, fail to show that MDP was acting under color of law.

The Complaint is noticeably vague in describing the action MDP is purported to have taken in connection with the January 15, 2008 Presidential Primary. In places plaintiff asserts that MDP violated her constitutional rights by deciding to “opt into” the Presidential Primary. (*E.g.* Compl.

¶¶ 8, 68) Elsewhere, plaintiff describes MDP as having the “ability to opt out of the January 15th Primary.” (Compl. ¶ 19) In other places, the MDP is alleged to have “participated in” the Primary with the intention to “use the results of that Primary for the purpose of selecting Delegates to the National Convention . . .” (Compl. ¶ 21, and 26, 32, 24, 38)

The Complaint’s noticeable confusion on this important point is not surprising, given that the statutes and documents relied on by and attached to the Complaint show that MDP did not and could not “opt into” or “opt out of ” or “participate in” the January 15, 2008 Primary. Instead, MDP’s only possible action was to use the results of the State-conducted Presidential Primary election in making its own internal decisions concerning selection of National Convention delegates. This internal decision by a private political organization cannot possibly be the predicate for state action.

Plaintiff Hayes attempts to mask the foregoing reality with conclusory and imprecise allegations. The Complaint avers that, “under § 613a(1) of this Act [MCL 168.613a(1), 2007 PA 52, attached to the Complaint as Exhibit 3], *the MDP was required to hold an open primary* for the purpose of selecting delegates to the Democratic National Convention on January 15, 2007.” (Compl. ¶ 18, emphasis added) The statute says nothing of the sort. Section 613a(1), MCL 168.613a(1), simply states: “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.” Secretary of State Land conducts the Presidential Primary Election. MCL 168.613a(4). The MDP’s role with respect to a Primary is limited to notifying the Secretary of State whether it will use a method other than the Primary in selecting delegates it will

send to the National Democratic Party Convention. MCL 168.613a(2).¹

The MDP's action under the statute was not to "participate" in the Primary. As demonstrated by Exhibit 4 of the Complaint, in accordance with the statute, MDP Chair Mark Brewer informed the Secretary of State of MDP's decision (subject to certain conditions) to, "use the results of the January 15, 2008 presidential primary to select its delegates to the 2008 Democratic National Convention."² Other than that, MDP's involvement in the Primary consisted solely of providing the Secretary of State with a list of individuals "whom they consider to be potential presidential candidates for nomination. . . ." MCL 168.614a(1). It is up to the listed candidates whether they wish to appear on the Primary ballot, and if so, which party's ballot they prefer. MCL 168.615a(1). Contenders who are not on the lists submitted by the parties can appear on the Primary ballot by filing petitions with the Secretary of State. MCL 168.615a(2). The statute reserves internal party processes as beyond its purview and expressly acknowledges that the parties do not relinquish autonomy over their internal decisions concerning allocation of Convention delegates.³

Hence, MDP's alleged "action" was not to "participate in" or "opt into" Michigan's

¹ Providing in pertinent part: "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." [Compl. Exh. 3, p. 1]

² One of the conditions was that the Michigan Republican Party decide to use the results of the January 15th Primary for allocation of its delegates. The Michigan Republican Party did so.

³ MCL 168.613a(5) states: "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."

Presidential Primary, but simply its decision to use the State-conducted Primary election results, rather than caucuses or other available methods, as a basis for allocating delegates. Michigan's Presidential Primary law, 2007 PA 52, did not compel this decision; it only made it available. At base, what plaintiff seeks to challenge is a delegate selection decision that MDP made without any degree of control or influence by the State. This solely private decision cannot possibly provide a basis for Section 1983 jurisdiction over MDP.

It should be noted at the outset that, given the associational rights of political parties, questions of state action in connection with internal party decisions such as delegate selection should be approached with "great caution and restraint." *O'Brien v. Brown*, 409 U.S. 1, 4 (1972)(*per curiam*). It is well settled that such decisions by a political party do not constitute state action. Where a primary election is involved, a party does not act under color of law unless it actually *conducts* the election. In *Banchy v. Republican Party of Hamilton County*, 898 F.2d 1192 (6th Cir. 1990), the Sixth Circuit held that the key inquiry for purposes of determining whether a political party's role in a primary election constitutes state action is whether the party actually conducts the election. Contrasting with the so-called "white primary" cases, such as *Terry v. Adams*, 345 U.S. 461 (1953) and *Smith v. Allwright*, 321 U.S. 649 (1944), where political parties dominated and controlled the primary election process, the court said:

These cases are easily distinguishable from the case before us. The Supreme Court did not assert that the Jaybirds had become a state actor for every purpose, only that the Jaybirds were state actors, acting under color of state law insofar as they had been assigned an 'integral part' in the election process, a governmental function. Other courts facing this question have reached similar conclusions. 'The primary election cases do not hold that a political party is part of the state, or that any action by a political party other than conducting an election is state action. . . . The primary election cases merely hold that conducting an election is a governmental function and constitutes state action, no matter who actually conducts the election.' *California Republican Party v. Mercier*, 652 F. Supp. 928, 934 (C.D.Cal. 1986).

