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. 2:08-CV-13982

Honorable David M. Lawson
District Judge

DEFENDANT MICHIGAN REPUBLICAN PARTY'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

Oral Argument Requested

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STATEMENT OF ISSUES PRESENTED

Whether a preliminary injunction or declaratory judgment should be granted:

(1) When there is no actual case or controversy because plaintiffs and the Michigan Republican Party agree that a voter should not be challenged based on foreclosure notices or proceedings affecting his or her registered address?

(2) When the claims are not ripe because the Michigan Republican Party will not make any foreclosure-based voter challenges?

(3) When the complaint fails to state a claim for relief because there are no factual allegations that the Michigan Republican Party will make foreclosure-based voter challenges or has agreed to participate in a plan to make such challenges?

(4) When there will not be any irreparable injury to voters because the Michigan Republican Party will not make any foreclosure-based voter challenges?

(5) When the requested preliminary injunction and declaratory judgment would constitute an advisory opinion?

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CONTROLLING AUTHORITIES

Standard for preliminary injunction

Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997)

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ARGUMENT

STANDARD FOR MOTION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997)(emphasis in original). "'There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing an injunction [*sic*].'" *Detroit Newspaper Publishers Association v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972). See also, *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000)("extraordinary remedy involving the exercise of a very far-reaching power, which is to be applied 'only in [the] limited circumstances' which clearly demand it").

When considering a motion for preliminary injunction, a district court must balance four factors: (1) whether the plaintiff has a strong likelihood of success on the merits; (2) whether the plaintiff would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) (citing *Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005)). These four considerations are "factors to be balanced, not prerequisites that must be met." *Id.* (quoting *Jones v. City of Monroe*, 341 F.3d 474, 476 (6th Cir. 2003)).

Because of the timing of this motion and the 2008 general election, the requested relief is equivalent to a permanent injunction. A plaintiff seeking a permanent injunction must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law are inadequate to compensate for that injury; (3) that, considering the balance of hardships between

the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006). Further, "[a] party is entitled to a permanent injunction if it can establish that it suffered a constitutional violation and will suffer 'continuing irreparable injury' for which there is no adequate remedy at law." *Women's Medical Professional Corp. v. Baird*, 438 F.3d 595, 602 (6th Cir. 2006).

INTRODUCTION

Plaintiffs have no likelihood of success on the merits against the Michigan Republican Party. Their motion depends on a disputed blog posting about an alleged statement by the chair of the Macomb County Republican Party that "[w]e will have a list of foreclosed homes and will make sure people aren't voting from those addresses."

There is no evidence that the Michigan Republican Party will participate in any such challenges. Instead, the evidence will show just the opposite:

> 1. Public statements that the Michigan Republican Party does not support and will not participate in any voter challenges based on foreclosure notices or proceedings affecting the voter's registered address.
>
> 2. Affidavits from its chairperson and director of election day programs that:
>
> > (a) There have never been any plans to make challenges based on foreclosure lists.
> >
> > (b) There have been no discussions or agreement with the Republican National Committee, any county committee or any other persons to engage in any such challenges.
> >
> > (c) No voter will be challenged because their home has been the subject of a foreclosure notice or proceeding.

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Faced with these consistent and explicit statements, plaintiffs maintain that the rights of potential voters "cannot be gambled on the mere hope that the Republicans' *casual denial* of the newspaper story are reliable." [R.12 – Plaintiffs' brief, p. 25 (emphasis added)] The Michigan Republican Party has submitted *sworn affidavits* from its chairperson and director of election day programs. These affidavits – filed with this Court under oath and subject to penalties of perjury – are hardly "casual denials."[1]

Alternatively, plaintiffs assert that the blog posting – followed by the Michigan Republican Party's prompt, unambiguous and public disavowal of any plans to make foreclosure-based challenges – could result in confusion among potential voters. Based on these speculative claims, they ask this Court to issue "a clear and reliable statement that their right to vote is secure, regardless of the conflicting reports that have been publicized." [*Id.* p. 29] However, there have never been any "conflicting reports" about the Michigan Republican Party's position and plans regarding foreclosure-based challenges.

