

UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

MARTHA HAYES,
Plaintiff

Case no. 1:07-cv-1237

v.

HON. Robert J. Jonker

MICHIGAN DEMOCRATIC PARTY,

and

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

Defendants

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**PLAINTIFF'S REPLY BRIEF TO DEFENDANTS TERRI LYNN LAND AND
THE MICHIGAN DEMOCRATIC PARTY'S BRIEF IN RESPONSE TO
PLAINTIFF'S BRIEF IN SUPPORT OF HER RULE 65 MOTION FOR A
PRELIMINARY INJUNCTION**

**PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANTS' MOTION TO
DISMISS**

I. INTRODUCTION

Defendants State of Michigan, Terri Lynn Land (hereinafter “Land”) and the Michigan Democratic Party (hereinafter “MDP”) have filed briefs in opposition to Plaintiff’s Motion for a Preliminary Injunction. Each Defendant has also filed a motion to dismiss Plaintiff’s Complaint. Because of its assertion of Eleventh Amendment immunity in its response brief, the State of Michigan has been dismissed from the case.¹

As the following table demonstrates, the issues raised in the response briefs filed by Land and the MDP are substantially identical

Issue	Section of MDP addressing issue	Section of Land Brief addressing issue
Art. III Standing	II.A.	I. A. & B.
Political Question Doctrine	II.B.	II.C.1.
State Action	I.B.	II.C.2.
12(b)(6) Dismissal	I.D.	II.A. & B.
Rule 65 and Laches	III	III. & IV.

Although the state action requirement is a part of each Defendants’ 12(b)(6) motion, Plaintiff’s table (and brief) treats it as a separate issue. So as to avoid a situation in which this Court reads the same material twice, Plaintiff has filed a motion to allow her to file a joint response and reply to the various briefs.

¹ This argument is raised in section I.C. of the joint brief filed by the State of Michigan and Land.

1. Plaintiff addresses the arguments raised in section C.1. through 3. of the MDP brief generally in section III, and specifically in section V of her brief in reply to the MDP.

2. Plaintiff addresses the arguments raised in section II.C.3. of Defendant Land's brief in section ___ of her brief in reply to Land.

THE MICHIGAN DEMOCRATIC PARTY IS A STATE ACTOR FOR PURPOSES OF THE ISSUES RAISED IN THIS LITIGATION

The MDP and Land urge this Court to find the MDP is not a state actor for the purposes of this litigation. Land argues that Plaintiff cannot demonstrate that the MDP is a state actor under either the public function, state compulsion or nexus tests.² The MDP argues that the "internal decision by a private political organization cannot possibly be the predicate for state action."³ As an initial matter, the MDP's suggested limits of the scope of "state action" in the context of litigation involving a political party's involvement in a state run election is simply too broad, as the *White Primary* cases demonstrate. For example, in *Smith v Allwright, Smith v. Allright*, 321 U.S. 649, 664, 88 L. Ed. 987, 64 S. Ct. 757 (1944) state action was found in the conduct of a primary established by internal party resolution at a state convention even though the primary was not expressly authorized by statute.⁴

² Land Brief, pp. 15-16

³ MDP Brief, p. 4

⁴ Of course, the holding in *Smith* was based upon the Supreme Court's conclusion that the Democratic party performed an "integral part of the election process", and did not rest upon the existence or the text of the internal resolution. That is precisely Plaintiff's argument here. Plaintiff is not challenging any decision made by the MDP. She is, rather, challenging the MDP's use of the January 15th primary results for the purpose of selecting delegates to the 2008 National Convention.

In her initial brief in support of her motion for a preliminary injunction, Plaintiff argued the existence of state action on the basis of the test stated in *Banchy*,⁵ which explains the Sixth Circuit's current approach to the *White Primary* cases, and argued a relationship between the action of the MDP and the state law on the basis of *Lugar*.⁶ Plaintiff now expands her state action argument.

The *Lugar* Court provided the following framework for an analysis of state action:

"Our cases have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State. These cases reflect a two-part approach to this question of "fair attribution." First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. In Sniadach, Fuentes, W. T. Grant, and North Georgia, for example, a state statute provided the right to garnish or to obtain prejudgment attachment, as well as the procedure by which the rights could be exercised. Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State."

Lugar, supra at 937.

In the present case, Plaintiff's claim rests upon the "some right or privilege" prong of the fair attribution test: the right and privilege here is that of receiving the results of a state wide primary conducted and paid for by the state.

