STATE OF MICHIGAN
IN THE COURT OF APPEALS

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MARK L. GREBNER, BENTON L. BILLINGS, LOTHAR S. KONIETZKO, AUBREY D. MARRON, JOSEPH S. TUCHINSKY, HUGH C. MCDIARMID, BERL N. SCHWARTZ AND PRACTICAL POLITICAL CONSULTING, INC.,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN, SECRETARY OF STATE, TERRI LYNN LAND,

Defendants-Appellants,

_____/

Court of Appeals No. _____

Ingham County Circuit Court
No. 07-1507

Under MCR 7.205(E)(2) action on this application is required on or before November 16, 2007, as it concerns the holding of the presidential primaries on January 15, 2008.

DEFENDANTS-APPELLANTS'
EMERGENCY APPLICATION FOR LEAVE TO APPEAL

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Statement of Basis of Jurisdiction of the Court of Appeals

This Court has jurisdiction over Defendants' emergency application for leave to appeal pursuant to MCR 7.203(B)(1) and MCR 7.205(A) and (E).

Statement of Question Involved

I. Did the trial court abuse its discretion in granting Plaintiffs' motion for preliminary injunction where Plaintiffs did not establish the four elements necessary to entitle them to such extraordinary relief, particularly where they did not show a substantial likelihood of success on the merits of their claims because they lacked standing to sue and their Complaint otherwise failed to state claims upon which relief may be granted?

Trial Court's answer: No

Appellant's answer: Yes

Appellee's answer: No

Statement of Order Appealed from, Allegations of Error and Relief Sought

On November 9, 2007, the Ingham County Circuit Court entered an order granting Plaintiffs' motion for a preliminary injunction enjoining the present and future enforcement of 2007 PA 52 on the basis that one of its provisions violated Const 1963, art 4, § 30, and art 2, § 4. (Order, attached as Appendix A). Because the Act contains a nonseverability clause, the court found the entire Act unconstitutional and enjoined its enforcement, which has the effect of enjoining the State from preparing for and holding the presidential primaries currently set for January 15, 2008. The court's order was wrongly entered because Plaintiffs failed to sufficiently allege or establish the requisite four elements for granting injunctive relief, particularly where they lacked standing to sue and their complaint failed to allege claims upon which relief may be granted.

By way of this application for leave to appeal and the various motions filed contemporaneously with it, Defendants request that this Court immediately grant their application for leave to appeal and reverse or vacate the order of the trial court and enter a final decision in this matter under MCR 7.205(D)(2) by November 16, 2007. Alternatively, Defendants ask that this Court immediately grant their motion for stay pending appeal while this Court resolves the merits of the application for leave to appeal.

Statement of Facts

This case concerns the recent enactment of 2007 PA 52, which amended the Michigan Election Law, MCL 168.1 *et seq*, and most notably moved the holding of Michigan's presidential primary for the 2008 election year to January 15, 2008, for that election only. (See 2007 PA 52, § 613a, attached as Appendix B). While the changing of the primary date generated the most attention and media coverage, local and nationwide, Plaintiffs challenge several other provisions that were added by the Act.

For instance, the Act again established a closed primary system. Thus, under the Act in order to vote at a presidential primary an elector must indicate in writing, on a form to be created by the Secretary of State, which "participating political party" ballot he or she wishes to vote when appearing to vote at a presidential primary. (Appendix B, § 615c(1)).[1] In other words, an elector need not actually declare or affirm which political party he or she is a member of, but the elector must disclose in writing which political party's ballot he or she wishes to vote at the primary.

In fulfilling these requirements, the Secretary of State must prescribe procedures intended to safeguard the confidentiality of the participating political party ballot selected by an elector. (Appendix B, § 615c(1)). Indeed, the Act states, "*[e]xcept* as otherwise provided in this section, the information acquired or in the possession of a public body indicating which participating political party ballot an elector selected at a presidential primary is confidential, exempt from disclosure under the freedom of information act . . . and shall not be disclosed to any person for

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

any reason." (Appendix B, § 615c(4) (emphasis added)).[2] True to its language, the Act provides exceptions to the confidentiality requirement.

Under the Act, local city and township clerks must keep a separate record of who votes at a presidential primary election that contains the printed name, address, and qualified voter file (QVF) number of each elector, and the participating political party ballot selected by that elector at the presidential primary. (Appendix B, § 615c(3)).[3] The local clerks must then submit this information to Defendant Secretary of State by a deadline to be established by the Secretary. (Appendix B, § 615c(6)). Thereafter the Secretary of State, within 71 days after the presidential primary, "shall provide to the chairperson of each participating political party a file of the records for each participating political party," as kept and submitted by the local clerks. (Appendix B, § 615c(6)).[4] The Act's stated purpose for the allowance of this disclosure of the otherwise confidential information is "[t]o ensure compliance with the state and national political party rules of each participating political party and this section . . . ." (Appendix B, § 615c(5)).

The Act then authorizes the participating political parties to use this information for limited purposes (Appendix B, § 615c):

> (7) Except as provided in subsection (8), a participating political party shall not use the information transmitted to the participating political party under subsection (6) indicating which participating political party ballot an elector selected at a presidential primary for any purpose, including a commercial purpose, and shall not release the information to any other person, organization, or vendor.

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[2] The Act also provides that any person who discloses this information for a purpose not authorized by the Act is guilty of a misdemeanor, punishable by a fine and/or jail time. (Appendix B, § 615c(11)).

[3] The information regarding the political party ballot choice will be destroyed at the end of the 22-month federal election records retention period. (Appendix B, § 615c(6)).

[4] Although it is not entirely clear, § 615c(6) appears to require that the Secretary provide the chairs of each party with both lists of voters. In other words, each party gets a list of their own voters as well as the other party's voters.

> (8) A participating political party may only use the information transmitted to the participating political party under subsection (6) to support political party activities by that participating political party, including, but not limited to, support for or opposition to candidates and ballot proposals. A participating political party may release the information transmitted to the participating political party under subsection (6) to another person, organization, or vendor for the purpose of supporting political party activities by that participating political party, including, but not limited to, support for or opposition to candidates or ballot proposals.

Thus, while the participating political party chairs cannot sell or make commercial use of the information, they may use it for the advancement of political party activities. A participating political party that chooses to release the information as authorized by § 615c(8) to another person, organization, or vendor must enter into a contract that, among other requirements, recognizes the use restrictions imposed by the Act. (Appendix B, § 615c(9)).

As far as the fiscal impact of 2007 PA 52 is concerned, the estimated cost of holding a two-party presidential primary is around $10 million. (Appendix C, Senate Fiscal Analysis, SB 624, September 11, 2007, p 8). Notably, this is not necessarily a new cost imposed by the Act since pre-existing law also provided for the holding of a presidential primary, only in February 2008 rather than January. With respect to the collection of the participating political party information, there would be some minimal costs incurred at the local level by the clerks who initially collect the data. This data is then transmitted to the Secretary of State, where the voter history and the party ballot information will be rolled into the QVF at a nominal cost to the State. The Secretary of State must then release this data in some format to the participating political party chairs. Thus, the Act essentially requires that an additional data entry be made in the QVF with respect to the party ballot information, and that a list be generated from the QVF to supply

to the party chairs.[5] The costs associated with maintaining this additional data entry in the QVF will be nominal.