In short, plaintiffs seek an advisory opinion that such challenges – which the Michigan Republican Party has never considered making and which it has no plans to make – are not valid under Michigan's election law and would unconstitutionally infringe on the fundamental right to vote. "The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

When a citizen's fundamental right to vote is subject to a *real and immediate threat*, then the jurisdiction and power of federal courts are properly invoked. However, in this case, there is

[1] 18 U.S.C. § 1621. See *U.S. v. Yoshida*, 727 F.2d 822 (9th Cir. 1983)(affidavit stated that defendant was "duly sworn" and affirmed to notary public that statements in affidavit were true). The submission of false affidavits is also sanctionable misconduct. *Scott v. Metro. Health Corp.*, 234 Fed.Appx. 341, 368 (6th Cir. 2007).

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no threat. Individuals who have suffered foreclosure of their homes will be able to exercise their right to vote without any challenge or interference by the Michigan Republican Party and its designated challengers.

When considering plaintiffs' motion, it is important to strip away the veneer. This is a politically motivated lawsuit. Weeks before a vigorously contested election, the Democratic National Committee and the campaign committee for its Presidential candidate filed a lawsuit against their political opponents. Along with the disputed statement in an advocacy blog, the complaint sets out a lengthy and unsubstantiated set of allegations regarding a purported history of voter-suppression tactics in other states and other elections – some dating back a quarter of a century. Their preliminary injunction brief expands on this trek back through the decades in highly partisan terms.

This Court is being asked to issue an injunction which will be exploited for political advantage. The inevitable press release and media campaign will portray any order as this Court's endorsement of plaintiffs' accusations about the election tactics of their political opponents. Plaintiffs' effort to advance their partisan goals will be wrapped in the mantle of this Court's credibility.

The motivation and purpose for plaintiffs' motion are evident from an invitation repeated throughout their brief. To this end, plaintiffs suggest that the defendants should "accede" or "stipulate" to the requested relief since, as plaintiffs have acknowledged in their complaint, the Michigan Republican Party has no plans to engage in challenging votes based on foreclosure status. [R. 12 - Plaintiffs' brief, p. 2, 27] After all, plaintiffs assert, what harm can come from an injunction if defendants are not going to do it anyway?

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Such an assertion ignores the limits of federal jurisdiction imposed by Article III, Section 2. "The exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy," and "a federal court [lacks] the power to render advisory opinions." *U.S. National Bank of Oregon v Independent Insurance Agents*, 508 U.S. 439, 446, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975)). The "case or controversy" requirement protects the principle of separation of powers and properly limits the role of the judiciary in a democratic society. *Allen v Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). In essence, the requirement keeps federal courts in the business of resolving existing legal disputes rather than offering advice on the legality of a proposed course of action. See *Crowley Cutlery Co. v United States*, 849 F2d 273, 276 (7th Cir. 1988).

In *Aetna Life Insurance Co. v Haworth*, 300 U.S. 227, 240-241, 57 S.Ct. 461, 81 L.Ed. 617 (1937), the United States Supreme Court outlined the broad parameters of a justiciable controversy:

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests…. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical set of facts. *Id.* (internal citations omitted).

In this case, plaintiffs and the Michigan Republican Party agree that a voter cannot be challenged because his or her home has been subject to a foreclosure notice or proceeding. In addition, plaintiffs have not, and cannot, provide this Court with any evidence that the Michigan Republican Party was or is planning to base voter challenges on foreclosure lists. Under such circumstances, there is no case or controversy invoking the jurisdiction of this Court.

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The "case or controversy" requirement has been applied in other cases where the defendants do not contest the plaintiff's asserted legal position and do not intend to engage in any challenged conduct. In *Deveraux* v. *City of Chicago*, 14 F 3d 328, 330 (7th Cir. 1994), police officers failed to allege an "actual controversy" under the Declaratory Judgment Act, 28 U.S.C. § 2201, when the city did not dispute their legal position regarding use of existing rosters for promotion decisions and the city had decided to stop using the rosters. In *Lucas v. Hope*, 515 F 2d 234, 236 (5th Cir. 1975), there was no case or controversy when the defendants denied any intention to rely on the state eviction statute challenged by the plaintiffs. *See also, Financial Guaranty Insurance Company v. City of Fayetteville*, 943 F 2d 925 (8th Cir. 1991); *Dixie Electric v. Citizens of Alabama*, 789 F 2d 852, 858 (11th Cir. 1986); *Trippe Manufacturing v. American Power Conversion*, 46 F 3d 624, 627-628 (7th Cir. 1995).