Id. at 1195-1196.

In *Hernandez v. Thomas*, No. 92-173, 1993 U.S. Dist. LEXIS 21285 (W. D. Mich. 1993)(slip op. attached), Judge Richard Enslen dismissed under F.R.C.P. 12(b)(6) a claim that MDP had violated the plaintiffs' rights under the Voting Rights Act by allocating Convention delegates according to Presidential primary election results. Judge Enslen concluded that MDP was not a state actor simply because it used the Primary results in its internal decision making, relying on earlier cases holding that Michigan's Election Law could not control MDP's delegate selection decisions. *Id.*, 1993 U.S. Dist. LEXIS 21285 at *9 (citing, *Ferency v. Austin (Ferency I)*, 493 F. Supp. 683 (W.D. Mich. 1980), *aff'd*, 666 F.2d 1023 (6th Cir. 1981)). The court explained:

In light of *Banchy*, it seems to me that anything short of actually conducting an election does not rise to the level of 'state action.' Here, clearly, the MDP did not conduct the Michigan Presidential primary, or any other election." [*Hernandez* at *9]

* * *

Thus, the private determination of the MDP whether and how to use, or not to use, the Presidential primary results as one factor in delegate selection does not amount to 'conducting' an election. [*Id.* at *14]

The earlier case cited by Judge Enslen, *Ferency v. Austin (Ferency I)*, dismissed a constitutional challenge to MDP's Presidential preference caucus procedures, in part on grounds that such internal party matters did not constitute state action. 493 F. Supp. at 699-700. The Sixth Circuit affirmed on other grounds, and declined to reach the state action question. *Id.* 666 F.2d at 1028.⁴ As

⁴ Dismissing a later state law challenge by the same plaintiff, the Michigan Court of Appeals commented: "Plaintiff's final argument is a 'state action' argument identical to the one advanced in *Ferency I*. On appeal, the Sixth Circuit neither affirmed nor rejected this aspect of the holding in *Ferency I*. [fn.] The Sixth Circuit declined to decide the issue because the plaintiff failed to show a violation of his federal constitutional rights. . . . The Sixth Circuit's opinion, although not expressly affirming the 'state action' holding of the district court in *Ferency I*, certainly leans in that direction. We, therefore, decline to find that the delegate selection process constitutes 'state action'

discussed above, in *Banchy* the Sixth Circuit later did address that question, and came down firmly on the side of no state action. As in *Hernandez v. Thomas, supra*, the action challenged here was MDP's decision to allocate delegates based on the results of a State-conducted Primary election. While a Michigan statute made that decision a possibility, Michigan did not require, assist or participate in MDP's internal decision.⁵

No state action can be found where the decision whether to use Michigan's Presidential Primary as the basis for selecting delegates was the MDP's to make, not the State of Michigan's. The fact that Michigan makes such an option available does not convert MDP's purely private decision into state action. Accordingly, the Complaint fails to state a claim as to MDP.

as argued by plaintiff." *Ferency v. Secretary of State (Ferency II)*, 139 Mich. App. 677, 687 (Mich. Ct. App. 1984), *lv. denied*, 422 Mich. 944 (Mich. 1985).

⁵ In *Federspiel v. Ohio Republican Party*, 1996 U.S. App. LEXIS 15422 (6th Cir. 1996)(*per curiam*)(unpublished), the Sixth Circuit affirmed dismissal of a state Republican Party faction's complaint that another slate had been selected for county level positions unconstitutionally. Citing *Banchy*, the court held that the Ohio Republican Party was not a state actor. *Id.*, 1996 U.S. App. LEXIS 15422 at *5-*7. The fact that state law empowered the party to make such a decision was not sufficient to bring the decision under color of law. *Id.* Citing cases holding that a state's grant to a private entity of the ability to decide a matter of public importance does not render the decision attributable to the state, the panel held that absent active enforcement by Ohio, no state action had occurred. *Id.*, citing, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 (1978)(holding that a private party's use of powers conferred by a commercial statute, without active government enforcement, did not involve state action); *Jackson v. Metropolitan Edison*, 419 U.S. 345, 357 (1974)("the exercise of a choice allowed by state law where the initiative comes from [the private party to whom the choice has been given] and not the State, does not make [that private party's] action in doing so 'state action' for the purposes of the Fourteenth Amendment"). Just as the Ohio Republican Party in *Federspiel* was free to resolve an internal dispute concerning delegate selection with or without a state law, MDP was free to select a state-run Presidential Primary or any other method for allocating Convention delegates, without converting itself into an arm of the State.