The Act was given immediate effect by the Legislature, and thus became effective September 4, 2007. Notably, the Act includes a "nonseverability" clause, which provides that "[i]f any portion of [the Act] or the application of [the Act] to any person or circumstances is found invalid by a court, it is the intent of the legislature that the provisions of this [Act] are nonseverable and that the remainder of the [Act] shall be invalid, inoperable, and without effect." (Appendix B, Enacting section 1).

Plaintiffs filed their complaint on October 24, 2007, against the State of Michigan and Secretary of State Terri Lynn Land, jointly and severally. (Appendix D, Complaint). Plaintiffs sought declaratory, injunctive, or equitable relief based on their various arguments that the disclosure and use provisions pertaining to the participating political party organizations as set forth in the Act violated state statutory or constitutional law. Plaintiffs also sought an ex parte temporary restraining order (TRO) and an order to show cause from the trial court on October 25, 2007. The court declined to enter a TRO at that time, and scheduled the case for a show cause hearing on the motion for preliminary injunction on November 7, 2007.

On November 2, 2007, Defendants filed a response in opposition to the motion for preliminary injunction, arguing that Plaintiffs could not establish the requirements for injunctive relief, particularly where Plaintiffs lacked standing to sue and their complaint failed to state claims upon which relief could be granted. (Appendix E, Defendant's response in opposition to preliminary injunction). Plaintiffs submitted a reply to Defendants' response late in the day on November 6, 2007. (Appendix F, Plaintiffs' reply brief). Also on November 6, the Michigan

[5] The QVF was created and implemented over ten years ago by the Secretary of State. See MCL 168.509(o).

Republican Party submitted an amicus curiae brief in support of Defendants' opposition to the preliminary injunction.

At the hearing on November 7, 2007, the trial court heard argument from the parties as well as from Amicus Michigan Republican Party. The court ruled from the bench that Plaintiffs have standing to sue, that § 615c of 2007 PA 52 was an unconstitutional appropriation of public property for a private purpose under Const 1963, art 4, § 30, that it also violated the Purity of Elections Clause under Const 1963, and that Plaintiffs' and the public's interests would suffer an injury absent an injunction. (Appendix G, Motion Transcript 11/7/07, pp 28-30). Because the Act contained the nonseverability clause, the trial court was forced to find unconstitutional and enjoin the operation of the entire Act, including the provisions for holding the presidential primaries.

The parties agreed to entry of an order granting Plaintiffs' motion for preliminary injunction, which was entered by the trial court on November 9, 2007. (Appendix A). Defendants now seek leave to appeal this order for the reasons set forth below.

Argument

I. The trial court abused its discretion in granting Plaintiffs' motion for preliminary injunction where Plaintiffs did not establish the four elements necessary to entitle them to such extraordinary relief, particularly where they did not show a substantial likelihood of success on the merits of their claims because they lacked standing to sue and their Complaint otherwise failed to state claims upon which relief may be granted.

Defendants State of Michigan and Secretary of State Terri Lynn Land submit that Plaintiffs' request for preliminary injunctive relief should have been denied because Plaintiffs did not establish the essential requirements for granting such extraordinary relief.

A. Standard of Review

This Court reviews the grant or denial of a temporary or preliminary injunction for an abuse of discretion.[6] An abuse of discretion occurs when a trial court's decision is not within the range of reasonable and principled outcomes.[7] The constitutionality of a statute is a question of law that this Court reviews de novo.[8]

B. Preservation of Issues

Defendants raised these arguments in the court below via their response in opposition to Plaintiffs' motion for preliminary injunction.

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[6] *Hiers v Detroit Superintendent of Schools,* 376 Mich 225, 234; 136 NW2d 10 (1965) (citations omitted); *Detroit Public Works Dep't v Local 77, AFSCME*, 34 Mich App 159, 160; 190 NW2d 700 (1971).
[7] *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).
[8] *Morreale v Dep't of Community Health*, 272 Mich App 402, 405; 726 NW2d 438 (2006).

C. Standards for granting preliminary injunctive relief.

A temporary or preliminary injunction is extraordinary relief and "should issue only in extraordinary circumstances."[9] The issuance of this extraordinary relief is determined by a four-factor analysis[10]:

> [H]arm to the public interest, if an injunction issues; whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; the strength of the applicant's demonstration that the applicant is likely to prevail on the merits; and the demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted. This inquiry often includes the consideration of whether an inadequate legal remedy is available to the applicant.

Plaintiffs have the burden of proof on each of these factors.[11] In this case, Plaintiffs failed to meet this burden in all respects.

D. Plaintiffs failed to establish a substantial likelihood of success on the merits of the claims asserted in their complaint because they lack standing to sue.

Defendants first submit that the trial court abused its discretion in concluding that Plaintiffs had standing to sue on the facts as alleged in their complaint.

1. A plaintiff must have standing to pursue a declaratory judgment action under MCR 2.605, and MCR 2.201(B)(4) did not automatically confer standing upon the Plaintiffs in this case.

The Michigan Supreme Court has consistently reaffirmed the idea that courts are limited to resolving actual disputes between adverse parties pursuant to separation of power principles. In *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, the Court observed that[12]:

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the

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[9] *Michigan State Employees Ass'n v Dept of Mental Health*, 421 Mich 152, 157, 158; 365 NW2d 93 (1984); *Michigan Coalition of State Employee Unions, et al v Civil Service Commission*, 465 Mich 212, 226, n 11; 634 NW2d 692 (2001).
[10] *Michigan State Employees Ass'n*, 421 Mich at 157, 158.
[11] MCR 3.310(A)(4).
[12] *Nat'l Wildlife Fed'n v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004) (internal citations omitted).

> avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.
>
> Perhaps the most critical element of the "judicial power" has been its requirement of a genuine case or controversy between the parties, one in which there is a real, not a hypothetical, dispute, and one in which the plaintiff has suffered a "particularized" or personal injury. Such a "particularized" injury has generally required that a plaintiff must have suffered an injury distinct from that of the public generally.
>
> Absent a "particularized" injury, there would be little that would stand in the way of the judicial branch becoming intertwined in every matter of public debate.

The result of this, the Court asserted, would be to have the judicial branch of government "the least politically accountable of the branches deciding public policy, not in response to a real dispute in which a plaintiff had suffered a distinct and personal harm, but in response to a lawsuit from a citizen who had simply not prevailed in the representative processes of government."[13]

These principles are important here because of the nature of this suit, and the principles and parties involved. Under these circumstances, it is tempting to brush aside the traditional legal concepts noted above in favor of forging ahead with a decision on the merits. Doing so, however, will likely result in a decision of questionable value. In this case, as in any other case, each Plaintiff was required to demonstrate to the trial court that they are entitled to pursue their claims against the State.

In *Michigan Coalition of State Employees Unions v Civil Service Comm'n*, the Supreme Court explained that[14]:

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[13] *Nat'l Wildlife*, 471 Mich at 615.

[14] *Michigan Coalition of State Employees Unions v Civil Service Comm'n*, 465 Mich 212, 219; 634 NW2d 692 (2001) (citations omitted).

> Ordinarily, the first requirement that a party must meet to request a trial court to grant any type of relief . . . is that the party have "standing" to request the relief. This means that a party is normally required to have a sufficiently concrete interest in bringing a case that it can be expected to provide effective advocacy. Said another way, standing has been described as a requirement that a party ordinarily must have a substantial personal interest at stake in a case or controversy, as opposed merely to having a generalized interest in the same manner as any citizen.