Lugar stands for the proposition that voluntary participation in a process set up by state law, if such involvement arises out of "joint engagement" with the state or a state official, constitutes state action:

"As is clear from the discussion in Part II, we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is

⁵ *Banchy v. The Republican Party of Hamilton County*, 898 F. 2d 1192 (6th Cir. 1990).

⁶ *Lugar v. Edmondson Oil*, 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)

sufficient to characterize that party as a "state actor" for purposes of the Fourteenth Amendment. The rule in these cases is the same as that articulated in *Adickes v. S. H. Kress & Co.*, *supra*, at 152, in the context of an equal protection deprivation: "Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents," quoting *United States v. Price*, 383 U.S., at 794."

Lugar, *supra* at 941.

As can be seen by the January 15th primary statutory scheme, by reference to *Banchy*, by reference to the *White Primary* cases, and by reference to the holding in *Gray v.*

Sanders,⁷ participation in a state run election is tantamount to being a "willful participant in joint activity with the State or its agents".

Michigan 2007 PA 52 defines "participating political party" as a political party authorized to participate in a presidential primary under section 613a. Section 613a, in turn defines participating political party as one that received at least 20% of the total vote cast in this state for the office of president in the last presidential election. Under this provision, only the Michigan Democratic Party and the Michigan Republican Party qualify as a "participating political party" eligible to participate in the January 15th Presidential primary.⁸

Section 19(c) of the Act defines "Presidential primary" as "a statewide primary election held for participating political parties in each presidential election year under section 613a."

613a(2), in turn, states:

⁷ *Gray v. Sanders*, 372 U.S. 368, 9 L. Ed. 2d 821, 83 S. Ct. 801 (1963).

⁸ The 2004 Michigan Presidential Election results are available online at the Secretary of States website at: <http://miboecfr.nicusa.com/election/results/04GEN/01000000.html>, last viewed January 2, 2008.

“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.”

The January 15th primary statute allowed both the Democratic or Republican State party to opt out of the using the results of the primary for the purpose of selecting delegates to their National Conventions:

“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.”

Under the Act, the January 15th primary would be cancelled if both the Democratic and Republican State parties opted out of the Act:

“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.”

The clear intent of the Michigan legislature in enacting 2007 PA 52 was to establish a state run presidential primary election for each of the state’s two major political parties. It is equally clear that the Michigan legislature made its offer to conduct the primary conditional: the very existence of this primary is expressly conditioned on the use of the primary by both parties for the purpose of selecting delegates to the respective participating⁹ political party’s national convention to nominate a candidate for

⁹ The MDP’s assertion that it is not “participating” in the primary is belied by the language of the statute and common sense. Land, in her brief at p. 7 uses this very language to describe the MDP’s actions in connection with the primary law.

president of the United States in 2008.¹⁰ Thus, the entire purpose of the Act is to provide tabulations of the choice of voters (done by the state at state expense) to each participating political party for the purpose of selecting delegates to the National Convention. And while state law did not require either the MDP or the MRP to participate, the Act does require, as a condition of the state undertaking the time and expense of holding the primary, that the results of the primary be utilized by both of the parties for the purpose of selecting delegates. Thus, the state of Michigan is marshalling its election machinery, utilizing its election laws, and expending funds from its treasury for an election, for the sole purpose of selecting delegates to the National Conventions of both the Republican and Democratic National Conventions.

Given that a purpose of the January 15th primary is to use the results of the primary to select delegates, it is accurate to characterize the selection of delegates as an integral part of the election process being run and paid for by the state. This reality, in turn, makes the MDP's use of the primary results state action, as this quote from *Banchy* (discussing the rationale of the *White Primary* cases) clearly illustrates:

"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

¹⁰ It is technically possible to read the January 15th primary Act as requiring the primary to be held if only one of the two "participating parties" had given the Secretary of State notification that it would be using the primary for the purpose of selecting delegates to its National Convention. This would not have any affect on plaintiff's litigation, as it does not focus on the decision made by the MDP, but rather on the MDP's participation in a primary held January 15th for the purpose of selecting delegates, and the party's use of the results of the election for the purpose of selecting delegates.

primary election cases merely hold that conducting an election is a governmental function and constitutes state action, no matter who actually conducts the election.”

Banchy, supra at 1196.