C. The Complaint Should Be Dismissed Because It Fails To Identify Any Cognizable Constitutional Right.

To state a claim under 42 U.S.C. § 1983, plaintiff must allege that she was deprived of a constitutional right, privilege, or immunity. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-157 (1978). The Complaint fails to do so. While the Complaint discourses at length about “First Amendment - General Principles” (¶¶ 45-65), it fails to identify any recognized constitutional right either to vote for a particular candidate in connection with the MDP’s internal delegate selection process, or to participate in primary election campaign events or activities sponsored by any particular candidate. The closest plaintiff comes to identifying the source of such a right is her citation of Democratic National Committee (“DNC”) Rules, which she claims standing to enforce as against MDP. However, a political party rule does not equate to or give rise to a constitutional right.

1. There Is No Constitutional Right To Select Political Party Convention Delegates.

Plaintiff claims that she has a “first Amendment right to cast an effective vote in the first step of the delegate selection process.” (Brief in Support of Preliminary Injunction, p. 20) Many of the cases plaintiff cites stand for the well-settled proposition that voters have a First Amendment right to vote for and support candidates in a general election for public office without unnecessary encumbrance by the government. *E.g.*, *Anderson v Celebrezze*, 460 U.S. 780 (1983)(holding that an early filing deadline for general election ballot access violated supporters’ voting rights); *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006)(addressing a minor political party’s ability to place its candidates on the general election ballot). Clearly, a state may not unnecessarily impede a citizen’s ability to cast his or her vote in a primary election. *Kusper v. Pontikes*, 414 U.S. 51 (1973). However, plaintiff cites no case recognizing a constitutional right to

participate in a political party's delegate selection process.

In *Cousins v. Wigoda*, 419 U.S. 477 (1975), the Supreme Court held that the State of Illinois did not have a compelling interest in regulating the Illinois Democratic Party's selection of National Convention delegates. The Court carefully distinguished the internal party process of delegate selection, as to which the party's decisions were protected from state interference by the First Amendment. *Id.* at 489-90. Accordingly, in *Ferency v. Austin (Ferency I)*, *supra*, this District Court dismissed a claim that MDP was required to follow state law requirements for selection of delegates rather than use its own caucuses. Judge Hillman expressly rejected any claim to a "first Amendment right to cast an effective vote in the first step of the delegate selection process," explaining:

I agree with the statement of the court in *Graham v. Fong Eu*, 403 F. Supp. 37, 44 (N.D. Cal.1975), *aff'd* 423 U.S. 1067, 96 S. Ct. 851, 47 L. Ed. 2d 80 (1976), where it said: 'The Constitution does not require that voters be afforded an opportunity to participate at either final or preliminary stages in the nomination process for presidential candidates. Whether the voters will participate in the delegate selection process, and, if so, at what stage, and whether their participation will be translated directly into delegate representation at the national convention are matters for the political parties themselves to determine, and, if the parties permit it, for the state' (Footnotes omitted.)

Id. at 699. The Sixth Circuit agreed with Judge Hillman. 666 F.2d at 1028 ("... it is implicit in the [*Cousins v. Wigoda*, 419 U.S. 477 (1975)] and [*Democratic Party v. LaFollette*, 450 U.S. 107 (1981)] opinions that the exclusion of non-Democratic voters from the delegate selection process of the Democratic Party does not constitute a denial of any federal constitutional right."); *see also*, *Hernandez v. Thomas*, *supra* at *12 ("Undoubtedly, it is solely for the private determination of a political party whether and how voters will participate in convention delegate selection.")

This case deals with MDP's Convention delegate selection. The action challenged in this case is MDP's decision to use the January 15th Presidential Primary results "to select delegates to

[its] national convention[.]” MCL 168.613a(2).⁶ Plaintiff has no constitutional right to vote in MDP’s delegate selection process other than as provided in MDP’s internal rules and protocols.