Here, Plaintiffs seek declaratory relief under MCR 2.605, which states in part:

> (A) Power to Enter Declaratory Judgment.
>
> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

In *Associated Builders & Contractors v Wilbur*, the Supreme Court observed that the "actual controversy" and "interested person" requirements of MCR 2.605 incorporated the "traditional restrictions on justiciability such as standing, ripeness, and mootness."[15] Specifically, the Court recognized that these requirements "subsume the limitations on litigants' access to the courts imposed by this Court's standing doctrine."[16] Thus, like all other plaintiffs, Plaintiffs in this case must satisfy the traditional requirements of standing in order to pursue their declaratory judgment action.

Plaintiffs, however, asserted in their Complaint that "standing on the part of the individual taxpaying Plaintiffs is conferred by MCR 2.201(B)(4)." (Appendix D, Complaint, ¶ 13). That rule provides, in part:

> (B) Real Party in Interest. An action must be prosecuted in the name of the real party in interest, subject to the following provisions:
>
> * * *

[15] *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 125; 693 NW2d 374 (2005).
[16] *Associated Builders*, 472 Mich at 126.

> (4) An action to prevent illegal expenditure of state funds or to test the constitutionality of a statute relating to such an expenditure may be brought:
>
> > (a) in the name of a domestic nonprofit corporation organized for civic, protective, or improvement purposes; or
> >
> > (b) in the names of at least 5 residents of Michigan who own property assessed for direct taxation by the county where they reside.

As recently noted by the Michigan Supreme Court, this rule appears, in essence, to "give qualifying persons or groups the right to sue without an injury."[17] In *Rohde v Ann Arbor Public Schools*, the Supreme Court addressed whether a group of citizens had standing pursuant to MCL 129.61[18] to sue the Ann Arbor School district from using public funds to provide benefits to same-sex domestic partners.[19] The Court concluded that although the plaintiffs were qualified or authorized to bring suit under the statute, the plaintiffs still had to satisfy the requirements of constitutional standing in order to pursue their lawsuit.[20] The Court determined that to the extent MCL 129.61 suggested that the plaintiffs did not have to demonstrate an injury-in-fact in order to bring suit, it was unconstitutional.[21]

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[17] *Rohde v Ann Arbor Public Schools*, 479 Mich 336, 354; 737 NW2d 158 (2007).
[18] MCL 129.61 is similar to MCR 2.201, and provides, in part: Any person or persons, firm or corporation, resident in any township or school district, paying taxes to such political unit, may institute suits or actions at law or in equity on behalf of or for the benefit of the treasurer of such political subdivision, for an accounting and/or the recovery of funds or moneys misappropriated or unlawfully expended by any public officer, board or commission of such political subdivision. Before such suit is instituted a demand shall be made on the public officer, board or commission whose duty it may be to maintain such suit followed by a neglect or refusal to take action in relation thereto. . . .
[19] *Rohde*, 479 Mich at 346.
[20] *Rohde*, 479 Mich at 347-354.
[21] *Rohde*, 479 Mich at 350-351.

The plaintiffs asserted that if they did not have standing under MCL 129.61, they had standing pursuant to the Court's decision in *House Speaker v Governor*.[22] The Supreme Court disagreed, finding the holding in *House Speaker* unpersuasive[23]:

> In *House Speaker*, the issue was whether the private nonprofit, corporate plaintiffs had standing to challenge the Governor's authority to transfer the powers of a legislatively created body to a new, gubernatorially created body. The Court, while acknowledging the general principle that standing requires a litigant to "'demonstrat[e] that [its] substantial interest will be detrimentally affected in a manner different from the citizenry at large,'" inexplicably neglected to actually apply that principle. What the Court did do, puzzlingly, was to conclude that because the civic groups met the requirements of MCR 2.201(B)(4), a court rule that in essence gives qualifying persons or groups the right to sue without an injury, they could sue. Yet, as *Lee* and *Cleveland Cliffs* made clear, no court rule or statute can eliminate the injury requirement for constitutional standing. Thus, *House Speaker* is not dispositive and is of limited value because the Court did not address whether the court rule (MCR 2.201) or the corresponding statute (MCL 600.2041) could constitutionally confer standing to an organization that did not have a concrete interest in the suit and did not suffer an injury in fact. To the extent one might read it as having silently done so, we disapprove of it as being inconsistent with *Lee* and *Cleveland Cliffs*.

The clear import of the Court's holding in *Rohde*, and its discussion of *House Speaker* and the rule, is that a plaintiff pursuing an action on the basis of MCR 2.201 still must satisfy the elements of constitutional standing in order to maintain a cause of action.

Accordingly, Plaintiffs must satisfy the traditional elements of constitutional standing in order to maintain their challenge to 2007 PA 52.[24] The trial court in this case simply concluded that, "these parties clearly have standing, the Plaintiffs, to bring this action. We have taxpayers, property owners, journalists, people who buy and sell political information, all of whom have joined an interesting group I might add of people who have joined together to bring this action.

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[22] *House Speaker v Governor*, 443 Mich 560; 506 NW2d 190 (1993).
[23] *Rohde*, 479 Mich at 354 (citation omitted).
[24] See *Associated Builders*, 472 Mich at 126-127, quoting *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992).

So I think they have standing." (Appendix G, p 28). Defendants disagree. Because Plaintiffs did not, in fact, satisfy these requirements, they did not establish standing to bring their action, and the trial court abused its discretion in granting their request for injunctive relief.

2. Plaintiffs in the first instance did not allege facts sufficient to satisfy MCR 2.201 as the basis for the assertion that they have standing to sue.

The Plaintiffs in this case are: Mark Grebner, Benton L. Billings, Lothar S. Konietzko, Aubrey D. Marron, Joseph S. Tuchinsky, Hugh C. McDiarmid, Berl N. Schwartz, and Practical Political Consulting, Inc. (Appendix D, ¶¶ 1-8). With respect to the individual Plaintiffs, the Complaint merely alleges that each is a "taxpayer" and a "resident" of a various city and county in Michigan. (Appendix D, ¶¶ 1-8). Under MCR 2.201(B)(4)(b), a potential plaintiff must "own property assessed for direct taxation by the county where they reside." The Complaint does not contain any assertions that the individual Plaintiffs own property in the county where they reside. The fact that they are "taxpayers" and "residents," even if true, does not demonstrate that they own property directly taxed by the county. Accordingly, the individual Plaintiffs have not sufficiently pleaded facts satisfying the requirements of MCR 2.201 for purposes of establishing standing to sue under that court rule.[25]

Similarly, with respect to Plaintiff Practical Political Consulting, Inc., the Complaint simply asserts that Plaintiff is "a duly authorized Michigan corporation whose principal place of business is in the City of East Lansing, State of Michigan." (Appendix D, ¶ 8). Under MCR 2.201(B)(4)(a), a potential organizational plaintiff must be a "domestic nonprofit corporation organized for civic, protective, or improvement purposes." The Complaint does not

[25] With respect to this argument, Plaintiffs merely again asserted in their reply to Defendants' response in opposition that Plaintiffs "are taxpayers who own property assessed for direct taxation by the county where they reside and can challenge the unconstitutional transfer of public property on that basis." (Appendix F, p 14).

allege that Practical Political Consulting, Inc., is a nonprofit corporation organized for civic, protective, or improvement purposes. Thus, this Plaintiff has not sufficiently alleged facts satisfying the requirements of MCR 2.201 for purposes of establishing standing to sue under that court rule.