The *White Primary* cases are not the only time the Supreme Court has viewed participation in a state run election by a political party as state action. For example, in *Gray v. Sanders*,¹¹ the plaintiff brought a challenge to the use of the “county unit” rule (a method of tabulating votes) in a state primary election. This challenge was brought under the Equal Protection and Due Process clauses of the Fourteenth Amendment, as well as under the Seventeenth Amendment, and the Georgia Democratic Party was named as a Defendant in this action. Finding that the Georgia Democratic Party was a state actor for the purpose of the litigation, the Supreme Court wrote:

“We agree with the District Court that the action of this party in the conduct of its primary constitutes state action within the meaning of the Fourteenth Amendment. Judge Sibley, writing for the court in Chapman v. King, 154 F.2d 460, showed with meticulous detail the manner in which Georgia regulates the conduct of party primaries (id., pp. 463-464) and he concluded: “We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State.” Id., p. 464. We agree with that result and conclude that state regulation of this preliminary phase of the election process makes it state action. See United States v. Classic, 313 U.S. 299; Smith v. Allwright, 321 U.S. 649.”

Gray, supra at 826.

The same level of regulation found in *Gray* exists in Michigan. For example, and to single out what Plaintiff argues to be the Constitutionally offensive provisions first, the state set the date of January 15th; the state implemented and enforces through pain of criminal prosecution the provision that keeps voter preferences a secret to all but the chair

¹¹ *Gray v. Sanders*, 372 U.S. 368, 9 L. Ed. 2d 821, 83 S. Ct. 801 (1963).

of the participating political parties; the state conditioned the very existence of the primary upon the two major state parties' use of the results of the primary for the purpose of delegate selection, in violation of National Party rules. In addition, the state runs the election, tabulates the votes, ascertains the qualifications of an individual to vote, and subjects the January 15th primary to the same procedures contained in its non-presidential primary statutes, and otherwise administers the January 15th primary.

In addition to the fact that the MDP is a state actor under the cases discussed above, it is also a state actor under both the compulsion/encouragement and the nexus tests discussed in *Lugar*. The state compulsion test requires that a state exercise such coercive power, or provide such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state¹², while under the nexus test, it must be demonstrated that the state is intimately involved in the challenged private conduct in order for that conduct to be attributed to the state for purposes of section 1983. *Wolotosky v. Huhn*, 960 F. 2d 1331, 1335 (6th Cir. 1992).

In *Edmonson* the Supreme Court utilized the state compulsion test to find that a private litigant exercising preemptory challenges in a jury trial in Federal District Court was a state actor. The Supreme Court began with an analysis of the extensive federal regulation of the jury system and an acknowledgement that the right to exercise preemptory challenges exists only because of statutory authorization:

"It cannot be disputed that, without the overt, significant participation of the government, the preemptory challenge system, as well as the jury trial system of which it is a part, simply could not exist. As discussed above, preemptory challenges have no utility outside the jury system, a system which the government alone administers."

Edmonson, supra at 622.

¹² *Edmonson v. Leesville*, 500 U.S. 614, 114 L. Ed. 2d 660, 111 S. Ct. 2077 (1991).

The Court then observed that the use of preemptory challenges involved the performance of a traditional government function, *Edmonson, supra* at 624, acknowledged that the decisions in two of the *White Primary* cases supported the view that the private litigant exercising preemptory challenges was a state actor (“Justice Clark's concurring opinion drew from *Smith v. Allwright*, 321 U.S. 649, 664, 88 L.Ed. 987, 64 S. Ct. 757 (1944), the principle that "any 'part of the machinery for choosing officials' becomes subject to the Constitution's constraints.”)¹³ and pointed out that the use of preemptory challenges constituted a joint venture between the state and the private litigant:

“In the jury selection process, the government and private litigants work for the same end. Just as a government employee was deemed a private actor because of his purpose and functions in Dodson, so here a private entity becomes a government actor for the limited purpose of using peremptories during jury selection.”

Edmonson, supra at 627.

All of the relevant factors of the state compulsion test utilized in *Edmonson* are present. The MDP's ability to utilize state primary results exists only because of statutory authorization to conduct the election, the election procedures are heavily regulated by the state, and an election constitutes a traditional governmental function. Further, it is clear that in conducting the state primary for the Democratic Party, the state and the MDP are engaged in a joint venture.