2. Plaintiff Has No Constitutional Right To Participation In A Candidate’s Sponsored Campaign Activities.

Plaintiff asserts an inchoate “First Amendment right to be exposed to. . . educationally oriented campaign activities” (Plaintiff’s Brief, p. 21), which similarly is without any legal basis. Other than invoking the “Marketplace of Ideas” (*Id.* p. 20), plaintiff offers no authority for such a right. But even if such a right existed, neither MDP, nor the State of Michigan for that matter, has interfered with plaintiff’s participation in political campaigns. No law or MDP rule prohibits plaintiff’s favored contender from campaigning in Michigan. Plaintiff asserts that, “[a]s a result of the January 15th primary law, all of the Democratic National contenders are . . . prohibited from campaigning in Michigan . . .” (Brief, p. 23) This is patently not the case since some of the candidates have opted to conduct campaign activity in Michigan as permitted under DNC Rules. (Mark Brewer Dec. ¶ 4) It may be that plaintiff’s favored candidate has decided not to campaign in Michigan in order to avoid penalties under the DNC Rules. That was not MDP’s decision, nor was it required by the Presidential Primary statute. Parenthetically, while the DNC Rules may affect candidates for the Party’s nomination, the Rules do not control their supporters. Plaintiff is free to advocate, fund-raise and campaign in Michigan for her candidate.

⁶ Under Michigan law, “[a] primary election is not an election to public office. It is merely the selection of candidates for office by the members of a political party having the form of an election.” *Line v. Bd. of Canvassers of Menominee County*, 154 Mich. 329, 332 (1908); *accord*, *Attorney General ex rel. Reuter v. Bay City*, 334 Mich. 514, 516 (1952).

3. Plaintiff May Not Invoke This Court's Jurisdiction To Enforce National Party Rules.

Apparently aware of the fundamental weakness in her assertions of a First Amendment right, plaintiff claims a right to have the DNC's Rules enforced against MDP. (Plaintiff's Brief, p. 19) The Constitution contains no such right, and plaintiff has no standing to ask this court to enforce the DNC's Rules on her behalf. Respectfully, the court has no jurisdiction to intervene in an internal political party dispute. In fact, the First Amendment's protection of the right to associate forecloses such judicial intervention. "[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." *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 123-24 (1981)(overturning Wisconsin's open primary law as in conflict with internal party delegate selection rules). Recognition of a political party's right to make such internal decisions applies equally to state parties as well as national parties. *See, Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989)(overturning California's restrictions on state party endorsements and officer selection procedures).

The Sixth Circuit's decision in *Heitmanis v. Austin*, 899 F. 2d 521 (6th Cir. 1990), is on point. National Republican Party rules deferred to state law governing the selection of delegates to state-level conventions, which in turn selected delegates to the national party's Presidential nominating convention. Michigan's election law required that elected officials be automatically accepted as state convention delegates. The Michigan Republican Party, however, disagreed, and enacted rules denying automatic delegate status to elected officials, who then successfully sued in State court to overturn the state party rules. The Sixth Circuit instead overturned the Michigan

statute because of its “conflict with *State Party* rules.” *Id.* at 529 (emphasis in original). The court explained that the Michigan statute “infringes upon the right of political parties to choose a method for selection of their party nominees.” *Id.* (citing and quoting *Democratic Party of the United States v. Wisconsin*, *supra*). See also, *Ferency v. Austin (Ferency I)*, *supra* (according constitutional protection to the MDP’s rules for Convention delegate selection).

This court should reject plaintiff’s assertion of a constitutional right to have national party rules annul MDP’s delegate selection rules.⁷

D. The Complaint Does Not Allege Facts Showing Causation.

Finally, plaintiff fails to properly plead causation. Count I of the Complaint does not specify exactly how plaintiff claims to have been injured by MDP’s alleged actions, other than to state in conclusory fashion that she is being deprived of rights protected by the First and Fourteenth Amendments. (Compl. ¶¶ 68, 70) The Complaint suggests that by deciding to allocate delegates in a manner contrary to DNC rules, MDP deprived plaintiff of a purported constitutional right to vote for the candidate of her choice in the Presidential Primary and to “engage in candidate initiated or sponsored activities. . . .” (Compl. ¶ 40) Assuming *arguendo* that such effects could be proven and that they would constitute a violation of constitutional rights (as stated above, no constitutional rights are implicated), the Complaint fails to state how MDP caused any of the alleged injuries. Absent the required showing of causation, the Complaint must be dismissed.