3. Plaintiffs cannot establish constitutional standing.

To establish constitutional standing to sue, Plaintiffs must first demonstrate that they have[26]:

> [S]uffered an 'injury in fact' an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not "conjectural" or "hypothetical."' Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'

A careful review of the Complaint does not reveal any allegations of fact on behalf of any of the Plaintiffs that demonstrate the actual or imminent suffering of an injury-in-fact by any of these Plaintiffs as a result of Defendants' present or future enforcement of 2007 PA 52. Plaintiffs responded to this argument by simply restating or quoting the "allegations" set forth in their Complaint. (Appendix F, pp 8-10).

Plaintiffs must identify what concrete and particularized legally protected interest is being invaded and show that this invasion is actual or imminent. Plaintiffs fail to do so. Plaintiffs have no legally protected interest in either the disclosure or nondisclosure of the information itself. Again, the only information Plaintiffs cannot obtain is the elector's actual disclosure of which political primary that elector chose to vote in. Plaintiffs are not prohibited from obtaining the names, addresses, QVF numbers, and voting history of electors, which would

[26] *Rhode*, 479 Mich at 348, quoting *Lee*, 464 Mich at 739, quoting *Lujan*, 504 US at 560-561.

include whether an elector participated in the presidential primary. Thus, the confidential information is limited to whether an elector wrote down Democrat or Republican on the required form.

The Michigan Constitution provides for the "secrecy of the ballot" by stating that "[t]he legislature shall enact laws to preserve the purity of elections, *to preserve the secrecy of the ballot,* to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting."[27] Defendants note that none of the Plaintiffs allege that requiring them to disclose which party primary they intend to vote before voting in a presidential primary violates secrecy of the ballot principles. Nor could they since Michigan's ballot secrecy requirement was previously interpreted as not being violated by requiring voters to declare publicly their party affiliation in order to vote in a presidential primary.[28] Indeed, many state courts have concluded that disclosing a party preference before voting in a primary does not violate secrecy of the vote or ballot principles.[29] Federal courts have repeatedly held that a

[27] Const 1963, art 2, § 4 (emphasis added).

[28] *Ferency v Secretary of State*, 190 Mich App 398, 414; 476 NW2d 417, 424-25 (1991), rev'd on other grounds, 439 Mich 1021, 486 NW2d 664 (1992) ("The requirement that a voter publicly register as being affiliated with one party or the other in order to be eligible to vote in the presidential primary does not itself directly affect the secrecy of the voter's ballot. That is, the voter is not required to disclose which individual candidate he is voting for, but is merely required to disclose from which group of candidates he is making his selection (i.e., which party primary he is voting in.").

[29] See, e.g., *O'Callaghan v Director of Elections*, 6 P3d 728, 732 (Alaska 2000); *Lett v Dennis*, 129 So 33, 34-35 (Ala. 1930) ("It is the secrecy of the ballot which the [Alabama statute] protects and not secrecy as to the political party with which the voters intend to act."); *Katz v Fitzgerald*, 93 P 112, 113 (Cal 1907) ("It is the secrecy of the ballot which [the California constitution] protects, and not secrecy as to the political party with which the voter desires to act."); *State v Beggs*, 271 P 400, 402 (Kan 1928) ("The secrecy required [by the Kansas constitution] is as to his vote for candidates, not as to political leaning or party affiliation."); (ballot secrecy requirement of Michigan constitution not violated by requiring voters to declare publicly their party affiliation in order to vote in primary).

requirement that a voter join the party before voting in its primary is an appropriate means of reducing raiding and cross-over voting.[30]

Thus, there is no legally protected right to the *nondisclosure* of this information that Plaintiffs could claim is being violated for purposes of establishing an injury-in-fact as to them. The Michigan Legislature has once again chosen to implement a closed presidential primary system, and that choice is well within established precedent.[31]

Conversely, it is also true then that there is no protected right to obtain the information regarding which political party primary an elector chooses to participate in. Just because the State may require electors to publicly disclose which political party primary they intend to vote in before voting, does not mean that the State must make this information available to anyone who would like it, or that the State may not place restrictions on who may obtain the information and for what uses it may be put.

Plaintiffs make much of the fact that only the participating political parties are entitled to obtain the information under the Act. This limitation is reasonable. Although presidential primaries are run by the State as a public election, primaries are, in effect, all about the private political parties participating in the primary.[32] In addition, as noted above, the federal courts have upheld closed primaries and the requirement that party affiliation be identified as consistent with First Amendment freedom of association rights of local and national political parties in protecting against raiding, cross-over voting, and "'[screening] out those whose affiliation is . . .

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[30] See *Rosario v Rockefeller*, 410 US 752, 61-62 (1973); *Ziskis v Symington*, 47 F3d 1004, 1005-06 (CA 9, 1995); *Nader v Schaffer*, 417 F Supp 837, 848-50 (D Conn 1976); see also *Allen v Berman*, 1999 US App LEXIS 15071; 1999 WL 475559 (2nd Cir 1999); *Jones v Alabama*, 2001 US Dist LEXIS 3909 (D Ala 2001); see e.g., *Democratic Party of United States v Wisconsin*, 450 US 107 (1981).

[31] For a brief review of Michigan's presidential primary experience, see Senate Fiscal Analysis, September 11, 2007, attached as Appendix C.

[32] See *Ferency*, 190 Mich App at 416-417.

slight, tenuous, or fleeting,'" which "screening is essential to build a more effective and responsible Party."[33]

Again, the Act's stated purpose for the disclosure requirement to the participating political parties is "[t]o ensure compliance with the state and national political party rules of each participating political party and this section . . . ." (Appendix B, § 615c(5)). Such a purpose is consistent with the principles stated above, and supports the requirement that the primary information be transmitted to the participating political parties. No such rights or principles support Plaintiffs' contention that they are also entitled to the information, thus there is nothing unlawful about the Legislature's decision to limit the disclosure to only the participating political parties. Similarly, to the extent that Plaintiffs additionally complain of the fact that the participating political parties may release this information to "another person, organization or vendor, for the purpose of supporting political party activities by that participating political party," (Appendix B, 615c(8)-(9)), that provision, too, is consistent with the participating political parties' rights and interests.

Thus, there is no legally protected right to the *disclosure* of this information that Plaintiffs could claim is being violated for purposes of establishing an injury-in-fact as to them. In their reply to Defendants' response in opposition to preliminary injunction, Plaintiffs claimed to have "voter standing" and cited a number of federal cases. These decisions, of course, are not binding on this Court, but more importantly they are either inapplicable or distinguishable from the facts of this case based on the status of the plaintiffs and the claims asserted in those cases. For example, Plaintiffs cite *Libertarian Party of Indiana v Marion County Board of Voter Registration*, but the plaintiffs in that case included the state's minor political parties, and they

[33] *Democratic Party of United States*, 450 US at 123. See also the cases cited in footnote 23.

asserted First Amendment and Equal Protection claims under the federal constitution.[34] The analysis and result in that case does not apply here.

Because Plaintiffs have not sufficiently pleaded an injury-in-fact in order to confer constitutional standing upon them, they cannot demonstrate a substantial likelihood of success on the merits of their claims.

E. Plaintiffs failed to demonstrate a substantial likelihood of success on the merits of their claims because Plaintiffs' Complaint failed to state claims upon which relief may granted.

Defendants next submit that the trial court abused its discretion in granting Plaintiffs' motion for preliminary injunction where Plaintiffs did not demonstrate a substantial likelihood of success on the merits of their claims because the Complaint failed to state any claim upon which relief may be granted.