In order to satisfy the nexus test, it must be shown that there is a sufficient nexus between the challenged actions and the regulatory scheme alleged to be the impetus behind otherwise private action. In her complaint, Plaintiff alleges violations of her

¹³ *Edmonson, supra* at 627.

associational rights as a member of the National Democratic Party based upon three aspects of the January 15th primary law: its timing, as the National Party Rules do not allow Michigan to hold an event which constitutes the first step in its delegate selection process prior to February 5, 2008; the fact that the January 15th primary essentially keeps a voter's ballot preference non-public information while the National Democratic Party Rules provide for participation by voters who publicly declare their party preference and have that preference publicly recorded; and the fact that the a state-wide primary is used, when the MDP has only been authorized to use a caucus. Each of these violations arose because of a conflict between National Democratic Party rules and express provisions of the January 15th primary law.

Faced with the reality that it is a state actor for the purpose of this litigation, the MDP asserts that what is really at issue here is the purely internal choice of a private association. This argument, however, provides an insufficient basis to argue that the MDP has retained its private character for the purpose of this litigation. Plaintiff is not challenging any internal decision of the MDP to use the January 15th primary for the purpose of selecting delegates. What Plaintiff is challenging is an actual act by the MDP that the MDP has said, in its letter to the Secretary of State,¹⁴ will occur following the January 15th primary: the act of reviewing the canvass of the election and using that canvass for the purpose of selecting delegates. By attempting to get this Court to focus on its decision, instead of its public statement as to how it will act, the MDP is diverting the Court from the focus of Plaintiff's litigation. Indeed, in *Edmonson*, the Constitutional

¹⁴ Exhibit 4, Complaint.

infirmity of the private litigant's use of preemptory challenges did not arise from the internal, mental deliberative process of the private litigant, but rather arose from his act of exclusion of a juror based upon that juror's race. And in *West*,¹⁵ the Constitutional infirmity did not arise from any mental deliberation or professional judgment of the Defendant Medical Doctor, but rather arose from his failure to act by treating the incarcerated patient.

That the State Party historically reserves the right to determine the method it uses to select its delegates, does not change the analysis, but in fact only serves to illuminate its strength. When a State Party is selecting its delegates through a convention or a caucus, it is clearly a private actor, for it has chosen the means and methods of its delegate selection process in a manner totally independent of state legislation. In this instance, the MDP, instead of remaining free from state legislation, has chosen to utilize as a "participating political party" the results of a state regulated and financed election system, understanding full well both that the ultimate purpose of the primary was for the selection of delegates to the National Convention and that the state had conditioned its expenditure of time and money on the MDP's use of the primary for that purpose.

III. PLAINTIFF HAS ARTICLE III STANDING

Both the MDP and the Secretary of State assert that Plaintiff lacks Article III standing. As each of the defendants correctly note, Plaintiff must demonstrate she has suffered an injury in fact that is concrete and particularized and actual or imminent, that the injury is fairly traceable to the action of the defendants, and that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

¹⁵ *West v. Atkins*, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988).

As to standing, each Defendant challenges both the “causation” and redressibility aspects of Plaintiff’s standing. In doing so, the MDP both narrows and restates the allegations of Plaintiff’s complaint. Land, in turn, asserts that “Even a cursory review of Plaintiff’s Complaint reveals that her primary allegations are directed at the MDP, not the State Defendants.”¹⁶

In its brief, the MDP asserts that “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.”¹⁷ The MDP fails to specifically identify any other claim of infringement as contained in Plaintiff’s complaint, or explain how, in its view, Plaintiff has failed to demonstrate causation or redressibility. Rather, the MDP asserts generally that “any purported constitutional violation plaintiff alleges would not meet the redressibility requirement.”¹⁸

Plaintiff, in her Complaint, devotes significant energy to indentifying both general constitutional principles as well as her constitutional interests at stake in this litigation. See, §§ V through IX, Complaint. In §§ VII through IX of the Complaint she identifies her personal constitutional interests at stake, for example as to voting and campaign activity¹⁹, Plaintiff alleges:

56. Supreme Court decisions establish the following Constitutionally protected interests of an individual voter, such as the Plaintiff:

¹⁶ Land Brief, p. 7

¹⁷ MDP Brief, p. 16

¹⁸ Id.