Significantly, what plaintiffs characterize as a "no harm, no foul" injunction could not issue even if the Michigan Republican Party were to "accede" or "stipulate" to the requested relief. "An advisory opinion cannot be extracted from a federal court by agreement of the parties, and no matter how much they may favor the settlement of an important question of constitutional law, broad considerations of appropriate exercise of judicial power prevent such determinations unless actually compelled by the litigation before the Court." *Barr v. Matteo*, 355 U.S. 171, 172, 78 S.Ct. 204, 2 L.Ed.2d 179 (1957). Accordingly, a preliminary injunction may not be issued where a case or controversy does not exist or is even alleged.

A turn of the tables demonstrates the point. Assume that a partisan journal published a report about potential election fraud by Democratic campaign organizers. Based on that article and anecdotal stories of past election fraud, the Michigan Republican Party sued for an injunction prohibiting the Democratic National Committee and Obama for America from

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encouraging individuals to submit fraudulent voter registrations. Assume that the national party committee and its national campaign denied that they have or would ever take such actions. According to plaintiffs' argument, they could certainly have no legitimate objection to an injunction prohibiting such actions. The Michigan Republican Party seriously doubts that plaintiffs would willingly agree to such an injunction. Indeed, they should not agree.

Plaintiffs and the Michigan Republican Party agree that a voter cannot be challenged because his or her home has been subject to a foreclosure notice or proceeding. This Court should decline plaintiffs' request for a declaratory judgment to settle a dispute that does not exist. In the same way, the Michigan Republican Party has unambiguously stated, both publicly and under oath, that it will not challenge voters based on foreclosure lists. This Court should also decline to issue an injunction to prohibit challenges which were never planned and which will not occur.

I. Plaintiffs have not demonstrated a strong likelihood of success on the merits. The Michigan Republican Party will not make any foreclosure-based voter challenges. The Michigan Republican Party has not taken any action or made any statements that would infringe upon the rights of potential voters.

The Michigan Republican Party has filed a motion to dismiss asserting that:

> 1. The claims for declaratory and injunctive relief are not ripe for review because there is no likelihood that the Michigan Republican Party will use foreclosure lists as the basis for voter challenges, and therefore, there is no significant possibility of future harm to plaintiffs. This Court lacks subject matter jurisdiction. F.R.Civ.P. 12(b)(1).
>
> 2. The only factual allegation relating to the Michigan Republican Party is its public and unequivocal denial of any plan or intent to challenge voters based on foreclosure notices or proceedings. The complaint against the Michigan Republican Party fails to state a claim upon which relief can be granted. F.R.Civ.P. 12(b)(6).
>
> 3. The Michigan Republican Party's designated challengers do not act under color of state law. Therefore, plaintiffs have not stated a claim under 42 U.S.C. § 1983.

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These arguments are fully briefed in the motion to dismiss and will not be repeated here.

A. The Michigan Republican Party will not challenge voters based on foreclosure lists.

In the news articles cited in plaintiffs' complaint, the Michigan Republican Party has repeatedly and consistently stated that no voter will be challenged based on foreclosure lists. The motion to dismiss and this response are supported by affidavits from Saulius Anuzis, its chairperson, and Kelly Harrigan, its elections day operations director. [Anuzis affidavit - Exhibit 1; Harrigan affidavit – Exhibit 2] The affidavits state:

