IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

DUANE MALETSKI, SHARON LOPEZ, FRANCES M. ZICK, and all others similarly situated, OBAMA FOR AMERICA, and DEMOCRATIC NATIONAL COMMITTEE PLAINTIFFS v. MACOMB COUNTY REPUBLICAN PARTY, MICHIGAN REPUBLICAN PARTY, REPUBLICAN NATIONAL COMMITTEE, and JOHN DOES #1-100, DEFENDANTS.	Case No. 08-cv-13982 **Hon. David M. Lawson** **CLASS ACTION**

REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

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INTRODUCTION

In their Motion for a Declaratory Judgment and Preliminary Injunction and Opposition to Defendants' Motions to Dismiss, Plaintiffs have responded to many of Defendants' arguments, but there are a few points that highlight both the critical need for, and Plaintiffs' entitlement to, injunctive and, particularly, declaratory relief against all of the Defendants.

First, there is no dispute that there is significant confusion among voters and even county clerks arising out of the announced "lose-your-home, lose-your-vote" scheme. Voters are uncertain whether they will be able to vote, they are afraid of being questioned at the polls about their personal finances, and county clerks, though they intend to follow the law, believe there is nothing that they can do to stop challenges based on foreclosure lists. Ex. 1 (Detroit Free Press, Michigan To Combat Claims, Oct 13, 2008). In contrast to this grave harm that the Court can avert, Defendants have no equities to support their arguments. Declaratory relief, at a minimum, is needed to quiet this confusion and ensure voters are able to go to the polls without fear.

Second, Defendants' recent promises to refrain from engaging in the conduct alleged in the complaint must be seen against the backdrop of history and their ongoing efforts to suppress the vote. The Republican Party's history of voter suppression has been catalogued in detail and is the subject of the multiple consent decrees and federal court injunctions. And it continues to this day throughout the country, with the most egregious recent effort being the 6,000 frivolous challenges made and withdrawn by the Montana Republican Party. History, as well as ongoing voter suppression efforts elsewhere, tip the balance against Defendants' bare denials, and this Court's oversight is needed to enforce their promises.

Third, Defendants' suggestion that they never once gave thought to using foreclosure lists to challenge voters is contradicted not only by Ms. Melzer's testimony in this case, but also by the statements made by Republican officials elsewhere in the country. In addition to the Ohio

Republican Party's apparent openness to the "lose-your-home, lose-your-vote" scheme, just recently the chair of the Marion County, IN Republican Party indicated that Republicans in his state "might" end up challenging based on foreclosures. The notion that there is no broader plan or coordination by the state and national party is belied by Defendants' supporters nationwide.

Fourth, the suggestion that Republican Party's Election Day efforts, including challenging voters, are not coordinated with the state and national party is absurd. As explained in Plaintiffs' Opposition to Defendants' Motion to Dismiss, there is a significant overlap of personnel among the County, State, and National Republican Party operatives, working under the umbrella of Victory '08; and the State and National Republican Party have joined together, formally to comply with FEC regulations, to raise money for those efforts. Thus, upon full discovery on the merits, Plaintiffs contend that they will be able to show pervasive coordination among Defendants on the vote suppression efforts discussed in Plaintiffs' complaint.

Because they cannot prevail on the merits, Defendants evade these and other basic issues, misstating the nature of the conspiracy through which Defendants have collaborated to suppress voter turnout by spreading misinformation about voters' eligibility and ignoring the present harms they are causing. As discussed below, the Court should grant Plaintiffs' request for declaratory and injunctive relief and ensure that voters in the state of Michigan know that they will be able to go to the polls free of the threat of the "lose-your-home, lose-your-vote" scheme.

ARGUMENT

A. The State and National Parties Are Equally Liable with the County Party.

The County Party's involvement here is not difficult to identify. Ms. Melzer's report of the County Party's statement is either substantially accurate or substantially false. Ms. Melzer has sworn that it is accurate, *see* Docket #12, Ex. 5, and the Michigan Messenger has stood behind it even against a libel suit apparently designed to pressure a retraction, *see* Docket #12,

Ex. 15. Neither has any incentive to lie. Mr. Carabelli's denial, in contrast, appears designed to tamp out a political fire. But the key here is that if the report is substantially accurate, the County Party must be subject to an injunction, and from there the State and National Parties' liability is plain.[1] At this early stage, when the overwhelming weight of the equities favors Plaintiffs, they need only show a reasonable prospect of success.

1. Michigan Republican Party

The State Party's liability follows because both the County and State Parties have admitted that if a foreclosure-based poll challenge plan exists, it would necessarily involve the State Party. *See* Pls. MTD Opp. 4-5. The County Party Chairman and the State Party's Election Day Operations Director agree that "[a]ll of the poll challenge coordination is done at the state level," Docket 33, Ex. 1 ¶ 8 (Carabelli Aff.), and that responsibilities for coordinating and overseeing "activities by the party's designated challengers" come out of the state-level office, Docket 32, Ex. 4 ¶ 3 (Harrigan Aff.). If there is a plan, it has to involve the State Party.