¹⁹ These rights were addressed in Plaintiff’s principal brief in support of her Motion for Preliminary Injunction in sections

a. *The fundamental right of a citizen to cast a meaningful vote for the candidate of their choice;*

b. *Assurance that the results of a primary election, in a broad sense, accurately reflect the voting of a party member;*

c. *The fundamental significance of the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes;*

d. *The availability of political opportunity for individual voters and the right of individual voters to inform themselves about campaign issues through the existence of political activity;*

e. *The right of individual voters to be involved in an electoral process that does not restrict the flow of information to them;*

f. *The freedom and ability to associate for the common advancement of political beliefs;*

g. *The right to identify and vote for a candidate who best represents the individual's ideologies and preferences;*

h. *The right to engage in political activities that aim to gather members together under a common title and common ideological beliefs;*

i. *The right to associate with other like minded qualified voters for the purpose gaining a voice in that election process.*

56[sic]. *The Supreme Court has recognized that the principles posited in this section of the Complaint impact upon, and provide protection for, an individual, such as Plaintiff, participating in the myriad of activities that cumulatively are understood as being a part of the American political process.*

57. *The Supreme Court has recognized that Presidential Primaries constitute a crucial juncture in the electoral process in that, among other things the primary process:*

a. *is a fertile source of new ideas and new programs;*

b. *often determines the position of the party and its members on significant public policy issues;*

c. *as the moment of choosing the party's nominee, is the crucial juncture at which the appeal to common principles may be translated into concerted action by the members of the party, and hence to political power;*

d. results in a nominee who is the ambassador charged with winning the general electorate over to its views.

58. For these reasons, and others, the First Amendment reserves a special place and accords a special protection for this process.

59. The Supreme Court has recognized that the principles posited in this section of the Complaint impact upon, and provide protection for, an individual, such as Plaintiff, participating in the myriad of activities that cumulatively are understood as being a part of the American political process.

As to her associational interests, Plaintiff alleged:

61. In the context of elections, core First Amendment principles include the protection and promotion of a voter's freedom of association, because an election campaign is the platform for the expression of views on the issues of the day, and serves as a rallying point for like-minded citizens engaged in the political process.

In her complaint, Plaintiff alleges that she has suffered injury to the constitutional rights asserted in the complaint as a result of the MDP's decision to opt into the January 15th primary and use the results of that election for the purpose of selecting delegates. ¶70, Complaint. Plaintiff asserts injury by the state as a result of the provisions of 2007 PA 52 regarding as they govern the timing and delegate selection process. ¶¶72 & 73, Complaint. As explained in her principal brief, her associational rights have been violated as a result of both the action by both the MDP and the state that has resulted in the conduct of a primary election constituting the first step in the delegate selection process that occurs on January 15, 2008, is not a caucus, and does not provide for a public declaration of affiliation with the Democratic party that is publically recorded. Each of these violations, which infringe upon Plaintiff's associational rights, results from both the express provisions of the primary act and from the fact that the Democratic party has publicly declared that it will use the results of the election for the purpose of delegate

selection. Clearly, causation between the insult to Plaintiff's associational rights and the activities of the Defendants is adequately alleged in the Complaint:

"Generally, an act or omission is a cause in fact of an injury only if the injury could not have occurred without (or "but for") that act or omission. While a plaintiff need not prove that an act or omission was the sole catalyst for his injuries, he must introduce evidence permitting the jury to conclude that the act or omission was a cause."

Craig v. Oakwood, 471 Mich 67, 87, 684 NW 2d 296 (2004).

In her Complaint, Plaintiff also alleges violations of her right to participate in campaign activities and to cast a meaningful and/or effective vote, ¶56, Complaint, and alleges that these rights were violated as a result of the Defendants' conduct. ¶¶70, 72 & 73, Complaint. It is clear that she is unable to engage in candidate sponsored activities as a result of the automatic operation of DSR Rule 20.C.1.b.²⁰ It is also clear that she is unable to cast a meaningful vote, as the DNC has voted to strip Michigan of all of its delegates to the 2008 National Convention as a result of the January 15th primary, and the MDP's decision to utilize the results of that election for the purpose of selecting delegates to the 2008 National Convention.²¹ While neither the state nor the MDP drafted the rule on the prohibition of campaigning, and while neither the state nor the MDP was involved in the actual vote to strip Michigan of its delegates, the fact that the DNC would enforce its delegate selection rules was reasonably foreseeable to each Defendant, and the actions of each Defendant was a cause of her injury, for without the actions of these Defendants Plaintiff would not have suffered the injuries to the rights she asserts in her Complaint.

Declaring the January 15th primary law unconstitutional (either on its face or as applied to the MDP's use of the results of the primary for the purpose of selecting

²⁰ Exhibit 1, Complaint.