> • Neither the Michigan Republican Party nor anyone acting with its knowledge or approval has obtained lists of persons or addresses subject to foreclosure notices or proceedings. [Anuzis ¶ 3; Harrigan ¶ 4]
>
> • The Michigan Republican Party has no plans to obtain such foreclosure lists, either on its own or in concert with any other persons or organizations. [Anuzis ¶ 4; Harrigan ¶ 5]
>
> • The Michigan Republican Party will not make any challenges to voters based on any foreclosure notices or proceedings and will not endorse, approve or participate in any such challenges by other persons or organizations. [Anuzis ¶ 5; Harrigan ¶ 5]
>
> • No one at the Michigan Republican Party authorized James Carabelli, the chair of the Macomb County Republican Party to make the statement alleged in plaintiffs' complaint. [Anuzis ¶¶ 6-7; Harrigan ¶¶ 7] Mr. Carabelli's alleged statement does not represent the plans or intentions of the Michigan Republican Party. [Anuzis ¶ 7]
>
> • No one at the Michigan Republican Party has approved, endorsed or authorized any such activities by the Macomb County Republican Party or any county parties. No one at the Michigan Republican Party has agreed with anyone at the Republican National Committee to engage in any such activities. [Anuzis ¶ 8; Harrigan ¶ 8]

Despite plaintiffs' persistent tactic of lumping the county, state and national party committees into a single entity described as "Defendant Republicans," the alleged statement by

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the county committee chairperson is not evidence against the Michigan Republican Party. Plaintiffs have not offered anything to show that the Michigan Republican Party has "manifested its adoption or belief" in the statement or that Mr. Carabelli was authorized to make the statement or was speaking on its behalf. F.R.Evid. 801(d)(2). To the contrary, the Michigan Republican Party promptly and unambiguously disavowed the alleged statement.

Plaintiffs' motion for preliminary injunction, as well as the supporting affidavits and exhibits, fail to include any evidence that the Michigan Republican Party has any plans or intention, by itself or in concert with others, to challenge voters because their homes have been subject to foreclosure notices or proceedings.

An effort to obtain a preliminary injunction when all of the defendants denied any intention to engage in the challenged conduct was refused in *Grove Press, Inc. v. Blackwell*, 308 F.Supp. 361 (W.D.Mich. 1969). A film distributor alleged that officials in several cities intended to interfere with the exhibition of a sexually explicit film. The complaint also alleged that the city officials were acting in concert and encouraging other cities to initiate enforcement efforts. Based on "a pall of anxiety or the fear of past experience" with other cities, the distributor sought an injunction against "continued harassment." *Id.* at 365. In response to the preliminary injunction motion, the mayors and city attorneys submitted affidavits that there was no intention, either by individual cities or in concert, to interfere with the film's distribution and exhibition. The district court concluded that relief should not be granted because the alleged threat of enforcement was not "clear, precise and immediate." *Id.* at 375. Declaratory relief was denied because there was no actual controversy. The preliminary injunction was refused because issuance requires "something more than fear, speculation or concern over a possible challenge to a party." *Id.*

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Plaintiffs incorrectly rely on the mootness principle that a party's voluntary cessation of challenged activity does not generally render a controversy moot. The principle does not apply when the defendant never engaged in the activity in the first place or when a defendant has not expressed any intent to subsequently resume the behavior. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 539 F.Supp.2d 960, 970 (E.D. Mich. 2008).

B. Any voter challenge activities in other states and elections do not demonstrate that the Michigan Republican Party will engage in challenges based on foreclosure lists in the 2008 general election.

As noted earlier, plaintiffs' brief is replete with vivid accusations of past and planned voter suppression by "Defendant Republicans" based on a mix of inadmissible newspaper articles, two consent orders in which no party acknowledged any facts as true, and a law review article. The purported justification for this partisan finger-pointing and election-year posturing is an assertion that the non-existent foreclosure-list challenges "build[] on a long history of Republican Party efforts to suppress the vote." [Plaintiffs' brief, p. 3]

However, the litany of alleged activities in other states and other elections are not relevant. The allegations in the complaint relate to events in different states and elections. None involve Michigan. None involve voter challenges based on foreclosure lists. And, most importantly, none involve the Michigan Republican Party. None of these unsubstantiated allegations demonstrate that the Michigan Republican Party will challenge voters based on foreclosure lists in the 2008 election – the only issue raised in plaintiffs' complaint and motion for preliminary injunction.