1. Count I - "The Act Unconstitutionally Appropriates Public Property for Private Use."

Again, the trial court concluded that the Act violated Const 1963, art 4, § 30, because it was an appropriation of public property for private use. This section provides: "The assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the appropriation of public money or property for local or private purposes."[35]

In Count I, Plaintiffs alleged the following (Appendix D, ¶¶ 45-51):

> 45. That Qualified Voter File and secret records created by the Act are compiled from millions of dollars of funds drawn from the public treasury, at the direction and for the benefit of the People of the State of Michigan.
>
> 46. That the Qualified Voter file and secret records created by the Act are public property, rightfully belonging to the People of the State of Michigan.

[34] *Libertarian Party of Indiana v Marion County Board of Voter Registration*, 778 F Supp 1458 (SD Ind 1991).
[35] Const 1963, art 4, § 30.

47. That, due to the absolute secrecy of said information, imposed by the Act and enforced by criminal sanctions, the contents of said Qualified Voter File and secret records cannot be generally known nor are they readily ascertainable by proper means.

48. The Act, by granting to the two Parties exclusive license to sell access to the secret records, gives two non-taxpaying – political parties substantial economic benefits not available to other people, entities, and/or taxpayers.

49. That a "trade secret" under the Michigan Uniform Trade Secrets Act, MCL 445.1902, is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

a). Derives independent economic value, actually or potential, from not being generally know [sic] to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure.

b). Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

50. That trade secrets are specifically recognized property interests in Michigan law.

51. That the Act seeks to divest public property, consisting of a trade secret and/or other public property, from the hands of the People of the State of Michigan and reconvey this property to private political parties for their private financial gain, thereby constituting an illegal transfer of public property to private use.

Thus, while Plaintiffs used the phrase "appropriates public property for private use," to title this count, the remainder of their allegations appeared directed at some sort of trade secrets violation.

In their response to Plaintiffs' motion for preliminary injunction, Defendants "note[d] that the Legislature can, in fact, appropriate public property for private use should it wish to under the Michigan Constitution," citing Const 1963, art 4, § 30, but further observed that "Plaintiffs . . . do not cite to that provision, but refer only to the Michigan Uniform Trade Secrets Act (MUTSA), MCL 445.1902." (Appendix E, p 16). Plaintiffs, in their reply to Defendants,

pointed out that the Act was not passed with a two-thirds vote of the Legislature, again implied that the information was a trade secret, and asserted that "the act as written had appropriated public property to the exclusive use of the two major private political parties, as the voting requirements of Const 1963, Art IV, § 30 have not been met." (Appendix F, pp 14-15).

At the hearing in this matter, the trial court asked Defendants' counsel whether Defendants were agreeing that the political party information was "public property" for purposes of art 4, § 30, since Defendants had cited that provision in their brief, and counsel responded that the information described by the Act was not the type of "property" contemplated by the constitution, and offered to provide additional briefing on that issue. (Appendix G, pp 15-17).

Despite the vague pleading and scanty arguments, the trial court concluded that "the property in question here is publicly owned property and amassed at public expense maintained at public expense, and only distributed – and actually distributed at public expense to third parties. And as such, you need a two-thirds vote of the legislature to in fact enact such a law, which was obviously not done in this particular case." (Appendix G, pp 28-29).

Defendants submit that Plaintiffs' failed to sufficiently plead a cause of action under art 4, § 30, and that the trial court essentially went beyond the pleadings to find a violation of this particular constitutional provision. Defendants recognize that the courts follow a liberal pleading standard.[36] "If a pleading gives a fair notice to the other party of the basis of the claim or defense asserted, with such reasonable particularity as the circumstances of the case permit (call it fact, law, conclusion, mixed question, or what-not), the pleading has fulfilled its function, and it is not

[36] See MCR 2.111(B)(1) ("A complaint . . . must contain the following: (1) A statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend.")

necessary to go further and plead one's evidence."[37] The allegations set forth by Plaintiffs in Count I, however, did not give fair notice or reasonably inform Defendants that Plaintiffs were asserting a cause of action under art 4, § 30. The fact that Defendants pointed this section out in their brief does not excuse the deficiency in Plaintiffs' pleading.[38]

Plaintiffs did not file a First Amended Complaint, nor did they ask the court for permission to do so at the hearing on the injunction. Yet, Plaintiffs came before the trial court seeking the extraordinary relief of a preliminary injunction enjoining the operation of a state statute affecting an upcoming election. Defendants submit that certainly under these circumstances, more was required of Plaintiffs, and clearly should have been demanded of Plaintiffs by the trial court, for purposes of pleading a cause of action that forms the basis for a request for injunctive relief. Accordingly, the trial court should not have granted relief for this reason alone.

Even if this Court is inclined to conclude that a claim for relief was sufficiently pleaded under art 4, § 30, Defendants submit that Plaintiffs failed to establish a substantial likelihood of success on the merits of that claim as presented to the trial court. Again, art 4, § 30 provides that "[t]he assent of two-thirds of the members elected to and serving in each house of the legislature shall be required for the *appropriation of public money or property for . . . private purposes*."[39] Defendants acknowledge that the Act did not receive a two-thirds vote of the Legislature, however, that certainly should not have ended the trial court's inquiry.

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[37] *Haenlein v Saginaw Bldg Trades Council*, 361 Mich 263, 271-272; 105 NW2d 166 (1960) (internal citation omitted) (discussing previous court rule).

[38] Certainly, had Defendants reasonably understood that Plaintiffs' were basing their claim on art 4, § 30, Defendants would have specifically addressed that provision in their brief, rather than discussing MUTSA.

[39] Const 1963, art 4, § 30 (emphasis added).

Michigan courts "presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional."[40] This case involves interpretation of both a statutory and constitutional provision. The Court outlined the methodology it applies when construing a constitutional provision[41]:

> When interpreting [a section of the Michigan Constitution], this Court's primary duty is to ascertain the provision's purpose and intent. By intent, we mean the intent of the people who adopted the constitutional provision at issue. As a result, our interpretation should reflect the meaning that the people themselves would apply. The clearest way to ascertain this meaning is to look at the text's "natural, common, and most obvious meaning, strictly construed and limited to the objects fairly within its terms, as gathered both from the section of which it forms a part and a general purview of the whole context."

Courts prefer "to avoid an interpretation that creates a constitutional invalidity."[42] The rules that apply when this Court construes a statute are well-known and similar to the rules of constitutional interpretation. "The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature."[43] "The first criterion in determining legislative intent is the specific language of the statute. . . . If the plain and ordinary meaning of the language is clear, judicial construction is neither necessary nor permitted . . . ."[44] If the language is ambiguous, this Court must strive to give effect to the intent of the Legislature by applying a reasonable construction, considering the purpose of the statute, and the object it seeks to accomplish.[45]

The first question is whether there has been an "appropriation" of public property under the Act for purposes of invoking art 4, § 30. Notably, the very next section of the constitution,

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[40] *Wayne County Treasurer v Perfecting Church (In re Treasurer of Wayne Foreclosure)*, 478 Mich 1, 9; 732 NW2d 458 (2007).
[41] *People v Antkoviak*, 242 Mich App 424, 435-436; 619 NW2d 18 (2000).
[42] *House Speaker*, 443 Mich at 585.
[43] *Hamilton v AAA Michigan*, 248 Mich App 535, 541; 639 NW2d 837 (2001).
[44] *Hamilton*, 248 Mich App at 541.
[45] *Macomb County Prosecuting Atty v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001).