²¹ ¶33, Complaint

delegates), enjoining the state of Michigan from conducting the Democratic primary, enjoining the state from tabulating the Democratic primary vote and furnishing it to the MDP, or enjoining the MDP from using the results of the primary for the purpose of delegate selection would provide clear redress for Plaintiff's associational rights. That the relief requested provides redress for Plaintiff's other claims may be seen from the Declaration of Mark Brewer and his statement that the MDP would be required to devise an alternative delegate selection procedure should this litigation be successful. ¶5, Declaration of Mark Brewer.

IV. THE POLITICAL QUESTION DOCTRINE IS INAPPLICABLE TO THIS LAWSUIT

Contending that the issues raised in this lawsuit are nothing other than an internal party dispute, both Defendants argue that this Court should dismiss Plaintiff's Complaint on the basis of the political question doctrine. In support of their arguments, each Defendant cites to *Wymbs v. Republican State Executive Committee of Florida*, 719 F. 2d 1072 (11th Cir. 1983).

Wymbs involved a challenge to rules of the Florida Republican Party addressing the method of delegate selection. The rules being challenged gave equal weight to every Florida county in delegate selection, no matter the population of Republican voters in the county. *Wymbs, supra* at 1074. The plaintiffs in this case sought an injunction enjoining the State Executive Committee from voting on presidential preference primary rules, the nomination of presidential electors, the filling of certain vacancies, and the collection of candidate assessments, until it adopted a weighted, proportional voting system. *Id.* The

plaintiffs also sought to overturn the Florida Republican Party Rule 11(4)(b) that required three delegates and three alternatives to the 1980 Republican National Convention be chosen from each congressional district in Florida, regardless of the number of Republican voters in the district. *Id.* Neither the state nor any state officer responsible for enforcing state statutes with respect to the matters for which an injunction was sought were named as a defendant in the action. *Id.* Further, the Court noted that State Party Rule 11(4)(b) incorporated and was subordinate to the Republican National Rules. *Wymbs, supra* at 1074. Although it did not intervene in the case, the National Republican party did file an *amicus curiae* brief.

The District Court sustained the plaintiffs' attack on the delegate selection method, agreeing with the plaintiffs "that even though the federal Constitution commands that each congressional district contain nearly the same number of people, it is not equality of population but, instead, equality of party registration that counts in determining the constitutionality of the apportionment of a state's delegation to a national political party convention." *Wymbs, supra* at 1075. The Committee took an immediate appeal, and while the case was on appeal the Supreme Court issued its opinion in *LaFollette*. The Fifth Circuit then vacated the District Court's order and remanded the case for reconsideration in light of *LaFollette*. *Id.* Subsequently, the District Court again held the state delegate selection rule unconstitutional, but on renewed appeal the Eleventh Circuit found the plaintiffs' claims to be nonjusticiable based in part on the political question doctrine. *Wymbs, supra* at 1080.

Unlike *Wymbs*, Hayes has not brought a challenge to the State Party delegate selection rule. Rather, Plaintiff has filed suit challenging the Act that created the January

15th Primary, and challenging the MDP's use of the results for the purpose of delegate selection. In this regard, and as she argues in her initial brief, Plaintiff's lawsuit is similar to *LaFollette*, which upheld the right of the National Party to enforce its delegate selection rules against a conflicting state law and, in that case, a recalcitrant state Democratic Party that sided with the State of Wisconsin. This lawsuit represents, in large measure, Hayes attempt to protect her associational rights against the infringement created by the Michigan primary law and the MDP's decision to use the results of the primary for delegate selection. As was discussed in detail in her principal brief, both the Sixth Circuit and the Supreme Court recognize she has standing to assert her associational rights in a lawsuit of this nature. Further, it is clear from *LaFollette* that a federal court can interfere with state level delegate selection, and can find unconstitutional a state level delegate selection procedure, at least so far as the state level delegate selection is involved with, derived from, or based in whole or part on state law and the state level procedures are in conflict with National Party rules.