Even if other activities have any marginal relevance, plaintiffs have not presented any admissible or persuasive evidence. Indeed, the insubstantiality of plaintiffs' position is

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demonstrated by their reference to a 2004 Detroit Free Press article.[2] Plaintiffs admit that "it was never determined whether aggressive Republican challengers in 2004 were caging." [Plaintiffs' brief, p. 5] An acknowledgement that their allegations regarding activities in 2004 are unsubstantiated hardly provides any support for their claims about 2008.

The remaining exhibits to their motion are no more substantial. Their brief asserts that the "Michigan Republican Party, working with the national Republican party, intends to engage in a coordinated 'election integrity' program designed to stop people from voting." [*Id.* p. 6] The blog posting cited as a reference contains no such statements. [Exhibit 3 - Post (9/10/08)] Instead, Kelly Harrigan, the Michigan Republican Party's director of election day programs, talks about assembling a legal team and training election challengers – an entirely lawful activity.[3]

Plaintiffs' effort to rely on these irrelevant and unsubstantiated accusations simply confirms they have no evidence that the Michigan Republican Party will make foreclosure-based challenges.

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[2] Newspaper articles are inadmissible as hearsay. F.R.Evid. 802; *Pallotta v. United States*, 404 F.2d 1035 (1st Cir. 1968); *May v. Cooperman*, 780 F.2d 240, 262 (3d Cir. 1985). Even if this Court considers the article, the report refers to accusations by representatives of both parties – including a successful lawsuit filed by the Michigan Republican Party to prohibit its challengers from being illegally ejected from polling places and a directive by the Secretary of State instructing election workers to prevent improper behavior by an organization supporting Democratic candidates. [R.12-10 (Exhibit 8 to plaintiffs' motion)]

[3] The brief refers to a news report about a statement by an Ohio county chairperson. Plaintiffs misquote the article – the Ohio county chair did not state that he "has not ruled out foreclosure-based challenges." [Plaintiffs' brief p. 6-7; Exhibit 3 - Post (9/10/08)]. Plaintiffs also misstate the terms of the consent order and Ohio litigation. The consent order did not make such eligibility challenges "unlawful." Moreover, the Ohio injunction prohibited state election officials from holding eligibility hearings with no notice or upon very short notice. The court did not find that the pre-election eligibility challenges filed in compliance with the state's election law were improper. *Miller v. Blackwell*, 348 F.Supp.2d 916 (S.D. Ohio), stay denied, 388 F.3d 546 (6th Cir. 2004).

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C. Any speculation about confusion caused by the disputed blog report does not demonstrate the need for declaratory or injunctive relief.

As an alternative approach, plaintiffs argue that the disputed blog posting, followed by the Michigan Republican Party's unambiguous statements, has created confusion among potential voters. This is a most curious argument: Because the Michigan Republican Party promptly and publicly reassured voters that there would be no challenges based on foreclosure lists, the Michigan Republican Party should be enjoined.

The Michigan Republican Party questions how a posting in an obscure blog became so widely publicized. At this early stage in the litigation, there has been no discovery into these suspicions. However, as a general principle, "[a] preliminary injunction movant does not satisfy the irreparable harm criterion when the alleged harm is self-inflicted." *Fiba Leasing Co. v. Airdyne Indus., Inc*., 826 F.Supp. 38, 39 (D.Mass. 1993)(citing *San Francisco Real Estate v. Real Estate Invest. Trust of America*, 692 F.2d 814, 818 (1st Cir. 1982). See also, *Lee v. Christian Coalition of America, Inc*., 160 F.Supp.2d 14, 33 (D.D.C. 2001); *Barton v. District of Columbia*, 131 F.Supp.2d 236, 247 (D.D.C. 2001).