To state a claim under 42 U.S.C. § 1983, plaintiff must allege that she was deprived of a

⁷ Even if plaintiff could assert such a right, she would be foreclosed from asking this court to enforce it because she has failed to exhaust internal the party appeal procedure. The DNC Rules contain such a challenge and appeal procedure concerning state party delegate selection decisions. (DNC Delegate Selection Rules, Section 20, Compl. Exh. 1, pp. 19-22).

constitutional right, privilege, or immunity, and that the deprivation was caused by the defendant while acting under color of state law. *Flagg Bros. v. Brooks*, supra; *Perry v. McGinnis*, 209 F.3d 597, 603 (6th Cir. 2000). “If a plaintiff fails to make a showing on any essential element of a § 1983 claim, it must fail.” *Redding v. St. Edward*, 241 F. 3d 530, 532 (6th Cir. 2001). Plaintiff must allege and show that MDP proximately caused her alleged injuries, under principles derived from the common law of torts. *Doe v. Sullivan County*, 956 F. 2d 545, 550 (6th Cir. 1992), *cert. denied*, 506 U.S. 864 (1992). Under applicable common law tort doctrine, MDP’s actions must have been a “substantial factor” in causing the asserted constitutional deprivation. *Martin v. A.O. Smith Corp.*, 931 F. Supp. 543 (W.D. Mich. 1996)(applying to claims under RICO). Further, determination of causation incorporates the common law principle of intervening or superceding cause. *Siggers v. Barlow*, 906 F.2d 241 (6th Cir. 1990); *Sowards v. City of Trenton*, 125 Fed. Appx. 31, 41-42 (6th Cir. 2005)(unpublished).⁸

Even read in the light most favorable to plaintiff, the Complaint alleges only that the actions of persons or entities *other than MDP*, such as the National Democratic Party or the candidates themselves, caused the asserted constitutional deprivation. Under DNC Rules, certain automatic sanctions would apply to candidates participating in the January 15th Primary, due to its timing. (Compl. ¶¶ 27-30) The DNC decided to impose the sanctions, and MDP reaffirmed its decision to proceed as planned. (*Id.* ¶¶ 32, 33) As a result, some, but not all, of the candidates for the Democratic Presidential nomination decided to honor prior pledges, with the result that those candidates abstained from participating in the Michigan Primary or actively campaigning in

⁸ *Restatement (2nd) of Torts* § 440 defines a superseding cause as, "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."

Michigan. (*Id.* ¶¶ 36, 37). Other candidates made the decision to conduct campaign-related activity in Michigan and to run in the Primary.⁹ (Mark Brewer Declaration ¶ 4)

Any deprivation of plaintiff’s asserted right to vote for a particular candidate resulted from decisions made by the candidate himself, or perhaps indirectly from decisions made by the DNC. Presumably, plaintiff is not claiming any violation of the constitutional rights of those supporting candidates on the Primary ballot -- although she asks the court to enjoin the entire Primary regardless of other voters’ rights. The superceding cause of plaintiff’s alleged injury was a decision made by the candidate she favors, rather than any action taken or not taken by MDP. Without the necessary allegations of causation, the Complaint should be dismissed as facially insufficient.

II. DISMISSAL IS CALLED FOR BECAUSE THE PLAINTIFF LACKS STANDING AND HER CLAIM IS NON-JUSTICIABLE.

A. Plaintiff Lacks Standing.

Closely linked to the question of causation is the matter of plaintiff’s standing to sue. To establish standing, plaintiff must show that she has suffered an injury “fairly traceable” to MDP’s conduct, and that it is redressable by the relief requested. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 568-71 (1992). Particularly in cases such as this:

The endless number of diverse factors potentially contributing to the outcome of state presidential primary elections, caucuses and conventions forecloses any reliable conclusion that voter support of a candidate is ‘fairly traceable’ to any particular event. In the case before us, whether [a plaintiff] is viewed in the character of a voter, contributor, a noncontributing supporter or a candidate for a delegate post, a court would have to accept a number of very speculative inferences and assumptions in any endeavor to connect his alleged injury with activities attributed to [the

⁹ Obviously, the statement that plaintiff’s favored candidate is “prohibited” from campaigning in Michigan (Compl. ¶¶ 7, 38), or that her candidate “could not” appear on the Primary ballot” (¶ 37), are simply hyperbole, and they do not square with the factual allegations of the Complaint.

defendants]. Courts are powerless to confer standing when the causal link is too tenuous.

Winpisinger v. Watson, 628 F.2d 133, 139 (D.C. Cir.), *cert. denied*, 446 U.S. 929 (1980)(holding that candidates for the Democratic Presidential nomination lacked standing to challenge the incumbents use of government resources to bolster his campaign).