V. PLAINTIFF'S COMPLAINT IDENTIFIES HER CONSTITUTIONAL RIGHTS

In its brief, the MDP asserts that Plaintiff has failed "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 campaign events or activities sponsored by any particular candidate."²² The basis for the MDP's first assertion is found in *Ferency I*,²³ an opinion written by Judge Hillman:

²² MDP Brief, p. 9

*"In addition, 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 [**47] 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.)"*²⁴

This accurately states the law as to the type of challenge brought in *Ferency*, but Plaintiff is not claiming the right in the abstract, as if she is trying to force the MDP to allow her to vote in the face of party rules that state her ineligibility. Rather, it is Plaintiff's claim is that in the context of the January 15th primary election, she has been denied the opportunity to cast an effective or a meaningful vote. It is the fact that an election will be taking place that gives rise to constitutional implications, and Plaintiff's assertion of her rights. Her Complaint, and the injury to the Constitutional rights she identifies in that Complaint, so far as they relate to campaign activities and the right to cast a meaningful vote, arise (in part) as a result of the DNC's decision to ban the seating of Michigan's delegates to the National Convention, a decision (as discussed earlier in this brief) that is a direct and proximate result of the combined and individual activities of both the State of Michigan and the MDP. Given that the entire purpose of the January 15th primary is to

²³ *Ferency v. Austin*, 493 F. Supp 683 (1980).

²⁴ Revealingly, the MDP cuts off Judge Hillman's observation just before he writes: "Given the clear absence of direct state involvement, I find that the activities of the Michigan Democratic Party, relative to the upcoming party caucuses, to be political activity unrelated to state regulations. For this reason, I find that the upcoming caucuses are not "state action" for purposes of plaintiff's complaint."

use the results for the purpose of delegate selection, a vote in that primary by a Democratic voter is an utterly meaningless act.²⁵

As noted in Plaintiff's principal brief, the rights of candidates and the rights of voters as they relate to campaign activity are intertwined and not easily separated. It is a wholly unremarkable proposition that a candidate otherwise eligible to participate in a state run election has a First Amendment right to campaign, and thus Plaintiff's right to involve herself in such activities is both related to, and derivative of, the candidate's right to campaign as well as well as arising from her own associational rights, as discussed in Plaintiff's principal brief. That no campaigning is occurring in Michigan as a result of the automatic operation of the DNC rule was foreseeable, and a direct and proximate cause of these Defendants activities.

Finally, Plaintiff has addressed her associational rights in her principal brief. Both the Supreme Court and the Sixth Circuit recognize that any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. Thus, the MDP's assertion that Plaintiff is merely attempting to enforce the rights of the National Democratic Party is incorrect.

VI. THE DECISION IN *MILLER V. BROWN* DOES NOT FORECLOSE THE RELIEF REQUESTED BY PLAINTIFF

In §II.C.3. of her brief, Land argues that the 4th Circuit's decision in *Miller v. Brown*, 503 F. 3d 360 (4th Cir. 2007) compels dismissal of Plaintiff's Complaint. In *Miller*, and incumbent state Senator notified the Virginia Board of elections (as he was

²⁵ In paragraph 4 of his declaration, Chair Brewer states that the Primary ballot allows a voter to write in a candidate's name. While this is true, the MDP has warned Democratic Primary voters not to undertake this act, as the vote will not count. See: Exhibit 1 to this brief.

allowed to do under state law) that he was choosing a state run primary election as the method of selection for nomination to run for his seat. *Miller, supra* at 362. Prior to his notification, the Virginia Republican Party had changed its rule addressing the type of voter it would allow in its primaries, excluding those voters who had participated in the nomination process of another party in Virginia after March 1, 2004, or in the last five years, whichever was more recent. *Id.* Voters who signed a statement of affiliation with the party were excluded from this requirement. *Id.* The state senator notified the Virginia Board of Elections (hereinafter “Board”) of this change to the State Party’s rules and requested confirmation that the Board would honor the voter limitations in the state run primary. *Id.* The Board responded by stating that unless the state Senator could point out specific provisions of state law allowing the voter exclusion embodied in the party rules, the state would not honor those rules. *Miller, supra* at 363. The Board also cited to a statute that required the use of open primaries in Virginia. *Id.*

A § 1983 action was then filed against the Board by the 11th Senatorial District Republican Committee and its chair, a Larry Miller, arguing that the Board’s refusal to follow the voter exclusion rule posited by State Party Rules violated the Plaintiffs’ First and Fourteenth Amendment associational rights. *Id.* The District Court initially granted the Board’s motion to dismiss on the grounds of standing and ripeness, a ruling that was reversed on appeal.²⁶ On remand, the District Court then found that Virginia’s open primary law was not facially unconstitutional given that Virginia law provided other mechanisms under which a state political party could nominate candidates in a closed system. *Id.* However, the District Court did find that the open primary law constituted a