art 4, § 31, provides that "[a]ny bill requiring an appropriation to carry out its purpose shall be considered an appropriation bill." Section 624g of the Act provides that if a presidential primary is held, the State shall reimburse local units of government for the cost of conducting the primary, and that the "legislature shall appropriate from the general fund of this state an amount necessary to implement this section." (Appendix B, § 624g(1)-(3)).[46] This language evidences the Legislature's intent to at least authorize an appropriation of public money to reimburse locals for the costs of the primary.[47]

However, with regard to whether the Act appropriates "public property," there is no similar provision in the Act. Certainly, there is no obvious "appropriation" of property as that term may be commonly understood within the context of the legislative process. Indeed there is no express appropriation of public property in the Act. Defendants did not discover any cases discussing the meaning of the term "appropriation" for purposes of art 4, § 30, and the relatively few decisions analyzing this provision (or its predecessor, Const 1908, art 5, § 24) did not reveal any factual instances similar to those asserted here.[48] At the 1963 constitutional convention, it was recommended that this provision be retained in the constitution because "[i]t provides against possible misuse of the appropriation power for private gain. The committee believes that a 2/3 vote of the members of each house of the legislature should be required for any bill appropriating public money or property for nongovernmental or nonpublic purposes, thereby

[46] MCL 168.624g.
[47] See *Oakland Schools Bd of Ed v Superintendent of Public Instruction*, 392 Mich 613, 620-621; 221 NW2d 345 (1974); *Michigan Asso. of Counties v Department of Management & Budget*, 418 Mich 667, 675; 345 NW2d 584 (1984).
[48] The Michigan Supreme Court discussed the meaning of the term "appropriation" for purposes of art 2, § 9, regarding referendums in *Michigan United Conservation Clubs v Secretary of State*, 464 Mich 359, 366; 630 NW2d 297 (2001), but that case is not immediately helpful as the legislation there contained a clear appropriation of money.

protecting public funds."[49] There was a brief discussion and description of examples of appropriations that would fall within the scope of § 30, including monies appropriated for 4-H programs and veterans' services.[50] Notably, in this case, the State is not losing anything of value when it provides the data to the party chairs. The Secretary of State still retains the information in the QVF, so it is not lost to the State in that sense. More significantly, however, is the fact that the party information data has no value to the State itself. There is no use that the State itself could put this political information to that would accrue a value to the State.

None of these sources suggest or support a conclusion that the Act's provision that the Secretary of State provide the list of political party ballot information to the party chairs constitutes an "appropriation" as that term may be commonly understood for purposes of construing art 4, § 30.[51]

If, however, this Court determines that § 615c is an appropriation, the next question is whether the political party information is "public property" as the trial court concluded. Article 4, § 30 does not define "property" nor does it appear that any cases interpreting § 30 or its predecessor art 5, § 24, have done so either. Because § 30 refers separately to "public money" it can be understood that "public property" does not include monies or funds. Other forms of property include "real" or "personal" property, which clearly are not at issue in this case. There is also, of course, intellectual property, but the list or data compilation of political party information does not appear to fit within that class of property.[52]

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[49] 1Official Record Constitutional Convention, Vol 2, p 837.
[50] 1Official Record Constitutional Convention, Vol 2, p 837.
[51] For examples of acts that are recognized as appropriating public money or property for a private purpose see 1997 PA 11 (sold a parcel of property for $1.00) and 2005 PA 157 (Department of History, Arts, and Libraries budget contained grants to local libraries, etc.)
[52] Copyrights are generally for original works of authorship and cover literary, educational, artistic or intellectual works in written, visual, or audio form. In *Feist Publications, Inc v Rural*

After the local units of government transfer the list information to the Secretary of State and it is then incorporated into the QVF, the information arguably qualifies as a public record of the State. The Freedom of Information Act (FOIA), MCL 15.231 *et seq*., defines "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created."[53] "Writing "means "handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, or other means of recording or retaining meaningful content."[54] The information at issue in the present case, although otherwise within the FOIA definition of "public record," essentially becomes non-public because FOIA excepts from the definition of public record a record that is exempt from disclosure under another statute. [55] Here, the Act specifically exempts the information from FOIA. (Appendix B, § 615c(4)). This is similar to the exception set forth in MCL 257.307(6), which requires the Secretary of State to forward the names and addresses of drivers license applicants who intend to become organ donors to the organ donor registry, but otherwise exempts this information from disclosure under FOIA.[56]

Telephone Service Company, Inc, 499 US 340, 345; 11 S Ct 1282; 113 L Ed 2d 358 (1991), the US Supreme Court determined that while a compilation of data may be protected under copyright law, the underlying data itself is not protected under copyright because facts cannot be copyrighted. Facts are not "original" and do not fall within the definition of copyrighted materials.

[53] MCL 15.232(e).

[54] MCL 15.232(h).

[55] MCL 15.232(e)(i); 15.243(1)(d).

[56] See also, Child Protection Law, MCL 722.621 *et seq.*; Children's Ombudsman Act, MCL 722.921 *et seq.*; and the Release of Information for Medical Research and Education Act, MCL

The Legislature's intent to accord the list information something less than "public record" status undercuts the argument that the information is nevertheless "public property" for purposes of art 4, § 30. Indeed, the Legislature determined that the information should not be considered "public" information – a decision within the Legislature's authority. While Michigan recognizes a common-law right of access to public records; there is no constitutional right, and the Legislature may restrict the general right of access.[57]

Moreover, all information has value. The State retains an enormous amount of information, virtually all of which has value, monetary or otherwise, to certain individuals or entities. The Legislature permits or restricts access to this information based on the policy choices it makes. Under this scenario, the argument that the Legislature, when it chooses to grant individuals or entities access to information, "appropriates" "public property" is unpersuasive. More to the point, nothing in the language or decisions interpreting art 4, § 30, remotely supports the notion that the drafters of the provision envisioned the term "public property" as encompassing information contained in records retained by the State.

Should this Court disagree and conclude that the list is "public property" for purposes of art 4, § 30, the final inquiry that must be made is whether the appropriation of public property is for a "private purpose." Defendants submit that the overarching purpose of the Act and its contested provisions is, in fact, a "public" purpose.

Defendants do not contest that the chairpersons or the political parties that participate in a primary are private persons or entities. That, however, is not the relevant inquiry. The question is whether the Act effectuates a "public purpose" or a "private purpose." The Michigan Supreme

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331.531 *et seq.*, each of which exempt information from FOIA based on confidentiality but authorize that the same information be disclosed to certain persons or entities.

[57] *In re Midland Pub Co*, 113 Mich App 55, 63-64; 317 NW2d 284 (1982), affd 420 Mich 148, 362 NW2d 580 (1984).

Court addressed a similar question in *Advisory opinion on the Constitutionality of 1975 PA 227*.[58] There the Court reviewed whether a new provision in the Michigan Campaign Finance Act, MCL 169.201 *et seq*., that instituted state funding for gubernatorial elections was an unconstitutional appropriation of public money for a private purpose under art 4, § 30.

The Court opened its analysis by stating that "the term public purpose should not be narrowly construed by the courts, for determinations of what constitutes a public purpose for which an appropriation of public money may be made is primarily the responsibility of the Legislature."[59] The Court quoted from its previous decision in *Gregory Marina, Inc v Detroit*, that "'[D]etermination of what constitutes a public purpose involves considerations of economic and social philosophies and principles of political science and government. Such determinations should be made by the elected representatives of the people.'" [60] The Court followed this principle with the statement that "[t]he fact that certain individuals benefit from the appropriation does not necessarily imply that the appropriation is lacking a public purpose. The question is whether society at large has an interest in having those individuals benefited."[61] Under these principles, the Court concluded that public funding of gubernatorial elections was a public purpose that advanced the welfare of the public.[62] The same is true here.