The essence of the injury plaintiff claims is vote dilution, i.e., that a vote she casts will not count as effectively in propelling her favored candidate toward nomination.¹⁰ Such claims cannot rest on tenuous or speculative grounds. The Sixth Circuit carefully analyzed the requirements for standing based on vote dilution in *Kardules v. City of Columbus*, 95 F.3d 1335 (6th Cir. 1996). In order to establish an “injury in fact” based on vote dilution, a plaintiff must show dilution “with mathematic certainty,” rather than based on speculative effects. *Id.* at 1348-49. Also, such a claim must be directed at the entity responsible for conducting the election. *Id.* at 1349-50. For example, standing could be based on a claim against the government official who prepares the ballot, but it may not be grounded on an attack against an outside entity that does not control the election. *Id.* at 1350. Here, plaintiff Hayes cannot show that her vote will be diluted with any degree of numerical certainty. Nor can standing rest on challenging the MDP’s decision to use the Primary election results, since MDP is not conducting or controlling the election.

Further, any purported constitutional violation plaintiff alleges would not meet the redressability requirement. The injunctive relief she requests – enjoining the entire January 15th

¹⁰ Note that plaintiff is not prohibited or precluded in any way from voting in the January 15, 2008 Democratic Presidential Primary. She can mark the “uncommitted” slot on the ballot or she can insert a write-in candidate. (Brewer Dec. ¶ 4) Plaintiff may not be aware of this because she only joined the MDP just before filing this action. (Mark Brewer Declaration ¶ 3) There is no record of her participating in MDP’s 2004 delegate selection caucuses. (*Id.*)

Presidential Primary, enjoining the Primary as to MDP, or enjoining MDP from using the Presidential Primary results¹¹ – would have no direct effect on plaintiff’s voting or campaign activities. Ms. Hayes’ ability to exercise the constitutional rights she asserts (assuming *arguendo* they exist) is dependent not on the MDP’s actions, but on the decisions of others not named in the Complaint -- namely, the candidates and the DNC. *Cf., Federspiel v. Ohio Republican Party, supra* at *5, holding that the plaintiff’s constitutional challenge of a statute allowing a political party to resolve internal disputes was not redressable under *Lujan v. Defenders of Wildlife*, where the statute did not control the party’s decisions.¹² Plaintiff does not satisfy the jurisdictional requirement of standing.

B. The Court Should Decline To Decide This Non-Justiciable Political Matter.

It follows from the foregoing that this case presents the court with a non-justiciable political question. Plaintiff effectively asks the court to referee the relationships between MDP, the DNC and various Democratic presidential contenders. Except in the most extreme circumstances (involving invidious racial discrimination not found here), federal courts have refused to intervene in internal political party matters. In staying the lower court’s intervention in a credentialing dispute at the 1972 Democratic National Convention, the Supreme Court explained in *O’Brien v. Brown, supra*:

¹¹ The Complaint’s Prayer for Relief requests orders enjoining MDP from “participating” in the Primary, and from using the election results to select delegates. Plaintiff’s Motion for Preliminary Injunction, however, asks the court to enjoin the entire Primary election as well.

¹² *Kardules v. City of Columbus, supra*, is helpful here too. Standing depends on establishing causation. 95 F.3d at 1352-1355. As discussed above, plaintiff’s cannot show a direct causal connection between MDP’s delegate selection decision and her alleged injury, because too many external influences, including decisions by candidates and the DNC, come into play. Moreover, plaintiff is completely free to campaign for, advocate, fund-raise and support her candidate in Michigan, without any injunction.

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 political in nature” (citations omitted). *Id.* at 4. The court went on further to say that the understanding has been since the inception of major parties as voluntary associations, that disputes arising out of the seating of delegates should be handled at the national convention. [citations] Judicial intervention in this area traditionally has been approached with great caution and restraint. [citations] 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.

409 U.S. at 4. While applicability of the political question doctrine to political party delegate selection was reserved in *Cousins v. Wigoda, supra*, at 483 n. 4, the Eleventh Circuit in *Wymbs v. Republican State Executive Committee of Florida*, 719 F.2d 1072 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984), provided a useful analysis. The court should “stay its hand when faced with ‘the impossibility of deciding [the controversy] without an initial policy determination of a kind clearly for non-judicial discretion,” and when there are no judicially discoverable and manageable standards allowing for effective resolution of the matter. *Id.* at 1082 (quoting, *Baker v. Carr*, 369 U.S. 186, 217 (1962)). The court in *Wymbs* concluded that the plaintiff’s claim of a right to proportional representation in electing Florida’s delegation to the Republican National Convention was purely an internal party conflict between national and state party organizations, and therefore was a political matter not properly before the court. *Id.* at 1082-83.