²⁶ *Miller v. Brown*, 462 F. 3d 312 (4th Cir. 2006)

severe burden on Plaintiffs' associational interests, and found the law unconstitutional as applied. *Id.* The Plaintiffs appealed the District Court's decision regarding the facial challenge, while the Board filed a limited cross-appeal on the as applied ruling. In its cross-appeal, the Board did not dispute the District Court's finding that the open primary statute was a severe burden on Plaintiffs' First and Fourteenth Amendment rights. *Miller, supra* at 368. Rather, the Board argued that the Plaintiffs were not forced to select its nominee by primary despite the fact that the primary process was the election procedure chosen by the state senator. *Miller, supra* at 369.²⁷

The Court of Appeals upheld the district Court's opinion in all respects. As to the ruling on the facial challenge, the Fourth Circuit wrote:

"In sum, 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. See Miller, 465 F. Supp. 2d at 595 (holding that "[s]ection 24.2-530 is constitutionally sound when engrafted onto a statutory scheme providing for alternative, less restrictive means of candidate selection"). We therefore affirm the holding of the district court that § 24.2-530 is facially constitutional."

Miller, supra at 368.

This decision is of dubious application in the present lawsuit, for two reasons. First, it only applies to a facial challenge. Second, the Fourth Circuit's ruling was extremely narrow, rejecting the facial challenge solely because the Virginia open primary law was "engrafted" onto other statutory provisions allowing the State Republican Party

²⁷ Despite the fact that the Opinion is careful to note that the Board, in its brief to the Fourth Circuit conceded the existence of a severe burden in the state compels a political party to use an open primary in violation of its rules, it appears that the Fourth Circuit treated the Board's argument in this regard as a way of arguing around the finding of the existence of a severe burden.

to utilize some other, closed method of choosing its nominees. Michigan has no such similar provisions in law.

Addressing the “as applied” challenge, the Fourth Circuit rejected the Board’s arguments that there existed “compelling state interests”, rejected the Board’s argument that the state Senator was acting as a representative of the party when he made the choice to utilize a primary, and rejected the Board’s argument that the Plaintiffs were not bound by the state senators decision to use a primary.²⁸

The state utilizes the *Miller* decision as a method of insulating itself from this litigation, arguing that it was the MDP’s decision to utilize the statute that has caused Plaintiff’s injury. As noted above, however, it was the state that chose to insert the offending provisions into the Act, and the state is in effect participating in a joint venture with the MDP. Also fatal to the state’s argument is the following observation by the Supreme Court in *Eu*:²⁹

“Finally, the State’s focus on the parties’ alleged consent ignores the independent First Amendment rights of the parties’ members. It is wholly undemonstrated that the members authorized the parties to consent to infringements of members’ rights”

Such is the case her, for the National Democratic Party has not only failed to change its rules to allow the MDP to utilize the results of its January 15th primary for the purpose of selecting delegates, it has in fact expressed its opposition to the MDP by the imposition of sanctions.

VII. LACHES

²⁸ The last two arguments were rejected as inconsistent with state law.

²⁹ *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 226, 103 L. Ed. 2d 271, 109 S. Ct. 1013, 1020 (1989).

Both the MDP and Land argue that Plaintiff is guilty of Laches. Prior to filing suit, Plaintiff was one of a number of individuals who had filed an Implementation Challenge with the MDP and the Democratic National Committee based upon the MDP's decision to utilize the January 15th Primary for the purpose of selecting delegates.³⁰ This challenge was filed on November 29, 2007,³¹ eight days after the Supreme Court upheld the Constitutionality of 2007 PA 52. This action was filed eleven days later, and the current motion was filed on December 26, 2007. The delay between the filing of the Complaint and the filing of the motion was due solely to Plaintiff's counsel and the complexity of the issues raised in the motion.

In order to demonstrate prejudice, Defendant MDP has offered the Declaration of Mark Brewer, chair of MDP. In paragraph 5 he offers mere conclusions as to the harm that will be suffered by the MDP if an injunction is entered. Further, as this litigation arises as a result of the MDP's violation of Plaintiff's associational rights and the National Democratic Party Rules, the MDP does not have clean hands in this matter.

Dated: December 29, 2007

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³⁰ This challenge was brought under DSR 20. Exhibit 1, Complaint.

³¹ See: Exhibit 3, the FedEx signature proof.