2. Republican National Committee

More specifically, that plan must come out of the State Party office that is jointly funded and directed by the National Party. Victory '08 is the Election Day program that oversees the challenge efforts and is a joint Federal and State Party operation. Docket #34, Ex. 5 (McCain Palin Victory 2008) (describing Victory '08 as "[a] joint fundraising committee by and composed of the Republican National Committee, [and] the Michigan Republican Party"). The National Party appointed the program's Michigan leaders, Docket #34, Ex. 7 (RNC Announces Victory '08), and the State Party's Ms. Harrigan, who runs the State's voter challenge program, is also part of the coordinated Victory '08 team. Docket #34, Ex. 8 at 2 ("Victory '08 Staff and

[1] Defendants have now submitted objections and bare bones responses to the jurisdictional discovery propounded by Plaintiffs. Those responses are wholly deficient — Defendants produced no documents at all — and will be the subject of a motion to compel.

Offices Announced" (July 2, 2008)). Through Ms. Harrigan, the State Party's Election Day Operations team and the National Party's Victory '08 team coordinate their agenda. The State Party's challenge operations, inasmuch as they involve Victory '08, involve the RNC.[2]

B. Defendants' Responses Are Legally Inadequate in Other Ways.

Once past their "not-me" defenses, the Defendant Republicans can avoid an injunction only by dodging Plaintiffs' claims. Plaintiffs' claims, and harms, are straight-forward.

The "lose your home, lose your vote" plan is already underway. Variously casting it as a standing, ripeness, mootness, and merits argument, Defendants suggest there is no harm here because there will be no foreclosure-based challenges. But whether implemented or not, Defendants hope the Court will overlook that as with any caging strategy, the strategy is implemented when it becomes public. This case became ripe then, the suppression-based harms that the Clerk testified to commenced then, and the activity required judicial oversight then.

Defendants' complaint that there is no Article III controversy when Defendants "never engaged in the activity in the first place" and that Plaintiffs cannot obtain an "'obey the law' injunction," thus fall flat.[3] County Br. at 10, 17-18; Nat'l. Br. at 25. Unlike in the cases that Defendants rely on, Plaintiffs here seek a prospective injunction against an action that Defendants have already initiated. Thus the very grounds on which Defendants try to evade *Kardules v. Columbus*, 95 F.3d 1335 (6th Cir. 1995), demonstrates its applicability: "In that case, …a commission had been formed and was taking affirmative steps." Nat'l Br. at 10. The announcement here was that affirmative step.

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[2] The Defendants' efforts to escape the long history of voter caging misconduct cannot prevail. Evidence of other similar wrongdoing is admissible evidence of a party's motivation. *See* Fed. R. Evid. 404(b); *Weberg v. Franks*, 229 F.3d 514, 527, 528 (6th Cir. 2000) (looking for evidence of coconspirators' "common objective").

[3] Defendants' arguments that the Court lacks subject matter jurisdiction all depend on the premise that there is no plan to engage in foreclosure-based challenges — a merits issue that cannot be addressed when Defendants have failed to produce a single document.

Defendants have targeted voters based on political animus. Defendants try to evade the Section 1985(3) claim by mischaracterizing Plaintiffs' claims as class-based, not viewpoint-based. But the animus is political, *see Conklin v. Lovely*, 834 F.2d 543, 549 (6th Cir. 1987), and contrary to the suggestion that foreclosure-based challenges would be non-discriminatory, County Br. at 15-16, the foreclosure-based challenges will disproportionately and systematically burden voters likely to prefer Democrats. Docket #12, Ex. 16 (Conrad Decl.).

Defendants' other efforts to dodge the issues are thoroughly addressed in previous briefing or require little extra attention here. On Section 1983, none of the Defendants acknowledges that the challenge process in which they participate involves a state function expressly delegated, in part, to political parties. Mich. Comp. Laws §§ 168.727(1), 168.730. On 42 U.S.C. § 1985(3), Defendants try to read the statute's "Support and Advocacy" clause out of the text. And on the balance of harms, Defendants never even address the pre-Election Day harms,[4] and argue only that enjoining the plan that Mr. Carabelli announced would offend the partisan challengers' sensibilities. If the notion of obeying a court order is so damaging to Defendants' plans, the relief is even more necessary than Plaintiffs thought.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction and declaratory relief should be granted.

Dated: October 15, 2008

Respectfully submitted,

/s/James R. Bruinsma
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[4] Defendants argue that election officials will be able to stop challengers from using foreclosure lists on Election Day. But challenge lists are developed behind closed doors, where only this Court, not election officials, can take action.

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Certificate of Service

I hereby certify that on October 15, 2008, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of such filing to the following counsel of record:

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