The Eleventh’s Circuit’s discussion of the second justiciability criterion, the ability to fashion an effective remedy, is particularly applicable here. The requested injunction commanding the state party to conduct a Presidential preference primary and select its delegates in the plaintiff’s preferred manner would have been “of trifling effect,” because ultimately the national party (which was not a party in the case) had final say on the seating of delegates. *Id.* at 1085. For that reason,

as well, the case was not within the federal court's Article III jurisdiction. *Id.* As in *Wymbs*, this case requires the court to resolve an intra-party dispute that is not amenable to an effective judicial remedy, because even if an injunction is granted, key decisions will be made by others who are not parties. *See also, Bachur v. Democratic National Party*, 836 F.2d 837 (4th Cir. 1987).¹³

III. PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF SHOULD BE DENIED, BECAUSE THE CLAIM IS BARRED BY LACHES, AND BECAUSE THE EQUITABLE REQUIREMENTS HAVE NOT BEEN MET.

A. The Claim Is Barred By Laches.

On the eve of the January 15, 2008 Presidential Primary, long after the state-wide election has been set in motion and is well under way, plaintiff asks the court to halt the election. If for no other reason, this extraordinary request is barred by laches. Under the circumstances present here, plaintiff's tardiness is inexcusable.

As recounted in the Complaint, Michigan's Presidential Primary statute, 2007 PA 52, was signed into law on September 3, 2007. (Compl. ¶ 17) MDP Chair Mark Brewer notified the Secretary of State that MDP would use the Presidential Primary results to allocate delegates on November 14, 2007. (Compl. ¶ 21) The Secretary of State immediately determined that the election would proceed. One week later, the Michigan Supreme Court upheld 2007 PA 152 as valid under Michigan's Constitution. *Grebner, et al. v. Sec'y of State*, ___ Mich. ___ ; 2007 Mich. LEXIS 2894

¹³ The Sixth Circuit did not disagree with *Wymbs v. Republican State Executive Committee*, but distinguished it in *Heitmanis v. Austin, supra*. There the dispute arose not from a conflict between the national and state party rules, but rather from the effect of a state law dictating the manner of the state party's selection of delegates. *Id.* 899 F.2d at 526. The national party's acquiescence in the state law did not negate the justiciable question of whether the law controlling delegate selection was constitutional. *Id.* Here, of course, the Michigan election law did not dictate or mandate any delegate selection decisions by the state or national Democratic Party organizations. Plaintiff's claims here arise solely from the manner in which candidates have reacted to a conflict between the MDP's and DNC's delegate selection procedures.

(Nov. 21, 2007). (Compl. ¶ 23) By December 1, the Secretary of State had delivered absentee ballots for the Primary election to local Clerks. *See* Secretary of State’s Timeline for January 15, 2008 Primary.¹⁴ Local Clerks proceeded to mail the ballots to absentee voters. Polling place workers for the Primary were appointed by December 6, 2007.

Inexplicably, plaintiff did not commence this action until December 10, 2007, over three months after 2007 PA 52 went into effect, and over three weeks after MDP announced its intention to allocate delegates according to the Primary election results. And then, after waiting all that time to file suit, plaintiff did not immediately seek a temporary restraining order or move for an expedited preliminary injunction – instead, she *waited another two weeks* to ask for an injunction halting the election and MDP’s delegate selection process. In the meantime, while plaintiff delayed, Michigan proceeded with its election preparations and MDP moved forward with implementing its delegate selection rules.

Under these circumstances, all of the injunctive relief plaintiffs seeks should be denied on grounds of laches. In *Kay v. Austin*, 621 F.2d 809 (6th Cir. 1980), the plaintiff filed suit in this District seeking a place on the primary ballot as a Democratic Presidential nominee. The Sixth Circuit barred his request for an injunction based on laches. *Id.* at 813. In that case, the plaintiff filed suit 3 ½ weeks after being informed that the ballot candidate list omitted his name, seven weeks before the primary election date. The Sixth Circuit explained why laches barred injunctive relief under those circumstances, as follows:

Those courts which have considered comparable claims have in effect balanced the interests of the parties and required that any claims against the state procedure be pressed expeditiously. *See, e.g., Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S. Ct.

¹⁴ available at: http://www.michigan.gov/documents/sos/Pres_Prim_Dates_New_31_208283_7.pdf

5, 12, 21 L. Ed. 2d 24 (1968). As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made, and the candidate's claim to be a serious candidate who has received a serious injury becomes less credible by his having slept on his rights. In this case, Kay waited until nearly two weeks after he knew the choice of the candidates would be made and further delayed eleven days before filing suit. During this time, the state proceeded with election preparations. . . . On the basis of these facts before it, it is the conclusion of this Court that the failure of the appellant to press his case when he should have known that an injury had occurred is fatal to his receiving any relief.