The "self-inflicted" confusion is somewhat evident in the press release issued by Carmella Sabaugh, the Macomb County clerk and register of deeds.[4] The press release notes that "the Republican Party disavowed a Web site article." It refers to four newspaper articles from Macomb County, Detroit and Lansing, each indicating that the Republican Party is not planning to make any foreclosure-based challenges. The release confirms that "[c]itizens whose homes are foreclosed still have the right to vote!" [Exhibit 4 – Press release]

Rather than confining the release to these clear statements that voters have no reason to be concerned, the clerk apparently decided to undermine her own message by stating –

[4] Ms. Sabaugh was also the Democratic Party candidate for Secretary of State in 2006.

incorrectly – that her office "would have no authority to stop Republicans from using foreclosure lists to challenge voters at the polls." As discussed in Section III, *infra,* the clerk misunderstands the election challenge procedures established under Michigan law, and specifically, does not understand the authority of election officials to stop any abusive or improper challenger activities.

In any event, Michigan's Secretary of State has taken prompt action to eliminate any confusion generated by the blog posting. The state's elections director confirmed that "foreclosure lists aren't enough to contest a voter's residence." An informational package is being sent to local clerks directing that "home foreclosure lists are not sufficient to challenge voting status." [Exhibit 5 – Articles regarding election director]

II. Voters will not be irreparably harmed because there will not be any challenges based on foreclosure lists.

Because there will be no foreclosure-based challenges, plaintiffs cannot meet their burden to demonstrate irreparable harm that is "both certain and immediate, rather than speculative or theoretical." *Michigan Coalition of Radioactive Materials Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991). As a result, a preliminary injunction may not issue. *Friendship Materials, Inc.*, 679 F.2d at 104.

The Michigan Republican Party does not dispute the general principle that infringement upon an individual's right to vote can constitute irreparable injury.[5] However, before there is irreparable injury, there must be evidence that the right to vote will in fact be infringed. Plaintiffs' argument on the irreparable injury requirement relies on the logical fallacy of assuming the truth of the premise as the proof for the conclusion. *Edelson v. Soricelli*, 610 F.2d

[5] The Michigan Republican Party does not agree that challenges to voter eligibility as authorized by Michigan's election law infringe upon the right to vote.

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131, 133 (3d Cir. 1979).[6] Because the Michigan Republican Party has no plans to challenge voters based on foreclosure lists, there will be no irreparable injury.

III. Issuance of a preliminary injunction would cause harm to Michigan's interest in protecting the integrity of elections through poll challengers and to the Michigan Republican Party's lawful and legitimate exercise of its rights under Michigan's election law.

Throughout plaintiffs' brief, the unstated premise is that there is something inherently unacceptable about voter challenges or that any such challenges are inevitably intended to suppress the right to vote. However, this ignores the determination by Michigan's legislature that the integrity of elections should be advanced by allowing challengers at polling places. Mich. Comp. Laws §§ 168.720 *et seq*.

Election challengers may be appointed by a state-recognized political party, an organized group of citizens interested in the adoption or defeat of a proposal on the ballot, or an organized group of citizens interested in preserving the purity of elections and in guarding against the abuse of the elective franchise. *Id.* § 168.731. Indeed, challenges may also be brought by any registered elector present at the polling place. *Id.* § 168.727. Designated challengers may challenge a potential voter if the challenger "has good reason to believe" that the person is not eligible to vote in the precinct. *Id.* § 168.733(1)(c). A challenge may be made by any registered voter who "has good reason to suspect" that an individual is not a registered voter in the precinct. *Id.* § 168.727.

Plaintiffs' speculation about widespread chaos on election day is greatly exaggerated. A political party may not have more than two challengers present in a voting precinct at any time.

[6] "The essence of our legal tradition is that the beginning point of legal reasoning, or, stated syllogistically, the major premise, must not be a statement of the suggested conclusion… [I]t is a process of circular reasoning that fails to prove the initial thesis propounded and uses the argued thesis as proof of itself." *Edelson*, 610 F.2d at 133.

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Id. § 168.730(1). However, *only one of the challengers has authority to initiate a challenge at any given time*. *Id.* § 168.730(3).