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[58] *In re Advisory Opinion on the Constitutionality of 1975 PA 227*, 396 Mich 465; 242 NW2d 3 (1976).
[59] *In re Advisory Opinion of 1975 PA 227*, 396 Mich at 495-496.
[60] *In re Advisory Opinion of 1975 PA 227*, 396 Mich at 496, quoting *Gregory Marina, Inc v Detroit*, 378 Mich 364, 394; 144 NW2d 503 (1966).
[61] *In re Advisory Opinion of 1975 PA 227*, 396 Mich at 496, quoting *Gaylord v Gaylord City Clerk*, 378 Mich 273, 299-300; 144 NW2d 460 (1966).
[62] *In re Advisory Opinion of 1975 PA 227*, 396 Mich at 497-499. See also *Airlines Parking v Wayne County*, 452 Mich 527, 539; 550 NW2d 490 (1996); *Falk v State Bar of Mich*, 411 Mich 63; 305 NW2d 201 (1981); *In re Advisory Opinion Re Constitutionality of PA 1975 No 301*, 400 Mich 270; 254 NW2d 528 (1977); OAG No. 6225, May 7, 1984.

Again, it is presumed that statutes are constitutional. The Legislature is constitutionally authorized to provide for the time, place, and manner of the holding of elections, and is constitutionally required to "enact laws to preserve the purity of the elections, to preserve the secrecy of the ballot, [and] to guard against the abuses of the elective franchise."[63] The enactment of 2007 PA 52 is supported by, and is fully consistent with, these two constitutional provisions. As recognized by this Court in *Ferency v Secretary of State*, although State primaries are run by the State and are regulated by State election law, they are primarily party functions of the private political parties choosing to participate in the primary process.[64] However, that these private parties benefit from the holding of a presidential primary does not mean that the Act lacks a public purpose. In response to an argument that forcing local units of government to hold the primaries without reimbursement violated Const 1963, art 7, § 26. The Michigan Supreme Court previously held, albeit in an order, that the holding of a presidential primary is a "public purpose authorized by law."[65] Similarly, this Court should conclude that the holding of a presidential primary under 2007 PA 52 is a "public purpose," and thus the Legislature did not need a two-thirds vote for the Act under art 4, § 30. Without doubt there is a benefit that is conferred upon society at large by the holding of efficient and well-run primaries statewide that offer large numbers of electors the opportunity to exercise associational and political speech rights with respect to candidates for the office of president of the United States.

The pertinent question is whether the Act's requirement that the State provide the participating political party chairs with the primary information also effectuates an overarching

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[63] Const 1963, art 2, §§ 4-5.
[64] *Ferency*, 190 Mich App at 416-417.
[65] *McLachlan v Secretary of State*, 396 Mich 365; 240 NW2d 472 (1976). Article 7, § 26 provides: "Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose."

public purpose. Defendants submit that it does. The Legislature, as a matter of public policy, chose to implement a closed primary system under 2007 PA 52, which requires electors to disclose which party's ballot the elector intends to vote. The apparent purpose in doing so was to increase voter participation in the nominating process, and to implement protections against cross-over voting, which is consistent with the national party rules of the Michigan Democratic Party. (Appendix C, p 8).

Providing the primary information to the participating political party chairs is consistent with the First Amendment associational rights of local and national political parties in protecting against raiding, cross-over voting, and "'[screening] out those whose affiliation is . . . slight, tenuous, or fleeting,'" which "screening is essential to build a more effective and responsible Party."[66] Again, the Act's stated purpose for the disclosure requirement to the participating political parties is "[t]o ensure compliance with the state and national political party rules of each participating political party and this section . . . ." (Appendix B, § 615c(5)). This purpose effectuates the rights of the parties, and supports the requirement that the primary information be transmitted to the participating political parties.

The Legislature, however, recognized that many electors are reluctant to disclose their political party affiliations. (Appendix C, p 8). Thus, the Legislature limited the disclosure of this information to the participating political parties, and limited the information's use to the furtherance of the party's activities. The overall purpose of these requirements then is to encourage wider participation in the nominating process by holding state-wide primaries, and to enhance the effectiveness of the primaries in accurately reflecting the popular vote of the party members. Defendants acknowledge that the participating party chairs will benefit from receiving

[66] *Democratic Party of United States*, 450 US at 123. See also the cases cited in footnote 23.

the primary information, but submit that this is a case where the public at large has an interest in having those individuals benefited because the overall purpose of the Act and its provisions is clearly public in scope.[67]

For all of these reasons, the trial court abused its discretion in granting a preliminary injunction on the basis that 2007 PA 52 violated art 4, § 30, where Plaintiffs' Complaint neither sufficiently pleaded a cause of action under that provision, nor established a substantial likelihood of success on the merits of any such claim because the Act does not appropriate public property for a private purpose within the plain and ordinary meaning of § 30.

2. Count V – "Violation of Defendant's Duty to Safeguard the Purity of Elections."

The trial court also concluded in this case that the Act violated the Purity of Elections Clause found in Const 1963, art 2, § 4, which provides: "The legislature shall enact laws to preserve the purity of the elections, to preserve the secrecy of the ballot, to guard against the abuses of the elective franchise."[68]

In Count V, Plaintiffs assert that the Act "places valuable public property in the sole possession of the political parties subjecting every candidate to the unrestrained coercion of the political parties if the candidate wants access to the secret records." (Appendix D, Complaint, ¶ 70). Plaintiffs claim that the Act violates the national rules of the political parties and undermines the deference ordinarily shown to the candidates' of the political parties under the rules. (Appendix D, Complaint, ¶ 71). Additionally, Plaintiffs allege that the Act transfers control of public records to the "exclusive control of the two major parties" without providing a standard for reviewing the parties' decisions to grant or withhold access to the candidates. (Appendix D, Complaint, ¶ 72). Plaintiffs claim that Defendants and this Court have a duty to

[67] *In re Advisory Opinion of 1975 PA 227*, 396 Mich at 496.
[68] Const 1963, art 2, § 4.

safeguard the purity of elections, and that the Act "pollutes" the purity of Michigan's elections for the "sole benefit of the two non-taxpaying so-called 'major' political parties." (Appendix D, Complaint, ¶¶ 74-75).

The trial court concluded at the hearing, "[s]econdly, the court is of the opinion that to maintain this information in the manner in which it is being maintained, and not making it available to other people, clearly, in my view, infringes upon the right for a free and fair election under the rights under Article 1 [sic]. To have a pure election is the phraseology used." (Appendix G, p 29). Defendants disagree and submit that the Act does not violate art 2, § 4.

The essence of Plaintiffs' claim appears to be that candidates are somehow disadvantaged by the Act because they may or may not gain access to the political primary information, which would be beneficial to candidates, at the whim of the participating political parties, and that the Act's conflict with national party rules similarly disadvantages party candidates. Defendants fail to see how any of the Plaintiffs have standing to raise issues or injuries belonging to candidates or political parties where none of the Plaintiffs allege that they are affiliated with any political party, local or national, are candidates for office, intend to become candidates for office in the near future, or assert that they intend to vote in the primary, if held. Moreover, Plaintiffs have alleged no facts that would support their claim of disadvantage to candidates. It would seem that just the opposite would be true under the Act. There is no reason to believe that the participating political parties would use the primary information to disadvantage any of its own candidates, and the Act specifically authorizes those parties to use the information to oppose the candidates of other participating political parties.