Kay v. Austin, 621 F.2d at 813. See also, *Nader v. Blackwell*, 230 F.3d 833 (6th Cir. 2000)(staying an injunction ordering that a candidate's party affiliate be printed on ballot, where the plaintiff waited ten days after receiving no response from the Secretary of State before filing suit, with ballots having been printed and distributed in the meantime, citing *Kay v. Austin*).

Plaintiff's motion for an injunction halting all or part of the January 15, 2008 Primary Election should be denied based on laches, if for no other reason. That such a request was rashly made and poorly thought out is obvious from plaintiff's plea that the entire state-wide primary, including the Republican Presidential primary, be enjoined, despite her asserting no standing, claim or allegations concerning the Republicans and her failure to serve or notify the Republicans.¹⁵

Plaintiff's request for a "preliminary injunction" enjoining MDP from using Primary election results "in any manner or fashion" for selection of delegates also is improper. As with the State of Michigan, MDP already has expended significant time, money and resources implementing a delegate selection plan using the Primary results. (Brewer Dec. ¶ 5) MDP will be severely prejudiced if such relief is granted after plaintiff's unaccountable delay. Such an injunction would

¹⁵ It is not clear, and plaintiff should be asked to explain, how "the Democratic portion of the January 15, 2008 Presidential Primary" could be enjoined. (Plaintiff's Brief, VIII(B)) Presumably this would require that all poll workers be instructed to turn away voters declaring their intent to vote as Democrats, or it would require the destruction of thousands of voted ballots.

require MDP to scrap its Delegate Selection Plan and devise an alternative method for selecting Convention delegates. It would be impossible for MDP to conduct substitute caucuses by the original February 9, 2008 date, or even before March. (Brewer Dec. ¶ 5)

B. Plaintiff Does Not Satisfy The Equitable Requirements.

In addition to being barred by laches, injunctive relief is not supported by the traditional equitable considerations. Plaintiff has demonstrated no irreparable injury. There simply is no injury to plaintiff's asserted associational rights when the organization to which she claims membership has made a voluntary decision to select its delegates in a certain manner, based solely on her disagreement with that decision. The case law plaintiff relies on establishes the associational rights of political party members to protect *their party's decisions* from being overridden by state government. *E.g., Democratic Party v. LaFollette, supra* (overturning an open primary law that conflicted with the party's closed primary rules); *Cousins v. Wigoda, supra* (holding that a state law on seating of delegates could not override the party's own rules); *Ferency v. Austin (Ferency I), supra* (holding that Michigan could not require MDP to participate in a Presidential primary in lieu of its own caucuses); *Heitmanis v. Austin, supra* (holding that a Michigan law providing for automatic delegate selection, even where incorporated in the national party's rules, could not control the state party's conflicting decision).

Plaintiff can claim no irreparable injury to her exercise of any rights. *To the contrary, she seeks to invoke the power of the court to impose her will on MDP – thereby violating the associational rights of MDP and its other members.* Plaintiff utterly fails to articulate an injury or any right that could be injured. The balance of harms strongly favors denial of an injunction, since

the requested relief would disrupt the duly-made decisions of the MDP and thereby infringe the very associational rights plaintiff professes to espouse.

CONCLUSION AND RELIEF SOUGHT

For the above reasons, MDP respectfully requests that the court dismiss the Complaint For Declaratory and Injunctive Relief as to MDP and deny the Motion for Preliminary Injunction. Should the court decide to grant a preliminary injunction, MDP requests an order that plaintiff post a security bond in an amount sufficient to secure MDP against consequential damages and losses.

Respectfully Submitted,

SACHS WALDMAN, P.C.

s/ Andrew Nickelhoff

Andrew Nickelhoff (P37990)

Attorneys for Michigan Democratic Party

1000 Farmer Street

Detroit, MI 48226

(313) 496-9429

e-mail: anickelhoff@sachswaldman.com

Dated: December 28, 2007

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Motion of Michigan Democratic Party To Dismiss And Brief in Support of Motion to Dismiss And Opposing Plaintiff's Motion for Preliminary Injunction** using the ECF system on this 28th day of December, 2007, which will send notice of this filing to all registered parties via electronic transmission.

SACHS WALDMAN, P.C.

By: s/ Andrew Nickelhoff

Andrew Nickelhoff

1000 Farmer Street

Detroit, MI 48226

(313) 496-9429

e-mail: anickelhoff@sachswaldman.com

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