Michigan's Secretary of State instructs election administrators that "[a] challenger can be expelled from the precinct for unnecessarily obstructing or delaying the work of the election inspectors; … or acting in a disorderly manner" and that "[c]hallenges may not be made indiscriminately or without good cause." Specifically, "*[t]he precinct chairperson has the authority to expel challengers who abuse the challenge process.*" [Exhibit 6 – The Appointment, Rights and Duties of Election Challengers and Poll Watchers, p. 6-7 (Michigan Department of State, Bureau of Elections)] Indeed, an individual who makes a challenge "for the purpose of annoying or delaying voters is guilty of a misdemeanor." Mich. Comp. Laws § 168.727(3). Thus, the Macomb County Clerk was simply wrong when declaring that election officials will be powerless to control abusive challenges on election day. And as noted earlier, Michigan's election director plans to send informational packets to county clerks stating that foreclosure lists are not sufficient to challenge voting status.

Certainly, there is "a strong public interest in allowing every registered voter to vote freely" – an interest which is not threatened in any way because no foreclosure-based challenges will be made. However, the Sixth Circuit recognizes that "[t]here is also a strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote." *Summit County Democratic Central and Executive Committee v. Blackwell*, 388 F.3d 547, 551 (6th Cir. 2004). Shortly before the 2004 Ohio general election, the district court issued a temporary restraining order prohibiting designated challengers from being present at polling places for the purpose of challenging voter eligibility. The Sixth Circuit stayed the order, finding that the challenge procedure was a legitimate exercise of the state's authority to ensure

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the integrity of elections. In response to the plaintiffs' allegations about potential problems at polling places, the court said that:

> Longer lines may of course result from delays and confusion when one side in a political controversy employs a statutorily prescribed polling place procedure more vigorously than in previous elections. But such a possibility does not amount to the severe burden upon the right to vote that requires that the statutory authority for the procedure be declared unconstitutional. *Id.*

Michigan's public interest in using volunteer challengers to monitor elections would be harmed by the requested injunction. An affidavit from Lola Peterson is attached. [Peterson affidavit – Exhibit 7] Ms. Peterson is a member of the Michigan Republican Party. Concerned about reports of potential election fraud, she wants to volunteer to act as a poll challenger. [*Id.* ¶ 2-3] However, she "do[es] not want to be in a position where [she] could be threatened with being dragged into court for performing a public service." [*Id.* ¶ 4] She cannot afford to be sued and is intimidated by the potential for litigation. Even though she has no intention of violating any court order, she will not serve as an election challenger because she doesn't want to be associated with activity subject to an injunction. [*Id.* ¶ 5-6] Given the unfounded accusations made by plaintiffs in this case, Ms. Peterson's fear of being falsely accused of violating an injunction and being "dragged into court for performing a public service" is certainly reasonable.

Ms. Peterson's concerns are reflected in the affidavit from Kelly Harrigan, the Michigan Republican Party's election day operations director. [Harrigan supplemental affidavit – Exhibit 8] She has responsibility for coordinating and overseeing the state party's plans for activities relating to election day, including activities by the party's designated challengers and any voter challenges and similar activities at polling places. She believes that if an injunction is issued against the Michigan Republican Party affecting the party's designated challengers, the negative

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publicity associated with an injunction will significantly harm the state party's ability to recruit challengers. [*Id.* ¶ 3-4]

Ultimately, however, plaintiffs' speculation about chaos at polling place is unfounded since the Michigan Republican Party will not make any challenges based on foreclosure lists.

IV. The public interest would not be served by issuing an injunction which amounts to an advisory opinion to be used for partisan purposes.

Plaintiffs argue that an injunctive and declaratory relief should be granted to confirm what is not disputed – that a foreclosure notice affecting a voter's residence is not grounds for challenge. Such an order would be nothing more than an advisory opinion.

The exercise of discretion under Declaratory Judgment Act, 28 U.S.C. § 2201, depends "upon a circumspect sense of its fitness informed by the teaching and experience concerning the function and extent of federal judicial power. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 283, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995). As noted earlier, the prohibition against advisory opinions is the "oldest and most consistent thread in the federal law." *Flast*. Absent "a substantial controversy… of sufficient immediacy and reality," a declaratory judgment is an impermissible advisory opinion. *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).[7]

The requested injunction would also be an advisory opinion – but one enforceable by this Court's contempt powers. An injunction is not properly issued to educate or reassure the public. Instead, the extraordinary remedy can only be used to prohibit a defendant from causing irreparable harm to a plaintiff. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391-92, 126 S.Ct. 1837, 1839, 164 L.Ed.2d 641 (2006). In essence, plaintiffs are seeking an injunction

[7] 10B Wright, Miller & Kane, *Federal Practice and Procedure* § 2757 (3d ed.1998) ("It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy, or if the opposing party disclaims the assertion of countervailing rights.").