Rather, art 2, § 4 authorizes the Legislature to enact provisions like Act 52 for the purpose of promoting and preserving the purity of the elections process. As explained above, the

Act effectuates an overarching public purpose. There is nothing impermissible or unconstitutional with requiring the disclosure of the political party information, and it is within the Legislature's authority to set restrictions on who may have access to public information or records.

Thus, the trial court abused its discretion in granting a preliminary injunction on the basis that 2007 PA 52 violated art 2, § 4, where Plaintiffs' Complaint did not sufficiently establish the standing of Plaintiffs to assert this claim, plead a cause of action under this provision, or establish a substantial likelihood of success on the merits of any such claim because the Act does not violate the Purity of Elections Clause set forth in art 2, § 4.

F. Plaintiffs' other asserted causes of action failed as well.

The trial court did not address the remaining counts asserted in Plaintiffs' Complaint. Defendants submit, however, that Plaintiffs were not entitled to a grant of injunctive relief with respect to these claims, and that this Court can and should conclude as much since Defendants request entry of a final judgment in this matter.

1. Count II – "The Act unconstitutionally Defines a Vague Speech Crime with the Ambiguous Terms of 'Use' and 'Information.'"

In Count II, Plaintiffs allege that the Act creates an unconstitutional speech crime by allowing the participating political parties to use the secret information, while the Act specifically prohibits and makes a misdemeanor, anyone else's unauthorized use of the secret information. They claim that under the Act's "strict liability provision, a journalist reporting that a person under consideration for a government appointment was a 'Democrat' or a 'Republican' based upon information derived from the secret records would be guilty of using 'information acquired or in the possession of a public body,' even if that information were furnished by a political party official with access to the secret records." (Appendix D, Complaint, ¶ 59).

At the hearing in this matter, the trial court and Plaintiffs observed that Plaintiff McDiarmid is at least a former journalist, and asserted that Plaintiff Schwartz is a journalist. Defendants simply observe that none of the Plaintiffs actually alleged in the Complaint that they are practicing journalists who believe they would encounter the situation described in the Complaint, and thus had any reasonable fear an imminent injury-in-fact of this nature to establish standing. Accordingly, Plaintiffs do not have standing to raise this claim as pleaded, and as a consequence could not establish a substantial likelihood of success on the merits of this claim for purposes of requesting injunctive relief.

2. Count III – "The Act Infringes Upon Protected Rights of Free Speech."

In Count III, Plaintiffs simply allege (Appendix D, Complaint, ¶¶ 63-64):

> 63. That Article 1, Section 5 of the Michigan Constitution guarantees: "Every person may freely speak, write, express and publish his views on all subjects . . . and no law shall be enacted to restrain or abridge the liberty of speech or of the press."
>
> 64. That the Act, for reasons stated above, infringes upon this constitutional right.

Defendants submit that even under liberal pleading requirements, this generalized statement does not sufficiently set forth or describe a constitutional violation upon which this Court may grant any relief. Indeed, conclusory statements, unsupported by factual allegations, are insufficient to state a claim.[69] Similarly, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to state a cause of action.[70] Thus, Plaintiffs' Count III fails to state a claim upon which relief may be granted, and they could not establish a substantial likelihood of success on the merits of this claim for purposes of requesting injunctive relief.

[69] *Ypsilanti Fire Marshal v Kircher (On Reh)*, 273 Mich App 496, 544; 730 NW2d 481 (2007).
[70] *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

3. Count IV – "Corrupt Diversion of Public Assets."

In Count IV, Plaintiffs claim (Exhibit D, Complaint, ¶¶ 66-68):

> 66. That the Act states that the political parties may release [secret records] to another person, organization, or vendor for the purpose of supporting political party activities by that political party."
>
> 67. Article 1, Section 1 of the Michigan Constitution provides as follows: "All political power is inherent in the people. Government is instituted for their equal benefit, security and protection."
>
> 68. That currently, the political parties stand in a position to improperly convert public assets by the sale of secret records to vendors.

Again, these conclusory statements do not suffice to state a cause of action.[71] Thus, Plaintiffs' Count IV fails to state a claim upon which relief may be granted, and they could not establish a substantial likelihood of success on the merits of this claim for purposes of requesting injunctive relief.

G. The trial court abused its discretion by entering an injunction where harm to the public interest would ensue if an injunction issues.

Michigan's electors have substantial interests and rights in being offered the opportunity to participate in the scheduled upcoming presidential primaries in order to select party choices for the office of President of the United States. Moreover, they have an interest in participating in a primary that is well-organized and well-run, which cannot be accomplished by the Defendants and local clerks on a moment's notice. Neither Plaintiffs' Complaint nor the Motion for Temporary Restraining Order or Preliminary Injunctive relief set forth any arguments or claims supporting enjoining of the holding of the presidential primaries as required under 2007 PA 52. Rather, the interests of the public will be best served by allowing preparation for and the primaries to proceed as scheduled.

[71] *Ypsilanti Fire Marshall,* 273 Mich App at 544; *Churella,* 258 Mich App at 272.

H. The trial court abused its discretion by entering an injunction where Plaintiffs did not demonstrate that they would suffer any harm in the absence of a stay that outweighs the harm to the Defendants if an injunction is granted.

The holding of a presidential primary is a significant undertaking by Defendants and the local city and township clerks. Preparations have already begun in anticipation of the primaries, which includes the development of forms and protocols necessary to implement 2007 PA 52. Ballots must also be developed and printed. All of these events, and others, must continue to occur in a timely fashion in order to ensure a well-run and successful presidential primary. That said, it is not absolutely certain that a presidential primary will, in fact, be held in January 2008. Under the Act, the participating political parties have until 4:00 p.m. on November 14, 2007, to notify Defendant Secretary of State whether they will be using the presidential primary, or some other method to select delegates. (Appendix B, § 613a(2)). Thus, at this time, not only is an injunction not warranted because Plaintiffs' claims are totally without merit, but it would also be premature and/or unnecessary because the parties may still opt out of holding a primary.

I. The trial court abused its discretion by entering an injunction where Plaintiffs did not demonstrate that they will suffer irreparable injury if a temporary or preliminary injunction is not granted.

The trial court concluded that "[i]t is my view that there is a clear injury to the public's interests and the interests of these parties." (Appendix G, pp 29-30). Defendants strongly disagree. Based on all of the above, Plaintiffs have not demonstrated that they will suffer an irreparable injury absent issuance of an injunction. As pleaded, none of the Plaintiffs have standing to bring the asserted claims, and the claims themselves are deficient. The interests, if any, of these eight Plaintiffs certainly do not outweigh the interests of the millions of Michigan electors in participating in the presidential primary, if held. Moreover, with respect to the

confidential primary choice information, Plaintiffs currently are not entitled to any such information, and 2007 PA 52 does not change that fact.

Because Plaintiffs did not meet their burden of proof on each of these four factors, they were not entitled to extraordinary relief in the form of a preliminary injunction against the State Defendants enjoining Defendants from enforcing the provisions of 2007 PA 52.

Conclusion and Relief Sought

For the reasons set forth above, Defendants respectfully request that this Court grant Defendants' emergency application for leave to appeal, reverse the order of the trial court granting Plaintiffs' motion for preliminary injunction, and enter a final judgment or any other relief that this Court deems appropriate pursuant to MCR 7.205(D)(2).

Respectfully submitted,

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