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requiring poll challengers to abide by the standard imposed by Michigan's election law, *i.e.*, good reason to believe that an individual is not eligible to vote. However, "obey the law" injunctions are not permitted. *E.E.O.C. v. Wooster Brush Co. Employees Relief Ass'n*, 727 F.2d 566, 576 (6th Cir. 1984); *Belitskus v. Pizzingrilli*, 343 F.3d 632, 550 (3d Cir. 2003); *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1532 (11th Cir. 1996); *U.S. v. Matusoff Rental Co.*, 494 F.Supp. 2d 740, 757 (S.D. Ohio 2007). Thus, plaintiffs want an injunction not just to educate the public, but also to threaten designated challengers with the coercive authority of a federal court.

V. Federal courts should be reluctant to intervene in election matters, particularly since there is no actual controversy on the substantive issue or any real threatened violation of voter rights.

In discussing the "likelihood of success" factor, plaintiffs erroneously assert that political parties are a protected class under 42 U.S.C. § 1985(3). [Plaintiffs' brief, p. 19-20] As support for this position, their brief cites a number of cases predating *United Brotherhood of Carpenters and Joiners v. Scott*, 463 U.S. 825, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983). In *Scott*, the Supreme Court questioned whether the statute applied to "non-racial, but politically motivated conspiracies."[8] This issue is fully briefed in the Republican National Committee's motion to dismiss and will not be further discussed here.

However, for purposes of this motion, the Supreme Court's warning about judicial interference in partisan disputes has particular importance.

> [W]e find difficult the question whether § 1985(3) provided a remedy for every concerted effort by one political group to nullify the influence of or to do other injury to a competing group by use of otherwise unlawful means. *To accede to that view would go far towards making the federal courts, by virtue of § 1985(3), the*

[8] Since *Scott*, courts have held that political parties are not protected classes. See, *e.g.*, *Harrison v. KVAT Food Management, Inc.*, 766 F.2d 155, 162 (4th Cir. 1985); *Jeffries v. Celeste*, 654 F.Supp. 305-309-311 (S.D.Ohio 1986).

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> *monitors of campaign tactics in both state and federal elections, a role that the courts should not be quick to assume. Id.* at 835-37.

Other courts have similarly cautioned against judicial intervention into election disputes. *Rivera-Powell v. New York City Board of Elections*, 470 F.3d 458, 469-70 (2d Cir. 2006) ("federal court intervention in garden variety election disputes is inappropriate"); *Powell v. Power*, 436 F.2d 84, 86 (2d Cir. 1970) (warning against federal courts being thrust into the details of virtually every election).

As noted in the introduction, this is a political lawsuit filed for partisan advantage. If this was an action brought by three individuals concerned about possible challenges to their eligibility at the polling place, the matter could be easily ended. Based on the information in their affidavits, Mr. Maleski, Ms. Lopez, and Ms. Zick are eligible voters who are properly registered at their home addresses.

There is no overriding principle which needs judicial resolution – plaintiffs and the Michigan Republican Party agree that challenges should not be based on foreclosure lists. There is no real threat to voters – the Michigan Republican Party will not make foreclosure-based challenges. Essentially plaintiffs want this Court to directly intervene in what amounts to a dispute about blog reports and newspaper articles.

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CONCLUSION

There is neither justification nor need for declaratory or injunctive relief. Despite plaintiffs' effort to turn a disputed blog post into a political firestorm, there is no substance to their allegations. The Michigan Republican Party has never planned – by itself or in concert with anyone else – to make challenges against voters whose homes have been subject to foreclosure proceedings. The Michigan Republican Party will not make any such challenges.

For the reasons stated in its motion to dismiss and in this brief, the Michigan Republican Party requests that this Court deny plaintiffs' motion for preliminary injunction and declaratory relief.

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I certify that on October 10, 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:

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